

**EMPLOYMENT LAW POINTS OF INTEREST AND FAIR LABOR STANDARDS –
PENNSYLVANIA**

LAW OFFICES OF THOMAS J. WAGNER, LLC

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1. Access to Personnel Records

Pennsylvania has enacted the Inspection of Employment Records Law Act 43 P.S. 1321-1324. An employer shall, upon request, permit an employee to review the employee's personnel files. Employees have access to files pertaining to qualifications for employment, promotion, additional compensation, termination, or disciplinary action.

Access to the following records is not required: records relating to the investigation of a possible criminal offense; letters of reference; documents being developed or prepared for use in civil, criminal, or grievance procedures; medical records; materials used by the employer to plan future operations; or information available to an employee under the Fair Credit Reporting Act.

The employer may require such request to be in writing on a form supplied by the employer. The form is solely for the purpose of identifying the requesting individual or the designated agent of the requesting individual to avoid disclosure to ineligible individuals. To assist the employer in providing the correct records to meet the employee's need, the employee shall indicate in his written request, either the purpose for which the inspection is requested, or the particular parts of his personnel record which he wishes to inspect or have inspected by the employee's agent. The employer must usually provide an inspection opportunity within a reasonable amount of time according to business necessity. All employees have the right to submit rebuttals to any information contained in the personnel record, which are to be included within the records.

2. Child Labor Laws

Minors under 14 years of age may not be employed or permitted to work in any occupation, except children employed on farms or in domestic service in private homes. No minor under 14 years of age may be employed on a farm by a person other than the farmer. Under certain restrictions, caddies may be employed at the age of 12, news carriers at 11 years of age, and juvenile performers in the entertainment field at the age of 7. Minors and infants may be in the cast of a motion picture if special permit is obtained. *Child Labor Act, 2012 P.L. 1209.*

With limited exceptions, no person under the age of 18 shall be employed without a general or vacation employment certificate. The employment certificates are issued by school authorities and, except for the transferable work permit, must be kept on file. Special performance permits are required for minors in theatrical and other performances at ages and hours permitted by Law. Applications may be obtained from the offices listed on the reverse side of this abstract. A transferable work permit may be issued to 16 and 17 year olds.

Additionally, the employer must keep detailed records of the minors at the work site. A photocopy of the transferable work permit may be used as a record, provided that the employer records the occupation in which the minor is engaged on such photocopy. There are two exceptions: A) 17 year olds, who have graduated from high school or who have attained their academic potential as determined by the chief school administrator, may be treated for purposes of the Child Labor Law as 18 years of age;

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and, B) Special rules apply to 16 and 17 year olds employed during the summer by a summer resident camp or a conference or a retreat operated by a religious or scout organization. *Id.* Section 8(d).

For children 14 and 15 years of age, the maximum hours of employment during the school term is 4 hours on a school day, 8 hours on any other day, and 18 hours per school week, and only at times that do not interfere with school attendance. During summer vacation, there is an 8 hour maximum per day, 44 hours per week. Employment is prohibited after 7 p.m. and before 7 a.m., except summer vacation is extended until 10 p.m.

For children ages 16 and 17, the maximum hours of employment during the school term is 28 hours per week (if enrolled in regular day school, plus an additional 8 hours on Saturday and Sunday. The daily hours cannot exceed 8 hours per day. During summer vacation, there is a maximum of 8 hours per day, 44 hours per week. Students may not work after midnight Sunday through Thursday or before 6 a.m. during the week. During summer vacation, there is no night work limit for students.

Employers are required to maintain true and accurate schedules for each minor employed. Any person, agent or manager for any person violating or permitting any violation of the Child Labor Law shall, upon conviction, be subject to a fine of not less than \$200 nor more than \$400 for the first offense and not less than \$750 nor more than \$1500 for any subsequent offense or imprisonment for 10 days, or both. Under the PA Workers' Compensation Law, fifty percent additional compensation shall be paid to any minor injured while illegally employed, all of which shall be paid by the employer.

3. Drug Testing

Pennsylvania does not require or prohibit private employers from testing employees for drugs. However, case law, the Drug Free Workplace Act of 1988, and federal agencies regulations (e.g. Federal Motor Carrier Safety Administration) have provided some parameters for work place drug testing.

Generally, the following drug testing is permitted:

1. Pre-employment;
2. Reasonable suspicion (must be based on objective specific evidence of a drug issue);
3. Random; and
4. Required or related to work.

The Pennsylvania Human Relations Act prohibits employment practices that discriminate on the basis of certain classifications, including disability or handicap. The Act covers public employers and private employers with four or more employees. Current addicts or illegal users of a controlled substance are *not* disabled for purposes of the state law against disability discrimination. *PA Stat. Tit. 43 Sec. 951 et seq.*

However, private employers that choose to implement a testing program should be sensitive to the privacy issues involved. For example, a random drug testing policy may compete with an individual's right to privacy. Pennsylvania courts use a balancing test that seeks to determine whether a reasonable person would find the employer's program highly offensive. The courts weight the employee's privacy with the employer's interest in maintaining a substance-free workplace.

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Pennsylvania's unemployment compensation law upholds an employer's right to discharge an employee following a positive drug test. In Pennsylvania, an employee is ineligible for unemployment compensation if he or she was discharged or suspended because of a failure to submit to a legitimate drug test, or a failure to pass a legitimate drug test. For Pennsylvania's unemployment compensation purposes, all employer drug tests must be conducted under the employer's established substance abuse policy.

4. Employment-at-will

Employment in Pennsylvania is presumed to be at will. *Stumpp v. Stroudsburg Municipal Authority*, 540 Pa. 391, 396 (1995). Where the employment is at will, the employer may discharge an employee for any reason or no reason, except for when the discharge violates a clearly mandated public policy. Conversely, though, an at-will employee may resign at any time (with no notice) and for any reason. *Veno v. Meredith*, 357 Pa. Super. 85, 96 (1986). When the discharge is contrary to a clear mandate of public policy, an employee has a cause of action for wrongful discharge. *Geary v. United States Steel Corp.*, 456 Pa. 171, 184 (1974).

The "at will" presumption can be overcome by showing that the parties contracted otherwise. Indeed, even an employee handbook or other policy statement can create enforceable contract rights if the traditional requirements for contract formation are present. The publishing of a handbook is not a meeting of the minds unless the parties bargained for the handbook provisions. As such, a just cause provision usually fails for lack of consideration unless the employer evinces a clear intent to bind itself to the handbook provisions. *Martin v. Capital Cities Media, Inc.*, 354 Pa. Super. 199 (1986).

5. Equal Employment Opportunity/Non-Discrimination Categories

It is a civil rights violation for any employer to discriminate on the basis of race, color, religion, sex, national origin, ancestry, age, sexual orientation, physical or mental disability, marital status, unfavorable discharge from military service, military status, arrest record, order of protection status, or citizenship status. Sexual harassment is also a civil rights violation. *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 78 (3d Cir. 1983).

The Pennsylvania Human Relations Act also prohibits discrimination based on race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability, or the use of a guide or support animal because of blindness, deafness or physical handicap of any individual or independent contractor. 43 P.S. §§ 951, et seq. In some cities/counties in Pennsylvania, discriminating on the basis of sexual orientation is prohibited.

6. FMLA

With some exceptions, Pennsylvania offers leave to employees to bond with a new child, care for a sick family member, inability to perform job duties due to a serious medical condition, or active military service of a family member. Pennsylvania does not expand the benefits outlined in the federal Family and Medical Leave Act. 29 U.S.C. §§ 2601, et seq.

An employee is entitled to up to 12 weeks in a 12 month period for FMLA leave. If the leave is related to active military status, the employee is entitled to 26 weeks in a single 12 month period. Under some circumstances, the employee may take leave over an intermittent or reduced schedule basis. The employer is not required to pay the employee during this time. Following leave, the employee must be restored to his/her original or equivalent position. *29 U.S.C. §§ 2601, et seq.*

Guidelines issued by Pennsylvania's Human Relations Commission advise employers to treat employees with disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, or recovery therefrom the same as employees who are temporarily disabled with respect to leave benefits and rights. *The Pennsylvania Human Relations Act, 43 P.S. §§ 951-963.*

7. Genetic Testing

Under Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), it is illegal for employers to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e. family medical history).

Employers must also keep genetic information confidential and in a separate medical file. (Genetic information may be kept in the same file as other medical information in compliance with the Americans with Disabilities Act.) There are limited exceptions to this non-disclosure rule, such as exceptions that provide for the disclosure of relevant genetic information to government officials investigating compliance with Title II of GINA and for disclosures made pursuant to a court order.

8. Meal or Rest Break

Pennsylvania labor laws require employers to provide a thirty (30) minute break period to employees ages fourteen (14) through seventeen (17) who work five (5) or more consecutive hours. *Pa. Stat. 43:40.3(a).*

Employers are not required to provide breaks to employees eighteen (18) and over. PA Dept. of Labor: Wage and Hour FAQs. If an employer chooses to provide a break and it lasts less than twenty (20) minutes, it must be paid. If an employer provides a meal period, it does not need to be paid if the employee does not work during the meal period and it lasts more than twenty (20) minutes. *Pa. Code 231.1.*

No minor under the age of 18 may work for more than 5 hours continuously without a 30-minute lunch period. No period of less than 30 minutes will be deemed to interrupt a continuous period of work. *43 P.S. Labor § 40.3(a).*

9. Method of Payment of Wages

In Pennsylvania, employers must each employee his or her earnings or wages semi-monthly, unless otherwise agreed upon. The first payment shall be made between the first and fifteenth day of each month, and the second payment shall be made between the fifteenth and the last day of each month. *43 P.S. Labor §251*. The wages shall be paid in lawful money of the United States or check.

Pennsylvania provides that salary payments may be made by credit to a financial institution designated by the recipient “if the recipient has requested such method of payment in writing.” *7 P.S. § 6121*.

The request must be in the form of a written agreement setting forth all of the terms and conditions for the transfer of funds and the methods by which the employee may withdraw the request and terminate the agreement. *7 P.S. § 6122(a)*.

An employer may pay an employee by direct deposit if the employee has consented in writing. The employee’s written consent must set forth all terms and conditions under which the direct deposit is to be made and the terms and conditions as to the method or methods to be used by which the employee may withdraw the written consent and terminate the agreement. Also, an employer must provide to each employee being paid by direct deposit a separate written record of each deposit at or prior to the time thereof.

10. Minimum Wage and Overtime Rules

The minimum wage in Pennsylvania in 2016 is \$7.25 per hour. The minimum wage in Pennsylvania increases automatically to keep pace with increases in the minimum wage under federal law. *43 Pa. Stat. Ann. § 333.104(a.1)*.

In determining the hourly wage an employer is required to pay a tipped employee, Pennsylvania holds that the amount an employer must pay to such employee shall be an amount equal to: (i) the cash wage paid the employee; and (ii) an additional amount on account of the tips received by the employee which is equal to the difference between the wage specified in subparagraph (i) and the current minimum wage. *43 Pa. Stat. Ann. § 333.103*

Employees are entitled to be paid at least 1.5 times their regular rate of pay if they have worked over 40 hours in a workweek. *34 P.S. § 231.43*.

11. New Hire Reporting

Employers are required to report new hires to the Department of Labor within 20 days from the first day an employee performs services for pay. *23 Pa.C.S §§ 4391, et seq. and 42 U.S.C. 653A*. Re-hires are considered new hires whenever the employee laid off, furloughed, separated or granted leave without pay for more than 30 days; or terminated from employment. *23 Pa.C.S § 4391*.

The purpose of this law is to locate absent parents in order to enforce child support orders and to identify individuals fraudulently receiving benefits. *23 Pa.C.S §§ 4392(a) and 4393.*

12. Non-Compete Agreements

A Non-Compete Agreement is enforceable provided it is not unreasonable. A covenant not to compete, assuming it is ancillary to a valid employment relationship, is reasonable only if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer; (2) does not impose undue hardship on the employee; and (3) is not injurious to the public.

Whether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. Factors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee's acquisition of confidential information through his/her employment, and time and place restrictions. No factor carries any more weight than any other, but rather its importance will depend on the specific facts and circumstances of the individual case.

In November of 2015, the Pennsylvania Supreme Court reaffirmed the long-standing common law rule that covenants not to compete entered into after the commencement of employment must be accompanied by new and valuable consideration. *Socko v. Mid-Atlantic Sys. of CPA, Inc., 126 A.3d 1266.* While at common law, covenants in restraint of trade have long been disfavored by Pennsylvania courts, an agreement containing a non-competes clause will be upheld, if, among other considerations, it is supported by adequate consideration. In the context of requiring an employee to agree to a restrictive covenant mid-employment, however, such a restraint on trade will be enforceable only if new and valuable consideration, beyond mere continued employment, is provided and is sufficient to support the restrictive clause. *Id.*

13. Overtime Exemptions

Federal and Pennsylvania laws do not require overtime pay for employees engaged in a bona-fide executive, administrative, professional, or outside salesman capacity who is paid a salary. *29 U.S.C. § 213a(1), 29 CFR §§ 541, et seq., 43 P.S. § 333.105a(5), and 34 P.S. § 231.81, et seq.* Being paid a salary does not necessarily mean the employee is exempt status. *29 U.S.C. § 213.* Other exemptions from Pennsylvania's overtime law include: seamen, automobile, truck or aircraft salesman or mechanics, taxi drivers, agricultural and farm workers, movie theater employees, live-in employees, etc.

Determining whether an employee is classified as exempt or non-exempt is based solely on their job functions:

1. Executive Exemption: primarily manage two or more employees;
2. Administrative Exemption: primarily non-manual work related to business operations, management policies, or administrative training; and
3. Professional Exemption: duties require advanced knowledge and extensive education.

34 P.S. §§ 231.81, et seq.

14. Payment of Wages

Employer shall pay wages, other than fringe benefits and wage supplements, on regularly scheduled paydays designated in advance by the employer. With some exceptions, the waiting period between paychecks cannot exceed fifteen (15) days. *43 P.S. §§ 251, 253, and 260.3.*

15. Penalties for Violation of Certain Provisions

Violation of Wage Payment and Collection Law

Employer is subject to a civil penalty of up to 10% of the portion of the claim found to be true and assessment of attorney fees against the employer even if there was a good faith dispute. *43 P.S. § 260.9 a (c) and (f).* Officers of the company may be personally liable. *43 P.S. § 260.2a.* Also, the Employer is subject to criminal penalties, including a fine of not more than \$300.00 or by imprisonment of up to ninety (90) days or both for each offense. If the employer is a corporation, the president, secretary, treasurer, or officer exercising corresponding functions can be convicted of the offense. *43 P.S. § 260.11a (b) and (c).*

Violation of Reporting New Hires or Rehires

Failure to report new hires or rehires will subject employer to a civil penalty of up to \$25 per violation after the first written warning. However, if it is determined that the failure to report is the result of a conspiracy between the employer and employee, the employer is subject to a penalty of up to \$500.00. *23 Pa.C.S. § 4396.*

16. Releases/Waivers

Federal law contains specific statutory requirements to waive age discrimination claims and prohibits the waiver of certain wage claims. An agreement cannot contradict the obligations set forth in the Wage Payment and Collection Law Act. An employee cannot waive their right to file an unfair labor practice charged under the National Labor Relations Act. Release of a Title VII claim may not affect an employee's right to bring an EEOC charge or limit the employee's right to testify or assist in an EEOC proceeding.

In 2013, the Pennsylvania Supreme Court affirmed the validity of a waiver of third party claims in an employment contract for future negligence by a non-contracting party. *Bowman v. Sunoco, Inc., 65 A.3d 901 (2013).*

If the employer seeks a release/waiver of all legal claims the employee may have against the employer, the employer must provide the employee with severance or other consideration in addition to the payments the employee was already entitled to receive.

17. Temporary Assignment for Injured Workers

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For work-related injuries, if an employee is able to perform light or modified duty and an accommodation can be made by the employer, the employee may be entitled to partial temporary disability benefits to offset any reduction in his/her pre-injury average weekly wage as a result of the work injury. 77 P.S. § 512(2). The EEOC has stated that “an employer is free to determine that a light duty position will be temporary rather than permanent.” *Graves v. Finch Pruyn & Co.*, 457 F.3d 181 (2d Cir. 2006). The courts have consistently held that an employer must, in certain circumstances actually re-assign the impaired employee as a reasonable accommodation, based on the clear language of the statute. 42 U.S.C. §12111(9)(B). The Third Circuit has held that that re-assignment to an existing position is a reasonable accommodation. *Haines v. Bethlehem Lukens Plate Steel*, 2001 U.S. App. LEXIS 24678 (3d Cir. 2001) (unpublished).

For unrelated work injuries, Federal law may require an employer to make reasonable accommodations for qualified employees with disabilities, if necessary to perform the job functions or to benefit from the same opportunities as those without a disability. *Americans with Disabilities Act (ADA)*, 42 U.S.C. 1201, et seq.

18. Termination Obligations

As a general rule, an at-will employee has no claim against an employer for termination of employment or “wrongful termination.” *Paul v. Lankenau Hosp.*, 569 A.2d 346, 348 (Pa. 1990); *Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 918 (Pa. 1989); *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974). “Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy.” *Clay*, 559 A.2d at 918.

An employer must pay the final compensation of separated employees in full, at the time of separation, if possible, but in no case later than the next regularly scheduled payday for the employee. Where the employee requests in writing that his/her final compensation be paid by check and mailed to him/her, the employer must comply with this request and send the check via certified mail. 43 P.S. § 260.5.

Under Pennsylvania’s Wage Payment and Collection Law (WPCL), the term “wages” specifically includes vacation pay. 43 P.S. § 260.2a. The WPCL does not, however, require an employer to pay a terminated employee for his or her accrued vacation time. *Doe v. Kohn, Nast & Graf, P.C.*, 862 F.Supp. 1310, 1325 (E.D. Pa. 1994). While many employers do adhere to that practice, Pennsylvania law does not require reimbursement for unused leave time. A “use it or lose it” policy is acceptable, but should be clearly communicated to employees.

19. Sales Commissions

Pennsylvania has enacted the Commissioned Sales Representative Act, which requires a commissioned sales representative who enters into an agreement for the sale of orders be provided with a contract in writing, which outlines the manner in which payment will be made, the method of payment, how

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payment will be computed, a time period during which the sales representative will perform services, how expenses incurred in making sales will be reimbursed, and the geographic territory or accounts assigned to the sales representative. The law also requires that the sales representative be provided with a copy of the executed contract.

All commissions due shall be paid within 14 days of termination of the employee, and commissions that become due after termination shall be paid within 14 days of the date on which those commissions become due. These requirements cannot be waived. *43 P.S. § 1474.*

An employer who fails to comply with these provisions is liable in civil action for damages in the amount of all commissions due the sales representative, plus exemplary damages in at most two times the commissions due the sales representative, plus the cost of the suit including reasonable attorneys' fees. *43 P.S. § 1475.* If the Sales Representative's suit is deemed frivolous, the principal is entitled to court costs and attorney fees. *Id.*

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