Other Employment Rights

Acknowledgements

EJC is grateful to the following individuals for their assistance in updating the Other Employment Rights Chapter for the 6th Edition:

Kelly Rojas, EJC Seibel Fellow (Law Clerk)

Table of Contents

Substance Abuse Testing

Government Workers

Drug testing is required by law for many federal and state government employees. For example, about half of all federal government employees are tested at some point, ranging from once during the application/hiring process to random ongoing testing for certain positions.

Federal Government Employees

When is Testing Required?

Executive Order 12,564, signed by Ronald Reagan in 1986, mandates drug testing for federal government employees in "sensitive positions." *See* 51 FR 32,889, § 3(a) (1986). This includes the handling of classified information; positions charged with law enforcement, national security, and protecting life, property, and public health and safety; and jobs requiring a high degree of trust and confidence. *Id.* at § 7(d). In total, about half of all federal government employees are covered by this law.

The tests are permitted under five circumstances: 1) initial job application; 2) reasonable suspicion of illegal drug use; 3) in conjunction with the investigation of an accident; 4) as part of an Employee Assistance Program (EAP); and 5) pursuant to a drug-testing program established by the agency head in accordance with section 3(a) of the Executive Order. *See id*. at § 3.

Manner of Testing

The Department of Health and Human Services (HHS) has promulgated regulations for the manner of testing of federal employees. *See* 53 FR 11970-01 (1988).

Urine testing is generally the method used. Thus, the guidelines exclusively and extensively cover urine collection techniques (as opposed to hair, which is sometimes tested by private employers). *See id.* at subpart B, § 2.2. The guidelines require testing for marijuana and cocaine; allow testing for amphetamines, opiates, and PCP; and allow testing for other Schedule I and II controlled substances during reasonable suspicion or accident-related testing, but do not allow testing for alcohol and other legal drugs. *See id.* at subpart B, § 2.1(a).

Some worker protections include:

(4) Employees must sign a statement that it is their specimen. *Id.* at subpart B, §2.2(f)(22).
(5) Specimen collectors must ensure workers' privacy unless there is reason to believe the worker may adulterate the sample. *Id.* at subpart B, § 2.2(e).
(6) Any tested employee must, upon written request, have access to documents relating to his or her test and to the certification of the lab performing the test. *Id.* at subpart B, § 2.9.

What to Do About a Positive Test

The Executive Order mandates a confirmatory test or the employee's admission that s/he used illegal drugs before action may be taken on any positive test. 51 FR 32,889, § 5(e) (1986). Both the first and confirmatory test are generally done before the employee is informed of a positive result. *See* 53 FR 11970-01, subpart C, § 3.5 (1988).

Once the worker is informed of a positive test result, s/he should make a written request for documents pertaining to his or her test. Prior to verifying a positive test result, a Medical Review Officer must give the employee a chance to explain the result. *Id.* at subpart B, § 2.7(c).

Section 5 of the Executive Order specifies disciplinary action once an employee's drug use is established. *See* 51 FR 32,889, § 5 (1986). Generally, the employee will be referred to an Employee Assistance Program (EAP) for rehabilitation, and refusal to take part will result in dismissal, as will any recurrence of drug use. *Id.* at § 5(a-d). Employees in sensitive positions will be temporarily removed pending successful completion of the EAP. *Id.* at § 5(c).

An employee who uses drugs can only avoid discipline if s/he admits to drug use or volunteers for testing before being identified by other means**.** *Id.* at § 5(b)(1). S/he must also: 1) seek EAP rehabilitation; and 2) refrain from future drug use. *Id.* § 5(b)(2-3).

D.C. Government Employees

Pursuant to D.C. law, certain employees of the D.C. Department of Corrections, Department of Human Services, and Department of Mental Health are subject to drug and alcohol testing.

The Department of Corrections Employee Mandatory Drug & Alcohol Testing Act of 1996, D.C. Code §§ 24-211.21 *et seq.*, requires drug and alcohol testing of department employees in the following cases: 1) pre-hire for all applicants; 2) reasonable suspicion based on supervisor's belief; 3) post-accident; and 4) random testing for "high potential risk" employees. D.C. Code § 24-211.22(a). This latter term means "any Department employee who has inmate care and custody responsibilities or who works within a correctional institution, including any employees and managers who are carried in a law enforcement retirement status." § 24-211.21(5).

In addition, supervisors must be trained in substance abuse recognition and get a second opinion from another supervisor before determining reasonable suspicion to test an employee. § 24-211.21(9). If an employee tests positive, s/he may request a confirmatory test of the previous untested half of the same sample at his or her own expense. § 24-211.23(c). A confirmed positive test, or the refusal to submit to a test, may be grounds for dismissal. § 24-211.24.

A very similar law exists for the Department of Mental Health and the Department of Human Services; however, a few significant differences should be noted. *See* D.C. Code §§ 1-620.21 *et seq*. For example, pre-hire testing is only done for applicants to positions in a

residential facility or with resident care or custody responsibilities in a secured facility. §§ 1-620.21(4), .22(a)(1). Instead of "reasonable suspicion," the statute refers to "probable cause" testing, and notes that "conditions giving rise to probable cause must be observed and documented." §§ 1-620.22(a)(2), (e). An employee testing positive has one opportunity to seek treatment before being fired. § 1-620.22(f).

Maryland Government Employees

There is no law requiring the testing of state government employees. If the worker is employed in Maryland and is being tested, see "Protections Against Unreasonable Testing/Maryland Regulation of All Employers" below.

Virginia Government Employees

No Virginia law requires the testing of any state government employee, but Virginia permits local governments to require pre-employment testing of law enforcement employees. A law officer who refuses to submit or has unexplained positive result shall be decertified. Va. Code Ann. § 15.2-1707.

Federal Government Contract Workers

The Drug Free Workplaces Act of 1988 requires federal **government contractors** and grant recipients to certify that they provide drug-free workplaces, but this act does not require testing. *See* 41 U.S.C.A. §§ 8101 to 8106.

Workers in the Transportation Industry

Millions of transportation workers in the private sector are subject to federally-mandated drug testing through the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, Tit. V, 105 Stat. 917, which requires random drug and alcohol testing of employees in the private transportation sector. It is promulgated through Department of Transportation regulations at 49 C.F.R. §40, along with the following industry-specific regulations:

- Trucking (7.3 million employees): Federal Motor Carrier Safety Admin., 49 CFR § 382
- Aviation (364,000 employees): Federal Aviation Admin., 14 CFR § 120.
- Mass Transit (214,000 employees): Federal Transit Administration, 49 CFR § 655
- Energy Pipeline (190,000 employees): Research & Special Programs Admin., 49 CFR § 199
- Coast Guard and Merchant Marine (132,000 employees): 46 CFR §§ 4, 16
- Railroad (97,000 employees): Federal Railroad Administration, 49 CFR §219

The above rules were written with the same language to the extent possible, for ease of compliance by companies under two or more regulations.

The Omnibus Transportation Act generally regulates private collection techniques and

mandates use of the same HHS testing procedures applicable to federal government employees who are tested. *See* 53 FR 11970. The act requires random, post-accident, and reasonable-suspicion alcohol and drug testing, as well as pre-employment testing for drugs only. *See American Trucking Associations, Inc. v. Federal Highway Admin.*, 51 F.3d 405, 407 (4th Cir. 1995) (citing the act). Periodic testing is discretionary. *Id.*

If a safety-sensitive employee tests positive for drugs, she must be removed from safety-sensitive duty if she had a positive drug test result. *See* 49 CFR § 382.501 (trucking employees). An employee may not be returned to safety-sensitive duties until she has been evaluated by a substance abuse professional or Medical Review Officer ("MRO"), complied with recommended rehabilitation, and had a negative result on a return-to-duty drug test. 49 CFR §§ 40.285(a), .305. Follow-up testing to monitor the employee's continued abstinence from drug use may be required. § 40.307.

Testing records are confidential. § 40.321. Test results and other confidential information may only be released to the employer and the substance abuse professional/MRO. *Id.* Any other release of this information is only with the employee's written consent. *Id.*

Workers of Private Employers

Unfortunately, **there are few statutory protections for private-sector workers whose employers choose to test.** If the worker is in a union and the employer tests, the subject is likely covered by the collective bargaining agreement as a mandatory subject of bargaining. *See* NLRA Sec. 8; *Schlacter-Jones v. General Telephone of California*, 936 F.2d 435, 442 (9th Cir. 1991).

In the D.C. metro area, only Maryland regulates the manner in which employees may be tested. The Maryland statute applies to all private employers who test their employees for substance abuse. *See* Md. Code Ann., Health - General § 17-214.[133] The employer must use a certified or licensed lab, and must comply with federal standards for cut-off levels for positive tests. *Id.* at § 17-214(f). The employer may use a "single-test device" at the place of work as a pre-employment screen, if the procedure is conducted by a trained operator and if positive tests are confirmed at a lab. *Id.* at § 17-214(j), (k). An employee must, at his or her request, be informed of the name and address of the lab doing the testing at the time the testing is conducted. *Id.* at § 17-214(b)(1)(ii). Hair samples may be used only for pre-employment testing. Specimens may not include hair more than 1½ inches from body. *Id.* at § 17-214(b)(3). Blood, urine and saliva may also be collected. *Id.* at 17-214(a)(11).

If there is a confirmed positive test, then within 30 days from the time the test was performed, the employee must be provided in person or by certified mail with: 1) a copy of test results; 2) a copy of the employer's written policy on use of drugs and alcohol; 3) a statement of the employee's right to request independent testing of the same sample at the employee's expense; and 4) if applicable, written notice of employer's intent to take disciplinary action. *Id.*

[133] This law does not apply to workers who are subject to federally-mandated testing, such as federal government employees in safety-sensitive position and private-sector transportation employees. *See French v. Pan Am Express, Inc.*, 869 F.2d 1, 1 (1st Cir. 1989) (holding state law pre-empted by federal law when it seeks to regulate federally-mandated testing).

at § 17-214(c), (e). Disclosure may not be made to the employer of any legal or medically prescribed drugs (excluding alcohol) found in the sample, except as necessary to comply with the Commercial Motor Vehicle Safety Act of 1986. *Id.* at § 17-214(i).

In addition, Maryland statute requires that persons who lease space at a marine facility from the Maryland Port Administration implement drug and alcohol testing, including random, reasonable cause, post-accident, return-to-work, and post-treatment testing of certain safety-sensitive positions and pre-employment testing of all employees. *See* Md. Code Ann., Transportation § 6-102.1.

In Virginia, the only reference to substance abuse testing is in the state's Unemployment Compensation Act, which provides that a positive drug test is "misconduct" disqualifying an employee from benefits, if the test was conducted in conformity with the HHS guidelines described under "Federal Government Employees/Manner of Testing" above. *See* Va. Code Ann. § 60.2-618(2)(b)(1).

Non-Statutory Protections against Unreasonable Testing

Constitutional Challenges

Federal- and state-mandated testing is analyzed under the Fourth Amendment. Drug testing by the government is a type of "special needs" search under the Fourth Amendment, subject to a **reasonableness balancing test**.[134]

Overall, courts have given the government broad discretion to test employees under safety and security rationales, but they have placed limits on who may be tested and how. The two major Supreme Court cases to address the issue are *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989). Unfortunately, these cases are very fact-specific and thus have little precedential value. *Skinner* upheld Federal Railroad Administration regulations requiring automatic testing of employees involved in accidents or who violate certain safety procedures. *Skinner*, 489 U.S. at 634. In a 7-2 decision, the Court held that warrants and individualized suspicion were not necessary in these situations, due to the government's compelling interest in public safety. *Id.*

Von Raab was a closer decision, upholding tests on certain U.S. Customs Service employees 5-4, and unanimously rejecting the testing of a third group of employees. *Von Raab*, 489 U.S. at 679. The government's stated interest in the testing was the security-related activities of some Customs employees, especially their work in stopping the drug trade. *Id.* The Court found the testing of *anyone* who handles classified materials to be too broad, encompassing mail clerks and attorneys not in the front line of the drug war. *Id.* Both *Skinner* and *Von Raab*

[134] Constitutional claims may only arise with government action, so if the client works for a private-sector employer not required by law to test, there is likely no constitutional ground for a complaint. *See, e.g., Parker v. Atlanta Gas Light Co.*, 818 F. Supp. 345, 346-47 (S.D. Ga. 1993) (holding that because Drug-Free Workplace Act does not mandate testing, an employer's decision to test in order to meet the act's requirements is not governmental action subject to the Constitution).

employed the reasonableness balancing test.

More informative are the many lower federal courts cases addressing workplace testing. Validity tends to depend on degree to which testing is essential to ensure public safety. *See Nat'l Treasury Employees Union v. Yeutter,* 918 F.2d 968 (D.C. Cir. 1990) (upholding random testing of Department of Agriculture motor vehicle operators while striking down suspicionless testing of employees not in safety- or security-sensitive jobs); *Nat'l Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (upholding random testing of Army air-traffic controllers, aviation mechanics, guards, and drug counselors, but striking down testing of lab workers and those in chain of custody of drug specimens). Pre-employment testing has been accepted for almost any employer. *Cf. Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991) (upholding pre-employment testing for attorney at DOJ, because in order to avoid the intrusion, a person may simply not apply for the job). *But see Georgia Assn. of Educators v. Harris,* 749 F. Supp. 1110 (N.D.Ga.1990) (striking down law requiring testing of all applicants for state employment).

For non-safety sensitive employees, **individualized suspicion** of some type has been required. *See Benavidez v. City of Albuquerque*, 101 F.3d 620 (10th Cir. 1996). The broadest interpretation of "safety-sensitive" included school teachers, aides, and secretaries, due to their interactions with children. *See Knox County Educ. Assoc. v. Knox County Board of Educ.*, 158 F.3d 361 (6th Cir. 1998).

Direct observation of urine collection, without reasonable, individualized, and articulable suspicion of intent to tamper with sample, is unconstitutional. *See Yeutter*; *Hansen v. California Dep't of Corrections*, 920 F.Supp. 1480 (N.D. Cal. 1996). *But see Wilcher v. City of Wilmington*, 139 F.3d 366 (3d Cir. 1998) (upholding direct observation of firefighters due to the nature of their employment and because observation of genitalia was only "incidental").

Common Law Challenges

In some extreme cases, a worker may be awarded damages for his or her employer's drug-testing policies. Such claims have usually involved tort claims such as invasion of privacy, negligence, defamation, and wrongful discharge. They have met with mixed success.

In Massachusetts, workers have successfully challenged testing under other statutes not directly relating to drugs or drug testing. *See, e.g., Webster v. Motorola, Inc.*, 418 Mass. 425 (1994) (testing of technical editor struck down under state privacy law). The First Circuit upheld an award for negligent infliction of emotional distress for direct observation of urination in drug testing. *See Kelly v. Schlumberger Technology Corp.,* 849 F.2d 41 (1st Cir. 1988). Successful lawsuits have been brought for excessive or malicious publication of testing results. *See O'Brien v. Papa Gino's of Am., Inc*., 780 F.2d 1067 (1st Cir. 1986); *Welch v. Chicago Tribune Co.,* 34 Ill.App.3d 1046 (1975). At least one court has held that the worker's discharge violated public policy when he was tested without reasonable suspicion but tested positive and was fired as a result. *See Twigg v. Hercules Corp.,* 185 W.Va. 155 (1990).

Americans with Disabilities Act & Family Medical Leave Act Issues

The Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA) provide some limited protection to workers who are being treated for substance abuse problems and for disabled workers subject to drug testing.

Under FMLA, an eligible worker can take 12 (federal) or 16 (D.C.) weeks of leave for medical care for the worker's own serious health condition. 29 U.S.C. § 2612(a)(1)(D). Substance abuse is considered a **serious health condition** under the law, and a worker can take leave for treatment by a health-care provider, which would include in-patient care. *See Gilmore v. University of Rochester*, 654 F.Supp.2d 141, 149 (W.D.N.Y. 2009). His or her employer, however, is allowed to inquire into the reason needed for the leave and to request medical certification to document the need for and duration of the leave. 29 U.S.C.A. § 2613.

Please review this manual's Family Medical Leave Act chapter for additional information.

Under ADA, individuals who are currently engaging in drug or alcohol abuse are not protected under the law. 42 U.S.C.A. § 12114(a). "Current use" is defined as use recent enough to justify the employer's belief that usage is an ongoing problem. 29 C.F.R. Appx. to § 1630.3(a). These employees may be terminated without violating the statute. 42 U.S.C.A. § 12114. Employers may not, however, discriminate against employees who are addicts but who are not currently using drugs or alcohol, and employers may be required to reasonably accommodate such employees by allowing time off for treatment. *See Buckley v. Consol. Edison Co. of New York, Inc.*, 155 F.3d 150, 154, 156 (2d Cir. 1998); *see also* 1 Empl. Privacy Law § 3:30. With respect to testing, a disabled employee who is required to take certain medications because of his or her disability may need reasonable accommodations when it comes to taking the employer's usual and routine drug tests. 42 U.S.C. § 12114(b).

Please review this manual's Discrimination chapter for additional information.

Worker Adjustment and Retraining Notification Act (WARN)

Notice of Layoffs Required

The Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2101 *et seq*., requires employers to provide **60-day notice of shutdowns and layoffs of a certain size to affected employees**. The act also requires employers to notify the workers' union, the workers themselves, and the local government office. Employers with 100 or more full-time employees or more than 100 employees who work in the aggregate more than 4,000 hours of regular time each week are required to comply with the statute. Part-time employees are not covered by the act.

Employment loss means an employment termination, other than a discharge for cause,

voluntary departure, or retirement, a layoff exceeding six months, or a reduction in hours of work of more than 50 percent during each month of any six-month period. Notice must be given when a single site of employment is shut down and 50 or more employees are laid off within 30 days. Notice must also be given when there is a layoff at a single site of 500 or more employees, or of 50 or more employees if this equals more than one-third of the workforce at the site. Enforcement is by a civil action in federal or D.C. Superior Court.

An exception to this requirement stipulates that an employee has not experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business. For the exception to apply, the employer must offer to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a six-month break in employment prior to the closing or layoff, or the employer must offer to transfer the employee to any other site of employment regardless of distance with no more than a six-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

Remedies for Violations

If the employer fails to adhere to the requirements of WARN, the act provides for damages. Remedies include back pay and ERISA benefits for each worker for each day the notice was late, up to a maximum of 60 days, a penalty paid to the local government, and attorneys' fees. *See* 29 U.S.C. § 2104. The remedy may also include insurance and disability benefits, but will not include punitive damages. The WARN Act states that the rights for which it provides are in addition to any other rights employees may have, and are not intended to alter or affect such rights or remedies. § 2105; *see also Assn. of American Railroads v. Surface Transp. Bd.*, 161 F.3d 58, 65 (D.C. Cir. 1998).

An employer may be exempted from paying all or part of the damages under WARN if the court finds that the employer acted in good faith in failing to adhere to the requirements of the act. If the business closing was not reasonably foreseeable as determined by the court, the employer may be required to pay a reduced amount of damages to the affected employees. Additionally, WARN does not apply if federal authorities shut down the place of employment. *See Office and Professional Employees Int'l Union Local 2 AFL-CIO v. FDIC*, 138 F.R.D. 325, 327 (D.D.C. 1991).

Employment Agencies

Employment agencies are regulated by D.C. Code §§ 32-401 to 416. The statute covers services aimed at providing employers with individual employees or advice concerning individual employees. *See A-L Associates v. Jorden*, 963 F.2d 1529, 1529 (D.C. Cir. 1992).

The statute protects workers' rights in several ways. Prior to performing any service, the employment agency must enter into a written contract with the job-seeker. *See* D.C. Code § 32-404(f)(1). The contract must be written in simple, easily understandable language. § 32-404(f)(2). After signing the contract with the agency, the job-seeker is entitled to cancel the

contract within three days, which is considered a cooling-off period. § 32-404(f)(5). Agencies cannot, among other things:

- charge registration fees or fees in advance of services;
- charge a fee unless they make an appointment for a job interview;
- refer applicants to jobs where conditions violate federal or D.C. law;
- refer applicants to sites where labor disputes are under way without informing the applicant;
- refer applicants to employers without openings;
- refer applicants without making an appointment with the employer;
- refer applicants for jobs for which they are not qualified; or
- solicit, persuade, or induce any employer to discharge any job-seeker.

§ 32-404(g)-(o).

Employment counseling agencies must provide notice stating that the service is not an employment agency, does not arrange job interviews, and does not provide job placement services. § 32-405(a). Employment counseling agencies are generally held to the same standards as employment agencies.

The statute also prohibits any employment agency, employment counseling service, employer-paid personnel service, job listing service, or employment counselor to fail or refuse to provide service to any person for any reason based on race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, or political affiliation. § 32-408.

The statute does not apply to résumé preparation companies; educational, religious, and charitable organizations that do not charge fees; labor organizations that secure employment for their members; or the United States or District of Columbia government. §32-416. The D.C. Department of Consumer and Regulatory Affairs, Business Services Division is responsible for enforcing the statute and can be reached at (202) 442-4400, (202) 442-4450, (202) 442-4312, or (202) 442-4515.

Polygraph Testing

Federal Law

Polygraph testing was effectively made illegal by the Employment Polygraph Protection Act. *See* 29 U.S.C. §§ 2001-2009. Direct complaints may be made to the Department of Labor; civil penalties up to $10,000 are available and attorney's fees are awarded to prevailing parties.

However, under the following circumstances, an employer can legally require a worker to submit to a polygraph examination: (1) the employer is engaged in an ongoing investigation involving economic loss or injury to its business; (2) the worker to be tested had access to the

property in question; and (3) the employer has a reasonable suspicion that the worker was involved in the incident. *See Long v. Mango's Tropical Café, Inc.*, 972 F. Supp. 655 (S.D. Fla. 1997). It is important to note that neither polygraph test results nor a refusal to submit to a polygraph test can form the sole basis for discharge, discipline, refusal to promote, or any other adverse employment action, even in the case of an ongoing investigation involving economic loss. Instead, an employer must have additional evidence to support such an action. *See Mennen v. Easter Stores*, 951 F. Supp. 838 (N.D. Iowa 1997).

D.C. Law

The Prevention of the Administration of Lie Detection Procedures Act of 1978 makes it a tortious act for employers in the District of Columbia to administer a lie detector test to an employee or prospective employee. *See* D.C. Code § 32-902(a) (prohibition); § 32-903(a) (tortious act). The act excludes employees of the federal government, employees of foreign governments, and employees of international organizations defined in 22 U.S.C. § 288. § 32-901(1). There is an exception to the prohibition in cases of "any criminal or internal disciplinary investigation, or pre-employment investigation conducted by the Metropolitan Police, the Fire Department, and the Department of Corrections; provided that any information received from a lie detector test which renders an applicant ineligible for employment shall be verified through other information and no person may be denied employment based solely on the results of a pre-employment lie detector test." § 32-902(b). The act further provides that its protections cannot be abrogated through contract or an arbitration decision. *Id.*

Employers who violate this act can be punishable criminally and civilly. There is a private right of action through which an employee can recover an amount to be determined by the court, including attorneys' fees. § 32-903(d). The language of subsection (a) indicates that it is a claim in tort and that tort damages are recoverable.

D.C. Government Employees' Right to Personnel File

Under D.C.'s Whistleblower Protection Act, a D.C. government employee also has the right to view his or her "own personnel file, medical report file, or any other file or document concerning his or her status or performance within his or her agency." See D.C. Code § 1-631.01 *et seq.*

Tax Issues

Withholding Requirement

At the beginning of employment, the employer needs to determine how much money to withhold. This amount depends on how much the worker makes, whether the worker is married or has dependents, and the number of exemptions the worker chooses to claim on his or her hiring tax forms.

Workers can determine the proper amount of withholding by using a Withholding Calculator available on many websites. One of the best such calculators can be found at www.4nannytaxes.com (registration for free calculator required). This site, designed for those who employ household workers, will calculate withholding for federal, D.C., Maryland, Virginia, and several other states.

The failure to withhold taxes from wages can make the employer liable for the amount not withheld. *See* 26 U.S.C. § 6672(a); D.C. Code § 47-1812.08(f). It is the employer's responsibility to ask for a withholding exemption certificate (a W-4 form, D-4 form for D.C. taxes). If the worker fails to furnish one, then the employer must consider the person as single with no withholding. *See* 26 C.F.R. § 31.3402(f)(2)-1(a).

Definitions

Employer is defined as "the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that 1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' means the person having control of the payment of such wages, and 2) in the case of a person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the U.S., the term 'employer' means 'such person.' " *See* 26 U.S.C. § 3401(d).

Wages are defined as "all remuneration for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash." 26 U.S.C. § 3401(a); *see also* D.C. Code § 47-1801.04 (adopting federal definitions of "employer" and "wages").

Exceptions to Withholding Requirement

Taxes do not need to be withheld on numerous types of wages. The following exceptions are relevant to low-income workers:

- live-in domestic workers in a private home;
- service not in the course of the employer's trade or business of less than $50, or if paid in a medium other than cash;
- children under 18 delivering newspapers;
- other newspaper sellers (see subsection (10)(A));
- tips paid in a medium other than cash; and
- tips below $20 a month.

See 26 U.S.C. § 3401(a).

Failure to Withhold Taxes

When an employer improperly fails to withhold taxes from a worker's paycheck, the worker can file a complaint with the D.C. Tax and Revenue Office, Audit Division. The

telephone number for the office is (202) 442-6854. The worker can also report the employer to the IRS Criminal Investigation Hotline at 1-800-829-0433 (be prepared to wait 15-20 minutes for your call to be answered). A report requires the name of the business, the address (preferably the corporation headquarters), the employer tax identification number (this can be found on a W-2 form or check stubs), and name of the individual in charge of the company.

Misclassification of Worker as Independent Contractor

Employers sometimes misclassify workers as independent contractors and do not withhold taxes. If the worker completed a W-4 at the time of hiring, the worker can contact the IRS to complain at (800) 829-1040. If the worker did not complete a W-4, the worker must pay the taxes on his or her own. In D.C. and Maryland, the worker must go through the IRS as described above. In Virginia, call the state tax office at (804) 367-8031. From there, the worker will be referred to the district office to file a complaint.

Misclassified workers can also follow this procedure when filing their taxes in order to remedy the misclassification:

- complete a 1040 form (the usual tax form);
- attach a completed 4852 form, a W-2 form substitute (can be obtained from www.irs.gov);
- complete an employee's affidavit, spelling out the working relationship between the worker and employer, and showing why the worker is an employee, not an independent contractor;
- attach a completed 4137 form (Social Security and Medicare Tax on Unreported Tip Income form; also available on www.irs.gov).

Issuance of W-2s

Under D.C. law, each employer must issue a year-end statement on or before January 31 of the following year. The statement must show the name and address of the employer; the name, address, and Social Security number of the worker; the total amount of wages; and the total amount deducted and withheld as tax. *See* D.C. Code § 47-1812.08(g)(1)(A). In practice, this requirement is fulfilled by the issuance of a W-2 form. If a worker does not receive a W-2, he or she should write the employer and request it, giving the current address. If it is still not received, a worker can complete IRS Form 4852, W-2 Substitute. To get a form or to file a complaint, the worker may contact the IRS at 800-829-1040. In Maryland, the worker may also call the state tax office at 800-638-2937 and they will file a complaint.

Earned Income Tax Credit

Most low-income workers who are older than 25 qualify for the federal and D.C. earned income tax credits. However, undocumented workers who file taxes using an ITIN rather than a valid Social Security number or who file with spouses who have only an ITIN are not eligible. The Earned Income Tax Credit (EITC) is a refundable federal tax credit for eligible individuals

and families who work and have earned income under a certain threshold. (This threshold amount of income varies by tax year; for more information, visit the IRS website at www.irs.gov.). The EITC reduces the amount of tax owed by the worker, potentially resulting in a refund. Workers can also file for **advance** EITC payments using a form available from the IRS. The advance EITC allows those taxpayers who expect to qualify for the EITC and have at least one qualifying child to receive part of the credit in each paycheck during the year the taxpayer qualifies for the credit.

The IRS has information on its website that describes the EITC and how to apply for it, which can be found at www.irs.govhttp://www.irs.gov/individuals/article/0,,id=96466,00.html or by calling 1-800-829-3676.

Free help is available for preparing tax returns through VITA, the Volunteer Income Tax Assistance program operated by the IRS. To find the site nearest to you, call 1-800-TAX-1040. You may also visit D.C. EITC Campaign's website at http://dceitc.org/tax_sites.html.

Note: D.C. also has an EITC, which may be of benefit to D.C. residents.

The Civil Rights Tax Fairness Act

The Civil Rights Tax Fairness Act amends Title 47 of the District of Columbia Official Code to exclude from gross income certain amounts received on account of unlawful discrimination and to allow income averaging for back pay and front pay awards received on account of claims arising from unlawful employment discrimination. The statute enables employees who have been discriminated in the workforce to bring forth their claims without concern of severe tax penalty if their claim succeeds. If an employee succeeds on a claim of unlawful employment discrimination, D.C. Code § 47-1806.10 governs the amount of tax imposed on the back pay or front pay received by the employee for the taxable year in D.C.

The statute stipulates that if employment discrimination back pay or front pay is received during a taxable year, the tax imposed shall not exceed the tax that would be imposed if: (a) no amount of back pay or front pay were included in gross income for the year; and (b) no deductions were allowed for the year for expenses in connection with making or prosecuting any claim of unlawful employment discrimination by or on behalf of the taxpayer. § 47-1806.10(b)(1).

The statute further mandates that the tax imposed shall not exceed the sum of the product of:

(a) the number of years in the back pay period and front pay period; and
(b) the amount by which the tax determined under section § 47-1806.10(b)(1) would increase if the amount on which such tax is determined were increased by the average annual net back pay and front pay amount.

§ 47-1806.10(b)(2).

The award or settlement, however, is still subject to federal taxes, with the general

exception of attorneys' fees and prejudgment interest.

Non-Compete Clauses in Employment Contracts

District of Columbia Law

As a general rule, any restraint of trade or commerce within the District of Columbia is illegal. *See* D.C. Code § 28-4502. D.C. courts, however, are willing to enforce reasonable non-compete clauses that are narrowly tailored to protect an employer's legitimate business interests. A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if 1) the restraint is greater than is needed to protect the promisee's legitimate interest in terms of time, geographic area, or type of activity, or 2) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public. *See Venture Holdings Ltd. v. Carr*, 673 A.2d 686, 689 (D.C. 1996). The validity of non-compete clauses is determined by a rule of reason, which requires a fact-intensive inquiry that depends on the totality of the circumstances. *See Deutsch v. Barsky*, 795 A.2d 669 (D.C. 2002).

Maryland Law

In Maryland, a non-compete clause will be enforced if proven reasonably necessary to protect the employer's business, but such a clause cannot be used simply as a tool to defeat competition. *See Holloway v. Faw, Casson & Co.*, 319 Md. 324 (1990) (enforcing non-compete clause containing a 40-mile restriction, but reducing time restriction from five years to three years). Restrictive covenants that perpetuate a monopoly, unreasonably restrict a worker's ability to support him or herself, or are part of an employment contract breached by the employer are not likely to be enforced. *See Ruhl v. F.A. Barlett Tree Expert Co.*, 245 Md. 118 (1967) (enforcing non-compete preventing competition for two years in surrounding six Maryland counties).

The two main factors that will determine whether a covenant not to compete will be deemed reasonable are the temporal and geographic restrictions placed on the worker. These restrictions cannot be greater than are reasonably necessary to protect the employer and may not impose an undue hardship on the worker. *See Tuttle v. Riggs-Warfield Roloson*, 251 Md. 45 (1968) (holding agreement barring employee from soliciting employer's customers for two years reasonable). Factors weighed in determining the reasonability of the covenant's restrictions include the nature of the occupation, the skill level of the worker, the opportunity for the solicitation of the employer's customers, the public interest in enforcing the covenant, and the impact on the worker and employer. *See Budget Rent A Car of Washington v. Raab*, 268 Md. 478 (1973) (refusing to enforce non-compete against unskilled worker with little access to employer's customer data).[135]

---

[135] The most common reason for the enforcement of a covenant is to prevent the misuse of trade secrets and other confidential material essential to the employer's business. *See Becker v. Bailey*, 268 Md. 93 (1973). Low-wage workers rarely have access to this kind of data.

Virginia Law

In Virginia, covenants not to compete are enforceable if the employer shows that (1) the restraint is "no greater than is necessary to protect the employer's legitimate business interest"; (2) the restraint is not excessively severe and oppressive in restricting the employee's ability to market him or herself and procure income; and (3) the covenant does not violate public policy. *See Paramount Termite Control v. Rector*, 238 Va. 171, 174 (1989).[136, 137]

The employer has the burden of proving that a non-compete covenant is valid. *See Foti v. Cook*, 220 Va. 800 (1980). In determining the legality of the restraint, the court looks to whether the time or geographic restrictions placed on the worker are reasonable or "greater than is necessary to protect the employer's legitimate business interests." *Paramount Termite Control v. Rector*, 238 Va. 171, 174 (1989). Time restrictions are likely to be upheld if the time limit is identical or closely related to an important element in the business. *See e.g., Roanoke Eng'g Sales Co. v. Rosenbaum*, 223 Va. 548 (1982) (validating a five-year limit dealing with insurance business competition on the ground that many policies came up for renewal in either three or five years). Likewise, geographic restrictions coterminous with the territory in which the *employer* does business have been found to be reasonable. *See Meissel v. Finley*, 198 Va. 577 (1956), *but see Blue Ride Anesthesia & Critical Care v. Gidick*, 239 Va. 369 (1990) (holding invalid geographic restriction where area was limited to territory serviced by *employees*.)

Establishing proof of harm

It is necessary for the employer to show actual damage by referring to occurrences of "successful competition; it is sufficient if such competition, in violation of the covenant, may result in injury." *Worrie v. Boze*, 191 Va. 916 (1951). If the employer has proven a breach of a valid non-compete covenant, and has shown actual injury, damages are usually determined according to provisions in the covenant, which often include liquidated damage provisions. *See Foti v. Cook*, 220 Va. 800 (1980).

Preliminary injunctions

Prior to a court judgment on the validity of the non-compete clause, the employer can obtain a preliminary injunction enforcing the non-compete covenant if s/he meets the requirements set forth in *Worrie v. Boze*, 191 Va. 916 (1951):

Generally, covenants by employees not to engage in a similar or competing

---

[136] The outcome as to the exact non-compete clause in Paramount Termite Control, but not the test applied, was recently overruled in Home Paramount Pest Control Companies, Inc. v. Shaffer, 282 Va. 412, 419-20 (2011), citing subsequent refinements to the law most recently in Omniplex World Services Corp. v. U.S. Investigation Services, Inc., 270 Va. 246 (2005).

[137] Critical information concerning consumer lists, exact market share, technological projects, and plans for market expansion are even more so protected and are generally also covered by nondisclosure agreements. *See Blue Ride Anesthesia & Critical Care v. Gidick*, 239 Va. 369 (1990); *Roto-Die, Inc. v. Lesser*, 899 F.Supp 1515 (W.D. Va. 1995).

> business for a definite period of time following the termination of the contract of employment in which the covenant is incorporated will be enforced in equity unless found to be contrary to public policy, unnecessary for the employer's protection, or unnecessarily restrictive of the rights of the employees, due regard being had to the subject-matter of the contract and the circumstances and conditions under which it is to be performed.

Id. at 921.

Judicial modification

Virginia courts have generally been less inclined to adopt the **blue pencil approach** (deleting or adding words to a particular clause to make it reasonable) or the severing rule of modification (construing independent clauses independently) in circumstances where the restrictions in the covenant not to compete are unenforceable because they are overbroad. *See Roto-Die, Inc. v. Lesser*, 899 F. Supp. 1515 (W.D. Va. 1995) (declining to adopt the blue pencil approach).

Organ & Bone Marrow Donor Leave Amendment Act of 2002

The act amends the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to provide government employees leave with pay to serve as an organ or a bone marrow donor. A government employee is entitled to up to 30 days of leave to serve as an organ donor, and up to seven days of leave to serve as a bone marrow donor. *See* D.C. Code § 1-612.03b(a). Additionally, the organ or bone marrow donor may utilize this leave without loss or reduction in pay, leave, or credit for time of service. However, the law only applies if the employee is a volunteer donor, and any compensation received by the employee is limited to the costs and expenses associated with organ or bone marrow donations. § 1-612.03b(b).

The D.C. Language Access Act of 2004

The D.C. Language Act of 2004, D.C. Code § 2-1931 et seq., requires that all covered D.C. agencies, including the **Office of Human Rights (DCOHR)** and all divisions of the **Department of Employment Services (DOES)**, provide "translations of **vital documents** into any non-English language spoken by a limited or no-English proficient population" as well as oral language services to individuals seeking to "access or participate in the services, programs, or activities offered by the covered entity." §§ 2-1932(a) and 2-1933(a). "Vital documents" means applications, notices, complaint forms, legal contracts, and outreach materials published by a covered entity in a tangible format that inform individuals about their rights or eligibility requirements for benefits and participation. § 2-1931(7). The languages covered under the act are Spanish, Vietnamese, Chinese, Korean, French, and Amharic.

Workers who are trying to access services or file claims with DCOHR or the Department of Employment Services, and who speak any one of the languages covered by the act, are entitled to and should request interpretation services and/or that they receive all correspondence from DCOHR or the DOES in their native languages. Any worker who speaks a language other than English, even if not specifically covered by the act, should request oral interpretation services through language line.

Complaint Process

The D.C. Office of Human Rights is charged with enforcing this act and encourages individuals to file an informal complaint with the agency where the issue occurred prior to submitting a formal complaint. This informal complaint entails contacting the Language Access Coordinator at the agency where the incident occurred with the following information:

Agency name;
Date of incident;
Time of incident;
Location where incident occurred (*i.e.*, address); and
Name of the staff person encountered at the agency.

A list of all Language Access Coordinators and their contact information can be found on the Office of Human Rights website.

Although filing an informal complaint is an option, individuals have the right to file a formal complaint with the D.C. Office of Human Rights by completing the complaint form found on the Office of Human Rights website (www.ohr.dc.gov). Complaints can be filed online, in person, or mailed to the Office of Human Rights, 441 4th St. NW, Suite 570 North, Washington, DC 20001. If the worker does not wish to file a complaint, organizations and/or advocates may file a complaint to report the violation.

Discrimination claims may be filed with the Office of Human Rights if the individual feels he or she has been directly harmed by the agency based race, color, or national origin as a result of the denial of language access. To file a discrimination complaint, please refer to the Discrimination section of this manual.

Social Security No-Match Letters

A "no match" letter is a letter sent out from the Social Security Administration (SSA) to an employer and/or an employee who has submitted documents that the SSA has determined contain names and Social Security numbers that do not match SSA records. Common errors resulting in a no-match letter include: incorrect name or SSN, misspelled names, using nicknames or shortened names, using titles before or after the name, hyphenated names, and name changes. If a worker receives a no-match letter, or if a worker becomes aware of a mismatch by being notified by his employer, the worker should first ask his or her employer for a copy of the letter received by the employer.

If the employee wants to correct the mismatch, the employee should go in person to his local SSA office with identification and Social Security card if possible, to submit any corrections to the SSA. If the employee works in a unionized workplace, s/he should talk to his or her union steward for assistance on no-match issues. The collective bargaining agreement between the union and the employer often will provide the best protection for the employee who is the subject of the no-match letter.

The employer is not required by the SSA to take any action regarding the no-match letter, even if the worker does not provide corrected information. SSA asks employers to respond to no-match letters ONLY if they or their employees have corrected information.

An employer may not lay off, fire, suspend, intimidate, discriminate, or threaten an employee just because his or her name appears on a no-match letter. A no-match letter, by itself, does not constitute notice that a worker is not authorized to work. Further, an employer cannot request that an employee provide additional documentation just because it has received a letter from the SSA about a mismatch. Employers may not require employees to re-verify their work authorization based only on receiving a no-match letter. See www.nelp.org; see also, www.ssa.gov.