

MODERN MANAGEMENT

AN OVERVIEW OF LOUISIANA EMPLOYMENT LAW

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INTRODUCTION

In addition to the numerous federal labor laws and regulations, Louisiana employers must comply with the State's laws governing the relationship with their employees. These State laws fall into two general groups:

- a) Discrimination laws, and
- b) General employer obligations.

An employer often encounters issues and obstacles in its efforts to comply with these laws. This pamphlet is not intended to address all of the concerns that employers must deal with under Louisiana State laws, rather it is intended to assist employers and managers in recognizing potential problems and analyzing employment decisions.

DISCRIMINATION LAWS

Age Discrimination La. – R.S. 23:302; 23:303; 23:322 et seq.

This statute prohibits discrimination against individuals forty years of age or older with respect to hiring, segregation, classification, discharge, compensation or other terms, conditions or privileges of employment. It applies to employers with twenty or more employees within the State. Employer is defined to include a person, association, legal or commercial entity, or the state, its agencies, boards, commissions and political subdivisions. Excluded is employment of an individual by a parent, spouse or child or employment in the domestic service of the employer.

The statute also provides protection for retaliation for opposition of any practice made unlawful by the statute or because an individual participated in any investigation or proceeding brought under the statute.

The employer is not prohibited from actions where age is a *bona fide* occupational qualification reasonably necessary for the normal operation of that business or where based on reasonable factors other than age. Nor does the statute prohibit an employer from observing the terms of a *bona fide* seniority system or employee benefit plan.

A victim of age discrimination can bring suit and seek back pay, benefits, reinstatement, front pay in lieu of reinstatement and reasonable attorney's fees, and court costs.

Disability Discrimination-La. R.S. 23:302; 23:303; 23:322 et seq.

Employers with fifteen or more employees are prohibited from discriminating against an "otherwise qualified disabled person" who with "reasonable accommodation" can perform the duties of the particular job or employment

position that such person holds or desires. An employer cannot discharge, segregate or classify, or refuse to hire, promote, or reasonably accommodate an "otherwise qualified disabled person" on the basis of a disability when it is unrelated to the individual's ability, with reasonable accommodation, to perform the duties of a particular job.

The statute also prohibits employers, labor organizations and employment agencies from discharging, failing or refusing to hire or promote and from other discriminatory actions against an otherwise qualified disabled person on the basis of physical or mental examinations or pre-employment interviews which are not directly related to the requirements of the specific job or not required of all employees or applicants. It also prohibits the same acts against an otherwise qualified disabled person when adaptive devices or aids may be needed to enable the individual, at the individual's expense, to perform the specific requirements of the job.

This law also contains restrictions regarding the making or use of written or oral inquiries or form applications that elicit or attempt to elicit information concerning a disability or expressing a preference, limitation or specification based on a disability and regarding the making, keeping or disclosing of a record of a disability of a prospective employee.

A defense may be available to an employer, labor organization or employment agency when an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to a disabled person is shown to be job-related and consistent with business necessity and the performance of the job cannot be accomplished by reasonable accommodation. Qualification standards can include a requirement that an individual shall not pose a direct threat to the health or safety of himself or others in the workplace.

A victim of disability discrimination can sue for compensatory damages, back pay, benefits, reinstatement, front pay in lieu of reinstatement, reasonable attorney's fees and court costs.

Civil Rights Act for Handicapped Persons—La. R.S. 46:2251 et seq.

This Act applies to employers with fifteen or more employees. It provides that it is unlawful to discriminate on the basis of a handicap or perceived handicap against an "otherwise qualified person," that is one who, with "reasonable accommodation," can perform the essential functions of the job in question. A handicapped person who believes he has been discriminated against may sue for damages, attorney's fees, costs and "any other relief deemed appropriate." The Act requires thirty day written notice to the employer before suit can be filed.

Race, Color, Religion, Sex and National Origin Discrimination—La. R.S. 23:302, 23:303, 23:332 *et seq.*

Employers that employ more than fifteen employees within the State are prohibited from discriminating against individuals on the basis of an individuals' race, color, religion, sex, or national origin in regard to hiring, discharging, segregating or classifying, compensation, and terms, conditions and privileges of employment. The statute also makes it unlawful for an employment agency to fail or refuse to refer for employment any individual based on the same protected characteristics. Nor can labor organizations exclude or expel from their membership, classify or segregate or cause an employer to discriminate against any individual included in the protected categories.

It is, however, not unlawful discrimination for an employer to hire and employ individuals on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a *bona fide* occupational qualification reasonably necessary for the normal operation of that particular business or enterprise. Nor is it illegal under the statute for an employer to apply different standards of compensation or different terms, conditions or privileges of employment pursuant to a *bona fide* seniority system or merit system or a system that measures earnings by quantity or quality of production or to employers that work in different locations as long as it is not based on race, color, religion, sex or national origin. An employer is free to administer and act on the results of a professionally developed test where such test is not designed, intended to or used to discriminate because of race, color, religion, sex or national origin.

The Louisiana Anti-Discrimination statute is clear that the definition of employee does not include individual supervisors and Louisiana Courts have routinely dismissed claims brought against individuals under this statute.

Under the Louisiana Anti-Discrimination statute, an employer is defined as a person, association, legal or commercial entity or the state, its agencies, boards, commissions or political subdivisions receiving services from an employee in return for any compensation. The statute specifically states that an insurer shall also be an employer with respect to the appointment of agents regardless of the character of the agent's employment. Excluded from the definition of employer are private educational or religious institutions and non-profit corporations. Like the Louisiana Age Discrimination Statute, it does not apply to the employment of an individual by his parent, spouse, or child or to employment in the domestic service of the employer or insurer.

A victim of discrimination can recover compensatory damages, back pay, benefits, reinstatement, front pay instead of reinstatement, reasonable attorney's fees, and court costs. Any employee that sues and is found by the Court to have filed a frivolous claim shall be responsible for the reasonable damages as a result of the claim as well as reasonable attorney's fees and court costs.

The statute further requires written notice to the employer thirty days before initiating court action detailing the alleged discrimination and both parties must make a good faith effort to resolve the dispute before court action is initiated.

Pregnancy, Childbirth and Related Medical Conditions—La. R.S. 23:341 *et seq.*

Employers who employ 25 or more employees within the State are prohibited from discriminating against a female employee affected by pregnancy, childbirth or related medical conditions in regard to discharge, promotion, and all benefits and privileges of employment, unless based on a *bona fide* occupational qualification. Also prohibited is the refusal to select such a female employee for a training program leading to promotion, provided she can complete the program at least three months before the anticipated date of her departure for pregnancy leave, as well as the discharge from a training program leading to promotion.

Pregnancy, childbirth or related medical conditions are to be treated as any other temporary disability. No employer shall be required to provide a female employee disability leave based on a normal pregnancy, childbirth or related medical conditions for more than six weeks. A pregnant employee, upon request, must be allowed to take a leave of absence for a reasonable period of time, not exceeding four months, and shall be entitled to use any accrued vacation leave during this period. A reasonable period of time is defined by the statute as that period during which the female employee is disabled because of her pregnancy, childbirth or a related medical condition.

Further, an employer must grant a female employee's request for a temporary transfer to a less strenuous or hazardous position for the duration of the pregnancy, if the transfer is recommended by her physician and can be reasonably accommodated. An employer does not have to create a new position or discharge, transfer or promote another employee to accommodate a request for transfer.

This statute defines an employer as a person, association, legal or commercial entity, or the state, its agencies, boards, commissions, or political subdivisions receiving services from an employee for compensation of any kind.

Sickle Cell Trait Discrimination—La. R.S. 23:351 et seq.

This statute prohibits discrimination against individuals with the sickle cell trait. It applies to employers with twenty or more employees within the State.

It provides for the following relief: compensatory damages, back pay, benefits, reinstatement, reasonable attorney's fees and court costs.

Genetic Trait Discrimination And Privacy–La. R.S. 23:368

This law provides that a person who is otherwise qualified cannot, on the basis of protected genetic information, be subjected to discrimination in employment. The statute also establishes certain privacy protections related to genetic information.

Garnishments-La. R.S. 23:731

Discharge or denial of employment because of an employee's voluntary assignment of earnings or a single garnishment of an employee's earnings is prohibited. The statute provides for the right to reinstatement and back pay for a person discharged but specifically states that damages are not available to such an individual. A person denied employment solely because of a voluntary assignment or garnishment shall be entitled however to reasonable damages. This law does not protect an employee who accumulates three or more unrelated garnishments within a two-year period. No garnishment resulting from an accident or illness causing an absence of ten consecutive days or more may be considered.

Political Activities—La. R.S. 23:961

Employers with twenty or more employees are prohibited from preventing an employee from engaging in politics or from becoming a candidate for public office. Further, an employer may not control or direct the political activities or political affiliations of its employees with the adoption or enforcement of any rule, regulation or policy. Coercion or influence by an employer by threats of discharge or employment loss for an employee's support or affiliation with a particular political faction or organization is also prohibited.

An individual who violates this statute is subject to civil suit and damages as well as a fine of up to \$1,000, or imprisonment of up to six months, or both. A firm or corporation that violates this statute is subject to a fine of up to \$2,000.

Labor Investigations—La. R.S. 23:964

It is unlawful to discriminate against an employee who has testified or furnished any other information in an investigation or proceeding relative to the enforcement of any of the labor laws of the State. An employer who violates this law may be fined up to \$250 or imprisoned up to 90 days, or both. In addition, persons violating this provision may be liable for an additional civil penalty of up to \$500, as well as reasonable litigation expenses of up to \$7,500 which can include attorney's fees, stenographer fees, investigative fees and expenses, witness fees and expenses, and administrative costs. The statute empowers the Assistant Secretary of the Office of Unemployment Insurance Administration to conduct and to institute civil proceedings to seek the civil penalties and litigation expenses.

Jury Duty-La. R.S. 23:965

Employees called to serve on a grand jury or a jury in criminal or civil cases are protected and, may be entitled to reinstatement if terminated, because of such service plus recovery of all lost wages and benefits and other conditions of employment. Also, the employer may be fined up to \$1,000 for illegally discharging an employee.

Further, employers must grant a leave of absence of up to one day to an employee called for jury duty, with no loss of wages or benefits such as sick, emergency or personal leave. An employer who violates this provision may be required to pay the employee his full wages for one day with no reduction in benefits, as well as a fine of up to \$500 for each offense.

Prohibition of Smoking Discrimination Act–La. R.S. 23:966

This Act prohibits an employer from discriminating against an individual with respect to discharge, compensation, promotion, or any other personnel action or other condition or privilege of employment on the grounds that the individual is a smoker or a non-smoker. An employer cannot require that an employee abstain from smoking or using tobacco products outside the course of employment. A smoker is limited by statute to a person that smokes tobacco. However, an employer may adopt a policy regulating the use of tobacco at the workplace. An employer who violates this statute can be fined up to \$250 for the first offense and up to \$500 for any subsequent offense.

Employee Protection From Reprisal—La. R.S. 23:967

Employers are prohibited from taking "reprisal" against an employee who, in good faith, and after advising the employer of the violation of law, engages in any of the following acts:

- 1) Reveals or threatens to reveal a workplace act or practice that is in violation of Louisiana law;
- 2) Provides information to or testifies before any public body that is conducting an investigation, hearing or inquiry into any violation of law; or
- 3) Objects to an employment act or practice that violates the law, or refused to participate in such an act.

An employee that successfully sues his/her employer under this statute can recover compensatory damages, back pay, benefits, and reinstatement, front pay in lieu of reinstatement, as well as reasonable attorney's fees and court costs. The statute also allows the employer to receive an award of attorney's fees and costs if it is found that the employee brought the lawsuit in bad faith or if the court determines that the employer's act or practice was not in violation of the law.

Reprisal is defined to include firing, layoff, loss of benefits or any discriminatory action the court finds was taken as a result of the employee's action protected by the statute. The reprisal statute, however, does not prohibit an employer from endorsing an established employment policy, procedure, or practice or exempt an employee from compliance with such policies, procedures or practices.

This statute is commonly referred to as the state whistleblower statute. Most state courts have held that the violation of law to which an employee objects must be a state not a federal law. The Louisiana courts have also held that the employee must show that the employer actually violated a state law to succeed not that the employee "perceived" a violation of a state law. Individual supervisors have been determined not to be an employer under the statute, and employment by a non-profit private religious university has been held not to fall within the scope of the statute. Courts have held that the act protects private as well as public employees.

Right to Work—La. R.S. 23:981 et seq.

Louisiana is a "right to work" state in which all persons are protected in the exercise of their right to freely and without fear of reprisal or penalty form, join or assist labor organizations or to refrain from such activity. Thus, no person can be required, as a condition of employment, to become or remain a member of any labor organization. Any agreement, understanding or practice, written or oral, between an employer and any labor organization in violation is declared unlawful, null and void, and of no legal effect.

A person who violates this statue shall be guilty of a misdemeanor and upon conviction shall be subject to a fine not exceeding \$1,000 and/or imprisonment for no more than 90 days. The statute also provides for injunctive relief and damages resulting from a violation or threatened violation.

School and Day Care Conference and Activities Leave—La. R.S. 23:1015 *et seq.*

An employer may grant an employee leave from work of up to a total of sixteen hours during any twelve-month period to attend, observe, or participate in conferences or classroom activities related to the employee's dependent children, for whom he is the legal guardian, that are conducted at the child's school or day care center, if the conferences cannot reasonably be scheduled during non-work hours of the employee. An employer is not required to pay an employee for any time taken as leave. An employee is permitted to substitute any accrued vacation time or other appropriate paid leave for any leave taken under this Act.

Workers' Compensation Act-La. R.S. 23:1361

The workers' compensation statute prohibits an employer from refusing to hire or discharging anyone because of a claim for workers' compensation benefits. Suit may be filed in state court and, if successful, the claimant may be awarded up to

one year's salary of the position sought for a failure to hire claim or the earnings of the employee at the time of discharge for a discharge claim as well as reasonable attorney's fees and court costs. Any party found to have brought a frivolous claim shall be held responsible for reasonable damages incurred as a result of the claim, including attorney's fees and court costs.

Military Service Relief Act-La. R.S. 29:401 et seq.

In 1991, the Louisiana legislature enacted the Military Service Relief Act, before many other states had enacted such provisions, which was intended to supplement federal law, specifically the Service Members Civil Relief Act (SMCRA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA). The statute provides re-employment rights and other benefits for persons who perform service in the uniformed services of the United States.

Employers are prohibited from denying initial employment, re-employment, retention in employment, promotion, or a benefit of employment on the basis of membership, application for membership, performance of service, application for service, or obligation to the uniformed services. An employer is considered to have taken such actions in violation of the Act if a motivating factor was the person's service or membership unless the employer can show that the action would have been taken in the absence of such membership or service. The statute also contains a specific retaliation provision that protects any employee that has taken an action to endorse a protection afforded under the Act, has testified or otherwise made a statement under the Act, has participated in an investigation under the statute or has exercised a right under the statute. Such an employee need not have served or applied for service.

Generally, employees who leave their employment to serve in the uniformed services are entitled to reinstatement within ten days with the same benefits he or she would have accrued during the period of military service, if the employee gives advance written or verbal notice of service to the employer, the total length of absence is not more than five years, and the employee has submitted a timely application for re-employment. The timeliness of an employee's application for reemployment varies with the length of time the employee was absent due to military service or whether the employee was hospitalized or recovering from an injury or illness. No notice is required of the employee if precluded by military necessity or if under the circumstances it is impossible or unreasonable.

The statute also contains provisions providing for mandatory military leave for service allowing the employee to utilize at his/her option certain paid and accrued leaves. The employer must allow the employee on leave to continue to accrue certain leaves such as sick leave, vacation and annual leave as well as any paid leave the employer provides.

Employers are prohibited from deducting from any compensation paid to the employee on military leave any cost of any replacement while on military leave. There are certain compensation provisions for peace officers, firefighters and state employees. The statute also provides for continuation of insurance and health benefits at the employee's costs for the service member, their family and dependants. It also provides for the suspension and resumption of certain worker's compensation benefits by the State Department of Labor. An employer must also afford the employee the credible service while in the military service toward vesting and computation of benefits in any retirement, pension, or employee benefit plan. The employee has the right to make employee contributions to such plans.

No employer is required to re-employ if: (1) the employee's circumstances have changed such that re-employment is impossible or unreasonable; (2) re-employment would cause an undue hardship on the employer; or, (3) the employment from which the person leaves was for a brief, non-recurrent period and there was no expectation that it would continue for a significant period. The employer bears the burden of proving these exceptions to re-employment.

Any employee re-employed under the provisions of the law cannot be discharged without cause for one year after re-employment. The re-employed employee is entitled to complete any training program applicable to his/her position while in the service. Finally, the re-employed employee is entitled to seniority and other rights and benefits determined by seniority the person had on the date service commenced plus those he/she would have attained while in service as if he/she had remained continuously employed.

The Louisiana statute adopts all benefits, protections and rights provided in SMCRA and USERRA and bestows upon the Louisiana state courts jurisdiction for enforcement. Courts are to give such cases preference and the Louisiana Attorney General is authorized to bring suits to enforce the Act. The court can award reasonable litigation expenses, including reasonable attorney's fees in any such proceeding.

Environmental Whistleblower's Statute-La. R.S. 30:2027

Employees who, in good faith, report or complain about possible environmental violations may not be retaliated against in connection with their employment. In making such a report or disclosure, the employee need only have a reasonable belief that there is or was a violation of an environmental law, rule or regulation.

The law also provides protection to any employee that provides information to or testifies before a public body conducting an investigation, hearing or inquiry into a violation of an environmental law, rule or regulation by his/her employer or another employer with whom there is a business relationship.

A victim of such retaliation may recover triple damages resulting from the action taken against him/her, as well as all costs of pursuing such action including attorney's fees and court costs. Damages to be tripled are defined to include but are not limited to lost wages, lost anticipated wages due to an increase or lost promotion for a three year period. The employee is entitled to actual damages beyond the three year period. Damages are also designed to include property lost as a result of lost wages, lost benefits and any physical or emotional damages.

Bone Marrow Donor Leave Act—La. R.S. 40:1299.124

This statute applies to an employer with twenty or more employees, at least one site within the State, and specifically includes an individual, corporation, partnership, association, non-profit organization, group of persons, state, parish, town, city, school district or other governmental subdivision. An employer is required to grant paid leaves of absence to an employee who seeks to undergo a medical procedure to donate bone marrow. The combined length of the leaves is determined by the employee but cannot exceed forty work hours unless the employer agrees. The employer may require medial verification. An employer is prohibited from retaliating against an employee for requesting or obtaining a leave of absence for a bone marrow donation. If it is determined that the employee does not qualify as a donor the paid leave cannot be forfeited.

Non-Smoking Requirements of Louisiana Law-La. R.S. 1300:251 et seq.

On January 1, 2007, Louisiana joined a growing number of states that prohibit smoking in all public places and workplaces. The Louisiana Smoke free Air Act prohibits smoking in any public building, school, public place, or enclosed area within a place of employment. The Act also prohibits any employer from knowingly permitting smoking "in any enclosed area within a place of employment." The Act extends covered workplaces to any "area under the control of an employer that employees frequent during the course of employment" and includes vehicles, meeting rooms, employee cafeterias, and hallways.

Outdoor areas are not within the confines of the Act, such as porches or terraces, parking areas, and other spaces that are not enclosed with four walls.

The Act requires employers to post "No smoking" signs or the "No smoking" symbol of a burning cigarette with a red bar across it in every public building and area within a place of employment. In addition, all ashtrays must be removed from areas where smoking is prohibited.

The Louisiana Smoke-free Air Act only provides the minimum requirements that must be met statewide. Any parish, city, or town can enact and enforce ordinances or laws that are more restrictive than the statewide standards.

Louisiana's Gun Law–La. R.S. 32:292.1

In 2008, Louisiana adopted a controversial firearms law that prohibits a property owner, tenant, public or private employment or business entity from prohibiting an employee and/or visitor to transport or store a firearm in a locked and privately-owned vehicle in any parking lot, parking garage or other designated parking area where such is not already prohibited by State law. This law applies to visitors and employees who chose to store a firearm in a privately-owned vehicle. The law does not apply to vehicles owned or in the control of the employer. Employers can provide separate parking for vehicles containing firearms, however, the law requires the segregated parking to be "reasonably close" to the employer's normal paring area. Employers can also adopt policies requiring that the firearms be hidden from plain view or stored in a locked case or container.

Prohibition Of Discrimination In Places Of Public Accommodation

La. Constitution of 1974, Article 1, Section 12; La. R.S. 49:146; La. R.S. 46:1951-56; 121:51-52; 51:2247-48

Under Louisiana law, it is unlawful to discriminate based on race, religion or national ancestry in providing access to public areas, accommodations, and facilities. Further discrimination based on age, sex, or physical or mental disability is prohibited where such discrimination is arbitrary, capricious, or unreasonable.

While the law indicates that discrimination based on age, or physical condition is allowed where there is a reasonable basis for it that is not contrary to public policy or constitutional principles, it is important to note that Louisiana has addressed and attempted to limit this type of discrimination. Moreover, federal law may impose stricter standards. For example, Title II of the Civil Rights Act of 1964 prohibits discrimination in public accommodations based on race, color, national origin, or religion. Further, the Americans with Disabilities Act of 1990 as recently amended by the American with Disabilities Act Amendments Act of 2008, prohibits discrimination in public accommodations based on physical or mental impairment or "perceived" physical or mental impairment.

Employer Reporting Program—La. R.S. 46:236.14

Employers must report to the Department of Social Services the hiring of any person to whom the employer anticipates paying earnings and the rehiring or return to work of any employee who was laid off, furloughed, separated, granted a leave without pay, or terminated. This information must be reported no later than 20 days after hiring or rehiring of the employee. An employer who fails to report may be fined a civil penalty which shall not exceed \$25.00.



Louisiana Commission on Human Rights Act—La. R.S. 51:2231 *et seq.*

The Louisiana Commission on Human Rights (LCHR) is charged with the responsibility to enforce state anti-discrimination laws that parallel the federal laws. The Commission consists of nine commissioners, appointed by the governor, to serve three-year terms. The LCHR has the power to enforce and adjudicate claims of discrimination.

Parishes and municipalities are authorized to adopt and enforce ordinances, orders and resolutions prohibiting all forms of discrimination, including that based on race, creed, color, religious, natural origin, sex, disability or age and can prescribe penalties for violations which will be in addition to those provided by the state statutes. These local governments are also authorized to establish local human rights commissions.

GENERAL EMPLOYER OBLIGATIONS

Employment References between Financial Institutions—La. R.S. 6:4

Banks, savings and loan associations or credit unions are protected from liability for providing to similar institutions a written employment reference regarding an employee that includes information reported to federal banking regulators under laws involving theft, embezzlement, misappropriation or other defalcation, provided:

- a) The information is true; and
- b) A copy of the written employment references is sent to the employee's last known address.

Notices Required to be Posted—La. R.S. 23:15

Employers are required to post a notice of those labor laws designated by the Secretary of the Louisiana Workforce Commission in conspicuous places on their premises. Current posting obligations include the prohibition against age discrimination, equal employment opportunity, the prohibition against genetic discrimination, minor labor laws, the requirement for employees to register out-of-state motor vehicles, employment/re-employment rights of national guardsmen, the prohibition against sickle cell trait discrimination, timely payment of wages, earned income tax credit and workers' compensation benefits.

Louisiana Group Health Insurance Continuation Act—La. R.S. 22:215.13

Employers who have fewer than 20 employees and, thus, are not covered by COBRA, have an obligation to provide continuation of employee group health coverage pursuant to the Louisiana Group Health Insurance Continuation Act to employees who lose their health insurance coverage as a result of termination or termination of membership in a class eligible for coverage under the policy. An employee must make a written election of continuation on a form furnished by the

employer and pay the first premium in advance on or before the date on which the employee's insurance would otherwise terminate.

In order to be eligible an employee must have been continuously insured under the group policy for 3 consecutive months immediately prior to the date of termination and must not be eligible for continuation of coverage pursuant to COBRA. An employee who obtains group coverage within 31 days immediately following the date of his termination or whose insurance was terminated because of fraud or as a result of failure to pay premiums is not eligible for coverage continuation.

Following the occurrence of a qualifying event, an employee must make a written election of continuation on a form furnished by the employer and pay the first premium in advance on or before the date on which the employee's insurance would otherwise terminate.

Covered employees are eligible for continuation for up to 12 months after the employee's insurance would have terminated due to a qualifying event. If the employee stops paying the required premium or becomes eligible for similar benefits under another group plan, the right to continue coverage pursuant to the Act terminates.

Group Insurance for Surviving Spouses—La. R. S. 22:215.7

Each group, blanket or franchise insurance policy containing provisions for payment of benefits for expenses incurred for hospital, nursing, medical or surgical services, issued or renewed in Louisiana, must include an option for all surviving spouses, 50 years or older, of the deceased employee to continue as a member of a group plan (at the surviving spouse's expense) when their eligibility for coverage ceases because of the death of the employee-member.

Minors-La. R.S. 23:161 et seq.

The employment of minors under eighteen years of age is strictly regulated. Employment of minors in hazardous occupations is forbidden. Minors may only be employed for certain hours after obtaining the appropriate employment certificate. The employer is obligated to maintain accurate records pertaining to the employment of minor employees.

No minor under the age of 18 years can be employed until the employer has procured and has on file an employment certificate for such minor issued by the city or parish superintendent of schools. No minor under the age of 16 years can be employed more than 8 hours in any one day, nor more than six consecutive days in any one week, nor more than 40 hours in any one week. Minors under the age of 18 years must be provided a break of at least 30 minutes after any five hour period of work.

There are no time standards for minors 16 and 17 years of age regarding the numbers of hours worked per day or per week, however, such minors must still receive an eight hour rest break at the end of each work day, before the commencement of the next day of work.

Louisiana law also imposes certain work hour restrictions for minors when school is in session:

- 1) No minor 16 years of age who has not graduated from high school shall be employed, or permitted, or suffered to work between the hours of 11:00 p.m. and 5:00 a.m. prior to the start of any school day.
- 2) No minor 17 years of age who has not graduated from high school shall be employed, or permitted, or suffered to work between the hours of 12:00 a.m. and 5:00 a.m. prior to the start of any school day.
- 3) No minor under 16 years of age who has not graduated from high school shall be employed, or permitted, or suffered to work between the hours of 7:00 p.m. and 7:00 a.m. prior to the start of any school day, or between the hours of 9:00 p.m. and 7:00 a.m. on any day.
- 4) No minor under the age of 16 years shall be employed, permitted, or suffered to work more than three hours each day on any day when school is in session, nor more than eighteen hours in any week when school is in session.

Wage Payment Statute-La. R.S. 23:631 et seq.

Louisiana law requires employers to pay employees all earned wages upon termination within fifteen (15) days of the employee's termination or by the employer's next regularly scheduled payday, whichever occurs first. The statute expressly provides that earned but unused vacation days constitute wages that must be paid at the time of termination.

In the event an employer fails to pay all wages owed to an employee the employee may institute an action to recover unpaid wages and reasonable attorney's fees. If the employer's failure to pay is proven to be in bad faith, the employee may also recover one day of penalty wages at the employee's regular rate of pay for each day that the employer fails to pay following demand by the employee, up to a maximum of ninety (90) days.

Employers are also required to inform employees at the time of hire what wages they will be paid, and the method and frequency of payment.

Contracts Forfeiting Wages—La. R.S. 23:634

Employers may not require employees to forfeit their wages in the event the employee is terminated or resigns. The statute authorizes agreements whereby employees can agree to reimburse the employer for the cost of their pre-

employment physical, drug testing in the event that the employee resigns within the first 90 days of employment, so long as the employee is compensated for his/her hours worked at the rate of not less than one dollar above the prevailing federal minimum wage rate.

Fines—La. R.S. 23:635

Employers may not assess fines against employees. However, the employer may require the employee to pay the actual cost of damages where the employee willfully or negligently damages the property of the employer or where the employee pleads guilty to or is convicted of the crime of theft of employer funds.

Loans to Employees—La. R.S. 23:691

When an employer lends money to an employee, the maximum that can be charged on such loans is eight (8) percent simple interest. Violation of this provision may result in the imposition of a civil fine of up to \$100.00 and/or three (3) months of imprisonment.

Employee Deposits—La. R.S. 23:891

If an employer requires its employee to make a deposit of money securing the return of employer-provided equipment, such as tools or uniforms, the employer must pay the employee interest at the rate of four (4) percent per annum on the amount deposited.

NOTE: When requiring an employee to make a deposit for the return of loaned equipment care should be taken to avoid violation of the Federal Fair Labor Standards Act by ensuring that any payroll deduction taken for the deposit does not reduce the employee's wages below the minimum wage for the week in which the deduction is made.

Medical and Other Examinations—La. R.S. 23:897

Employers are prohibited from charging employees or applicants for the cost of fingerprinting, medical examinations, or a drug test (except as provided by La. R.S. 23:634) or the cost of obtaining any records required by the employer as a condition of employment.

Strikebreakers—La. R.S. 23:898 et seq.

It is unlawful for anyone except common carriers to transport or cause to be transported into Louisiana persons who are employed to obstruct or interfere by force or threats with peaceful picketing or union organizational activities. Further, any person not directly involved in a strike or lockout is prohibited from recruiting, hiring, securing or furnishing striker replacements. This law does not apply to employers directly involved in a strike or to employment agencies as long as they are not primarily engaged in the business of providing striker replacements. The statute provides an exemption for certain agricultural industries.

Non-Competition Agreements—La. R.S. 23:921

The Louisiana non-compete statute generally provides that any agreements which restrain individuals from pursuing a lawful profession, trade or business shall be null and void, except as expressly provided for by the statute. Noncompetition agreements prohibiting a party from engaging in a competing business and/or soliciting customers are authorized in the following contexts:

- 1) Between the seller and buyer of the goodwill of a business;
- 2) Between an agent, servant, contractor or employee and the employer;
- Between partners, upon or in anticipation of the dissolution of their partnership;
- 4) Between a franchisor and franchisee;
- 5) Between an employee and employer with respect to any confidential computer programs with which an employee works;
- 6) Between a corporation and its shareholders;
- 7) Between a limited liability company and its members.

Non-competition agreements must be limited geographically to a specified parish or parishes, municipality or municipalities and may not exceed a period of two years. The agreement must also adequately describe the business being restricted. Failure to strictly comply with the requirements of the statute will render the agreement null and void. Finally, the statute prohibits the avoidance of its requirements through choice of law provisions in an employment agreement (for example, a Louisiana-based employee could not sign an employment contract stating that Texas law controls the enforceability of his non-compete agreement).

Agreements of non-solicitation of employees and former employees and confidentiality agreements are allowed without compliance with these strict statutory requirements.

Employment of Aliens-La. R.S. 23:991 et seq.

Employers are prohibited from knowingly hiring, recruiting or referring for employment in Louisiana any alien who is not entitled to lawful residence in the United States. The statute creates an exception for certain persons engaged in agricultural, dairy or animal caring activities. An employer that relies in good faith on a picture identification card and at least one of the following forms of documentation shall not be subjected to prosecution under the statute: United States birth certificate, naturalization certificate, certificate of citizenship, alien registration receipt card or United States immigration form I-94. Penalties for violations include fines ranging from \$500 for a first offense to up to \$2,000 for each illegal alien employed.

Workers Exposed to Toxic Substances—La. R.S. 23:1016

Employees who are exposed to certain toxic substances and hazardous agents (as defined by federal occupational health and safety laws/regulations) are entitled to access to the employer's records of exposure to such toxic substances or hazardous agents and, any employer analysis of employee exposure or employee medical records. If the employer fails to provide such records upon request the employee may file suit to gain access to such records and shall be entitled to recover the reasonable costs and attorney's fees incurred in obtaining such records.

Workers' Compensation Act-La. R.S. 23:1021 et seq.

Every employee who suffers on the job injury or occupational disease due to an accident or on-the-job exposure is entitled to receive workers' compensation benefits without regard to the fault of the employer. The benefits generally consist of a specified weekly amount of benefits based on the nature of the employee's injury and the duration of his/her disability and payment of all necessary medical bills. In the event the employee dies as a result of job-related injury or disease the statute provides a death benefit for the employee's survivors.

Defenses to a workers' compensation claim include:

- 1) Willful intention to injure oneself or another;
- Intoxication, unless the employee's intoxication resulted from activities in pursuit of the employer's interest, or in which the employer procured the intoxicating beverage or substance and encouraged its use during working hours;
- 3) Evidence at the time of the accident that the employee had used a nonprescribed controlled substance, either on or off the job;
- Failure to use available, adequate guards or protection against accidental injury; or
- 5) The injured employee was the initial aggressor in an unprovoked physical altercation (unless excessive force was used in retaliation).

Workers' compensation benefits generally provide the exclusive remedy for workplace injury or disease, such that an injured employee ordinarily cannot sue the employer or his/her co-workers in tort. The exclusive remedy bar to tort claims does not apply where it is proven that the employee's injuries were the result of an "intentional" act – which is limited to situations where the employer (or its agents) purposefully intended to commit the act which harmed the employee or where the employer knew that such injury was "substantially certain" to occur.

Disputed claims for workers' compensation benefits are adjudicated through the Louisiana Office of Workers' Compensation and hearings of such disputes are conducted by appointed administrative law judges. Settlement of a claim for workers' compensation benefits must be approved by the Louisiana Office of Workers' Compensation.

Louisiana Employment Security Law-La. R.S. 23:1471 et seq.

The Louisiana Employment Security Law provides unemployment compensation benefits for eligible employees in the event of a loss of employment. The benefits system is funded by employer paid premiums that are based on the employer's number experience rating. The rating record is established for each employer and updated annually as of June 30th according to the employer's total wages paid, taxes paid, and benefits paid to its former employees.

The unemployment statute is liberally construed in favor of providing benefits in favor of the unemployed. However, the law provides a number of grounds for disqualification of claimants, including the following reasons:

- 1) The employee leaves his job without "good cause;"
- 2) The employee is discharged for misconduct in connection with the work;
- 3) The employee fails to apply for or accept suitable employment; or
- 4) The employee refuses to report for work because he is participating in an active labor strike.

Employees will also be disqualified if the employer proves by a "preponderance of the evidence" that the employee was terminated based on use of illegal drugs pursuant to the employer's written drug testing policy.

An employee's receipt of severance pay and workers' compensation benefits may also render the employee ineligible to receive unemployment benefits for the work weeks covered by such compensation.

At the time of termination the employer is responsible for reporting the reason for discharge to the Office of Employment Security. The Agency then makes a preliminary determination as to whether the terminated employee is eligible to receive unemployment benefits and notifies the parties of this preliminary determination. Either the employee or the employer may appeal this initial benefits determination. The appeal is heard by an administrative law judge who conducts an informal hearing during which the employer and employee are permitted to offer evidence and witnesses in support of their position as to whether unemployment benefits are owed. The administrative law judge's determination may be appealed to the Louisiana Workforce Commission and the Agency's determination may be appealed by either party by filing a Petition for Judicial Review in a Louisiana state district court.

Tax Credit for Persons Providing Employment—La. R.S. 47:6004

This provision was enacted to encourage the employment of previously unemployed Louisiana residents, and recipients of Aid to Families with Dependent Children ("AFDC") payments who are participating in Project Independence, The Louisiana Job Opportunities and Basic Skill (JOBS) Program. The statute provides a tax credit of \$750 for taxable periods beginning on or after January 1, 1992 to Louisiana employers for each new full-time job created and filled by a person who has resided in Louisiana for at least six months and has been unemployed for a continuous period of at least eight weeks.

The created jobs must exceed five percent of the average full-time number of jobs reported by the employer to the Office of Employment Security during the prior year, and the new employee must complete one year of full-time service in order for the position to be credit-eligible. The employer may offset the credit against all state income and corporation franchise taxes. The credits earned pursuant to this provision may be carried over for a maximum period of five years.

Drug Testing Guidelines-La. R.S. 49:1001 et seq.

Employers who drug test either job applicants or employees for the presence of marijuana, opiates, cocaine, amphetamines and phencyclidine must comply with the provisions of the Louisiana Drug Testing Statute when the results of such testing may result in negative employment consequences. The statute requires the use of a testing laboratory that is certified by the federal Substance Abuse Mental Health Services Administration ("SAMHSA") or the College of American Pathologists. Testing procedures are required to follow SAMSHA mandatory testing guidelines for federal workplace drug testing programs.

The statute creates exemptions for certain industries, including the National Football League and any company involved in the exploration, drilling or production of oil or gas in Louisiana or its territorial waters. The statute does not create a private right of action for employees who contend that they were terminated based on a drug test that fails to comply with the statutory requirements and to date no Louisiana court has recognized a private right of action for wrongful termination under this statute.

Unfair Trade Practices Act—La. R.S. 51:1402 et seq.

The Louisiana Unfair Trade Practices Act ("LUTPA") declares as unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." This broadly worded statute has been invoked by employers in certain circumstances to assert claims against former employees for engaging in unethical competition with their former employer, in most instances in situations where the employee has usurped a company opportunity while still working for the employer or misappropriates confidential employer information (such as customer lists) or other proprietary information. If a violation

of the LUTPA is established a prevailing litigant is entitled to recover treble damages and reasonable attorney's fees, but also provides for the award of reasonable attorney's fees to a prevailing defendant in the event a claim under the statute is found to have been brought in bad faith.

Courts applying the statute to the employment relationship have held that a determination of whether competition is unfair requires the careful balancing of the right of employees (in the absences of a valid non-compete agreement) to compete with a former employer against the right of the employer to honest and fair competition and the protection of business assets and proprietary information. Results of litigation against employees under the LUTPA have been mixed, such that employers are better served by utilizing well-drafted non-compete, non-solicitation and confidentiality agreements than relying on this statute.

Uniform Trade Secrets Act-La. R.S. 51:1431 et seq.

The Trade Secrets Act provides protection against employee misappropriation of an employer's trade secrets. Prohibited "misappropriation" is defined as "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means." "Trade secret" is defined as information, including a formula, pattern, compilation, program, device, method, technique, process, that:

- 1) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- 2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Courts interpreting the Trade Secrets Act have applied a narrow interpretation of the statute by carefully scrutinizing whether an employer's proprietary information rises to the level of a legally protected "trade secret." Louisiana appellate courts have found that the identities of customers, identity of key suppliers and the employer's pricing information do not qualify for protection as trade secrets. Although the Trade Secrets Act does provide additional protection against employee misappropriation of proprietary information, employers will be better served by utilizing well-written confidentiality, non-compete and non-solicitation agreements with their employees to protect their interests in proprietary information.

Employment at Will—La. Civ. Code 2747 and 2749

The Louisiana Civil Code incorporates the doctrine of employment-at-will, such that either the employee or the employer, in the absence of an agreement of employment for a specific term, is free to terminate the employment relationship without notice or cause, so long as the employer's reason for termination does not violate state or federal law. Pursuant to this doctrine, Louisiana courts have

held that opened ended promises of future employment or even lifetime employment, and remarks by an employer about an employee's promising future with the company are not sufficient to create a contract of employment for a specific term. Louisiana courts have relied on the doctrine of at-will employment to find that statements of employer policies, such as those contained in employee handbooks, do not create contractual rights in favor of employees who are not engaged for a specific term, and thus may be terminated at any time, with or without cause.

However, Louisiana courts have made clear that there is no specific form required for the creation of an employment contract for a specific term, such that oral employment contracts for a specific term are enforceable. In some cases Louisiana courts have found statements in an employer's offer letter to an employee constituted a promise of employment for a specific term. Louisiana employers are well advised to include disclaimers indicating that employment with the Company is "at-will" in their employment-related documents, such as job applications, offer letters and employee handbooks and consider having employees execute a written acknowledgement of their "at-will" employment status at the start of the employment relationship.

About Lemle & Kelleher, L.L.P.

Lemle & Kelleher is one of the oldest major law firms in Louisiana, tracing its origins to the late 19th century when New Orleans was experiencing a boom as the shipping and commercial center of the South. Building on that genesis, we have diversified and expanded our capabilities for more than 100 years to meet the growing needs of our clients regionally and nationally. Today, Lemle & Kelleher offers responsive, innovative, and experienced legal representation covering a broad range of practice areas. For more information please visit www.lemle.com.

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