# PPTA Human Resource Toolkit

## Disclaimer:

In order to help our members better cope in today's business environment with the ever-increasing human resource demands and obligations, the Pennsylvania Public Transportation Association has published this edition of the Human Resources Toolkit.

This publication should provide a general human resources guide to assist employers throughout the employment process, from hiring to termination. The book outlines major areas of the employment cycle; identifies commonly occurring issues that arise during the employment relationship, including legal issues and many of the state and federal employment laws impacting the workplace; suggests best practices and includes samples of human resources forms and policies.

The Pennsylvania Public Transportation Association and its legal counsel disclaim any intent to provide legal advice and disclaim any liability for opinions provided herein. The information should be construed as general guidelines and not interpreted as legal advice. The materials should serve as a general reference to facilitate more thorough research and analysis with the assistance of a competent professional who would have an opportunity to consider the facts of any particular situation. Members are encouraged to seek competent legal counsel in the event that particular legal advice or interpretation is required.

Due to the ever-changing nature of the law, some information may be or become outdated with the passage of time.

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# Recruitment and Interviewing

## Overview

Hiring the right employee for the job is one of the biggest challenges employers face. A methodical and systematic interview process conducted by trained interviewers will aid in obtaining information which will enable the employer to select the right candidate for the job. It is recommended that you and your agency develop a thorough, documented process that works to ensure that you are getting the right people for the right positions within your organizations. All hiring decisions should be guided by this process and adhere to your agency's Hiring Policy.

*See sample Hiring Policy in Appendix #1*

## New hire checklist

The development and adherence to a New Hire Checklist guarantees consistency in the hiring process and safeguards against missing steps or not securing required documentation on a candidate or new hire. The process should be designed to provide you the most complete information on your candidate(s) as possible to permit you the ability to hire the right person for your job and organizational culture, and to enhance the on-boarding process in order to get your new staff member up and running.

The checklist should include sections focused on:

- Application process
- Job Description review
- Interview process
- Background checks
- Medical examinations
- D & A Testing
- Policy and procedure requirements
- On-Boarding process

All line items/tasks should have section where date completed and staff member name/initials can be documented.

*See Sample New Hire Checklist in Appendix #2*

## Recruitment

**Advertise Appropriately -** make sure your company utilizes the most appropriate advertising medium for the position(s) you are hiring. Some examples of advertising

resources are newspapers, social media sites, job sites (i.e. Indeed), employee referrals, etc. No matter what format you select always include language regarding being an equal opportunity employer. Advertisements should include:

- Desired qualifications
    - Education
    - Experience
    - Certifications
- Job functions or descriptions – be concise
- Hours
- Rate of Pay
- Appropriate/desired contact method and person

*See Sample Advertisement in Appendix #3*

## APPLICATION/PRE-HIRE PROCESS

Once you have appropriately selected or designed your recruitment strategy, you must ensure that you have a logical and complete application process for potential candidates to complete. Applications are a vital tool in providing the Agency's decision-makers complete information on possible new hires and be easy to understand and complete for potential employees. Your agency's application process should include the following:

- **Acceptable Application Form -** make sure your company's application form complies with current state/federal legal requirements. For example, if you are using an application form that predates the Americans with Disabilities Act, chances are your form asks questions that are prohibited. Additionally, ensure that your application fulfills the DOT requirements for job candidates by including driver license/history check, previous employment history, and previous residences. Additional tools for information on candidates; such as social media handles or usernames is permitted but consistency is paramount for requests and application. These forms need to be available in a variety of means from walk-ins (hard-copy) to your website (electronic), prospective candidates need to be able to access your application with relative ease.

*See Sample Application in Appendix #4*

- **Completed Application Form -** have the candidate fully complete your company's application form. Ensure all questions are answered and signature blocks executed. PA State law requires forms to be fully executed for candidate to be considered for position.

- **Educate the Interviewers -** persons conducting the interview should understand the interviewing process and be trained in interviewing. When this is not possible, at

least provide the persons conducting the interview with a description of the job duties and skills or qualities which a successful person in the position should possess, and equally as important, provide a list of questions designed to elicit responses indicative of those skills or qualities.

- **Interview Team -** your interview team could range from a single individual (not recommended) to a larger group (recommended no more than four). Team members could come from HR, Admin, Operations, Maintenance, etc. Try to ensure that the department hiring is well represented.

- **Update the Job Description** - job descriptions should be reviewed and updated for the position which is being filled. An excellent interviewing practice will include providing a copy of the job description to the interviewee for review and obtaining confirmation that the applicant can perform all of the duties. Job descriptions in general should be reviewed by department and admin staff on a scheduled basis (i.e. annually)

**A. Why Have Job Descriptions?**

Generally, the law does not require an employer to use job descriptions. However, job descriptions can benefit both an employer and employee and can be used in the following ways: setting performance requirements; filling vacant positions, including interviewing; exploring reasonable accommodations under disability laws; deciding whether or how to restructure jobs; training employees; assigning work; evaluating job performance; and setting compensation. Job descriptions can even be used to convey that an employer supports equal employment opportunity because every applicant for and employee in a specific job is subject to the same job description.

**B. Legal Implications**

Although The Americans with Disabilities Act (“ADA”) does not require employers to use job descriptions, job descriptions that are prepared before advertising or interviewing applicants for a job will be considered evidence in determining essential functions of a job. An individual is protected by the ADA only if he or she is able to perform the essential functions of his or her job with or without an accommodation. Therefore, it is imperative that employers are able to identify and, if necessary, prove the essential functions of each position.

Job descriptions may discourage employees from bringing legal claims against an employer. Employees who have had access to objective standards in the job descriptions against which their performance is measured know when that they have not met the standards and may be less likely to complain about employers’ actions based on those standards. Employers may use job descriptions as defenses against certain legal claims, including claims of discrimination,

retaliation and claims under the ADA, Title VII, and Equal Pay Act (where a description of skill, effort and responsibility levels become important).

## C. What Should be in a Job Description?

Job descriptions may be general or specific, but always at least should document the major duties and responsibilities of a position. A typical job description will cover the following areas: introduction to the job; essential functions of the job; nonessential functions of the job; physical demands; knowledge, skills and abilities necessary to perform the job; supervisory responsibilities; working conditions; minimum qualifications for the jobs, and exempt and safety sensitive status.

> The introduction to the job should explain briefly the purpose of the position and the results expected from the employee in the position. Also, technical aspects of the position should be included, such as: the job title (including the position number or code); the department or company area the job is in; relationships to other jobs; to whom the position reports; and the position's salary range.
>
> All essential functions of the position, including physical demands, should be addressed explicitly to prevent misunderstanding about the duties and responsibilities necessary to perform the job. A function could be considered essential if the job exists to perform the function, if there are limited number of other employees that could perform the function or if the function is highly specialized and the person in the job is hired for his or her expertise and/or ability to perform the highly specialized function. Remember to include regular attendance and timeliness as essential functions of any job that requires regular and punctual employee presence.
> Nonessential functions of the job, including physical demands, also should be included in the job description to provide a complete picture of job duties.
>
> Physical demands of the position should include the time spent on each duty in relation to the entire job and frequency of the activity. Some sample physical demands are as follows: sitting up to 3 hours per day; walking up to 2 hours per day; standing up to 2 hours per day; lifting/pushing/pulling up to 25 lbs. 3 times per week; bending, stooping, twisting and reaching with entire body, arms and/or legs up to 10 times per day; and climbing and balancing weekly.
>
> The knowledge, skills and abilities necessary to the job are the minimum requirements the employee must meet in order to perform the job.

If the employee will supervise other positions, the scope of the person’s authority should be stated, along with the position(s) the person supervises.

The working conditions of the position should be addressed, including the physical working environment (for example, warehouse environment) and any special conditions such as required overtime.

The minimum qualifications, including education, training, specific experience and/or any licenses or certifications, that are required for an employee to perform the position should be included.

**D. Tips for Drafting a Job Description**

Job descriptions should be written in brief and clear sentences. Employers should use action verbs in the present tense (for example– evaluates, writes, prepares) and an explicit work result (for example–spreadsheets, reports, proposals).

The desired outcome of the work should be described, rather than a method of accomplishing the outcome, because a reasonable accommodation may enable an employee with a disability to accomplish a job function in a different manner than an employee who is not disabled. For example, a job description should state “records meeting minutes” rather than “writes down meeting minutes”.

Finally, job descriptions should be an accurate reflection of the job. They should be reviewed on a regular basis and updated as appropriate.

*See Sample Job Descriptions in Appendix #5*

- **Prepare Questions** - develop a standard set of questions designed to elicit information on an applicant’s past job performance, job duties and accomplishments. Prepare a standard list of interview questions for the particular position you seek to fill. Use these questions in every interview for that position. All team members involved in interview should have copy of questions with ability to document responses and/or notes.

*See Sample Interview Questions in Appendix #6*

## Conducting the Interview

- **Set the scene** – utilize a comfortable room/area with appropriate seating, lighting, etc. Introduction and welcoming remarks can serve to put candidate at ease.

- **Use Behavioral Interviewing** - ask open‑ended questions which focus on behavioral descriptions rather than simply "yes or no" questions (e.g., have them describe a work situation in which they handled stress well rather than just asking if they can "handle stress well")

- **Listen** – active listening is key to conducting a positive interview. Focus on the candidates responses and provide audible feedback that you are engaged. If you need to follow up for more information on a response, do so.

- **Create a Record** - take notes. Inform candidate before you begin that you or team members will be taking notes. Record actual responses and objective behaviors; do not write down subjective impressions or judgments (e.g., note that interviewee shifted in his chair and would not make eye contact when asked about leaving his last job; do not note that interviewee is a liar).

- **Questions to Avoid** - stay away from questions that have more to do with personal lifestyles than job experience; phrase the question so that the answer will describe on‑the‑job qualities instead of personal qualities. If the question is not related to performance on the job, it should not be asked. The following are areas/questions to stay away from:
  - In general, don't ask for information unless there is a legitimate, job‑related reason to know the information and is legally permissible.
  - Ask whether the applicant has a lawful right to work in the United States rather than asking if the applicant is a citizen of the United States.
  - Don't ask about arrest records. You may ask about criminal convictions.
  - Don't ask for a picture of the applicant prior to actual employment.
  - Don't ask race, color, religious creed, national origin, birth place, religion, citizen‑ ship of parents or spouse, foreign language skills (unless foreign language skills are a bona fide occupational qualification).
  - Don't ask age. If the job has a minimum age requirement you may ask if the applicant is old enough to qualify for the job; e.g., in Pennsylvania, bartenders must be 18 years of age.
  - Don't ask marital status.
  - Don't ask the applicant how many children he or she has, or who will care for the children while the applicant works.
  - You must be extremely careful in asking questions relating to an applicant's health or disability. There are some permitted inquiries, but they are very limited. Your company's obligations in interviewing and hiring under the Pennsylvania Human Relations Act ("PHRA") and the Americans with Disabilities Act ("ADA") are discussed below.

### After the Interview

- ○ Consider Road Test and/or Bus Survey to assist in determining skill or knowledge level
- ○ Consider personality or aptitude testing
- ○ Check references.
- ○ Check social media accounts – must be consistent for all applicants and application; not permitted to create fake account to monitor
- ○ Driving Record Check
- ○ Complete background checks
- ○ Conduct D & A pre-employment test
- ○ DOT Physical Exam
- ○ Conduct Functional Capacity test
- ○ Timely and appropriately notify applicants of decision; be consistent in notifications.
- ○ Send appropriate offer letter. *See Sample Offer Letter in Appendix #7*
- ○ Keep all required records. *See section beginning on page 39.*

# Medical examinations And Background Checks

### Overview

Employers often have various selection procedures in place to screen applicants for hire. These may include medical examinations, credit checks, and criminal background checks.

While the use of tests and other selection procedures can be very effective, employers must ensure that they do not violate the federal anti‐discrimination laws in using them. Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), disability or any other status protected by law.

The EEOC enforces most federal anti‐discrimination laws. The EEOC has published a fact sheet on Employment Tests and Selection Procedures which can be found at. http://www.eeoc.gov/policy/docs/factemployment_procedures.html.

For general information on discrimination, see the EEOC's web site at:

- http://www.eeoc.gov/abouteeo/overview_practices.html
- http://www.eeoc.gov/abouteeo/overview_laws.html

A summary of relevant points about medical examinations are listed below:

- **<u>NO PRE-OFFER MEDICAL EXAMS OR INQUIRIES</u> -** An employer may not ask questions about disability or require medical examinations until after it makes a conditional job offer to the applicant. 42 U.S.C. §12112 (d)(2).
- **<u>MUST TREAT PERSONS THE SAME IN POST-OFFER EXAMS/INQUIRIES</u> -** After making a job offer (but before the person starts working), an employer may ask

disability-related questions and conduct medical examinations as long as it does so for all individuals entering the same job category.

- **BUSINESS-NECESSITY CRITICAL IN MEDICAL EXAMS OF CURRENT EMPLOYEES** - With respect to employees, an employer may ask questions about disability or require medical examinations only if doing so is job-related and consistent with business necessity. Thus, for example, an employer could request medical information when it has a reasonable belief, based on objective evidence, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition, or when an employer receives a request for a reasonable accommodation and the person's disability and/or need for accommodation is not obvious.

Physical examinations that should be conducted as a condition of offering employment are:

- DOT physical exam
- Function Capacity test
- Conduct D & A pre-employment test

## BACKGROUND CHECKS

Conducting background checks on candidates is a vital piece of the hiring or pre-employment process. You and your staff want the most complete set of information on all candidates possible as to make the best hiring decision for your organization. The process of informing candidates, obtaining permission, executing checks, and documenting results does take time, but leads to better hiring results. Background checks may change depending on the specific job function for which you are reviewing candidates.

The process of conducting background checks contains the following steps:

1. **Disclosure** – an employer must provide the employee or applicant with a clear and conspicuous written disclosure that report may be obtained. The disclosure must be provided to the employee or applicant before the report is obtained and should be provided in a document that consists solely of the disclosure or as part of application that is required to be completed in full for consideration of employment. *See Sample Disclosure and Consent Form in Appendix #8*

2. **Written Authorization** - an employer must obtain a written authorization from the employee or applicant prior to obtaining the report. Unlike the disclosure, the consent language does not have to be contained in a separate document. Thus, consent language in a signed job application would be sufficient. The consent language, however, must be conspicuous. To ensure that consent is conspicuous, it may be wise to have the consent in a separate document. Employers are well advised to have all job applicants sign a consent form in anticipation that an employer may determine that a post-employment consumer report is needed. Another protective step for employers to take is to include a background check policy in the employee handbook, if background checks are regularly obtained. *See Sample Disclosure and Consent Form in Appendix #8*

3. **Certification to Consumer Reporting Agency** - the employer must certify to a consumer reporting agency that the consumer was given a clear and conspicuous written disclosure and that the employer obtained prior written authorization from the consumer for the report. The employer must also certify that the information obtained will not be used in violation of any federal or state equal opportunity law or

regulation, and, if any adverse action is taken based upon the consumer report, a copy of the report and a summary of the consumer's rights will be provided to the consumer. Most consumer reporting agencies will request that the employer sign the agency's own certification agreement.

4. **Document** – once certification or report is received from reporting agency, keep certification/report with Disclosure and Authorization form (if possible).

Background certifications that should be conducted before offering employment are:

- Driving Record
- Criminal history check
  - State
  - Federal
- Child Abuse Clearance
- Drug & Alcohol testing/records history
- Fingerprinting – school districts
- OIG Exclusions List
- Employment & Safety history check
- Consumer Credit Checks – candidates for roles involving the handling of money
- Arrest/Conviction report & certification
- Reference check

## New hire selection Process

Once you have completed the application, interview, and background check processes you should be ready to select your new staff member. Once the team has made the decision and secured all pre-employment documentation, notify all candidates you have interviewed in writing of your decision. Notify the candidate you have decided to hire by phone before sending formal letter, to discuss start date and allow them to provide their previous employer the courtesy of the appropriate notice.

Additionally, a phone call, either before the letter is sent or after it has been delivered, can serve as a professional courtesy to those who you did not select for the position. This permits the candidate to move forward with the job search.

*See Sample Job Offer and Turndown letters are in Appendix #7*

Lastly, now is the time to begin and/or review your DOT required Driver Qualification files that must be maintained. Files that must be included are:

- Application/resume (entire length of employment)
- Evidence of employment reference checks (entire length of employment)
- Evidence of drug test checks (entire length of employment)
- Copy of MVR review for hire (entire length of employment and three year rotation)
- Copy of medical qualification card or physical exam and function capacity (entire length of employment and three year rotation)
- Copy of CDL (entire length of employment and three year rotation)
- Job description – signed by employee (entire length of employment)
- Company policies sign-off – signed by employee (entire length of employment)

*See Sample Driver Qualification file checklist in Appendix#9*

## ADA Compliance in the Hiring Process

The EEOC has published guidance regarding the ADA and pre-employment inquiries. The following are examples of **prohibited** inquiries compiled by the EEOC:

- Have you ever had or been treated for the following conditions or diseases? (Followed by a checklist of various conditions or diseases.)
- List the conditions or diseases for which you have been treated in the last three (3) years.
- Have you ever been hospitalized? If so, for what condition?
- Have you ever been treated by a psychologist or psychiatrist? If so, for what condition?
- Have you ever been treated for any mental condition?
- Is there a health‐related reason you may not be able to perform the job for which you are applying?
- Have you had a major illness in the last five (5) years?
- How many days were you absent from work because of illness last year? (Pre-employment inquiries about illness may not be asked because they reveal the existence of a disability. However, an employer may provide information on its attendance requirements and ask if the applicant can meet the requirements.)
- Are you taking any prescribed drugs? (Questions about use of prescribed drugs are not permitted before a conditional job offer, because the answers to such questions might reveal the existence of certain disabilities which require prescribed medication.)
- Have you ever been treated for drug addiction or alcoholism?
- Have you ever filed for workers compensation insurance? Here are some examples of acceptable inquiries:
- Can you perform the essential functions of this job with or without a reasonable accommodation? (Examples: Can you lift and carry a 20 pound bag? Can you distinguish between red and blue wires for color coded wires? Can you type 60 words per minute?) If the applicant needs a reasonable accommodation

to demonstrate their ability to do the job, that accommodation should be provided or the person should be permitted to explain how they could do the job with an accommodation.

- How well can you handle stress?
- Here is information regarding our regular work hours and attendance requirements. Can you meet the attendance requirements for this job?
- Do you illegally use drugs? Have you used illegal drugs in the last two years?
- Please demonstrate/describe how you would perform these job functions.

In addition, the ADA requires that the pre-employment process be made accessible to persons with disabilities. This may require, for example, that the interview site be moved to a suitable location for an applicant in a wheel-chair or modifying the application completing process for someone with vision impairment.

The ADA also makes it unlawful to (1) use employment tests that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test, as used by the employer, is shown to be job-related and consistent with business necessity; (2) fail to select and administer employment tests in the most effective manner to ensure that test results accurately reflect the skills, aptitude or whatever other factor that such test purports to measure, rather than reflecting an applicant’s or employee’s impairment; and (3) fail to make reasonable accommodations, including in the administration of tests, to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such accommodation would impose an undue hardship.

# Employee Relations

The concept of employee relations is the idea of managing the employee-employer relationship to ensure workplace satisfaction and productivity. It begins at the time of hire and continues through termination of employment. It is a set of practices to address workplace concerns, including work conduct and performance. Effective communication and performance management are critical aspects of employee relations programs. Communication with employees on workplace rules, benefits and expectations should begin at the time of hire. Ongoing communication on these topics needs to occur too. Performance management is a method to continue important communication and critical to the support of employee relations.

## Orientation or Introductory Periods

Employers frequently impose orientation or introductory periods ("Introductory Periods") on new employees and employees transitioning positions or departments. The Introductory Period begins on the first day of employment or first day of new position/department. On the first day or within the first few days is a good time for employers to review policies and general employment information or obtain necessary from employees and complete all necessary forms. A checklist, *(see Sample New Hire Checklist Appendix #2)* may assist employers in ensuring they cover all necessary steps, including Employee Data Sheet *(see Sample Data Sheet Appendix #9).*

One of the main functions of an Introductory Period is to provide a time for the employer and employee to further evaluate one another for job fit. Therefore, the organization's mission, vision, and values must be relayed to the employee; along with expectations of team members. During the Introductory Period, an employer may use performance reviews as a tool to determine whether the employee is a good fit for the employer, focusing on work performance, including work habits and the employee's capabilities.

The evaluation should include the employer's suggestions for improvement of the employee's work performance and acknowledgment of what the employee is doing well. Employers should ensure that the use of an Introductory Period will not tie an employer's hands when it comes to disciplining employees. This is accomplished by making it clear that employees remain at-will employees during and after the Introductory Period and otherwise not suggesting a guarantee of employment for the Introductory Period.

Likewise, the Introductory Period will not preclude an employee from bringing a complaint. Employees have the same ability to bring claims within their Introductory Period as they do after they have completed their Introductory Period. Remember, it is just as important for an employer to respond appropriately to any complaint, be it an internal complaint to a supervisor or a formal written complaint to the Pennsylvania Human Relations Commission, made within the Introductory Period as a complaint made after the Introductory Period has been completed.

Often, employers preclude employees from being eligible for certain benefits until they have completed the Introductory Period satisfactorily. For example, employees often will not be eligible to accrue time off (such as paid time off, vacation leave and/or sick leave) during an Introductory Period. Sometimes, employers permit the accrual of time off but do not permit employees to begin using the accrued time until after they have completed their Introductory Period. Some employers also begin an employee's eligibility for health care insurance coverage only once the employee has completed the Introductory Period.

If an employer utilizes an Introductory Period for new employees, an explanation of the Introductory Period should be included in the employee handbook, including the length of the Introductory Period. As noted above, it is important that an employer make clear to new employees that completion of the Introductory Period does not guarantee or imply continued employment for any specific period of time. An employer should also make clear that the employee remains at-will upon completion of the Introductory Period and either the employer or employee may terminate employment for any or no reason at any time.

The following is a list of mandated policies your agency needs to have in place and documented that each employee has received.

- FMLA Policy
- Sexual Harassment/discrimination Policy
- Reasonable Accommodation Policy
- Salary/Payroll Policy
- Hiring Policy Policy
- Administrative Policies
- Social Media Policy
- Medical Qualification Policy
- Light/Modified Duty Policy
- Substance Abuse Policy
- Hours of Service Policy

*(See Sample Employee Introduction Period Policy in Appendix #10)*

## Administrative Handbook

Agencies utilize Administrative Handbooks as a tool or resource to incorporate all relevant work-related processes and information so employees know expectations of the organization and their position.

These resources should include the Agency's Code of Conduct and Code of Ethics; as well as, Mission, Vision, and Values, and general personnel and/or admin policies. *See sample Admin and Personnel Policies in Appendix #10*

# Drug & Alcohol Testing Program

## OVERVIEW

The Federal Transit Administration (FTA) requires that all transit agencies receiving federal funds maintain, implement, and execute a drug and alcohol program; as well as possess a Drug Free Workplace Policy *(See sample Drug Free Workplace Policy in Appendix #11)*

The Federal Transit Administration (FTA) of the U.S. Department of Transportation has published 49 CFR Part 655 as amended, that mandate urine drug testing and breath alcohol testing for safety-sensitive positions and prohibits performance of safety-sensitive functions when there is a positive test result. The U.S. Department of Transportation (DOT) has also published 49 CFR Part 40, as amended, that sets standards for the collection and testing of urine and breath specimens. In addition, the Federal government published 49 CFR Part 29, "The Drug-Free Workplace Act of 1988," which requires the establishment of drug-free workplace policies and the reporting of certain drug-related offenses to the FTA.

All anti-drug and alcohol misuse programs must have a statement describing the employer's policy on prohibited drug use and alcohol misuse in the workplace.  For example, some agencies have a Zero Tolerance policy on failed drug testing while others may employ Second Chance programs.

The Federal Transit Administration (FTA) provides guidelines, tools, and resources to ensure that you agency's policy is compliant with FTA policy. Below is an outline of the required elements of a Drug and Alcohol policy.

Additionally, The Drug-Free Workplace Act of 1988 (41 U.S.C. 81) requires some Federal contractors and all Federal grantees to agree that they will provide drug-free work places as a pre-condition of receiving a contract or grant from a Federal agency. Any agency receiving Federal funds is required to have adopted and physically display a Drug Free Workplace Policy.

### <u>Drug & Alcohol Policy Checklist</u>

**Designated contact person, board adoption**

❏ Identity of the person, office, branch or position designated by the employer to answer employee questions about the anti-drug and alcohol misuse prevention program
❏ Approval/adoption by the local governing board of the employer or operator, or other responsible individual with appropriate authority

**Covered Employees**

❑ Operation of a revenue service vehicle, in or out of revenue service
❑ Maintaining a revenue service vehicle or equipment used in revenue service
❑ Controlling dispatch/movement of a revenue service vehicle (determined by employer)
❑ Operation of a non-revenue vehicle requiring a CDL
❑ Volunteers:

1. *Must* have CDL to drive vehicle, or
2. Remunerated for service in excess of costs incurred

❑ Carrying a firearm for security purposes
**The policy must include a list of the actual positions/categories covered at your company*

**Prohibited Substances**

❑ Marijuana
❑ Cocaine
❑ Amphetamines
❑ Opioids
❑ Phencyclidine
❑ Alcohol

**Prohibited behavior**

❑ Use of illegal drugs prohibited at all times
❑ Alcohol use prohibited 4 hours prior to performing safety-sensitive functions, while on call, and while performing safety-sensitive functions
❑ Alcohol use prohibited 8 hours after accident or until Post Accident test is performed
❑ Employees are prohibited from performing safety-sensitive functions while having an alcohol concentration of 0.04 or greater

**Pre-employment**

❑ Employers are permitted to conduct a road test with candidate prior to executing a DOT drug test
❑ Negative test before 1st safety-sensitive duty, must be made up if canceled

❑ If out of safety-sensitive duty for 90+ days, and out of random testing pool, employee needs DOT pre-employment test with negative result prior to returning to covered duty
❑ Applicant who previously failed/refused a DOT test must show evidence of treatment
❑ If employer chooses to require alcohol test:

1. *pre- SS duty,*
2. *all covered employees*
3. *after offer of employment/transfer*
4. *must follow Part 40 regulations*
5. *BAC < 0.02*

**Random**

❑ Scientifically valid selection method
❑ Equal chance of selection on each draw
❑ No discretion on the part of management/supervisors
❑ Testing is conducted on all days and hours throughout the year
❑ Unannounced and immediate
❑ Alcohol testing only permissible just before/ during/just after actual performance of safety-sensitive functions

**Post-accident**

*FTA Thresholds:*
❑ Fatality
❑Medical treatment away from scene, unless driver discounted
❑Disabling damage, unless driver discounted
❑All other covered employees whose performance could have contributed to the accident
❑ Readily available *(or considered a refusal to test)*
❑ Readily available *(testing is stayed while employee assists in resolution of the accident or receives medical attention following the accident)*

**Reasonable suspicion**

❑ Trained supervisor
❑ Physical signs & symptoms, contemporaneous observation
❑ Alcohol testing only permissible just before/during/just after SS duty

**Return-to-duty and Follow-up**

❏ Conducted in accordance with Part 40, subpart O
❏ All tests conducted under direct observation
❏ Follow-up alcohol testing only permissible just before/ during/just after actual performance of safety-sensitive functions

**Procedures**

❏ Policy states all FTA-required testing conducted in accordance w/ 49 CFR Part 40

**Requirement to Submit**

❏ All covered employees are required to submit to drug and alcohol tests as a condition of employment in accordance with 49 CFR Part 655

**Period of Coverage**

❏ Drug test - anytime on while on duty
❏ Alcohol test (random, reasonable suspicion, and follow-up) - Just before, during, or immediately after actual performance of safety-sensitive functions

**Test Refusal**

❏ Failure to remain until the testing process is complete
❏ Failure to attempt to provide a breath or urine specimen
❏ Failure to provide a sufficient quantity of urine or breath without a valid medical explanation
❏ Failure to undergo a medical evaluation as required by the MRO or DER
❏ Failure to cooperate with any part of the testing process
❏ Failure to permit an observed or monitored collection when required
❏ Failure to follow an observer's instructions to raise and lower clothing and turn around (observed)
❏ Possessing or wearing a prosthetic or other device used to tamper with the testing process
❏ Failure to take a second test when required
❏ Admitting the adulteration or substitution of a specimen to the collector or MRO
❏ MRO verified adulterated/substituted sample
❏ Refusal to sign Step 2 of alcohol test form
❏ Failing to appear within a reasonable time
❏ Failure to remain readily available following an accident
**For pre-employment, NOT a refusal: Failure to appear, failure to remain at site prior to start*

*of test, aborting collection before test commences*

**As a covered employee, if you refuse to take a drug and/or alcohol test, you incur the same consequences as testing positive and will be immediately removed from performing safety-sensitive functions, and referred to a SAP.**

**Consequences**

❏ Positive drug or alcohol (above 0.04) test result or test refusal (SAP Referral Required)
❏ BAC in range of 0.02 to 0.039 *(remove employee from safety-sensitive position- apply transit system disciplinary policy if applicable; DOT SAP referral prohibited)*
❏ Dilute negative: must have fixed policy to retest or not retest (though policy may differ between test types)

**Additional Employer Provisions Allowed**

❏ Policy delineates between FTA and company policy prohibitions, terms, etc.
❏ The provisions of the Drug Free Workplace Act of 1988 may be incorporated in the policy statement but must be so identified

**Compliance Tips**

❏ Effective date of policy-normally found on cover of policy
❏ Policy distribution -Employees should be requested to sign a confirmation of receipt form
❏ Make sure future revisions of a substantive nature also receive Board approval
❏ Make sure all employees have the most current version of the policy
❏ Clearly differentiate between FTA and company authority

The FTA supplies a Policy Builder to develop a customized policy for your organization, which can be locate at:

https://transit-safety.fta.dot.gov/drugandalcohol/tools/PolicyBuilder/CreatePolicy.aspx

*(See sample Drug Free Workplace Policy in Appendix #11)*

# Immigration

## Overview

The Immigration and Nationality Act ("INA") addresses employment eligibility, employment verification and nondiscrimination, which provisions apply to all employers. Under the INA, employers may hire only persons who may legally work in the United States (i.e., citizens and nationals of the United States) and aliens authorized to work in the United States. The employer must verify the identity and employment eligibility of anyone to be hired, which includes completing the Employment Eligibility Verification Form I-9 ("Form I-9"). The INA protects United States citizens and aliens authorized to accept employment in the United States from discrimination in hiring or discharge on the basis of national origin and citizenship status.

For more complete and up-to-date information regarding Immigration policies, practices, and procedures, please go to https://www.dol.gov/whd/immigration/.

**Form I-9**

All United States employers are obligated by federal law to verify the employment eligibility and identity of employees hired after November 6, 1986 to work in the United States, whether or not those employees are United States citizens. Generally, an employer must complete Section 2 of Form I-9 by an employee's third day of work. This section requires an employer to review certain documents from a list of official documents accompanying the Form I-9, and then record the document information on the form, including the title, number and expiration date of the documents.

The list of official documents is divided into lists "A", "B", and "C". The documents in List "A" establish both identity and work eligibility. The documents in List "B" establish only the identity of an employee, while List "C" documents establish only work eligibility. An employer is permitted to accept (1) any document that an employee presents from List "A", or (2) any document that an employee presents from List "B" together with any document that an employee presents from List "C". An employer should supply employees with the official list of documents acceptable to establish identity and work eligibility, but an employer may not specify the documents that it will accept from an employee.

Recently, the federal government has been frequently revising the Form I‑9. Employers should be sure they are using the correct version. To obtain the correct Form I‑9, employers may check the website of the United States Citizenship and Immigration Services ("USCIS") at www.uscis.gov.

# Compensation & Benefits

## OVERVIEW

Some of the most critical aspects of the employment relationship center on compensation and employee benefits. These are obviously topics of critical importance to employees.

Compensation can take various forms – hourly wages, salaries, bonuses and commissions. Competitive employers will stay abreast of market wages. PPTA conducts an annual wage survey which provides helpful information about current market wages. (See link to survey…updated as provided).

Generally, employee benefits refer to the fringe benefits of employment – the benefits other than compensation which employers provide to their employees in return for the services rendered. They include retirement plans, health life insurance, life insurance, disability insurance, vacation or paid time off, leave benefits, employee stock ownership plans, etc. Benefits are increasingly expensive for businesses to provide to employees, so the range and options of benefits are changing rapidly also.

In this section, employee benefits which are mandated by law are discussed.

## SALARY PAYROLL

Compensation in terms of payroll is governed by the Fair Labor Standards Act (FLSA). Agencies must determine the designation of their employees:

| | |
|---|---|
| -Exempt | -Non-exempt |
| -Part-time | -Full-time |
| -Salaried | -Hourly |

Additionally, your agency must adhere to regulations on minimum wage rate, payment of overtime, and child labor. Please see FLSA & PMWA for more information regarding these regulations.

*See Sample Salary Payroll policy in Appendix #12*

## FMLA

The Family and Medical Leave Act (FMLA) applies to all public agencies, all public and private elementary and secondary schools, and companies with 50 or more employees. Under the FMLA, certain employers must provide qualifying employees with up to 12 weeks (26 weeks for military related leave) of unpaid, job protected leave per year.

In addition to providing the required leave to eligible employees and continuing group health insurance benefits for employees on FMLA, employers have certain positing and notice

obligations to employees. The United States Department of Labor (DOL) provides a sample posting for covered employers to use. It can be found at http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf.

DOL also provides forms for covered employers to use to notify employees of their rights and eligibility for FMLA, as well as to designate leave as FMLA-covered.

*A sample FMLA leave policy can be found in Appendix #13, which includes qualifying reasons for FMLA leave, who qualifies, and other policy definitions and parameters.*

## WORKER'S COMPENSATION

Employers must provide workers' compensation (WC) coverage for all of their employees, including seasonal and part-time workers. Non-profit corporations, unincorporated businesses, and even employers with only one are required to provide WC coverage.

Coverage is provided to employees who sustain a job injury or a work-related illness as defined by the Pennsylvania Workers' Compensation Act (Act). The Act provides for medical expenses and wage-loss compensation benefits until an employee is able to return to work. Additionally, death benefits for work-related deaths are paid to dependent survivors. WC records should be retained four (4) years after the signing of final settlement receipt, or four (4) years after death of recipient.

Employers can obtain information on WC from Pennsylvania's Department of Labor and Industry. See http://www.dli.state.pa.us/landi/site/default.asp.

There are Workers' Compensation situations where the injured employee is able and medically released to perform some job functions or modified job functions. The employee shall, if the physician indicates that the employee is not capable of returning to his/her regular duties, request the physician evaluate the employee for a modified duty assignment. Your agencies WC policy and program should include the following types of Return-to-Work Programs on a temporary basis:

A. **Light Duty** - The injured employee is brought back to work and placed temporarily within an existing job that is not as physically taxing or demanding as their normal job. This temporary job placement must meet the physical restrictions that a physician has assigned to the injured employee.

B. **Restricted Work** – The injured employee is brought back to their normal job with restrictions assigned by the doctor. For example, this may involve placing a thirty (30) pound lifting restriction on the injured worker or regular job duties at reduced hours. It is important to impress these restrictions on the injured worker. It is equally important to communicate the mandatory nature of these restrictions to others, including the injured worker's supervisor, fellow employees with whom the injured work will be in contact with etc.

C. **Transitional** – The injured employee is brought back to a position that has been specifically created to accommodate the restrictions of a specifically injured employee if the need for such work should arise and such an assignment does not cause a financial hardship to the Authority.

**In each case above, the employer must notify the employee(s) of the expectations under the work program and that the modification is temporary. In most instances, the goal is to get the employee back to his/her regular job status not create a new position.**

*Examples of Light/Modified duties and policy are included in Appendix #14*

## Short Term Disability

Short term disability can be awarded to both injured and ill employees who cannot work. There is a one-week waiting period before benefits are payable. (You can't receive benefits until the 8th day you are temporarily disabled). The illness or injury must be non-work related. Pregnant women can receive short-term disability for several weeks for delivery and recovery.

Short-term disability insurance pays a percentage of the employee's salary if they become temporarily disabled, meaning that if they are not able to work for a short period of time due to sickness or injury (excluding on-the-job injuries, which are covered by workers compensation insurance). Percentage of weekly salary paid out is typically between 40 percent to 60 percent of weekly salary. Duration of short-term disability benefits is typically between nine to 52 weeks, depending upon your policy. The maximum amount of time covered under the disability program up to 52 weeks

## Long Term Disability

Long term disability plans provide financial protection for employees by paying a portion of their income while they have a long period of disability. The amount received is based on the amount earned before the disability began. In some cases, individuals can receive disability payments even if they work while they are disabled. Benefits start after the elimination period (typically 90 days).

## Unemployment compensation

Unemployment Compensation (UC) benefits are available to workers who lose their jobs through no fault of their own and who have earned sufficient wages from an employer covered under the Pennsylvania UC Law (UC Law). UC benefits provide temporary income support and are paid, for a limited time, to individuals who are able and available for suitable work, and are actively seeking new employment.

An employee is ineligible for benefits for any week in which his/her unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature. Under the UC Law, a person who voluntarily quits continuing work has the burden of showing good cause for quitting. He or she must show that the reason for quitting was real and substantial, leaving the claimant no other alternative. The burden is on the employee to show that, prior to quitting

continuing employment, he/she made every reasonable effort to maintain the employment relationship.

Additionally, an employee is ineligible for UC benefits if they are physically unable to work and employment is available and offered.

Lastly, an individual who is discharged from employment for willful misconduct is also not eligible to receive benefits. The employer must show that the employee's actions rose to the level of willful misconduct. Under the UC Law, "willful misconduct" is considered an act of wanton or willful disregard of the employer's interests, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from an employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. Effective performance management is helpful in establishing when an employee is terminated for willful misconduct, and provides UC officials/referees proof that policies do exist, the employee was aware, and violations occurred.

### Wellness programs

Wellness programs are designed to positively impact employees and the agency. Typically, staff members are more productive when healthy and happy, which benefits the agency is a variety of ways.

- Increased production
- Enhanced customer service
- Increased morale
- Less sick time utilized (call-offs)
- Decrease over-time
- Possible decrease in health insurance costs
- Reduce workplace injuries

Examples of Wellness programs could be:

- Health goals (i.e. flu shots, wellness check-ups, etc.) equal premium decrease or "cash back"
- Gym membership reimbursement
- Gym access within facility
- Health support groups (i.e. smoking, cancer, etc.)
- Education sessions (i.e. weight management,

## COBRA

The right to COBRA continuation coverage was created by a federal law, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). (See Employment Laws Section for a detailed discussion of COBRA). COBRA may become available to employees when they lose their group health coverage because of a life event known as a "qualifying event". It can also

become available to other members of an employee's family who are covered under the employer's group health insurance plan. Qualified beneficiaries who elect COBRA continuation coverage must pay for COBRA continuation coverage; this is not an expense which employers must pay.

COBRA generally covers employers with 20 or more employees who are covered by a health care plan. Covered employers have notice obligations under COBRA and must be familiar with the various notice obligations and to whom the notices must be provided (the employee and all qualifying beneficiaries). The notice obligations include a general notice at the time an employee becomes eligible for group health insurance coverage and an election notice which must be provided at the time of a qualifying event. DOL provides model general and election notices which covered employers may use. Please reference the Department of Labor's website for updated information at https://www.dol.gov/general/topic/health-plans/cobra

## PERFORMANCE MANAGEMENT

Performance management is comprised of various efforts to assist employees in understanding and meeting goals which in turn helps ensure organizational goals are consistently met and work is done in an effective and efficient manner. It includes setting expectations, continual monitoring of performance, addressing problematic performance and rewarding good performance. Tools include performance evaluations, performance improvement plans, discipline policies and forms and training.

Employee performance management should be included as part of your Employee Handbook or Personnel Policies that all staff receive as part of the new-hire or on-boarding process.

## PERFORMANCE EVALUATIONS

Traditionally, performance evaluations are done in written format for a given time often coordinate with an anniversary date. Employee evaluations are snapshots of employee's performance over a certain period of time. Evaluations are an important component in the defense of a wrongful termination claim. Lag in completing evaluations may have serious effect on employee's misconduct or on memorializing misconduct. Employers should take steps to ensure that an employee's misconduct or failure to perform is immediately communicated and documented.

Job related criteria should always be used. Canned forms may be inappropriate. Forms evaluating dishwashers may not be equally appropriate for banquet sales or maintenance personnel.

Evaluator comments should be specific in nature. They should be directed to the employee's specific performance, giving examples as to why the employee was so rated. General narratives often have a negative effect.

Evaluators should be honest in the evaluation. A common error is excessive leniency in trying to be an evaluator friend. Review must be honest and candid. The evaluator must take care not to be unduly harsh as well as unduly lenient. If confrontation with the employee is necessary,

do not avoid it because it is viewed to be an unpleasant experience. Future performance is dependent on accurate evaluations. Few things are more damaging to an employer's position in a wrongful termination lawsuit than having an unduly favorable evaluation in a personnel file.

Managers need to be trained to be objective and eliminate the employee's personality from the evaluation. The evaluator must learn to communicate expectations. To ensure that employees do not construe an appraisal system as a contractual guarantee to employment, raise or bonus, an evaluator needs to communicate management's purpose and use.

## Performance Improvement Plans

Another aspect of Performance Management is individualized Performance Improvement Plans for employees. The need for this type of plan may arise from the evaluation process, the need to formalize potential disciplinary action based on performance issues, job performance perception differences between employer and employee, or by request from employee who wants to formalize their performance progress.

When utilizing individualized performance improvement plans, the employer must be certain to:

- Make expectations clear
- Develop steps for improvement
- Provide resources to aid in improvement
- Determine how you will measure the success
- Determine a specific time to follow-up and discuss the improvement/situation

Consistent communication is critical to providing the employee with timely input into the progress and their development.

## Employee Conduct & Discipline

Addressing employee conduct, both positive and negative conduct, is a critical aspect of ongoing performance management. Some employers use a coaching format to address both positive and negative workplace conduct. Some employers use discipline forms or performance improvement plans to handle negative workplace conduct. (See Sample Discussion Planner, Performance Action Plan, Performance Discussion Record, and Sample Disciplinary Counseling Report.) Regardless of the tool selected or its name, it is essential that employers attempt to correct negative conduct on a timely basis.

With respect to discipline, it is beneficial for employers to establish a written policy based on operating practicalities. Employers, however, should carefully build discretion into their discipline policies to allow for deviation from the procedures and policies, as the employers deem appropriate. For example, policies should indicate the steps that "can" and "may" be taken, but not necessarily that "will" be taken. In addition, policies should permit employers to skip or repeat disciplinary action in their sole discretion. This is important because no two situations are exactly the same. It also helps prevent the policy from being construed as a binding agreement or unnecessarily tying the employer's hands. This is critical in the event of

litigation resulting from a given discipline/termination. It is never good for an employer to face the argument that it failed to follow its own procedures or policies. Extremely structured policies that mandate set progressive steps of discipline invite such arguments and limit employers' ability to address employee issues. Employers with flexible discipline policies are far less likely to face such arguments or restrictions.

Employers often include policies in the employee handbook addressing standards of conduct. One area of conduct which generally receives heightened attention in the form of its own policy is harassing/discriminatory behavior. Employers are obligated to maintain a workplace free of harassment and discrimination under federal, state and local laws. The failure to do so can result in significant penalties. Courts have suggested that part of an employer's obligation to maintain a harassment free workplace is having a policy precluding harassment and setting forth avenues to report complaints of harassment. Accordingly, employers almost always include an anti-harassment/anti-discrimination policy in their employee handbooks. See sample anti-harassment and anti-discrimination policy.

**Disciplinary Checklist**

Before issuing discipline, it is important for the supervisor and/or human resources to review the employee's performance record and any prior discipline, if any, issued to the employee. In addition to reviewing documents, the following checklist should also be considered before using discipline:

Has a thorough investigation been documented? How would the facts line up if this situation were brought before a jury? How much of the decision is based on speculation, hearsay or perception? Are the witnesses credible? (This helps an employer evaluate if it will be able to successfully defend potential claims or whether it needs to take steps to build a better defense, including accumulating more/better evidence).

Has the employee been given an opportunity to present his/her side of the story?

Are there extenuating circumstances which should be considered?

Should you consider suspending the employee while further investigation is conducted?

Is the decision timely?

How do the employee's performance problems compare with the essential job functions as outlined on the written job description for the employee?

If the employee is being disciplined for violating accompany rule, was the rule known to the employee? How was the rule published/communicated to employees?

Have disciplinary steps/corrective actions outlined in handbooks and policies been followed?

Did the employee have notice and an opportunity to correct the problem or take remedial action?

Was the information which supports the discipline obtained lawfully? (E.g., An employer can't use taped conversation between employee and third party if tape was obtained in violation of a wiretap law).

- Is the investigation/corrective action, etc. properly documented?
- If the employee is being disciplined for performance reasons, do the employee's evaluations support the decision? (It may be hard to explain to a jury why an employee who performed satisfactorily for a number of years and who just received a merit raise is suddenly disciplined/terminated for poor performance).
- If the employee is being repeatedly disciplined for inadequate performance, was the employee not only told of deficiencies but also advised how to improve? Was the employee given a time frame in which improvement was to occur?
- If repeated discipline is based on poor performance, did the employee ask for help to improve which was denied? (i.e., additional training which was refused?)
- If the discipline is based on poor performance, can the performance be measured objectively?
- Is this action consistent with other actions taken in similar situations with other employees? In other words, treat all similarly situated employees alike!
- If the individual is disabled, has the company investigated possibilities and made an offer of reasonable accommodation? (This helps ensure that the employer is not violating any obligations that it has under disability laws, either to hold an interactive meeting with the employee or accommodate an employee's disability).
- Was the individual engaging in protected union or other protected "concerted activity"?

**Conducting the Disciplinary Meeting**

After reviewing these considerations, an employer should determine if and what discipline to issue. Once that decision is made, employers should handle the discipline in a professional and humane manner. The following is a list of discipline Do's and Don'ts:

- Do not reprimand employees in the presence of others or in a public place.
- Have two management representatives (especially for significant disciplinary actions like written warnings, suspensions and terminations)
- If Union facility, Union representation for the employee is recommended
- Determine the appropriate time and place for a disciplinary meeting.
- Disciplinary actions should always be documented in detail. The documentation should include:
    - who, what, when, where, and how what, if any, policies/procedures were violated
    - the effect of the conduct as it relates to performance, job related behavior or company interest
    - what action will be taken because of the incident
    - what action will be taken in the future if another infraction occurs
    - the employee's recourse (if any) if he/she is in disagreement with the action
- Present the disciplinary action in a slow calm manner.
- Avoid raising issues outside the scope of the discipline
- Listen critically and take notes.
- Conclude the discussion and determine what will happen from that point.
- If termination is the result, calmly instruct the employee on the process and their rights

Provide clear expectations and benchmarks, where possible
Monitor the employee's performance and progress.

The last item is especially important. Too often, employers issue performance based discipline and then fail to monitor an employee's continued performance. Commonly, performance does not improve, but the employee is not aware (or will state that he/she is not aware) of the continuing performance deficiencies and is then surprised when issued further discipline or terminated. Lawyers for employees may effectively argue that if the performance was so bad, the employer would have surely monitored and continued to advise the employee of the problems. This may create doubt in a fact finder's mind that the employer is being entirely honest about the reasons for discipline/termination.

## Harassment/Abuse

Providing a workplace that is committed to an environment and service free from all forms of harassment and abuse is vital and legally mandated. It is the Agency's responsibility to foster an environment that is safe for all staff and customers.

Training and policies regarding harassment and all forms of abuse (including sexual) must include:

- Company statement regarding issue
- Definition of abuse/harassment
- Responsibilities – employees and management
- Procedures and process for filing complaint
- Consequences for abuse/harassment

## Sexual Harassment

Sexual Harassment is a form of sexual discrimination that violates Title VII of the Civil Rights Act of 1964. All employees should be able to work in an atmosphere that is free from discriminatory intimidation based on sex, as well as intimidation based on race, color, gender, age, religion, marital status, national origin, or the presence of a physical, sensory or mental disability. All employers cannot permit or tolerate workplace harassment of employees by anyone – supervisors, mangers, co-workers, contractors, vendors, suppliers, passengers, guests, or other patrons. This policy should be considered a zero-tolerance policy.

Your policy should provide specific examples of sexual harassment, the policy's provisions – including methods of investigation and discipline- also apply to all forms of illegal discrimination. The actions in your policy should also apply to bullying of co-employees, patrons, vendors or other persons affiliated with the Authority. Finally, ensure the policy applies to all actions of an employee when in furtherance of the Authority's business.

Sexual harassment policies should address the following:

- Definition(s) and/or examples of sexual harassment
- Retaliation or discrimination against accuser(s)

- Statement of prohibited conduct
- Statement of Agency's commitment to workplace environment
- Definition(s) and/or examples of other forms of discrimination
- Penalties for misconduct
- Procedures for making, investigating, and resolving workplace harassment and retaliation complaints

*(See Sample Sexual Harassment Policy in Appendix #16)*

**Termination**

Despite the very best performance management practices, sometimes termination of employment occurs. Termination may be voluntary or involuntary. Voluntary terminations are generally easier; an employee provides notice of his/her intention to leave the organization and leaves, generally within a specified notice period. However, sometimes employees or employers decline to honor the resignation notice period. A best practice is to designate a notice period and wherever possible seek compliance from employees and permit employees to work out the notice period.

There are some important steps for employers to take with respect to terminations, including discussion of final pay, benefits continuation issues, return of company property, etc. Employers may want to develop a checklist to be used in each termination to ensure all this information is covered. *(See Sample Separation Checklist in Appendix #17).* In addition, employers should consider conducting an exit interview for those who voluntary resign. This gives employers an opportunity to learn of the reasons for termination and address any internal issues which may exist.

Sometimes, however, terminations are involuntary. Involuntary terminations are more likely to lead to lawsuits than voluntary resignation. Claims can include discrimination complaints, breach of contract claims, whistleblower claims, etc. Companies which have engaged in effective performance management, including following the steps outlined in the Discipline Section, should have the reason for termination well-documented and proceeding with the termination in a timely manner. These are critical aspects to defending any workplace claim arising out of a termination.

Consideration should be given regarding how and when to notifying an employee that his or her employment has been terminated. The same considerations in Conducting the Disciplinary Meeting apply in conducting terminations; it should be done privately and professionally and involve two management representatives; as well as, possible Union representation. The employer should be prepared to respond to the employee's questions regarding final payroll, COBRA, and protocol for return of any issued company property.

*(See Sample Progressive Discipline Policy & Reports in Appendix #15)*

# Employment Laws & Recordkeeping Obligations

## ADA

The Americans with Disabilities Act of 1990 ("ADA") prohibits discrimination against qualified individuals with disabilities in employment, transportation, public accommodation, communications and governmental activities. In 2008, the ADA Amendments Act (the "ADAAA") was passed, which became effective January 1, 2009. In accordance with the ADAAA, many more workers are now covered by the ADA. The ADA covers employers with 15 or more employees.

It is illegal under the ADA to discriminate against people with disabilities in any aspect of employment including the following: hiring and firing; compensation, assignment or classification of employees; transfer, promotion, layoff or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plans and disability leave; and other terms and conditions of employment. The ADA also prohibits an employer from retaliating against a person for opposing employment practices that discriminate based on disability or for filing a discrimination charge, testifying or participating in any way in an investigation, proceeding or litigation under the ADA.

Under the ADA, an employer must make a reasonable accommodation to a known disability of a qualified employee or job applicant if it would not impose an "undue hardship" on the operation of the employer's business. An undue hardship may occur when the accommodation requires an action of significant difficulty or expense when considered in light of factors such as the employer's size, financial resources and the nature and structure of its operation.

An individual with a disability is a person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment. A qualified employee or qualified employment applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job. However, individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

"Major life activities" have been expanded by the ADAAA and include but are not limited to the following activities: caring for oneself; performing manual tasks; seeing; hearing; eating; sleeping; walking; standing; lifting; bending; speaking; breathing; learning; reading; concentrating; thinking; communicating and major bodily functions (e.g., functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions). Mitigating measures other than ordinary eyeglasses or contact lenses cannot be considered in assessing whether an individual has a disability.

*See Sample Reasonable Accommodation Policy in Appendix #18*

## ADEA

The Age Discrimination in Employment Act of 1967 ("ADEA") prohibits employment discrimination based on the age of employees and job applicants who are 40 years old or older. Employers with 20 or more employees are covered by the ADEA.

It is illegal under the ADEA to discriminate against an employee or job applicant who is 40 years old or older because of his/her age in any aspect of employment including the following: hiring and firing; compensation, assignment or classification of employees; transfer, promotion, layoff or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plans and disability leave; and other terms and conditions of employment. The ADEA also prohibits an employer from retaliating against a person for opposing employment practices that discriminate based on age or for filing an age discrimination charge, for testifying or participating in an investigation, a proceeding or litigation under the ADEA.

## EPA & PEPL

The Equal Pay Act of 1963 ("EPA"), which is an amendment to the Fair Labor Standards Act ("FLSA"), prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work of similar skill, effort and responsibility for the same employer under similar working conditions. The EPA covers all employers who are covered by the FLSA, which is most employers. The Pennsylvania Equal Pay Law ("PEPL") prohibits employers from discriminating against employees based on sex by paying different wages to males and females who work under equal conditions on jobs that require equal skills. All Pennsylvania employers are subject to the PEPL, even those not covered by the FLSA.

It is unlawful under the EPA for an employer to retaliate against an individual for opposing employment practices that discriminate based on compensation or for filing a discrimination charge, testifying or participating in any way in an investigation, proceeding or litigation under the EPA. It also is unlawful for an employer to discharge or discriminate in any other manner against any employee because such employee has made any complaint to the employer, the Secretary of the Pennsylvania Department of Labor and Industry or any other person who instituted or caused to be instituted any proceeding under or related to the PEPL, or has testified or is about to testify in any such proceedings.

Pursuant to the EPA, employers are precluded from reducing wages of either sex to equalize pay between men and women. Pay differentials are permitted generally under the EPA and PEPL when they are based on seniority, merit, quantity or quality of production or a factor other than sex.

## FCRA

Background checks, including credit checks and criminal background checks, often implicate the Fair Credit Report Act ("FCRA") and employers need to be aware of their obligations under the FCRA. 15 U.S.C. § 1681 et seq. In addition, a Pennsylvania statute, the Criminal History Records Information Act ("CHRIA"), limits the use of criminal records for employment.

**A. When the FCRA Applies**

If an employer conducts background checks without hiring the services of third parties, the FCRA generally does not apply to the background checks procedure.

An employer, however, that uses a consumer reporting agency or other third party (such as the state police or the FBI) to conduct background checks is covered by the FCRA.

**B. What the FCRA Covers**

The FCRA regulates the conduct of credit report agencies which prepare consumer reports and investigative consumer reports; the content of those reports; and employers who use those reports. The regulations are aimed at ensuring that 1) information collected and provided to credit grantors, insurers, employers and others, is fair, accurate and relevant and 2) a consumer's right to privacy is protected.

**C. What Qualifies as a "Consumer Reporting Agency"**

Persons or entities qualify as "consumer reporting agencies" only if they regularly engage in assembling or evaluating consumer credit information for the purpose of furnishing "consumer reports" to third parties. Thus, an employer which investigates an employee on its own would not be regulated. In contrast, an employment agency that routinely obtains information on job applicants from former employers and providers such information to prospective employers, would qualify as a "consumer reporting agency".

**D. What Constitutes a "Consumer Report"**

The FCRA defines a "consumer report" as a "written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for… employment purposes". 15 U.S.C.A. § 1681a(h). "Employment purposes" includes hiring, termination, reassignment or promotion of an applicant and/or an employee. Id. Obviously, credit checks and criminal records checks obtained by an employer from an outside agency are "consumer reports".

**E. What Constitutes an "Investigative Consumer Report"**

An "investigative consumer report" is distinct from a "consumer report". 15 U.S.C.A. § 1681a (e). An "investigative consumer report", like a "consumer report", relates to a consumer's

character, reputation, personal characteristics, or mode of living, but is obtained by personal interviews with the consumer's neighbors, friends, business associates, etc. Examples of "investigative consumer reports" are reference checks. The Federal Trade Commission ("FTC") who enforces the FCRA issued an opinion in 1999, stating that reports from sexual harassment investigations by law firms, consultants or other third parties are consumer reports. Courts have not adopted this position to date. Again, the FCRA will only apply if these are obtained from consumer reporting agencies.

**F. FCRA Obligations of Employers using Consumer Reports**

The FCRA permits a consumer reporting agency to furnish a consumer report to an employer who intends to use it for employment purposes, however, it imposes restrictions and requirements on the employer. Generally, an employer must take four basic steps if it wants to use a consumer report, including a criminal background report.

***Disclosure and Written Consent***

An employer must provide the employee or applicant with a clear and conspicuous written disclosure that a consumer report may be obtained. The disclosure must be provided to the employee or applicant before the report is obtained and should be provided in a document that consists solely of the disclosure.

***Written Authorization***

An employer must obtain a written authorization from the consumer prior to obtaining the consumer report. Unlike the disclosure, the consent language does not have to be contained in a separate document. Thus, consent language in a signed job application would be sufficient for authorization purposes under the FCRA. The consent language, however, must be conspicuous. To ensure that consent is conspicuous, it may be wise to have the consent in a separate document. Employers are well advised to have all job applicants sign a consent form in anticipation that an employer may determine that a post-employment consumer report is needed. Another protective step for employers to take is to include a background check policy in the employee handbook, if background checks are regularly obtained.

***Certification to Consumer Reporting Agency***

The employer must certify to the consumer reporting agency that the consumer was given a clear and conspicuous written disclosure and that the employer obtained prior written authorization from the consumer for the report. The employer must also certify that the information obtained will not be used in violation of any federal or state equal opportunity law or regulation, and, if any adverse action is taken based upon the consumer report, a copy of the report and a summary of the consumer's rights will be provided to the consumer. Most consumer reporting agencies will request that the employer sign the agency's own certification agreement.

***Providing Documentation before "Adverse Action"***

An employer must provide a copy of the report to the consumer, as well as a summary of the consumer's rights, before taking any "adverse action" The consumer reporting agency must provide this summary of rights, along with the report, to the employer. Interestingly, the law does not advise employers how long they must wait before taking adverse action after providing the required documentation to the consumer. Staff opinion letters from the
Federal Trade Commission advise that an employer must wait a "reasonable" amount of time before taking adverse action. Employers who are interested in reviewing Federal Trade Commission opinion letters can find the letters at the following website:

http://www.ftc.gov/os/statutes/fcra/index.htm

**G. FCRA Obligations of Employers Using Investigative Consumer Reports**

If an employer orders the more invasive investigative consumer report, it must comply with additional steps under the FCRA. The written disclosure must be mailed or otherwise delivered to the consumer, no later than three days after the date on which the report was first requested. If the consumer makes a reasonably timely, written request, the employer must completely disclose the nature and scope of the investigation that was requested. Again, this written statement must be mailed or otherwise delivered to the consumer, no later than five days after the date on which the request was received from the consumer or the report was first requested, whichever is later. An employer must also certify to the consumer reporting agency that it will make these required disclosures.

**H. Enforcement of the FCRA**

As noted above, the FTC enforces the FCRA. Applicants or employees may bring civil actions against employers in federal district court. Plaintiffs may recover actual damages, attorneys' fees and costs. For willful violations, employers may be subjected to punitive damages.

## CHRIA

B. **What the CHRIA Allows and is Required**

The CHRIA limits the use of criminal history record information. 18 Pa.C.S.A. § 9125. Whenever an employer obtains an applicant's criminal history, it may only use the information as permitted by the CHRIA. Specifically, an employer may consider felony and misdemeanor convictions only to the extent that the convictions relate to an applicant's suitability for the employment in the position for which he/she applied. 18 Pa.C.S.A. § 9125(b).

If an employer does consider the criminal background information, it must notify the prospective employee. If the employer denies employment to the applicant, based in whole or part on the criminal history information, then the employer must notify the applicant in writing.

The statute does not specify when the notice must be given or require that the employer allow the employee to respond. From a practical and defensive standpoint, however, employers may be well-advised to provide the notice as soon as possible once the decision is made. In addition, employers may want to consider allowing an employee an opportunity to respond in case the information is inaccurate. However, such steps are not required.

It is important to note that the CHRIA limits an employer's consideration to convictions for felonies and misdemeanors; anything short of convictions is improper consideration in the hiring process. The Pennsylvania Superior Court affirmed this principle in Cisco v. United Parcel Services, Inc., 328 Pa. Super. 300, 476 A.2d 1340 (1984).

The Cisco court also held that the CHRIA did not apply to the employer in that case who was making a decision about a current employee. In the Cisco case, a UPS employee was arrested for theft and trespass in the course of making a delivery. He was ultimately acquitted of the charges. While the charges were pending, however, UPS told the employee that if he did not quit, he would be terminated and the employee resigned. Although the Cisco court recognized that the CHRIA limited an employer to considering convictions for hiring decisions, it distinguished an employer faced with an employee who was arrested during the course of his employment; the court ruled that UPS did not violate public policy when it forced its arrested employee to resign.

The CHRIA and the Cisco case leave several questions unanswered for employers. If an employee has a conviction for a summary offense, may an employer consider the information? The strict language of the CHRIA would suggest that an employer may only consider misdemeanors and felonies. Can an employer discharge current employees for previous convictions of which the employer does not learn until the employee is already working for the employer? The statute does not address this situation and the only case to discuss current employees is the Cisco case.

### C. Enforcement Under the CHRIA

Individuals aggrieved by violations of the CHRIA may sue for damages. Injured persons are entitled to no less than $100 for each violation as well as reasonable costs and attorneys' fees. Punitive damages in the range of $1,000 to $10,000 may also be awarded if the violator's actions were willful. Finally, the Attorney General or other individuals may seek injunctions under the CHRIA to compel persons to comply with the Act.

### D. Practical Advice for Employers

Employers are required to include a section for disclosure of criminal history on DOT applications. If the applicant does not disclose convictions, then the employer can make its hiring/firing decision based on falsification of records rather than the criminal information itself.

## FLSA & PMWA

The Fair Labor Standards Act (FLSA) establishes standards for minimum wage payment, overtime pay, recordkeeping and child labor. Most employers are covered by the FLSA. The Pennsylvania Minimum Wage Act ("PMWA") also sets forth standards on minimum wage payment and overtime pay and applies to all employers in Pennsylvania. Both the FLSA and the PMWA require that nonexempt employees be paid overtime pay at a rate of at least one and one-half times their regular rates of pay after 40 hours of work in a workweek.

Employers are required to maintain wages for non-exempt workers at current minimum wage rates set forth by the FLSA.

The FLSA contains some exemptions from the minimum wage and overtime pay standards; the PMWA sets forth similar exemptions. PMWA requires employers to establish the definition of a work week for the purposes of calculating overtime for employees regardless of exempt status. However, workers employed as bona fide executive, administrative, professional or outside sales employees and certain computer employees are exempt if they meet certain tests regarding their job duties and are paid on a salary basis at a rate of at least $455 per week.

The FLSA makes it unlawful to fire or in any other manner discriminate against an employee for filing a complaint or participating in a legal proceeding under the FLSA.

## PHRA

The Pennsylvania Human Relations Act ("PHRA") was passed in 1955 and covers employers with four or more employees. The PHRA prohibits unlawful discriminatory practices in employment because of race, color, religion, ancestry, age (40 years old and older), sex, national origin, non-job-related disability, known association with a disabled individual, possession of a diploma based on passing a general education development test and willingness or refusal to participate in abortion or sterilization. An employer may not take any of the following actions because of any of the characteristics listed above: deny any person an equal opportunity to be referred for employment, to obtain employment, to be promoted and to be accorded all other rights to compensation, tenure and other terms, conditions and privileges of employment; deny membership rights and privileges in any labor organization; and refuse to contract or otherwise discriminate in contracting with any independent contractor who is licensed by the Pennsylvania Department of State, Bureau of Professional and Occupational Affairs.

It is unlawful for an employer to retaliate against an individual because the individual has filed a complaint with the Pennsylvania Human Relations Commission ("PHRC") or has participated in any PHRC proceeding. It is also unlawful for any person to aid or abet any unlawful discriminatory practice under the PHRA.

## TITLE VII OF THE CIVIL RIGHTS ACT

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination based on race, color, religion, sex and national origin. Title VII covers employers with 15 or more employees. Title VII mandates that employers must have a policy against discrimination based on race, color, religion, sex, and national origin.

Title VII makes it illegal to discriminate in any aspect of employment because of any of the characteristics listed above in the following: hiring and firing; compensation, assignment or classification of employees; transfer, promotion, layoff or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plans and disability leave; and other terms and conditions of employment. It also is unlawful under Title VII for an employer to take retaliatory action against any individual for opposing employment practices made unlawful by Title VII or for filing a discrimination charge or testifying, assisting or participating in an investigation, proceeding or hearing under Title VII.

## USERRA & PENNSYLVANIA MILITARY LEAVE OF ABSENCE LAW

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services and applicants to the uniformed services. The Pennsylvania Military Leave of Absence law prohibits employers from discriminating against individuals who are members of the National Guard or one of the other reserve components of the United States armed forces, or who are called to active state duty by the governor during an emergency or as otherwise authorized by law, or called to active duty by the federal government.

An employee has the right to be reemployed in his/her civilian job if the employee leaves the job to perform service in the uniformed service and meets all of the following qualifications: the employee ensures that the employer receives advance written or verbal notice of the employee's service as soon as the employee knows that he/she will be performing military service; the employee has five years or less of cumulative service in the uniformed services while with the employer; the employee returns to work or applies for reemployment in a timely manner after conclusion of service; and the employee has not been separated from service with a disqualifying discharge or under other than honorable conditions. If an employee is eligible to

be reemployed, the employee must be restored to the job and benefits that the employee would have attained if he/she had not been absent due to military service or, in some cases, a comparable job.

USERRA prohibits an employer from denying employment, reemployment, retention in employment, promotion or any benefit of employment to any of the following: a past or present member of the uniformed service; a person who has applied for membership in the uniformed service; or a person who is obligated to serve in the uniformed service. An employer also is prohibited under USERRA from retaliating against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

# Record Retention

**II. Federal Laws**

**A. <u>Title VII of the 1964 Civil Rights Act ("Title VII"</u>**

Under Title VII, no specific form of record retention is specified, although Title VII does require retention of the following documents: All personnel and employment records made or kept by an employer, including applications and records relating to hiring, promotion, demotion, transfer, layoff, termination, compensation and selection for training. These records must be retained for either one (1) year from the date of making the record or the personnel action involved, whichever is later.

All records pertaining to racial or ethnic identities of employees should be retained in separate files in order to avoid potential discrimination claims. In addition to the mandate of previously discussed federal case law, Title VII also requires the retention of all personnel records relevant to a discrimination claim. These particular records must be kept until final disposition of the claim. Additionally, a copy of the EEO-1 report must be filed annually and retained at the company's headquarters for employers with 100 or more employees. Finally, an employer is required to display the Consolidated EEOC Poster in a conspicuous place where other employee notices usually are posted.

**B. <u>Americans with Disabilities Act ("ADA")</u>**

Under the ADA, records must be kept in accordance with the records retention requirements under Title VII. Also, like Title VII, these records must be retained for one (1) year; no specific form of retention is required.

It must be noted that any records containing medical information must be kept in a separate, confidential medical file; they cannot be kept in an employee's personnel file. Also, any records related to an employee's request for accommodation under the ADA are considered relevant personnel records and fall under the one-year requirement.

Again, just as under Title VII, the ADA requires that an employer post the Consolidated EEOC Poster in a conspicuous place where other employee notices usually are posted.

**C. <u>Age Discrimination and Emplpoyment Act ("ADEA")</u>**

The records retention requirements under the ADEA are as follows:

Payroll or other records containing the employee's name, address, date of birth, occupation, pay rate and compensation earned per week must be kept for at least three (3) years after personnel action is taken and be readily available;

All personnel and employment records relating to job applications, resumes, replies to job advertisements, promotions, demotions, transfers, selection for training, layoffs, discharge, job orders to employment agencies/unions, employment tests, physical examination results relating to personnel actions and job advertisements must be kept for at least one (1) year after personnel action is taken;

Records relating to employee benefit plan and written seniority or merit rating system must be kept while plan or system is in effect and one (1) year after termination

Personnel records relevant to any enforcement action brought against an employer under the ADEA must be kept until final disposition of the action and be readily available. Finally, an employer is required by the ADEA to display the Consolidated EEOC Poster in a conspicuous place where other employee notices usually are posted.

**D. <u>Fair Labor Standards Act ("FLSA")</u>**

The FLSA contains very broad record retention provisions and no specific form of retention is specified. Certain records must be retained for three (3) years from the date of the action or from the last effective date in the record. This requirement applies to the following records:

Basic employee information; payroll; certificates, agreements, plans and notices; collective bargaining agreements; employee contracts; and sale/purchase records.

Other records need only be maintained for two (2) years. These records include the following:

- Basic employment and earning records; wage rate tables; work time schedules; order, shipping and billing records; records of additions to or deductions from wages paid; and documentation of the basis for any wage differential between employees of the opposite sex in the same establishment.

Certificates of age must be kept for all minors. The FLSA requires that these certificates be retained until termination of employment of the minor. However, a claim for a violation may be brought within three (3) years and, accordingly, it may be wise to retain the certificates for three (3) years following termination of employment. Additionally, written training agreements must be retained for the duration of the training program.

Further requirements are based on employee status. For all employees, the employer must keep records containing the following information: Employee name and identification number or symbol; address; date of birth (if under the age of 19 years of age); gender; and occupation. The standards for exempt/non-exempt employees are as follows. For non-exempt employees, employers must keep records of the following: Time of day and day of week that the workweek begins; pay rate; hours worked each work day and week; total daily and hourly straight time earnings; total overtime earnings; total additions and deductions to and from wages each pay period; total wages each pay period; date of payment and pay period covered by payment; and any retroactive wage payment information.

The records retained must be kept at the place of employment or at the central record-keeping office where records normally are kept. Records must be available for inspection. Finally, employers must display the FLSA Poster listing these provisions in a conspicuous place where other employee notices usually are posted.

**E. <u>Equal Pay Act ("EPA")</u>**

No specific form of records retention is specified. The basic record-keeping requirements set forth in the FLSA have been adopted in the EPA. In addition, records made in the regular course of business relating to wages or other matters that describe or explain the basis for payment of any wage differential to employees of the opposite sex in the same establishment must be obtained for two (2) years, regardless of exempt/non-exempt status. This requirement includes the following records: Records relating to wage payments; wage rates; job evaluations; job descriptions; and merit or seniority systems. The regulations do not state when the two (2) year period requiring retention begins.

Finally, records relevant to any enforcement action under the EPA must be kept until final disposition of the action and should be readily available. The EPA requires an employer to display the Consolidated EEOC Poster in a conspicuous place where other employee notices usually are posted and can be readily observed.

**F. <u>Family and Medical Leave Act ("FMLA")</u>**

Although the FMLA contains record retention requirements, employers are also required to follow the FLSA record-keeping requirements, meaning that the employer must make, keep and preserve records of its employees and of the wages, hours and other practices of employment. Furthermore, the employer must be able to make all records ready for inspection, copying or transcription.

The FMLA protects the privacy of the medical records involved. Therefore, any records relating to medical histories of the employee or family members must be kept in a file separate from the employee's personnel file. These medical files are to be treated confidentially.

For every employee, employers must retain the following for three (3) years: Records pertaining to compliance with the FMLA's leave requirements; basic payroll information and identifying employee data; pay rate; compensation terms; daily and weekly hours worked per pay period; additions and deductions to and from wages; and total compensation paid.

Employers do not need to keep a record of actual hours worked for ineligible employees under the FLSA regarding minimum wage or overtime compliance.

Employers must also maintain the following records for FMLA eligible employees for three (3) years: Dates of FMLA leave taken by an employee; hours of FMLA leave, if taken incrementally; copies of written employee notices given to the employer; all documents describing employee benefits or employee policies and practices relating to paid and unpaid leave; premium payments of employee benefits; and records of any disputes between the employer and employee about designation of leave under the FMLA.

No specific form of retention is described under the FMLA. Finally, employers must display a poster delineating the provisions of the FMLA in a conspicuous place that other employee posting are usually displayed.

### G. <u>Immigration Reform and Control Act ("IRCA")</u>

The IRCA prohibits employers from hiring or continuing to employ aliens not authorized to work in the United States. The IRCA requires employers to limit their hiring to citizens and nationals of the United States, as well as aliens authorized to work in the United States.

Employers are required to keep Form I-9, a Department of Homeland Security form that needs to be signed by the employer and employee at the commencement of employment. This form must be retained for three (3) years after the date of hire or one (1) year after the termination of the employee, whichever is later. In addition, this form must be readily available upon request. Although not required, an employer is well-advised to keep copies of the supporting documents produced by an employee to verify his or her work eligibility.

Beginning in October 2004, regulations were passed permitting employers to store Form I-9 electronically, as well as by the previously acceptable methods of storage of the original, or on microfilm or microfiche. Even though the Form I-9 may now be stored electronically, the most critical record‑keeping requirement still remains ‑ Form I-9 must be kept separate from employee personnel files.

### H. <u>Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)</u>

The VEVRAA requires employers that have federal contracts or subcontracts of at least $100,000 to employ and promote through employment any special disabled veteran or Vietnam ‑era veteran. A special disabled veteran is one who has a disability of at least 30%, a disability of 10%-20% along with a serious employment handicap or a person who was discharged or released from active duty because of a service-connected disability. A Vietnam‑era veteran is any eligible veteran who served actively (for at least 180 days) in the military, naval or air service during the Vietnam War and was not dishonorably discharged.

Under the VEVRAA, the Secretary of Labor is required to list all complaints filed by veterans pursuant to VEVRAA. In addition, each contractor that VEVRAA applies to is required to submit annual reports of hired veterans to the Secretary of Labor. These reports must contain the following: The number of employees in the workforce of such contractor, by category and

by job location; the number of such employees, by job category and location, who are qualified veterans; the total number of new employees hired; the number of new qualified veterans hired; and the maximum and minimum number of employees employed during the relevant time period.

An employer must post the Consolidated EEOC Poster in a conspicuous location that is accessible easily to employees and applicants. The EEOC Poster sets forth the purpose of VEVRAA and the procedures for filing a complaint under VEVRAA.

**III. Records Retention under Pennsylvania Law**

**A. Pennsylvania Minimum Wage Law**

The following information must be retained, in no particular form, by employers for three (3) years after the date of last entry: Employee name and identifying number or symbol, if used; home address including zip code; regular hourly pay rate; occupation; time and day that the workweek begins; number of hours worked daily and weekly; total daily or weekly straight time wages; total overtime excess compensation; total additions and deductions to and from wages; allowances, if any, claimed as part of minimum wage; total wages paid each pay period; date of payment and pay period covered by payment; and special certificates for students and learners.

An employer's payroll records must be open for reasonable inspection at a reasonable time. When records are maintained at a central record‐keeping office, rather than the place of employment, the records must be made available for inspection at the place of employment upon notice of such inspection. Finally, employers are required to post the Pennsylvania Minimum Wage Law in a conspicuous place in the employer's establishment.

**B. Pennsylvania Equal Pay Law**

The following must be retained under the Equal Pay Law: Records of employee wages and wage rates; job classifications; and other terms and conditions of employment. Records of employees' names, addresses and wage rates must be kept for one (1) year. Any records relevant to a pending claim or action must be retained until final disposition of the action. If an employer has both males and females employed, the employer must post the Equal Pay Law in a conspicuous place where it can be noticed and employees may conveniently read it.

**C. Pennsylvania Child Labor Laws**

The Child Labor Laws establish rules provided to protect minors from being over-worked at a young age, as well as to protect the health, safety and welfare of minors. The Child Labor Laws apply to all Pennsylvania employers that have employees under the age of 18 in their employ.

The employer is required to obtain an employment certificate for each minor, beginning with the date of hire. While there is no specific form of retention required, the employer must be able to produce these certificates for inspection.

### D. Pennsylvania Human Relations Commission Regulations

Regulations promulgated by the Pennsylvania Human Relations Commission state that records, documents and data pertaining to the employment, transfer, promotion, and dismissal of individuals actually employed must be preserved by employers for 120 days following termination of employment.

### E. Right to Know

The Right to Know Law is the Pennsylvania law that guarantees the right to access and obtain copies of public records held by government agencies. All governmental agencies are required to know and follow the Right to Know Law. Please click the links for **PA Right to Know Law** and **Agency Open Records Officer Guidebook**

## Driver Qualification File

In addition to the general recordkeeping requirements and best practices, DOT requires a driver qualification file that includes:

- Application
- Motor Vehicle Record (MVR)
- Note regarding annual MVR review
- DOT medical card – just copy of card, NOT medical details
- Certificate of Road Test (if conducted)

# *PPTA Human Resource Toolkit*

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