Arkansas Municipal League

Human Resource and Personnel Matters Affecting Arkansas Municipalities
(Certification Course)

October 15, 2014
Our Changing World
Preparing for the Future

KEN WASSON, DIRECTOR OF OPERATIONS
ARKANSAS MUNICIPAL LEAGUE
OCTOBER 15, 2014—AML HEADQUARTERS
“There is a mysterious cycle in human events. To some generations much is given. Of other generations much is expected. This generation of Americans has a rendezvous with destiny”

Prelude to today’s workshop

Societal Changes have and will continue to affect the employment world and its personnel practices

Let’s examine two important cultural changes and their impact on workplace environments.

I. Societal Changes
   ◦ a. Facts/Trivia
   ◦ b. Generational Differences

II. Workplace Trends & Challenges
I. Societal Changes
   a. Facts/Trivia
   ◦ The Family structure has changed. The “nuclear family” is dissolving.
   ◦ In less than 3 years, half of all kindergarten children will be from single parent households.
   ◦ 2/3 of all divorces are now being initiated by women.
   ◦ Average age of first time marriages is 29 for men and 27 for women.
   ◦ Home ownership is less significant – renting is preferred.
   ◦ More and more people are moving back to the inner-city and out of the suburbs.
   ◦ **We will discuss specific demographic changes in a little bit.**
Municipal Leaders need to keep up with and be aware of current societal trends as they will impact their workplace and their cities.
I. Societal Changes

b. Generational Differences

Today’s workforce consists of three (3) generations

- 1. Baby Boomers – ages 51-68
- 2. Generation X – ages 30-50
- 3. Millennial – ages 21-29

We need to recognize that different generations view the world differently.
Generational Differences

1st the Baby Boomers: Born between 1943 to early 1960’s (Ages 51-68)

- Approximately, 70-75 million
- Boomers are often associated with counterculture such as the civil rights movement & feminist causes of the 70’s
- 60% lost value in investments due to economic crisis
- 42% are delaying retirement
- 25% claim they will never retire and remain working
- Late retirement means increased possibility of 3 generations remaining in the workforce together and for a longer period of time.
- Boomers account for more than half of all consumer spending
- Boomers buy 77% of all prescription drugs, 61% of over-the-counter drugs and contribute to 80% of the leisure travel industry
Generational Differences

2nd Generation X: Born between 1960 to the early 1980’s (Ages 30-50)

- Approximately, 41 million
- Referred to as the “Lost Generation” or “Latchkey Kids”
- What’s in it for me attitude
- Dual working parents. Exposed to daycares and a higher rate of divorce
- Lowest rate of voter participation
- Well educated with 29% obtaining bachelor’s degrees (6 % higher than the previous generation)
Generational Differences

3rd Mellennia: Born between 1994 to 2000’s (Ages 21-29)

- Approximately, 71 million
- The most Tech savvy, sophisticated and well educated workforce in history
- Very mobile. Plan to only stay on the job 3 years.
- Have the attitude “If I am not happy, I’m out of here”
- Differently motivated workforce than previous generations.
- Employee Retention & Motivation – A big challenge for Employers
- Want casual Fridays everyday.
- Being 28 and living with your parents is awesome.
- By 2020 they will make up 50% of the workforce.

Observation: Diversity means there is a potential for friction in the workplace and a strain on City Leaders.
II. Workplace Trends and Challenges
There will be Focus on Accountability to Control Costs

◦ Especially true in the world of health care costs.
◦ With cost continuing to increase both consumer and provider accountability are gaining attention as potential solutions to controlling rising health care costs.
◦ Recent surveys indicate that 3 out of 4 employees say they would be willing to change their lifestyle habits if their employers rewarded them with lower premiums.
Workplace Trends and Challenges continued…

There will be Compliance Challenges

- For decades cities have been faced with compliance challenges in understanding & enforcing Federal & State Employment Laws accurately.
- All indications are this trend will continue.
- It seems that more and more groups are seeking recognition as protected groups.
- Employers will have to continually educate themselves on emerging issues and laws as they relate to legal compliance.
- This includes laws regarding discrimination whether it be:
  - **Age discrimination**
  - **Race** (refers to skin color and appearance)
  - **Ethnicity** (involves customs, traditions, ceremonies and values);
  - **Nationality** (geographic national origin)
  - **Creed** (refers to religious beliefs)
  - **Gender**
  - **Medical and Privacy Issues** (HIPPA Compliant, etc)
Workplace Trends and Challenges continued...

There will be Significant Changes in Social Media

- Volumes have already been written about it and it is here to stay.
- Networking through social media is a must for:
  - Posting jobs and finding qualified employees
  - Locating needed resources
  - Getting Informed Answers to Questions
  - Stay current on trends
  - Education
- 83% of millennial age group state they sleep with their communication devices near their bed

Note: Municipal Leaders and Cities need to develop social media & blogging policies.
“Where do you want to go for lunch?”
“I don’t know. You decide”

“Let me check my mobile app and see what is in the area”
“Shall we ride our bikes or walk?”
“Let me check my weather app and see if it is going to rain”
“OK, I’ll check the lunch *special* at *Hungry Yuppies*”
Workplace Trends and Challenges continued...

There will be Demographic Changes

- Demographic Changes mean “Diversity”
- Diversity in regard to age, gender, national origin, race, religion, background and social differences.
- More women are in work force. Even in career fields historically held by males, i.e. police, fire and public works.
- Recently, the Latino population in American surpassed African-Americans as the largest minority group in the United States.
- African-Americans are the majority race in some Arkansas Cities.
- The Latino population is now approaching 30% of local populations in several Arkansas Cities.
- This demographic represents challenges for those who are responsible for managing employees in the work place.
* All these demographics have a major role in changing the economic and cultural fabric of our communities and work place environments.
“The Purpose of looking into the future is to disturb the present”

Gaston Berger (1 October 1896 – 13 November 1960) was a French futurist but also an industrialist, a philosopher and a state manager.
Start Disturbing – Begin to ask...

◦ What will my cities workforce be like as demographics change?
◦ Who will be delivering the city work services in the future?
◦ What will my city population look like if we have:
  ◦ more retirees,
  ◦ less home ownership; and
  ◦ a younger workforce?
◦ Are we prepared for the continued rise of technology in the work place and among your workers?
◦ Are we taking measures to adjust for the more transient workforce of the future as the baby boomers are leaving the work force?
◦ Have you thought about developing a succession plan?
Today’s Municipal Leaders would be wise to...

- Recognize that their current city workforce consist of a diverse group of people
- That those demographics create a need for more understanding leadership
- Familiarize themselves with current trends affecting Human Resources & Personnel issues within your cities workforce
- Understand the Basics of Employment Law

For the next 2.5 hours our legal staff is going to help you understand the specific traps to avoid in the “Employment Law” world
Employment Law: Traps for the Unwary

John Wilkerson
AML Staff Attorney

Michael Mosley
AML Staff Attorney

Human Resource and Personnel Matters
October 15, 2014
Employment at-will:

• The well established rule in Arkansas is that when an employee’s employment is for an indefinite term, either party may terminate the relationship without cause or at-will. *Griffin v. Erickson*, 277 Ark. 433, 437, 642 S.W. 2d 308, 310 (1982).
In English if you please...

• The employee, being 50% finished on a massive project that will make the mayor and the council city “officials for life…”

• ...QUITES despite previous promises to finish the project.

• You’re toast. Per Travis Tritt: “Here’s a quarter, call someone who cares!”
More English...S’il Vous Plait

• The employer (psssst, that’s you), is in a meeting with several employees asking why a project isn’t done.
• Response: if you don’t like it, fire me.
• Employer: Okie Dokie!
Employment at-will: The Importance of State Law...
BE CAREFUL!

• To determine whether an employee enjoys a protected property interest in continued employment, for purposes of a procedural due process claim (as discussed later), the court of appeals looks to state law. Eddings v. City of Hot Springs, 323 F.3d 596, 601 (8th Cir. 2003).
Employment at-will: The Importance of State Law...

BE CAREFUL! (part II)

• The at-will doctrine has been modified providing that where an at-will employee relies on a personnel manual or employment agreement that expressly states that he or she cannot be discharged except for cause, the employee may not be arbitrarily discharged in violation of such provision. *Gladden v. Arkansas Children’s Hospital v. Saline Memorial Hospital*, 292 Ark. 130, 136, 728 S.W. 2d 501, 505 (1987).
Additional Exceptions to the Employment at-will Doctrine:

• Cases in which the employee is discharged for refusing to violate a criminal statute.
• Cases in which the employee is discharged for exercising a statutory right or a constitutional right.
• Cases in which the employee is discharged for complying with statutory duty.
• Cases in which an employee is discharged in violation of the general public policy of the state.
• Employment contracts for time.

U.S. Constitution Property Right: Pre Deprivation Due Process

• Remember, recognized by state law.
• Remember the exceptions to at will.
• Primarily the “just cause” exception.
• Pre as in before.
• One more time: pre as in before. As in before you decide to fire.
• BEFORE NOT AFTER.
Simply Put, What is Due Process?

• Notice; and
• An opportunity to be heard
Claims under 42 U.S.C. § 1983 & the Fourteenth Amendment

Procedural Due Process
What does this mean? (hint: lawsuits...)

• The Due Process Clause within the Fourteenth Amendment to the United States Constitution...that’s what!
• It provides that government may not deprive an individual of life, liberty, or property without due process of law.
What Is Property?

• Pickup? Yep.
• Bass boat? Yep.
• Huntin’ gear? Yep.
• Your job. Oh yeah. That’s what I’m talkin’ about!
Procedural Due Process

• Procedural due process requires...
• A meaningful opportunity to be heard...
• Must be afforded to a public employee...
• Who has a property or liberty interest in his or her employment.
• Also, the employee must be given notice both of the underlying issue and...
• The time and place to be heard.
Why do we have to fool with this?! U.S. Supreme Court says we must!

• In fact, the Supreme Court has decided several cases involving the procedural due process rights of public employees.
• These cases employ a multipart test.
• First, whether there is a sufficient interest grounded in state or local law or practice,
The Supreme Court also Said...

• That minimum procedural due process requirements are a matter of federal constitutional law,

• and that an individual with a property interest in public employment cannot be deprived of that interest without constitutionally adequate procedures.

• In determining what process was due, Loudermill applied the three-part balancing test enunciated in Mathews v. Eldridge. Loudermill, 470 U.S. at 542-43.
The Mathews v. Eldridge Balancing Test... 3 Part Harmony...

1. The employee’s private interest in retaining employment.
2. The risk of an erroneous deprivation of such interest through the procedures used; and
3. The governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of fiscal and administrative burdens
The Supreme Court Held

• The governmental interest in immediate termination was held to be insufficient to outweigh the need for a pretermination hearing.

• An opportunity to respond prior to termination was held to impose neither a significant administrative burden nor intolerable delays.

• After applying the Mathews balancing test, the Loudermill Court held that the "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 470 U.S. at 546.
The Hearing Requirements: Oyez! Oyez! Oyez!

• First requirement is that the employee receive reasonable notice of all charges against him.

• The purpose of notice under the due process clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing.

• Notice is sufficient if it apprises the employee of the "nature of the charges and the general evidence against him and if the notice is timely under the particular circumstances of the case."

• Most cases provide that notice must occur prior to the meeting, such that the employee can prepare his or her response. Rogers v. Masem, 788 F.2d 1288, 1295 (8th Cir. 1985).
The Notice Requirement
(more notice? Mmmmm)

- In one case, the Eighth Circuit held that notice required the "specific nature and factual basis" for the discharge. *Brouillette v. Bd. of Dirs. of Merged Area IX*, 519 F.2d 126, 128 (8th Cir. 1975).

The Hearing Requirement. Pardon Me, What Did You Say?!

• The majority decision in *Loudermill* leaves uncertainty as to the specific dictates of procedural due process. The separate concurring opinions of Justices Marshall and Brennan provide additional insight. In essence, they would require that employees have an opportunity to confront and cross-examine adverse witnesses where factual disputes are involved.

• I think it less than that. **Allow the person to say what they like and their pals to talk to.**
Mark’s Practical Lessons, and other cool stuff.

• Do you have employee writings?
• ALL WRITINGS.
• Employee handbook?
• Ordinances?
• Resolutions?
• Memos?
• Do you know what these things say?!
Knowing Your Employee Writings (Practical Tips cont’d)

• If you know what your writings say, are you following them?
• Do they need a review and possible revision?
• Yearly Review
• Just Cause; Contract for Time
• Who should review? You, that’s who!
• Whom else should review? Your City Attorney Too!
Gimme Some Help!

• Employee Handbook
  http://www.arml.org/pdfs/publications/sample_personnel.pdf

• FLSA, FMLA, ADA Lookie Here:
  http://www.arml.org/pdfs/publications/Personnel_Law_Avoiding_Lawsuits_02.pdf

• And Here:
  http://www.arml.org/pdfs/publications/FMLA%20booklet_2013_WEB.pdf

• And Here:

• And Here:
  http://www.arml.org/pdfs/publications/Drug_testing.pdf
Needs Continued...

• KISS method.
• Find your historical documents
• That ticking you're hearing ain’t an alarm clock.
• And most of all, recall the words of this great philosopher:
• “The writer who breeds more words than he needs, is making a chore for the reader who reads.”
• Dr. Suess
Appoint & Removal

• Department Heads:
  Police Chiefs  Fire Chiefs  Water Superintendent

  Elected Officials Are Not Department Heads

• Non-Department Heads:
  Police Officers  Fire Personnel  Administrative Support

  Non-department heads are a matter of local policy.

  YOUR POLICY or PRACTICE!
Mayor Has the Power – Department Heads

• State Law gives MOST power to Mayor:

  Dept. Heads appointed and removed by mayor
  Mayor Can Hire & Fire Department Heads

• State Law gives SOME power to Council

  Council can over-ride Mayor
  but, ONLY with 2/3rds Vote
More Appoint and Remove Stuff

• Non-department heads are matter of local policy.

  NO POLICY!!! NO PROBLEM!!
  (but, really, WRITE A POLICY!!)

• Practice is Policy? But, look closely!

  Recommendations are NOT Decisions

  Question: Who’s actually hiring and firing?
Department Head: Example

- Mayor hires Mark as Police Chief
- Council says “No way Jose!”
- Mark is out, Mayor hires ME!
- Council Applauds!!!
Non-Dept. Head: Example

- City needs a police officer
- **Policy** (I hope, I hope, I hope):
  
  city clerk posts job, Chief interviews, recommends to Mayor, and Mayor makes final decision

Any other variations?

- **Practice** (I hope, I hope, I hope ... it’s consistent)
  
  Chief asks mayor can we hire new officer (assuming it’s budgeted), Mayor says “SURE!,” Chief posts job, interviews and hires.
City Council as Employers

- City Council has Legislative Immunity
  
  Waived When You Start Making These Decisions
Civics Reminder

• Three branches of government
• Judicial
• Legislative
• Executive/Administrative
• By staying in your role, less likelihood of liability
Arkansas Civil Rights Act
ACRA AND TITLE VII

Employment Discrimination
DON’T DISCRIMINATE

Law protects against:

“the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution”

DON’T DISCRIMINATE!

(Adverse Employment Action)

race
religion
national origin
gender, or
disability
DON’T RETALIATE, either

• No Adverse Employment Action against those who opposed any unlawful act or practice.

  Termination
  Demotion
  Pay Decrease ... maybe more.

• Opposition to Employee’s Own Treatment
  Or, Treatment of Other

• Timing is Everything!!
Retaliation Laws

• These laws prohibit retaliation:
  • Family and Medical Leave Act
  • Fair Labor Standards Act
  • Retaliation for exercising one’s First Amendment rights
  • Title VII
  • Age Discrimination in Employment Act
  • Arkansas Whistleblower Act
Some Definitions

• “Because of gender” means, but is not limited to, on account of pregnancy, childbirth, or related medical conditions;

• “Disability” means a physical or mental impairment that substantially limits a major life function, but “disability” does not include:
  • (A) Compulsive gambling, kleptomania, or pyromania;
  • (B) Current use of illegal drugs or psychoactive substance use disorders resulting from illegal use of drugs; or
  • (C) Alcoholism; . . .

• “National origin” includes ancestry; . . .

• “Religion” means all aspects of religious belief, observance, and practice.
The Feds Don’t Like Discrimination, Either
Supervisors = City When It Comes to Discrimination

• An employer can be liable under Title VII for workplace harassment by an employee given supervisory authority over subordinates.
• Supervisors are extensions of their company’s management.
• First, can be liable if the supervisor’s harassment resulted in a “tangible employment action.”
• OR . . . .
What to Be on the Lookout For

• Nasty Language Connected with Termination

“I’m firing you because you’re Hispanic.”
“Hey, Bob, I’m about to fire that hormonal crazy woman!”
“I’m so tired of him taking time off for his disability.”
“This is a man’s job.”
What to Be on the Lookout For, cont.

• Other Evidence Can Be More Subtle

The Similarly Situated Employee

**RULE OF THUMB:**

Don’t treat people differently!
Here’s Your Defense

• Legitimate Non-Discriminatory Reason
  
  Always have a good/solid/documentated reason for your decisions!!

• Look for those Similarly Situated

• Document, Document, Document!!
Family Medical Leave Act (FMLA)
Family Medical Leave Act

Posting Requirement

For additional information:


Family Medical Leave Act

**Posting Requirement**

- All covered employers are required to display and keep displayed a poster prepared by the Department of Labor summarizing the major provisions of The Family and Medical Leave Act (FMLA) and telling employees how to file a complaint. The poster must be displayed in a conspicuous place where employees and applicants for employment can see it. A poster must be displayed at all locations *even if there are no eligible employees.*
If an employer is covered by FMLA and has any FMLA eligible employees it shall publish in writing a general notice that the employer recognizes and honors FMLA leave along with general statements of FMLA leave rights of the employee.
Family Medical Leave Act
Who is covered

Employers: Local Governments with 50 or more employees for at least 20 calendar workweeks in the current or preceding calendar year. 29 C.F.R. § 825.104(a). The calendar workweeks do not necessarily have to be consecutive. 29 C.F.R. § 825.105(e).

Employees: Those employees who have completed at least 12 months of employment and worked at least 1,250 hours within the prior 12 months. The determination of a “working hour” is governed by the principles of “working hours” found in the FLSA. See 29 C.F.R. § 825.110 (for employee coverage generally); 29 C.F.R. § 785.6 (for determining “work hours”).
Family Medical Leave Act
How much leave can employees receive?

• The rule of 12.
• Employees entitled to 12 weeks of unpaid leave in a 12 month period. 29 C.F.R. § 825.200(a)
• The 12 weeks can be intermittent. 29 C.F.R. § 825.200(c)
Family Medical Leave Act
Is the Employee entitled to leave?

Reasons for leave: 29 C.F.R. § 825.112(a)

- Birth of child or care for a newborn
- Placement with employee of adoptive or foster child
- Spouse, child or parent is on active duty (or notified) and causes a “qualified exigency” to occur
- Care for an injured or ill armed services member in the line of duty (see later slide)
- Employee has “serious health condition” that causes employee to be unable to perform functions of the job
- Employee’s spouse, son, daughter or parent has “serious health condition”
Family Medical Leave Act

Caring for Family Injured in the Line of Duty on Active Duty………………..

• 26 weeks of leave to care for immediate family member (spouse, son, daughter, parent or next of kin) if seriously injured, or suffering from a serious illness, in the line of duty on active duty. 29 C.F.R. § 825.127(b).

• If used, no more FMLA is available for any other reason during the same 12 month period. 29 C.F.R. § 825.127(c)(2).
What is a Serious Health Condition?

• An illness, injury, impairment, or physical or mental condition that involves inpatient care requiring an overnight stay in a hospital or residential medical care facility. 29 C.F.R. § 825.113(a).

• This includes follow ups regardless of whether the follow up is inpatient care, as well as days prior to the first inpatient setting. 29 C.F.R. § 825.113(b).

• This also includes continuing treatment by health care provider. 29 C.F.R. 7 825.113(c).
What is a Serious Health Condition?

- “Continuing treatment...includes any one or more of the following”: 29 C.F.R. § 825.115.
  - Period of incapacity and treatment for more than 3 consecutive days
  - Period of incapacity due to pregnancy
  - Period of incapacity due to a chronic serious health condition (periodic visits of at least twice a year, continues over an extended period of time, etc.)
  - Period of incapacity that is permanent or long-term (may not need active treatment, i.e.: Alzheimer's)
  - Any absences to receive multiple treatments (includes periods of recovery, i.e.: chemo, physical therapy etc.)
Family Medical Leave Act

What Notice should the Employee Provide?

• Caveat: all employee notice requirements may be waived by the employer. 29 C.F.R. § 825.304(e).
• 29 C.F.R. § 825.302(a) – Foreseeable Leave – Requires:
  ➢ 30 days advance notice if:
    ➢ Expected birth or placement for adoption/foster care,
    ➢ Planned medical treatment for serious health condition of employee or family member (employee is obligated to work with employer so as not to disrupt operations)
    ➢ Planned medical treatment for the serious injury or illness of a covered service member
    ➢ In event employee fails to notify, the employer may ask why the employee failed to meet deadline
Family Medical Leave Act

What Notice should the Employee Provide?

• 29 CFR 825.302(b) – Foreseeable Leave – Con’t:
  ➢ If 30 days isn’t practicable then notice as soon as is practicable (generally the same day or next business day)
  ➢ If the leave is qualified exigency based, notice must be given as soon as practicable, even if its in advance of 30 days
  ➢ Notice need only be given one time but must advise employer should leave logistics change in as practicable manner as possible (i.e.: spouse with terminal cancer but actual leave dates unknown)
Family Medical Leave Act

What Notice should the Employee Provide?

• 29 C.F.R. § 825.303(a) – *Unforeseeable Leave* – Requires:

  ➢ Notice as soon as is practicable under the particular circumstances of the case and that notice must meet all employer required notice provisions (i.e.: calling of immediate supervisor and mayors office etc.)
Family Medical Leave Act

Some things to remember about employee notices......

• Notice need not specify the FMLA
• Notice can be done verbally
• Initially notice may only contain minimal information (remember the term “when practicable”)
• Make sure you review 29 C.F.R. §§ 825.302(c) & 303(c) for a more complete description of content of employee notices.
Family Medical Leave Act

What notice should the Employer Provide?

• Employers should notify w/in 1 or 2 days after receiving employee’s notice: 29 C.F.R. §§ 825.300-301.
  ➢ That the leave will be counted as FMLA leave;
  ➢ Any requirement of providing medical certification, 29 C.F.R. §§ 825.305-308;
  ➢ Employees right to use accrued paid leave, or employers decision to use accrued paid leave, 29 C.F.R. § 825.207;
  ➢ Any requirement that the employee make co-premium payments on health coverage; and
  ➢ Any requirement to present fitness for duty certification before job restoration.
Family Medical Leave Act

What does an employer do with employees health benefits and seniority benefits?

- Employer must maintain health benefits, but can require employee to continue paying share of premiums if portion was required prior to leave. 29 C.F.R. § 825.209(a).
- An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate). 29 C.F.R. § 825.209(h).
Family Medical Leave Act

What to do when the employee returns?

• “General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

• An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.” 29 C.F.R. § 825.214.
What to do when the employee returns?

Equivalent Benefits: 29 C.F.R. § 825.215(d).

- Benefits must be resumed in the same manner and at the same levels as provided when the leave began,
- An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.
- With respect to pension and retirement plans, any period of unpaid FMLA is not a break in service for vesting and eligibility to participate.
- They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken.
- An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.
• What to do when the employee returns?

- Equivalent Pay: 29 C.F.R. § 825.215(c).
  - An employee is entitled to any unconditional pay increases, such as cost of living increases.
  - Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave.
  - Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees.
Family Medical Leave Act

• **What to do when the employee returns?**

  • **Equivalent terms and conditions of employment**: 29 C.F.R. § 825.215(e)
    • The employee must be reinstated to the same or a geographically proximate worksite,
    • The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule,
    • The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments,
    • FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position.
The Americans With Disabilities Act Recent Amendment Act..... ADAAA
Americans with Disabilities Act

• The ADA prohibits discrimination based on disability.

• Disability:
  1) physical or mental impairment that substantially limits one or more major life activities,
  2) a history of having such an impairment, or
  3) being regarded as having such an impairment.

• ADA disabilities include both mental and physical medical conditions.

• A condition does not need to be severe or permanent to be a disability.
Qualified Individual

• Employee still has to be able to do the job, with or without a reasonable accommodation.

• In other words, has to be a “Qualified Individual”

“person who meets legitimate skill, experience, education, or other requirements of an employment position that s/he holds or seeks, and who can perform the essential functions of the position with or without reasonable accommodation.”
Americans with Disabilities Act

- deafness,
- blindness,
- intellectual disability,
- autism,
- cancer,
- cerebral palsy,
- diabetes,
- epilepsy,
- HIV,
- major depressive disorder,
- bipolar disorder,
- post-traumatic stress disorder,

Just About Anything Else
ADAAA and Pre-Offer Limitations

• **Job Announcements:** Nothing suggestive of a preference for non-disabled persons.

• **Job Applications:** Nothing asked about an applicant’s physical or mental condition.

• **Job Descriptions:** Include all essential physical, mental, and emotional requirements of the job, including regular work attendance. Essential job functions can include those rarely used.
ADAAA and Pre-Offer Limitations

**Job Interviews & Questions**

- You can explain what the job application process entails, ask if reasonable accommodations are needed to complete the application process, and require documentation supporting the accommodation requested;
- You can ask if an applicant can perform the essential functions of the job with or without accommodation;
- You can ask about non-medical qualifications, certifications and skills;
- You can ask applicants to explain how they would perform their job tasks, *as long as you ask this of all job applicants in that job category.*
Pre-Offer Limitations/Job Interviews

**Tests**

- You can require applicants to demonstrate how they would perform their job functions, and require them to take physical agility and fitness tests.
- You can require applicants to take a polygraph examination, so long as doing so is otherwise legal and no disability-related questions are asked.
- You can require an applicant to take a pen and pencil “personality traits” test, so long as it does not measure mental impairments.
Pre-Offer
Limitations/Job Interviews

Obvious or Disclosed Disabilities
• You may ask what accommodations may be needed to perform job duties.
• You **may not** ask about an applicant’s disability, any accommodation needs for non-job related activities, or possible future accommodation needs.
Pre-Offer Limitations/Job Interviews

*Interview Site*

• For telephone interviews, you must provide a TDD number or a telephone relay service. Printed application forms and test materials should be available on cassette, in Braille or in large print. On-line applications, job kiosks, recruitment fairs and job bulletin boards must be handicapped accessible.

• Your interview process must be modified to accommodate disabled applicants. Tests must be given in a format and manner that does not require applicants to use their impairment, unless the test is designed to measure that impaired skill.
Questions and Exams

• After a conditional job offer has been made, but before an applicant begins work, you may ask medical-related questions and conduct medical tests, so long as this is required of all applicants in that job category.

• Your medical tests and questions do not necessarily have to be job-related or consistent with business necessity. You can ask about prior worker’s compensation claims, sick leave usage, illnesses, diseases and impairments, and general mental and physical health.

• If an applicant’s drug tests come back positive, you can also ask about current legal drug use if this could have affected the test results.
ADA Post-Offer, Pre-Employment

“Real” Job Offer Required

• Make an applicant a “real” job offer before asking medical questions or requiring a medical examination.

• A “real” job offer means one offered after all relevant non-medical information that can reasonably be obtained is received and analyzed.
ADA Post-Offer, Pre-Employment

**Individualized Assessments**

- Your health care provider must perform an “individualized risk assessment” on each applicant’s ability to perform the essential functions of the job, with or without accommodation.

- Reliance upon a medical option that is itself based upon a stereotype or an unfounded assumption can result in ADA liability.
Rescinding The Job Offer

• The reason for the withdrawal is job-related and consistent with business necessity, and

• That no reasonable accommodation is available to enable the applicant to perform essential job functions without a “significant risk” to health or safety, or

• The applicant is being excluded to avoid a “direct threat” to the health or safety of the applicant or others, and

• No reasonable accommodation is available to reduce the risk of harm to the applicant or to others below the “direct threat” level, or

• Any reasonable accommodation that does exist would cause undue hardship to the employer.
• Once an employee begins work, medical testing and medical inquiries must be job-related and consistent with business necessity.
• This usually takes the form of a “fitness for duty” examination.
Sexual Harassment under the Arkansas Civil Rights Act
Two Types of Harassment

1) Hostile Work Environment:

   exists when discriminatory conduct or behavior exists that is **unwelcome** (but, seriously, no need for any of that) and offensive to an employee

2) Quid Pro Quo:

   boss threatens employee with adverse employment action, because employee will not submit to his sexual demands
Hostile Work

(1) Membership in a protected group or class,
(2) Unwelcome sexual harassment
(3) Based upon gender
(4) Resulting in an effect on a term, condition, or privilege of employment, and
(5) That the employer knew or should have known about the harassment and failed to take proper remedial action.

+ In addition, the plaintiff must show that the sexual harassment created an environment that was both objectively and subjectively abusive.
Quid Pro Quo Harassment

(1) she was a member of a protected class;
(2) she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors;
(3) the harassment was based on sex; and
(4) her submission to the unwelcome advances was an express or implied condition of receiving job benefits or her refusal to submit resulted in tangible job detriment.
City Liability

• Is a City liable for Sexual Harassment?

Yes, unless it can show:

- It exercised reasonable care to prevent and correct the harassing behavior, **AND**
- The harassment victim unreasonable failed to take advantage of the preventative or corrective opportunities that the employer provided.
- You have to have some process to provide for corrective measures if an employee complains of harassment.
- If the harasser is not a supervisor, the victim can still recover if the employer was negligent in correcting or trying to remedy the co-worker’s harassing behavior.
Best Rule

• Take all steps necessary to prevent harassment from occurring, such as:
  
  o affirmatively raising the subject,
  
  o expressing strong disapproval,
  
  o developing appropriate sanctions,
  
  o informing employees of their right to raise and how to raise the issue of harassment under Title VII;
  
  o and developing methods to sensitize all concerned.
The Arkansas Whistle-Blower Act


§§ 21-1-601 through 21-1-609
The proper analysis for a First Amendment retaliation claim is as follows:

1. The employee must show that he did something which was speech touching on a matter of "public concern" thereby making it protected activity. Id. at 418; see Pickering at 568. If the answer to question number one (1) is no, the inquiry ends and employer is entitled to summary judgment. Id.; see Connick at 147. If the activity in question is determined to be a matter of public concern, the Court then looks to whether the employer’s legitimate interests, deferentially viewed, outweigh any First Amendment interests at stake. Id.; see Pickering at 568; see generally Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 676 (1996). If the employer's interest outweighs the activity, even if it is a matter of public concern, the employer is entitled to summary judgment. Id. The Pickering balancing analysis is conducted only if the Court finds the activity was of a matter of public concern; both the question of “public concern” and the Pickering balancing are issues of law for the Court to decide. Sparr v. Ward, 306 F.3d 589, 594 8th Cir. (2002).

2. If the employee survives the analysis identified in number one (1) then the next issue is whether the employee showed that the alleged protected activity was a substantial or motivating factor in the employer’s action against the employee. Garcetti at 418; see Pickering at 568. However, if the answer to question number two (2) is no, the employer is likewise entitled to summary judgment.

3. If the answer to (2) is yes, then the question becomes whether the employer could show that it would have taken the same action absent the alleged protected activity, i.e., the “same decision” test. See generally Hoffmann v. Mayor, Councilmen and Citizens of City of Liberty, 905 F.2d 229, 233 (8th Cir. 1990); see also Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977).
In *Garcetti*, the question presented was whether the First Amendment protected a government employee from discipline based on **speech made pursuant to the employee's official duties**. *Id.* (emphasis added). The Court held that:

• “[W]hen public employees make statements pursuant to their official duties, the employees are **not** speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

*Id.* at 421 (emphasis added).

• The *Garcetti* Court concluded that “Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.”

• The Court noted that State Whistleblower Acts were a method by which Plaintiffs could still seek relief even if they complained pursuant to their official duties.
Ark. Code Ann. § 21-1-603
Retaliation prohibited

• A public employer shall not take adverse action against a public employee because the public employee or a person authorized to act on behalf of the public employee communicates in good faith to an appropriate authority:
  • The existence of waste of public funds, property, or manpower, including federal funds, property, or manpower administered or controlled by a public employer; or
  • A violation or suspected violation of a law, rule, or regulation adopted under the law of this state or a political subdivision of the state.

Also cannot take adverse action against a public employee for giving information in an investigation, hearing, court, legislative or other inquiry, or any form of administrative hearing. Finally, cannot take adverse action against a public employee for the employee’s refusal or objection to a directive that the employee reasonably believes violates a law, rule, or regulation adopted by the state or City.
Ark. Code Ann. § 21-1-603
Elements

• Public employment relationship
• Good faith communication of waste or violation
• Reasonable basis in fact
• To an appropriate authority
• Provide reasonable notice of the need to correct
• Adverse action based on the communication
Adverse Action

• “means to discharge, threaten, or otherwise discriminate or retaliate against a public employee in any manner that affects the employee’s employment, including compensation, job location, rights, immunities, promotions, or privileges.” A.C.A. § 21-1-602(1).

• Case Law: A constructive discharge exists when an employer intentionally renders an employee's working conditions intolerable and thus forces him to resign. *Harris v. Wal-Mart, 658 F.Supp. 62 (E.D.Ark.1987)*. It exists only when a reasonable person would have resigned under the same or similar circumstances.

• Case Law: An employee is not constructively discharged, however, if she quits “without giving her employer a reasonable chance to work out a problem.” *Alvarez, 626 F.3d 410 (8th Cir. 2010).*
Is a bad performance evaluation an adverse action?

- No law on this topic under the Ark Whistle-blower act.
- Federal law under Title VII: A lower satisfactory performance evaluation, by itself, does not provide a material alteration of employment and is not an actionable retaliation claim under Title VII. *Sutherland*, 580 F.3d 748 (8th Cir. 2009).
- Discuss what the result would be under the Whistle-blower act.
Who is a proper Defendant?

- Public Employer: “an agency, department, board, commission, division, office, bureau, council, authority, or other instrumentality of the State of Arkansas, including the offices of the various Arkansas elected constitutional officers and the General Assembly and its agencies, bureaus, and divisions;
- A state-supported college . . . .”
- The Supreme Court, Court of Appeals, the AOC, circuit courts, and prosecutors;
- “An office, department, commission, council, agency, board, bureau, committee, corporation, or other instrumentality of a county government or municipality or a district court, a county subordinate service district, a municipally owned utility, or a regional or joint governing body of one (1) or more counties or municipalities; or
- A public school district, school, or an office or department of a public school district in Arkansas.”
- What’s missing and what is the most likely defendant a Plaintiff will try to sue?
What is Waste? A Violation?

• WASTE: “a public employer’s conduct or omissions which result in substantial abuse, misuse, destruction, or loss of public funds, property, or manpower belonging to or derived from state or local political subdivision’s resources.

• VIOLATION: “an infraction or a breach which is not of a merely technical or minimal nature of a state statute or regulation, of political subdivision ordinance or regulation, or of a code of conduct or code of ethics designed to protect the interest of the public or a public employer.

• SO, there are some possible defenses built into the definitions here.
What is a Whistle-Blower?

• “A person who witnesses or has evidence of a waste or violation while employed with a public employer and who communicates in good faith or testifies to the waste or violation, verbally or in writing, to one of the employee’s superiors, to an agent of the public employer, or to an appropriate authority, provided that the communication is made prior to any adverse action by the employer.”

• The latter part of this definition is a key feature in many cases. It results in a race to discipline/whistle-blow literally in some fact scenarios. Examples

• A “public employee” must establish by a preponderance of the evidence that there is a causal connection between an employee suffering an adverse employment action and the employee engaging in conduct protected by the Arkansas Whistle-Blower Act.

• This is what I see a lot of these cases hinging on. Consider the definition of whistle-blower above.

• The Arkansas Supreme Court considers the timing between the communication and the termination a primary factor in establishing that connection. *Smith v. Brt*, 363 Ark. 126, 131, 211 S.W.3d 485, 490 (2005). While a civil rights case, I often argue *Brt’s* temporal proximity should apply in whistleblower cases.
Ark. Code Ann. 21-1-604(e)(1) 
Affirmative defense

• The public employer has an affirmative defense to whistle-blower claims where the adverse action is based on employee misconduct, poor job performance, or a reduction in workforce unrelated to the public employee’s protected conduct. Again, this is the issue of causation and a pivotal issue in most of these cases.

Barrows v. City of Fort Smith
2010 Ark. 73, 360 S.W.3d 117 (2010)

• Where there is no factual dispute in which reasonable persons would differ as to whether an employee’s multiple documented violations warranted termination, the employer is entitled to summary judgment.

• In Barrows, the plaintiff claimed the City terminated him because Barrows had voiced concerns regarding the Chief’s competency.

• In reviewing the termination, the Civil Service Commission found that (1) there were sufficient facts to support a finding that Barrows had violated rules and policies of the department and (2) termination was the appropriate disciplinary action.
Barrows v. City of Fort Smith
2010 Ark. 73, 360 S.W.3d 117 (2010)
cont’d

• Barrows challenged the findings of the Civil Service Commission in circuit court and asserted a cause of action under the Arkansas Whistle-Blower Act.

• The circuit court reviewed the record of the proceedings before the Commission and found that Barrows was terminated as a result of his violations of departmental rules and policies.

• The circuit court’s determination that the termination resulted from violations of departmental rules and policies established the City’s affirmative defense under the Arkansas Whistle-Blower Act.

• Thus, causation was lacking.
• While the Court does not address it, there is a question as to whether Barrows communications regarding the Chief’s competency are properly considered a report of violation or waste under the Whistle-Blower Act? My guess is probably not. See “good faith” requirement below.

• What about First Amendment retaliation? Why does that work or not work for the alleged “speech,” in this case, i.e., that the Chief was allegedly not competent?
What Constitutes Good Faith?

• There is no definition in the statute, but there is a definition of what good faith is not.
• “Good faith is lacking when the public employee does not have personal knowledge of a factual basis for the communication or when the public employee knew or reasonably should have known that the communication of the waste or of the violation was malicious, false, or frivolous.” Ark. Code Ann. § 21-1-603 (b)(2).
Hughes v. City of Mena

• The public employee must have personal knowledge of the factual basis for any communication made under the Arkansas Whistleblower Act regarding misconduct to satisfy the good faith requirement.

• In Hughes, the plaintiff had no reasonable basis in fact for reporting misconduct because his personal knowledge was based on rumors circulating among the city department. As such, the plaintiff had no personal knowledge regarding the misconduct he reported.
• To determine whether a report was made in good faith that court looks at the content of the report, and also at the reporter’s purpose in making the report. *Id.* “The central question is whether the reports were made for the purpose of blowing the whistle, i.e., to expose an illegality … we look at the reporter’s purpose at the time the reports were made, not after subsequent events have transpired.” *Id.* (citing generally Wolcott v. Champion Intern. Corp., 691 F.Supp. 1052, 1059 (W.D.Mich.1987)).

• The Michigan court held that the good-faith requirement was not met where the employee’s purpose, at the time of making the reports, was not to protect the public, but to protect the jobs of himself and his co-workers. “Whistle-blower laws are not ‘intended to be used by employees to shield themselves from the consequences of their own misconduct or failures.’” *Freeman v. Ace Telephone Ass’n*, 404 F.Supp.2d 1127, 1140 (D. Minn. 2005).

• The Michigan court in *Wolcott* was considering a newly enacted Whistleblowers Protection Act with similar language to Ark. Code Ann. § 21-1-603. Because the Michigan Supreme Court had yet to interpret the statute, there was “little Michigan law setting out the elements necessary to present a claim under the Whistleblower Act.” 691 F.Supp. 1052, 1058 (W.D.Mich.1987) The court in that case relied heavily on employment discrimination actions under both Michigan and Federal Law. *Id.*
The Plaintiff, an independent contractor, brought a whistleblower action against the Dept. of Career Education, Division of Rehabilitation Services (ARS), claiming ARS terminated his counseling services based on his reporting waste of federal funds.
Bob Means, a licensed psychologist, contracted to provide his services to ARS on a part-time basis from 2004 until 2008.

Means testified at trial that the Hot Springs Rehabilitation Center (HSRC) continued to provide services to a patient who had completed his rehabilitation training, thereby wasting federal funds.

Means testified further that he reported the waste to his immediate supervisor but that the supervisor had no managerial authority over him.
• Whether an independent contractor may be considered a “public employee” as defined in the Arkansas Whistle-Blower Act.
  • An independent contractor providing part-time services for wages falls within the definition of “public employee”.

• “Appropriate authority” includes a supervisor of the agency in which the alleged violation occurs because to hold otherwise would lead to an absurd result.
  • Whether the public employer exercises managerial authority over the public employee is irrelevant to the inquiry.

• The defendant bears the burden to prove matters relating to mitigation.
• Essential takeaways—
  • The Supreme Court has construed the terms “public employee” and “appropriate authority” fairly broadly.
  • A whistle-blower’s failure to mitigate should be considered when addressing damages.
Ark. Code Ann. §§ 121-1-605, 121-1-606
Available Remedies

• Injunction
• Reinstatement
  • Federally, reinstatement will not be ordered where there is animosity between the parties; in lieu of reinstatement, often front pay is ordered.
• Compensation
  • Lost wages, benefits, and any other remuneration
• Costs and attorney’s fees
  • The decision to award these fees is discretionary. Arkansas Dep't of Health & Human Servs. v. Storey, 372 Ark. 175, 271 S.W.3d 500 (2008).
  • Also available to an employer if the court determines the action is without basis in law or fact.
  • The employee shall not be assessed attorney’s fees if, after exercising reasonable and diligent efforts, the public employee files a voluntary nonsuit concerning the employer within sixty (60) calendar days after determining that the employer would not be liable for damages.
Rewards

• Recent Act 211 amended the Arkansas Whistle-Blower Act to reward a “state employee” when communication of waste or violation results in savings of state funds.
  • State employee is defined as “a person who performs a full or part-time service for wages, salary, or other remuneration for a state employer.”
• The “state employee” shall be eligible to receive a reward in an amount equal to 10% of any savings (but no greater than $12,500) up to in state funds attributable to changes made based on a communication under § 21-1-603.
• Recent news regarding state official
Adverse Employment Action

• Ark. Code Ann. § 21-1-602(1) states that adverse action “means to
• discharge,
• threaten, or
• otherwise discriminate or
• retaliate against a public employee
• in any manner that affects the employee’s employment, including compensation, job location, rights, immunities, promotions, or privileges...”
Causal Connection

• To reach a causal connection there must be a relationship between the activity and the termination such that one event is generated by the other. *Zhuang v. Datacard Corp.*, 414 F.3d 849, 856 (8th Cir. 2005).

• The Supreme Court of Arkansas considers the timing between the communication and the termination a primary factor in establishing that connection. *Smith v. Brt*, 363 Ark. 126, 131-32, 211 S.W. 3d 485, 490 (2005) (court found 15 days sufficient).
Ark. Code Ann. § 21-1-603(a)(2)

• A protected communication must give the employer “reasonable notice” of the need to correct the alleged waste or violation.
What is Reasonable Notice?

• The Supreme Court of the United States defines “reasonable notice” as “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).
Drug Testing
Non-CDL Employees
Drug Testing
NON-CDL Employees

• Call Ken!
• Call David!
• See this link: http://www.arml.org/pdfs/publications/Drug_testing.pdf
• Ok, here are some quick thoughts.
Drug Testing
NON-CDL Employees

Safety Sensitive Employees May be Randomly Tested.

• Who are the safety sensitive folks?
  • Law enforcement officers
  • Motor vehicle operators who carry passengers, including, but not limited to, ambulance drivers
  • Fire department employees who directly participate in fire-fighting activities.
  • Medical personnel with direct patient care responsibilities including physicians, nurses, EMT’s etc
  • Mechanics etc who work on vehicles designed to carry passengers i.e.: buses, ambulances, police cruisers, vans etc
Fair Labor Standards Act
Fair Labor Standards Act
Who is entitled to overtime pay?

• Generally, every employee is entitled to overtime compensation. However, there are key exemptions to this general rule.

  **Key exemptions**

• Elected officials and their personal staff; executive employees, administrative, and professional employees. 29 U.S.C. § 203(e)(2)(C).

• Title of position is not the determining factor of whether an individual is exempt.
Executive Employees: 29 C.F.R. § 541.100

http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm

(1) Compensated on a salary basis at a rate of not less than $455 per week;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

EXAMPLES: Police Chiefs, Fire Chiefs, and Department Heads
Fair Labor Standards Act

**Administrative Employees: 29 C.F.R. § 541.200**

http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

EXAMPLES: HR Director, Computer/Systems Administrator, Financial Officer
**Professional Employees: 29 C.F.R. § 541.300**

- [http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm](http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm)

• **Professional Employee Elements:**

  • (1) Compensated on a salary or fee basis at a rate of not less than $455 per week; and

  • (2) Whose primary duty is the performance of work:

    • (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
    • (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

**EXAMPLES:** City Engineer, Wastewater Professionals, Planning Directors, City Attorneys
Are all non-exempt employees the same?

- There is a key difference between **uniformed** (police and fire) and **non-uniformed** employees and their entitlement to overtime.

**What is a uniformed employee?**

- Generally, **uniformed** employees are police and fire personnel, but does not include radio operators, clerks, secretaries, or janitors. 29 C.F.R. §§ 553.210 & 211.

- EMTs may qualify if their services are substantially related to firefighting or law enforcement activities. 29 C.F.R. § 553.215.
To what overtime provisions are non-uniformed employees entitled?

• Time-and-a-half for every hour of work over 40 for a workweek. 29 U.S.C. § 207.

What is a workweek; does it need to be Monday thru Sunday?

• Any 7-day period; the employer can establish a workweek that does not coincide with the calendar week. Generally, a workweek beginning and ending at 5pm on Friday is appropriate. 29 C.F.R. § 778.104.
Does every city owe its uniformed employees overtime?

- There is an exemption for police and fire departments that have less than 5 employees, including chiefs. 29 U.S.C. § 213(b)(20).

- Volunteer firefighters and auxiliary police officers are “volunteers” and are not treated as employees.

- Part-time Employees are considered employees. 29 C.F.R. § 553.200(b).

- Employees who are on leave and not working are also considered employees. 29 C.F.R. § 553.200(b).
To what overtime provisions are uniformed employees entitled?

The FLSA provides a partial overtime exemption to the 40 hour work week for law enforcement officers and firefighters who work a “work period” of no fewer than 7 days and no more than 28 days. 29 U.S.C. § 207(k).
What is a uniformed employees “work period”?

An employer can establish a uniformed officers work period as anywhere between 7 and 28 days consecutively. 29 U.S.C. 207(k).

The Secretary of Labor has set maximum hour standards based on a 28-day work period for both fire department and law enforcement personnel. Law enforcement employees who work over 171 hours within a 28-day work period must be compensated for those hours in excess of 171. Fire department employees working in excess of 212 hours within a 28-day period must also be compensated for overtime hours in excess of 212. These amounts are prorated for shorter work periods. 29 C.F.R. § 553.201.
Is there an option other than paying overtime?

Instead of paying overtime pay, an employer can compensate an employee with compensatory time (“comp time”), and that time must accrue at time-and-a-half. 29 U.S.C. § 207(o)(1).

The City may only elect to provide “comp time” if an agreement or understanding existed between the employer and the employee before the performance of that work; the employee must understand that the city has a policy of giving compensatory time. 29 U.S.C. § 207(o)(2)(A)(ii).

The agreement between the employee and employer can be made individually or collectively (i.e. collective bargaining agreement), although the employee must understand prior to performing the work. See generally, United Food & Commercial Workers Union, Local 1564 of New Mexico v. Albertson's, Inc., 207 F.3d 1193 (10th Cir. 2000).
Fair Labor Standards Act

When can employee use “comp time”?  
• An employee can request the use of “comp time” at any time; the employer is obligated to allow the use of that “comp time” within a reasonable time unless by doing so, it would disrupt the operations of the employers. 29 U.S.C. § 207(o)(5)(B).

Can an employer require the use of comp time?  
• An employer can require an employee to use “comp time”. See Christensen v. Harris County, 529 U.S. 576, 585 (2000).
Is there a limit on the amount of “comp time” an employee can accrue?

A non-uniformed employee can only accrue a total of 240 hours of “comp time” (160 actual overtime working hours) before the employer is required to pay the additional hours of overtime in cash. 29 U.S.C. § 207(o)(3)(A).

A uniformed employee can only accrue 480 hours of “comp time” (320 actual overtime working hours) before the employer is required to pay the additional hours of overtime in cash. 29 U.S.C. § 207(o)(2)(A)(ii).

Do not eliminate unused comp time without paying the employee for that overtime!
How do I pay accrued “comp time” when the employee quits or is terminated?

• Payment of “comp time” at termination is time-and-a-half at a wage equaling the average regular rate of pay for the final three years of employment or the final regular rate received by the employee, whichever is higher. 29 U.S.C. § 207(o)(4).

• Because unused “comp time” must be paid at the time of termination, it is advised to “pay as you go.” Compensate employees for their unused “comp time at the end of each year, or mandate that the employees use their comp time at your discretion.
Some Things to Watch and Do...Be Smart

• Emotional decisions are bad decisions
• Be consistent (do things the same way, even if it's your buddy!)
• Documentation
• KISS Method (Keep It Simple Stupid)
• Follow your policies. (You must know if you have policies and also WHAT THEY SAY)
• Politics. Remember you work for government no matter how much you'd like to believe to the contrary
Be Smart, Part Deux!

- Don’t ignore bad behavior
- Bad behavior starts with little things and always leads to VERY BIG THINGS
- You must manage
- De-certify or not to de-certify
- Common sense and initial reactions
- Get involved
- Stay informed
- Understand what your employees are doing
You Must Discipline in These Cases

• Actual Harassment
• Unreasonable use of Force, Deadly or Not (ASP, mace, gun, Taser, etc.)
• False Arrest
• Theft or Other Illegality (Liberty Interest)
The End!

John Wilkerson
Michael Mosley
jwilkerson@arml.org
mmosley@arml.org
The Patient Protection and Affordable Care Act

2015 Implementation Helps for Arkansas Cities and Towns

A presentation of materials to attendees of the Arkansas Municipal League’s HR & Personnel Matters Certification Course, October 15, 2014
by J. Chris Bradley, Attorney at Law
Department of the Treasury (Internal Revenue Service)

Proposed Rule

for the Implementation of

Shared Responsibility for Employers

Regarding Health Coverage

under the

Patient Protection and Affordable Care Act

The Affordable Care Act imposes responsibilities upon Employers to share in the costs of health care coverage for employees. The portion of the Affordable Care Act (ACA) imposing these responsibilities is codified in the United States Code at 26 USC §4980H.

These materials address Internal Revenue Service regulations for the implementation of and administration of employer cost sharing. These regulations are found at 26 CFR §4980H0-H6, which address Excise taxes.

These materials pertain to responsibilities of “an applicable large employer and to all of the applicable large employer members that comprise that applicable large employer” and includes municipal governmental employers.

DISCLAIMER

THE INFORMATION PROVIDED IS INTENDED TO BE A RESTATEMENT OF AND A GENERAL SUMMARY OF INFORMATION TAKEN FROM MATERIALS FOUND AT 26 CFR §4980H0-H6. THIS INFORMATION IS NOT INTENDED TO TAKE THE PLACE OF THE WRITTEN LAW, REGULATIONS, OR CONSULTATION WITH YOUR ENTITY’S LEGAL COUNSEL.

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§ 54.4980H-1  Key Definitions

A set of definitions apply to the Shared Responsibility regulations. The Shared Responsibility Regulations are published in the Code of Federal Regulations. See, 26 CFR §54.4980H0-H6. Section 4980H-0 is a Table of Contents. Section H-1 provides definitions. As of this date there are 50 terms. This document singles out the most important ones. As noted above, these definitions provided here are not the word for word re-presentation of the regulatory definitions but have been paraphrased when believed to be helpful.

(1) Administrative period.

The term administrative period is an optional period, selected by an applicable large employer member, of no longer than 90 days beginning immediately following the end of a measurement period and ending immediately before the start of the associated stability period. The administrative period also includes the period between a new employee's start date and the beginning of the initial measurement period, if the initial measurement period does not begin on the employee's start date.

(4) Applicable large employer.

The term applicable large employer means, with respect to a calendar year, an employer that employed an average of at least 50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year. For rules relating to the determination of applicable large employer status, see § 54.5980H–2.

(5) Applicable large employer member.

The term applicable large employer member means a person that, together with one or more other persons, is treated as a single employer that is an applicable large employer.

For this purpose, if a person, together with one or more other persons, is treated as a single employer that is an applicable large employer on any day of a calendar month, that person is an applicable large employer member for that calendar month.

If the applicable large employer comprises one person, that one person is the applicable large employer member. An applicable large employer member does not include a person that is not an employer or only an employer of employees with no hours of service for the calendar year. For rules for government entities, and churches, or conventions or associations of churches, see § 54.4980H–2(b)(4). (This provision was reserved for final rule-making in February 2013 and as of today’s date, is still reserved)
(7) **Bona fide volunteer.**

The term bona fide volunteer means an employee of a government entity or an organization described in section 501(c) that is exempt from taxation under section 501(a) whose only compensation from that entity or organization is in the form of—

(i) Reimbursement for (or reasonable allowance for) reasonable expenses incurred in the performance of services by volunteers, or

(ii) Reasonable benefits (including length of service awards), and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers.

(11) **Cost-sharing reduction.**

The term cost-sharing reduction means a cost-sharing reduction and any advance payment of the reduction as defined under section 1402 of the Affordable Care Act and 45 CFR 155.20.

(12) **Dependent.**

The term dependent means a child of an employee who has not attained age 26 but excluding a stepson, stepdaughter or an eligible foster child and also excluding any individual who is not a citizen or national of the United States unless such individual is a resident of the United States or a country contiguous to the United States.

A child attains age 26 on the 26th anniversary of the date the child was born. A child is a dependent for purposes of section 4980H for the entire calendar month during which he or she attains age 26.

Absent knowledge to the contrary, applicable large employer members may rely on an employee's representation about that employee's children and the ages of those children. **The term dependent does not include the spouse of an employee.**

(14) **Eligible employer-sponsored plan.**

The term eligible employer-sponsored plan has the same meaning as provided under section 5000A(f)(2) and the regulations thereunder and any other applicable guidance.
(15) **Employee.**

The term employee means an individual who is an employee under the common-law standard. For these purposes, a leased employee, a sole proprietor, a partner in a partnership, or a 2-percent S corporation shareholder is not an employee.

(16) **Employer.**

The term employer means the person that is the employer of an employee under the common-law standard. For purposes of determining whether an employer is an applicable large employer, all persons treated as a single employer under section 414(b), (c), (m), or (o) are treated as a single employer. Thus, all employees of a controlled group of entities under section 414(b) or (c), an affiliated service group under section 414(m), or under section 414(o) are taken into account in determining whether the members of the controlled group or affiliated service group together are an applicable large employer. For purposes of determining applicable large employer status, the term employer also includes a predecessor employer and a successor employer.

(18) **Exchange.**

The term Exchange means an Exchange as defined in 45 CFR 155.20.

(20) **Form W-2 wages.**

The term Form W-2 wages with respect to an employee refers to the amount of wages as defined under section 3401(a) for the applicable calendar year (required to be reported in Box 1 of the Form W-2) received from an applicable large employer.

(21) **Full-time employee.**

The term full-time employee means, with respect to a calendar month, an employee who is employed an average of at least 30 hours of service per week with an employer. For this purpose, 130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week, provided the employer applies this equivalency rule on a reasonable and consistent basis. For rules on the determination of whether an employee is a full-time employee, including a description of the look-back measurement method and the monthly measurement method, see §54.4980H-3.

The look-back measurement method for identifying full-time employees is available only for purposes of determining and computing liability under section 4980H and not for the purpose of determining status as an applicable large employer under §54.4980H-2.
Determination of full-time employee status using weekly rule under the monthly measurement method. Under the optional weekly rule set forth in §54.4980H-3(c)(3), full-time employee status for certain calendar months is based on hours of service over four weekly periods and for certain other calendar months is based on hours of service over five weekly periods.

With respect to a month with four weekly periods, an employee with at least 120 hours of service is a full-time employee, and with respect to a month with five weekly periods, an employee with at least 150 hours of service is a full-time employee. For purposes of this rule, the seven continuous calendar days that constitute a week (for example Sunday through Saturday) must be consistently applied for all calendar months of the calendar

(22) Full-time equivalent employee (FTE).

The term full-time equivalent employee, or FTE, means a combination of employees, each of whom individually is not treated as a full-time employee because he or she is not employed on average at least 30 hours of service per week with an employer, who, in combination, are counted as the equivalent of a full-time employee solely for purposes of determining whether the employer is an applicable large employer. For rules on the method for determining the number of an employer’s full-time equivalent employees, or FTEs, see § 54.4980H–2(c).

(24) Hour of service—

(i) In general. The term hour of service means each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence (as defined in 29 CFR 2530.200b–2(a)). For the rules for determining an employee’s hour of service, see § 54.4980H–3.

(ii) Excluded hours—(A) Bona fide volunteers. The term hour of service does not include any hour for services performed as a bona fide volunteer.

(B) Work-study program. The term hour of service does not include any hour for services to the extent those services are performed as part of a Federal Work-Study Program as defined under 34 CFR 675 or a substantially similar program of a State or political subdivision thereof.
(25) Initial measurement period.

The term initial measurement period means a time period selected by an applicable large employer member of at least three consecutive calendar months but not more than 12 consecutive calendar months used by the applicable large employer as part of the look-back measurement in § 54.4980H–3(d).

(26) Limited non-assessment period for certain employees.

References to the limited non-assessment period for certain employees refers to the limited period during which an employer will not be subject to an assessable payment under section 4980H(a), and in certain cases section 4980H(b), with respect to an employee as set forth in—

(i) Section 54.4980H-2(b)(5) (regarding the transition rule for an employer's first year as an applicable large employer),

(ii) Section 54.4980H-3(c)(2) (regarding the application of section 4980H for the three full calendar month period beginning with the first full calendar month in which an employee is first otherwise eligible for an offer of coverage under the monthly measurement method),

(iii) Section 54.4980H-3(d)(2)(iii) (regarding the application of section 4980H during the initial three full calendar months of employment for an employee reasonably expected to be a full-time employee at the start date, under the look-back measurement method),

(iv) Section 54.4980H-3(d)(3)(iii) (regarding the application of section 4980H during the initial measurement period to a new variable hour employee, seasonal employee or part-time employee determined to be employed on average at least 30 hours of service per week, under the look-back measurement method),

(v) Section 54.4980H-3(d)(3)(vii) (regarding the application of section 4980H following an employee's change in employment status to a full-time employee during the initial measurement period, under the look-back measurement method), and

(vi) Section 54.4980H-4(c) and §54.4980H-5(c) (regarding the application of section 4980H to the calendar month in which an employee's start date occurs on a day other than the first day of the calendar month).
(27) **Minimum essential coverage.** The term minimum essential coverage, or MEC, has the same meaning as provided in section 5000A(f) and any regulations or other guidance thereunder.

(28) **Minimum value.** The term minimum value has the same meaning as provided in section 36B(c)(2)(C)(ii) and any regulations or other guidance thereunder.

(29) **Month.** The term month means—

(i) A calendar month means one of the 12 full months named in the calendar, such as January, February, or March.

(ii) The period that begins on any date following the first day of a calendar month and that ends on the immediately preceding date in the immediately following calendar month (for example, from February 2 to March 1 or from December 15 to January 14).

(30) **New employee.**

Under the look-back measurement method, the term new employee means an employee who has been employed by an applicable large employer for less than one complete standard measurement period. For treatment of the employee as a new employee or ongoing employee following a period for which no hours of service are earned, see the rehire and continuing employee rules at § 54.4980H-3(d)(6). Under the monthly measurement method, the term new employee means an employee who either has not previously been employed by the applicable large employer or has previously been employed by the applicable large employer but is treated as a new employee under the rehire and continuing employee rules at §54.4980H-3(c)(4).

(31) **Ongoing employee.**

The term ongoing employee means an employee who has been employed by an applicable large employer member for at least one complete standard measurement period. For the treatment of an ongoing employee as a new employee or continuing employee following a period for which no hours of service are earned, see the rehire and continuing employee rules at §54.4980H-3(d)(6).

(32) **Part-time employee.** The term part-time employee means a new employee who the applicable large employer member reasonably expects to be employed on average less than 30 hours of service per week during the initial measurement period, based on the facts and circumstances at the employee's start date. Whether an employer's determination that a new employee is a part-time employee is reasonable is based on the facts and circumstances at the employee's start date. Factors to consider in
determining a new employee's full-time employee status are set forth in §54.4980H-3(d)(2)(ii).

(33) Period of employment.

The term period of employment means the period of time beginning on the first date for which an employee is credited with an hour of service for an applicable large employer (including any member of that applicable large employer) and ending on the last date on which the employee is credited with an hour of service for that applicable large employer, both dates inclusive. An employee may have one or more periods of employment with the same applicable large employer.

(35) Plan year. A plan year must be twelve consecutive months, unless a short plan year of less than twelve consecutive months is permitted for a valid business purpose. A plan year is permitted to begin on any day of a year and must end on the preceding day in the immediately following year (for example, a plan year that begins on October 15, 2015, must end on October 14, 2016). A calendar year plan year is a period of twelve consecutive months beginning on January 1 and ending on December 31 of the same calendar year. Once established, a plan year is effective for the first plan year and for all subsequent plan years, unless changed, provided that such change will only be recognized if made for a valid business purpose. A change in the plan year is not permitted if a principal purpose of the change in plan year is to circumvent the rules of section 4980H or these regulations.

(37) Qualified health plan. The term qualified health plan means a qualified health plan as defined in Affordable Care Act section 1301(a) (42 U.S.C. 18021(a)), but does not include a catastrophic plan described in Affordable Care Act section 1302(e) (42 U.S.C. 18022(e)).

(38) Seasonal employee. The term seasonal employee means an employee who is hired into a position for which the customary annual employment is six months or less.

(39) Seasonal worker.

The term seasonal worker means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including (but not limited to) workers covered by 29 CFR 500.20(s)(1), and retail workers employed exclusively during holiday seasons. Employers may apply a reasonable, good faith interpretation of the term “seasonal worker” and a reasonable good faith interpretation of 29 CFR 500.20(s)(1) (including as applied by analogy to workers and employment positions not otherwise covered under 29 CFR 500.20(s)(1)).
(40) **Section 1411 Certification.** The term Section 1411 Certification means the certification received as part of the process established by the Secretary of Health and Human Services under which an employee is certified to the employer under section 1411 of the Affordable Care Act as having enrolled for a calendar month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee.

(41) **Section 4980H(a) applicable payment amount.**

The term section 4980H(a) applicable payment amount means, with respect to any month, 1/12 of $2,000, adjusted for inflation in accordance with section 4980H(c)(5) and any applicable guidance thereunder.

(42) **Section 4980H(b) applicable payment amount.**

The term section 4980H(b) applicable payment amount means, with respect to any month, 1/12 of $3,000, adjusted for inflation in accordance with section 4980H(c)(5) and any applicable guidance thereunder.

(43) **Self-only coverage.** The term self-only coverage means health insurance coverage provided to only one individual, generally the employee.

(44) **Special unpaid leave.** The term special unpaid leave means—

(i) Unpaid leave that is subject to the Family and Medical Leave Act of 1993 (FMLA), Public Law 103-3, 29 U.S.C. 2601 et seq.;

(ii) Unpaid leave that is subject to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353, 38 U.S.C. 4301 et seq.; or

(iii) Unpaid leave on account of jury duty.

(45) **Stability period.**

The term stability period means a time period selected by an applicable large employer member that follows, and is associated with, a standard measurement period or an initial measurement period, and is used by the applicable large employer member as part of the process of determining whether an employee is a full-time employee under the look-back measurement method in § 54.4980H–3(d).
(46) Standard measurement period.

The term standard measurement period means a time period of at least three but not more than 12 consecutive months that is used by an applicable large employer as part of the look-back measurement method in § 54.4980H-3(d). See § 54.4980H-3(d)(1)(ii) for rules on payroll periods that include the beginning and end dates of the measurement period.

(47) Start date. The term start date means the first date on which an employee is required to be credited with an hour of service with an employer. For rules relating to when, following a period for which an employee does not earn an hour of service, that employee may be treated as a new employee with a new start date rather than a continuing employee, see the rehire and continuing employee rules at §54.4980H-3(c)(4) and §54.4980H-3(d)(6).

(49) Variable hour employee.

The term variable hour employee means an employee if, based on the facts and circumstances at the employee’s start date, the applicable large employer member cannot determine whether the employee is reasonably expected to be employed on average at least 30 hours of service per week during the initial measurement period because the employee’s hours are variable or otherwise uncertain. For this purpose, the applicable large employer member may not take into account the likelihood that the employee may terminate employment with the applicable large employer (including any member of the applicable large employer) before the end of the initial measurement period.

Factors to consider in determining whether it can be determined that the employee is reasonably expected to be (or reasonably expected not to be) employed on average at least 30 hours of service per week during the initial measurement period include, but are not limited to, whether the employee is replacing an employee who was a full-time employee or a variable hour employee, the extent to which the hours of service of employees in the same or comparable positions have actually varied above and below an average of 30 hours of service per week during recent measurement periods, and whether the job was advertised, or otherwise communicated to the new employee or otherwise documented (for example, through a contract or job description) as requiring hours of service that would average at least 30 hours of service per week, less than 30 hours of service per week, or may vary above and below an average of 30 hours of service per week.
These factors are only relevant for a particular new employee if the employer has no reason to anticipate that the facts and circumstances related to that new employee will be different. In all cases, no single factor is determinative. For purposes of determining whether an employee is a variable hour employee, the applicable large employer member may not take into account the likelihood that the employee may terminate employment with the applicable large employer (including any member of the applicable large employer) before the end of the initial measurement period.

In the case of an individual who, under all the facts and circumstances, is the employee of an entity (referred to solely for purposes of this paragraph (a)(49) as a “temporary staffing firm”) that hired such individual for temporary placement at an unrelated entity that is not the common law employer, additional factors to consider to determine whether the employee is reasonably expected to be (or reasonably expected not to be) employed by the temporary staffing firm on average at least 30 hours of service per week during the initial measurement period include, but are not limited to, whether other employees in the same position of employment with the temporary staffing firm, as part of their continuing employment, retain the right to reject temporary placements that the temporary staffing firm offers the employee; typically have periods during which no offer of temporary placement is made; typically are offered temporary placements for differing periods of time; and typically are offered temporary placements that do not extend beyond 13 weeks.

The term variable hour employee is used as a category of employees under the look-back measurement method and is not relevant to the monthly measurement method.

(50) Week. The term week means any period of seven consecutive calendar days applied consistently by the applicable large employer member.

This section is applicable for periods after December 31, 2014.
§ 54.4980H–2 Applicable large employer and applicable large employer member.

Are we a large employer?

An employer’s status as an applicable large employer for a calendar year is determined by taking the sum of the total number of full-time employees (including any seasonal workers) for each calendar month in the preceding calendar year and the total number of full time equivalent employees (FTE), including any seasonal workers, for each calendar month in the preceding calendar year, and dividing by 12, rounding down if not a whole number.

If the result of this calculation is less than 50, the employer is not an applicable large employer for the current calendar year. If the result of this calculation is 50 or more, the employer is an applicable large employer for the current calendar year, unless the seasonal worker exception in paragraph (b)(2) of this section applies. § 54.4980H–2 (b)(1).

What is the seasonable worker exception?

If an employer has more than 50 employees and that is only due to using seasonal workers then the employer may not be an applicable large employer if the total number of employees exceeds 50 for only 120 days or less during the preceding calendar year.

For purposes of this paragraph (b)(2) only, four calendar months may be treated as the equivalent of 120 days. The four calendar months and the 120 days are not required to be consecutive. § 54.4980H–2 (b)(2).

So, what are equivalent employees (FTEs)?

An FTE is an employee, including seasonal workers, who were not employed on average at least 30 hours of service per week for a calendar month in the preceding calendar year.

To determine the number of FTEs for each calendar month for the preceding calendar year calculate the aggregate number of hours of service for each calendar month for employees who were not full-time employees (but not more than 120 hours of service for any employee) and dividing that number by 120. In determining the number of FTEs for each calendar month, fractions are taken into account. § 54.4980H–2 (c).
Here are some examples.

The following examples illustrate the above rules. Hours of service are computed following the rules set forth in § 54.4980H–3, and references to years refer to calendar years unless otherwise specified.

**Example No. 1: Applicable large employer with FTEs.**

*(i) Assume.*

During each calendar month of 2014, Employer L has 20 full-time employees each of whom averages 35 hours of service per week, 40 employees each of whom averages 90 hours of service per month, and no seasonal workers.

First, each of the 20 employees who average 35 hours of service per week count as one full-time employee for each month.

Second, determine the number of FTEs for each month, by looking at the total hours of service of the employees who are not full-time employees. Multiply the number of part-time employees times the average hours worked but in any event do not use an average hours worked greater than 120. Then divide the result by 120.

Here, the employer has 30 FTEs for each month (40 × 90 = 3,600, and 3,600 ÷ 120 = 30).

*(ii) Discussion*

Employer L is an applicable large employer because the employer has 50 full-time employees. The employer has 50 full time employees because the sum of 20 full-time employees and 30 FTEs during each month in 2015 is equal to 50 or greater and because the seasonal worker exception is not applicable. Employer L is an applicable large employer for 2015.

**Example 2: Seasonal worker exception.**

*(i) Assume.*

During 2014, Employer N has 40 fulltime employees for the entire calendar year, none of whom are seasonal workers. In addition, Employer N also has 80 seasonal full-time workers who work for Employer N from
September through December, 2015. Employer N has no FTEs during 2014.

(ii) Discussion.

First, Employer N has 40 full-time employees during each of eight calendar months of 2014 and due to its 80 seasonal workers it has 120 full-time employees during each of four calendar months of 2014.

Therefore, Employer N has (40*8) + (120 * 4) which is the same as 320+480 which equals 800 employees for the year.

Divide the 800 employees by 12 to get an average of 66.5 employees for the year, rounded down to 66 full-time employees.

But, Employer N is not an applicable large employer because the workforce equaled or exceeded 50 full-time employees (counting seasonal workers) for no more than four calendar months (treated as the equivalent of 120 days) in calendar year 2014, and the number of full-time employees would be less than 50 during those months if seasonal workers were disregarded.

Accordingly, Employer N is not considered to employ more than 50 full-time employees, Employer N is not an applicable large employer for 2015.

Example 3: Seasonal workers and other FTEs.

(i) Assume.

Same facts as in Example 2, except that Employer N has 20 FTEs in August, some of whom are seasonal workers.

(ii) Discussion.

Employer N averaged 68 full-time employees in 2014: [(40 × 7) + (60 × 1) + (120 × 4)] ÷ 12 = 68.33, rounded down to 68.

In the previous example the seasonal worker exception applied, but here, the number of the employer’s full-time employees (including seasonal workers) and FTEs equaled or exceeded 50 employees for more than 120 days during the year.
Employer N had at least 50 full-time employees for a period greater than four calendar months (treated as the equivalent of 120 days) during 2014, and accordingly, Employer N is an applicable large employer for calendar year 2015.

**Transition Rule.** There is a transition rule for an employer's first year as an applicable large employer.

The employer will not be subject to an assessable payment under section 4980H by reason of its failure to offer coverage to the employee for January through March of that year, provided the employer offered affordable coverage having at least minimum value on or before April 1 of the first calendar year for which the employer is an applicable large employer.

Otherwise, the employer may be subject to a section 4980H(a) assessable payment with respect to January through March as well as any later calendar months for which coverage was not offered.

If the employer offers coverage to the employee by April 1 but the coverage is not affordable or does not have minimum value, then the employer may be subject to a section 4980H(b) assessable payment with respect to the employee for those months where affordable coverage with minimum value is not provided.

The transition rule applies only during the first year that an employer is an applicable large employer. Consequently, this transition rule would not apply if the employer were to fall below the 50 full-time employee threshold for a subsequent calendar year and then increases employment and becomes an applicable large employer again.
§ 54.4980H–3 Determining full-time employees.

How do I determine whether an employee is a full-time employee?

Rules and methods and for the determination of full-time status are found in this section of the regulations. The measurement methods are referred to as the look-back methods. The look-back methods discussed in this section are only used to determine full-time employee status for the purpose of determining and calculating liability under for assessable penalty payments. The methods are not used to determine status as an applicable large employer. § 54.4980H–3(a)

Hourly workers. An employer of hourly employees must calculate actual hours of service from records of hours worked and hours for which payment is made or due.

Non-hourly employees – calculation. When calculating hours of service for non-hourly employees, the employer must use one of the following methods.

1. Use actual hours of service from records of hours worked and hours for which payment is made or due, or

2. Use a days-worked equivalency whereby the employee is credited with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service, or

3. Use a weeks-worked equivalency whereby the employee is credited with 40 hours of service for each week for which the employee would be required to be credited with at least one hour of service.

How does this work?

An employer must use one of these three methods for calculating the hours of service for non-hourly employees. An employer is not required to use the same method for all non-hourly employees, and may apply different methods for different classifications of non-hourly employees, provided the classifications are reasonable and consistently applied.

Similarly, an applicable large employer member is not required to apply the same methods as other applicable large employer members of the same applicable large employer for the same or different classifications of non-hourly employees, provided that in each case the classifications are reasonable and consistently applied by the applicable large employer member.
May I use a day or weeks worked equivalency or understate hours?

The number of hours of service calculated using the days-worked or weeks-worked equivalency must reflect generally the hours actually worked and the hours for which payment is made or due. An employer is not permitted to use the days-worked equivalency or the weeks-worked equivalency if the result is to substantially understate an employee’s hours of service in a manner that would cause that employee not to be treated as full-time.

For example, an employer may not use a days-worked equivalency in the case of an employee who generally works three 10-hour days per week, because the equivalency would substantially understate the employee’s hours of service as 24 hours of service per week, which would result in the employee being treated as not a full-time employee. Rather, the number of hours of service calculated using the days-worked or weeks-worked equivalency method must reflect generally the hours actually worked and the hours for which payment is made or due. § 54.4980H–3(b)

Does the look-back method work differentiate between types of employees?

The Look-back method addresses four (4) groups of employees:

- Ongoing employees—
- New non-variable hour and non-seasonal employees.
- New variable hour and new seasonal employees—
- Transition from new employee to ongoing employee—

What is required for ongoing employees?

Generally, applicable large employer determines each ongoing employee’s full-time status by looking back at the standard measurement period.

Determine the months in which the standard measurement period starts and ends. The determination must be made on a uniform and consistent basis for all employees in the same category. See below for permissible categories.

If the employer chooses a standard measurement period of 12 months, the 12 months could be:

- the calendar year;
- a non-calendar plan year, or
- a different 12-month period, such as one that ends shortly before the start of the plan’s annual open enrollment period.
If the applicable large employer member determines that an employee was employed on average at least 30 hours per week during the standard measurement period, then the applicable large employer member treats the employee as a full-time employee during a subsequent stability period, regardless of the employee’s number of hours of service during the stability period, so long as he or she remains an employee.

How are payroll periods used with respect to measurement periods?

For payroll periods that are one week, two weeks, or semi-monthly in duration, an employer is permitted to treat as a measurement period a period that ends on the last day of the payroll period preceding the payroll period that includes the date that would otherwise be the last day of the measurement period, provided that the measurement period begins on the first day of the payroll period that includes the date that would otherwise be the first day of the measurement period.

An employer may also treat as a measurement period a period that begins on the first day of the payroll period that follows the payroll period that includes the date that would otherwise be the first day of the measurement period, provided that the measurement period ends on the last day of the payroll period that includes the date that would otherwise be the last day of the measurement period.

For example, an employer using the calendar year as a measurement period could exclude the entire payroll period that included January 1 (the beginning of the year) if it included the entire payroll period that included December 31 (the end of that same year), or, alternatively, could exclude the entire payroll period that included December 31 of a calendar year if it included the entire payroll period that included January 1 of that calendar year.

What if an employee is determined to be employed an average of at least 30 hours of service per week?

An employee who was employed on average at least 30 hours of service per week during the standard measurement period must be treated as a full-time employee for a stability period that begins immediately after the standard measurement period and any applicable administrative period. The stability period must be at least six consecutive calendar months but no shorter in duration than the standard measurement period.
What if an employee is determined not to be employed on average at least 30 hours of service per week.

If an employee was not employed an average at least 30 hours of service per week during the standard measurement period, the applicable large employer member may treat the employee as not a full-time employee during the stability period that follows, but is not longer than, the standard measurement period. The stability period must begin immediately after the end of the measurement period and any applicable administrative period.

What are permissible employee categories?

Subject to the rules governing the relationship between the length of the measurement period and the stability period, applicable large employer members may use measurement periods and stability periods that differ either in length or in their starting and ending dates for the following categories of employees:

- Collectively bargained employees and non-collectively bargained employees.
- Each group of collectively bargained employees covered by a separate collective bargaining agreement.
- Salaried employees and hourly employees.
- Employees whose primary places of employment are in different States.

What is an optional administrative period?

An applicable large employer member may provide for an administrative period that begins immediately after the end of a standard measurement period and that ends immediately before the associated stability period; however, any administrative period between the standard measurement period and the stability period for ongoing employees may neither reduce nor lengthen the measurement period or the stability period.

The administrative period following the standard measurement period may last up to 90 days. To prevent this administrative period from creating a gap in coverage, the administrative period must overlap with the prior stability period, so that, during any such administrative period applicable to ongoing employees following a standard measurement period, ongoing employees who are enrolled in coverage because of their status as full-time employees based on a prior
measurement period must continue to be covered through the administrative period. Applicable large employer members may use administrative periods that differ in length for different categories of employees.

**What if there is a change in a position of employment or other employment status?**

If an ongoing employee’s position of employment or other employment status changes before the end of a stability period, the change will not affect the application of the classification of the employee as a full-time employee (or not a full-time employee) for the remaining portion of the stability period.

For example, if an ongoing employee in a certain position of employment is not treated as a full-time employee during a stability period because the employee’s hours of service during the prior measurement period were insufficient for full-time-employee treatment, and the employee changes position of employment to a position that involves an increased level of hours of service, the treatment of the employee as a non-full-time employee during the remainder of the stability period is unaffected.

Similarly, if an ongoing employee in a certain position of employment is treated as a full-time employee during a stability period because the employee’s hours of service during the prior measurement period were sufficient for full-time-employee treatment, and the employee changes position of employment to a position that involves a lower level of hours of service, the treatment of the employee as a full-time employee during the remainder of the stability period is unaffected.

**Is there an example for how this works?**

(i) Assume.

Employer W is an applicable large employer member and computes hours of service following the rules in this section. Employer W chooses to use a 12-month stability period that begins January 1 and a 12-month standard measurement period that begins October 15. Consistent with the terms of Employer W’s group health plan, only employees classified as full-time employees using the look-back measurement method are eligible for coverage.

Employer W chooses to use an administrative period between the end of the standard measurement period (October 14) and the beginning of the stability period (January 1) to determine which employees were employed on average 30 hours of service per week during the measurement period, notify them of their eligibility for the plan for the calendar year beginning on January 1 and of the
coverage available under the plan, answer questions and collect materials from employees, and enroll those employees who elect coverage in the plan. Previously-determined full-time employees already enrolled in coverage continue to be offered coverage through the administrative period.

Employee A and Employee B have been employed by Employer W for several years, continuously from their start date.

Employee A was employed on average 30 hours of service per week during the standard measurement period that begins October 15, 2015 and ends October 14, 2016 and for all prior standard measurement periods.

Employee B also was employed on average 30 hours of service per week for all prior standard measurement periods, but is not a full-time employee during the standard measurement period that begins October 15, 2015 and ends October 14, 2016.

(ii) Discussion.

Because Employee A was employed for the entire standard measurement period that begins October 15, 2015 and ends October 14, 2016, Employee A is an ongoing employee with respect to the stability period running from January 1, 2017 through December 31, 2017.

Because Employee A was employed on average 30 hours of service per week during that standard measurement period, Employee A is offered coverage for the entire 2017 stability period (including the administrative period from October 15, 2017 through December 31, 2017).

Because Employee A was employed on average 30 hours of service per week during the prior standard measurement period, Employee A is also offered coverage for the entire 2016 stability period and, if enrolled, would continue such coverage during the administrative period from October 15, 2016 through December 31, 2016.

Because Employee B was employed for the entire standard measurement period that begins October 15, 2015 and ends October 14, 2016, Employee B is also an ongoing employee with respect to the stability period in 2017. But because Employee B did not work full-time during this standard measurement period, Employee B is not required to be offered coverage for the stability period in 2017 (including the administrative period from October 15, 2017 through December 31, 2017).
However, because Employee B was employed on average 30 hours of service per week during the prior standard measurement period, Employee B is offered coverage through the end of the 2016 stability period and, if enrolled, would continue such coverage during the administrative period from October 15, 2016 through December 31, 2016.

Employer W complies with the measurement and stability standards because the measurement and stability periods are no longer than 12 months, the stability period for ongoing employees who work full-time during the standard measurement period is not shorter than the standard measurement period, the stability period for ongoing employees who do not work full-time during the standard measurement period is no longer than the standard measurement period, and the administrative period is no longer than 90 days.

**What about new non-variable hour and non-seasonal employees?**

If, at the time of an employee’s start date, the employee is reasonably expected to be a full-time employee (and is not a seasonal employee), an employer that sponsors a group health plan that offers coverage to the employee at or before the conclusion of the employee’s initial three full calendar months of employment will not be subject to an assessable payment under section 4980H by reason of its failure to offer coverage to the employee for up to the initial full three calendar months of employment; however, if the employer did not offer coverage to the employee by the end of the employee’s initial three full calendar months of employment, the employer may be subject to a section 4980H assessable payment for those months as well as for any subsequent months for which coverage was not offered.

**So, then how does this work for new variable hour and new seasonal employees?**

Generally, large employer members are permitted to determine whether the new variable hour employees or new seasonal employee, is a full-time employee using an initial measurement period of between three and 12 months (as selected by the employer member) that begins on any date between the employee’s start date and the first day of the first calendar month following the employee’s start date.

The employer member measures the new employee’s hours of service during the initial measurement period and determines whether the employee was employed on average at least 30 hours of service per week during this period. **The stability period for such employees must be the same length as the stability period for ongoing employees.**
What about employees determined to be employed on average at least 30 hours of service per week?

If a new variable hour employee or new seasonal employee has on average at least 30 hours of service per week during the initial measurement period, the applicable large employer member must treat the employee as a full-time employee during the stability period that begins after the initial measurement period (and any associated administrative period). The stability period must be a period of at least six consecutive calendar months that is no shorter in duration than the initial measurement period.

What about employees determined not to be employed on average at least 30 hours of service per week?

If a new variable hour employee or new seasonal employee does not have on average at least 30 hours of service per week during the initial measurement period, the applicable large employer member is permitted to treat the employee as not a full-time employee during the stability period that follows the initial measurement period.

This stability period for such employees must not be more than one month longer than the initial measurement period and must not exceed the remainder of the standard measurement period (plus any associated administrative period) in which the initial measurement period ends.

We have new employees who become an on-going employee. How does that work?

Generally, once a new variable hour employee or new seasonal employee has been employed for an entire standard measurement period, the applicable large employer must test the employee for full-time employee status, beginning with that standard measurement period, at the same time and under the same conditions as apply to other ongoing employees.

An employer member with a calendar year standard measurement period and a one-year initial measurement period that begins on an employee’s start date, of February 12, would test a new variable hour employee for full-time status first based on the initial measurement period (February 12 through February 11 of the following year) and again based on the calendar year standard measurement period (if the employee continues in employment for that entire standard measurement period) beginning on January 1 of the year after the start date.
How does this effect employees determined to be employed an average of at least 30 hours of service per week?

An employee who was employed an average of at least 30 hours of service per week during an initial measurement period or standard measurement period must be treated as a full-time employee for the entire associated stability period. This is the case even if the employee was employed an average of at least 30 hours of service per week during the initial measurement period but was not employed an average of at least 30 hours of service per week during the overlapping or immediately following standard measurement period.

In that case, the applicable large employer member may treat the employee as not a full-time employee only after the end of the stability period associated with the initial measurement period. Thereafter, the employer member must determine the employee’s status as a full-time employee in the same manner as it determines such status in the case of its other ongoing employees.

How does this effect employees determined not to be employed an average of at least 30 hours of service per week?

If the employee was not employed an average of at least 30 hours of service per week during the initial measurement period, but was employed at least 30 hours of service per week during the overlapping or immediately following standard measurement period, the employee must be treated as a full-time employee for the entire stability period that corresponds to that standard measurement period (even if that stability period begins before the end of the stability period associated with the initial measurement period). Thereafter, the employer member must determine the employee’s status as a full-time employee in the same manner as it determines such status in the case of its other ongoing employees.

What are the permissible differences in measurement or stability periods for different categories of employees?

Subject to the rules governing the relationship between the length of the measurement period and the stability period, applicable large employer members may use measurement periods and stability periods that differ either in length or in their starting and ending dates for the categories of employees referenced above.
What is the “Optional administrative period”?

Generally, and subject to the limits below, an employer member is permitted to apply an administrative period in connection with an initial measurement period and before the start of the stability period.

This administrative period must not exceed 90 days in total. For this purpose, the administrative period includes all periods between the start date of a new variable hour employee or new seasonal employee and the date the employee is first offered coverage under the applicable large employer member’s group health plan, other than the initial measurement period.

Thus, for example, if the applicable large employer member begins the initial measurement period on the first day of the first month following a new variable hour or new seasonal employee’s start date, the period between the employee’s start date and the first day of the next month must be taken into account in applying the 90-day limit on the administrative period.

Similarly, if there is a period between the end of the initial measurement period and the date the employee is first offered coverage under the plan, that period must be taken into account in applying the 90-day limit on the administrative period. Applicable large employer members may use administrative periods that differ in length for the categories of employees identified previously.

Is there a limit on combined length of initial measurement period and administrative period?

In addition to the specific limits on the initial measurement period (which must not exceed 12 months) and the administrative period (which must not exceed 90 days), there is a limit on the combined length of the initial measurement period and the administrative period applicable to a new variable hour employee or new seasonal employee.

Specifically, the initial measurement period and administrative period together cannot extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee’s start date.

For example, if an applicable large employer member uses a 12-month initial measurement period for a new variable hour employee, and begins that initial measurement period on the first day of the first calendar month following the employee’s start date, the period between the end of the initial measurement period and the offer of coverage to a new variable hour employee who works full time during the initial measurement period must not exceed one month.
Examples

The following examples illustrate the look-back measurement methods described in this section.

In all of the following examples, the applicable large employer member offers all of its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan. The coverage is affordable (or is treated as affordable coverage under one of the affordability safe harbors described in § 54.4980H–5) and provides minimum value according to law.

In Examples 1 through Example 8, the new employee is a new variable hour employee, and the employer has chosen to use a **12-month standard** measurement period for ongoing employees starting October 15 and a 12-month stability period associated with that standard measurement period starting January 1. (Thus, during the administrative period from October 15 through December 31 of each calendar year, the employer continues to offer coverage to employees who qualified for coverage for that entire calendar year based upon working on average at least 30 hours per week during the prior standard measurement period.) Also, the employer offers health plan coverage only to full-time employees (and their dependents).

In Examples 9 and Example 10, the new employee is a new variable hour employee, and the employer uses a **six-month standard** measurement period, starting each May 15 and November 15, with six-month stability periods associated with those standard measurement periods starting January 1 and July 1.

**EXAMPLE NO. 1** (12-Month Initial Measurement Period Followed by 1+ Partial Month Administrative Period).

(i) Assume.

For new variable hour employees, Employer B uses a 12-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y’s initial measurement period runs from May 10, 2015, through May 9, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016 through June 30, 2017.
(ii) Discussion.

Employee Y has an average of 30 hours of service per week during his initial measurement period and Employer B uses an initial measurement period that does not exceed 12 months; an administrative period totaling not more than 90 days; and a combined initial measurement period and administrative period that does not last beyond the final day of the first calendar month beginning on or after the one-year anniversary of Employee Y’s start date.

Accordingly, from Employee Y’s start date through June 30, 2017, Employer B is not subject to any payment under section 4980H with respect to Employee Y, because Employer B complies with the standards for the initial measurement period and stability periods for a new variable hour employee.

Employer B must test Employee Y again based on the period from October 15, 2015 through October 14, 2016 (Employer B’s first standard measurement period that begins after Employee Y’s start date).

EXAMPLE NO. 2  (11-Month Initial Measurement Period Followed by 2+ Partial Month Administrative Period).

(i) Assume.

Same as Example 1, except that Employer B uses an 11-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period until the end of the second calendar month beginning after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y’s initial measurement period runs from May 10, 2015, through April 9, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016 through June 30, 2017.

(ii) Discussion.

Same as Example No. 1.

EXAMPLE NO. 3  (11-Month Initial Measurement Period Preceded by Partial Month Administrative Period and Followed by 2- Month Administrative Period).

(i) Assume.
Same as Example 1, except that Employer B uses an 11-month initial measurement period that begins on the first day of the first calendar month beginning after the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the second calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y’s initial measurement period runs from June 1, 2015, through April 30, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016 through June 30, 2017.

(ii) Discussion.

Same as Example No. 1.

EXAMPLE NO. 4 (12-Month Initial Measurement Period Preceded by Partial Month Administrative Period and Followed by 2-Month Administrative Period).

(i) Assume.

For new variable hour employees, Employer B uses a 12-month initial measurement period that begins on the first day of the first month following the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the second calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y’s initial measurement period runs from June 1, 2015, through May 31, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from August 1, 2016 through July 31, 2017.

(ii) Discussion.

Employer B does not satisfy the standards for the look-back measurement method in paragraph (c)(4)(v) of this section because the combination of the initial partial month delay, the 12-month initial measurement period, and the two month administrative period means that the coverage offered to Employee Y does not become effective until after the first day of the second calendar month following the first anniversary of Employee Y’s start date.

Accordingly, Employer B is potentially subject to a payment under section 4980H.
EXAMPLE NO. 5  (Continuous Full-Time Employee).

(i) Assume.

Same as Example 1; in addition, Employer B tests Employee Y again based on Employee Y’s hours of service from October 15, 2015 through October 14, 2016 (Employer B’s first standard measurement period that begins after Employee Y’s start date), determines that Employee Y has an average of 30 hours of service a week during that period, and offers Employee Y coverage for July 1, 2017 through December 31, 2017. (Employee Y already has an offer of coverage for the period of January 1, 2017 through June 30, 2017 because that period is covered by the initial stability period following the initial measurement period, during which Employee Y was determined to be a full-time employee.)

(ii) Discussion.

Employer B is not subject to any payment under section 4980H for 2017 with respect to Employee Y.

EXAMPLE NO. 6  (Initially Full-Time Employee, Becomes Non-Full-Time Employee).

(i) Assume.

Same as Example 1; in addition, Employer B tests Employee Y again based on Employee Y’s hours of service from October 15, 2015 through October 14, 2016 (Employer B’s first standard measurement period that begins after Employee Y’s start date), and determines that Employee Y has an average of 28 hours of service a week during that period. Employer B continues to offer coverage to Employee Y through June 30, 2017 (the end of the stability period based on the initial measurement period during which Employee Y was determined to be a full-time employee), but does not offer coverage to Employee Y for the period of July 1, 2017 through December 31, 2017.

(ii) Discussion.

Employer B is not subject to any payment under section 4980H for 2016 with respect to Employee Y, provided that it offers coverage to Employee Y from July 1, 2016 through June 30, 2017 (the entire stability period associated with the initial measurement period).

EXAMPLE NO. 7  (Initially Non-Full-Time Employee).
(i) Assume.

Same as Example 1, except that Employee Y has an average of 28 hours of service per week during the period from May 10, 2015 through May 9, 2016 and Employer B does not offer coverage to Employee Y in 2016.

(ii) Discussion.

From Employee Y’s start date through the end of 2016, Employer B is not subject to any payment under section 4980H, because Employer B complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Employee Y.

EXAMPLE NO. 8  (Initially Non-Full-Time Employee, Becomes Full-Time Employee).

(i) Assume.

Same as Example 7; in addition, Employer B tests Employee Y again based on Employee Y’s hours of service from October 15, 2015 through October 14, 2016 (Employer B’s first standard measurement period that begins after Employee Y’s start date), determines that Employee Y has an average of 30 hours of service per week during this standard measurement period, and offers coverage to Employee Y for 2017.

(ii) Discussion.

Employer B is not subject to any payment under section 4980H for 2017 with respect to Employee Y.

EXAMPLE NO. 9  (Initially Full-Time Employee).

(i) Assume.

For new variable hour employees, Employer C uses a six-month initial measurement period that begins on the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the first full calendar month beginning after the end of the initial measurement period. Employer C hires Employee Z on May 10, 2015. Employee Z’s initial measurement period runs from May 10, 2015, through November 9, 2015, during which Employee Z has an average of 30 hours of service per week. Employer C
offers coverage to Employee Z for a stability period that runs from January 1, 2016 through June 30, 2016.

(ii) Discussion.

Employer C uses an initial measurement period that does not exceed 12 months; an administrative period totaling not more than 90 days; and a combined initial measurement period and administrative period that does not last longer than the final day of the first calendar month beginning on or after the one-year anniversary of Employee Z’s start date. From Employee Z’s start date through June 30, 2016, Employer C is not subject to any payment under section 4980H, because Employer C complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Employee Z. Employer C must test Employee Z again based on Employee Z’s hours of service during the period from November 15, 2015 through May 14, 2016 (Employer C’s first standard measurement period that begins after Employee Z’s start date).

EXAMPLE NO. 10  (Initially Full-Time Employee, Becomes Non-Full-Time Employee).

(i) Assume.

Same as Example 9; in addition, Employer C tests Employee Z again based on Employee Z’s hours of service during the period from November 15, 2015 through May 14, 2016 (Employer C’s first standard measurement period that begins after Employee Z’s start date), during which period Employee Z has an average of 28 hours of service per week. Employer C continues to offer coverage to Employee Z through June 30, 2016 (the end of the initial stability period based on the initial measurement period during which Employee Z has an average of 30 hours of service per week), but does not offer coverage to Employee Z from July 1, 2016 through December 31, 2016.

(ii) Discussion.

Employer C is not subject to any payment under section 4980H with respect to Employee Z for 2016.

EXAMPLE NO. 11  (Seasonal Employee, 12-Month Initial Measurement Period; 1+ Partial Month Administrative Period)

(i) Assume.
Employer D offers health plan coverage only to full-time employees (and their dependents). Employer D uses a 12-month initial measurement period for new variable hour employees and seasonal employees that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning after the end of the initial measurement period. Employer D hires Employee S, a ski instructor, on November 15, 2015 with an anticipated season during which Employee S will work running through March 15, 2016. Employer D determines that Employee S is a seasonal employee based upon a reasonable good faith interpretation of that term. Employee S’s initial measurement period runs from November 15, 2015, through November 14, 2016. Employee S is expected to have 50 hours of service per week from November 15, 2015 through March 15, 2016, but is not reasonably expected to average 30 hours of service per week for the 12-month initial measurement period.

(ii) Discussion. Employer D cannot determine whether Employee S is reasonably expected to average at least 30 hours of service per week for the 12-month initial measurement period. Accordingly, Employer D may treat Employee S as a variable hour employee during the initial measurement period.

EXAMPLE NO. 12 (Variable Hour Employee).

(i) Assume.

Employer E is in the trade or business of providing temporary workers to numerous clients that are unrelated to Employer E and to one another. Employer E is the common law employer of the temporary workers based on all of the facts and circumstances. Employer E offers health plan coverage only to full-time employees (including temporary workers who are full-time employees) and their dependents. Employer E uses a 12- month initial measurement period for new variable hour employees and new seasonal employees that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning after the end of the initial measurement period. Employer E hires Employee T on January 1, 2015 and anticipates that it will assign Employee T to provide services for various clients. As of the beginning of the initial measurement period, Employer E reasonably expects that, over the initial measurement period, Employee T is likely to be offered short-term assignments with several different clients, with significant gaps between the assignments and that the assignments will differ in the average hours of service per week (meaning averaging both above and below 30 hours of service per week), all depending on client needs and Employee T’s availability. The number of actual assignments that Employee T will be offered, the number that Employee T will accept, the duration of
assignments, the length of the gaps between assignments, and whether various assignments will result in Employee T being employed on average at least 30 hours of service per week during the assignment, are all uncertain.

(ii) Discussion.

Employer E cannot determine whether Employee T is reasonably expected to average at least 30 hours of service per week for the 12-month initial measurement period. Accordingly, Employer E may treat Employee T as a variable hour employee during the initial measurement period.

EXAMPLE NO. 13 (Variable Hour Employee).

(i) Assume.

Employee A is hired on an hourly basis by Employer Y to fill in for employees who are absent and to provide additional staffing at peak times. Employer Y expects that Employee A will average 30 hours of service per week or more for A’s first few months of employment, while assigned to a specific project, but also reasonably expects that the assignments will be of unpredictable duration, that there will be gaps of unpredictable duration between assignments, that the hours per week required by subsequent assignments will vary, and that A will not necessarily be available for all assignments.

(ii) Discussion.

Employer Y cannot determine whether Employee A is reasonably expected to average at least 30 hours of service per week for the initial measurement period. Accordingly, Employer Y may treat Employee A as a variable hour employee.

How should a change in employment status be treated?

Generally, if the position of employment or other employment status of a new variable hour employee or new seasonal employee materially changes before the end of the initial measurement period in such a way that, if the employee had begun employment in the new position or status, the employee would have reasonably been expected to be employed on average at least 30 hours of service per week, the employer is not required to treat the employee as a full-time employee for purposes of determining and calculating any liability under section 4980H until the first day of the fourth month following the change in employment status or, if earlier and the employee averages more than 30 hours of service per week during the initial measurement period, the first day of the
first month following the end of the initial measurement period (including any optional administrative period associated with the initial measurement period).

The following example illustrates the provisions of this section. In the following example, the applicable large employer member offers all of its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan. The coverage is affordable within the meaning of the law or is treated as affordable coverage under one of the affordability safe harbors described in § 54.4980H-5) and provides minimum value.

**EXAMPLE** (Change in employment from variable hour employee to non-variable hour employee).

(i) Assume.

For new variable hour employees, Employer A uses a 12-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning on or after the end of the initial measurement period. Employer A hires Employee Z on May 10, 2015. Employer A’s initial measurement period runs from May 10, 2015, through May 9, 2016, with the optional administrative period ending June 30, 2016. At Employee Z’s May 10, 2015 start date, Employee Z is a variable hour employee. On September 15, 2015, Employer A promotes Employee Z to a position that can reasonably be expected to average at least 30 hours of service per week.

(ii) Discussion.

For purposes of determining Employer A’s potential liability under section 4980H, Employee Z must be treated as a full-time employee as of January 1, 2016, because that date is the earlier of the first day of the fourth calendar month following the change in position (January 1, 2016) or the first day of the calendar month after the end of the initial measurement period plus the optional administrative period (July 1, 2016).

*How should we deal with employees rehired after termination of employment or resuming service after other absence?*

**Treatment as a new employee after a period of absence.**

Solely for purposes of section 4980H, an employee who resumes providing services to (or is otherwise credited with an hour of service for) an applicable
large employer after a period during which the employee was not credited with any hours of service may be treated as having terminated employment and having been rehired, and therefore may be treated as a new employee upon the resumption of services only if the employee did not have an hour of service for the applicable large employer for a period of at least 26 consecutive weeks immediately preceding the resumption of services or, if chosen by the applicable large employer, for a shorter period (measured in weeks) of at least four consecutive weeks that exceeds the number of weeks of that employee’s period of employment with the applicable large employer immediately preceding the period during which the employee was not credited with any hours of service.

For purposes of the preceding sentence, the duration of the period of employment immediately preceding the period during which the employee was not credited with any hours of service is determined after application to that period of employment of the averaging methods described below, if applicable. An employee treated as a continuing employee retains, upon resumption of services, the status that employee had with respect to the application of any stability period (for example, if the continuing employee returns during a stability period in which the employee is treated as a full-time employee, the employee is treated as a full-time employee upon return and through the end of that stability period). For purpose of the preceding sentence, a continuing employee treated as a full-time employee will be treated as offered coverage upon resumption of services if the employee is offered coverage as of the first day that employee is credited with an hour of service, or, if later, as soon as administratively practicable.

This rule set forth in this paragraph applies solely for the purpose of determining whether the employee, upon the resumption of services, is treated as a new employee or as a continuing employee, and does not determine whether the employee is treated as a continuing full-time employee or a terminated employee during the period during which no hours of service are credited.

What is an “employment break period”?

An employment break period is a period of at least four consecutive weeks (disregarding special unpaid leave as defined below) during which an employee of an educational organization is not credited with hours of service for an applicable large employer.

What is “Special unpaid leave”?

For purposes of this paragraph, special unpaid leave refers to—
● Unpaid leave that is subject to the Family and Medical Leave Act of 1993 (FMLA), Public Law 103–3, 20 U.S.C. 2601 et seq.,

● Unpaid leave that is subject to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103–353, 38 U.S.C. 4301 et seq., or

● Unpaid leave on account of jury duty.

What is the “anti-abuse rule”?

An hour of service will be disregarded if the hour of service is credited, or the services giving rise to the crediting of the hour of service are requested or required of the employee, for a purpose of avoiding or undermining the application of the employee rehire rules, or the application of the averaging method for employment break periods.

Examples

The following examples illustrate the provisions of paragraph (e) of this section. All employers in these examples are applicable large employer members, each is in a different applicable large employer group, and each computes hours of service under the rules cited above.

EXAMPLE NO. 1.

(i) Assume.

As of April 1, 2015, Employee A has been an employee of Employer Z for 10 years. On April 1, 2015, Employee A terminates employment and is not credited with an hour of service until September 1, 2015 when Employer Z rehires Employee A and Employee A continues as an employee through December 31, 2015, which is the close of the measurement period as applied by employer Z.

(ii) Discussion.

Because Employee A’s period for which he is not credited with any hour of service is not longer than Employee A’s prior period of employment and is less than 26 weeks, Employee A is not treated as having terminated employment and been rehired for purposes of determining whether Employee A is treated as a new employee upon resumption of services. Therefore, Employee A’s hours of service prior to termination are required to be taken into account for purposes of the measurement period, and, Employee A’s period with no hours of service is
taken into account as a period of zero hours of service during the measurement period.

EXAMPLE NO. 2.

(i) Assume.

Same facts as Example 1, except that Employee A is rehired on December 1, 2015.

(ii) Discussion.

Because the period during which Employee A is not credited with an hour of service for Employer Z, exceeds 26 weeks, Employee A may be treated as having terminated employment on April 1, 2015 and having been rehired as a new employee on December 1, 2015, for purposes of determining Employee A’s full-time employee status. Because Employee A is treated as a new employee, Employee A’s hours of service prior to termination are not required to be taken into account for purposes of the measurement period, and the period between termination and rehire with no hours of service is not taken into account in the new measurement period that begins after the employee is rehired.

How is non-payment or late payment of premiums to be handled?

An applicable large employer member will not be treated as failing to offer to a full-time employee (and his or her dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan for an employee whose coverage under the plan is terminated during the coverage period solely due to the employee failing to make a timely payment of the employee portion of the premium. This treatment continues only through the end of the coverage period (typically the plan year). For this purpose, the rules in § 54.4980B–8, Q&A–5(a), (c), (d) and (e) apply under this section to the payment for coverage with respect to a full-time employee in the same manner that they apply to payment for COBRA continuation coverage.

When does this begin?

This section is applicable for periods after December 31, 2014.

If you are a large employer and don’t provide coverage an assessable payment may be levied against you.

An assessable payment is triggered when an applicable large employer member fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan for any calendar month, and the applicable large employer member has received a Section 1411 Certification with respect to at least one full-time employee.

What is a Section 1411 Certification?

A Section 1411 Certification means the certification received as part of the process established by the Secretary of Health and Human Services under which an employee is certified to the employer under section 1411 of the Affordable Care Act as having enrolled for a calendar month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee.

What is the assessable payment for a calendar month?

The amount is of the payment is calculated by multiplying the number of full-time employees of the applicable large employer member, adjusted as set out below, times the “applicable payment amount” also set out below.

An applicable large employer member is treated as offering such coverage to its full-time employees (and their dependents) for a calendar month if, for that month, it offers such coverage to all but five percent (or, if greater, five) of its full-time employees, provided that an employee is treated as having been offered coverage only if the employer also offers coverage to that employee’s dependents). § 54.4980H–4(a)

How do I offer “coverage”?

To offer coverage for a plan year, an applicable large employer member must provide its full-time employees an effective opportunity to elect to enroll (or decline to enroll) in the coverage no less than once during the plan year.

Whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including:

• adequacy of notice of the availability of the offer of coverage
● the period of time during which acceptance of the offer of coverage may be made, and

● any other conditions on the offer. § 54.4980H–4(b)

An employee's election of coverage from a prior year that continues for the next plan year unless the employee affirmatively elects to opt out of the plan constitutes an offer of coverage for purposes of section 4980H.

What about staffing firms?

In cases where a staffing firm is not the common law employer of the individual and the staffing firm makes an offer of coverage to the employee on behalf of the client employer under a plan established or maintained by the staffing firm, the offer is treated as made by the client employer for purposes of section 4980H only if the fee the client employer would pay to the staffing firm for an employee enrolled in health coverage under the plan is higher than the fee the client employer would pay the staffing firm for the same employee if that employee did not enroll in health coverage under the plan.

What about partial calendar months?

If an applicable large employer member fails to offer coverage to a full-time employee for any day of a calendar month, that employee is treated as not offered coverage during that entire month.

However, in a calendar month in which the employment of a full-time employee terminates, if the employee would have been offered coverage for the entire month had the employee been employed for the entire month, the employee is treated as having been offered coverage for that entire month. § 54.4980H–4(c)

In addition, an applicable large employer member is not subject to an assessable payment under section 4980H with respect to an employee for the calendar month in which the employee's start date occurs if the start date is on a date other than the first day of the calendar month, and, in addition, with respect to the calendar month in which the start date occurs, such an employee is not included for purposes of the calculation of any potential liability under section 4980H(a).
What is the “allocated reduction of 30 full-time employees?”

Once the number of an applicable large employer member’s has been established, that number is reduced by that member’s allocable share of 30.

If a large employer has several sub-parts, the applicable large employer member’s allocation is equal to 30 allocated ratably among all members of the applicable large employer on the basis of the number of full-time employees employed by each applicable large employer member during the calendar year.

If an applicable large employer member’s total allocation is a fractional number that is less than one, it will be rounded up to one. This rounding rule may result in the aggregate reduction for the entire group of applicable large employer members exceeding 30. § 54.4980H–4(e)

What is the “applicable payment amount?”

For calendar year 2015, the applicable payment amount for a large employer that fails to offer coverage, is $2,000 divided by 12 to arrive at the amount for one month. 26 US Code 4980H(c).

The following example illustrates the provisions of this section.

(i) Assume:

An applicable large employer member A and an applicable large employer member B are the two members of an applicable large employer.

Employer A employs 40 fulltime employees in each calendar month of 2014. A does not sponsor an eligible employer-sponsored plan for any calendar month of 2015, and receives a Section 1411 Certification for 2015 with respect to at least one of its full-time employees.

Employer member B sponsors an eligible employer sponsored plan under which all of its fulltime employees are eligible for minimum essential coverage. Applicable large employer member B employs 35 full-time employees in each calendar month of 2014.

For 2015, the applicable payment amount for a calendar month is $2,000 divided by 12.
(ii) Discussion:

To determine whether there is an assessable payment first determine the total number of full time employees for both employer members.

Here that is 40 and 35 respectively. The total is 75 total employees.

Employer A is entitled to 40/75 times 30 to get their offset.

Employer B is entitled to 35/75 times 30 to get their offset.

Employer A’s allocation is 16 and Employer B’s allocation is 14.

Employer A’s payment is equal to 40 minus 16 or 24 times $2,000 or $48,000.

Employer B does not owe a payment because it provided coverage. § 54.4980H–4(e)

When does this start?

This section is applicable for periods after December 31, 2014. § 54.4980H–4(h)
§ 54.4980H–5 Assessable payments under US Code 4980H(b).

Even though a large employer offers coverage to its full time employees and their dependents, the employer may still be liable for an assessable payment.

If, an applicable large employer member:

- fails to offer minimum essential coverage for any calendar month to all but five percent or less (or, if greater, five or less) of its full-time employees and their dependents, and

- the applicable large employer member has received a Section 1411 Certification with respect to one or more full-time employees of the applicable large employer,

then the IRS may impose an assessable payment on the employer.

The assessable payment is equal to the product of $3000, and the number of full-time employees of the applicable large employer member for which it has received a Section 1411 Certification, less:

- those employees who are new full-time employees during their first three months of employment, or

- who are new variable hour or new seasonal employees during the months of that employee’s initial measurement period (and associated administrative period) under § 54.4980H–3(c)(3), or

- who were offered the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that satisfied minimum value and met one or more of the affordability safe harbors described in paragraph (e) of this section.

Lastly, calculation of the assessable payment may be further lessened by reducing the employer’s full-time employee number by the employers “ratable allocation” of the employee reduction provided under § 54.4980H–4(d), but not to exceed 30. See, § 54.4980H–5(a).
**What about offering coverage for partial calendar months?**

If an applicable large employer member fails to offer coverage to a full-time employee for any day of a calendar month, that employee is treated as not offered coverage during that entire month.

However, in a calendar month in which a full-time employee’s employment terminates, if the employee would have been offered coverage if the employee had been employed for the entire month, the employee is treated as having been offered coverage during that month regardless of whether the employer uses the payroll period rule set forth in §54.4980H-3(d)(1)(ii) or the weekly rule set forth in §54.4980H-3(c)(3) to determine full-time employee status for the calendar month.

In a calendar month in which a full-time employee's employment terminates, if the employee would have been offered coverage if the employee had been employed for the entire month, the employee is treated as having been offered coverage during that month.

Lastly, an applicable large employer member is not subject to an assessable payment under section 4980H with respect to an employee for the calendar month in which the employee's start date occurs if the start date is on a date other than the first day of the calendar month. See, § 54.4980H–5(c)

**What does it mean that the offered coverage be affordable?**

Generally, an employee entitled to a premium tax credit or cost reduction when offered coverage by an applicable large employer where the employee’s cost of coverage 9.5% or more of the employee’s household income.

However, regulations offer affordability safe harbors.

**What are the affordability safe harbors for section 4980H(b)?**

The safe harbors apply to this section only and allow an applicable large employer member that offers minimum essential coverage providing minimum value to avoid an assessable payment under section 4980H(b) with respect to any employee receiving the premium tax credit or cost sharing reduction. This rule applies even if the applicable large employer member’s offer of coverage that
meets the requirements of an affordability safe harbor is not affordable when using household income figures.

**What are the conditions of using an affordability safe harbor?**

First, the employer must offer minimum essential coverage that provides at least a minimum value with respect to the self-only coverage offered to the employee. The applicable large employer may use any of the safe harbors for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a category. Reasonable categories generally include specified job categories, nature of compensation (hourly or salary), geographic location, and similar bona fide business criteria. An enumeration of employees by name or other specific criteria having substantially the same effect as an enumeration by name is not considered a reasonable category.

**What is the W-2 safe harbor?**

An employer will not be subject to an assessable payment under section 4980H(b) with respect to a full-time employee if that employee’s required contribution for the calendar year for the employer’s lowest cost self-only coverage that provides minimum value during the entire calendar year (excluding COBRA or other continuation coverage) does not exceed 9.5 percent of that employee’s Form W-2 wages from the employer for the calendar year.

Application of this safe harbor is determined after the end of the calendar year and on an employee-by-employee basis, taking into account the Form W-2 wages and the required employee contribution for that year.

In addition, to qualify for this safe harbor, the employee’s required contribution must remain a consistent amount or percentage of all Form W-2 wages during the calendar year (or for plans with fiscal year plan years, within the portion of each plan year during the calendar year) so that an applicable large employer member is not permitted to make discretionary adjustments to the required employee contribution for a pay period. A periodic contribution that is based on a consistent percentage of all Form W-2 wages may be subject to a dollar limit specified by the employer.

**Are there adjustments for partial-year offer of coverage?**

For an employee not offered coverage for an entire calendar year, the Form W-2 safe harbor is applied by adjusting the Form W-2 wages to reflect the period for which coverage was offered, then determining whether the employee’s required
contribution for the employer’s lowest cost self-only coverage that provides minimum value, totaled for the periods during which coverage was offered, does not exceed 9.5 percent of the adjusted amount of Form W–2 wages.

To adjust Form W–2 wages for this purpose, the Form W–2 wages are multiplied by a fraction equal to the number of calendar months for which coverage was offered over the number of calendar months in the employee’s period of employment with the employer during the calendar year.

For this purpose, if coverage is offered during at least one day during the calendar month, or the employee is employed for at least one day during the calendar month, the entire calendar month is counted in determining the applicable fraction.

What is the rate of pay safe harbor?

Hourly Employees
An applicable large employer member satisfies the rate of pay safe harbor with respect to an employee for a calendar month if the employee’s required contribution for the month for the applicable large employer member’s lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of an amount equal to 130 hours multiplied by the lower of the employee’s hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year) or the employee’s lowest hourly rate of pay during the calendar month.

Salaried Employees
For salaried employees, monthly salary is used instead of calculations using hours, and solely for purposes of this paragraph, an applicable large employer member may use any reasonable method for converting payroll periods to monthly salary.

An applicable large employer member may use this safe harbor only to the extent it does not reduce the hourly wage of hourly employees or the monthly wages of salaried employees during the calendar year (including through the transfer of employment to another applicable large employer member of the same applicable large employer).

For this purpose, if coverage is offered during at least one day during the calendar month, the entire calendar month is counted both for purposes of determining the assumed income for the calendar month and for determining the employee’s share of the premium for the calendar month.
What about the Federal poverty line safe harbor?

An applicable large employer member satisfies the Federal poverty line safe harbor with respect to an employee for a calendar month if the employee’s required contribution for the calendar month for the applicable large employer member’s lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of a monthly amount determined as the Federal poverty line for a single individual for the applicable calendar year, divided by 12.

For this purpose, if coverage is offered during at least one day during the calendar month, the entire calendar month is counted both for purposes of determining the assumed income for the calendar month and for determining the employee’s share of the premium for the calendar month. For this purpose, the applicable Federal poverty line is the Federal poverty line for the State in which the employee is employed.

Some Safe Harbor Examples

The following examples illustrate the application of the affordability safe harbors.

EXAMPLE NO. 1: (Form W–2 wages safe harbor).

(i) Assume.

Employee A is employed by applicable large employer member Z consistently from January 1, 2015 through December 31, 2015. In addition, Z offers Employee A and his dependents minimum essential coverage during that period that meets the minimum value requirements. The employee contribution for self-only coverage is $100 per calendar month, or $1,200 for the calendar year. For 2015, Employee A’s Form W–2 wages with respect to employment with Z are $24,000.

(ii) Discussion.

Because the employee contribution for 2015 is less than 9.5% of Employee A’s Form W–2 wages for 2015, the coverage offered is treated as affordable with respect to Employee A for 2015 ($1,200 is 5% of $24,000).
EXAMPLE NO. 2: (Form W–2 wages safe harbor).

(i) Assume.

Employee B is employed by applicable large employer member Y from January 1, 2015 through September 30, 2015. In addition, Y offers Employee B and his dependents minimum essential coverage during that period that meets the minimum value requirements. The employee contribution for self-only coverage is $100 per calendar month, or $900 for Employee B’s period of employment. For 2015, Employee B’s Form W–2 wages with respect to employment with Y are $18,000. For purposes of applying the affordability safe harbor, the Form W–2 wages are multiplied by 9/9 (9 calendar months of coverage offered over 9 months of employment during the calendar year) or 1. Accordingly, affordability is determined by comparing the adjusted Form W–2 wages ($18,000) to the employee contribution for the period for which coverage was offered ($900).

(ii) Discussion.

Because the result is less than 9.5% of Employee B’s Form W–2 wages for 2015, the coverage offered is treated as affordable with respect to Employee B for 2015 ($900 is 5% of $18,000).

EXAMPLE NO. 3: (Form W–2 wages safe harbor).

(i) Assume.

Employee C is employed by applicable large employer member X from May 15, 2015 through December 31, 2015. In addition, X offers Employee C and her dependents minimum essential coverage during the period from August 1, 2015 through December 31, 2015 that meets the minimum value requirements. The employee contribution for self-only coverage is $100 per calendar month, or $500 for Employee C’s period of employment. For 2015, Employee C’s Form W–2 wages with respect to employment with X are $15,000. For purposes of applying the affordability safe harbor, the Form W–2 wages are multiplied over 8 months of employment during the calendar year). Accordingly, affordability is determined by comparing the adjusted Form W–2 wages ($9,375 or $15,000 x 5/8) to the employer contribution for the period for which coverage was offered ($500).
(ii) Discussion.

Because $500 is less than 9.5% of $9,375 (Employee C’s adjusted Form W-2 wages for 2015), the coverage offered is treated as affordable with respect to Employee C for 2015 ($500 is 5.33% of $9,375).

EXAMPLE NO. 4: (Rate of pay safe harbor).

(i) Assume.

Employee D is employed by applicable large employer member W from January 1, 2015 through December 31, 2015. In addition, W offers Employee D and his dependents minimum essential coverage during that period that meets the minimum value requirements. The employee contribution for self-only coverage is $85 per calendar month. Employee D is paid at a rate of $7.25 per hour (the minimum wage in Employer W’s jurisdiction), for the entire year 2015. For purposes of applying the affordability safe harbor, W may assume that Employee D earned $942.50 per calendar month (130 hours of service multiplied by $7.25 per hour). Accordingly, affordability is determined by comparing the assumed income per month ($942.50) to the employee contribution per month ($85).

(ii) Discussion.

Because $85 is less than 9.5% of Employee D’s assumed income, the coverage offered is treated as affordable with respect to Employee D for 2015 ($85 is 9.01% of $942.50).

EXAMPLE NO. 5: (Rate of pay safe harbor).

(i) Assume.

Employee E is employed by applicable large employer member V from May 15, 2015 through December 31, 2015. In addition, V offers Employee E and her dependents minimum essential coverage from August 1, 2015 through December 31, 2015 that meets the minimum value requirements. The employee contribution for self-only coverage is $100 per calendar month. From May 15, 2015 through October 31, 2015, Employee E is paid at a rate of $10 per hour. From November 1, 2015 through December 31, 2015, Employee E is paid at a rate of $12 per hour. For purposes of applying the affordability safe harbor V may assume that Employee E earned $1,300 per calendar month (130 hours of service multiplied by the
lowest hourly rate of pay for the calendar year, or $10). Accordingly, affordability is determined by comparing the assumed income ($1,300 per month) to the employee contribution ($100 per month).

(ii) Discussion.

Because $100 is less than 9.5% of Employee E’s assumed monthly income, the coverage offered is treated as affordable with respect to Employee E for 2015 ($100 is 7.69% of $1,300).

EXAMPLE NO. 6: (Federal poverty line safe harbor).

(i) Assume.

Employee F is employed by applicable large employer member W from January 1, 2015 through December 31, 2015. In addition, W offers Employee F and his dependents minimum essential coverage during that period that meets the minimum value requirements. W uses the look-back measurement method. Under that method as applied by W, Employee F is treated as a fulltime employee for the entire calendar year 2015. Employee F is regularly credited with 35 hours of service per week but is credited with only 20 hours of service during the month of March 2015 and only 15 hours of service during the month of August, 2015. Assume for this purpose that the Federal poverty line for 2015 for an individual is $11,170. With respect to Employee F, W determines the monthly employee contribution for employee single-only coverage for each calendar month of 2015 as an amount equal to 9.5% multiplied by $11,170, which is $1,061.15, and that amount is then divided by 12, and the result is $88.43.

(ii) Discussion.

Regardless of Employee F’s actual wages for any calendar month, including the months of March, 2015 and August, 2015 when Employee F has lower wages because of significantly lower hours of service, the coverage under the plan is treated as affordable with respect to Employee F.

When does this start?

This section is applicable for periods after December 31, 2014. § 54.4980H–5(g)
Human Resource and Personnel Matters

The Hiring Process

Presented by Ken Wasson
Human Resource issues can be the most challenging part of a City Officials job

- Poorly made decisions regarding personnel problems and issues can and will haunt you and your city for years to come.
- City officials need to be well informed and educated in Personnel Laws.
- Establishing good quality personnel policies and procedures for your city employees is critical.
- Please refer to the information in your notebook titled The Hiring Process. I will be referring to it frequently.
A well run city is a reflection of those managing it

BUT….

• How does a City Administration go about acquiring high quality employees?

• What are some basics that you need to look at when considering a pool of applicants?

* Let’s look at a typical situation that arises often in cities. The replacement of an employee.
Scenario - Street Department employee is retiring after 35 years

FIRST - to fill the position you need to know what is their official job title and description?

!! WHAT….no job title or description??

STOP

* Every City Employee needs a job title and a description of skills needed for their position.
Let’s take a look at an example of a typical job description that you could use for any employee.

Note: This basic job description is intended to be an example only. You would want to tailor make job descriptions to detail specific job skills needed for each individual position.

We will discuss specific job descriptions in a minute. First let’s look at a generic or general job description.
General Job Description
(See Page 2 of your job description handout/sample forms tab)

- **TITLE:** All city employees should have a job title, even part-time employees
- **DEPARTMENT:** _______________________
- **JOB SUMMARY:** This section should be no more than three or four sentences and be a summary of the duties and responsibilities associated with the job.
- **SPECIFIC JOB DUTIES AND RESPONSIBILITIES:** This section should only list duties which are critical to the successful performance of the job as it currently exist. As jobs change, job descriptions should be rewritten.
General job descriptions should include:

- **SPECIAL KNOWLEDGE, SKILLS, ABILITIES OR EDUCATION**: This section should include the specifications and qualifications needed to adequately do the job. The level of educational development required for the position should be listed in this section i.e., High School, Technical School, Academy Certification, etc. The skills and the levels stated should be realistic, specific, and justifiable based on the responsibility statement.
In conclusion general job descriptions should list:

- **IMMEDIATE SUPERVISOR:** ______________
- **WORKING CONDITIONS:** This section is used to describe the physical environment in which the work is being performed. Especially important are any conditions which are unpleasant or hazardous.
- **MINIMUM QUALIFICATIONS:** This section is used to describe the education or experience required to obtain this specific job.
- **DISCLAIMER:** This statement indicates that the job description is not intended to be an exhaustive list of all duties performed of the incumbent.

* Now let’s look at several job descriptions personalized to include specific jobs skills needed for a particular position.
TITLE: Patrolman

Department: Police Department

Job Summary: Under the general supervision of the Patrol Sergeant, will assist in the prevention of crime and the preservation of order. Patrolmen are primarily responsible for protecting life and property and enforcing laws and regulations throughout the city.
SPECIFIC JOB DUTIES AND RESPONSIBILITIES (Patrolman)

- **Enforces** City/State laws and ordinances as well as other pertinent laws.
- **Investigates** suspicious conditions and complaints, and makes arrests of persons who violate laws and ordinances.
- **Accompanies** prisoners to headquarters, jail or court and appears in court as the arresting officer.
- **Directs** traffic and either arrests or issues violation tickets to those who break traffic laws.
- **Checks** vehicle parking in restricted areas and gives violation tickets when necessary.
- **Attends** fires or accidents in assigned area as directed, provides all possible assistance, administers first aid, and prepares necessary reports.
- **Maintains** order in crowds and may occasionally escort parades, funerals or attend other public gatherings.
- **Answers** criminal complaints and takes necessary corrective action.
- **Gives** advice on laws, ordinances and general information to the public.
- **Operates** radio patrol car as required and performs minor maintenance such as adding gas, oil and checking tires.
- **Attends** and testifies in court as required.
- **Performs** related work as required.
SPECIAL KNOWLEDGE, SKILLS, ABILITIES OR EDUCATION (Patrolman)

- Knowledge of Federal, State and City laws and Ordinances, including laws of search and seizure and rule of evidence.
- Knowledge of modern police methods.
- Ability to physically and mentally react in a variety of emergency situations.
- Good social and general intelligence with the ability to communicate effectively both orally and in writing.
- Ability to understand and carry out oral and written instructions.
- Ability to drive an automobile safely and to use good judgment in the operation and use of the automobile.
- Considerable skill in the use of department approved firearms.
- Physical ability to react to a variety of emergency law enforcement situations including juvenile crime automobile accident, domestic disturbances and to use the best effort to restore peace and order.
- Ability to observe situations; to report and record them clearly.
PATROLMAN

- **IMMEDIATE SUPERVISOR:** SERGEANT
- **WORKING CONDITIONS:** Police Officers work in a variety of conditions and situations including patrolling in an automobile, walking on foot patrol, working indoors at a desk, directing auto traffic outdoors in various types of weather, investigating accidents and crimes in various types of weather and working or being on duty at any time during the day or night of an assigned shift.
PATROLMAN

MINIMUM QUALIFICATIONS:

◦ Completion of the Arkansas Police Academy Basic Police Course or equivalent.
◦ Completion of all State required certifications for Law Enforcement Officers.
◦ Graduation from High School or equivalent.
◦ A valid Arkansas Drivers License.

* The above information is intended to describe the general nature of this position and is not to be considered a complete statement of duties, responsibilities and requirements.
Equipment Operator

See Pgs. 5 & 6 job description handout/sample forms tab

- **Title:** Equipment Operator
- **Department:** Streets
- **Job Summary:** Under general supervision, may operate a bulldozer, dump truck, backhoes, road grades and other comparable heavy equipment in the construction and maintenance of all city streets.
Specific Job Duties & Responsibilities (Equipment Operator)

- **Operates** all street department heavy equipment to assist in the construction, repair and maintenance of all streets.
- **Assists** in preparing sub-grade for street patching.
- **Assists** in cleaning of city ditches to insure proper drainage and the installation of culverts to insure proper drainage.
- **Responsible** for assuring that safe procedures are followed in the operation of all street department equipment.
- **Assists** other street department employees in a variety of tasks including construction and maintenance of storm sewers, opening drainage ditches, cleaning right of way and loading trucks.
- **Performs** related tasks as assigned.
Special Knowledge, Skills, Abilities or Education (Equipment Operator)

- Ability to safely and skillfully operate all city street department heavy equipment.
- Ability to follow oral and written instructions.
- Awareness of all safety standards when operating heavy equipment vehicles.
- Ability to perform minor repairs and upkeep on all street department equipment.
- Knowledge of traffic ordinances governing the use of vehicles and ability to obtain proper licenses.
- Ability to perform manual physical labor when necessary.
Equipment Operator

- **Immediate supervisor:** Street Superintendent

- **Working Conditions:** Working conditions include operating heavy equipment outdoors and in all types of weather conditions including extreme heat and cold, dry and wet. Working conditions may also include working after dark to assist in emergency situations.
Equipment Operator

Minimum Qualifications:

- Experience in the operation of repair and maintenance of heavy motorized equipment.
- Graduation from High School or equivalent.
- A valid Arkansas Drivers License.
- Must be at least 18 years of age.

* The above information is intended to describe the general nature of this position and is not to be considered a complete statement of duties, responsibilities and requirements.
Let’s look at one last job description

Pgs. 7 & 8 job description handout/sample forms tab

- **TITLE:** Animal Control
- **Department:** Law Enforcement
- **Job Summary:** Under the general supervision of the _________________, is responsible for enforcing all ordinances pertaining to Animal Control within the city.
SPECIFIC JOB DUTIES AND RESPONSIBILITIES

- **Patrols** city streets to observe **violation** of the Animal Control ordinances.
- **Picks** up and impounds stray animals.
- **Advises** animal owners of the provisions of the animal control ordinances of the city.
- **Removes** dead animals from city streets and Right of Ways.
- **Humanely** disposes of impounded animals as prescribed by law.
- **Daily** cleans and maintains the city animal shelter in a sanitary manner.
- **Cleans** and washes animal control truck.
- **Receives** fines from owners of stray animals.
- **Cares** for animals within the animal shelter including feeding and watering.
- **Performs** related work as required.
Special Knowledge, Skills, Abilities or Education (Animal Control)

- **Ability** to follow oral and written instructions.
- **Ability** to catch and control dogs in a safe and humane manner.
- **Ability** to lift a 50 lb. dog three feet up into the back of the Animal Control truck.
- **Ability** to communicate courteously and get along with citizens who have lost dogs or who have violated the Animal Control Ordinances.
- **Ability** to write a receipt, make change, and perform light record keeping.
- **Working knowledge** of routine animal care, animal diseases and afflictions.
Animal Control

- **Immediate Supervisor:** _________________________

- **Working conditions:** Working conditions include driving a pickup truck throughout the city. Working around various types of dogs.

- **Minimum Qualifications:**
  - A valid Arkansas Drivers License.
  - Graduation from High School or equivalent.
  - Ability to courteously explain and enforce animal control regulations.
  - Must be at least 18 years of age.

* The above information is intended to describe the general nature of this position and is not to be considered a complete statement of duties, responsibilities and requirements.
Reviewing

- Now that we have gone over some examples of how to create both generic and specific job titles and descriptions let’s look at how you might advertise these positions.
Questions to ask before advertising

- By law do we have to advertise?
- Does our city have a standard form for advertising?
- What are some ways to advertise?
- Finally...does our city have a standard application form for applicants to fill out?

* First let's take a look at a standard form that cities might use in posting employment opportunities.
Job Opportunity Notice

Date to be posted __________

**JOB TITLE:** Equipment Operator  **SALARY LEVEL:** $25,000-$30,000  
(Depends on qualifications)

- **JOB LOCATION and/or CITY DEPT:** Midtown Street Department
- **DESCRIPTION/REQUIREMENTS:** Under general supervision. May operate a variety of heavy equipment in the construction and maintenance of all city streets.
- **APPLICANT MUST MEET THE FOLLOWING MINIMUM REQUIREMENTS:** Experience in operation of heavy equipment, Valid Arkansas Driver’s License, High School Graduate, must be 18 years of age.
- If you wish to apply for Equipment Operator you may pick up an application at City Hall or provide us with a resumé. The City of Midtown is an Equal Opportunity Employer. The City of Midtown does not discriminate on the basis of race, color, religion, sex, national origin, marital or veteran status, political status or other legally protected status.
What are some effective means of advertising?

- Local paper
- Statewide paper
- City’s website
- Arkansas Municipal League (AML) website [www.arml.org](http://www.arml.org)
- City & Town Magazine (AML publication)
- National Publications
- Association newsletters of publications
You have now created:

- An official *Job Title & Description* for each position within your city.
- A *Job Opportunity Notice*
- and…You have published or advertised that notice.

*Does your city have a standard *Application for Employment* for those persons responding to your job posting?*
Before we look at a typical job application that city’s might use

Here are some basics to consider:

- Does our application meet current ADA requirements or guidelines?
- Does our application address specific mental and physical requirements?
- Does our application address drug testing requirements?
- Does the Statement/question section address special skills or experiences that are required of the applicant?
- References: VERY IMPORTANT

Now let’s look at an actual job application.

(See Application for employment pages 10-15 of handout)
Also consider:

- Who to interview and:
- Who will conduct the interview (consider Department heads, City Attorney, City Council, HR, Mayor or other pertinent city employees)
- Pick a quiet uninterrupted spot
- No cell phones
THE INTERVIEW
Ken’s Free Advice

Before the Interview

- Put the candidate at ease. Do your best to help the candidates relax.
- Start with low key questions. (How ‘bout that Bronco defense?)
- First impressions are often lasting but be careful not to judge on first impressions. Try to withhold judgment until you have a chance to thoroughly evaluate the candidate’s total capabilities and potential.
During the Interview

• Tell the candidate about the job. Start with a brief summary of the position, including the main responsibilities and your expectations.

• Listen: If you are doing most of the talking you will have difficulty obtaining enough information to make the right hiring choice.
more of “During the Interview”

- Take notes: Write down important points and the applicant’s response to key questions. Write down information that will help you remember and fairly evaluate each candidate. (An interview guide, prepared in advance will help you in taking important notes)
more of “During the Interview”

- Invite applicants to ask questions during the interview process: This might be the most significant part of the interview.
- Why do they want the job – is it because of the challenge of the job, and advance in their career, or something specific about your city?
- Is the candidate fixated on salary, benefits and time off?
more of “During the Interview”

- Make notes of what the applicant asks and be sure to follow up if you don’t know the answer. If the applicant has no questions this may be a red flag, especially for senior level employees.
Follow legal interviewing guidelines: The easiest way to keep your interviews fully compliant is to ask only questions that relate to the job thus eliminating the potential for bias by not introducing questions that will elicit irrelevant information.
After the Interview

- Let the applicant know when they can expect to hear from you regarding a decision.
- Review your notes and discuss the applicant’s pros and cons. If more than one person participated in the interview, compare notes and try and reach a consensus as to which candidate would be the best fit for your city.
more of “After the Interview”

- Once you have reached a decision notify the candidate that you are making an official job offer contingent on the passing a pre-employment physical. (This may include the candidate passing a drug test if you city has an established drug testing policy)
Suggested questions for interviews

- Tell me about yourself.
- How do you feel about reporting to a younger person?
- What three words would people use in describing you?
- Explain what it means to be a team-player?
- Do you work well under pressure? Can you multi task?
- What motivates you?
- Do you prefer to work individually or in a group?
- How would you handle a co-worker not pulling their own weight?
- What have been some of your most satisfying & most disappointing work related experiences?
- What challenges are you looking for in working for us?
IN INTERVIEWS...

- Narrow questions down.
- Look for overall neatness of appearance.
- Good communication skills (ability to organize thoughts and express those thoughts well).
- Look for a pleasant demeanor and a positive attitude.
Job applications are coming in

- Review all applications
- Eliminate unqualified applicants
- Check references
- Discuss the applicants with the department head/supervisor or other involved city employees
- Make a selection
Concluding the hiring process

- Notify ALL persons you interviewed, whether hired or not
- Notify the person you have hired and inform them of any physicals, drug testing or anything else required of them prior to taking the position (Note: this is why job titles & descriptions are so important)
- Decide a start date
Hiring Policies

• If you don’t have a hiring policy – establish one
• If you have a current hiring policy – review it often making sure it is:
  ◦ Current
  ◦ Legal
  ◦ Non-discriminatory
• One last thought! Now that you have a new employee what guidelines (Policies & Procedures) are there for them?

Answer: Personnel Policy Handbook
Sage Hiring Advice from Ken
Remembering the 3 “C’s”

- Make an effort to hire people on the basis of:
  - Character
  - Chemistry
  - Competence

What does this mean?
- Can you trust the person?
- Will that person get along with others?
- Does the person have the ability to do the essential tasks of the job?
After screening out those who lack the basic skills and competencies and narrowing the field to a manageable number based on competency, begin to apply the three Cs. **Skills are the easiest of the three to change in people** who possess basic technical competency. It is by far, more difficult to change a person’s character or the way a person relates to others.
Personnel Policy Handbooks

Do you know if your city has one?
Do you know how current it is?

What is a personnel handbook and why do I need one? **Answer:** It is your city’s publication detailing specific guidelines for each department and its employees. Maintaining proper policies and procedures will keep you out of hot water and court.

* For a great resource refer to the green AML booklet titled the *Personnel Policy Handbook for Arkansas Cities & Towns.*
JOB DESCRIPTION

TITLE: All city employees should have a job title, even part-time employees

DEPARTMENT: _________________________

JOB SUMMARY: This section should be no more than three or four sentences and be a summary of the duties and responsibilities associated with the job.

SPECIFIC JOB DUTIES AND RESPONSIBILITIES:

This section should only list duties which are critical to the successful performance of the job as it currently exist. As jobs change, job descriptions should be rewritten.

SPECIAL KNOWLEDGE, SKILLS, ABILITIES OR EDUCATION:

This section includes the specifications and qualifications needed to adequately do the job. The level of educational development required for the position should be listed in this section i.e., High School, Technical School, Academy Certification, etc. The skills and the levels stated should be realistic, specific, and justifiable based on the responsibility statement.

IMMEDIATE SUPERVISOR: _________________________

WORKING CONDITIONS:

This section is used to describe the physical environment in which the work is being performed. Especially important are any conditions which are unpleasant or hazardous.

MINIMUM QUALIFICATIONS:

This section is used to describe the education or experience required to obtain this specific job.

DISCLAIMER:

This statement indicates that the job description is not intended to be an exhaustive list of all duties performed of the incumbent.
TITLE: Patrolman

DEPARTMENT: Police Department

JOB SUMMARY: Under the general supervision of the Patrol Sergeant, assists in the prevention of crime and the preservation of order. Patrolmen are primarily responsible for protecting life and property and enforcing laws and regulations throughout the city.

SPECIFIC JOB DUTIES AND RESPONSIBILITIES:

1) **Enforces** the laws and ordinances of the City and State and all other pertinent laws.
2) **Investigates** suspicious conditions and complaints and makes arrests of persons who violate laws and ordinances.
3) **Accompanies** prisoners to headquarters, jail or court and appears in court as the arresting officer.
4) **Directs** traffic and either arrests or issues violation tickets to those who break traffic laws.
5) **Checks** vehicle parking in restricted areas and gives violation tickets when necessary.
6) Attends fires or accidents in assigned area as directed, provides all possible assistance, administers first aid, and prepares necessary reports.
7) **Maintains** order in crowds and may occasionally escort parades, funerals or attend other public gatherings.
8) **Answers** criminal complaints and takes necessary corrective action.
9) **Gives** advice on laws, ordinances and general information to the public.
10) **Operates** radio patrol car as required and performs minor maintenance such as adding gas, oil and checking tires.
11) **Attends** and testifies in court as required.
12) **Performs** related work as required.
SPECIAL KNOWLEDGE, SKILLS, ABILITIES OR EDUCATION:

1) Knowledge of Federal, State and City laws and Ordinances, including laws of search and seizure and rule of evidence.

2) Knowledge of modern police methods.

3) Ability to physically and mentally react in a variety of emergency situations.

4) Good social and general intelligence with the ability to communicate effectively both orally and in writing.

5) The ability to understand and carry out oral and written instructions.

6) The ability to drive an automobile safely and to use good judgment in the operation and use of the automobile.

7) Considerable skill in the use of department approved firearms.

8) The physical ability to react to a variety of emergency law enforcement situations including juvenile crime automobile accident, domestic disturbances and to use the best effort to restore peace and order.

9) Ability to observe situations; to report and record them clearly.

IMMEDIATE SUPERVISOR: Sergeant

WORKING CONDITIONS: Police Officers work in a variety of conditions and situations including patrolling in an automobile, walking on foot patrol, working indoors at a desk, directing auto traffic outdoors in various types of weather, investigating accidents and crimes in various types of weather and working or being on duty at any time during the day or night of an assigned shift.

MINIMUM QUALIFICATIONS:

1) Completion of the Arkansas Police Academy Basic Police Course or equivalent.

2) Completion of all State required certifications for Law Enforcement Officers.

3) Graduation from High School or equivalent.

4) A valid Arkansas Drivers License.

The above information is intended to describe the general nature of this position and is not to be considered a complete statement of duties, responsibilities and requirements.
JOB DESCRIPTION

TITLE: Animal Control Officer

DEPARTMENT: Law Enforcement

JOB SUMMARY: Under the general supervision of the _________________, is responsible for enforcing all ordinances pertaining to Animal Control within the city.

SPECIFIC JOB DUTIES AND RESPONSIBILITIES:

1) Patrols city streets to observe violation of the Animal Control ordinances.
2) Picks up and impounds stray animals.
3) Advises animal owners of the provisions of the animal control ordinances of the city.
4) Removes dead animals from city streets and Right of Ways.
5) Humanely disposes of impounded animals as prescribed by law.
6) Daily cleans and maintains the city animal shelter in a sanitary manner.
7) Cleans and washes animal control truck.
8) Receives fines from owners of stray animals.
9) Cares for animals within the animal shelter including feeding and watering.
10) Performs related work as required.

SPECIAL KNOWLEDGE, SKILLS, ABILITIES OR EDUCATION:

1) Ability to follow oral and written instructions.
2) Ability to catch and control dogs in a safe and humane manner.
3) Ability to lift a 50 lb. dog three feet up into the back of the Animal Control truck.
4) Ability to communicate courteously and get along with citizens who have lost dogs or who have violated the Animal Control Ordinances.
5) Ability to write a receipt, make change, and perform light record keeping.
6) Working knowledge of routine animal care, animal diseases and afflictions.
IMMEDIATE SUPERVISOR: ________________________________

WORKING CONDITIONS: Working conditions include driving a pickup truck throughout the city. Working around various types of dogs, including vicious dogs and dogs that may be diseased.

MINIMUM QUALIFICATIONS:

1) A valid Arkansas Drivers License.
2) Graduation from High School or equivalent.
3) Ability to courteously explain and enforce animal control regulations.
4) Must be at least 18 years of age.

The above information is intended to describe the general nature of this position and is not to be considered a complete statement of duties, responsibilities and requirements.
JOB DESCRIPTION

TITLE: Equipment Operator

DEPARTMENT: Street Department

JOB SUMMARY: Under general supervision, may operate a bulldozer, dump truck, backhoes, road grades and other comparable heavy equipment in the construction and maintenance of all city streets.

SPECIFIC JOB DUTIES AND RESPONSIBILITIES:

1) Operates all street department heavy equipment to assist in the construction, repair and maintenance of all streets.

2) Assists in preparing sub-grade for street patching.

3) Assists in cleaning of city ditches to insure proper drainage and the installation of culverts to insure proper drainage.

4) Responsible for assuring that safe procedures are followed in the operation of all street department equipment.

5) Assists other street department employees in a variety of tasks including construction and maintenance of storm sewers, opening drainage ditches, cleaning right of way and loading trucks.

6) Performs related tasks as assigned.

SPECIAL KNOWLEDGE, SKILLS, ABILITIES OR EDUCATION:

1) Ability to safely and skillfully operate all city street department heavy equipment.

2) Ability to follow oral and written instructions.

3) Awareness of all safety standards when operating heavy equipment vehicles.

4) Ability to perform minor repairs and upkeep on all street department equipment.

5) Knowledge of traffic ordinances governing the use of vehicles and ability to obtain proper licenses.

6) Ability to perform manual physical labor when necessary.
IMMEDIATE SUPERVISOR: Street Superintendent

WORKING CONDITIONS: Working conditions include operating heavy equipment outdoors and in all types of weather conditions including extreme heat and cold, dry and wet. Working conditions may also include working after dark to assist in emergency situations.

MINIMUM QUALIFICATIONS:

1) Experience in the operation of repair and maintenance of heavy motorized equipment.

2) Graduation from High School or equivalent.

3) A valid Arkansas Drivers License.

4) Must be at least 18 years of age.

The above information is intended to describe the general nature of this position and is not to be considered a complete statement of duties, responsibilities and requirements.
DATE POSTED: October 15, 2014

JOB TITLE: Equipment Operator

SALARY LEVEL: $30,000-$35,000 (Depends on qualifications)

JOB LOCATION and/or CITY DEPT: Midtown Street Department

DESCRIPTION/REQUIREMENTS: Under general supervision. May operate a variety of heavy equipment in the construction and maintenance of all city streets.

APPLICANT MUST MEET THE FOLLOWING MINIMUM REQUIREMENTS: Experience in operation of heavy equipment, Valid Arkansas Driver’s License, High School Graduate, must be 18 years of age.

If you wish to apply for Equipment Operator you may pick up an application at City Hall or provide us with a resumé.

The City of Midtown is an Equal Opportunity Employer. The City of Midtown does not discriminate on the basis of race, color, religion, sex, national origin, marital or veteran status, political status or other legally protected status.
Interview Questions You Might Consider Asking

The interview is an opportunity for you the employer to acquaint yourself with the perspective employee and to determine if the perspective employee will be the right fit for the position that you are trying to fill. It is very important that you decide in advance what you hope to accomplish in the interview then structure the interview in advance to achieve these goals. A written list of questions to be asked of each perspective employee should be prepared in advance so important items will not be forgotten.

Possible Interview Questions

- Tell me about yourself. What do you consider to be your greatest strengths and weakness?
- How do you feel about reporting to a younger person?
- If I asked people who know you to describe you, what three words would they use?
- What are your team-player qualities? Give examples
- In your opinion do you work well under pressure?
- What motivates you?
- Do you prefer to work as an individual or in a group?
- What would you do if a co-worker wasn’t pulling his/her own weight and was hurting your department?
- What have been your most satisfying and most disappointing work related experiences?
- What challenges are you looking for in working for us?
SAMPLE
APPLICATION FOR EMPLOYMENT

Our policy is to comply with all applicable state and federal laws prohibiting discrimination in employment based on race, age, religion, national origin, disability status, or other legally protected status.

Name ___________________________________________ Date __________________

Address ___________________________________________

Telephone number where you can be reached or a message left for you __________________________

Are you 18 years old or older? ___Yes ___No

Have you ever been convicted of a felony? ___Yes ___No (Conviction will not necessarily disqualify an applicant for employment.) If yes, describe conditions:

________________________________________________________________________

________________________________________________________________________

Do you have the legal right to work and remain in the United States? ___Yes ___No

Can you perform the duties of the job which you are applying with or without reasonable accommoda-
tions? ___Yes ___No

If Yes, can you produce evidence of U.S. citizenship or legal work status within three (3) days?

___Yes ___No

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<tr>
<th>Education</th>
<th>Name &amp; Location of School</th>
<th>Year Graduated</th>
<th>Major</th>
<th>Diploma/Degree</th>
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<td>High School</td>
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<tr>
<td>Other Training</td>
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</table>
Position applied for:
1. ___________________  2. ___________________

Wage or salary desired? $ _________  When can you start? _________

### Work History

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<tr>
<th>Most recent employer</th>
<th>Address</th>
<th>Telephone</th>
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<tr>
<td><strong>Date started</strong></td>
<td><strong>Starting Salary: $</strong></td>
<td><strong>Starting Position</strong></td>
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<tr>
<td><strong>Name of Supervisor</strong></td>
<td><strong>Title of Supervisor</strong></td>
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<td><strong>Description of Duties</strong></td>
<td><strong>Reason for Leaving</strong></td>
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<td><strong>Reason for Leaving</strong></td>
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</table>
In addition to your work history, what other experiences, skills or qualifications would especially qualify you for work with the City of ____________________? Specify office equipment, machines, computers you can operate:

__________________________________________________________________________

Give the names and addresses of three (3) persons, other than relatives, who have knowledge of your character, experience or ability:

<table>
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<tr>
<th>NAME</th>
<th>ADDRESS/PHONE NO.</th>
<th>OCCUPATION</th>
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APPLICANT INFORMATION FOR RECORD KEEPING REQUIREMENTS

(Answer All Questions and Please Print)

The City of ____________________ is an Equal Opportunity Employer. We request that you voluntarily provide the following information which will be used to study recruitment and employment patterns and to provide, as requested, statistical data to certain federal compliance agencies. This information WILL NOT be used in the employment process; and failure to provide the information WILL NOT jeopardize your opportunity for employment with the City of ____________________.

NAME _______________________________ TODAY’S DATE ________________

SEX AND RACE/ETHNIC IDENTIFICATION

SEX:  Male [ ]  Female [ ]  (Check One)

RACE/ETHNIC: For the purpose of Equal Opportunity, race/ethnic categories are identified as follows: Please check the category which identifies your race/ethnic background.

[ ] WHITE: (Not of Hispanic origin) All persons having origin in any of the original peoples of Europe, North America or the Middle East.

[ ] BLACK: (Not of Hispanic origin) All persons having origin in any of the black racial groups of Africa.

[ ] HISPANIC: All persons of Mexican, Puerto Rican, Cuban, Central or South America or other Spanish culture or origin, regardless of race.

[ ] ASIAN OR PACIFIC ISLANDERS: All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Subcontinent or the Pacific Islands (Ex: China, Japan, Korea, the Philippine Islands and Samoa).

[ ] OTHER:

I understand that I am protected by various laws prohibiting discrimination on the basis of race, color, national origin, sex, religion, age and, in some circumstances, disability or veteran status. I further understand that the information contained in this form is to be used solely in equal employment record keeping, reporting and other legal requirements. I also understand that this information will be kept in the strictest of confidence and will not be disclosed to others except for the above stated purpose and then only if necessary.

Signed: _______________________________  Date: ____________________

NOTE: THE information provided on this form will be kept separate from the employment application form such as in Section III of this file.
Employee Statement

I understand that this application is not intended to create any contractual or other legal rights. It does not alter the at-will employment status nor does it create an employment contract.

I certify that I have made no willful misrepresentations in this application nor have I withheld information in my statements and answers to questions. I am aware that the information given by me in my application will be investigated, with my full permission, and that any misrepresentations may cause my application to be rejected or my employment to be terminated.

I authorize former employers to release to the City of _________________ or its authorized representative any and all employment records and other information it may have about my employment. I understand that the information will be used for the purpose of evaluating my application for employment with the city. A photocopy of this authorization shall be as valid as the original.

I understand that my appointment will be at the discretion of the department head, subject, to the approval of the (chief administrative officer) and that this application is the property of the city and will become a part of my file if I am accepted for employment.

Signature of Applicant: ___________________________________________

Date of Signature: _______________________________________________
Personnel Records & FOIA in Arkansas
October 2014

David Schoen, Legal Counsel
Arkansas Municipal League
Tel: 501-978-6114
Fax: 501-537-7251
dschoen@arml.org
www.arml.org
General Rule:

- Employment Records are FOI ‘able
- Examples of information you must release upon request:
  - Salary and compensation
  - Dates of hire
  - Job applications and resumes
  - Work history
  - Work e-mail address

Ark. FOI Handbook p. 31
Exempt from FOIA disclosure

• Note: “exempt” does NOT mean you need not release the document, just that you must redact the exempt info from an otherwise releasable document.

  – Personal privacy
  – Job evaluation records (with exceptions)
**Personal privacy exemption**

FOIA Handbook p. 31

- **Examples**
  - Non-elected employee’s addresses (must verify city or county)
  - Unlisted phone numbers
  - Religious affiliation
  - Welfare payments
  - Payroll deductions
  - Social security numbers
  - Marital status
  - Details about family life

Job Evaluation Records

• Generally exempt
  – Includes “disciplinary” records

Suspension/Termination Exception:
  1. S/T must be final (all appeals exhausted or waived)
  2. Records formed a basis for the S/T
  3. A “compelling public interest” in disclosure exists

Employee may see his or her own records

Ark. Code Ann. 25-19-105(c)
What’s “compelling?”

- Factors:
- (1) nature of the infraction that led to suspension or termination, with particular concern as to whether violations of the public trust or gross incompetence are involved;

- (2) the existence of a public controversy related to the agency and its employees; and

- (3) the employee's position within the agency. In short, a general interest in the performance of public employees should not be considered compelling, for that concern is, at least theoretically, always present.

• AG’s police officer rule: public interest in police officer misconduct is almost always compelling.

• Professors Watkins and Peltz note that “[i]n some cases, ... rank is unrelated to importance” - a proposition they illustrate by noting that “[t]he public has a great interest in the performance of police officers and other law enforcement officials, and in this case the ‘cop on the beat’ is just as important as the chief of police.”

Procedure for personnel or job evaluation record requests

• Determine whether records are releasable within 24 hours
• Notify person making request and employee of decision
• If contact fails, send written notice via overnight mail to last known address
• Custodian, requester or subject may seek an AG opinion, to be issued within 3 working days
• No disclosure until AG opinion is issued.

Personnel

Document Retention Guidelines

David Schoen
Legal Council
Arkansas Municipal League
October 2014
General Rule In Arkansas

- Cities and towns may determine their own retention schedule for records not covered by another law. Ark. Code Ann. 14-2-203(b).

- However, as we will see, in the employment field there are many laws setting forth retention periods.
Statute of Limitations Issues

- While specific retention periods have been provided, state statute of limitations are important considerations when considering records maintenance
  - While the statute of limitations for employment discrimination is 1 year under the Arkansas Civil Rights Act, federal courts have held that employment discrimination may be a constitutional violation, which could be brought as a § 1983 claim with a limitation period of 3 years
  - Suits based on contract have a 5 year statute of limitations

Altered Title VII, the ADA, and the ADEA by renewing the statute of limitations after each new paycheck is issued rather than limiting it to 180 days after the decision to discriminate on the basis of pay was made. The rule also applies when “an individual is affected by application of a discriminatory compensation.”
It is not yet clear what effect this has on record retention requirements, but at a minimum it would be advisable to keep personnel records for as long as an *employee* works for you, plus five years for breach of contract claims.

Some commentators have suggested you should extend this period for pensioners, since each pension payment might also trigger a new filing period.

*Why? – Because the Act applies when an “individual” – note it doesn’t say “employee” – is “affected.”*
Payroll/Personnel Records

- Title VII
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Equal Pay Act/Fair Labor Standards Act
- Family and Medical Leave Act
- Other federal regulations
- Arkansas statutory law
- Department of Homeland Security
- Unemployment
- Tax Documentation
- Workers’ Compensation
Title VII & Americans with Disabilities Act

- **Title VII of the Civil Rights Act of 1964**
  - Prohibits employment discrimination based on race, color, religion, sex, or national origin

- **Americans with Disabilities Act of 1990 (ADA)**
  - Prohibits employment discrimination against qualified individuals with disabilities

- Both apply to local governments with 15 or more employees

- The Equal Employment Opportunity Commission (EEOC) enforces compliance with these acts
Title VII/ADA Requirements

• **2 years** from the date of making the records or the personnel action involved, whichever occurs later

• For records regarding a person that has been involuntarily terminated, **2 years** from date of termination

• If charge is filed or action is brought, relevant records must be kept until final disposition
  – Final disposition – either expiration of statute of limitations or date on which litigation is terminated
  – Relevant records can include not only records pertaining to individual filing claim, but also records of employees in similar positions

29 C.F.R. § 1602.31 (2012).
CFR?

- Code of Federal Regulations
- [http://tinyurl.com/32xyecv](http://tinyurl.com/32xyecv) or web search.

- *Not* in the AML Handbook!

- Read the regs: this presentation contains only *short summaries*. 
**EEO-4**

- An EEO-4 is a state and local government information report
- It must be filed and maintained for **3 years** by:
  - Any political jurisdiction having 100 or more employees, and
  - Any political jurisdiction having 15 or more employees from whom the EEOC requests a filing of a report

Age Discrimination in Employment Act

- The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination based on age of employees age 40 or older
- Applies to local governments with 20 or more employees
- The EEOC enforces compliance with the act
ADEA – In General

- Payroll or other records containing name, address, date of birth, occupation, rate of pay, and compensation earned each week retained for 3 years.
- If an action or charge is brought, the relevant records must be kept until final disposition.
- Personnel or employment records made, obtained, or used in the regular course of business kept for 1 year from the date of the personnel action to which the records relate
  - Can include job applications, advertisements to public regarding job openings, records pertaining to hiring, firing, promotions, etc.

29 C.F.R. § 1627.3
ADEA: employee benefit plans

- Employee benefit plans (such as pension, insurance) and copies of any seniority systems and merit systems in writing must be kept for the full period the plan is in effect and for at least 1 year after its termination or final disposition of enforcement action.

  - If the plan is not in writing, a memorandum fully outlining the plan’s terms and the manner in which it has been communicated to employees must be kept for the same time period as if it were in writing.

29 C.F.R. § 1627.3
Equal Pay Act/Fair Labor Standards Act

- The Equal Pay Act of 1963 (EPA) prohibits against sex-based wage discrimination.

- The Fair Labor Standards Act (FLSA) establishes standards regarding overtime pay and minimum wage.

- The recordkeeping requirements of the FLSA are the same as those for the EPA.
EPA/FLSA – In general

• Records made in the regular course of business pertaining to matters which describe or explain any wage differential paid to employees of the opposite sex and which may be relevant to a determination of whether the differential is based on a factor other than sex must be kept for at least 2 years
  – These include records relating to payment of wages, job evaluations, seniority systems, etc.
  – *Note that some government employees are excluded under 29 U.S.C. § 203(e)(2)(C), such as elective officers and personal staff.

• Some specific records must be maintained for 2 years, while others have a retention period of 3 years. – 29 C.F.R. §§ 516.5, 516.6.
EPA/FLSA – Additional Requirements

Regarding employees subject to minimum and maximum hours standards, specific records must be kept regarding personnel and payroll information:

- These include name, home address, time and day of week on which workweek begins, total premium pay for overtime hours, total additions to or deductions from wages paid each period, etc.

29 C.F.R. § 516.2 (2011)

In addition, certain records must be kept in regard to compensatory time:

- Including number of hours compensated in cash, collective bargaining agreements, etc.
• For employees engaged in fire protection or law enforcement activities, a notation must be made on payroll records showing the work period for each employee and indicating the length and starting time of the period.

29 C.F.R. § 553.51 (2011).
Arkansas Statutory Law

In addition to the EPA/FLSA regulations, Arkansas law stipulates that the certain information must be kept for a minimum of 3 years: name, address, and occupation of each of the employees, the rate of pay and amount paid each pay period to each employee, job classifications, etc.

• Ark. Code Ann. 14-2-204 requires that employment records for police departments must be kept for **three years**.
Department of Homeland Security – I-9 Form

- I-9 Forms must be retained by an employer for 3 years after the date of hire or 1 year after the date the individual’s employment is terminated, whichever is later.

8 C.F.R. § 274a.2 (2013)
Family and Medical Leave Act

- Employers must keep certain information for at least 3 years, including basic payroll and identifying employee data, additions to or deductions from wages, dates FMLA leave is taken, etc.

- Any records relating to certificates, recertifications, or medical histories of employees or employees’ family members must be kept as confidential medical records separate from personnel records.

- 29 C.F.R. § 825.500
Unemployment

- Under Arkansas law, an employer must retain records for a period of 5 years from the end of the month next following the end of the calendar quarter to which the records pertain.

- Records include pay period covered by any payroll, social security number of each worker, date each worker was hired, rehired, or returned to work after temporary lay-off, number of hours spent in employment and/or the hours spent in non-subject work, etc.

Tax Documentation – 941s & other records

- Tax records must be kept for at least 4 years from tax due or date paid, whichever is later
  - Includes employer ID number, amounts and dates of all wage, annuity, and pension payments, amounts of tips reported, reports of allocated tips, fair market value of in-kind wages paid, etc.
FUTA

- Under the Federal Unemployment Tax Act, certain records must be kept, including, total remuneration paid during the calendar year, amount of remuneration constituting wage subject to tax, etc.

26 C.F.R. § 31.6001–4
FICA

- Under the Federal Insurance Contribution Act (FICA), other records must be maintained
  - Includes amount of employee tax collected with respect to such payment and date collected if collected at a time other than when such payment was made, reason for any inequality between total remuneration payment and the amount of taxes, etc.

26 C.F.R. § 31.6001-2
Workers’ Compensation
 These records are governed by the more general procedures affecting personnel matters

 Arkansas statutory law requires keeping records as the Workers’ Compensation Commission may require. Ark. Code Ann. § 11-9-528.

 Within 10 days of receiving notice of an injury, an employer must submit information to the Commission, including name, address and business of employer and employee, cause and nature of injury or death, time and location where injury or death occurred, etc.

  • The Commission may also ask for additional reports regarding the injury and condition of employee

 The statute of limitations varies depending upon the type of injury incurred
Lawsuit Records

- The Municipal League recommends keeping lawsuit records forever in electronic capacity and disposes of paper records after 7 years
This File, Your City Attorney
and
What Works for You

All cities should have a file where important personnel information about each employee is kept. Individual employee personnel files can assist cities in organizing and storing proper personnel information. However, your personnel file should never be considered a substitute for the advice of your city attorney. The *Model Personnel File* is for guidance and reference only. Simply copying the contents of this *Model Personnel File* without determining the specific applicability to your city could pose legal problems. Remember, the *Model Personnel File* is for information and education. Each city is encouraged to adopt it to its own individual needs.

Cities making significant decisions concerning legal issues and questions in employment, labor or personnel law should consult their city attorney.

---

Employers should be aware that the American’s With Disabilities Act (ADA) requires that all information obtained concerning the medical condition of an employee must be collected and maintained on separate forms. Access to the information is permitted only: (See attached form, Employee or Applicant Confirmation of Request for Reasonable Accommodation)

- To supervisors who need to know about necessary restrictions on the employee or duties of an employee and any necessary accommodations;

- To designated safety personnel, if the employee has a disability that might require emergency treatment or if any specific procedures are needed in case of fire or an evacuation;

- To government officials investigating compliance with the ADA, or

- To comply with state workers’ compensation laws

Following is a Department of Labor’s Appendix A or Reasonable Accommodation Request Form.
Appendix A
Employee or Applicant
Confirmation of request for
REASONABLE ACCOMMODATION

Executive Order 13164 dated July 26, 2000, requires that agencies track the processing of requests for reasonable accommodation and maintain the confidentiality of medical information in accordance with applicable law and regulations.

SECTION I.

1. Name: ____________________________
   (Employee/Applicant (circle one))

2. Home Address: ____________________________


5. Agency and Agency component: ____________________________

6. The title, occupational series and grade of the position for which reasonable accommodation is requested (vacancy number for applicant only):

    ____________________________

7. Date of the request for reasonable accommodation: ____________________________

SECTION II.

ACCOMMODATION REQUESTED
(Be as specific as possible, e.g.; adaptive equipment, reader, interpreter, etc., or attach a description.)

SECTION III.

REASON FOR REQUEST

SECTION IV.

Signature ____________________________ Date ____________________________
SECTION I

This section documents the city’s selection process and important separation records when that event occurs. Documents you should place in this file include, but are not limited to:

- The Job Announcement Notice with Proof of Publication
- The Job Description
- Letters of Reference (if available)
- Application for Employment
- Offer of Employment and Acceptance Letter(s)
- Employee Statement
- Acknowledgment of Receipt of Handbook
- Employee Separation Clearance Checklist
- Voluntary Resignation Letter
- Inventory of City Property

Federal law requires that certain payroll and personnel records be kept for three (3) years following the last date of entry. A reasonable file retention practice for the personnel file of separated employees is four (4) years. However, it is also a good practice to retain basic employee data such as I.E.O. and key employee data on a permanent basis.

Cities would be wise to consult with their city attorney and also review state statutes when questions concerning file retention arise.
SAMPLE

Job Opportunity Notice
(This form may be used to advertise vacancies.)

DATE POSTED: 

JOB TITLE: ___________________________ SALARY LEVEL: ___________________________

JOB LOCATION and/or CITY DEPT.: __________________________________________________

DESCRIPTION / REQUIREMENTS: ____________________________________________________

______________________________________________________________________________

______________________________________________________________________________

______________________________________________________________________________

______________________________________________________________________________

APPLICANT MUST MEET THE FOLLOWING MINIMUM REQUIREMENTS:

______________________________________________________________________________

______________________________________________________________________________

______________________________________________________________________________

If you wish to apply for ___________________________ you may pick up an application at

(job description)

______________________________________________________________________________
or provide us with a resumé.

The City of ___________________________ is an Equal Opportunity Employer. The City of

______________________________ does not discriminate on the basis of race, color, religion, sex,
national origin, marital or veteran status, political status, disability status or other legally
protected status.
SAMPLE

Application for Employment

Our policy is to comply with all applicable state and federal laws prohibiting discrimination in employment based on race, age, religion, national origin, disability status, or other legally protected status.

Name: ____________________________ Date: __________________

Address: ____________________________

City: ____________________________ State: _____ Zip: _________

Telephone: ____________________________ Cell: __________________

Are you 18 years old or older? _____ Yes _____ No

Have you ever been convicted of a felony? _____ Yes _____ No
(Conviction will not necessarily disqualify an applicant for employment.) If yes, describe conditions: ____________________________

Do you have the legal right to work and remain in the United States? _____ Yes _____ No
If Yes, can you produce evidence of U.S. Citizenship or legal work status within three (3) days? _____ Yes _____ No

Can you perform the duties of the job for which you are applying? _____ Yes _____ No
If No, will you need any accommodations? Explain: ____________________________

** If additional space is needed please attach additional pages.

<table>
<thead>
<tr>
<th>Education</th>
<th>Name and Location of School</th>
<th>Year Graduated</th>
<th>Major</th>
<th>Diploma/Degree</th>
</tr>
</thead>
<tbody>
<tr>
<td>High School</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>College/Univ.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>College/Univ.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Training Education, Including Police/Fire Academy</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
**POSITIONS APPLIED FOR:**

1) ____________

2) ____________

**WORK HISTORY**

<table>
<thead>
<tr>
<th>Most Recent Employer:</th>
<th>Address:</th>
<th>Telephone:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Date Started:</strong></td>
<td>Starting Salary: $ Per:</td>
<td>Starting Position:</td>
</tr>
<tr>
<td><strong>Date Left:</strong></td>
<td>Salary on Leaving: $ Per:</td>
<td>Position on Leaving:</td>
</tr>
<tr>
<td><strong>Name of Supervisor:</strong></td>
<td>Title of Supervisor:</td>
<td></td>
</tr>
<tr>
<td><strong>Description of Duties:</strong></td>
<td>Reason for Leaving:</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Most Recent Employer:</th>
<th>Address:</th>
<th>Telephone:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Date Started:</strong></td>
<td>Starting Salary: $ Per:</td>
<td>Starting Position:</td>
</tr>
<tr>
<td><strong>Date Left:</strong></td>
<td>Salary on Leaving: $ Per:</td>
<td>Position on Leaving:</td>
</tr>
<tr>
<td><strong>Name of Supervisor:</strong></td>
<td>Title of Supervisor:</td>
<td></td>
</tr>
<tr>
<td><strong>Description of Duties:</strong></td>
<td>Reason for Leaving:</td>
<td></td>
</tr>
<tr>
<td>Most Recent Employer:</td>
<td>Address:</td>
<td>Telephone:</td>
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</tr>
<tr>
<td>Date Started:</td>
<td>Starting Salary: $ Per:</td>
<td>Starting Position:</td>
</tr>
<tr>
<td>Date Left:</td>
<td>Salary on Leaving: $ Per:</td>
<td>Position on Leaving:</td>
</tr>
<tr>
<td>Name of Supervisor:</td>
<td>Title of Supervisor:</td>
<td></td>
</tr>
<tr>
<td>Description of Duties:</td>
<td>Reason for Leaving:</td>
<td></td>
</tr>
</tbody>
</table>

Do you have a current commercial driver’s license? __________

In addition to your work history, what other experiences, skills or qualifications would especially qualify you for work with the City of _______________? Specify office equipment, machines, computers you can operate:

________________________________________

________________________________________

________________________________________
Give the names and addresses of three (3) persons, other than relatives, who have knowledge of your character, experience or ability:

<table>
<thead>
<tr>
<th>NAME</th>
<th>ADDRESS/PHONE NO.</th>
<th>OCCUPATION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td></td>
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<td></td>
</tr>
</tbody>
</table>
SAMPLE
OFFER/ACCEPTANCE LETTER

Dear ___________________________ Date: ___________________________
(employee name) (month/day/year)

This will confirm our oral conversation regarding an offer of employment. We are very pleased
that you have decided to join our city in the position of ___________________________ (job
title), starting ___________________________ (month/day/year).

The position is located in ___________________________ (department and city
name) and will pay $ ______________ per ___ Month ___ Week ___ Hour (check one). You
will report to ___________________________.*

All of us here at the City of ___________________________ expect a smooth transition and look forward to
the contribution which you can make to our mutual success. Since there can be no guarantees
however, it is understood that your employment is at-will. That is, the City of
_________________________ may terminate your employment at any time with or without cause, and
you may do the same.

I look forward to seeing you in my office at ___ a.m./p.m. on your first day to complete the
necessary payroll procedures and personnel forms. We will be pleased to describe in detail our
benefits to you and answer any other questions you may have.

Again, we are happy that you will be joining us. It will be a pleasure having you on the team.

Sincerely yours,

_________________________
Mayor, H.R. Manager or City Manager

Please acknowledge below your acceptance of this offer and return a copy to me for our records.
The other copy may be retained for your files.

Accepted: ___________________________ Date: ___________________________
(new employee’s signature) (month/day/year)

NOTE: Avoid quoting salaries in annual amounts, such figures have been
cited as an implied contract for a full year’s employment.

* If you intend to require a pre-employment physical examination, please
see and discuss 42 U.S.C. § 12116(d) with your city attorney
EMPLOYEE STATEMENT

I understand that this application is not intended to create any contractual or other legal rights. It does not alter the at-will employment status nor does it create an employment contract.

I certify that I have made no willful misrepresentations in this application, nor have I withheld information in my statements and answers to questions. I am aware that the information given by me in my application will be investigated, with my full permission, and that any misrepresentations may cause my application to be rejected or my employment to be terminated.

I authorize former employers to release to the City of __________________ or its authorized representative any and all employment records and other information it may have about my employment. I understand that the information will be used for the purpose of evaluating my application for employment with the city. A photocopy of this authorization shall be valid as the original.

I understand that my appointment will be at the discretion of the department head, subject to the approval of the (chief administrative officer) and that this application is the property of the City and will become a part of my file if I am accepted for employment.

Signature of Applicant: ________________________________

Date of Signature: ________________________________
SAMPLE
RECEIPT FOR EMPLOYEE HANDBOOK

I have received a copy of the City of ______________________ employee handbook dated ______________________ (month/year).

The handbook contains policies, practices and regulations which I have read, understand and agree to comply with during my employment with the City of ______________________. After reading the polices, practices and regulations, I understand that I am an at-will employee, and nothing in the handbook alters that status.

I further understand that I will be responsible for complying with future changes in such policies, practices and regulations communicated to employees from time to time, whether or not I have signed an acknowledgement of such changes.

_________________________________________  __________________________________
Employee Signature  Date

_________________________________________  __________________________________
City Representative  Date

Please keep a copy of the Receipt for Employee Handbook for your records.
SAMPLE
EMPLOYEE SEPARATION
CLEARANCE CHECKLIST

Employee ____________________________ Last Day Worked _______

Department __________________________ Social Security # ______ - ______

☐ Expense Account
☐ Advance Loans
☐ Continuation of Insurance
☐ Final Change of Status Notice
☐ Insurance Conversion Privilege
☐ Accrued Vacation Pay
☐ Retirement Benefits
☐ Final Paycheck
☐ Address Verification
☐ Letter of Resignation
☐ Notice of Termination**
☐ Other (specify) __________________________

Personnel Department Clearance: ______________________________________

Personnel Manager _______________________ Date ____________

Supervisor Department Clearance: ______________________________________

Supervisor _________________________ Date ____________

** Contact your city attorney or legal counsel prior to drafting any Notice of Termination.
SAMPLE
VOLUNTARY RESIGNATION

Employee Name ___________________________ Department ___________________________

I voluntarily resign my employment with the City of ___________________________

Effective: ___________________________
(month/day/year)

My reasons for leaving are:

___________________________________________
___________________________________________
___________________________________________
___________________________________________
___________________________________________

Forwarding Address:

___________________________________________
___________________________________________

___________________________________________

Employee Signature ___________________________ Date ___________________________
Supervisor Signature ___________________________ Date ___________________________
Management Signature ___________________________ Date ___________________________
# SAMPLE
## INVENTORY OF CITY PROPERTY

<table>
<thead>
<tr>
<th>Property</th>
<th>Date Received</th>
<th>Initials</th>
<th>Date Returned</th>
<th>Initials</th>
</tr>
</thead>
<tbody>
<tr>
<td>Keys</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Manual</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Credit Cards</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tools</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Safety Equipment</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Library Material</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Computer Equipment</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>City Vehicle</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employee Identification</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Return of Checklist Completed</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other:</td>
<td></td>
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<td>Other:</td>
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<td>Other:</td>
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</tr>
<tr>
<td>Other:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(Employee Name) has turned in all city property assigned to him/her and has received his/her final paycheck.

Employee Signature

Date

 Supervisor Signature

Date
SECTION II

This section should include documents related to employee development such as job performance, attendance records and correspondence. Documents you should place in this file should include:

- Employee Performance Review
- Disciplinary / Employment Action Notice
- Promotion Documents
- Records of Training Courses Completed
- Attendance Records
- Leave Request Forms
- Correspondence
- Disciplinary Actions and Commendations
- Significant Achievements

Records and notes pertaining to disciplinary or legal investigations that are in progress should NOT be kept in this file. It is important to review this section regularly and to discard materials that are no longer relevant. Each of these documents should be copied to the employee.

*** Allowing supervisor access to employee information that is not directly job-related can potentially expose the city to complaints of discrimination.

*** Any documents containing medical information, such as sick leave forms, and requests for accommodations should be kept in a separate medical folder.
Following is a sample *Employee Performance Review* and sample *Disciplinary Notice* form. The AML offers this as an example, not an endorsement.

** Please note that Employee Performance Reviews are not required by law. Should you adopt an evaluation policy then it should be administered and applied honestly and objectively.

** Should your city decide to adopt these forms, the need for accurate and meaningful critiques cannot be stressed enough.
SAMPLE
EMPLOYEE PERFORMANCE REVIEW
(Example of Goal-Oriented Approach)

Employee ___________________________ Department ___________________________

Title ___________________________ Date Began this Position ___________________________

Hire Date ___________________________ Appraisal Period from _________ to _________

Appraising Supervisor ___________________________ Date ___________________________

Reason for Appraisal  □ Regular  □ Special ___________________________
(transfer, promotion, etc)

1) Job Description: Attach Job Description and note recommended modifications, if any.

2) Results Achieved (Refer to goals and objectives established at last performance review):
To what extent are goals and objectives being met? Discuss individually. Add attachment if necessary.

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

3) Summary of Performance Rating: Supervisor—Check sentence that summarizes review.
   □ Results achieved were excellent and continually exceeded overall requirements in all major areas.
   □ Results achieved at times exceeded overall requirements in most major areas.
   □ Results achieved met overall requirements.
   □ Results achieved met most requirements but will need to improve in some areas.
   □ Results achieved failed to meet requirements in one or more major areas.

Comments: ______________________________________________________________
________________________________________________________________________
________________________________________________________________________
EMPLOYEE PERFORMANCE REVIEW (continued)

4) Goals and Objectives Planned for Next Review Period, Ending ____________________:
List key job performance goals and objectives, with work plan and completion dates as appropriate. If more space is needed, attach additional sheet(s).

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

5) Employee Comments: Each individual evaluated is encouraged to add comments to this review. If more space is needed, attach additional sheet(s).

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Employee Signature ___________________________ Date __________

Supervisor Signature ___________________________ Date __________

Employee signature merely indicates receipt of appraisal and not necessarily agreement.

Management Signature ___________________________ Date __________

** Distribution: One copy to the employee and supervisor; the original remains in the personnel file.
SAMPLE
DISCIPLINARY/EMPLOYMENT
ACTION NOTICE

Employee ___________________________ Date __________

Department __________________________ Supervisor __________________________

Type of Action: □ Training Meeting
□ Verbal Reprimand
□ Written Reprimand
□ Suspension
□ Other (explanation required)

1) Statement of the Problem / Reason for Action (brief description including violation of rules, policies, standards, practices, need for training or unsatisfactory performance):

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

2) Summary of Corrective Action to be Taken (include dates and/or employee goals):

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

3) Employee comments (continue on reverse side if necessary):

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Employee Signature __________________________ Date __________

Supervisor Signature __________________________ Date __________

Management Approval (if necessary) __________________________ Date __________
SECTION III

This section should contain selected employee data, including emergency information and information necessary for enrollment. Information such as:

- Health Insurance Information
- Employee Pay Status Records
- Insurance Beneficiary Information
- Benefit Plan Enrollment

Family Medical Leave Act (if applicable)

1) Notice of Eligibility and Rights and Responsibilities

2) Certification of Health Care Provider for Employee’s Serious Health Condition

3) Certification of Health Care Provider for Family Member’s Serious Health Condition

4) Requests for Reasonable Accommodation

5) Insurance Premium Recovery Form

REMEMBER: Any documents containing medical information should be kept in a separate medical file.
ARKANSAS MUNICIPAL LEAGUE
(SAMPLE)
INSURANCE PREMIUM RECOVERY AUTHORIZATION FORM

To: ____________________________ (City Clerk or City Officer)

I certify by my signature that I have read and understand the following policy:

I acknowledge the city's legal right to recover the cost of any premium paid by it to maintain my coverage in group health benefits during any period of unpaid leave under the following conditions:

1) I fail to return from leave at the expiration of the leave to which I am entitled; and

2) The reason I fail to return to work is not one of the following:

   a) The continuation, recurrence, or onset of a serious health condition that entitles me to leave to care for a child, parent or spouse with a serious health condition, or if I am unable to perform the functions of my position due to my own serious health condition; or;

   b) Other conditions beyond my control prevent me from returning.

Date: _______________ Name (Print): ____________________________

Employee Number: _______________ Name (Sign): ____________________________

INSURANCE PREMIUM REIMBURSEMENT AGREEMENT

I certify by my signature that I have read and agree to do the following:

IF I fail to return from leave, for any reason other than 2(a) or 2(b) above, I agree to coordinate with the City to develop a mutually acceptable schedule to reimburse the City for the cost of any premium paid by it to maintain my coverage in group health benefits during any period of unpaid leave taken by me.

Date: _______________ Name (Print): ____________________________

Employee Number: _______________ Name (Sign): ____________________________

1 copy to employee; original in personnel file
## Sample Important Data Reference

### Employee Data

<table>
<thead>
<tr>
<th>Employee Name</th>
<th>Social Security #</th>
<th>Hire Date</th>
<th>F/T □</th>
<th>P/T □</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Regular □</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Temp □</td>
</tr>
<tr>
<td>FLSA Status</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Exempt □</td>
<td>Department</td>
<td>Extension #</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-Exempt □</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Birthdate</td>
<td>Sex</td>
<td>Payroll #</td>
<td>Marital Status</td>
<td>Spouse Name</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Address:</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>City</td>
<td></td>
<td>State</td>
<td>Zip</td>
<td>Phone</td>
</tr>
<tr>
<td>In Emergency,</td>
<td></td>
<td>Relationship</td>
<td>Address</td>
<td>Phone</td>
</tr>
<tr>
<td>Notify:</td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

### Insurance Coverage Record

<table>
<thead>
<tr>
<th>Plan</th>
<th>Date Eligible</th>
<th>Elected Coverage Y/N</th>
<th>Dependant Coverage Y/N</th>
<th>Carrier</th>
</tr>
</thead>
<tbody>
<tr>
<td>Health</td>
<td></td>
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<td></td>
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</tr>
<tr>
<td>Dental</td>
<td></td>
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</tr>
<tr>
<td>Life</td>
<td></td>
<td></td>
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Employee Separation Date:

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22
## SAMPLE

**EMPLOYEE PAY STATUS RECORD**

<table>
<thead>
<tr>
<th>Date</th>
<th>Position</th>
<th>Dept. Location</th>
<th>Pay Guide</th>
<th>Rate of Pay Amt./Per</th>
<th>Reason for Change</th>
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* Exempt or Non-Exempt. To determine the status use the Department of Labor Tests as provided on the following pages.
Following is a Notice of Eligibility and Rights and Responsibilities (Family and Medical Leave Act)

** This form should be completed by the employer and delivered to the employee to notify him/her that he/she has or has not met the eligibility requirements for taking FMLA leave.
Notice of Eligibility and Rights & Responsibilities
(Family and Medical Leave Act)

In general, to be eligible an employee must have worked for an employer for at least 12 months, meet the hours of service requirement in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employers with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

[Part A – NOTICE OF ELIGIBILITY]

TO: ____________________________________________

Employee

FROM: ____________________________________________

Employer Representative

DATE: ____________________________________________

On ______________________________________, you informed us that you needed leave beginning on _________________________ for:

____ The birth of a child, or placement of a child with you for adoption or foster care;

____ Your own serious health condition;

____ Because you are needed to care for your _____ spouse; _____ child; _____ parent due to his/her serious health condition.

____ Because of a qualifying exigency arising out of the fact that your _____ spouse; _____ son or daughter; _____ parent is on covered active duty or call to covered active duty status with the Armed Forces.

____ Because you are the _____ spouse; _____ son or daughter; _____ parent; _____ next of kin of a covered service member with a serious injury or illness.

This Notice is to inform you that you:

____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)

____ Are not eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):

_____ You have not met the FMLA’s 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately _____ months towards this requirement.

_____ You have not met the FMLA’s hours of service requirement.

_____ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact ________________________________ or view the FMLA poster located in ________________________________.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _______________________. (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

____ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request ______ is/____ is not enclosed.

____ Sufficient documentation to establish the required relationship between you and your family member.

____ Other information needed (such as documentation for military family leave):

______________________________________________________________________________

______________________________________________________________________________

______________________________________________________________________________

No additional information requested

CONTINUED ON NEXT PAGE

Form WH-381. Revised February 2013

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If your leave does qualify as FMLA leave you will have the following responsibilities while on FMLA leave (only checked blanks apply):

Contact ___________________________ at ___________________________ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

You will be required to use your available paid _____ sick, _____ vacation, and/or _____ other leave during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.

Due to your status within the company, you are considered a “key employee” as defined in the FMLA. As “key employee,” restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We ___ have ___ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every ___________________________.

(Indicate interval of periodic reports, as appropriate for the particular leave situation)

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following rights while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:
  - the calendar year (January – December).
  - a fixed leave year based on ___________________________.
  - the 12-month period measured forward from the date of your first FMLA leave usage.
  - a “rolling” 12-month period measured backward from the date of any FMLA leave usage.

- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on ___________________________.

- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember’s serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have sick, _____ vacation, and/or _____ other leave run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

For a copy of conditions applicable to sick/vacation/other leave usage please refer to ___________________________.

Applicable conditions for use of paid leave:

________________________________________________________________________

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

________________________________________________________________________

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PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 253.3003(a), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 255.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.
Following is a Sample of the Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)

** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertification, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies. If you choose to use this form, please complete Section I of this form before giving the form to your employee.
SECTION I: For Completion by the EMPLOYER
INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: ________________________________

SECTION II: For Completion by the EMPLOYEE
INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: ________________________________
First       Middle       Last

Name of family member for whom you will provide care: ________________________________

Relationship of family member to you: ________________________________
First       Middle       Last

If family member is your son or daughter, date of birth: ________________________________

Describe care you will provide to your family member and estimate leave needed to provide care:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

Employee Signature ________________________________ Date ________________________________

Page 1 CONTINUED ON NEXT PAGE Form WH-380-F Revised January 2009
SECTION III: For Completion by the HEALTH CARE PROVIDER
INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as “lifetime,” “unknown,” or “indeterminate” may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider’s name and business address:

Type of practice / Medical specialty:

Telephone: (_____) __________________ Fax: (_____) __________________

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _________________________________

Probable duration of condition: ____________________________________________

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility? ___ No ___ Yes. If so, dates of admission: _______________________________________

Date(s) you treated the patient for condition: __________________________________

Was medication, other than over-the-counter medication, prescribed? ___ No ___ Yes.

Will the patient need to have treatment visits at least twice per year due to the condition? ___ No ___ Yes

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)? ___ No ___ Yes. If so, state the nature of such treatments and expected duration of treatment:

________________________________________________________________________

________________________________________________________________________

2. Is the medical condition pregnancy? ___ No ___ Yes. If so, expected delivery date: ________________________________

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________
PART B: AMOUNT OF CARE NEEDED: When answering these questions, keep in mind that your patient’s need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? ___No ___Yes.

Estimate the beginning and ending dates for the period of incapacity: ______________________________

During this time, will the patient need care? ___No ___Yes.

Explain the care needed by the patient and why such care is medically necessary:

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

5. Will the patient require follow-up treatments, including any time for recovery? ___No ___Yes.

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

Explain the care needed by the patient, and why such care is medically necessary:

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? ___No ___Yes.

Estimate the hours the patient needs care on an intermittent basis, if any:

_____ hour(s) per day; _____ days per week from ____________ through ____________

Explain the care needed by the patient, and why such care is medically necessary:

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________
7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities?  ____No   ____Yes.

Based upon the patient’s medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency: _____ times per _____ week(s) _____ month(s)

Duration: _____ hours or ___ day(s) per episode

Does the patient need care during these flare-ups?  ____No   ____Yes.

Explain the care needed by the patient, and why such care is medically necessary:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

Signature of Health Care Provider _______________________________ Date __________________

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 255.50. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.
Fact Sheet #17A: Exemption for Executive, Administrative, Professional,
Computer and Outside Sales Employees Under the Fair Labor Standards Act
(FLSA)

This fact sheet provides general information on the exemption from
minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 C.F.R. Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee’s specific job duties and salary must meet all the requirements of the Department’s regulations.

See other fact sheets in this series for more information on the exemptions for executive, administrative, professional, computer and outside sales employees and for more information on the salary basis requirement.

Executive Exemption
To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee’s primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemptions
To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
Professional Exemption
To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must consist of the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption
To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field, performing the duties described below;
- The employee's primary duty must consist of:
  1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Sales Exemption
To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

Highly Compensated Employees
Highly compensated employees performing office or non-manual work and aid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt...
from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

**Blue Collar Workers**

The exemptions provided by FLSA Section 13(a)(1) apply only to “white collar” employees who meet the salary and duties test set forth in the Part 541 regulations. The exemptions do not apply to manual laborers or other “blue collar” worker who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA and are not exempt under the Part 541 regulations no matter how highly paid they might be.

**Police, Fire Fighters, Paramedics and Other First Responders**

The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance, pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

**Other Laws and Collective Bargaining Agreements**

The FLSA provides minimum standards that may be exceeded but cannot be waived or reduced. Employers must comply, for example, with any federal, state or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.

**Where to Obtain Additional Information**

For additional information, visit our Wage and Hour Division Web site: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-USWAGE (1-866-487-9243).

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/whd/contacts/state_of.htm.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

**U.S. Department of Labor**

Frances Perkins Building
200 Constitution Avenue, NW
Washington, D.C. 20210

1-866-4-USWAGE
TTY: 1-866-487-9243

Contact Us