Over the past 35 years the Institute for Labor Studies and Research has delivered a wide variety of high quality education and training programs to more than 150,000 working Rhode Islanders with the goal of improving their lives and those of their families.

The Rhode Island Guide to Employment Law is one of the primary publications that we have used over the years as a resource in designing and delivering many of our customized programs. As well, the Institute has sent hundreds of copies of the guide, to teachers and college faculty throughout the state as a resource to be used in their classroom.

This is the third edition of the guide and the Institute for Labor Studies and Research is very proud to again have had the opportunity to collaborate with the author John Leidecker in this recent update.

This edition has also had a thought provoking addition from the Rhode Island Labor History Society. Inside you will be able to read an insert of a few notable moments in Rhode Island Labor History.
The Rhode Island Labor History Society was formed in 1987 to preserve and promote the history of working people and their organizations in the Ocean State. We host programs and activities that highlight important events for the working class, immigrants and labor unions. We sponsor trips to the Museum of Work and Culture, provide cash awards for students doing labor projects at the annual History Day Fair, and host an annual Labor Day speech.

Our annual summer banquet honors local labor leaders and activists. Since 1987, more than 100 men and women have received our award. The banquet is normally held in late August at the Roger Williams Park Casino in Providence.

Below are a few highlights of notable moments in Rhode Island Labor History. Information was derived from the RILHS publication A History of Rhode Island Working People edited by Paul Buhle, Scott Molloy and Gail Sansbury and a timeline of Rhode Island Labor History prepared by Ryan McIntyre. If you want more information about Rhode Island Labor History, or to get a membership application, visit our website at www.rilaborhistory.org.
HIGHLIGHTS OF RHODE ISLAND LABOR HISTORY

First Trade Organizations – In 1752, maritime workers in Providence formed the “Fellowship Club of Rhode Island” to provide relief for distressed workers, their widows and children. In 1760, masons in Newport published rules of work. In 1796, carpenters in Providence revised their rules of work. On March 24, 1757, six cabinetmakers in Providence updated an agreement that set prices for their work.

Providence Association of Mechanics and Manufacturers – On February 27, 1789, a group of workers in different trades came together to form an organization to protect their crafts and improve their way of life. The Providence Association of Mechanics and Manufacturers was chartered by the Rhode Island General Assembly on March 16, 1790. The group consisted of hat makers, tinsmiths, cabinetmakers, printers, blacksmiths, coppersmiths, store clerks, clothiers and hairdressers. The organization promoted home manufacturing, created a fund for the distressed, favored public education and temperance, and lobbied the General Assembly over work issues.

Industrial Revolution and Child Labor – In 1790, Samuel Slater built the first factory in the United States on the Blackstone River in Pawtucket. His cotton mill was run by nine workers, seven boys and two girls, who were all under age 12.
Pawtucket Turnout of 1824 – In the Spring of 1824, a week-long strike closed 8 cotton mills in Pawtucket. The strike was the first known strike in Rhode Island and the first strike in the country that was led by women. The weavers struck to protest an increase in hours and a reduction in pay that had been coordinated by the local mill owners. The newspaper called it a riot and the workers called it a turn-out. A fire was set at one of the mills. The community protested in support of the workers. On June 6, 1824 a settlement was reached and the workers returned to the mills.

Seth Luther – Labor Activist – Born in 1795 in Providence, Seth Luther was a carpenter by trade, but was widely known as a forceful labor advocate. In 1832, he was part of a delegation asking the Governor to support a ten hour work day. Four of his speeches were published. In 1834, he and William Tillinghast, a barber, helped found the Providence Workingmen’s Association. He also helped found the Trade Union of Boston and Vicinity and was active in the National Trades Union. In 1841 he was a spokesperson for the movement to get rid of property ownership as a voting requirement. He was arrested and imprisoned after the Dorr War. In his later years, he was institutionalized at several places included Butler Hospital and the Vermont Asylum (now Brattleboro Retreat) where he died and was interred.

The Dorr War – In the 1830s, most workers could not vote because they did not own sufficient property. Labor advocates such as Seth Luther and William Tillinghast organized efforts to end the practice with Harvard-educated lawyer Thomas Wilson Dorr. In December, 1841, the reformers held their own election and ratified the People’s Constitution. Rhode Island had two Governors and two state governments. The Dorrites tried to seize the Dexter Street Armory in Providence. Dorr was arrested and spent a year in prison. Some reforms were made by the conservatives, allowing poor native-born and blacks to vote but not immigrants. Property restrictions were not lifted for state elections until 1888 and local elections in 1928.
Granite Cutters – In July, 1887, Granite Cutters organized a union in Westerly. The 500 members belonged to the Granite Cutters National Union. The organization provided a $125 funeral benefit. In the 1890s, quarry workers were paid $2.50 / day for a ten hour, six day workweek.

Black Bridget Strikes – On May 9, 1858 workers at the Georgiaville Mill in Smithfield joined a regional strike at textile mills. Workers at the Arctic Mill (West Warwick) and Quidnic Mills (Coventry) were successful in having prior wage cuts reversed. The strike also reduced prices by 25% at the company stores that workers were forced to use. The workers at Georgiaville settled nine days later without a pay raise. On March 24, 1859 eight Irish women, led by one known as “Black Bridget”, led a strike for higher wages. They were fired and Black Bridget and her sister were thrown out of the company housing.

America’s Fist Labor Day Parade – On August 23, 1882, a thousand union members paraded through downtown Providence. This parade pre-dates the September 5, 1882 parade by 10,000 workers in New York City. The Rhode Island parade included tailors, boilermakers, blacksmiths, Knights of Labor, and 48 members of Carpenters Local 94. After the parade, 5,000 boarded steamboats to Rocky Point in Warwick. Peter McGuire, a founder of the AFL, was the featured speaker. Labor Day became a holiday in Rhode Island in 1893.

Knights of Labor – Workers joined different organizations to agitate for a ten hour day and increased wages. The Knights were involved in social and political work throughout the state in the 1880s. They operated a day care center in Olneyville. A labor paper The People was published. The Knights of Labor organized all kinds of workers in Rhode Island including textile operatives, shoemakers, rubber workers and machinists.
Rhode Island AFL – On March 27, 1884 in Providence, the Rhode Island Central Labor Union was founded. The statewide organization was founded by delegates from workers affiliated with national organizations, three socialist societies and the Knights of Labor. By 1890, 17 unions were part of the Rhode Island Central Labor Union composed of about 3,000 workers.

Streetcar Strike – On June 4, 1902 700 workers went on strike against the Union Railroad Company owned by U.S. Senator Nelson Aldrich. They struck for a union shop, the arbitration of grievances, and a ten hour day. Riots broke out. Pawtucket Mayor John Fitzgerald declined to use the city police to protect company property. The Governor mobilized 1,000 state militia to suppress the strike and the growing community support of the strikers. Union members caught riding streetcars were fined by their local union. The strike ultimately failed though the workers organized a permanent transit union a decade later.

Providence Bishop Arbitrates Dispute – on June 1, 1906, Episcopal Bishop Right Reverend William N. McVickar acted as an arbitrator in a wage dispute between Carpenters Union and the Master Builders’ Association. Bishop McVickar awarded carpenters the 2 ½ cents per hour increase they sought. 1,400 workers benefited from the new hourly rate of 37 ½ cents per hour.

Industrial Workers of the World – the IWW had a strong presence in Rhode Island after the successful 1912 “Bread and Roses” strike in Lawrence, MA. Early supporters were from the Italian Socialist Federation and the Karl Marx Circle in Federal Hill. The IWW let a strike at Esmond Mill (Smithfield) in 1913. Strikes occurred in Pawtucket, South Kingstown, Centerdale (North Providence), Thornton (Johnston), Warren, Woonsocket, Berkeley (Cumberland) and Olneyville. IWW members participated in protests that led to a food riot on Federal Hill in 1914.
James Reid – Working as bobbin boy in textile mills, James Reid rose to become Secretary of the National Textile Union in 1896. The union was headquartered in Providence. After the union folded due to blacklisting and economic pressure, he became a dentist and worked in Olneyville. Reid was active in the IWW and the Socialist Party led by Eugene V Debs. As a Socialist, he was elected to the Rhode Island General Assembly in 1911, where he championed labor legislation. He was President of a new National Textile Workers Union headquartered in Providence in 1928.

1922 Textile Strike – On January 23, 1922, textile workers at the Royal Mills in Warwick struck to protest an increase in hours and a 20% pay cut. Workers at other mills joined the effort over the next eight months. A striker was killed in Pawtucket. Some wages were increased but the work week remained at 54 hours instead of the 48 hours sought by the strikers.

Saylesville Massacre, Social District Riots – A nationwide textile strike was called by the United Textile Workers on September 3, 1934. Many textile workers in northern Rhode Island participated in the strike. Two workers were killed by National Guardsmen in riots around the Moshassuck Cemetery in Central Falls. Two others were killed in the riots in the Social District in Woonsocket on September 11. The National Guard used tear gas to suppress the strikers. The UTW called off the strike two weeks later.

Pawtucket Teacher Strike – A sixteen week teacher strike ended on August 31, 1951 in Pawtucket. Teachers sought an increase in pay, and won higher wages as part of the strike settlement. The contract also prohibited a walk-out over wages for a four year period while permitting the Pawtucket Teachers’ Alliance to strike over unresolved grievances over the summer and into the new school year.
**Public Sector Bargaining** – Private sector workers won statutory right to bargain with the passage of the National Labor Relations Act in 1935. The federal law did not include public sector workers, who had to obtain their own state laws. In 1961, Rhode Island Firefighters obtained collective bargaining rights. Following the Firefighters, State Police (1963), Teachers (1966), Municipal Workers (1967) and State Workers (1972) won passage of bargaining laws governing union recognition and dispute resolution.

**IMH Strike Fatality** – On November 9, 1974, a striking AFSCME member Wilma Schesler was struck and killed while walking a picket line in Cranston. AFSCME members were on strike at the Institute of Mental Health and other state facilities. A road in the state government complex was named after Ms. Schesler.

**Brown and Sharpe** – On March 29, 1982 tear gas is used against strikers and their supporters during a strike at the Brown and Sharpe plant in North Kingston. The Machinists had struck Brown and Sharpe (then located in Providence) in 1915.

**Warwick Teacher Strike** – On September 12, 1992, Judge Pederzani ordered 18 striking Warwick teachers to jail for failing to obey his back-to-work order. The strike occurred after the School Committee failed to live up to a tentative agreement and later unilaterally imposed contract changes.
A RHODE ISLAND GUIDE TO EMPLOYMENT LAW

Written, compiled, and edited by:
John Leidecker, Esq.
With assistance from the Rhode Island Institute for Labor Studies and Research

Third Edition 2015
Rhode Island Institute for Labor Studies and Research
99 Bald Hill Road, Cranston, RI 02920
401-463-9900 Fax 401-463-8190 e-mail: info@riilsr.org
Additional copies can be e-mailed or mailed at your request.

Note: All laws are subject to change, varying interpretation, and may have exceptions. Therefore, the Rhode Island Institute for Labor Studies and Research does not guarantee the accuracy of any laws listed within.

WE STRONGLY URGE YOU TO CALL THE APPROPRIATE AGENCIES LISTED IN EACH CHAPTER OR AN ATTORNEY TO FIND OUT MORE ABOUT THE LAW AND HOW AND WHETHER IT APPLIES TO YOUR EXACT SITUATION.

Preparation of this guide was supported in part by a grant from the Rhode Island Department of Labor and Training. The opinions expressed herein do not necessarily reflect the policy of the Rhode Island Department of Labor and Training.

This guide has been an effort of the Institute for many years. We would particularly like to thank John Leidecker for his commitment and dedication, and the many hours he donated to the Institute in revising this guide. His hard work and expertise have been invaluable to both editions.
# A RHODE ISLAND GUIDE TO EMPLOYMENT LAW

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ABOUT THIS GUIDE

This third edition of *A Rhode Island Guide to Employment Law*—like the first & second editions—represents the collective and collaborative efforts and contributions of many people. We are indebted to the assistance of the staff of the Institute for Labor Studies and Research. In addition, many attorneys and government officials have contributed to the writing and editing of this book. Below is a list of people who have contributed to the manual in significant ways.

We are particularly indebted to the Bureau of Labor Education of the University of Maine for giving us permission to use their *Maine Guide to Employment Law* as the model for this manual. We have, with their permission, borrowed heavily from their guide, both in format and in content.

We use the question-and-answer format in the belief that it enables us to present complex employment laws and issues in easy-to-understand language. Our objective is to provide important legal information on employee rights, responsibilities, and protections in the workplace.

**Attorneys and others knowledgeable about these laws, along with government officials responsible for enforcing these statutes, have reviewed this publication for legal sufficiency, accuracy, and clarity. However, employment law is a body of law that constantly changes through legislative and congressional actions and decisions derived from both judicial and administrative rulings. Therefore, it is particularly important to consult appropriate authorities regarding any developments in these laws. Also, since this book is only a guide, it cannot in any way be substituted for competent legal advice, which can be obtained from attorneys, state and federal government officials, and leaders of employee organizations.**

While we have attempted to be accurate and have everything double-checked, we may have made some errors or omissions. We would appreciate your comments, criticisms, feedback, and questions so that we can improve the guide for future editions or updates. Comments, etc. should be emailed to: John Leidecker (johnleidecker@verizon.net).

Finally, we wish to acknowledge the following individuals whose consultation, review, and information were extremely helpful in the revisions of this publication:

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Jeanette Woolley
Derek Hallam, MPA
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Kyle St. Pierre
SOME PRACTICAL TIPS FOR EMPLOYEES

What follows is an overview of the many statutes and regulations, court decisions and agency rulings that govern the workplace. Our focus is on the protections these laws and rulings provide workers and the rights that workers derive from them. More often than not the workplace functions well, the laws are adhered to, and there are no problems. But sometimes problems do arise and what you know - in terms of your rights - may make all the difference in the world.

But it is not enough to merely know your rights. Successfully protecting your rights may also depend on the records you maintain. Whether the issue is an injury on the job or unlawful discrimination by a fellow worker or a claim that the employer has violated the collective bargaining agreement, the information you record will be critical - especially if the attempts to resolve the matter occur many months, or even years, after the events at issue occurred.

The authors of this book suggest, as a practical matter, that when you are faced with what you believe is a violation of your workplace rights, you begin to maintain a contemporaneous record. Doing so will help avoid the inevitable problems that occur when memories fade, co-workers leave employment, and paperwork is lost. Whether it is you, your union steward, or your attorney that addresses the problem - whether your forum is before a grievance coordinator, an arbitrator, a judge, or a hearing officer - the contemporaneous record you compile will be invaluable.

Once again, it is important to record relevant information immediately. We recommend that you maintain your records in a safe and secure place. Not necessarily in the workplace. Use the following checklist to help develop a complete record for later use.

<table>
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<tr>
<th>What happened?</th>
<th>When did it happen? Did the problem recur on different occasions?</th>
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<td>Who was involved?</td>
<td>What was said? Who said it? What was done?</td>
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<tr>
<td>Who were the witnesses?</td>
<td>Were witness statements taken? Do you have copies?</td>
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<tr>
<td>Do you have phone numbers and addresses of witnesses?</td>
<td>Was this problem brought to the attention of a supervisor? To the attention of an agency? If so, when? What were the results?</td>
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<tr>
<td>Do you have any written records?</td>
<td>Do you have notes from meetings with the employer or the employer’s representative? Did an agency representative contact you?</td>
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<tr>
<td>Employee handbooks?</td>
<td>Do you have notes from any grievance hearings?</td>
</tr>
<tr>
<td>Memoranda? Letters?</td>
<td>Do you have all necessary medical records?</td>
</tr>
<tr>
<td>Policies? Pay stubs?</td>
<td>Do you have any receipts for your out-of-pocket expenses?</td>
</tr>
<tr>
<td>Did you see a doctor or visit a medical clinic?</td>
<td>Are there videotapes or photos that are relevant and available?</td>
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CHAPTER I
EMPLOYMENT-AT-WILL

Most people will spend a significant portion of their lives working. It is estimated that there are nearly 140 million people working in the United States today. In Rhode Island workers fill more than 484,000 non-farm jobs. While work relationships are defined by a myriad of federal and state laws - some of which apply to some workers and some of which apply to all workers - any analysis of employment law must begin with the doctrine of employment-at-will. Employment-at-will has a fairly long history in the United States, dating back to the 1800’s. Perhaps more important is the fact that it is the presumed employer-employee relationship in the United States absent any evidence of any other form of employment relationship.

What is employment-at-will?

Employment-at-will is a common law (judge-made law) doctrine that defines the employer-employee relationship. It permits the employer wide latitude in deciding how he or she will conduct business, including whom he or she will employ and for how long. With respect to discharges, the employment-at-will doctrine provides for the termination of employment by either the employer or the employee at any time and for almost any reason. At-will employment is contrasted with employment governed by a contract for a definite term or employment covered by a collective bargaining agreement.

Is an employer required to explain why an at-will employee is being terminated?

No. Employers terminating an at-will employee are not obligated to give any reasons for the termination. Employment-at-will was typically understood to mean that an employer did not have to give any reason for firing an employee and was permitted to do so for “good reason, bad reason, or no reason at all.” Indeed, Rhode Island courts have long held that “a contract to render personal services to another for an indefinite term is terminable at the will of either party at any time for any reason or no reason at all.” Roy v. Woonsocket Inst. For Savings, 525 A.2d 915 (R.I. 1987).

Often, at-will employees assume – having heard the term just cause – that an employer must have a good reason for terminating an employee and demonstrate that reason before terminating the employee. That is not the case. Just cause is a creation of contract – typically collective bargaining agreements – with a specific meaning that has developed over a period of years primarily in the unionized setting. See discussion of just cause on page 44.

A fuller explanation of the employment-at-will doctrine must take into account changes in the law. Perhaps better stated is that an employer is permitted to terminate an at-will employee for “good reason, bad reason, or no reason at all, but not an illegal reason.” This definition recognizes those limits (such as illegal discrimination, whistleblower protections, etc.) imposed by the law. These topics are discussed in subsequent chapters.

Do at-will employees have any protections?

Yes, but most of these protections derive from restrictions imposed by statutes. For instance:

- Federal and state discrimination laws prohibit discharging employees because of race, color, gender, creed, or national origin, or because an employee is older. Rhode Island law extends this protection to stop discrimination based on sexual orientation and gender identity or expression.
- Federal and state disability laws make it illegal for employers to discharge workers with disabilities in most instances simply because of their disability.
- OSHA laws prohibit retaliation against employees who file safety complaints.
- The Whistleblower statute prohibits retaliation against employees who report employer violations of various laws.
- Federal and state labor relations acts prohibit discharging employees engaged in certain concerted activities in order to improve their terms or conditions of employment.

This is not meant to suggest that employees in an at-will situation are immune from an employer’s unlawful acts. Some employers will intentionally violate the law and take their chances in court, assuming that the employee even has the time and the resources to bring suit. Some employers may unwittingly violate the law. But the laws mentioned above do provide an employee with some protection and provide a mechanism for relief when terminated unlawfully.
It is also possible that the \textit{at-will} employee may find that some of his or her rights will not be adjudicated in court, but will be decided through arbitration. This depends on whether the employee agreed to arbitrate work-related claims - perhaps by signing an employment application when commencing employment which contains an agreement to arbitrate employment-related disputes. See \textit{Circuit City Stores Inc., v. Adams}, 532 U.S. 105 (2001).

\textbf{Apart from the statutory restrictions, do employees-at-will have any other protections?}

Employees who believe that their terminations were unlawful have brought suit using several theories. (Cases sited from other jurisdictions are intended to provide illustrations of certain theories mentioned in the text and are not binding on Rhode Island courts.) In Rhode Island, plaintiffs have met with limited success. The theories include:

- \textit{Covenant of Good Faith};
- \textit{Implied Contract Theory};
- \textit{Wrongful Discharge Based On Public Policy}; and
- \textit{Tortious Interference With Contractual Relationship}.

\textbf{What does the \textit{Covenant of Good Faith} mean?}

The critical issue in suits based on a violation of the \textit{Covenant of Good Faith} is employer honesty and whether the employer sought to avoid certain obligations due the employee - such as a firing motivated by the employer’s desire to avoid paying a sales commission to an employee. \textit{Fortune v. National Cash Register Co.}, 364 N.E.2d 1251 (MA. 1977) Where courts have rejected the doctrine it has been because it was viewed as an attempt to place a \textit{just cause} requirement on the employment relationship. The Rhode Island Supreme Court has yet to embrace this theory.

\textbf{What does an \textit{Implied Contract Theory} mean?}

The \textit{Implied Contract Theory} generally involves employee handbooks or personnel policies and the contention that the handbook (or policy, practice, memo, etc.) created a contractual right which the employer violated when terminating the employee. In short, this theory holds that a contract can be inferred from the conduct of the parties.

The Rhode Island Supreme Court has indicated that a plaintiff relying on this theory will bear the burden of demonstrating that the employer’s policies, practices, procedures, or employee memoranda “give rise to a reasonable belief that [the employee] was anything other than an \textit{at-will} employee.” A mere belief on the part of the employee and nothing more will be insufficient to establish an implied contract. \textit{DelSignore v. Providence Journal}, 691 A.2d 1050 (R.I. 1997). The Court has also held that an employer had no contractual obligation to provide severance benefits outlined in the employee handbook to a terminated employee where the handbook expressly stated that it was not intended to be a contract and reserved to the employer the right to unilaterally change benefits. \textit{D’Oliveira v. Rare Hospitality International, Inc.}, 840 A.2d 538 (R.I. 2004)

\textbf{What does a \textit{Wrongful Discharge Based On Public Policy} mean?}

An employee, who claims that his or her termination amounted to a \textit{Wrongful Discharge Based On Public Policy}, generally alleges that he or she was terminated for having exercised a right or duty created under a statute. Courts typically have required that the public policy upon which the terminated employee relies be express and explicit. So, for example, a termination because an employee missed work because she served on jury duty or because he was away on National Guard duty would likely constitute a wrongful discharge based on a clear public policy.

In the relatively few instances where the Rhode Island Supreme Court has considered this issue it has read the public policy exception narrowly.

\textbf{What does \textit{Tortious Interference With a Contractual Relationship} mean?}

\textit{Tortious Interference With a Contractual Relationship} speaks to conduct on the part of a third party which induces one party to break a valid contract it has entered into with another party. The elements of the tort include:

1. the existence of a business relationship or an expectancy,
2. knowledge by the interferor of the relationship or expectancy,
3. an intentional act of interference,
4. proof that the interference caused the harm sustained, and
5. damages to the plaintiff.

Legal malice, that is, a malice that evidences an intent to do harm without justification – though not necessarily spite or ill will – is required. Once the plaintiff establishes these elements the burden shifts to the defendant to prove that there was sufficient justification for his or her interference. Toste Farm Corp. v. Hadbury, Inc., 798 A.2d 901 (R.I. 2002)

Example: A is employed at-will by B. The relationship is good and A has received good evaluations and regular raises. C has a personal grudge against A’s father. C brings this grudge to B’s attention, and suggests to B that A – who has nothing whatsoever to do with the grudge – may be disloyal to B. C encourages B to terminate A’s employment and B does so.

Rhode Island courts recognize this tort and have concluded that an employee’s at-will status “would not and could not permit a third party . . . to interfere with an existing employment relationship, which but for [the interference], may have gone on indefinitely.” D’Andrea v. Calcaigni, 723 A.2d 276, 278 (R.I. 1999)

What does employment-at-will mean with respect to workplace rules?

As it pertains to private businesses and where there is no contract or collective bargaining agreement defining the work relationship, employers can establish almost any workplace rules they choose, unless restricted by other law. Many of these laws limiting an employer’s discretion (i.e., FLSA, OHSA, FEPA, Title VII, etc.) are discussed in subsequent chapters.

Lawful employer rules can range from establishing employee dress codes and absenteeism policies to the regulation of certain on-the-job conduct (such as smoking). And while some employers may try to regulate off-the-job conduct, generally they have had less success with such efforts.
CHAPTER II
EMPLOYMENT DISCRIMINATION

Discrimination occurs in a variety of ways in daily life, including employment. Some employment discrimination is lawful and necessary (such as prohibiting the employment of minors in certain occupations or before or after a particular hour of the day). Most discrimination, however, whether intentional or otherwise, is based on factors such as race, gender, national origin and religion, and has resulted in people who are discriminated against constituting a disproportionate share of those living in poverty. Over the years the law has begun to address these inequities.

What is employment discrimination?

Employment discrimination refers to unlawful discrimination in employment. This occurs when a person is treated differently than others in the employment relationship on the basis of race, color, religion, national origin, sex, age, physical or mental disability, and, in Rhode Island, on the basis of the employee’s sexual orientation and gender identity or expression. State and federal anti-discrimination laws protect certain categories of workers who have traditionally been excluded from employment opportunities. Each of these categories constitutes what the law refers to as a protected class. Both federal and state laws prohibit unlawful discrimination, but they do not require an employer to hire members of a protected class if they are not qualified for a job.

For discrimination to be illegal, the person must belong to a protected class, and the discriminatory treatment must be based on this fact. And while other types of discriminatory treatment (for example refusing to hire someone with body piercings) may not seem illegal (since people with body piercings are not a protected class under the law), employers may run afoul of the law if the discrimination is based on a characteristic or appearance common to certain protected groups.

What laws protect Rhode Island workers?

Both federal and state anti-discrimination laws cover Rhode Island workers. The federal laws (which also include presidential executive orders) include:

- Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.)
- Executive Order 11246 of 1965 (3 C.F.R. Pt. 1964)
- Age Discrimination in Employment Act (29 U.S.C. §§621 - 634)
- Americans with Disabilities Act (42 U.S.C. §§12101, et seq.)
- Fifth and Fourteenth Amendments to the U.S. Constitution

The Rhode Island laws protecting workers are similar to the federal laws and provide workers with additional legal protection. These laws include:

- Fair Employment Practices Act (R.I.G.L. §§28-5-1, et seq.)
- Civil Rights of Individuals with Disabilities Act (R.I.G.L. §§42-87-1, et seq.)
- Sexual Harassment, Education and Training in the Workplace (R.I.G.L. §§28-51-1, et seq.)
- Rhode Island Civil Rights Act of 1990 (R.I.G.L. §§42-112-1, et seq.)
- Protections for employees who are HIV positive or perceived to be HIV positive (R.I.G.L. §§23-6-22 - 23-6-23)
- Rhode Island Constitution, Art. I, §.2

Do these laws apply to all employers?

For the most part, yes, but not all employers or employees are covered. Each law has particular requirements that must be satisfied for the law to apply, and many of the laws list employer-types or jobs that are excluded from coverage.

For example, the Fair Employment Practices Act applies to all employers employing four or more individuals. Title VII sets the minimum threshold at fifteen employees. The Age Discrimination in Employment Act (ADEA) applies to employers with at least twenty employees. Other laws have no minimum threshold number of employees.
Once again, not all laws cover all workers. Certain workers are excluded from the protections of some laws. People employed in domestic service are not covered under the Fair Employment Practices Act. *Title VII* doesn’t cover independent contractors. And while *Title VII* prohibits religious discrimination, generally, the law does not cover workers in religious institutions. Finally, the *ADEA* only applies to employees 40 years of age or older. By and large, however, the laws are broad enough to encompass most employers and most workers.

**With respect to unlawful discrimination, does the term employees include former employees?**

Under *Title VII*, the answer is yes. This enables former workers to take advantage of *Title VII*’s remedial mechanisms.

With respect to other laws, it is advisable to check the definitions provided in each law. In addition, it is important to determine whether courts, when construing the law, have extended it in order to cover former employees.

**Do these laws cover temporary employment agencies?**

Yes. Temporary employment agencies are generally covered under antidiscrimination statutes. Temporary help will typically qualify as employees of the agency, the client firm, or both. Neither the temporary employment agency nor the client firm may discriminate against workers on the basis of race, color, religion, sex, national origin, age, or disability, and, in Rhode Island, on the basis of sexual orientation and gender identity or expression.

But a critical inquiry as to whether the worker is a covered employee under these statutes concerns the control of the means and manner or work. If the control of the means and manner of work rests with the temporary employment agency and/or its client, then the worker is a covered employee.

**What are the basic provisions of the Civil Rights Act?**

The *Civil Rights Act* prohibits discrimination in employment based on race, sex, color, religion or national origin. The term *employment* covers recruitment, hiring, job classifications, transfers, training, promotions, compensation, and discharge. Most employers, including individuals, corporations, labor unions, partnerships, trusts and government, must comply with the provisions of the law.

**What protections does the Rhode Island Fair Employment Practices Act provide?**

The protections provided by the Rhode Island *Fair Employment Practices Act* are very similar to those provided for in the federal *Civil Rights Acts*. Like the federal laws, the Rhode Island law prohibits discrimination in employment based on an individual’s race or religion, color, disability, age, ancestry, and sex. And, as noted above, the *Fair Employment Practices Act* also prohibits discrimination based on sexual orientation and gender identity or expression.

Rhode Island’s *Fair Employment Practices Act* also provides that an employee who has presented a complaint of harassment (based on race or color, religion, sex, disability, age, sexual orientation, gender identity or expression, or country of ancestral origin) to his or her employer, with the right to learn the outcome of the employer’s investigation. This includes the disposition of the complaint, including a description of any action taken in resolution of the complaint. R.I.G.L. §28-5-7(1)(v)

**What protections does the Rhode Island Civil Rights Act provide?**

The Rhode Island *Civil Rights Act* also provides employees with extensive protections against discrimination in employment. An important distinction between the R.I. *Civil Rights Act* and the R.I. *Fair Employment Practices Act* is in access to the courts. Under the R.I. *Civil Rights Act*, an employee may file a discrimination suit without having exhausted administrative remedies. The *Fair Employment Practices Act* requires employees alleging discrimination in employment to file a charge with the Rhode Island Commission for Human Rights and wait at least 120 days before filing suit in Superior Court. (The administrative procedures are detailed toward the end of this chapter.)

**What kinds of discrimination do the civil rights laws cover?**

The civil rights laws prohibit two kinds of discrimination: *Disparate Treatment* and *Disparate Impact*. 

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Disparate Treatment refers to intentional discrimination. Discriminatory conduct may be clearly stated (for example, an employer who says, “We don’t hire disabled workers,” or “I don’t put blacks into management positions,” has engaged in overt intentional discrimination), but in most cases of discrimination the discriminatory reason will not be given. The discriminatory treatment happens, nonetheless. Discrimination of this sort is more difficult to prove. Sometimes a pattern of discriminatory treatment can be shown.

For instance, an employer’s demonstrated pattern of:

- laying off women with more seniority than men;
- refusing to promote Hispanic-Americans or people with disabilities to management positions; or,
- forcing older workers into retirement

may evidence illegal discrimination.

There are very rare occasions when an employer’s intentional discrimination is lawful. An employer can legally exclude certain protected groups from employment opportunities when the characteristic, which would otherwise be an unlawful requirement, is a bona fide occupational qualification (BFOQ) for the job. That is, where the classification is a business necessity. The Rhode Island Human Rights Commission must certify any BFOQ. R.I.G.L. §28-5-7(4).

Disparate Impact refers to discrimination evidenced in the results of facially neutral employment policies and practices where discrimination was never intended. Where a job requirement looks neutral on its face, but has the effect of discriminating against a protected group of workers, the employer must prove that the requirement is job-related and governed by principles of business necessity.

Example: If an employer has a height requirement that has the effect of excluding a disproportionate number of women, the employer must prove the requirement is necessary for the performance of the essential functions of the job. If there are ways to select qualified applicants that are less discriminatory, then the policy is illegal.

Any worker who suspects discrimination is the reason for an employer’s action should contact the R.I. Commission for Human Rights (at 401-222-2661) or the Equal Employment Opportunity Commission (at 617-565-3200 or 800-669-4000).

Can an employer or employment agency ask questions about age, nationality, race or gender?

Generally, questions in this area are impermissible under both federal and state law. Rhode Island’s Fair Employment Practices Act specifically prohibits employers and employment agencies (and other organizations), prior to employment, from eliciting or attempting to elicit any information pertaining to an individual’s race, color, religion, gender, disability, age, sexual orientation, gender identity or expression, or country of ancestral origin. For a more detailed discussion of employer questions pertaining to an individual’s disability, see the discussion on disability laws below.

Examples of impermissible questions are:

- What is your race?
- What is your nationality?
- Where were you/your parents born?
- Are you a member of a church?
- What religious holidays do you observe?
- What is your birth date?

There are a couple of exceptions to this general prohibition, however. First, an employer or employment agency may ask an applicant if he or she wishes to voluntarily identify himself or herself as a minority in order to assist the employer or the employment agency in meeting affirmative action goals. But any information so obtained must be placed on a record that is maintained separately from application materials. Second, if the job at issue is illegal for minors, an applicant may be asked if he or she is of legal age.

What is color bias?

Color bias or color discrimination - a separate protected category under Title VII, but often asserted with a charge of race discrimination – occurs when an employee suffers discrimination by an employer of the same race because the employee’s skin is either lighter than or darker than the employer’s. The EEOC anticipates an increase of allegations of color discrimination given the changing demographics of the American workplace. Color discrimination not only affects African-Americans, according to one
EECO Vice-Chair, but cultures in India and Pakistan and in South America.

**Can an employer or employment agency ask applicants about marital status or child-care plans?**

Except as it pertains to the federal government as an employer, and, therefore, only with respect to federal employees, neither federal nor state law expressly prohibits questions about marital or familial status, but these questions tend to come so close to the line, that the person asking may easily tread into prohibited territory.

The difference between:

- How many children do you have?
- Do you have children that are not in school? and,
- Who looks after your children for you?

and

- What days and hours can you work?
- Are there any specific times that you cannot work? and,
- Would you be available for job related travel?

is that the former questions don’t focus on the legitimate requirements of the job, whereas the last three do.

Certainly asking only female applicants about child-care arrangements would be unlawful. And if a potential employer were to ask both male and female applicants about child-care arrangements, but used the information to disqualify only female applicants, such conduct would also be unlawful.

Also, if an employer’s policy on child-care screened out a significantly higher percentage of female applicants and was not justified by *business necessity*, the policy, too, would be unlawful.

Federal employees can rely on the express prohibitions against discrimination based on marital status contained in Executive Order 13087, Executive Order 13152 and the Civil Service Reform Act of 1978 (CSRA) for protection. The CSRA expressly prohibits (in addition to other categories) discrimination in federal employment based on marital status or conduct which does not adversely affect the performance of the applicant or employee.

Executive Order 11478 prohibits discrimination in federal employment based on race, color, religion, sex, national origin, handicap, or age. Executive Order 13087 added a prohibition based on sexual orientation and Executive Order 13152 further amended the original order to prohibit discrimination based on an individual’s status as a parent.

**Can an employer or employment agency ask applicants about citizenship?**

As is the case with marital or familial status, neither *Title VII* nor the state’s *Fair Employment Practices Act* specifically prohibits discrimination on the basis of citizenship status. While questions about citizenship do not expressly violate these laws, they do run the risk of serving as a pretext for prohibited discrimination (for example, discrimination on the basis of national origin).

However, the *Immigration and Nationality Act (INA)* as amended by the *Immigration Reform and Control Act of 1986 (IRCA)* (Pub. L. 99-603 of 1986), does prohibit employment discrimination on the basis of citizenship status against certain *protected individuals*, namely, citizens and nationals of the United States, lawful permanent residents, temporary residents and persons who have been granted asylum or refugee status. The law does not cover individuals who are not lawfully authorized to work in the United States.

Employers with four or more employees are covered by *IRCA*, which is enforced by the Department of Justice – Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices. Covered employers may limit employment to United States citizens in limited circumstances.

**Can an employer require that an employee be a U.S. citizen in order to qualify for employment?**

No. Once again, with a few limited exceptions, employers cannot require that an individual be a U.S. citizen in order to qualify for employment. Employers must comply with the requirements of the *Immigration Reform and Control Act* and verify the employment eligibility and identity of all employees hired to work in the United States after November 6, 1986. Employers are required to
complete Employment Eligibility Verification forms (Form I-9) for all employees, including U.S. citizens. The purpose of these requirements is to ensure that the applicant is eligible to work in the United States.

Employers must be shown specific documentation as set forth in U.S. Citizenship and Immigration Services guidelines. These include: Certificate of Naturalization, U.S. Passport, unexpired Employment Authorization Card (a.k.a. Work Permit), and Alien Registration Card. For a complete list see the Handbook for Employers: Instructions for Completing Form I-9 printed by the Department of Justice.

Are pregnant workers protected from discrimination?

Yes. Under the Pregnancy Discrimination Act of 1978 (42 U.S.C. § 2000e(k)) (an amendment to Title VII of the Civil Rights Act of 1964), employers cannot discriminate in employment-based situations (with few exceptions) because of pregnancy-related conditions. In short, employers cannot refuse to hire an applicant because the applicant is pregnant. Nor can company policies lawfully discriminate between males and females. For instance, health insurance must cover expenses for pregnancy-related conditions and reimbursements that are pregnancy related on the same basis as costs for other medical conditions.

The law requires employers to treat pregnancy the same as any other temporary disability or illness. This may entail providing modified tasks, alternative assignments, disability leave or leave without pay.

The R.I. Fair Employment Practices Act also prohibits employment discrimination against women “on the basis of pregnancy, childbirth or related medical conditions.”

Are pregnant employees entitled to anything different under a leave of absence policy?

No. In Rhode Island, disability leave due to pregnancy must be treated the same as leave provided for any other illness or disability. Rhode Island state law and federal law specifically define the minimum amount of time employers must provide to their employees for family medical leave. The Family and Medical Leave Act is discussed in Chapter VII.

Are women workers protected from sex-based wage discrimination?

Yes. Both the Equal Pay Act of 1963 and Rhode Island law (R.I.G.L. §28-6-18) require the same pay for men and women performing equal work. Equal work means work requiring substantially equal skill, effort, and responsibility, performed under similar working conditions. The law does provide for wage variations based on seniority, experience, training, skill and ability.

Does the law prohibit sexual harassment?

Yes. Both Title VII and the R.I. Fair Employment Practices Act prohibit sexual harassment in the workplace.

What is sexual harassment?

As defined in Rhode Island, sexual harassment is “any unwelcome sexual advances or requests for sexual favors or any other verbal or physical conduct of a sexual nature when:

- submission to such conduct or such advances or requests is made either explicitly or implicitly a term or condition of an individual’s employment; or,
- submission to or rejection of such conduct or advances or requests by an individual is used as the basis for employment decisions affecting such individual; or
- such conduct or advances or requests have the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”

The definition under Title VII is the same.

In short, the law prohibits sexual harassment, which it recognizes as a form of sexual discrimination. There are two forms of sexual harassment: Quid Pro Quo and Hostile Environment harassment. Although neither term is contained within either statute, the courts use these terms to distinguish forms of sexual harassment.

Quid Pro Quo harassment (Latin, meaning, “one thing in return for another.”) is a sexual demand by a supervisor (or person in
authority at the place of employment) in exchange for a benefit or threat of a job detriment. Example: If a supervisor says to an employee, “You must sleep with me if you want a promotion.” that is quid pro quo sexual harassment.

Hostile Environment harassment exists when the workplace is “permeated with discriminatory intimidation, ridicule, and insult” that is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment” Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). The “sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” Faragher v. City of Boca Raton, 524 U.S. 775 (1998). Example: An environment in which there are continuing comments or gestures of a sexual nature or a break area decorated with nude centerfolds or graphic cartoons would very likely constitute a hostile environment.

In order to determine whether the environment is sufficiently abusive, the courts will look at all the circumstances including: The frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with the employee’s work performance.”

The courts have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment. Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.

If an employee complies with sexual advances does it mean that such advances could not constitute sexual harassment?

No. The key is that the sexual advances were unwelcome. An employee may have complied in order to keep his or her job. It is somewhat different however – and, consequently, more difficult to prove the advances were unwanted – if a consensual relationship develops between the employee and the alleged harasser. If a once-consensual relationship becomes unwelcome, the party finding it so must make it clear that the relationship is unwelcome and must cease. Once again, courts will look at all circumstances in determining whether the conduct constitutes sexual harassment.

What should a person who experiences sexual harassment at work do?

It is perhaps most important to document everything. It is helpful if the harasser is told that the behavior is unwelcome and must stop, but absence of notice to the employer does not insulate the employer from liability. If the harasser is a co-worker, the offensive conduct should be reported to a supervisor. If the harasser is a supervisor, the offensive conduct should be reported to the supervisor’s supervisor, to the personnel office, or to a grievance committee.

If the offensive conduct continues, a complaint can be filed with the U.S. Equal Employment Opportunity Commission (617-565-3200 or 800-669-4000) or the Rhode Island Commission for Human Rights (401-222-2661). If the employee is a state employee, a complaint may be filed with the State Equal Employment Opportunity Office (401-222-3090).

Does Title VII cover same sex sexual harassment?

Yes. The U.S. Supreme Court said there is no justification in either Title VII’s language or the Court’s precedence for a categorical rule barring a claim of discrimination “because of . . . sex” merely because the plaintiff and the defendant are of the same sex. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

Is it necessary that a person suffer tangible job consequences to bring a sexual harassment claim?

No. Under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor (quid pro quo harassment), yet suffers no adverse, tangible job consequences, may recover against the employer.

So long as there was no tangible consequence, however, an employer may defend against such a claim by showing that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior and that the harassed employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. Burlington Industries, Inc. v. Ellerth, 542 U.S. 742 (1998).

In the case of hostile environment sexual harassment, an employee’s psychological well-being need not be seriously affected nor need the employee suffer injury. In such instances, the courts will consider the severity of the offensive conduct, its frequency, and whether
it interferes with the employee’s work performance, but psychological injury is not required.  

Do the laws provide legal protection for people with disabilities?

Yes. The federal Americans with Disabilities Act (ADA), R.I. Fair Employment Practices Act, and the Rhode Island Civil Rights of People With Disabilities statute prohibit employment discrimination on the basis of any physical or mental handicap.

The ADA covers those individuals who:

- have a mental or physical impairment that substantially limits one or more major life activities (i.e., hearing, seeing, walking, talking, breathing, performing manual tasks, self-care, learning or working);
- have a record of such an impairment; or,
- are regarded as having such impairment.

To be protected by the ADA, a person with a disability must be qualified to do the job, with or without reasonable accommodation. This means that the person with a disability must meet the employer’s job requirements (such as education, employment experience, skill, or licenses) and must also be able to perform the essential functions of the job with or without reasonable accommodation. Denying employment opportunities to a qualified disabled individual is illegal discrimination if the decision is based on the person’s inability to perform a marginal function or the person’s need for reasonable accommodation.

The United States Supreme Court held that a person who experiences no substantial limitation in any major life activity when using a mitigating measure does not meet the ADA’s first definition of disability (although he or she could still meet the second and/or third definitions under the ADA).  Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999). In a separate case, the Court extended this analysis to individuals who specifically develop compensating behaviors to mitigate the effects of an impairment (for example, learning to compensate over time for blindness in one eye). Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

It is important to note that the definition of disability in Rhode Island’s Fair Employment Practices Act does not require that mitigating measures be taken into account when determining whether a person has a disability. Consequently, an individual who is discriminated against on the basis of a qualifying disability may receive more favorable treatment in state courts rather than federal courts.

Which employers are covered by the ADA?

The ADA covers all employers with fifteen or more employees and includes private employers, state and local governments, employment agencies, labor organizations, and labor-management committees.

What employment practices are covered?

The ADA makes it unlawful to discriminate in all employment practices such as recruitment, hiring, firing, training, job assignments, pay, layoff, promotions, benefits, leaves, and all other employment-related activities.

What is meant by an essential function of a job?

An essential function of a job is a function that is fundamental to the performance of the job, not a marginal function. An employer will never have to eliminate an essential function as a reasonable accommodation, since a person who cannot perform the essential function, with or without reasonable accommodation, is not a qualified individual with a disability as that term is used in the ADA.

The distinction is an important one and marginal functions (i.e., nonessential functions) cannot be used to keep otherwise qualified individuals from employment.

Example: An advertisement for a clerical position that does not generally include driving duties cannot lawfully include the requirement that the applicant have a driver’s license. If the applicant is qualified to do clerical work (the essential functions), the fact that the applicant cannot drive (a marginal function) because of a mental or physical disability cannot be used to deny employment.
What is meant by a *reasonable accommodation* and are there any limits to those accommodations an employer must provide?

*Reasonable accommodations* are:

- modifications or adjustments in the job application process to enable a qualified applicant with a disability to be considered for the desired position;
- modifications of the work environment in order to enable the qualified individual to perform the *essential functions* of that position; and,
- modifications that enable a qualified employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other employees without disabilities at the job.

There are numerous possible *reasonable accommodations*, such as:

- making existing facilities accessible
- job-restructuring
- part-time or modified work schedules
- reassignment to a vacant position
- changing tests, training materials, or policies
- acquiring or modifying equipment

In terms of the limits on *reasonable accommodations*, the law, once again, does not require that employers eliminate an *essential function* of the job as an accommodation. Nor are employers obligated to provide accommodations that would prove to be an *undue hardship* on the company. Finally, an employer does not have to provide as a *reasonable accommodation* personal use items such as a wheelchair or prosthetic limb if such devices are also needed off the job.

An employee is not obligated to accept a *reasonable accommodation*. If, however, the employee needs the accommodation in order to perform an *essential function* and refuses to accept the accommodation, he or she may not be qualified to remain in the job.

**What is an undue hardship?**

An *undue hardship* is an action that imposes significant difficulty or expense in light of the cost of the accommodation to the overall financial resources of the employer. What this means is that a large employer may have to do more than a small employer to accommodate the needs of a person with a disability.

**What happens if there are two or more ways an individual could be reasonably accommodated?**

So long as the accommodation is effective, it satisfies the *reasonable accommodation* requirement. If there are two possible *reasonable accommodations*, and one is more costly, the employer may choose the less expensive accommodation or the one that is easier to provide.

**May a manager or supervisor ask if an employee or prospective employee is disabled?**

No. But this question must be distinguished from whether an employer may inquire about the need for a *reasonable accommodation*. The question of any need for a *reasonable accommodation*, as noted above, may come up during the application process. For instance, the hiring process may include a timed written test. It would be permissible for the employer to ask an applicant – provided that all applicants are asked – whether the applicant will need a *reasonable accommodation* in order to take the test.

An employer may not ask the applicant if he or she will need a *reasonable accommodation* for the job before making a conditional offer of employment. The exception to this rule is where the employer knows that the applicant has a disability and reasonably believes that the applicant will need a *reasonable accommodation* to perform the specific job functions. If an applicant has a known disability that appears to limit, interfere with, or prevent the applicant from performing job-related functions, the employer may ask the applicant to describe or demonstrate how he or she would perform the function with or without a *reasonable accommodation*. If a known disability would not interfere with performance or job functions, an applicant may only be required to describe or demonstrate how he or she will perform a job if this is required of all applicants for the position.

After a conditional offer of employment is made, an employer may ask whether the applicant will require a *reasonable accommodation* for the job. Also, after making a conditional job offer and before an individual starts work, an employer may ask health-related questions, provided that all candidates who receive a job offer in the same job category are required to respond to the same inquiries.
Should a person with a disability tell the employer of the need for a reasonable accommodation?

The employee or applicant is generally responsible for telling the employer when an accommodation is needed. If an applicant with a disability thinks that a reasonable accommodation will be needed to participate in the application process or if an employee with a disability thinks that a reasonable accommodation is needed to perform the essential duties of a job, then the employer should be informed.

Also, a family member, friend, health professional, or other person may request a reasonable accommodation on another’s behalf.

It is important to note that an employee is not prevented from requesting a reasonable accommodation after commencing employment even though such a request was not made during the application process.

May an employer ask for documentation of a disability when a person requests a reasonable accommodation?

Yes. When the disability or the need for a reasonable accommodation is not obvious, the employer may request documentation about the disability and functional limitations in order to verify the existence of an ADA disability and to determine the sort of accommodation needed.

Does the ADA prohibit medical examinations?

The law prohibits medical examinations before a job offer is made. Employers can condition the job offer on a medical examination, but only if all entering employees for that job category take the same examination.

The ADA prohibits an employer from requiring employees to undergo a medical examination or answer medical inquiries unless the examination or inquiry is directly related to the job and necessary for the business. But if the individual provides insufficient information to substantiate the disability and the need for a reasonable accommodation, the ADA does not prohibit an employer from requiring an individual to go to a health professional of the employer’s choice.

Who pays for reasonable accommodations?

Unless providing an accommodation would present an undue hardship for the employer, the employer must pay. If the cost of providing the needed accommodation would be an undue hardship, the employee must be given the choice of providing the accommodation or paying for the portion that causes the undue hardship.

Can employers pay people with disabilities less than other workers doing the same job to cover the cost of reasonable accommodations?

No. Employers cannot make up the cost of reasonable accommodations by lowering the salary or paying lower wages to people with disabilities.

Does an employer have to make non-work areas used by employees accessible to employees with disabilities?

Yes. The requirement to provide reasonable accommodations covers all services, programs, and non-work facilities provided by the employer. However, if making existing non-work facilities accessible would be an undue hardship, the employer must provide comparable facilities, unless to do so would also constitute an undue hardship.

Does the ADA require preferential treatment for people with disabilities?

No. The ADA does not call for preferential treatment and require that an employer hire an applicant with a disability over other applicants. The ADA only prohibits discrimination on the basis of disability.

Does the ADA take safety issues into account?

Yes. The law permits an employer to refuse to hire an individual who presents a direct threat to themselves or others at work. The direct threat must be one for which a reasonable accommodation cannot be made.
The determination that there is a direct threat cannot be merely speculative or based on stereotypes. It must be based on objective, factual evidence supporting a significant risk of substantial harm. Also, the employer must consider whether a risk can be eliminated or reduced to an acceptable level with a reasonable accommodation. The burden of substantiating that an employee is a risk rests on the employer. It is not the responsibility of the applicant or employee to prove that they pose no risk.

Are users of illegal drugs considered persons with disabilities?

Individuals who currently use illegal drugs are specifically excluded from the definition of individual with a disability and employers can refuse to hire such applicants; however, the ADA bars discrimination against individuals based on past drug addiction. Testing for illegal drugs is permissible under the ADA, but may be illegal under Rhode Island’s drug testing statute. However, there are provisions under the ADA for those applicants and employees who are actively involved in rehabilitation programs.

Does the ADA or Rhode Island law cover people with AIDS or HIV?

Yes. Both laws prohibit such discrimination. The legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV from discrimination and the U.S. Supreme Court has held that such individuals are covered. Bragdon v. Abbott, 524 U.S. 624 (1998). Rhode Island law (R.I.G.L. §23-6-22) expressly prohibits discrimination against such individuals.

The ADA also makes it unlawful to discriminate against an individual because of that individual’s relationship or association with an individual with a known disability.

Example: If an employee of Company X cares for a friend with AIDS, it would be illegal for Company X to discriminate against the employee because of that relationship.

What happens when ADA accommodations conflict with a collective bargaining agreement?

It may happen that an employee will request what he or she deems to be a reasonable accommodation and the employer’s compliance with that request would violate the collective bargaining agreement. In those cases where an employee has sought special job placement or job protection (from bumping) in violation of the seniority system in place under a collectively bargained agreement, the Courts have held that such special treatment is not a reasonable accommodation and, therefore, not required. Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996) cert. denied 520 U.S. 1146 (1997); Aka v. Washington Hosp. Center, 156 F.3d 332 (D.C. Cir. 1998) (en banc).

In a non-collective bargaining situation, the U.S. Supreme Court – holding that a requested accommodation in conflict with a seniority system is not reasonable - explained that it supported such systems because they tend to provide important employee benefits by creating and fulfilling employee expectations of fair and uniform treatment. The Court did distinguish typical seniority systems from those where the employer retained the right to change the seniority system unilaterally and exercised that right fairly frequently. In those instances, the Court held, one more departure would make little difference. U.S. Airways v. Barnett, 535 U.S. 391 (2002).

Can an employer discriminate on the basis of age?

Yes and no. It is not unlawful to discriminate on the basis of age where the person is under the age of forty. But, with few exceptions, both federal and state laws do prohibit discrimination on the basis of age when the individual is at least forty years old. The Age Discrimination In Employment Act (ADEA) and the Rhode Island Fair Employment Practices Act both prohibit discrimination against any individual who is at least forty years old in terms, conditions, or privileges of employment on the basis of that individual’s age.

Such discrimination may not be overt, but may underlie comments such as, “You’re not able to keep up with the changes around here.” or “We need to get a younger perspective.”
What should an individual do if they feel they have been discriminated against?

If a person suspects employment discrimination, he or she should contact one of the following:

- **R.I. Commission for Human Rights**
  180 Westminster St, 3rd Floor
  Providence, RI 02903
  (401) 222-2661
  (401) 222-2664 (TDD)

- **Equal Employment Opportunity Commission**
  JFK Federal Office Bldg., Room 475
  Government Center
  Providence, RI 02903
  (401) 222-2661
  (617) 565-3200
  (800) 669-4000

for state employees:

- **R.I. Department of Administration**
  Equal Employment Opportunity Office
  One Capitol Hill
  Providence, RI 02908-5865
  (401) 222-3090

Filing a complaint will start an investigation into the employment practice. It does not mean that the person filing the complaint has proven discrimination. In many instances, cases filed with the R.I. Commission for Human Rights will automatically be filed with the federal agency charged with enforcing the federal anti-discrimination laws.

**Is there a time limitation for filing a complaint?**

Yes and it is important to take note of the different limitations. EEOC guidelines provide that charges must be filed within 180 days of the occurrence that one suspects is discriminatory. The 180-day deadline for filing is extended to 300 days if the charge is also covered by state or local anti-discrimination law.

The R.I. Commission for Human Rights requires that charges be filed with the Commission within one year from the date of the alleged harm. This time limitation refers to situations where a person can identify a distinct occurrence, such as a firing or a refusal to hire or promote. In situations where discrimination has been an ongoing process, a worker should file a charge as soon as he or she becomes aware that the policy may have a discriminatory effect.

**Can an employer retaliate against an employee for filing a complaint?**

No. It is illegal to retaliate against an employee for filing a complaint, stating an intention to file a complaint, or being a witness in proceedings of the R.I. Commission for Human Rights or the EEOC or for opposing unlawful employment practices. If a person is fired, or discriminated against in any way, because of the above activities he or she should contact the enforcing agency immediately.

**What happens after a complaint is filed with the Rhode Island Commission for Human Rights?**

After a worker files a complaint, the Commission will assign an impartial investigator who will conduct an investigation with the worker, the employer, and any witnesses to the alleged discrimination. Following the investigation, the Commissioner will make a preliminary ruling. If the Commissioner rules there is No Probable Cause, the case will be dismissed. If the Commissioner rules that Probable Cause exists, the case will go into conciliation. In the event that conciliation is unsuccessful, the matter will go to a public hearing. If, at such hearing, the Commission finds discrimination, the Commission may award damages (such as backpay, frontpay, promotion, hiring, reinstatement, the next available job, compensation for pain and suffering) to the victim. The Commission’s services are free. There are “right to sue” provisions in the laws and subject to certain statutory restrictions, a case may be taken from the Commission to court.
CHAPTER III
OCCUPATIONAL SAFETY AND HEALTH

The Bureau of Labor Statistics (based on employer reports) reports that there were more than 5,500 fatal work injuries in 2002, with construction continuing to record the highest number of fatal injuries of any major industry. In addition, there were nearly 4.7 million nonfatal injuries and illnesses reported in private industry workplaces, of which 2.5 million resulted in days away from work, job transfer, or restrictions of some sort (i.e., recuperation away from work, restricted duties at work, or some combination of these actions). Finally, many workers die long after leaving employment from diseases caused by carcinogens, dusts, solvents, fibers, and other hazards encountered through their work.

These statistics point out the great need for workers to play an active role toward insuring that healthy and safe working conditions are provided for them on the job. This chapter contains information for helping to resolve occupational health and safety problems through the legal right to a safe and healthful workplace using the Occupational Safety and Health Act (OSH Act) and the Occupational Safety and Health Administration (OSHA), the National Institute for Occupational Safety and Health (NIOSH), and Rhode Island’s Chemical Identification Law.

When workers and/or management are confronted by safety and health hazards, they have a right to take one or all of the following actions:

- exercise their rights under the Occupational Safety and Health Act (OSH Act).
- request the National Institute for Occupational Safety and Health (NIOSH) conduct an occupational health hazard evaluation of their workplace.
- utilize the Rhode Island law designed to identify the hazards of chemicals used in a work area. R.I.G.L. §§28-21-3, et seq.

What is the purpose of OSHA?

Congress passed the Occupational Safety and Health Act (OSH Act or the Act) in 1970 to assure, so far as possible, safe and healthful working conditions for American workers. The Occupational Safety and Health Administration (OSHA), created under the Act and within the Department of Labor, is responsible for promulgating legally enforceable standards and charged to:

- encourage employers and employees alike to reduce workplace hazards and to implement new or improved existing safety and health programs;
- develop mandatory job safety and health standards and enforce them effectively;
- establish “separate, but dependent responsibilities and rights” for employers and employees for the achievement of better safety and health conditions;
- maintain a reporting and record-keeping system to monitor job-related injuries and illnesses; and,
- provide for the development, analysis, evaluation, and approval of state occupational safety and health programs.

Who is covered by the Act?

The Act covers almost every private employer and their employees in the country. The areas of covered employment include manufacturing, construction, longshoring, agriculture, law, medicine, organized labor, and private education.

Most private sector workers will be covered by the Act. And since the term employee is broadly interpreted, welfare recipients working pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 are considered employees for OSHA purposes. But not all workers are covered. Volunteers, for instance, may or may not be covered under the Act. It will often depend on whether they serve of their own free will and are compensated. Hospital volunteers usually are not considered employees for purposes of the Act, while volunteer firefighters are considered employees.

What businesses are not covered by the Act?

The Act does not apply to businesses over which state and other federal agencies exercise statutory authority concerning occupational safety and health. Also exempted from the law are:

- self-employed persons, and
farms at which only immediate members of the farm employer’s family are employed.

Are public sector employees covered by the Act?

The Act contains special provisions to assure safe and healthful working conditions for federal employees. The responsibility to ensure that each federal agency establishes and maintains a comprehensive occupational safety and health program consistent with OSHA standards falls to the head of each federal agency. However, OSHA does retain jurisdiction over federal agencies (apart from the military) and does inspect and issue citations to federal agencies.

OSHA does not cover Rhode Island’s public employees. Instead, the responsibility to establish and maintain an occupational safety and health program belongs to the head of each state agency and of each municipal agency. The creation of codes for the elimination of safety or health hazards is the duty of the Code Commission for Occupational Safety and Health, within the Department of Labor and Training, and the Commission has adopted federal OSHA standards to protect public employees from workplace hazards. Responsibility for administering and enforcing this legislation falls on the Rhode Island Department of Labor and Training.

Do employers have a duty to provide a safe and healthful workplace?

Yes. The employer’s first obligation under the Act is to provide safe and healthful working conditions. The general duty clause requires an employer “furnish to each of his or her employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm... .” (Section 5 of the OSH Act). The employer is also obligated to “comply with occupational safety and health standards promulgated under [the] Act.” The Secretary of Labor sets the occupational safety and health standards. Everything in the Act focuses on these two obligations.

What do these obligations include?

The first obligation is the general duty clause designed to cover all hazards that don’t fall under a specific standard or regulation. OSHA may cite violations of this employer duty directly from the language of the Act, where no published or promulgated standard exists. The general duty clause can only be enforced when OSHA has determined that:

- there is no standard,
- it is a recognized hazard,
- employees are exposed,
- the condition is of a nature that could cause death or serious physical harm,
- there is a feasible and useful method to correct the hazard.

The second obligation is compliance with existing federal occupational safety and health standards (i.e., specific standards). The specific standards are detailed and technical, and cover nearly all aspects of the job environment for selected industries. Some of the specific standards include:

- control of ventilation, air contaminants, and noise levels
- chemical hazard communication
- keeping the workplace clean and orderly
- emergency exits, fire protection, sprinklers
- evacuation plans
- medical and first-aid treatment
- handling and storage of explosives, hazardous wastes, and other toxic materials
- personal protective equipment
- training procedures
- electrical standards
- general working conditions (waste disposal, toilets, showers, dressing rooms, ventilation, and food handling)

What other legal responsibilities do employers have?

Employers also have a number of other legal responsibilities. Generally, they must be familiar with OSHA standards and keep employees informed about OSHA and the various safety and health matters with which they are involved. Specifically, the employer is obligated to:
• conduct examinations of the workplace to ensure it conforms to OSHA standards;
• provide proper warnings to employees of potential hazards;
• provide OSHA-mandated training;
• maintain certain OSHA-required records concerning injuries, illnesses, and fatalities;
• report fatalities and injuries requiring three or more hospitalizations to OSHA within eight hours;
• abate cited violations within the period prescribed by OSHA;
• post the Job Safety and Health Protection poster informing employees of their rights and responsibilities under the Act; and,
• where employees are exposed to particularly hazardous materials (for example: asbestos, vinyl chloride, or lead), the employer is obligated to conduct periodic testing to determine the presence and concentration of hazardous substances. In addition, the employer must provide periodic medical exams for those employees.

Other obligations are detailed within this section.

**Is an employee entitled to know if the employer seeks a variance from an OSHA standard?**

Yes. The *OSH Act* provides that an employee has the right to be notified if the employer applies for a variance from an OSHA standard. Furthermore, an employee may testify at a variance hearing and appeal the final decision.

**What duties do employees have under the OSH Act?**

Employees are also required to comply with OSHA standards, rules, and regulations. It is important to note, however, that an employer is not relieved of his or her obligations under the Act because an employee fails to comply with OSHA regulations.

**What rights do employees have under the OSH Act?**

Employees have numerous rights under the Act relating to information about safety and health hazards, monitoring of hazards, and inspections of the worksite. Some of these rights derive directly from the Act and some derive from standards promulgated pursuant to the Act. Several of these standards are explained more fully below.

**What does the Chemical Hazard Communication Standard entail?**

The purpose of the Chemical Hazard Communication Standard is “to ensure that the hazards of all chemicals produced or imported are evaluated, and that information is transmitted to employers and employees.” This means that employers must inform employees about the dangers presented by various chemicals, the necessary precautions to be taken when working with these chemicals, and the procedures that must be adopted and followed if employees are involved in a job-related accident or exposed to a hazardous chemical.

The other specific provisions of the Chemical Hazard Communication Standard include:

- Hazard Communication Written Program
- Material Safety Data Sheets
- Training
- Labeling

**What is the Hazard Communication Program?**

OSHA requires employers who use, produce, or distribute hazardous chemicals and substances to develop a written Hazard Communication Plan. This plan must describe the hazardous chemicals and provide details on how the employer will protect employees from these hazards.

**What are Material Safety Data Sheets?**

OSHA mandates that each company that manufactures, imports, or distributes hazardous chemicals provide Material Safety Data Sheets (MSDS) to the companies to which they ship those chemicals. The MSDS must list the chemicals’ properties and dangers, the proper means of handling them, appropriate medical treatment in case of exposure (inhalation, ingestion, skin contact or absorption), fire and explosion limit information, dangerous chemical reactions, acute and chronic health hazards, handling and labeling, disposal
procedures in case of accidents, and how to avoid exposure.

Manufacturers, distributors, and importers of chemicals are required to label all hazardous containers. The labels must identify the chemical, warn of potential dangers, and provide the name and address of the manufacturer, distributor, or importer.

**Must employers permit employees (or their representatives) access to records of exposure?**

Yes. Employers must allow employees and former employees (or their representatives or attorneys) to see all records (including medical records) of employees’ exposure to toxic substances and harmful agents within fifteen days of the written request. OSHA representatives must be given immediate access to exposure records. Employers must retain records of exposure for thirty years.

**What sort of information and training does the Chemical Hazard Communication Standard mandate?**

Employees must be informed of operations in their work area where hazardous chemicals are present. The standard also requires employers to provide employees with training on the handling of any hazardous chemical as soon as it is introduced into their work area or as soon as an employee is assigned to an area containing a hazardous chemical. This training must include an explanation of the requirements of the Chemical Hazard Communication Standard, how to recognize when a hazardous chemical is being released into the work area, physical and health hazards of chemicals in the work area, and appropriate protective measures.

**What does the Personal Protective Equipment Standard entail?**

This standard requires employers to provide and employees to use personal protective equipment (PPE) when hazards are present or likely to be present which necessitates the use of PPE.

**What do the Workplace Fire Safety Standards entail?**

These standards require employers to provide proper exits, fire fighting equipment, and employee training to prevent fire deaths and injuries in the workplace. The standards also require employers to develop and implement emergency action plans.

**What does the Bloodborne Pathogens Standard entail?**

This standard covers all employees who, as a result of performing their job duties, could “reasonably anticipate” coming into contact with blood and other potentially infectious materials. The standard requires employers to develop and implement a written plan covering how employees will be protected from exposure to blood and other potentially infectious materials. Employers must also provide training and personal protective equipment in accordance with the employer’s written plan.

**Can workers request that OSHA conduct an inspection of their workplace?**

Yes. Under the Act workers have the right to request that OSHA inspect their workplace if the workers believe hazardous conditions or violations of standards exist. Responsibility for conducting the investigation and determining any apparent violation falls on the OSHA compliance officers. If OSHA decides not to inspect, a worker may request an informal review of that decision.

**Under what circumstances does OSHA conduct inspections?**

OSHA inspections are usually conducted without advance notice. Inspections priorities are:

- where there is an allegation of imminent danger;
- where a fatality or catastrophe has occurred; or
- in response to a formal complaint or to a referral.

OSHA also conducts programmed inspections and follow-up inspections.

Federal OSHA and occupational safety and health agencies conduct approximately 80,000 inspections per year. This amounts to slightly more than one-percent of the nearly six million workplaces covered by the Act.

A non-formal complaint will result in notification of the employer and a time frame for a written response to OSHA. The complainant
will also be notified and OSHA requests that the complainant inform OSHA if no corrective action is taken within the specified time period.

**What does an OSHA inspection entail?**

An OSHA inspection can be very comprehensive. After presenting appropriate credentials to the owner, operator or agent in charge, the OSHA compliance officer is authorized to inspect and investigate the work site during regular working hours and at other reasonable times. Inspections usually include a check of company records, a review of compliance with the *Hazard Communication Standard*, an examination of workers’ personal protective gear and fire-protection measures, and a review of the company’s general health and safety plan.

Under the Act, a compliance officer may inspect “all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein.” In addition, the compliance officer has authority to “question privately any such employer, owner, operator, agent or employee.”

Once the compliance officer has been permitted entry, interference with the inspection by the employer may be deemed a refusal. Examples of interference include refusals to permit the walkaround, the refusal to permit essential photographs or videotapes, the refusal to permit employee interviews, and the refusal to allow the attachment of sampling devices.

The compliance officer will conduct an opening conference with the representatives from the employer and employees (during which the procedures for the inspection will be discussed) and a closing conference with the employer or the employer’s representative (during which the compliance officer will review the findings and inform the employer of any apparent violations).

**Can OSHA ever give employers advance notice for an inspection?**

Yes, but only under special circumstances. An unauthorized advance notice may result in criminal charges. The special circumstances for which advance notice is permitted include:

- imminent danger situations to allow for swift correction;
- inspections that must take place after regular business hours, or that require special preparation;
- cases where notice is required to assure that the employer and employee representative(s), or other personnel will be present; and,
- situations in which the OSHA area director determines that advance notice would produce a more thorough or effective inspection. In such a case, employers must inform their employees’ representative or arrange for OSHA to do so.

**What can workers do during an OSHA inspection?**

Workers can play an important role during OSHA inspections. The compliance officer must determine as soon as possible after arriving whether the employees at the workplace are represented. If they are, employee representatives shall be permitted to participate in the walkaround. An *employee representative* refers to:

- a representative of the certified or recognized bargaining agent, or, if none,
- an employee member of a safety and health committee who has been chosen by the employees as their OSHA representative, or
- an individual employee who has been selected as the walkaround representative by the employees in the workplace.

At workplaces where there is more than one employer, it is permissible to have more than one employer-employee representative for the different phases of the walkaround.

During the inspection, employees may show the compliance officer the violations and ask verbally or in writing for appropriate action to be taken. If no citation is issued as a result of the employee’s complaint, the area director must send written notice to the employee or employees stating the reason that no citation was issued.

Employees also have the right to observe any monitoring or measuring of hazardous materials and see the resulting records.

If an employer resists participation by an employee representative it shall be construed as a refusal to permit the inspection.
How do employees discover the inspection results?

When violations are found, the OSHA area director will send a citation to the employer, which the employer must post at or near where the violation occurred. The citation lists the nature of the violation, the standard violated, the time allowed to repair, fix, or replace, and the penalty. The time permitted by OSHA to correct the violation is called an abatement time. There is a penalty for not conspicuously posting this citation at or near the violation.

Can citations be contested?

If the time allowed for correction seems too long and employees wish to contest the citation, they may file a notice of contest by writing the area director within fifteen working days from the date of the employer’s posting of the citation. After that, the decision is final.

The employer also has fifteen working days to appeal the citation, the abatement time, or the penalty. If the employer appeals or asks for a hearing, employees must be notified and allowed to participate in any hearing. After a hearing, the result may be appealed by anyone affected.

Rhode Island workers should direct their complaints to either one of the following offices:

<table>
<thead>
<tr>
<th>Employees of private employers and the federal government:</th>
<th>Employees of the state and municipalities:</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Department of Labor</td>
<td>R.I. Dept. of Labor and Training</td>
</tr>
<tr>
<td>OSHA Providence Office</td>
<td>Division of Occupational Safety</td>
</tr>
<tr>
<td>Federal Building</td>
<td>1511 Pontiac Avenue</td>
</tr>
<tr>
<td>380 Westminster Street</td>
<td>Cranston, Rhode Island 02920</td>
</tr>
<tr>
<td>Providence, Rhode Island 02903</td>
<td>(401) 462-8557</td>
</tr>
<tr>
<td>(401) 528-4669</td>
<td></td>
</tr>
</tbody>
</table>

Complaints may also be filed on the internet at the worker page of OSHA’s Homepage: www.osha.gov/as/opa/worker/index.html

Can a worker ever refuse to do certain work?

Workers have a right to refuse to do a job under very limited circumstances. The workers must believe “a danger exists which could reasonably be expected to cause death or serious physical harm immediately.” Thus, the hazard must be both serious and imminent. This right is not contained in the law, but in OSHA regulations which have been upheld by the U.S. Supreme Court.

Example: A boiler about to explode is clearly an imminent danger. Long-term exposure to toxic substances would not likely be regarded as an imminent danger because there normally is sufficient time to have such a hazard abated through regular OSHA inspection procedures.

When an imminent danger condition is discovered by an employee, the employee should act immediately by contacting a supervisor and, if a member of a union, a union representative. If a worker refuses to do a job because of a perceived imminent danger, it is extremely important that the employee inform the supervisor, in front of a witness, that, while the employee refuses to work in the location or function which poses the immediate danger, the employee is willing to work at another location or in another function that is occupationally safe and healthful.

If the employer fails to remedy the situation, employees should contact the OSHA area office to report the condition. If OSHA determines an imminent danger exists, OSHA will attempt to have the employer abate the condition. If the employer fails to abate the condition, OSHA can initiate legal action with the Secretary of Labor’s office.

As noted above, the right to refuse work was upheld by the U.S. Supreme Court. The court ruled unanimously that an employee might refuse hazardous work provided that:

“[T]he employee is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and, the employee has reason to believe that there is not sufficient
time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.” Whirlpool Corporation v. Marshall, Secretary of Labor, 445 U.S. 1, 100 S.Ct. 883, 63 L.Ed.2d 154 (1980).

It is important to note that the employee runs the risk of discipline should a court subsequently determine that the employee acted unreasonably or in bad faith. NLRB v. Washington Aluminum Co., 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962). Still, the employee may be protected under other law. See, NLRA Protected Actions - Hazardous Work Refusal Under §8(a)(1).

Can a worker legally be discriminated against for filing an OSHA complaint or testifying at a hearing?

No. Section 11(c) of the Act prohibits discrimination for filing an OSHA complaint. Discrimination is understood broadly. It does, of course, include discharge, but also includes discrimination in compensation, terms, conditions or privileges of employment.

When a compliance officer presents a complaint, the identity of the complaining employee is deleted. Also, information given to the compliance officer during the inspection is confidential. But even if an employer knows who is invoking the OSHA complaint, the employee is legally protected from discrimination. The Act provides:

“No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded under this Act.”

If discrimination does occur, the employee must notify the Secretary of Labor or a local OSHA office within thirty days of any act of discrimination. The Secretary can investigate the complaint and go to federal district court to get appropriate relief, including rehiring or reinstatement with back pay.

What function does NIOSH serve?

The National Institute for Occupational Safety and Health (NIOSH) is charged with identifying and evaluating new or challenging health hazards on the job. NIOSH also updates and revises previously promulgated standards. NIOSH has no authority to promulgate or enforce standards, but is responsible for conducting the research about occupational hazards. NIOSH makes its recommendations to the Department of Labor.

Section 20 (a) (6) of the Occupational Safety and Health Act stipulates that upon written request from an employer or authorized representative of employees, the National Institute for Occupational Safety and Health (NIOSH) will determine whether any substance normally found in a workplace has potentially toxic effects when used in the concentrations found within that place of employment. After completion of its study, NIOSH submits its findings to OSHA, the employer, and affected employees as soon as possible.

NIOSH can be extremely important in helping workers conduct a health-hazard evaluation of a particular workplace. Workers can request a NIOSH health-hazard evaluation by completing a request form provided by the agency and mailing it to:

NIOSH, C-13
4676 Columbia Parkway
Cincinnati, Ohio 45226
1-800-356-4674

What protections do Rhode Island laws provide to workers with respect to hazardous substances?

Rhode Island’s Hazardous Substance Right-To-Know Act requires an employer who “uses, transports, stores, or otherwise exposes its employees to toxic or hazardous substances” maintain and make available to the employees a list of all hazardous substances to which the employees are or may be exposed.

Employers must also:

• maintain Material Data Safety Sheets conforming to OSHA regulation;
• update on an annual basis the chemical identification list;
• ensure that the local fire department is informed of the types and locations of hazardous substances on the premises; and,
provide training and education to an employee regarding hazardous substances prior to the commencement of the employee’s work with such materials.

In addition, because an employee has a Right to Know, an employer must provide, upon request by an employee or an employee’s authorized representative, information regarding hazardous materials within three working days from the date of request.

The employer’s failure to provide the employee with the requested information may trigger the employee’s right to refuse to work with or be exposed to the hazardous material. Unlike the more limited right to refuse mentioned above, the Rhode Island law does not require the employee to perceive an imminent danger before invoking the right. Discipline of the employee for exercising this right is prohibited by statute.

More information can be obtained by contacting the Rhode Island Department of Labor and Training, Division of Occupational Safety at (401) 462-8557.

**Do any other laws provide Rhode Island citizens with protection from chemical hazards?**

Yes. Under the Superfund Amendments and Reauthorization Act (SARA, 42 U.S.C. §9601 et. seq.), Congress passed the Emergency Planning and Community Right to Know Act. The Emergency Planning and Community Right to Know Act requires employers who have hazardous chemicals in their workplaces to report them to various state and local emergency agencies and local fire departments.

Employers must also submit a list of hazardous chemicals they regularly release into the environment and the quantities released, as well as notify emergency agencies of the release of any harmful chemical into the environment.

**Does Rhode Island have a law or does OSHA have a standard addressing ergonomic designs?**

Rhode Island has no law relating to ergonomics, although the Workers’ Compensation statute does recognize certain injuries sustained over a longer period, such as carpal tunnel syndrome, occurring as a consequence of employment as compensable.

*OSHA*’s ergonomic standards were repealed shortly after enacted in 2001, although using the general duty clause, *OSHA* has developed an approach to address musculoskeletal disorders (MSDs) in the workplace, including inspections and the development of voluntary industry-specific and task-specific guidelines. Again, the guidelines are voluntary and an employer’s failure to implement the guidelines will not be deemed violation of the general duty clause of the OSH Act.

**Does either OSHA or Rhode Island regulate smoking in the workplace?**

Rhode Island does regulate smoking in the workplace. *OSHA*’s efforts to regulate in this area, via its rulemaking authority, have stalled.

Employers are required by the Rhode Island Public Health and Workplace Safety Act (R.I.G.L. §§23-20.10-1, et seq.) to ban smoking in all enclosed public places and enclosed places of employment. Employers are permitted, however not required to offer an outdoor smoking space. Exemptions exist for pari mutual gaming facilities and “Smoking bars” where the revenue generated by the serving of tobacco products exceeds the combined revenue from the serving of beverages and food.

An employer may not require, as a term of employment that an employee or prospective employee refrain from smoking or using tobacco products outside the course of his or her employment. An exemption exists for nonprofit organizations which as one of its primary purposes or objectives discourages the use of tobacco products by the general public. (RI Regulation R23-20.10-SMOKE)

The employer may decide to adopt a policy that prohibits smoking throughout in the workplace. This act, and these regulations are enforced by the Rhode Island Department of Health. Complaints must be in writing and signed and mailed to:

Rhode Island Department of Health  
Community Health Services  
3 Capitol Hill, Room 209  
Providence, RI 02908  
(401) 222-2231
CHAPTER IV
WORK-RELATED INJURIES AND DISEASES

The Bureau of Labor Statistics reports that slightly more than one out of every twenty workers in private industry suffered a non-fatal occupational injury or illness during 2002 and more than 5,500 workers died from occupational injuries. Every day Rhode Island citizens are injured on the job or suffer from occupational diseases. Under Rhode Island law there are three possible paths of relief to the employee: Workers’ Compensation, Social Security Disability Benefits, and, in certain instances, a common-law right to sue. Depending on the situation an employee may be eligible for all three paths or may have no relief at all.

What is Workers’ Compensation?

Workers’ Compensation is the primary source of benefits for injured workers. (See Title 28, Chapters 28 – 38) Essentially a no-fault insurance system, the law is designed to provide compensation for injured employees. In most instances, the law functions as a complete bar to any suit against the employer brought by the injured employee or his representatives. Employers, in turn, cannot defend against compensation to an injured employee by asserting that the employee was somehow responsible for the injury or that the employee had assumed the risk of injury except for injuries occasioned by the employee’s willful intent, intoxication or substance abuse. R.I.G.L. §28-33-2.

While the Workers’ Compensation laws will bar suits against employers in most instances, as mentioned above, the laws do not bar suits against third parties (such as negligent manufacturers). The third party recovery, however, entitles the employer to be repaid by the employee under the Workers’ Compensation subrogation statute. R.I.G.L. §28-35-58.

Who administers the Workers’ Compensation system?

The Rhode Island Department of Labor and Training administers the Workers’ Compensation system. For questions about Workers’ Compensation, call the Rhode Island Department of Labor and Training, Education Unit Information Line at (401) 462-8125.

Where does the money come from that funds the program?

Workers’ Compensation benefits are funded primarily through private insurance companies who contract with Rhode Island employers. (Some employers may have their own self-insured workers’ compensation system.) There is no cost to the employee for this coverage.

Benefits are established by law and further defined through evolving legal decisions made by the Workers’ Compensation Court and the Rhode Island Supreme Court. Therefore, it is particularly important to consult knowledgeable authorities about Workers’ Compensation benefits and the current state of the law.

Whom does Worker’s Compensation cover?

Workers’ Compensation covers virtually all employees in Rhode Island - public and private - as well as those who are either injured or hired in Rhode Island. Employers with one or more employees are required to carry Workers’ Compensation coverage for their employees.

Who is not covered by Workers’ Compensation?

The Workers’ Compensation laws specify which workers are not covered. Those not covered include:

- persons engaged in domestic services,
- agricultural workers,
- regularly organized police and fire department employees,
- independent contractors and casual employees,
- employees of municipalities (other than Providence) and school districts (unless otherwise designated) who have elected not to participate,
- licensed real estate brokers,
- salespeople and appraisers who work on commission,
- voluntary and charitable workers,
partners and sole proprietors,
and, any person who is appointed a corporate officer between January 1, 1999 and December 31, 2001, and was not previously an employee of the corporation, unless that officer has filed a notice with the Department of Labor and Training.

If Rhode Island’s Workers’ Compensation statutes do not cover a worker, might the worker be covered by other laws?

Yes. In some instances workers not covered by state law may be covered by federal laws. Covered occupations include:

- railroad workers (Federal Employer Liability Act, 45 U.S.C. §51, et seq.),
- non-military federal employees (Federal Employees’ Compensation Act, 5 U.S.C. §8101, et seq.),
- specified employees of private maritime employers (Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §901, et seq.),

Shipyard employees may have an option of coming under the coverage of the Rhode Island Workers’ Compensation Act or the Longshore and Harbor Workers’ Compensation Act.

How are employees different from independent contractors?

The difference between being deemed an employee or an independent contractor is a significant one when it comes to Workers’ Compensation benefits. Employees are covered and independent contractors are not. Where a worker’s status was unclear, the court used the following factors to determine a worker’s status:

- Who controls and directs the work?
- How is the worker paid? Is it weekly? Are taxes and social security deductions made?
- Who supplies the materials and the tools for the work?
- Does the employer or the worker set the hours of work?
- Does the employer have the power to hire or fire the worker?

Where the characterization of the relationship was contested, the law was clear: The burden fell on the injured worker to prove that he or she was an employee when injured.

Independent contractors are required to file a Notice of Designation as Independent Contractor (DWC-11-IC) with the Department of Labor and Training, Division of Workers’ Compensation. The law is designed to protect an employee whose employer may be attempting to misrepresent the employment relationship. Filing the form will preserve the independent contractor status if litigated before the Workers’ Compensation Court at a later time.

If the relationship changes and the independent contractor becomes an employee, he or she must file a Notice of Withdrawal of Designation of Independent Contractor (DWC-ICR) with the Department of Labor and Training.

What sort of injuries does Workers’ Compensation cover?

Workers’ Compensation covers those injuries “arising out of and in the course of employment,” that is, work-related injuries. In addition to those injuries resulting from accidents at work or connected to work, Workers’ Compensation will cover:

- certain occupational diseases, such as asbestosis and lead poisoning (for a complete list see R.I.G.L. §28-34-2)
- repetitive type injuries sustained over a long period, such as carpal tunnel syndrome, and
- emotional injuries, such as depression and anxiety

Example: A worker who has a pre-existing heart disease or congenital cardiac abnormality can be covered by the Workers’ Compensation Act if the work activities or work environment precipitated a heart attack while the employee was at work.
When referring to injuries for Workers’ Compensation purposes, how is incapacity measured?

Disability is measured both by the extent of the injury (total or partial) and duration of the injury (permanent or temporary). Compensation is based not only on the injury, but on the impairment of earnings that results.

What constitutes total disability?

A worker is deemed totally disabled if he or she is unable to do any type of work as a result of the injury. A person may also be deemed totally disabled by the Workers’ Compensation Court even though that person suffers from a partial disability, if, because of age, education, background, and training, that person is unable to perform any work at all.

The law states that permanent total incapacity is conclusively presumed to exist in the following cases:

- total and permanent loss of sight of both eyes;
- loss of both feet at or above the ankle;
- loss of both hands at or above the wrist;
- loss of one hand and one foot;
- an injury to the spine resulting in permanent and complete paralysis of the legs or arms; and,
- an injury to the skull resulting in incurable insanity or imbecility.

In all other instances, the Workers’ Compensation Court is responsible for making a final determination regarding an injured worker’s permanent and total incapacity based on the facts of each case.

What constitutes a partial disability?

A partial disability is one which renders an individual unable to do the work that he or she did prior to the injury, though the individual can still do some work.

How are payments calculated?

Determining the dollar amount of benefits provided to a totally disabled worker involves a somewhat complicated formula. The calculation takes into consideration all wages, from all work performed, and includes vacation pay, holiday pay, bonuses and overtime. This figure is cross-referenced with a figure provided by the Department of Labor and Training (which establishes an annual maximum benefit) in order to determine the injured worker’s spendable base. The worker is provided with 75% of his or her spendable base.

If the court finds that a permanent total incapacity exists, Workers’ Compensation benefits have to be provided to the injured employee for the duration of their incapacity. Where the employee’s total incapacity extends beyond fifty-two weeks the law provides for compensation to be increased annually. The cost of living adjustment is calculated and paid each May 10th.

If a worker is partially disabled, the weekly compensation is 75 percent of the difference between the employee’s spendable average weekly base wages before the injury (subject to the same limitations and exclusions noted above) and the employee’s weekly wages thereafter, but not more than the maximum weekly compensation for total incapacity.

How long do benefits continue?

Partial compensation is limited to three hundred and twelve weeks, unless extended by the Workers’ Compensation Court. Extended compensation is also increased annually.

Does the law provide for any additional monetary compensation?

Yes. Insurers may be required to pay for a specific loss. This additional compensation is paid to the injured employee in a single lump sum. The law (R.I.G.L. §28-33-19) addresses additional compensation for disfigurements of varying extent, loss of sight, and loss of hearing, and the partial loss of use of an employee’s extremity.
Is there an additional allowance provided to the injured worker for dependents?

Yes. Once again with certain limits, an additional allowance is provided for each dependent of a worker determined to have a total disability. Certain individuals are presumed to be wholly dependent upon the injured worker. In other cases, the court determines dependency.

Is there a minimum period of incapacitation in order to qualify for compensation?

Yes. There is no compensation for an injury that does not incapacitate for a minimum of three work-days. In which case, where the period of incapacity does extend beyond three days, compensation will commence on the fourth. Where a work-related injury does not result in incapacitation for three work days, the employee is, nonetheless, entitled to medical benefits and a Non Payment of Weekly Indemnity Agreement memorializing the work-related injury.

What medical benefits are available to an injured worker?

The law provides that covered injured workers are entitled to reasonable medical and dental services as necessary to cure, rehabilitate or relieve the injured employee from the effects of the injury. This means that not only medical treatment, ambulance service, emergency room treatment, and prescriptions, but appliances and apparatus (such as prosthesis) are provided so long as they are medical in nature. Necessary services rendered by a nurse or nurse’s aide may also be compensable.

Treatment and appliance costs are subject to a large extent to a predetermined schedule and the Workers’ Compensation Court determines disputes.

Can an injured worker determine who will provide medical care?

Yes and no. While the employee has the right to determine the health care provider initially, changes after the initial determination are subject to certain limits. However, injured workers need not worry that treatment at an emergency room by a company physician after an accident will count as the first medical care provider. It won’t. Furthermore, an injured worker’s first provider may refer the injured worker to a qualified specialist without prior approval for independent consultation or assessment, or specified treatment. If, however, the injured worker decided to change doctors, he or she must first find out if the employer/insurer has an approved list of physicians, otherwise known as the “preferred provider network.” The list is available at the Medical Advisory Board at the Workers’ Compensation Court.

Employees have the same free choice of a certified vocational expert licensed by the Department of Labor and Training.

Finally, an injured employee is required to have prior approval by the employer, the insurer, or the Workers’ Compensation Court for all major surgeries (other than surgery to relieve the employee from imminent danger). If the employer’s insurance company refuses to give permission for surgery and it is not an emergency situation, the employee is entitled to get an ex-parte (an order requested by and on behalf of only one party) Order from the Workers’ Compensation Court.

Must an injured employee submit to an examination by the company doctor?

Yes, in certain instances and only if so directed by the employer or the employer’s insurance carrier (who must assume the costs for the examination). Also, the company doctor may see an injured worker on anniversary reviews.

Workers must be cautious so that they do not find that they have inadvertently designated the company doctor as their own treating doctor. This may occur - again, inadvertently - in situations where an injured worker goes to a company doctor for an exam and returns for a follow-up exam.

In addition to cash payments and medical benefits, does Workers’ Compensation provide any other benefits?

Yes. As noted above, injured workers may also receive vocational rehabilitation. Such vocational rehabilitation may include schooling, the costs of which are borne by the insurer. An injured employee is entitled to have a vocational assessment by a vocational expert of his or her choosing at it relates to his or her vocational evaluation.

Workers’ Compensation benefits also include death benefits payable to dependents. The weekly payment to the dependents equals
that which would have been paid to the deceased employee, with an additional $20 per week for each qualifying dependent child.

Benefits to a surviving spouse cease upon remarriage. And except where a dependent child is physically or mentally incapacitated from earning, payments of dependency benefits terminate when the child turns 18 (unless the child is enrolled in school full-time, in which case the benefits continue until the child turns 23). Currently, payments, whether to a surviving spouse, or if there is no surviving spouse, to dependent children, are increased annually by 4 percent to cover rises in the cost of living.

Finally, Workers’ Compensation will pay $15,000 toward burial expenses.

**How does an injured worker apply for benefits?**

An injured employee should provide the employer with prompt notice of the injury. Failure to give prompt notice, however, will not bar a claim if the Workers’ Compensation Court determines that good cause existed or that the employer was not mislead thereby.

Employers must report worker injuries to the Rhode Island Department of Labor and Training within ten days after an employee has informed them that the employee’s work-related injury has resulted in three or more days of lost work time or required medical treatment. In cases where the injury is fatal, the employer’s report must be made within 48 hours of death.

If the claim is accepted, the employer/insurer will file a Memorandum of Agreement (MOA) and the employee should start receiving weekly benefits within 14 days. The MOA is an acknowledgment of the employer’s liability for Workers’ Compensation purposes.

In other instances, however, an employer/insurer may file a Non-Prejudicial Agreement. A Non-Prejudicial Agreement allows the payment of Workers’ Compensation benefits to begin without the company/insurer accepting liability for the injury or illness. Benefits paid under a Non-Prejudicial Agreement are limited to 13 weeks and can be stopped at any time by the employer or the insurer. If benefits continue past the 13 weeks, the employer or insurer must issue an MOA.

The distinction between the MOA and the Non-Prejudicial Agreement is significant, and an injured worker should determine as soon as possible which form it is that the employer or insurer has filed. R.I.G.L. §28-33-33.

If the injured worker has not been notified by the employer/insurer within 21 days from the date of the injury, the employee has a right to file a petition for weekly benefits at the Workers’ Compensation Court, but must do so within two years. R.I.G.L. §28-35-57.

**What if an injured worker is denied compensation?**

If a worker is denied compensation after having exhausted all routes of appeal, the worker should investigate filing a Temporary Disability Insurance (TDI) claim. The employee may file for TDI at the time the employee files for Workers’ Compensation benefits in contested matters. TDI will then pay the claim and have a lien against a subsequent Workers’ Compensation Court order awarding the employee retroactive benefits.

**What is Temporary Disability Insurance?**

Temporary Disability Insurance is a benefit administered by the Rhode Island Department of Labor and Training designed to protect workers against wage loss resulting from a non-work related injury or illness. The program is funded exclusively by deductions from the wages of Rhode Island workers. To be eligible for TDI workers must meet certain medical and earnings requirements. Workers can receive an application for TDI by calling 462-8420. Currently state employees are ineligible for TDI by statute.

**What is Temporary Caregiver Insurance?**

Temporary Caregiver Insurance allows individuals who will be out of work for seven (7) or more days to collect benefits as allowed under the Temporary Disability Insurance program for a maximum of four (4) weeks. Benefits may be collected for the following purposes: caring for a seriously ill child, parent, spouse, domestic partner, parent-in-law or grandparent, to bond with a newborn child, adopted child or foster-care child. Monetary eligibility is determined the same as Temporary Disability Insurance, however Temporary Caregiver Insurance is taxable, and benefits collected under the Temporary Caregiver Insurance program reduce the maximum number of weeks you may collect Temporary Disability Insurance during a benefit year period.
Can a worker receive both Workers’ Compensation and Social Security benefits?

Yes. A worker may receive both benefit payments; however, the Social Security benefit may be reduced during the period in which the worker is receiving Workers’ Compensation payments. And if the employee and the employer settle the Workers’ Compensation claim, the employee’s Social Security status may require a restructuring of the settlement agreement.

Under what circumstances would an injured worker qualify for Social Security Disability Benefits?

Workers disabled from any cause, work related or not, are eligible for Social Security Disability Benefits if they have worked long enough and recently enough under Social Security. The standards for eligibility are available at a regional office of the Social Security Administration. It is important to note, however, that Social Security Disability Benefit payments cannot begin before the sixth full month of disability.

When is a worker disabled as it pertains to Social Security Disability Benefits?

Generally, a worker is disabled when:

- he or she has a mental or physical disability which prevents him or her from participating in substantial and gainful activity as determined through medical evidence and other factors such as age, education, training, and work experience, and,
- the disability must be expected to last at least twelve months or be expected to result in death.

Usually it is not enough that a worker can no longer do only his or her regular work. If the worker can do other substantial gainful activity, then that worker is not considered disabled. However, depending on age, education and past relevant work experience, an injured worker may be entitled to Social Security Disability Benefits if that person cannot do his or her regular job even if they can do some work.

Examples of disabling conditions: Cancer, loss of function of two major limbs, the kidneys, the digestive system, or the ability to speak. Sometimes diseases of the heart and lungs, severe arthritis, disabling back conditions, brain damage, and mental illness are included.

How does a disabled worker apply for Social Security Disability Benefits?

Information and referral services can be obtained from the Social Security Administration by calling (800) 772-1213 (TTY 800-325-0778) between 7 a.m. and 7 p.m. on weekdays. For referrals to private attorneys call the National Organization of Social Security Claimants’ Representatives at (800) 431-2804 between 9 a.m. and 5:30 p.m. on weekdays.

Does an injured worker have the right to reinstatement after a work injury?

Yes. A worker shall be reinstated to his or her former position on demand if the employer has more than nine employees, the position exists and is available and the worker is not disabled from performing the duties of the position with reasonable accommodation. A worker’s former position is available even if a replacement worker has filled that position.

If an employee intends on returning to his or her former position, reinstatement must be requested within:

- one year from the date of injury,
- within ten days from the time period of release of return to work by the employee’s treating physician, or,
- within 30 days after the employee reaches maximum medical improvement.

If an employee is not allowed to return to work, he or she may file a petition with the Workers’ Compensation Court. The Workers’ Compensation Court is authorized to order reinstatement and award back pay and the cost of fringe benefits lost during the appropriate period. It is important to remember that an injured employee may qualify for coverage under the ADA. (See Chapter II)

Must the employer maintain health insurance for the injured employee?

Although R.I.G.L. §28-33-44 provides that employers are required to maintain health insurance coverage for two years for those
injured workers out of work due to total incapacity, under most circumstances, this statute has been declared unconstitutional and is unenforceable, at present. Lucille Sepe Pacia v. Sears Roebuck, Inc., W.C.C. No. 91-11343.

**What if the employer goes out of business or moves?**

The law is intended to protect injured workers regardless of whether an employer goes out of business or moves and there are statutory provisions against potential employer defaults under the system. The insurance company or self-insured system still is responsible regardless of what happens to the employer.
During the Great Depression, when as many as one-third of the nation’s workers were unemployed, comprehensive social legislation reforms were enacted. This New Deal legislation also sparked sweeping changes at the state level, including the creation of a program designed to insure eligible individuals against lost wages during periods of temporary unemployment: Unemployment Insurance. The Rhode Island legislature, seeing economic insecurity resulting from unemployment as a “serious menace to the health, morale, and general welfare of the people,” enacted Rhode Island’s Employment Security laws.

Rhode Island’s unemployment insurance program began in 1936 and is codified in the general laws (R.I.G.L. §28-42-1, et seq.). Benefits are administered through the Rhode Island Department of Labor and Training (RIDLT). Briefly, the program provides eligible individuals with up to 60% of his or her weekly wage for a specified period.

Who should a worker call to find out if he or she is eligible for benefits?

Anyone interested in learning if he or she is eligible for Unemployment Insurance benefits should call the Department of Labor and Training Call Center at (401) 243-9100.

Does the Rhode Island Employment Security Act cover all employment?

No. Not all employment is covered, but most employment is. Employers are subject to the Employment Security Act if they have employed one or more individuals during the year, but examples of excluded work are:

- domestic help in a private home for which less than $1,000 in wages were paid;
- work performed by an individual in the employ of his or her child or spouse or work performed by a minor in the employ of his or her parent;
- work for a church or a religious order;
- work performed as part of an unemployment work-relief or work-training program funded in any part by a federal, state, or local government;
- work performed in a rehabilitation program for individuals whose earning capacity is impaired by age, physical or mental handicap, or injury;
- work performed by inmates of a custodial or penal institution;
- work performed on behalf of certain tax exempt organizations;
- work which is occasional, incidental, and occurs irregularly, not in the course of the employer’s trade or business;
- service as a real estate salesperson or insurance broker working on commissions alone; and
- independent contractors.

How does an unemployed worker file a claim?

Filing is an easy process. An individual filing a new or reopened claim for benefits should file by telephone within seven days of his or her last work day (in order to avoid any delay or loss in benefits) by calling the Unemployment Insurance Call Center at (401) 243-9100 or file the claim on their website at http://www.dlt.ri.gov/fileclaim.htm. After the claim has been filed, the Department of Labor and Training will send a notice of filing to the employer requesting information about wages and the reason for termination. Once this inquiry has been completed (this may also include a follow-up interview with the employer), the RIDLT will make an initial determination on the claimant’s request.

If the employer fails without good cause to return the notice to the RIDLT, the employer cannot later contest any subsequent decision by the RIDLT with respect to the claim.

How is an applicant for Unemployment Insurance benefits informed of eligibility?

The applicant should be notified in writing. The claimant must serve a waiting period of seven consecutive days for which no benefits are paid, before benefits commence. If a claimant is not eligible, applicants are to be given the reasons for disqualification and the periods of ineligibility.

After the waiting period, eligible claimants can have benefits paid to them weekly by using Department of Labor and Training’s Tele-
Serve telephone number or website. By answering a series of “yes” or “no” questions, claimants can receive their benefit payment usually within two days.

**When is a worker eligible for benefits?**

Assuming that a worker is otherwise qualified, an unemployed worker is eligible to receive benefits if that individual has:

- filed a claim,
- met the minimum earning requirements, and
- is able and available for full-time work, but unable to obtain suitable work.

**Is every person who is out of work eligible for benefits?**

While not every unemployed worker is eligible for benefits, the system generally favors the employee and individuals laid off from work should certainly apply. Even in questionable situations, individuals should apply for benefits. However, there are circumstances where a worker (who might otherwise be qualified) would be disqualified. A worker is disqualified from receiving benefits if that individual:

- was discharged for misconduct connected with work,
- voluntarily left work without good cause,
- refused to accept or apply for suitable work,
- is taking part in a strike, or
- is in some other way disqualified.

**Are full-time students eligible for benefits?**

Possibly. If a student is laid off or fired without just cause, he or she may be able to collect unemployment benefits, provided he or she has earned enough money to be eligible and is able and available for full-time work, but unable to obtain suitable work. Hours of school must not interfere with hours of work in the student’s occupation.

**Are teachers eligible for benefits?**

Not if they are:

- between two successive school years or terms, having taught in the first and have a reasonable assurance of returning for the second, provided they received the assurance in writing;
- if they are full-time teachers under contract; or,
- if they worked the week prior to and have reasonable assurance of working the week after a scheduled week’s vacation period.

**As it relates to Unemployment Insurance, what is the difference between an independent contractor and an employee?**

Just as the difference between being deemed an employee or an independent contractor is a significant one when it comes to Workers’ Compensation benefits, so too it is important with respect to Unemployment Insurance.

Rhode Island law provides that the factors used to determine whether a worker is an independent contractor or an employee are those used by the Internal Revenue Service in its determination. They include:

- Who controls and directs the work?
- How is the worker paid?
- To what extent can the worker realize a profit or incur a loss?
- To what extent does the worker have unreimbursed business expenses?
- To what extent does the worker make his or her services available to the relevant market?
- Does the employer have the power to hire or fire the worker?
- Are there written contracts describing the relationship the parties intended to create?
May a retired person ever receive Unemployment Insurance benefits?

Possibly, provided that after a voluntary retirement they have worked for the requisite eight weeks to re-establish eligibility. The Unemployment Insurance benefit amount is offset by the retirement pension. Social Security and other employee-contributed pensions would only be deducted at one-half the weekly pension amount. Non-employee contributed pensions would be deducted at the full weekly pension amount.

Are strikers eligible for Unemployment Insurance?

Generally, strikers are not eligible for benefits. They may be eligible for benefits if the unemployment resulted from a lockout intended to gain concessions from the union or to resist collective bargaining demands. But, there is an exception to this exception. Where the employer is part of a multi-employer collective bargaining group and the lockout is in response to a strike at the facility of another member of the multi-employer group, benefits will be denied.

If a claimant is unemployed due to a strike and is not a member of the organization responsible for the dispute, nor does the individual support the strike by either participation or financial contribution, the claimant may be eligible for benefits.

What rights of appeal does an applicant have if denied benefits?

If an applicant has been denied benefits, the applicant may appeal the denial. An individual seeking a review of a denial must request a hearing within 15 calendar days. A referee, after a hearing, will make findings and conclusions and either affirm, modify, or reverse the decision of the Department of Labor and Training. That decision is final unless further review by a board of review is initiated within 15 days. The law does provide for judicial review of the board’s decision.

When an employer appeals any decision, benefits will continue until a final determination of eligibility has been made. Benefits paid to the claimant during the appeal period cannot be recovered.

How is the weekly benefit amount computed?

Computation of the weekly benefit begins with a calculation of the Base Period. Typically an individual’s Base Period consists of the first four of the last five completed calendar quarters before the starting date of the claim. The starting date of an individual’s claim is the Sunday of the week in which the individual first files.

To be eligible for Unemployment Insurance benefits an individual must have been paid at least $10,800 in the Base Period or Alternate Base Period. If the individual doesn’t meet this minimum-earning requirement, the Department of Labor and Training will use an Alternate Base Period, which consists of the last four completed calendar quarters before the starting date of the claim.

If an individual does not meet the earning requirements, the individual may still be eligible if that individual:

- was paid at least $1,800 in one of the Base Period Quarters,
- was paid total Base Period wages of at least one and one-half times the highest single quarter earning, and
- was paid total Base Period wages of at least $3,600.

The weekly benefit is computed by multiplying an individual’s highest quarter’s wages in the Base Period by 3.85%. The maximum Rhode Island weekly benefit rate is capped at 67% of all Rhode Island workers’ average weekly wage, currently $566.00. Benefits remain unchanged throughout the benefit year.

Eligible individuals may also be entitled to a Dependency Allowance for up to five children. The rate is computed at 5% of the individual’s Weekly Benefit Amount for each child, limited to five (5) children with a minimum allowance of $15 for each dependent.

When do benefits commence and for how long will they continue?

Eligible individuals should get their first benefit payment during their third week of unemployment.
Following a seven day (Sunday through Saturday) waiting period, benefits run for a maximum of 26 weeks or until an individual has exhausted his or her benefits, whichever comes first. The total amount of benefits available to an individual is equal to 33% of the individual’s Base Period wages divided by the Weekly Benefit Amount (excluding the dependent’s allowance) to arrive at the number of weeks (again, up to 26 weeks) for which benefits will be provided.

**How does the law define total and partial unemployment?**

An individual is deemed **totally unemployed** in any week in which he or she performs no work and receives no wages. Furthermore, the individual cannot reasonably return to any self-employment in which the individual has customarily been engaged.

An individual is deemed **partially unemployed** in any week of less than full-time work if he or she fails to earn in wages for that week an amount equal to the weekly benefit rate for total unemployment to which the individual would be entitled if totally unemployed and eligible.

**Are benefits available for partial unemployment?**

Yes. An eligible individual would be entitled to benefits for any week in which he or she earned less than his or her benefit rate and worked less than full-time hours. Claimants must report all wages received during any week he or she is claiming benefits.

**What does it mean to be able to work?**

An applicant is **able** to work when the individual is physically or mentally capable of performing his or her usual occupation or other suitable work. This means an individual will not be considered able if he or she is sick or injured off the job and cannot work. Such an individual may be eligible for Temporary Disability Insurance (TDI) benefits (provided he or she has earned enough money to qualify for benefits).

If an individual was injured at work and for that reason is not able, that individual is similarly ineligible for Unemployment Insurance, but may qualify for Workers’ Compensation benefits.

**When is an applicant available to work?**

In order to collect benefits an individual must make an “active, independent search for suitable work” and register for work with the Job Service. Restrictions placed on availability, even with good cause, which substantially impair a claimant’s availability, may render the individual ineligible for benefits. The Department of Labor and Training recommends claimants maintain a written record of weekly search efforts.

An exception to this requirement is provided for those individuals on a temporary lay-off with a definite date of return within 12 weeks from the last day of work. Such individuals will not be required to look for work. The exception also applies to those persons on a staggered (week on/week off) schedule.

Lastly, members in good standing of unions that normally hire through a hiring hall or which make use of a business agent are not required to look for work.

**What is meant by suitable work?**

Suitable work refers to the sort of work for which the claimant is reasonably fitted and which is located within a reasonable distance from the claimant’s home or last place of work.

Work is **not** suitable if:

- it is detrimental to the claimant’s health, safety or morals;
- it results from a strike, lockout or other labor dispute;
- the wages, hours, and other employment conditions are substantially less favorable to the employee than those prevailing for similar work in the locality; or,
- as a condition of work, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.
What does it mean to be discharged for misconduct?

Assuming that a claimant is in all other respects qualified to receive benefits, he or she will be disqualified if the discharge resulted from misconduct. Misconduct usually involves:

- deliberate actions detrimental to the employer;
- gross negligence;
- disregard of standards of behavior, which the employer has the right to expect of his employee; or
- knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

Since a discharge for misconduct disqualifies an individual from receiving benefits, it is important to note what is not misconduct. A discharge because of:

- mere inefficiency,
- failure in good performance as the result of inability or incapacity, or,
- good faith errors in judgment

will not constitute misconduct and, therefore, would not disqualify an individual from receiving benefits.

Misconduct is not necessarily limited to on-the-job conduct and the RIDLT denied benefits to an employee whose misconduct took place after work hours and off the work site. That denial was upheld by the Rhode Island Supreme Court which found that the off-duty, off-site misconduct was job-related, given the defendant’s position of “high visibility and great responsibility” as the Superintendent of the Rhode Island Training School. The Court defined misconduct as:

[C]onduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his [or her] employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. (italics in original)

In this instance, according to the Court, the misconduct “extinguished” the employee’s abilities to carry out the employer’s work and that the employer “had the right to expect from the claimant a reasonable standard of obedience to the criminal law both on and off the premises of [the employee’s] employment.” C. Mae Bunch v. Board of Review, Rhode Island Department of Employment and Training, 690 A.2d 335, 338 (R.I. 1997)

Following a discharge for misconduct, a worker will have to reestablish eligibility by working for no less than eight weeks during which time he or she will have to meet certain earning thresholds.

Under what circumstances can an employee who voluntarily leaves a job receive Unemployment Insurance benefits?

If an individual voluntarily left employment with good cause, eligibility for benefit payments is not forfeited. It is important, however, to note that the departure from employment must be voluntary and with good cause. Voluntariness was not found when an employee retired after being told to take an early retirement or she would be fired.

What is meant by good cause?

Good cause generally results from adverse circumstances beyond the employee’s control. Rhode Island courts, which take a liberal reading of the law, have stated that good cause is a “mixed question of law and fact.” The most important thing to recall is that it is the employee who quits voluntarily who bears the burden of demonstrating that the separation occurred for good cause.

Good cause has been found where:

- an employee left employment because he had a particular sensitivity to chemicals used by his employer
- a public relations person voluntarily left employment when he refused to publish a misleading news release, and,
- a teacher voluntarily terminated his employment in order to accompany his working wife (the wife had not
retired) to another state,

but not where:

- an employee quit merely because of personal dissatisfaction with the nature of the employment
- an employee left a job to marry and move to another state, or
- an employee failed to contact the temporary agency upon completion of an assignment.

Rhode Island law also recognizes good cause where an employee voluntarily leaves work to protect herself, himself, or family from domestic abuse.

**Can an individual receive benefits in Rhode Island for work performed out of state?**

While the benefits are actually benefits from the state in which the work was performed, the Department of Labor and Training can provide information about another state’s requirements and assist in filing the claim. Also, if an individual worked in more than one state he or she may be eligible to file a Combined Wage Claim. The RIDLT will request that out-of-state wage credits be transferred in order to be applied toward benefits in Rhode Island.

**Can an individual receive Unemployment Insurance benefits while receiving Temporary Disability Insurance (TDI) or Workers’ Compensation?**

An individual cannot receive Temporary Disability Insurance and Unemployment Insurance benefits because the criteria for Unemployment Insurance benefits include being able and available for full-time work; whereas, the criteria for TDI benefits are that the individual is unemployed due to illness and under a doctor’s care and cannot work.

If an individual is partially disabled and receiving partial Workers’ Compensation benefits, and he or she is able and available for full-time work, that individual might be eligible for partial Unemployment Insurance benefits. A decision will be made as to eligibility. The Workers’ Compensation benefits must then be less than the Unemployment Insurance benefit rate and would be deducted from the Unemployment Insurance benefit rate.

**Are benefits taxable?**

Yes. Benefits are subject to federal and state income tax. Claimants may elect to have the Department of Labor and Training withhold taxes from the benefit check.

**Are Unemployment Insurance benefits protected from creditors?**

Yes. So long as benefits are not mingled with other funds they are exempt from the claims of creditors or attachment. However, the law does provide for deductions and withholding of child support payments.

**How are non-fraudulently obtained unemployment insurance overpayments treated?**

If a claimant receives benefits he or she is not entitled to, the claimant will be required to repay the amount overpaid. Repayment is usually made in a one-time, lump sum payment; however, it may be possible to make installment payments.

**Are other benefits available from the Department of Labor and Training?**

Yes. In some cases, tuition waivers are available for Rhode Island state operated colleges or at the University of Rhode Island. Under certain circumstances - such as job loss because of imports - an individual may be eligible for job training, job search allowance, relocation allowance, and extended benefits.

**Can a worker receive benefits while enrolled in a training program?**

Individuals should notify the Department of Labor and Training if they are enrolled in any school or training program. The law provides for an individual to continue to receive benefits while enrolled in approved adult basic education or vocational training programs. The Department of Labor and Training makes the decision on whether the program is approved.
CHAPTER VI
COLLECTIVE BARGAINING

History has shown that organization has been an effective way for working people to change their social and economic status and to protect their interests. The story of workers’ efforts to form labor organizations is long and filled with struggles. At one point labor organizations were regarded as criminal conspiracies. Today they are recognized as legal organizations, the formation of which was - and continues to be - expressly encouraged by both national and state policy.

What led to the passage of labor laws?

The development of labor law was somewhat sporadic until the first part of the twentieth century. Early on, the development of labor law was driven, primarily, by court decisions. The collective efforts of workers were frequently regarded by courts as criminal conspiracies. This view continued until the latter part of the 19th century, but even after it had changed it did not mean that unions would no longer face formidable legal obstacles. Laws such as the Sherman Anti-Trust Act of 1890, for example, intended to outlaw conspiracies among corporate competitors, were interpreted by the courts to outlaw union activities such as boycotts. See, Loewe v. Lawlor, 208 U.S. 274 (1908) (*The Danbury Hatters Case*).

Despite efforts by Congress to remedy the situation (i.e., The Clayton Act of 1914 was one such effort, though an ineffective one) relief for workers did not really arrive until the mid-1920’s with the passage in 1926 of the Railway Labor Act. That Act prohibited railroads companies from interfering with the right of railroad workers to organize and bargain collectively. Six years later, the Norris-LaGuardia Act declared a public policy extending to workers the “full freedom of association, self-organization, and designation of representatives of [their] own choosing” to negotiate terms of employment.

However, the single most important development in labor law came three years after Norris-LaGuardia: The National Labor Relations Act of 1935 (the Wagner Act).

What is the National Labor Relations Act?

The National Labor Relations Act, passed in 1935, is the labor law of the land. It established employee rights and unfair labor practices by employers. It also established procedures through which employees can choose their own representatives.

Often referred to as the Wagner Act (after the senator who sponsored the legislation), the NLRA expressly sought to contain the industrial strife that gripped the United States during the Great Depression by “encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”

What is the Labor Management Relations Act?

The Labor Management Relations Act (LMRA) refers to the NLRA, as amended by the Taft-Hartley Act. The Taft-Hartley Act amended the NLRA in 1947 by establishing several union unfair labor practices, as well as certain other changes.

What is the Landrum-Griffin Act?

The Landrum-Griffin Act amended the LMRA in 1959 and primarily deals with the internal practices and procedures within unions. After Landrum-Griffin, the LMRA was renamed the Labor Management Relations Act, 1947, as amended.

It is not uncommon, however, to hear people speak of component parts of the Act. As noted above, the original NLRA is still referred to frequently as the Wagner Act. Similarly, the specific changes made in 1947 are often referred to collectively as Taft-Hartley.

Throughout this chapter, unless stated otherwise, the term NLRA (or, the Act) is used and includes along with the original Act, all amendments.

How is the NLRA administered and enforced?

The National Labor Relations Board (NLRB) is responsible for administering and enforcing the NLRA. The Board has the following
responsibilities:

- Determining whether employees have decided to have union representation through secret ballot elections; and,
- Preventing and remediying unfair labor practices.

What is the extent of the Act’s coverage and the Board’s jurisdiction?

In terms of coverage, the Act speaks in the broadest terms and refers to employers whose operations affect commerce. However, before the Board will assert jurisdiction, the employer must meet the monetary threshold established by the National Labor Relations Board. These thresholds vary from industry to industry. Also, there are certain employers and employees that the Act excludes from coverage.

Excluded from coverage are:

- employees of the United States (except employees of the U.S. Postal Service)
- employees of any wholly owned government corporation
- employees of any Federal Reserve Bank
- state and municipal employees
- employees subject to the Railway Labor Act
- agricultural employees
- domestic servants
- persons employed by a parent or spouse
- independent contractors
- supervisors
- confidential employees
- management employees

Federal employees are covered by the Federal Service Labor-Management Relations Act. Rhode Island’s public employees are covered by several different laws, listed toward the end of this chapter.

How is the NLRB structured and organized?

The NLRB is composed of interrelated parts: The National Labor Relations Board and the General Counsel. Their respective roles, as they interrelate, have been compared to a judge and a prosecutor.

The Board, composed of five members serving staggered terms, acts as a “quasi-judicial body” which decides cases on the basis of formal records in administrative proceedings. The President appoints board members with approval by vote of the Senate, except for the Board Chair who is selected by the President and confirmed by the Senate. The General Counsel is independent from the Board and is charged with investigating and prosecuting unfair labor practices. The General Counsel also oversees the regional field offices, each of which has a Regional Director. Regional Directors make the initial determinations in unfair labor practice and representation cases. Currently there are 34 regional offices. Rhode Island is in Region One.

What are the basic rights of employees under the Act?

The basic rights of employees are spelled out in Section 7 of the Act:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [the Act].”

The Act officially recognizes that under modern economic conditions “an individual unorganized worker is commonly helpless to exercise actual liberty,” so that a worker must be free to organize collectively. As a declared national policy, the NLRA encourages collective bargaining, defines the rights of employees and employers in this process, and seeks “to eliminate certain practices on the part of labor and management that are harmful to the general welfare.”
Does the Act apply only to unionized employees?

No. The express language of the Act does not limit the exercise of the enumerated rights to union members only. It speaks to employees engaged in “concerted activity.” But since the Act is interpreted by the National Labor Relations Board, whose members tend to reflect the political views of the appointing authority, the inclusiveness of the Act will vary.

In *New York University*, 2-RC-22082; 332 NLRB No. 111, New York, NY Oct. 31, 2000, the Board held that graduate assistants at private universities are employees under the *National Labor Relations Act* and entitled to organize and bargain with their employer even though they are enrolled as students.

While this and other decisions make it clear that even nonunionized employees have rights under the *NLRA*, it does not mean that an employer will not illegally retaliate. Many of these cases arise simply because an employer has retaliated when employees exercise their rights under the Act.

Finally, the Act even extends to people who are not yet - or who actually may never be - employees of a particular company, since, under the Act, it is unlawful for an employer to refuse to hire an individual because that individual is a union supporter.

If there is no labor organization can one be started?

Yes. Workers in nearly every place of employment are free to join an existing organization or start their own. Workers might affiliate with an international union or start their own organization in a single work site. Labor organizations must be free, independent, and worker controlled. “Company unions” - that is, company controlled employee organizations that give a deceptive appearance of independence - are currently illegal.

Can an employer oppose the unionization of employees?

Employers may be personally opposed to the unionization of company employees, and can even articulate their opposition, but their actions in opposition to organizing employees are restricted by the law. Violations of the restrictions indicated in the NLRA are termed *unfair labor practices*.

Section 8(a) of the Act identifies the *unfair labor practices* of employers and Section 8(b) identifies the *unfair labor practices* of unions. The prohibitions are written in somewhat broad terms and have been further defined by decisions of the *National Labor Relations Board* and the courts.

What are the *unfair labor practices* of employers?

As set out in Section 8(a), it is an *unfair labor practice* for employers:

- “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7” 8(a)(1);
- “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it” 8(a)(2);
- “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a union” 8(a)(3);
- “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act” 8(a)(4);
- “to refuse to bargain collectively with [employee] representatives.” 8(a)(5).

Decisions by both the NLRB and the courts serve to illustrate these rights. For instance, *unfair labor practices* have been found where an employer:

- told employees that by unionizing they may have fewer rights and benefits,
- gave employees the impression that their union activities are being watched,
- told employees that the company will not bargain with the union,
- closed part of the business in order to “chill” unionization efforts,
- refused to reinstate employees in open jobs because they took part in a lawful strike
- harassed union activists, and
• provided unscheduled and unanticipated wage increases to workers being organized by a union in an attempt to discourage unionization.

The line between lawful and unlawful conduct is, at times, very fine. While it is unlawful to interrogate workers about union sympathies, it may be lawful, under certain conditions, to poll workers. Threats of reprisal in an employer’s anti-union speech to employees will make an otherwise lawful expression of opinion, unlawful.

What are the restrictions that may be placed on the distribution of literature and the solicitation of employees during organizing efforts?

Generally, workers have the right to talk about organizing and to pass out union membership cards anywhere in the workplace as long as it does not disrupt production. Handing out union literature is protected activity as long as it is done on a worker’s own time (i.e., lunch hour, coffee break, etc.) and in non-work areas (i.e., cafeteria, locker rooms, or parking lot).

However, the rules for nonemployee union organizers are different. An employer may ban nonemployee organizers from distributing literature or soliciting company employees on company property, but only if it is possible for the union to reach the employees with reasonable efforts through other channels and the employer’s rule is applied to all other non-union distributions and solicitations (such as charities). See NLRB v. Babcock and Wilcox Co., 76 S.Ct. 679 (1956); American Postal Workers v. NLRB, - F.3rd - (6/4/2004)

Can the union communicate to members through the company bulletin board or email system?

It depends. If the company permits the bulletin board or email system to be used for other non-business uses, it cannot discriminate against the union seeking to use the same means to communicate to its members. See E.I. du Pont & Co., 311 NLRB 893 (1993).

If workers communicate with each other through social media accounts (such as Facebook and Twitter) about working conditions, will the workers be protected?

In Hispanics United of Buffalo, Inc. and Carlos Ortiz, 359 NLRB No. 37 (N.L.R.B.), (December 14, 2012) the NLRB found worker communication on social media to be protected concerted activity. The facts of Hispanics United are as follows: Five employees posted comments on Facebook in response to a co-worker's criticism of their job performance. The co-worker who made the initial criticism complained that the responses of the other five constituted bullying. The five were later terminated by their employer.

The Board defined concerted activity as that which is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” (Meyers I, 268 NLRB at 497) Later, the board expanded this definition to include those “circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” Meyers II, 281 NLRB at 887.

Applying these principles to the specific facts before them in United Hispanics, the board concluded that the five employees engaged in protected concerted activity by posting comments on Facebook that responded to a co-worker's criticism of their job performance.

Responding to the contention that the postings of the five constituted bullying in violation of the company’s no-bullying policy, the Board wrote, “[T]he Respondent could not lawfully apply its policy “without reference to Board law.” Consolidated Diesel Co., 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001). As the Board explained in Consolidated Diesel, “legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to . . . discipline on the basis of the subjective reactions of others to their protected activity.” Id

It is important to note, however, that not all comments by employees will fall under the protection of the NLRA.

How does a labor organization come to represent workers?

The National Labor Relations Act sets up a straightforward procedure for organizing. The first step is to demonstrate that a labor organization has support. This is accomplished with authorization cards (also known as cards of intention). Workers who want to join the union sign the cards, which may be presented to the National Labor Relations Board as evidence of the workers’ desire to join a labor organization. However, if the employer believes that many of the employees desire to join the union, the employer may voluntarily agree to bargain collectively with the organization.
Employers often do not voluntarily accept the signed cards as proof of union interest and there are many legal tactics available to employers to delay recognition of the union. When an employer refuses to voluntarily recognize the labor organization, the labor organization, any employee, or the employer may file a representation petition requesting an election with the regional office of the National Labor Relations Board. The Board determines if there is sufficient interest among the workers for forming a union. Sufficient interest is demonstrated if at least 30 percent of the work force has signed authorization cards. If so, the Board will determine the potential bargaining unit and set the date for an election.

Determining who should be in the bargaining unit is often a complicated and time-consuming process. The basic test is that all unit members have a community of interest in terms of job responsibilities, wage rates, benefits, and other common aspects of work. People excluded from bargaining units pursuant to the Act are those persons identified with management’s interests.

**Must an employer provide the union with information about employees during organizing efforts?**

If a union election is to be held, employers may be required to provide the union with the names and addresses of workers who may be eligible to form the union. This is referred to as the Excelsior List. In addition, professional organizers may have a right to enter the workplace if it is open to other members of the public.

**How is an election held?**

The National Labor Relations Board works to ensure a fair election. There are many rules surrounding an election and if an employer or union violates these rules, it may result in an unfair labor practice charge or invalidate the election. In some cases of serious employer misconduct, the Board may order an employer to recognize the union without holding an election. According to the NLRB Regional (Boston, MA) Director:

> “If the Board determines that objectionable conduct has been committed, it will order a rerun election. If a union has obtained proper authorization cards from a majority of employees in the bargaining unit and the employer subsequently commits serious unfair labor practices precluding a fair election, the Board may require the employer to recognize the union without holding an election.”

The election is held by secret ballot and gives workers a choice between one or more unions, and no union. If no choice receives a majority of the votes, a run-off election may be held.

**What happens after the election?**

Votes are counted. Each party to the election may appoint observers at the poll, assist in counting ballots, or otherwise help the Board’s agent. If over 50 percent of the employees voting chooses to join a particular union, the organization is certified and the employer is required to bargain with the organization.

**Can there be another election if “no union” wins?**

Yes, but not before a minimum of twelve months has elapsed since the first election. However, in cases where the National Labor Relations Board finds that the employer engaged in objectionable conduct, a rerun election may be ordered without the waiting period.

**Can there be another election if the union wins?**

Yes. But once again, not before a minimum of twelve months has elapsed since the first election. At that point a decertification election can be held or another union can seek to represent the workers. Any worker or employee group can request it, but it is illegal for an employer to sponsor any action encouraging a union’s decertification.

The methods for initiating and conducting an election to change the union, or to return to no representation, are the same as the original election. If the employees vote against the labor organization, it is decertified. However, if the union and employer have negotiated a contract within twelve months from when the union was certified, then no election can be held until after the expiration of that contract, or three years, whichever comes first.
Does the employer have to bargain with the union?

Yes, both parties are obligated to bargain in good faith. But recognition of a union - either through the election and certification process, or through voluntarily recognition by the employer – signifies more: The union is the exclusive representative of the employees. This means that the employer cannot bargain with any other entity or individual that purports to act on behalf of the organized employees.

The employer is under a duty to meet with the union representing a majority of the employees and bargain in good faith. The union is under a reciprocal duty. However, neither party is required to agree to a proposal made by the other or to make a concession.

Good faith suggests - and courts have held - that merely going through the motions of bargaining is insufficient. Nor can employers have a “take it or leave it” approach in negotiations. Lastly, they cannot attempt to go around the union and deal directly with the employees.

Can the employer bargain directly with the employees?

No. The status of exclusive representative enjoyed by the union means that the employer is legally prohibited from dealing directly with members of the bargaining unit as to all terms and conditions of employment. With few exceptions (such as major league baseball players whose base salary is negotiated by the player’s union and who, individually, bargain any salary above that base), an employer is prohibited from engaging in individual bargaining.


What does the law say about the subjects over which the parties seek to bargain?

The subjects over which parties bargain are widely varied and, while many subjects are common to all collective bargaining agreements, many are specific to the workplace, the industry, or the profession. In addition, federal and state laws may already address particular subjects and, thereby, limit the extent to which the parties can negotiate on an item. (For instance, both federal and state minimum wage laws would prohibit the parties from negotiating a wage below the minimum wage.)

The Act requires parties to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” Subjects that fall within the meaning of “wages, hours, and other terms and conditions of employment” have been deemed mandatory subjects of bargaining; that is, the parties are forced to bargain over these subjects. The failure of an employer to bargain over mandatory subjects constitutes an unfair labor practice.

Mandatory subjects are contrasted with permissive subjects of bargaining and nonbargainable subjects. Permissive subjects are those subjects that can be included in a collective bargaining agreement, but are not subjects over which the parties are forced to bargain; that is, they are not mandatory subjects. Permissive subjects include:

- the scope of the bargaining unit represented by the union
- employer insistence that nonunion employees have a right to participate and vote in union meetings
- insistence by the union that the employer furnish a bond for the payment of wages and benefits
- insistence by the employer that the union furnish a bond to indemnify the employer should it be picketed by outside unions
- settlement of Unfair Labor Practice charges
- insistence upon a transcript of negotiations or the tape recording of bargaining sessions

Neither party is required to bargain about a permissive subject, which means that neither party can lawfully insist upon a permissive proposal to the point of impasse. This doesn’t mean, however, that permissive subjects are so easily removed from negotiations.

The Board has recognized that there are often considerable relationships between permissive subjects and mandatory subjects within a package proposal containing both. (For instance, an employer’s proposal on reinstatement of certain discharged employees and
waiver of back-pay - two permissive subjects - could very likely have bearing on a wage-increase proposal - a mandatory subject. If the permissive proposal is removed from the table, the employer could lawfully alter its wage-increase proposal).

The Board has also made it clear that under such circumstances, one party cannot conclude negotiations by agreeing only to those demands of the other party which constitute mandatory subjects of bargaining. Nordstrom, Inc. and Retail Store Employees Union Local No. 1001, AFL-CIO, 229 NLRB 601 (1977)

Nonbargainable subjects are subjects on which no bargaining is permitted. They either must be included in the bargaining agreement automatically (i.e., a clause acknowledging the union as the exclusive representative of employees must be included in the agreement) or they may not be included in the agreement at all (i.e., a “hot cargo” clause: A clause in which an employer agrees not to require its employees to handle or work on products of plants employing strikebreakers or non-union workers. Such clauses were outlawed by Taft-Hartley).

Notwithstanding the law and, as a practical matter, what the parties bargain over and the extent to which they bargain over certain issues, will depend very much on the relative strengths of the parties.

Specifically, what subjects have the courts and the NLRB deemed mandatory subjects?

Those subjects that are embraced by the terms “wages, hours, and other terms and conditions of employment” and, therefore, have been deemed mandatory subjects include:

- wages
- discipline and discharge procedures
- substance abuse policies
- work schedules
- union security and checkoff
- vacations and individual merit raises
- bonuses and profit sharing,
- grievance and arbitration procedures
- tape recording arbitration proceedings
- work rules
- group insurance plans
- no-strike clauses
- seniority provisions
- zipper clauses (In its broadest form a zipper clause is a contract clause which indicates that the parties have had the opportunity to bargain over all of the mandatory subjects of bargaining and each waives their right to bargain over any matters during the life of the contract. More narrowly, the clause can limit the waiver to only those issues discussed during negotiations.)

Does the employer have to give the union information for use during collective bargaining?

The National Labor Relations Act requires that an employer, upon request, supply the union with relevant information needed for bargaining. This means, for example, that the union can obtain:

- the costs of benefit packages proposed by the employer; and
- economic information data on wages.

A particularly significant rule is that a company claiming the financial inability to meet a union’s demands may be required to prove its claim by showing its financial records to the union.

What is a collective bargaining agreement?

A collective bargaining agreement is an agreement entered into by an employer and a labor organization for the purpose of regulating certain work-related issues. The provisions of the labor contract are binding on both sides for a mutually acceptable period of time and are enforceable through the grievance and arbitration procedures, appeal to the National Labor Relations Board (or, for public employees, the Rhode Island State Labor Relations Board), and finally, through recourse to state or federal courts.
This agreement takes the form of a legal contract for several reasons. Employees need to know in advance about wages, fringe benefits, discipline proceedings, and other matters. Employers need to know the same things, plus they want protection from strikes for a certain period of time.

In the vast majority of cases both parties to the agreement comply with its contents and the law never enters the picture. In some cases serious abuses do occur, and workers may turn to the Labor Board or the courts to seek protection.

**What changes in working conditions can an employer make during the term of a collective bargaining agreement?**

That depends on what changes are proposed, whether the matter is contained in the collective bargaining agreement, and whether or not the union has waived the right to bargain over the subject. In certain instances the obligation imposed by the Act to bargain in good faith will be a factor.

Generally, if the terms are spelled out in the collective bargaining agreement - whether they are *mandatory subjects for collective bargaining* or *permissive subjects for collective bargaining* - the employer can neither insist on a change nor implement a change for the duration of the contract without the union’s consent.

If the employer - without first having bargained with the union - makes a change in a condition of employment spelled out in the collective bargaining agreement, and the subject is a *mandatory subject for collective bargaining*, the employer has committed an unfair labor practice.

If the employer changes an aspect of employment contained in the collective bargaining agreement - once again, without having bargained with the union - and the subject is a *permissive subject for collective bargaining*, there is no unfair labor practice; however, there may be an action for breach of contract. See, *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 188 (1971).

If the change sought is not spelled out in the collective bargaining agreement, but the item is a *mandatory subject for collective bargaining*, the employer cannot make any changes until the employer gives the union notice of an intended change and both the employer and the union bargain to impasse, provided that the issue was among those issues discussed at the bargaining table. Only then can the changes be lawfully implemented.

If the change is not spelled out in the collective bargaining agreement and the matter concerns a *permissive subject for collective bargaining*, the employer, generally, has no duty to bargain. There is at least one exception to this rule: If the *permissive subject* at issue is the scope of the bargaining unit and the parties do not agree on a change, no unilateral change is permitted without the Board’s consent.

And lastly, an employer can make changes permitted by the contract.

**Why is the scope of the bargaining unit different?**

The reason underlying the law’s disfavor with unilateral changes in the unit description is simple: If an employer could vary unit descriptions at will, that employer would have the power to sever the link between a recognizable group of employees and its union as the collective bargaining representative of these employees. “This, in turn, would have the effect both of undermining a basic tenet of union recognition in the collective bargaining context and of greatly complicating coherence in the negotiation process.” *Boise Cascade Corp. v. NLRB*, 860 F.2d 471 at 474-75 (1988).

Thus, continuing with the question of permissible changes by an employer: Once a specific job has been included within the scope of the bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board.

**What is an impasse in negotiations?**

According to the NLRB, an impasse occurs following good faith bargaining at the “point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile.” *A.M.F. Bowling Co.*, 314 NLRB 969 (1994). Whether an impasse exists is largely a factual determination. Among the factors considered is the bargaining history of the parties, the fluidity of
bargaining positions, whether there is a demonstrated willingness to give issues any further consideration, and statements by the parties regarding impasse.

An inability to reach agreement on one issue, generally, does not create an impasse. Rather, it is reached when discussions on proposals as a whole become fruitless.

An impasse can end – and the duty to bargain renewed – when circumstances or conditions change, such as a change in a bargaining position by one of the parties.

What happens when an impasse occurs?

While the primary objective of the National Labor Relations Act and the corresponding state Labor Relations Act is to require labor and management to establish working conditions jointly through the process of collective bargaining, it doesn’t always happen. What happens following an impasse in negotiations depends on whether the relationship is governed by the laws of the private sector or the public sector – and if governed by the laws of the public sector, which employee group.

When an impasse is reached in the private sector, the duty to bargain is not terminated, but only suspended. The impasse permits the employer to make unilateral changes in working conditions that are “not substantially different or greater than any which the employer… proposed during the negotiations.” Atlas Tack Corp., 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977).

While the impasse doctrine permits an employer to use unilateral economic pressure by establishing new terms and conditions of employment as set out in the employer’s bargaining proposals, the Courts have recognized the limits as to what may be unilaterally imposed by an employer after an impasse has been reached. Subjects that the Courts have found are beyond the implementation-after-impasse doctrine because they either arise from statute or contract, include union-security, dues check-off, and no-strike provisions, and an employer’s withdrawal from multi-employer bargaining.

Also beyond the scope of the doctrine are those proposals which, if implemented, would tend to destroy rather than further the bargaining process. Thus, an employer’s proposal to implement wage increases without limitation as to time, standards, criteria, or the union’s agreement was found to be so “inherently destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.” NLRB v. McClatchy Newspapers, Inc., 321 NLRB 1386 (1996).

Impasse in the public sector is discussed on page 50.

What is the grievance and arbitration procedure referred to in the collective bargaining agreement?

The grievance and arbitration procedures referred to in the collective bargaining agreement are the mechanism used by the parties, most frequently the union, to administer the contract and further define the rights and obligations of the parties. The procedure is regarded as a more efficient and less costly means to resolve disputes over contract interpretation than litigation.

The grievance - essentially a complaint - is the first step of a multi-step process constructed by the parties used to resolve disputes. Generally, the first step involves efforts by the union to resolve the matter informally, that is, without having reduced the complaint to writing. If those efforts fail, the grievance is put in writing and aired at a hearing in which both the union and the employer present their respective arguments on the issue. There may be one or two more steps in this process before an arbitrator hears the matter. The precise number of steps before arbitration is determined by the parties and included in the collective bargaining agreement.

The procedure will include timeframes for submitting grievances and appealing unfavorable decisions, in order that disputed matters be resolved as efficiently and equitably as possible.

The final step in the process is arbitration. An arbitrator - often referred to as a third party neutral - hears each side of the dispute and renders a decision on the matter. The decision of the arbitrator is, for the most part, final and binding on both parties.

Is the arbitrator limited in deciding matters presented by the parties?

Yes. Because the grievance and arbitration process is a creation of the parties to the collective bargaining agreement, the parties define the authority of the arbitrator. Most frequently the arbitrator is asked to determine whether the contract has been violated and, if so, what the remedy should be.
As noted, however, the decision of the arbitrator is final and binding - for the most part. A party to the arbitration may appeal the arbitrator’s ruling to the courts, but courts are limited in the scope of their review. The contours of the court’s review were outlined in three cases decided by the U.S. Supreme Court and referred to collectively as the Steelworker’s Trilogy.

The Steelworkers Trilogy makes clear that:

- The question of arbitrability (substantive arbitrability) is for the courts to decide and “[d]oubts should be resolved in favor of [arbitration].”
- The question of whether the grievance process was followed (procedural arbitrability) is for the arbitrator to decide.
- If the arbitrator’s decision “draws its essence from the collective bargaining agreement” the courts may not revise the decision or refuse to enforce it merely because the court disagrees with the arbitrator’s interpretation.

In sum, unless the decision of the arbitrator is clearly irrational and does not “draw its essence from the collective bargaining agreement,” it is final and binding on the parties and will be enforced by the courts.

**What do collective bargaining agreements mean when they refer to just cause for discipline and discharge?**

Contracts usually include a clause referencing the right of the employer to discipline employees. Unions attempt to limit unfair treatment and unduly harsh discipline of employees by including a just cause standard in the collective bargaining agreement.

A finding that just cause existed usually presumes that:

- the employee had notice of the rule the employee is charged with violating;
- the employee had notice that his or her conduct may lead to discipline or discharge;
- the rule is reasonably related to the employee’s employment;
- there was a fair investigation of the alleged infraction conducted in a timely manner;
- there is sufficient proof of the misconduct charged;
- the rule is applied equally to all employees; and,
- the penalty is commensurate to the infraction and may take into account the employee’s record.

**What are Weingarten rights?**

Weingarten rights provide that an employee, upon request, may have his or her union representative (often referred to as the shop steward) present when the employee is questioned by the employer about an issue that may result in discipline. The name is derived from the case in which the U.S. Supreme Court upheld these rights. NLRB v. J. Weingarten, Inc., 420 U.S 251 (1975).

There are two important points that must be recalled with respect to an employee’s Weingarten rights. First, the rights only come into play when the employer is investigating a matter which the employee reasonably believes may lead to discipline. Second, the employee must request the presence of the union representative, since the employer is not obligated to inform the employee of his or her Weingarten rights.

Because simple investigations can sometimes quickly become problematic, Weingarten rights are invaluable when it comes to protecting an employee’s rights. And the invocation of the right does not suggest that the employee has committed any wrong.

**What happens after an employee asks for union representation?**

After an employee asks for union representation the employer has three choices:

- Stop the interview altogether;
- Stop the interview and ask the employee if he or she wishes to continue without union representation; or,
- Stop the interview until the union representative has arrived and has had an opportunity to confer with the employee.

**What happens when the union representative arrives?**
The union representative should ask for the opportunity to confer with the employee, since the employer does not have to give the union representative such an opportunity unless the representative requests it. However, the employer is obligated to inform the union representative of the subject matter of the investigation.

**What can a union representative do during the questioning of the employee by the employer?**

The U.S. Supreme Court has made it clear that the union representative is present to assist and counsel the employee.

The union representative can confer with an employee and advise the employee how to answer a question. And while a union representative cannot advise an employee not to answer a fair and straightforward question, the representative can advise an employee not to answer questions that are confusing, misleading, or abusive. The union representative can also ask that questions be clarified and ask the employer to explain the relevancy of certain questions when the relevancy is not apparent.

The union representative can - and should - ask questions of the employer. It is crucial to the effective representation of an employee who may be disciplined to require the employer to:

- Specify the allegation(s) or charge(s) being leveled against the employee;
- Identify who is making the allegation(s) or charge(s);
- Specify what evidence the employer has relied on (and provide copies where appropriate);
- Indicate what witnesses have said and whether any statement is in writing (and provide copies where appropriate).

As noted below, the union is entitled to information relevant to the processing of a grievance. For instance, in a discipline case in which an employee is charged with violating a company rule or policy, the union representative should request a copy of the rule or policy and inquire as to how the employees were made aware of the rule or policy.

**What should a union representative do when a union member is charged with misconduct by the employer and there is the possibility that the member could also be charged criminally?**

The union representative must be extremely cautious in such situations, not only with respect to any questioning an employer may undertake, but with respect to private conversations the representative may have with the union member charged with misconduct. Unless the union representative can claim a legal privilege (i.e., attorney-client privilege), disclosures by the union member will not be protected.

Many employers understand that an employee may be reluctant to respond to questions in the face of parallel criminal proceedings or possible criminal charges. The employer may, therefore, limit any discussion to informing the union member of the misconduct charge and engage in no further questioning.

However, some employers - even though fully aware that a union member might face criminal charges - might pursue questioning. It is inadvisable under circumstances such as these for the union member to respond to the employer’s questioning. It should be noted, however, that an employer may draw an adverse inference from the employee’s nonresponse to the employer’s questions.

Even in those situations in which the union member does not answer the employer’s questions, the union representative may still need to engage in fact finding in order to represent the employee on the employer’s charge of misconduct. It is essential to determine the essential facts: Who, what, where, when, and what evidence has been relied on and is available.

**What if the employer ignores the employee’s request for union representation and proceeds to question the employee without such representation?**

This can be a problem. The employer’s conduct constitutes an unfair labor practice, but this does not mean that an employee’s troubles will necessarily be resolved in the employee’s favor. For instance, if the employee makes a self-incriminating statement - even though the requested representation was not provided - and, as a result of the information, the employer discharges the employee, it is very unlikely that the employee will be reinstated merely because he or she did not have union representation.

However, if the employee refuses to answer any questions until such time as his or her union representative is present, and, if - and
only if - as a result of the employee’s refusal to answer the employer’s questions, the employee is fired, reinstatement and back pay may be ordered.

Are employers under any obligation to provide information for grievance hearings and arbitrations?

In addition to the duties of the employer to provide information during organizing efforts and contract negotiations, a union may be entitled to personnel records or other relevant information it needs to represent its members in grievance proceedings. If relevant information is not provided upon request, an arbitrator, at the request of a party, may issue a *subpoena duces tecum* (a legal demand for records).

What are the unfair labor practices of unions?

As set out in Section 8(b), it is an unfair labor practice for a union:

- “to restrain or coerce employees in the exercise of the rights guaranteed in Section 7 (however, a union may discipline members, provided that such discipline is not contrary to the policies of the Act, and the union is acting to further its own legitimate interests). . .” 8(b)(1)(A);
- “to restrain or coerce an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances . . .” 8(b)(1)(B);
- “to cause or attempt to cause an employer to discharge or otherwise discriminate against an employee except for the failure to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership . . .” 8(b)(2);
- “to refuse to bargain collectively with an employer (if the union has been designated as the representative by a majority of the employees) . . .” 8(b)(3);
- to induce or encourage employees to stop work or to threaten people engaged in commerce or industry in order to:
  - (A) force an employer or a self-employed person to join a union;
  - (B) force an employer to stop doing business with another employer or person, or to force any other employer to recognize and bargain with the union where the union has not been certified as the representative of that other employer’s employees (secondary boycott);
  - (C) force an employer to recognize and bargain with a union where another union has been certified as the representative of the employees (strike against certification);
  - (D) force an employer to assign particular work to members of one union instead of to members of another union, unless the employer fails to conform to an order or certification of the Board determining the bargaining representative for employees performing such work (jurisdictional strike);
  - 8(b)(4);
- to charge excessive fees as a precondition to union membership 8(b)(5);
- to cause or attempt to cause an employer to pay for work that is not performed (featherbedding) 8(b)(6);
- to engage in recognition picketing where the employer has lawfully recognized another union; a valid election was conducted within the past year; or, where the picketing continues for more than 30 days without a petition for election begin filed with the NLRB. 8(b)(7).

What is the union’s responsibility to the members of the bargaining unit?

The U.S. Supreme Court has concluded that as a result of the union’s status as the exclusive representative of employees, it has an obligation to “serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and avoid arbitrary conduct.” This is referred to as the *duty of fair representation*.

How might the union breach its *duty of fair representation*?

A union breaches its *duty of fair representation* if its actions are either arbitrary, discriminatory, or in bad faith. This tripartite standard applies to all union activity. The union will likely avoid problems if it attempts to treat members equally, handle similar cases consistently, investigate each grievance, maintain records, observe time limits, and provide an internal appeal process.

The union must be especially diligent when it has a dispute between two of its own members. It must make an independent determination as to the merits of the conflicting claims by investigating the case for both sides and must allow each side the
opportunity to be heard prior to a decision by the union as to which side, if any, the union will take. \textit{Belanger v. Matteson}, 346 A.2d 124 (1975).

\textbf{Does the duty of fair representation mean that the union’s representation of members or its administration of the contract will be error free?}

No. Though each case will be determined by the facts, a union’s negligent conduct does not mean that the union has breached its \textit{duty of fair representation}. Courts have routinely held that the ‘arbitrary, discriminatory, or bad faith’ standard (first articulated by the U.S. Supreme Court in \textit{Vaca v. Sipes} 386 U.S. 171 (1967)) does not impose upon the union an onerous and unrealistic obligation and does not call for error-free conduct in the administration of the collective bargaining agreement. However, the Rhode Island Supreme Court has held that the \textit{perfunctory handling} (i.e., the failure to perform the ministerial act of a timely demand for arbitration) of an employee’s grievance amounts to more than mere negligence. \textit{Lee v. R.I. Council 94, AFSCME}, 796 A.2d 1080 (R.I. 2002) and suffices as an element in a suit for the breach of fair representation.

\textbf{What if the union violates the duty of fair representation?}

An employee who believes that his or her union has breached the \textit{duty of fair representation} can file an unfair labor practice charge with the National Labor Relations Board or sue the union and/or employer in state or federal court. Before the Board or courts will hear such a claim, the employee must do all he or she can through the contract’s and union’s procedures. If the Board or courts uphold an employee’s claim and finds that the union breached its \textit{duty of fair representation}, lost pay, reinstatement, or other compensation can be awarded.

The Landrum-Griffin Act (\textit{Labor-Management Reporting and Disclosure Act of 1959}) outlines additional rights of individual union members. (See below).

\textbf{What if a union member believes that an unfair labor practice has taken place?}

Any employer, employee, or group of employees may file an unfair labor practice charge with the regional office of the National Labor Relations Board.

If anyone believes a violation has occurred, he or she should write to:

\begin{center}
Regional Director  
National Labor Relations Board, Region 1  
Thomas P. O’Neill Federal Building, Room 601  
10 Causeway Street  
Boston, Massachusetts 02222-1072  
(617) 565-6700
\end{center}

The Regional Office will send the appropriate forms and information to file a formal charge. The formal charge must be filed and served on the charged party within six months of the violation and contain a brief general description of what happened. Under the NLRB rules, the charging party has the responsibility for insuring that the charge is timely served on the charged party. Any employee, whether in a union or not, may file. No lawyer is required and there is no filing fee or other cost to the employee.

\textbf{What will happen after the charge is made?}

An NLRB investigator will look into the charge. This will involve determining jurisdiction, researching the facts of the case, and interviewing workers, union representatives, the employer, and other witnesses. The employer or labor organization is guilty of an unfair labor practice if it interferes with the investigation.

The investigator will then make a full report to the NLRB’s regional office where it will be studied. If the regional office finds there was no violation, it will ask for the charge to be withdrawn. If the charge is not withdrawn, the regional office can dismiss the charge. This decision is subject to appeal to the General Counsel of the National Labor Relations Board in Washington, D.C.

If the regional office feels a violation did take place, the office will issue a complaint to the charged party. The charged party can demand a hearing, which is much like a trial. The decision of the hearing can also be appealed. Of course, the problem may be solved.
informally at any point along the way.

What if an unfair labor practice has been determined?

If the National Labor Relations Board finds that either an employer or a labor organization has committed an unfair labor practice, it has the power to order the practice stopped and to compensate the victim.

Common remedies ordered by the Board include reinstatement to a job with or without back pay, ordering new elections, or requiring employers to post notices concerning the rights of their employees. Each party has the right to appeal any of these orders, and it often takes years before a case is resolved.

What other laws protect the rights of union members within their unions?

The Labor-Management Reporting and Disclosure Act of 1959 (also known as the Landrum-Griffin Act) is the basic federal law protecting individual rights of union members. It contains a “Bill of Rights” for union members and sets up procedures for union elections, discipline, and financial reporting.

Whom does the Landrum-Griffin Act cover?

The Landrum-Griffin Act applies to all members of unions in the private sector, and to those federal, state, or local government employees who belong to unions representing both public and private employees.

Must a union be run as a democracy?

Yes. Title I of the LMRDA insures all union members enjoy equal rights and a voice in the affairs of the union. Union members have the right to attend union meetings and the expression of opinion - at union meetings and elsewhere - to candidates or others - is expressly protected conduct. Union members are also free to assemble apart from union meetings and may discuss union issues without fear of reprisal. Members, of course, cannot interfere with the union’s performance of its legal obligations. Subject to reasonable rules and regulations in the union’s constitution and by-laws, union members have the right to:

- vote in elections or referenda of the labor organization
- nominate candidates
- attend membership meetings
- participate in the deliberations and vote on the business of such meetings
- obtain a copy of the collective bargaining agreement
- file a grievance

Can a union discipline a member?

A union cannot discipline a member for exercising a protected right (even for suing the union in court or at the National Labor Relations Board). However, a member can be disciplined for activities such as crossing a picket line, disrupting union meetings, misusing funds, or not paying dues. The LMRDA provides a right to written charges, a full and fair hearing, and an impartial trial board before discipline can be imposed. The union cannot force or even encourage the employer to fire a worker for any reason except failure to pay union dues. See, NLRA, §8(b)(2) above.

How does the Landrum-Griffin Act affect elections held within unions?

Title IV of the Landrum-Griffin Act governs union elections. National or international unions, except a federation of national or international labor organizations, must hold elections at least once every five years. Local unions must conduct elections at least once every three years. In each case, the elected are chosen by secret ballot.

All candidates must have an equal opportunity to distribute campaign literature and are entitled to have an observer at the polls and at the counting of ballots. All union members must be notified fifteen days before the election and ballots must be preserved for one year.

If a union member alleges a violation of the election rules, he or she, after exhausting certain administrative steps (outlined in Title IV,
Sec. 402(a)(1) and (2)), may file a complaint with the Secretary of Labor, who shall investigate. If the Secretary of Labor finds probable cause of a violation that has not been remedied, the Secretary shall bring a civil action. The Secretary must prove that the violation “may have affected the outcome” of the election (a preponderance of the evidence standard). If a violation is proved, the election will be set aside and a new election called for to be supervised by the Secretary of Labor.

What disclosures does the Landrum-Griffin Act require of unions?

Title II of the Act requires the union to make disclosures of two sorts. First, the union must adopt a constitution and by-laws and file a copy of each with the Secretary of Labor, along with a detailed report on numerous matters (i.e., qualifications or restrictions on membership, authorization for the disbursement of funds, financial audits, discipline of members, imposition of fines on members, ratification information, authorization for strikes, etc.) See, Title II, Sec. 201(a). Second, the union must file a financial report detailing matters such as salaries, loans, and other disbursements. Such reports must be made available to union members.

How can a union member enforce these rights?

The Landrum-Griffin Act provides union members with the right to sue their unions for violation of their rights, but, as noted above, may require the member to first pursue internal union procedures. A union member is almost always better off trying to resolve matters internally. If unsuccessful, the member may be entitled to sue the union in federal court or may file a complaint with the U.S. Department of Labor.

A union member who thinks his or her rights have been violated may contact:

U.S. Department of Labor
Office of Labor/Management Standards
2 Whitney Avenue
Suite 301
New Haven, CT 06510
(203) 773-2130

RHODE ISLAND PUBLIC SECTOR COLLECTIVE BARGAINING LAWS

Do public employees have a right to organize?

Yes. The organization of public employees came after the organization of their private sector counterparts. There was no single act (such as the NLRA) extending the right to organize and bargain collectively to public employees. Consequently, the organization of public employees happened in something of a piecemeal fashion and this is reflected in the several statutes affording public employees the right to bargain collectively.

What statutes extend collective bargaining rights to public employees in Rhode Island?

There are seven statutes that provide the various public employees with the right to organize and bargain collectively. Listed by title and chapter, they are:

- Fire Fighters’ Arbitration Act (R.I.G.L. §28-9.1)
- Municipal Police Arbitration Act (R.I.G.L. §28-9.2)
- School Teachers’ Arbitration Act (R.I.G.L. §28-9.3)
- Municipal Employees’ Arbitration Act (R.I.G.L. §28-9.4)
- State Police Arbitration Act (R.I.G.L. §28-9.5)
- 911 Employees’ Arbitration Act (R.I.G.L. §28-9.6)
- Organization of State Employees (R.I.G.L. §36-11)

What do these laws provide?

Although the laws differ in certain respects, they have a similar structure. Each provides for the employees’ right to organize and bargain collectively. They also obligate the employer to recognize the association or organization selected by the employees. Most
important - and unlike the laws governing the organization of private sector employees - each law provides some dispute resolution mechanism.

The laws fit within the broader scheme of the Rhode Island State Labor Relations Act. R.I.G.L. §28-7-1, et seq. The Rhode Island State Labor Relations Act is modeled on the National Labor Relations Act. The state Act outlines unfair labor practices for employers and for public sector employee unions, too. The Act also established the Rhode Island State Labor Relations Board.

The Rhode Island State Labor Relations Act (RISLRA) and the National Labor Relations Act are not identical, however. The RISLRA defines the terms "employer" and "employee" more broadly than its national counterpart, embracing both public and private sector parties. However, private sector employees meeting the jurisdictional requirements of the National Labor Relations Board generally seek recourse through the NLRB, while those private sector employees that do not meet the jurisdictional requirements of the NLRB find recourse through the State Labor Relations Board. Of course, since public sector employees are excluded under the NLRA, their only recourse (for elections and to redress unfair labor practices) is to the State Labor Relations Board.

If public employees decide to organize, must they seek established labor groups to represent them?

No. Public employees, like private sector employees, may form their own labor group and do their own bargaining. Many labor groups, however, seek to merge, or affiliate with larger state and national labor organizations for support and assistance.

Is the scope of bargaining the same for public employees as it is for private sector employees?

Not quite. While public employees can bargain over many of the same subjects as their private sector counterparts, the scope is narrower, often limited by state statutes and city charters. For instance, Rhode Island’s public employees are prohibited by statute from bargaining over any and all matters relating to the state retirement system.

While a limit on bargaining may not be expressly stated in a statute or a city charter, courts have in certain instances held that parties to a collective bargaining agreement cannot strike a bargain that contravenes a statute or charter provision.

How is an impasse in bargaining dealt with in public sector bargaining?

That depends on which public sector group is bargaining. The various statutes – specific to each of the various public sector groups – outline sometimes similar paths to resolve issues unresolved through collective bargaining.

Several statutes (State Police Arbitration, Municipal Police Arbitration, Firefighters’ Arbitration, and 911 Employee’s Arbitration) are straightforward and provide, simply, that any unresolved matter can be submitted to arbitration if the parties are unable to reach agreement within 30 days of their first meeting. The arbitrators consider factors (specific to each group) such as:

- Wages of comparable groups;
- Physical qualifications;
- Job Training and skills;
- Interest and welfare of the public; and,
- Mental qualifications.

With respect to each of the above groups, the majority decision of the arbitrators is binding on the parties.

The statutes concerning certified school teachers, municipal employees, and the state employees are somewhat more involved. Each provides that either party to bargaining may request mediation and conciliation within 30 days of their first meeting. The Municipal Employees’ statute mandates participation in mediation and conciliation once commenced.

Each statute also provides for arbitration in the event that mediation and conciliation either fails or is not requested. R.I.G.L. §36-11-8 provides for conciliation and fact finding as a possible intermediate step between mediation and arbitration for state employees.

All three statutes (Teachers’ Arbitration statute, Municipal Employees’ Arbitration statute, and the state employee statute) also provide that unresolved issues can be submitted to the Director of Labor and Training for compulsory mediation within a specified number of days before the last day on which money can be appropriated by the appropriating authority. Mediation in each instance can continue until the date upon which money is scheduled to be appropriated.
Finally, each of these statutes provides that if the parties have not reached agreement within a specified number of days of a certain event the unresolved issue can be submitted to the Director of Labor and Training for compulsory mediation. Those timeframes are:

- 10 days before the close of school in June of the last year of the contract for teachers (R.I.G.L. §28-9.3-9(c));
- 30 days before school begins for municipal employees employed by a school board (R.I.G.L. §28-9.4-10(c));
- 10 days before the expiration of a contract for other municipal employees (R.I.G.L. §28-9.4-10(c)); and,
- 10 days before the expiration of the contract for state employees (R.I.G.L. R.I.G.L. §36-11-7.1(c)).

With respect to state employees, the decision of the arbitrator is binding as to all issues and matters other than an issue which involves wages. The decision is advisory on the issue of wages. With respect to municipal employees and school teachers, the decision of the arbitrator is binding on all matters not involving the expenditure of money.

**Does the State Labor Relations Board serve a function similar to that of the National Labor Relations Board?**

Yes. The Rhode Island State Labor Relations Board is a seven-member board that serves as interpreter of the labor relations’ statutes. The Rhode Island State Labor Relations Board will:

- hear petitions for representation and unit clarification, and
- prevent and remedy unfair labor practices.

**What is the composition of the State Labor Relations Board?**

The board is comprised of three representatives of labor, three representatives of management, and one representative of the general public. The governor appoints the chairman of the board. Like their NLRB counterparts, the State Labor Relations Board will consider petitions for representation, unit clarification, and conduct hearings on unfair labor practices, and any other matters covered by the state Act.

The Board can be contacted at:

Rhode Island State Labor Relations Board  
1151 Pontiac Avenue  
Cranston, Rhode Island 02920  
(401) 462-8830

**Is federal labor law binding on the State Labor Relations Board?**

No. While the state Board may look to federal law and the decisions of the National Labor Relations Board for guidance, those decisions are not binding on the state Board. The state Board has developed its own rulings and policies, which may differ in some respect from those of the NLRB.

Similarly, in their review of State Labor Board decisions, the state courts have expressed a “willingness to look to federal labor law for guidance in resolving labor questions” Board of Trustees v. Rhode Island State Labor Relations Board, 694 A.2d 1185, 1189 (R.I. 1997)(italics added), but they too have developed their own line of labor law which may vary at times from the federal labor law.

The decisions of the State Labor Relations Board are available (along with certifications and forms) on the Rhode Island State Labor Relations Board web page.
In addition to those federal and state statutes reviewed in the preceding chapters, there remain several very important laws governing the work relationship. These laws address matters such as minimum wages, overtime compensation, and retirement. Also, and in a significant way, these laws deal with broader social issues such as child labor and family care.

It is likely that the laws most immediately affecting workers are those governing wages and hours of employment. Both the Fair Labor Standards Act (FLSA) (enacted in 1938) and the corresponding Rhode Island wage laws deal with, among other things, minimum wages, overtime pay, and child labor.

Regulation of the employment relationship extended beyond the walls of the workplace once again in 1993 with the passage of the Family and Medical Leave Act (FMLA). This Act enables qualified employees to take extended leave from work to care for themselves or to tend to ailing family members.

Finally, the Employee Retirement Income Security Act (ERISA), enacted in 1974, extends protection to employees and their beneficiaries beyond the life of the employment relationship. Intended to protect the interest of employees by protecting their pensions, ERISA establishes the minimum standards and outlines the requirements pension plans must meet.

These laws, as well as several others, are covered more fully below.

What laws govern wages?

Wages are governed by two sets of laws: the federal law (Fair Labor Standards Act, 29 U.S.C. §201, et seq.), and the corresponding state wage laws (R.I.G.L., Title 28, various chapters). With certain exceptions, workers are covered under both laws, with the federal law providing a floor, or minimum standard which states must meet or exceed.

Since the current federal minimum wage for covered, non-exempt employees is $7.25 per hour, no state could provide less, although any state could provide more. Rhode Island’s current minimum wage is $9.00 per hour, increasing to $9.60 effective January 1, 2016.

Of course, workers can contract for a wage greater than the minimum wage; however, they cannot contract for less. See, Travis v. Ray, 41 F. Supp. 6, 1 WH Cases 802 (DC WKy 1941); Barrentine v. Arkansas-Best Freight System, 615 US 1194, 24 WH Cases 1284 (1981).

What is the relationship between the wage laws and collective bargaining agreements?

The wage laws establish the minimum to which all covered workers are entitled. They cannot be waived or reduced. But the minimums established by the law can be enlarged upon by a collective bargaining agreement. So, for instance, while the statutory overtime rate is 150 percent of the regular rate, a union and an employer could agree that overtime will be paid at a rate of 200 percent of the regular rate. And while federal and state laws mandate overtime after 40 hours, many collective bargaining agreements have provisions that require overtime before 40 hours have been worked.

Whom do the wage laws cover?

The short answer is that those persons who have an employment relationship with their employer are covered by the Act unless they are expressly exempted by the Act or are excluded by a court decision. Since the Act only covers those persons who have an employment relationship with their employer, independent contractors are not covered. Nevertheless, the wage laws have extensive coverage.

With respect to employees, the federal law is very broad and covers all employees - unless specifically exempted - of certain enterprises. The law covers workers:

- engaged in interstate commerce;
- producing goods for interstate commerce; and,
- handling, selling, or otherwise working on goods or materials that have been moved in or produced for such commerce by any person.
With respect to employers, the federal law is equally broad and covers:

- those enterprises whose gross sales or business is not less than $500,000;
- enterprises engaged in the operation of a hospital or similar facility in which patients (the aged, for instance) are cared for on the premises; and,
- enterprises that are an activity of a public agency.

Rhode Island law uses a very broad understanding of the terms employer and employee. Unless otherwise exempted, the Rhode Island minimum wage and overtime wage laws cover everybody working for “any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer, in relation to an employee.”

**What are minimum wages?**

Minimum wages are the gross minimum hourly rates employers must pay covered workers. Once again, where the state minimum wage exceeds the federal - as is the case in Rhode Island - the greater wage prevails.

Along with the payment of wages, every employer also must provide a statement showing the date of the pay period, hours worked, total earnings, and itemized deductions.

**What are the overtime requirements of these laws?**

Once again, except for those exemptions identified in each law, both the federal and the state laws require overtime pay at a rate of not less than one and one-half times the regular rate of pay after 40 hours of work in a workweek.

**Can a worker be required to work more than forty hours in one week?**

Yes. Neither federal nor state laws place any restrictions on the number of hours an adult employee can be required to work. However, limitations on compulsory overtime are often established by collective bargaining agreements.

**Does the employer have to pay for all hours worked?**

Yes. Employees must be paid for all hours worked, even if the employees are required to work before or after scheduled hours.

**Who qualifies for overtime under the FLSA?**

Under the current rules workers earning less than $23,660 per year or $455 per week are guaranteed overtime protection.

The regulations contain certain so-called “white collar” exemptions. To be considered exempt, employees must meet certain minimum tests related to their primary job duties and, in most cases, must be paid on a salary basis at not less than minimum amounts as specified in the regulations.

**What exemptions from overtime are provided under the FLSA?**

The exemptions are:

- executive,
- administrative,
- professional and creative professional,
- outside sales,
- computer employees, and
- certain highly compensated employees

The minimum salary required for most exempt employees is $455 per week “free and clear,” that is, it cannot include the value of non-cash items provided by an employer to the employee such as meals and lodgings. The salary must be a predetermined amount, which cannot be reduced because of variations in the quality or quantity of the work performed by the employee.
Are any deductions permitted that would not cause the loss of an exempt status?

Yes. Employees don’t have to be paid for any week in which they do not work. Also, the exempt status will not be lost if an employer made a deduction in full-day increments for any of the following reasons:

1. Because the exempt employee was absent from work one or more full days for personal reasons other than sickness or disability;
2. Because the exempt employee was absent from work for one or more full days due to sickness or disability if deductions are made under a bona fide plan, policy, or practice of providing wage replacement benefits for such absences;
3. In order to offset payments received for jury duty, witness fees, or military pay;
4. By imposing a penalty in good faith for a violation of safety rules of major significance; and,
5. By imposing an unpaid disciplinary suspension of one or more full days for violations of workplace conduct rules (such as a prohibition on sexual harassment or workplace violence).

Also, a proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment, as well as for unpaid leave taken under the Family and Medical Leave Act.

Is there any penalty if an employer makes an improper deduction?

It will depend whether the employer has an actual practice of making improper deductions. If the employer does, the exemption will be lost for the relevant time period, and overtime will be due to the affected employee and all employees in the same job classification working for the same manager responsible for the improper deduction.

Will an inadvertent improper deduction result in a loss of the exemption?

No. If the improper deduction is isolated or inadvertent, it will not result in the loss of the exemption, provided the employee is reimbursed.

What is the duties test?

The duties test identifies the duties for each exemption. The employee must perform the duties indicated in order to be exempt. In no case is an exemption determined by the job title. The Department of Labor website provides detailed explanations for the following duties and each of the key terms. The website also provides a number of examples illustrating the duties.

The executive employee exemption applies if all of the following conditions are met:

1. The employee is compensated in a salary or fee basis at a rate of not less than $455 per week;
2. The employee’s primary duty must be management;
3. The employee must customarily and regularly direct the work of two or more full-time (or the equivalent thereof) employees; and,
4. The employee must have authority to hire or fire other employees, or the employee’s recommendations regarding hiring, firing, advancement, promotion or any other change of status is given particular weight.

The administrative employee exemption applies if all of the following conditions are met:

1. The employee is compensated in a salary or fee basis at a rate of not less than $455 per week;
2. 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,
3. The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

The professional employee exemption applies if all of the following conditions are met:

1. The employee is compensated in a salary or fee basis at a rate of not less than $455 per week;
2. 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;
3. The advanced knowledge must be in a field of science or learning; and
4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

The creative professional exemption applies if all of the following conditions are met:

1. The employee is compensated in a salary or fee basis at a rate of not less than $455 per week; and,
2. The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

The computer employee exemption applies if all of the following conditions are met:

1. The employee is compensated in a salary or fee basis at a rate of not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
2. The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing certain specified duties.

The outside sales exemption applies if all of the following conditions are met:

1. The employee’s primary duty must be making sales as described in the FLSA, or obtaining orders or contracts for services of for the use of facilities for which consideration will be paid by the client or customer; and,
2. The employee must be customarily and regularly engaged away from the employer’s place of business.

The highly compensated employee exemption applies to employees performing office or non-manual work, paid a total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary basis or fee) if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee.

Are there occupations to which the exemptions will not apply?

Yes. The exemptions do not apply to manual laborers or other “blue collar” workers. Non-management employees in production, maintenance, construction and similar occupations (such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, laborers) are entitled to minimum wage and overtime pay under the FLSA protection no matter how highly they may be paid. Nor do the exemptions apply to occupations such as police officers, state troopers, deputy sheriffs, detectives, highway patrol officers, investigators, inspectors, probation and parole officers, correctional officers, fire fighters, park rangers, paramedics, emergency medical technicians, rescue workers, ambulance workers, hazardous materials workers, and similar employees.

Conversely, some employees (teachers, doctors, and lawyers) are exempt no matter what their pay.

Who is exempted from coverage under the Rhode Island minimum wage law?

The Rhode Island minimum wage law does not apply to:

- workers in domestic service;
- those employed by the United States;
- those engaged in the activities of an education, charitable, religious, or nonprofit organization where the employer-employee relationship does not exist or where the services rendered to the organization are voluntary;
- newspaper deliverers on home delivery;
- shoeshiners;
- caddies;
- pin setters;
- theater ushers;
- traveling salespersons;
- outside salespersons;
- persons employed by his or her child or spouse;
- children under 21 employed by his or her parent;
- individuals employed between May 1 and October 1 in a resort establishment which serves meals to the public
and which is open for business not more than six months of the year; and,

- Camp employees where the camp does not operate for more than seven months in any calendar year unless the camp on an annual, full-time basis employs such employees.

**Who is exempted from coverage under the Rhode Island overtime pay law?**

Employees excluded from the Rhode Island overtime pay law include:

- employees of summer camps when such camps are open no more than six months of the year;
- police officers, firefighters, and rescue service personnel employed by cities and towns;
- employees of the state or political subdivision of the state who, through an agreement with the employer, choose to receive compensatory time off;
- employees employed in an executive, administrative, or professional capacity (as defined by the FLSA);
- any salaried employee of a nonprofit national voluntary health agency who may elect to receive compensatory time off for hours worked in excess of 40 hours per week;
- employees whose qualifications and maximum hours of service are established by the Secretary of Transportation pursuant to 49 U.S.C. § 3102;
- salespersons, partspersons, or mechanics primarily engaged in the sale and/or servicing of automobiles, trucks or farm implements employed by nonmanufacturing sellers to the extent that such employers are exempt under the federal Wage-Hour and Equal Pay Act, 29 U.S.C. § 201 et. seq. and 29 U.S.C. § 213(b)(10), provided that the employee’s wages when computed on an hourly basis, calculate to the standard one and one-half the hourly rate for hours worked in excess of 40 for the workweek; and,
- Employees employed in agriculture and nurseries.

**In addition to the exemptions, are there any exceptions to the FLSA minimum wage requirements?**

Yes. The FLSA has specific provisions for some workers. Exceptions to the FLSA minimum wage requirements apply in certain instances to:

- workers with certain disabilities;
- full-time students under age 19 years working in non-profit religious, educational, library, or community service organizations;
- employees under age 20 in their first 90 days of employment;
- tipped employees; and,
- Vocational education students.

Special rules regarding overtime apply to state and local government employment involving fire protection and law enforcement activities, and volunteer services.

**What is meant by the term regular rate?**

The FLSA uses the term regular rate in connection with overtime pay. The Act defines the regular rate as “all remuneration for employment paid to, or on behalf of, the employee” except for payments made to the employee for time not worked by the employee or if the payment is not based on hours worked, quantity produced, quality produced, or efficiency. The regular rate is calculated before any deductions from wages are made. Where an employee is compensated solely by an hourly wage, the employee’s regular rate will be the same as the hourly wage.

Certain supplemental payments must also be included in the calculation of the regular rate. These include:

- bonuses and incentive payments based on the quality or quantity of work performed or based on efficiency;
- bonuses that depend on hours worked;
- commission payments;
- payments for meals, lodging, and facilities; and,
- shift differentials.
While the FLSA requires that certain supplemental payments be included in the calculation of the regular rate, there are other supplemental payments that are excluded when calculating the regular rate. They include:

- discretionary bonuses,
- gifts, and
- certain employee benefit plan contributions

What sources of income are creditable toward the federal minimum wage?

The FLSA requires employers to include in the employees’ regular rates the reasonable cost of certain employer-provided lodgings, meals, and facilities furnished to the employees - unless these are specifically excluded under the terms of a collective bargaining agreement.

An employer can only count the value of lodgings, meals, or facilities toward wages if they are customarily furnished to the employee. Furthermore, these employer-provided extras may be counted as wages only where they are for the convenience of the employee and are accepted voluntarily. In any case, the reasonable cost cannot be any more than the actual cost to the employer.

Tools of the trade, the cost of laundering uniforms, transportation costs, sleeping facilities where the employee is required to be on duty for an extended period (See, Bailey v. Pilots’ Assn., 406 F.Supp. 1302, 22 WH Cases 723 (DC EPa 1976)), and transportation costs (See, Donovan v. Harper, 26 WH Cases 1089 (DC WLa 1984)) are excluded when calculating the employee’s minimum wage.

Can an employee voluntarily agree to work for less than the minimum wage?

Unless a worker fits into one of the categories for which either the FLSA or Rhode Island law permits a subminimum wage, a worker cannot work for less than the minimum wage. Even where the law allows for some voluntary deductions from an employee’s pay (such as union dues), wages are not permitted to dip below the minimum.

The FLSA does provide for the employment of certain individuals at wage rates below the minimum. These individuals include student-learners (vocational education students), as well as full-time students in retail or service establishments, agriculture, and institutions of higher education. Also, persons whose earning or productive capacity is impaired by a physical or mental disability may be employed at wage rates below the minimum. Such employment is permitted only under certificates issued by the Wage-Hour Division of the Department of Labor.

The FLSA also allows for a minimum wage of not less than $4.25 an hour for employees under 20 years of age during their first 90 consecutive calendar days of employment with an employer. However, employers are prohibited from taking any action to displace or partially displace (i.e., reduce hours, wages, or benefits) employees working at the regular rate in order to hire employees at the youth minimum wage.

Rhode Island law permits a subminimum wage in several instances:

- certain disabled workers
- full-time students under age 19 years in certain professions
- tipped employees
- student learners and apprentices
- minors, 14 and 15 years of age, working less than 24 hours in a workweek

Whether a worker with a disability may be hired at a rate below the minimum will depend upon the degree of impairment and will require a special license issued by the Department of Labor and Training.

What does the law say about employees who receive gratuities (tips)?

The FLSA permits an employer to reduce the minimum wage paid to an employee, but the employer must pay at least $2.89 an hour in direct wages, $3.39 after January 1, 2016 and those wages plus tips must equal the minimum wage of $9.00 per hour, $9.60 per hour after January 1, 2016.
The law applies to wages paid to a salesperson, too. In such cases, the earned commissions coupled with the wage paid must equal at least the current minimum wage. In similar fashion, the earnings of employees compensated on a piece rate must average out to at least the minimum wage.

**Is there any penalty under Rhode Island law for the payment of substandard wages?**

Yes. The Rhode Island Department of Labor and Training may bring criminal action against any employer who pays substandard wages to an employee. Penalties include both fines (up to $500.00) and imprisonment (of not less than 10 days and up to 90 days) for each week an employer fails to pay the applicable minimum wage.

**Can an employer require that an employee work on a Sunday or a holiday?**

Under the FLSA there are no special provisions regarding weekend work.

Under Rhode Island law, any work that is performed on Sunday or holidays is voluntary on the part of the employee. If an employee works on a Sunday or a holiday, then the employer must pay the employee at one and a half times their normal rate of pay. Certain employers, such as restaurants, pharmacies, and health facilities, are exempt from this requirement.

**Are employers required to pay a minimum number of hours per day?**

There is no requirement for an employer to pay a minimum number of hours in a day under the FLSA.

Under Rhode Island Law if an employer either requests or permits an employee to report for duty at the beginning of a work shift and does not provide that employee with at least three hours work, the employee must still be paid for three hours at his or her regular rate.

**Does the employer have a time limit on when it must pay wages to its employees?**

Yes. Every employer is obligated to establish a regular payday and each payday must fall within nine days of the end of the payroll period for which wages are computed. The employer must provide the employee with:

- a statement of the hours worked by the employee (except certain exempt employees) during the pay period;
- a record of deductions from the employee’s gross pay;
- and, for employers engaged only in the commercial construction industry, a record of the employee’s hourly regular rate of pay.

**How frequently must wages be paid?**

Except for special rules surrounding separation of employment and industrial disputes, Rhode Island law provides that every employee - other than public employees and employees of religious, literary, or charitable corporations - shall be paid weekly, unless the employee’s compensation is fixed at a biweekly, semi-monthly, monthly, or yearly rate.

Under rules implemented in 2013, certain employers whose average payroll exceeds 200% of the new state minimum wage and no history of wage and hour violations may apply to the Director of the Department of Labor and Training to pay employees on a biweekly basis. The application will only be approved upon showing proof of a surety bond, and with written consent from the collective bargaining representative if applicable.

**If an employer sells, merges, liquidates or moves its business out of state, is the employee still entitled to wages?**

Yes. Under Rhode Island law, in such circumstances all wages earned by employees become due immediately and must be paid within 24 hours. In addition, if the employee has been employed for at least one year, any holiday time, vacation time and insurance benefits due to the employee under a collective bargaining agreement or company policy are considered unpaid wages and also become due and payable within 24 hours.

**What happens to any earnings in the event of an industrial dispute?**

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Any wages or compensation earned, but not paid at the time of suspension of work activity, must be paid, without any reduction, at the next regular payday.

**Is an employee that quits entitled to payment of any accrued vacation?**

Not under the *FLSA*. Under Rhode Island law as long as the employee has been employed for at least one year, any vacation time accumulated under a collective bargaining agreement, company policy or any other arrangement between the employer and the employee shall be considered wages and must be paid to the employee on the next regular payday.

**What if an employer owes the worker wages, but has filed for bankruptcy?**

A worker may be able to file as a creditor in bankruptcy court and receive at least a portion of the back wages.

**Who must pay for a pre-employment physical?**

If an employer requires an applicant to get a physical, the employer must pay whether or not the prospective employee is hired.

**Are workers entitled to any rest periods or meal breaks?**

There is no requirement under the *FLSA* for any rest periods or meal breaks. However any break under 20 minutes must be paid.

Under Rhode Island law employees are entitled to a break of at least 20 minutes when working six (6) hours, and a thirty (30) minute mealtime with an eight (8) hour work shift. Employers are not required to compensate for this mealtime. Exempted are employers operating health care facilities or an employer with less than three (3) people on any shift at the worksite. (R.I.G.L. § 28-3-14)

**Are workers entitled to any paid holidays or vacations?**

There are no federal or state laws that guarantee workers paid holidays or vacations. However, paid holidays and vacations may be established by a collective bargaining agreement, a contract, or a company policy.

**Do employees have a right to review their own personnel files?**

Yes, provided that the employee has submitted a written request and provided the employer with at least seven days advance notice.

Under this arrangement, the employee has the right to inspect his or her personnel file up to three times a year in the presence of an employer or employer’s designee.

While an employee is not entitled to make any copies of, nor remove his or her personnel file from the immediate place of inspection, if permitted to do so, he or she may be charged a reasonable fee for the copies.

However, the employee’s right to examine his or her personnel file does not apply to records of an employee relating to the investigation of a possible criminal offense or records prepared for use in any civil, criminal, or grievance proceedings, any letter of reference, recommendations, managerial records kept or used only by the employer, confidential reports from previous employers, and managerial planning records.

**Can an applicant be charged a fee in order to file an application with a potential employer?**

No. Employers who do charge a fee can be fined.

**Is it permissible to do assembling or processing work for an employer at one’s home?**

No. It is illegal for employers and employees to do assembling or processing of materials for an employer in the home.

**Can an employee or job applicant be required to take a lie detector test?**

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No employer can require an employee to take a lie detector test as a condition of employment or continued employment.

**Are there any legal restrictions on drug and alcohol testing?**

Yes. However, a distinction must be made between drug testing prospective employees and drug testing current employees as a condition of continued employment. For the most part, the former is permitted with certain restrictions, while the latter is prohibited with certain exceptions.

**Under what circumstances can prospective employees be tested for drugs?**

Prospective employees may be subjected to blood or urine testing if:

- the applicant has been offered the job conditioned on a negative test result;
- the test is conducted privately; and,
- positive tests are confirmed by certain recognized technology.

Public employers - except where the applicants are seeking employment as police officers, firefighters, correctional officers, and wherever else required by federal law - cannot require such testing.

**What is the law regarding drug testing as a condition of continued employment?**

Generally, drug testing as a condition of continued employment is illegal unless:

- the employer has reasonable grounds to believe based on specific objective facts that an employee’s illegal drug use is impairing the employee’s ability to do the job;
- the employee is tested privately;
- employees testing positive are not terminated on that basis, but are instead referred to a substance abuse professional for assistance;
- positive tests are confirmed by certain recognized technology;
- the employee is advised of and has the opportunity to have the sample tested by an independent testing facility, at the employer’s expense;
- the employer provides the employee with an opportunity to explain the results;
- the employer has promulgated a drug abuse policy consistent with the law; and,
- the employer keeps the results of any tests confidential except where disclosure is permitted by law.

When an employee testing positive is referred to a professional for assistance, additional testing may be required by the employer in accordance with the referral. If testing indicates any continued use of controlled substances despite treatment, the employee may be terminated.

Employers in violation of Rhode Island law are subject to both fines and imprisonment.

**Can an employer require either an employee or an applicant to submit to genetic testing?**

No. Genetic testing is not permitted as a condition of employment. Nor may it affect the terms, conditions, or privileges of employment.

**Can an employer electronically monitor workers or workers’ electronic communications?**

In many respects the law is just starting to develop in this area. So far what is clear is that case law distinguishes public employment from private employment.

Although Rhode Island has a statute that prohibits the interception of wire, electronic, or oral communication, the law contains an exception. Communications intercepted by a telephone or telegraphy instrument furnished by a provider of wire or electronic communication service when used in the ordinary course of business are not prohibited.

organizations, including employers, from intercepting wire, oral, or electronic communications of others. However, this law contains an *extension phone exemption*, which enables employers to monitor employee conversations by listening on an extension to the employer’s telephone system if the monitoring is done in the ordinary course of the employer’s business and if employees are advised that their communications may be monitored. If the call is of a personal nature, the employer must disconnect immediately and cannot use information gained from such against the employee.


Employees should assume that email on the company’s computer might be viewed. Employers have a right to search company email because the communications - if used for the employer’s business - constitute company property.

The American Civil Liberties Union of Rhode Island (ACLU) at 831-7171 can help workers with questions and can provide workers with a free brochure titled “Your Rights to Workplace Privacy in Rhode Island.”

**Do temporary workers have any rights?**

Yes. Temporary workers are covered by many of the laws already reviewed, such as the laws on discrimination and wages. But temporary workers were specifically addressed in Rhode Island’s *Job Description Notification* law.

That law provides that before any temporary employee is given any new job assignment - even if the assignment is with the same contracting company - employment agencies must provide the employee with the opportunity to see and have a copy of a written notice about the job. The notice must include:

- a job description with classification requirements;
- estimated longevity of the assignment;
- information concerning any job hazards; and,
- anticipated pay rate, benefits and work schedules.

The law requires that the employment agency keep a copy of the job description on file for a period of one year. A notice of this law must be posted and maintained at all employment agencies where workers can view it.

**Can temporary workers join unions?**

Temporary workers can join an existing union at the company where they are working at if the company - and not the temporary agency - supervises the employee, such as assigning projects or providing discipline. The National Labor Relations Board announced that it would decide such instances on a case-by-case basis.

**What is the Family and Medical Leave Act?**

The *Family and Medical Leave Act* (FMLA) was passed by Congress and signed into law with the express purpose of helping workers “balance the demands of the workplace with the needs of families” in order “to promote the stability and economic security of families” and “to promote national interests in preserving family integrity.” To accomplish those ends, the Act allows employees to take leave from work:

- because of the birth of a child of the employee and in order to care for such child;
- because of the placement of a child with the employee for adoption or foster care;
- in order to care for the spouse, or child, or parent, of the employee, if such spouse, child, or parent has a serious health condition;
- because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

*FMLA* leave is available equally to both male and female employees. For instance, a father is entitled to take leave for the birth of a child, just as the mother is eligible.
The Rhode Island Parental and Medical Leave Act allows for leave to care for a mother-in-law or father-in-law, in addition to the other family members listed under the federal law.

**Can an employee take leave to attend the school-related activities of his or her child?**

Yes. Under the Rhode Island Parental and Medical Leave Act, an eligible employee may take up to ten hours leave during any 12-month period to attend school conferences or other school-related activities for a child of whom the employee is a parent, foster parent or guardian. The employee must provide twenty-four hours notice.

**What is the relationship between the FMLA, Rhode Island’s Parental and Medical Leave Act, employer benefits, and collective bargaining agreements?**

Essentially, FMLA benefits can be enlarged upon by the state, by the employer, or by a collective bargaining agreement, but they cannot be reduced. The FMLA provides that the Act shall not supersede any provision of state or local law that provides greater family or medical leave protection. And employers must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA.

See the discussion on page 68 regarding overlapping provisions of the FMLA and the ADA.

**How much leave is an individual entitled to take?**

Under the FMLA, an eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period for any one of the foregoing reasons, while the Rhode Island law provides that an eligible employee is entitled to up to 13 consecutive work weeks within 2 calendar years.

**Whom do these laws cover?**

**Covered employers** under the FMLA include:

- any enterprise that is engaged in commerce or an activity which affects commerce, and employs at least 50 employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

Also included are:

- the U.S. Government;
- state governments and the political subdivisions of the state; and,
- interstate governmental agencies.

Public agencies, unlike other covered enterprises, are covered by the FMLA regardless of the number of employees and not subject to the threshold of 50 employees on the payroll each day for 20 or more weeks in a year. There are certain limitations to coverage for employees of the U.S. Government. See, 5 C.F.R. Part 630, Subpart L and 29 C.F.R. 825.109

Under the FMLA covered employees include:

- those employees who have been employed by a covered employer for at least 12 months by the employer from whom leave has been requested; and
- have been employed for at least 1,250 hours of service with that employer during the previous 12 months; and
- have been employed at a worksite where the employer within 75 miles of that worksite employs 50 or more employees.

Special rules apply to employees of local educational agencies, and both public and private elementary and secondary schools.

In connection with FMLA employee eligibility, it is important to note that some courts have strictly construed the Act and refused to expand eligibility. These courts have held that at least part of one Department of Labor regulation (29 CFR 825.110(d)) that had the effect of expanding eligibility is unenforceable. See, Brungart v. Bellsouth Telecommunications, Inc., 231 F.3d 791 (CA 11, 2000)

Covered employers under the Rhode Island Parental and Family Medical Leave Act include:

- any person, sole proprietorship, partnership, corporation, or other business entity that employs 50 or more employees;
- the state of Rhode Island, including all three branches of government and state departments and agencies;
- city and municipal agencies that employ 30 or more employees; and,
- any person who acts in the interest of an employer.

Covered employees include:

- employees who have been employed by the same employer for 12 consecutive months.

What is a key employee under the FMLA?

The Act defines a key employee as a salaried FMLA-eligible employee who is among the highest paid 10 percent of all employees employed by the employer within 75 miles of the employee’s worksite. Key employees have limited rights under the Act.

Key employees must be provided written notice of their status from the employer. This notice must also inform the key employee of the employee’s limited rights to reinstatement and maintenance of benefits following leave should the employer determine the employee’s FMLA leave would cause substantial and grievous economic injury to the employer’s operations.

How does the FMLA define the terms spouse, parent, and son or daughter?

Spouse means husband or wife as defined or recognized under state law where the employee resides. This includes common law marriages where such is recognized.

Parent means biological parent or one who stands or stood in loco parentis to an employee, but does not mean “in-law.”

Son or daughter means a biological child, an adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either under age 18, or age 18 or older and incapable of self care because of mental or physical disability.

As noted above, the Rhode Island Parental and Family Medical Leave Act does permit leave to care for a mother-in-law or father-in-law, so despite the limits in the FMLA, a Rhode Island employee can take leave to care for his or her mother-in-law or a father-in-law.

How is incapable of self-care because of mental or physical disability interpreted?

An individual is regarded as incapable of self care because of mental or physical disability if that person requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. Activities of daily living include hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, taking public transportation, paying bills, and using a telephone.

What is meant by a serious health condition?

For FMLA purposes, a serious health condition is one that requires:

- inpatient care in a hospital, hospice, or residential medical care facility; or
- continuing treatment by a health care provider in connection with certain periods of incapacity (continuing, episodic, and permanent incapacity), including periods of incapacity due to pregnancy or for parental care.

How does the Rhode Island Parental and Family Medical Leave Act define serious illness?

The Rhode Island law defines serious illness as a “disabling physical or mental illness, injury, impairment, or condition that involves inpatient care in a hospital, a nursing home, or a hospice, or outpatient care requiring continuing treatment or supervision by a health care provider.”
What does it mean that the employee is unable to perform the functions of the position of the employee?

This term means that the employee is either unable to work at all or is unable to perform any one of the essential functions of the employee’s position as the term is defined by the Americans With Disabilities Act (ADA), 42 U.S.C. 12101, et seq., and the regulations at 29 C.F.R. Sec. 1630.2(n).

The essential functions of the employee’s job are determined either when notice for leave is given or when the leave commences, whichever is earlier.

Is FMLA leave or Rhode Island Parental and Family Medical Leave Act leave paid or unpaid?

Generally, leave under each Act is unpaid, although each Act permits eligible employees to substitute paid leave for FMLA or Rhode Island Parental and Family Medical Leave Act leave. If an employee does not elect to use paid leave, the employer may require it, nonetheless. In such cases, earned or accrued vacation, personal or family leave, medical or sick leave may be substituted for any otherwise unpaid leave.

It remains the employer’s responsibility to designate leave - paid or unpaid - as FMLA-qualifying, and to give notice of the designation to the employee.

May an employer deduct hourly amounts from an exempt employee’s salary, when providing unpaid leave under FMLA, without jeopardizing the employee’s exempt status?

Yes. When providing an exempt employee with unpaid FMLA leave, an employer may deduct an hourly amount from an exempt employee’s salary for any hours taken as intermittent or reduced schedule FMLA leave without affecting the exempt status of the employee. It is unlikely that this exception to the full-day increment reduction rule for exempt employees will change with the new rules.

What are the notice requirements for FMLA leave?

Where the leave is foreseeable (such as in the case of an expected birth or foster care placement), the employee must provide the employer with at least 30 days advance notice before FMLA leave is to begin. Where 30 days notice is not practicable or the need for leave is not foreseeable, notice must be given as soon as practicable.

Employees need not expressly assert rights under the Act or even mention the FMLA, but may only state that leave is needed. The employer is expected to obtain any additional information via informal means.

Regulations (devised by the Secretary of Labor to carry out the Act) also require employers, once they have acquired the knowledge that leave is being taken for FMLA purposes, to promptly notify (within two business days) eligible employees that the leave will be counted as FMLA leave.

Previously, the regulations prohibited an employer that failed to designate an employee’s leave as FMLA leave from retroactively designating it as such. However, the U.S. Supreme Court in Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002) criticized the Secretary of Labor’s regulation because it penalized the employer for failure to give notice even when that lapse did not cause the employee to suffer any loss. The Court found that the regulation established an irrebuttable presumption that the employer’s lapse impaired the employee’s exercise of FMLA rights and, therefore, was inconsistent with the Act. However, the Court did not dismiss entirely the possibility that an employer’s failure to provide notice that leave was designated as FMLA leave might burden the employee’s exercise of rights under the FMLA and that such failure might be actionable.

What are the notice requirements for Rhode Island Parental and Family Medical Leave Act leave?

The law is similar to the federal law and requires at least 30 days notice unless prevented by medical emergency from giving notice.

Is it necessary to take all the FMLA leave at one time?

That depends on the reason for the leave. Leave for the birth of a child or to care for a child following birth or leave for placement of a child with the employee for adoption or foster care cannot be taken intermittently or on a reduced leave schedule unless the
employer agrees with such a schedule.

However, leave to care for a qualified family member or for the employee may be taken - subject to certain notice requirements - intermittently (i.e., a few hours for medical exams, hospitals, or doctor visits) or on a reduced leave schedule. The medical need must be such that it is best accommodated through an intermittent or reduced leave schedule.

The Rhode Island law does not allow for intermittent leave status, but, once again, an eligible employee gets the greater benefit of the two laws and may be eligible for intermittent leave under the *FMLA*.

**If leave is taken for the birth of a child or for placement (either adoption or in foster care), when must such leave be concluded?**

Leave under either of these circumstances expires at the end of the 12-month period beginning on the date of the birth or placement.

**If a husband and wife are employed by the same employer, is each entitled to *FMLA* leave?**

A husband and wife who are eligible for *FMLA* leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken:

- for the birth of the employee’s child or to care for the child after birth;
- for the placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement; or
- to care for the employee’s parent with a serious health condition.

This limitation (a total of twelve weeks of leave) applies only to the foregoing reasons as long as the husband and wife are employed by the same employer.

If the husband and wife both use a portion of the total 12-week *FMLA* leave entitlement for one of the foregoing purposes, each would be entitled to the difference between the amount he or she has taken individually and the 12 weeks for *FMLA* leave for a purpose not included in the foregoing list.

Example: If each spouse took six weeks leave for the birth and care of a healthy newborn child, each could use the remaining six weeks to care for his or her own serious health condition or to care for a parent or child with a serious health condition.

**If a husband and wife are employed by the same employer, is each entitled to leave under the *Rhode Island Parental and Family Medical Leave Act*?**

Yes and without the limitations contained in the *FMLA*. Under the Rhode Island law, both the husband and wife could each take up to 13 weeks leave during a 24-month period and the leave periods may be simultaneous.

**Is an employee entitled to benefits while on *FMLA* leave?**

Yes. During any period of *FMLA* leave, employers are required to maintain the employee’s group health benefits on the same conditions as coverage would have been provided had the employee not been on leave. For instance, if an employee had family coverage before taking *FMLA* leave, such coverage must continue so long as the employee is otherwise eligible during *FMLA* leave. Similarly, if the employer changes benefit packages, an employee on *FMLA* leave would be entitled to the changed benefits.

Finally, any share of group health premiums that would normally have been paid by the employee were the employee not on leave will remain the responsibility of the employee during the leave period.

This rule, which requires employers to treat employees on *FMLA* leave as they would have had the employees not been on leave, applies to terminating health benefits, too. Except to the extent that the employer is limited by the *Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)* (29 U.S.C. §1161, et seq.) and in the cases of certain key employees, an employer’s obligation to maintain health benefits during *FMLA* leave ceases if and when the employment relationship would have terminated if the employee had not taken leave.

An employer may recover its share of the health plan costs during a period of unpaid *FMLA* leave from an employee if the employee

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The employer cannot recover its share where the employee does not return because of:

- the continuation, recurrence, or onset of a serious health condition of the employee or the employee’s family member which would otherwise entitle the employee to FMLA leave; or
- other circumstances beyond the employee’s control. (The U.S. Department of Labor provides several examples of circumstances deemed beyond the employee’s control, including (1) where an employee’s spouse is unexpectedly transferred to a job location more than 75 miles from the employee’s worksite; and, (2) where an employee is laid off while on leave.)

If an employer elects to maintain other benefits - such as life insurance or disability insurance - for the employee during the FMLA leave period, the employer may, at the conclusion of the leave, recover the costs incurred for paying the employee’s share of any premiums whether or not the employee returns to work.

**Is an employee entitled to benefits while on Rhode Island Parental and Family Medical Leave Act leave?**

Yes. The employer must maintain existing health benefits for the employee during leave just as if the employee had continued in employment. Prior to the leave, the employee must pay the employer a sum equal to the health insurance premium during the leave period. This sum must be returned to the employee within ten days of his or her return to work.

**May an employer transfer an employee to a different position in order to accommodate intermittent leave or reduced schedule leave?**

Yes. An employer may require an employee who will be out on either intermittent leave or reduced schedule leave to take another position during the period of the intermittent or reduced schedule leave. It must be a position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee’s regular position.

Also, while the alternate position must have equivalent pay and benefits, it does not have to have equivalent duties. An employer cannot transfer an employee to an alternate position in order to discourage the employee from taking leave or if such a transfer - even though temporary - would create a hardship for the employee.

**When must an employee provide medical certification for FMLA leave?**

An employer may require medical certification to support a request by an employee for FMLA leave for the serious illness of a child, spouse, parent or the employee’s own serious illness. An employer must give notice of a requirement for medical certification. An oral request is sufficient.

When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins.

An employer may also request medical certification after leave has begun if the employer has reason to question the appropriateness of the leave or its duration.

**Under what circumstances may a covered employer delay FMLA leave?**

There are limited circumstances under which an employer may refuse to provide FMLA leave:

- If an employee fails to give notice in a timely fashion when the need for FMLA leave is foreseeable, the employer may delay the taking of FMLA leave until 30 days after the date the employee provides notice; or,
- If an employee fails to provide the requested medical certification in a timely fashion, an employer may delay the continuation of the leave until the documentation is provided. If the employee never provides the requested documentation, the leave is not FMLA leave.

An employer may require an employee on FMLA leave to report periodically on the employee’s status and intention to return to work. If an employee unequivocally advises the employer either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is terminated, the employee’s entitlement to continued leave, maintenance of health
benefits, and restoration ceases unless the employment relationship continues, for example, by the employee remaining on paid leave.

Finally, an employee who fraudulently obtains FMLA leave from an employer is not protected by the FMLA’s job restoration or maintenance of health benefits provisions.

What are the employee’s rights upon returning to work from FMLA leave?

Once the employee no longer needs to continue FMLA leave and is able to return to work on a full-time basis, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. The position must provide equivalent pay, benefits, and working conditions. Duties and responsibilities should be substantially equivalent and should demand similar skills, effort, and authority.

If a returning employee is unable to perform an essential function of the position because of a physical or mental disability, the employee has no right to restoration to another position under the Act; however, the Americans With Disabilities Act may control the employee’s rights.

If an employee is no longer qualified because, as a result of the FMLA leave, the employee was unable to attend a necessary course, or the employee needs to renew a license, the employee must be given a reasonable opportunity to fulfill those conditions upon return to work.

What are the employee’s rights upon returning to work from Rhode Island Parental and Family Medical Leave Act leave?

They mirror the rights of the employee returning from FMLA leave. The employee is to be restored to the position held by the employee when the leave commenced, or to a position with equivalent seniority, status, employment benefits, pay, fringe benefits and service credits.

Are there limitations on an employer’s obligation to reinstate an employee?

Yes. An employee’s right to reinstatement is no greater than the employee would have enjoyed had the employee not been on FMLA leave. So, for instance, if a shift were eliminated, an employee returning from leave would not be entitled to return to that shift. An employer denying reinstatement bears the burden of proving that an employee seeking reinstatement would not otherwise have been employed at the time reinstatement is requested.

Key employees may be denied reinstatement if it is necessary to prevent “substantial and grievous economic injury to the operations of the employer.”

Who enforces the FMLA and what options are available to employees who believe their rights under the FMLA have been violated?

The U.S. Department of Labor (401-528-4431) is responsible for administering and enforcing the FMLA by investigating and resolving complaints of violations concerning this law. Employees who believe that their rights under the Act have been violated have the choice of:

- filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor; or
- filing a private lawsuit pursuant to Section 107 of the FMLA.

If an employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

Who enforces the Rhode Island Parental and Family Medical Leave Act and what options are available to employees who believe that their rights have been violated?

The Rhode Island law is enforced by the R.I. Department of Labor and Training, Labor Standards Division (401-462-8850). The law provides that either an employee or the Director of the Department of Labor and Training may bring a civil action in superior court.

In lieu of a suit - or at least one possible remedy short of a suit - an employee may give notice of an alleged violation to the Director of
the Department of Labor and Training. The Director, in turn, will serve written notice on the employer and give the employer an opportunity to be heard. If the Director finds that the employer has violated the law, he or she may issue those orders deemed necessary to protect the rights of employees.

**Does the employer have an obligation to inform workers of their rights under the FMLA?**

Yes. The Act requires employers to post and keep posted, in a conspicuous place, summaries of the pertinent provisions of the Act and information pertaining to the filing of a charge. Failure to comply with this provision of the Act may result in a fine.

**What happens when FMLA provisions overlap with ADA protections?**

The short answer is that an employer must consider the employee’s rights under each statute and provide the employee with the greater benefits. The U.S. Equal Employment Opportunity Commission provides some useful examples (modified here):

Example One. An employee with an ADA disability needs 15 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks leave (and 13 weeks under Rhode Island’s statute), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee leave beyond the 12th week (and beyond the 13th week under Rhode Island law), but because the employee is also covered under the ADA, the employer cannot deny the request for additional leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial absence, along with other undue hardship factors.

Example Two. An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original job. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without a reasonable accommodation), the employer must reinstate the employee to her original position.

**How can an employee get information on the healthcare coverage provided through employment?**

Employees are entitled to a summary plan description of their health benefits. This information should be available to you from your plan administrator, human resources coordinator, or your union representative.

**What is the Patient Protection and Affordable Care Act?**

The Patient Protection and Affordable Care Act (PPACA), more commonly known as the Affordable Care Act (ACA), is a comprehensive health care reform law that became effective March 23, 2010, most of its provisions have been implemented already, although the law will not be fully implemented until 2020. The law has mandated that individuals are required to carry health insurance, that large employers are required to offer health insurance coverage, banned health insurers from denying coverage or enrollment due to pre-existing health conditions, established Health Insurance exchanges for individuals to purchase insurance from if their employer does not offer it. Additionally, dependent children are now allowed to stay on their parents coverage until age 26. This law has made certain provisions of the Health Insurance Portability and Accountability Act (HIPAA) and the Consolidated Omnibus Budget Reconciliation Act (COBRA) obsolete by expanding the protections offered by them.

**Can an individual be required to pass a physical examination before being enrolled in a group health plan?**

No. You cannot be required by a group health plan to pass a physical examination before enrolling.

**Is there any assistance available to the children of workers who experience a temporary reduction in income (i.e., a job loss)?**

Yes. Such children may be eligible for health coverage through the combined federal/state Children’s Health Insurance Program (CHIP). For more information call 1-877-KIDS NOW (1-877-543-7669). The website is www.insurekidsnow.gov.
What is COBRA?

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) provides dislocated workers with the right to continue healthcare coverage previously provided by the employer. Employers with 20 or more employees are required to provide COBRA coverage.

Does the employer have to provide notice of COBRA to employees?

Yes. The employer must provide employees notice of entitlement to COBRA coverage and will generally do so when the employee is hired.

When the employee is no longer eligible for health coverage either through termination or a reduction in hours that causes the employee to lose coverage, (each a triggering event), the employer must provide the employee or former employee with notice regarding his or her rights to a continuation benefits through COBRA.

The employer must also notify the plan administrator within 30 days after the triggering event. The plan administrator must then provide notice to the individual employee of the employee’s right to elect COBRA coverage. This notice must be provided by the plan administrator within 14 days after the administrator has received notice from the employer and the employee must respond to this notice and elect COBRA coverage by the 60th day after the written notice is sent or the day health care coverage ceased, whichever is later or lose all rights to COBRA benefits.

Spouses and dependent children covered under an individual’s health plan have an independent right to elect COBRA coverage upon the individual’s termination or reduction in hours.

What does COBRA coverage cost?

Generally, COBRA coverage will cost an individual the full amount of the premium - either single plan or family plan – plus a two-percent administrative cost. Though it is costly, individual’s continuing their coverage through COBRA will pay group premium rates rather than the more costly individual premium rate.

How long does COBRA coverage last?

Generally, coverage will last up to eighteen months.

Does COBRA coverage continue if an employer declares bankruptcy?

COBRA is coextensive with the employer’s coverage. If the employer’s health plan ceases, COBRA coverage ceases. However, if the employer offers another plan, coverage may continue.

What if I can’t afford coverage under COBRA?

Under the Affordable Care Act, if you lose your job and are unable to afford continued coverage under COBRA you have the option to enroll in a plan offered through your state’s Health Insurance exchange. You may qualify to receive Advance Premium Tax Credits to lower the cost of your premiums, Cost Sharing Reductions to reduce your out of pocket expenses or depending on your overall income, you may qualify for Medicaid.

What is the Whistleblower law?

The Whistleblower law (R.I.G.L. §28-50-1, et seq.) is intended to protect employees - and independent contractors - who report violations of state or federal laws or regulations from retaliation. In general terms, the Rhode Island law prohibits retaliation:

- because an employee or a person acting on the employee’s behalf reports or is about to report to a public body, or to the employee’s employer or supervisor, a violation of state or federal law;
- because the employee is requested by a public body to participate in an investigation or hearing held by the public body or court; or,
- because the employee refuses to violate or assist in violating a federal, state, or local law.
Enforcement is through civil action.

**Must an employer permit an employee time away from the job for jury duty?**

Yes. Employers must permit employees called for jury duty to serve. Furthermore, an employee cannot be penalized with the loss of position, denial of wage increase, promotion, longevity benefit or denied any other benefits that he or she would have been entitled to receive except for the fact that they were serving jury duty.

**Must an employer pay wages to an employee who is on jury duty?**

Not in all cases. Unless there is a company policy, contract, or collective bargaining agreement that specifically requires the payment of an employee’s wages while that employee is serving jury duty, Rhode Island employers are not obligated to make such payments.

**What job protections do military veterans have?**

The *Uniformed Services Employment and Reemployment Rights Act* (*USERRA*) (38 U.S.C. §43) provides extensive job and benefit protection for veterans and members of Reserve components. *USERRA* expands upon the protections offered veterans and Reserve members contained in the *Veterans’ Reemployment Rights (VRR)* statute, which it replaces.

Briefly, *USERRA*:

- extends the length of time that an individual may be absent from work because of a military commitment while still retaining reemployment rights;
- covers accommodations employers must make for disabled veterans;
- requires employers to provide training in certain instances to returning veterans; and,
- outlines terms for the continuation of health insurance and pension plan coverage for individuals on active military service.

**How long may an individual be absent from work because of military service and still retain reemployment rights?**

The Act provides that an individual may be absent from work for military duty and retain reemployment rights for up to five years. There are exceptions to this five-year limit that will extend the time frame. These include:

- initial enlistments lasting more than five years;
- periodic training duty; and,
- involuntary active duty extensions and recalls, especially during a time of national emergency.

**How long does a returning veteran have to apply for reemployment after release from active duty?**

That will depend upon how long the employee was away for active duty. The longer the period of active duty, the longer the period a returning employee will have to apply for reemployment. For service of:

- less than 31 days, the employee must return at the beginning of the next regularly scheduled work period on the first full day after release from the service (taking into account travel time and a rest period);
- more than 30 days, but less than 181 days, the employee must submit an application for reemployment within 14 days of release from the service;
- more than 180 days, an application for reemployment must be submitted within 90 days of release of service.

Rhode Island law (R.I.G.L. §30-21-1) allows employees 40 days after discharge from military service to apply for reemployment. It is likely that were an employee to rely on *USERRA* and apply for reemployment after the 40th day permitted by Rhode Island law, but before the deadline established by federal law, the veteran would be entitled to the greater benefit of the federal law.

**Do these time limits apply to disabled veterans?**

No. The Act provides additional protection for disabled veterans. An employee recovering from injuries received while on active duty may have up to two years to return to his or her job.
Does *USERRA* protect a worker’s status and benefits while the worker is on active duty?

Yes. Returning service members are to be reemployed in the job that they would have held, but for the interruption of military service. That means they are entitled to the same seniority, status, pay, rights and benefits they would have enjoyed had they not been called to active duty.

What training and accommodations for returning veterans does *USERRA* require?

The Act requires employers to make reasonable efforts to accommodate disabled veterans. It also requires employers to make similar efforts, such as training or retraining, to enable returning veterans to refresh or upgrade their skills in order to help them in qualifying for reemployment. Finally, it provides for alternative reemployment positions if the returning employee cannot otherwise qualify for the job he or she would have held, but for the interruption of military duty.

Are employers required to continue health insurance on employees on active military service?

Once again, it depends upon the length of military service. Employees on military duty:

- of less than 31 days continue to be covered by employer-sponsored health care plans as though the employee had not been called to active duty;
- of more than 30 days may elect to continue employer-sponsored health care for up to 18 months; however, they may be required to pay up to 102 percent of the full premium.

Must an employee give notice of upcoming military duty?

*USERRA* requires employees give advance notice to their employers of upcoming military duty obligations unless giving such notice is impossible, unreasonable, or precluded by military necessity.

Does active duty time count toward employment time for *FMLA* purposes?

Yes. According to the Department of Labor, the active military service time should be credited toward the 12-month threshold and the 1250 hours-of-service requirement to determine whether the employee meets those eligibility requirements.

Who handles violations of *USERRA*?

The Department of Justice, through the Veterans’ Employment and Training Service provides assistance to all persons having claims under *USERRA*.

Is there a resource available to individuals called to active duty which will provide information about employer provided pensions and benefits?

Yes. The Department of Labor’s Veterans’ Employment and Training Service (VETS) has such information and may be accessed through the VETS website.

Is an employer required to give notice of plant closings or layoffs?

Employers covered by the *Worker Adjustment and Retraining Notification Act* (*WARN*) must give notice to affected employees for certain plant closings and layoffs, unless the reason for the closing or layoff fits within one of the exceptions to the notice requirement. (29 U.S.C. §2101, *et seq.*; 20 C.F.R. 639) *WARN* was instituted to provide protection to workers, their families, and communities by requiring covered employers to provide 60 days notice of *plant closings* and *massive layoffs*.

What employers are covered?

Employers are covered if they have 100 or more employees, excluding those who have worked less than 6 months in the last 12 months and those employees who work an average of less than 20 hours a week. Public employers that provide public services are not covered.
**What constitutes a plant closing under WARN?**

A plant closing occurs when a facility is closed for more than 6 months, or when 50 or more employees lose their jobs during any 30-day period at the single site of employment.

**What constitutes a massive layoff under WARN?**

A massive layoff occurs when a layoff of 6 months or longer affects 500 or more workers or at least 33 percent of the employer’s workforce when the layoffs affect between 50 and 499 workers. The number of affected workers is the aggregate laid off during a 30-day, or in some instances, a 90-day period.

**Will WARN always require notice to the employees?**

No. WARN does not apply to the closing of a temporary facility. Also, where a company is failing or has unforeseeable business circumstances or where it has been harmed by natural disaster, the Act provides for less than 60-days notice.

**What are the penalties for a violation of WARN?**

Penalties include back pay and benefits for each employee for the violation period, up to 60 days. Employers are also subjected to civil penalties. Enforcement of the Act is private, so, in order to gain relief, either the employees or their representatives - as well as local governments - must bring either individual or class action suits in the U.S. District Court.

**How does the law protect a worker’s pension?**

In response to pension abuses over the years, Congress enacted the Employee Retirement Income Security Act (ERISA) in 1974 in order to protect the interests of employees and their beneficiaries.

ERISA covers both employee welfare plans (which may include medical coverage, disability benefits, prepaid legal services, and vacation pay) and pension plans. The Act recognizes two types of pension plans:

- **Defined benefit plans** which ensures employees and their beneficiaries a predetermined monthly income for life; and,
- **Defined contribution plans** in which the employer contributes a fixed amount into the retirement account, which is invested on behalf of the employee who will later receive the proceeds from the investments.

Defined benefit plans are insured against failure and administered by the Pension Benefit Guaranty Corporation (PBGC). Defined contribution plans are not. If an employer encounters financial difficulties and cannot adequately fund the pension – with the end result being an underfunded pension – the PBGC will assume responsibility as trustee of the plan and pay benefits.

**How does ERISA protect an employee’s pension contributions?**

ERISA imposes significant demands on persons who seek to qualify as fiduciaries (i.e., persons exercising discretionary authority or control over the plan). The Act details prohibited conduct for fiduciaries and the penalties for engaging in prohibited conduct. Enforcement of provisions pertaining to these duties is the responsibility of the Department of Labor and participants and their beneficiaries.

Further protections apply to those plans qualifying for special tax treatment. These are referred to as minimum requirements. These include:

- minimum funding requirements to protect against any unfunded liabilities;
- vesting schedules designed to protect a worker from losing accrued benefits; and,
- a summary plan description, which outlines all-important aspects of the pension plan, including procedures for presenting claims.

Minimum vesting and participation requirements are enforced by the Internal Revenue Service. Enforcement and administration of ERISA is the responsibility of the Employee Benefits Security Administration (EBSA). Employees are entitled to a summary annual report of their plan’s annual finances. Employees should also be provided with a statement showing how much money is in the
pension account and the value of the employee’s pension benefit.

**Can a prospective employer ask about an applicant’s criminal history?**

Except for positions in law enforcement, an employer may not ask an applicant if they have ever been arrested, charged with, or convicted of any crime, until the first interview. For positions where a federal or state law or regulation would create a mandatory or presumptive disqualification due to specific criminal convictions, an employer may ask about convictions specific only to those offenses on an application. (R.I.G.L. §28-5-7(7) et seq.)

Rhode Island Legal Services, Inc. through its Employment Opportunity Legal Corps initiative can assist individuals facing legal barriers to employment. They may provide services such as seeking the expungement of criminal records, the reinstatement of driver’s licenses needed to secure or travel to a job and assistance to obtain or prevent the loss of an occupational license. They may be contacted at (401) 274-2652 or toll free at (800) 662-5034

**Can an employer compel an applicant or a current employee to provide his or her Facebook password?**

No. The law prohibits employers from requesting – much less requiring – an applicant for work or a current employee to share his password to social media accounts, such as Facebook or compelling an employee or applicant to add anyone to their lists of contacts associated with a personal social media account. (R.I.G.L. §§28-56-2 and 28-56-3)

**Does the law prohibit an employer using information gleaned from a social media account in making employment decisions?**

No. The law only prohibits the employer from compelling an employee or applicant from sharing his or her password or from requiring the employee to add the employer (or the employer’s agent) to the contact list.

Employers can and often do get information from public social media sources. Facebook pages and Twitter tweets are often available and become known to employers.

Whether the employer can take any adverse action will depend on a number of factors; perhaps, the most important considerations are: (1) Is the employee in a union and protected by the *just cause* provision of the contract? And (2) Is the employee an at-will employee whose employment can be terminated for a good reason, bad reason, or no reason?

If an employee falls into the latter category, these statutes (R.I.G.L. §§28-56-1 et seq.) will be of no help. If, however, the employee is protected by the *just cause* provision of a collective bargaining agreement, discipline by the employer will be governed by *just cause* standards, assuming that the employer can demonstrate a *nexus* between the employer’s interests and the employee’s conduct on social media.

**What are some of the other labor laws governing employment?**

There are several federal laws that govern employment. These laws are enforced by the Wage and Hour Division of the U.S. Department of Labor. They include:

- **Davis-Bacon and Related Acts** which require payment of prevailing wage rates and fringe benefits on federally-financed or assisted construction projects;
- **Walsh-Healy Public Contracts Act** which requires payment of minimum wage rates and overtime pay on contracts to provide goods to the federal government;
- **Service Contract Act** which requires payment of prevailing wage rates and fringe benefits on contracts to provide services to the federal government.

Rhode Island law also provides for the payment of prevailing wages on certain public works projects. The guidelines are those contained in Davis-Bacon and related acts. All contractors bidding on public works projects paid with taxpayer dollars over the amount of $1,000 must comply with the prevailing wage laws.
CHAPTER VIII
CHILD LABOR LAWS

We are all familiar with the horror stories of child labor in the 19th century - young children working 14 hours a day, six days a week, risking life and limb in mines and mills. And while today’s young workers would appear to have little in common with their counterparts of the past century, nearly three-quarters of today’s high school students hold a part-time or full-time job. In addition, many educators complain that too many students are sacrificing their schoolwork in the interest of pursuing after-school employment. Finally, despite the lessons of history, child labor violations have increased dramatically.

Labor laws were created to prevent discrimination, ensure a safe work environment, provide economic security against illness or injury on or off the job, and protect workers from being underpaid. Child labor laws were created to extend these same protections to young workers, as well as protect their educational opportunities.

What laws relate to the employment of youth?

Both the Fair Labor Standards Act and Rhode Island law address many of the specific terms of child labor. These laws are intended to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions deemed detrimental to their well-being. In those areas where the laws overlap, the stricter requirements are adhered to.

Neither the federal law nor Rhode Island law places any restrictions on work or work hours for youths 18 years or older other than those generally applicable to all workers.

What types of employment are permitted for youths less than 14 years of age?

Rhode Island law prohibits the employment of youths less than 14 years of age in any business or industrial establishment. Children younger than 14 years of age can work in a private home or on a farm or for their parents or their parents’ business.

What types of employment are prohibited for youths 14 and 15 years of age?

Youths 14 and 15 years of age are prohibited from certain occupations in two ways. First, both Rhode Island law and the Secretary of Labor (who is charged under the FSLA to identify hazardous jobs) identify specific occupations prohibited to youths 14 and 15 years of age. Second, this same age group is prohibited from certain work for which the Secretary of Labor has deemed 18 years as the minimum age.

Both the FSLA and Rhode Island laws prohibit youths under age 16 from working in factories, mechanical, manufacturing or processing establishments.

The Rhode Island law (R.I.G.L. §28-3-9) contains an extensive list of prohibited activities, but examples include work that involves:

- dangerous machinery
- acids
- paints or dry colors, or red or white lead
- explosive materials
- all occupations in warehouses, except office and clerical work
- occupations in any billiard or pool room
- any occupation involving work in a tunnel

Minors ages 14 and 15 are expressly limited by the regulation issued by the Secretary of Labor which prohibits:

- manufacturing, mining, or processing occupations
- occupations requiring the performance of any duties in a workroom or workplace where goods are manufactured, mined, or otherwise processed
- occupations involving the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines
- public messenger service
- occupations declared to be particularly hazardous or detrimental to health or well-being by the Secretary of Labor
occupations (except office or sales work) in connection with transportation of persons or property by rail, highway, air, water, pipeline, or other means; warehousing and storage; communications and public utilities, and construction (including demolition and repair)

office and sales work if such work is performed on trains or any other media of transportation or at the actual site of construction operations

Finally, as noted above, a further limitation is imposed by seventeen orders issued by the Secretary of Labor that prohibit certain employment to all youths under the age of 18. The orders cover the following types of work:

- manufacturing and storing explosives
- coal mining
- logging and sawmilling
- power-driven woodworking machines
- exposure to radioactive substances
- power-driven hoisting apparatus
- power driven metal-forming, punching, and sheering machines
- mining, other than coal mining
- slaughtering, or meat packing, processing, or rendering, including the operation of a power-driven meat slicer
- power-driven bakery machines
- power-driven paper-products machines
- manufacturing brick, tile, and related products
- power-driven circular saws, band saws, and guillotine sheers
- wrecking demolition, and shipbreaking operations
- roofing operations
- excavation operations
- motor vehicle driving and outside helper unless otherwise permitted by the Drive for Teen Employment Act (29 U.S.C §213(c)).

The Drive for Teen Employment Act, an amendment to the child labor provisions of the FLSA, specifies prohibited activities and limits for youthful employees. For example, the Act prohibits sixteen-year-old workers from driving on public roads while working and restricts seventeen-year-olds to driving cars and light trucks as part of their employment to daylight hours only. The Act also contains restrictions of the types of property which youthful employees can transport, the distance youthful employees can travel, the number of trips which can be taken in any one day, and the number of passengers which a youthful employee can transport.

Additionally, Rhode Island has prohibited all persons under the age of 18 years from working inside of a commercial adult entertainment establishment (R.I.G.L § 28-3-9.1)

What types of employment are permitted for young people 14 and 15 years of age?

The law permits young people 14 and 15 years of age part-time and school vacation employment in business, food service, and other mercantile establishments provided they have obtained a work permit from the local school department.

Examples of permissible work include:

- office and clerical work (unless in a prohibited location)
- work as a cashier
- price marking and tagging by hand or by machine, assembling orders, packing and shelving
- bagging and carrying out customers’ orders
- errand and delivery work by foot, bicycle and public transport
- inside cleanup work
- grounds maintenance (excluding the use of power-driven mowers or cutters)
- kitchen work and food preparation at soda fountains, lunch counters, snack bars, or cafeteria serving counters
- gas station work, including pumping gas (but not including work involving the use of pits, racks, or lifting apparatus, or involving the inflation of any tire mounted on a rim equipped with a removable retaining ring)
- certain grocery store work (when performed in areas physically separate from areas where meat is prepared for sale, and
outside freezers and meat coolers)

What are the hour limits on employment for young people 14 and 15 years of age?

The laws relating to the employment of young people 14 and 15 years of age prohibit employment in excess of:

- 3 hours a day on a school day
- 8 hours a day on a nonschool day
- 18 hours per week when school is in session
- 40 hour per week during school vacations

Furthermore, such work cannot commence before 7 a.m. and must end by 7 p.m. (except during school vacations when work must end by 9 p.m.).

What are the limits on employment for young people 16 and 17 years of age?

The limitations are those indicated above in which the Secretary of Labor has deemed 18 years as the minimum age and those limitations outlined in the Drive for Teen Employment Act.

What are the hour limits on employment for young people 16 and 17 years of age?

The FLSA places no limit on the number of hours worked for young people 16 and 17 years of age.

Under Rhode Island law workers 16 and 17 years of age who are enrolled in school are prohibited from working:

- between the hours of 11:30 p.m. and 6 a.m. when the next day is a school day, and,
- after 1:30 a.m. if school is not scheduled for the following day.

The workweek while school is in session is also limited to:

- no more than 48 hours; and,
- no more than 9 hours per day, except when the 48 hours are worked in five days, in which case the work day cannot exceed 9 and 3/5th hours.

During school vacations there is no limit on the total hours worked in a given week or on a particular workday.

Penalties for violations of hour limitations range. The law provides that every person who willfully employs any person in violation of the provisions of §§ 28-3-11 – 28-3-14, and every parent or guardian who permits any child to be so employed, shall be fined not exceeding $20 for each offense. Employers who violate the law governing maximum continuous hours without a meal shall be punished by a fine of not less than $50 nor more than $100.

The law also provides (except as otherwise indicated) any person or corporation who: (1) employs a child under sixteen (16) years of age without the permit required by the law, (2) makes a false statement in regard to any part required by the certificate, (3) violates any of the provisions of R.I.G.L. §§ 28-3-1 – 28-3-20, or permits any child to be employed in violation of their provisions may be fined up to $500 upon conviction. If a child employed in violation of the provisions of R.I.G.L. §§ 28-3-1 – 28-3-30 is injured or killed in the course of the employment, the fine may be increased to an amount not exceeding $5,000.

Does the law permit a wage less than the minimum for young people?

While the Rhode Island minimum wage is currently $9.00, some workers may be paid less. Full-time students under 19 years of age working in nonprofit religious, educational, library, or community service organizations may be paid $8.10 (90 percent of the applicable minimum wage). The law also permits an hourly rate of not less than $6.75 (75 percent of the minimum wage) for workers ages 14 and 15 years working 24 hours per week or less.
Are young workers eligible for unemployment benefits?

Perhaps. Full-time students cannot collect unemployment compensation if they are employed by the school they are attending. However, if a young worker is laid off or fired without just cause, that worker may be able to collect unemployment benefits, provided he or she has earned enough money to be eligible, and is able and available for full-time work, but unable to obtain suitable work. Hours of school must not interfere with hours of work in the student’s occupation.

How can young workers enforce their rights and how can employers protect teenage workers?

Most government agencies have very few inspectors on staff to police thousands of workplaces. The only way policing agencies are likely to hear about labor law violations is if they are contacted. In some cases, a worker can call anonymously or a parent or union representative can file a complaint on the worker’s behalf. In nearly all cases, workers cannot be fired for filing a complaint with a government agency.

Employers can do their part by making sure that all employees adhere to the law. They can also institute some protective measures. The Department of Labor lists several examples of successful practices used by employers across the country to protect younger workers. They include:

- issuing different colored smocks to convenience store employees under age 18. This way supervisors know who isn’t allowed to operate the electric meat slicer;
- placing “warning stickers” on equipment that teenagers may not legally operate or clean;
- issuing a laminated, pocket-sized “Minor Policy Card” on the first day of work explaining the company’s policy and requirements for complying with Child Labor Laws; and,
- developing and instituting a computer tracking system to ensure that no young worker is scheduled for too many hours during the school week.
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USEFUL WEB SITES

The following sites can provide employers and employees with valuable information. The site strings were valid as of the date of publication.

Employment Discrimination

*Federal Acts and Regulations (Full Text)*

- EEOC Hompage including links to statutes: [http://www.eeoc.gov/](http://www.eeoc.gov/)

*Other Federal Resources*

- Department of Labor Homepage: [http://www.dol.gov/](http://www.dol.gov/)

Occupational Safety and Health

*Federal Acts and Regulations (Full Text)*


*Other Federal Resources*

  (Provides links to Record Keeping, Standards, Interpretations, and Directives)
- OSHA Worker Page (at which complaints may be filed): [https://www.osha.gov/workers/index.html](https://www.osha.gov/workers/index.html)
- U.S. Environmental Protection Agency (Major Environmental Laws): [http://www.epa.gov/epahome/laws.htm](http://www.epa.gov/epahome/laws.htm)

Work-Related Injuries and Diseases

*Federal Resources*

  The above link lets you research and apply for benefits online.

Collective Bargaining

*Federal Acts (Full Text)*

The full text of the Labor Management Relations Act, 1947, as amended, can be located at:
http://uscode.house.gov/
In the title field type 29 and in the section field type 151.

Other Federal Resources

National Labor Relations Board Homepage:  http://www.nlrb.gov/nlrb/home/default.asp
The above link permits you to research Board Decisions, obtain a Weekly Summary, review Advice Memos, General Counsel Memos, Manuals, retrieve forms, as well as access other Board information.


Regulation of the Employment Relationship

Federal Acts and Regulations (Full Text)

Family and Medical Leave Act of 1993:  http://www.dol.gov/whd/fmla/
Uniformed Services Employment and Reemployment Rights Act:  http://www.dol.gov/vets/usc/vpl/usc38.htm

Other Federal Resources

FMLA Advisor:  http://www.dol.gov/elaws/fmla.htm
FLSA Advisor (Minimum wages, Overtime, and Record Keeping):  http://www.dol.gov/elaws/esa/flsa/screen5.asp
Employee Benefits Security Administration, DOL:  http://www.dol.gov/ebsa/
Pension Benefit Guaranty Corporation:  http://www.pbgc.gov/
Department of Labor, Fact Sheet No. OASVET 97-3:  http://www.dol.gov/vets/programs/fact/vet97-3.htm

Other useful web sites:

U.S. Code title or section, go to the U.S. Code search engine located at:
http://uscode.house.gov/
and type in either your Search Terms or Title and Section numbers in the appropriate field.
State Resources

Rhode Island Supreme Court Decisions (since 1999):
https://www.courts.ri.gov/Courts/SupremeCourt/Pages/Opinions%20and%20Orders%20Issued%20in%20Supreme%20Court%20Cases.aspx

Rhode Island General Laws: http://www.rilin.state.ri.us/Statutes/Statutes.html

Department of Labor and Training (DLT) Homepage: http://www.dlt.state.ri.us/

Rhode Island State Labor Relations Board: http://www.dlt.state.ri.us/lrb/

DLT: Filing a Claim for Unemployment Insurance: http://www.dlt.ri.gov/ui/

DLT: Frequently Asked Questions about Unemployment Insurance: http://www.dlt.ri.gov/ui/UIfaq.htm

DLT: Temporary Disability Insurance: http://www.dlt.ri.gov/tdi/


The AFL-CIO maintains several very useful web sites:

AFL-CIO Homepage: http://www.aflcio.org/


Safety & Health on the Job: http://www.aflcio.org/Issues/Job-Safety


Listed below are many of the agencies noted in the text. Many of these agencies are responsible for the enforcement of statutes and regulations governing the workplace. Others can help workers confronted with problems and can assist workers with their workplace rights. Still others provide workers with training and skill development.

AMERICAN CIVIL LIBERTIES UNION OF R.I. (ACLU) ................................................................. 831-7171
HMONG UNITED ASSOCIATION ......................................................................................... 455-0847
INJURED WORKERS OF RHODE ISLAND (IWORI) ......................................................... 438-4800
INSTITUTE FOR LABOR STUDIES AND RESEARCH ......................................................... 463-9900
INTERNATIONAL INSTITUTE ............................................................................................... 461-5940
NATIONAL LABOR RELATIONS BOARD (NLRB) ........................................................... 866-667-6572
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) .................. 528-4669
PROGRESO LATINO .............................................................................................................. 728-5920
RHODE ISLAND AFL-CIO ..................................................................................................... 751-7100
RHODE ISLAND COMMISSION FOR HUMAN RIGHTS (RICH) ........................................ 222-2661
RHODE ISLAND COMMITTEE ON OCCUPATIONAL SAFETY AND HEALTH (RICOSH) .... 751-2015
RHODE ISLAND DEPARTMENT OF ADMINISTRATION
   EQUAL EMPLOYMENT OPPORTUNITY OFFICE .............................................................. 222-3090
RHODE ISLAND DEPARTMENT OF HEALTH ........................................................................ 222-2231
RHODE ISLAND DEPARTMENT OF LABOR AND TRAINING (RIDLT)
   WORKFORCE DEVELOPMENT SERVICES ...................................................................... 462-8800
   LABOR STANDARDS ......................................................................................................... 462-8550
   OCCUPATIONAL SAFETY ................................................................................................. 462-8557
   STATE LABOR RELATIONS BOARD ............................................................................. 462-8830
   TEMPORARY DISABILITY INSURANCE (TDI) ............................................................... 462-8420
   UNEMPLOYMENT INSURANCE ......................................................................................... 243-9100
   WORKERS’ COMPENSATION EDUCATION UNIT (WC) .................................................. 462-8100
RHODE ISLAND LEGAL SERVICES
   PROVIDENCE ...................................................................................................................... 274-2652
   NEWPORT .......................................................................................................................... 846-2264
SOCIO-ECONOMIC DEVELOPMENT CENTER FOR SOUTHEAST ASIANS .............. 274-8811
U.S. CITIZENSHIP AND IMMIGRATION SERVICES (FORMERLY IMMIGRATION AND
NATURALIZATION SERVICE) (A BUREAU OF THE DEPARTMENT
OF HOMELAND SECURITY .................................................................................................. 800-375-5283
U.S. DEPARTMENT OF LABOR (USDOL)
   WAGE AND HOUR DIVISION ............................................................................................ 528-4431
   PENSIONS ......................................................................................................................... 617-565-9600
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ............................................. 800-669-4000
The Institute for Labor Studies & Research (ILSR) is a private, non-profit educational institution that provides education and training to enable working Rhode Islanders and the labor movement to have a stronger voice in the workplace, to participate more effectively in Rhode Island’s changing job market and to create a more just and equitable society.