

HUMAN RESOURCE REFERENCE GUIDE

For Local Governments in North Dakota



A project of the North Dakota
Human Resource Collaborative



ND Insurance Reserve Fund

ND Association of Counties

ND League of Cities

ND Recreation and Parks Association

ND School Boards Association

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DISCLAIMER

The primary purpose of this Human Resource Reference Guide is to provide information and various links to other resources to assist public employers in North Dakota in developing policies, complying with legal requirements, and addressing unique issues that exist within the public employment sector.

Nothing contained herein should be regarded as legal advice nor interpreted as a replacement for competent legal and other such consultation.

INTRODUCTION

The Human Resource Reference Guide for Local Governments is a project that was funded by a grant from the Otto Bremer Foundation in collaboration with the ND Insurance Reserve Fund, ND League of Cities, ND Association of Counties, ND School Boards Association, and the ND Recreation and Parks Association.

People are the heart of local government – it's most valuable resource. They are the backbone that supports its mission and purpose. Human resource management is the primary care doctor that assures a healthy work environment. It includes all the policies, processes, training, strategies and activities that impact staff.

Human resource management impacts everyone in local government: policy makers, elected and appointed officials, supervisory staff and employees are all part of the human resource management structure. Solid human resource management built on a strong strategic vision creates positive employee/employer relationships. Effective policies and procedures that are consistently enforced, along with training, help assure legal compliance with state and federal laws.

This reference guide is not a sample personnel policy but is intended to provide information and various links to other resources in order to assist public employers in North Dakota in understanding the basics of human resource management.

Efforts have been made to ensure the accuracy of the information within this guide, but both state and federal laws and regulations are continuously changing. Local governments should consult with local legal counsel in both policy development and particular situations of major concern. If there are situations that could result in litigation and your jurisdiction is a member of the North Dakota Insurance Reserve Fund, or obtains insurance from another carrier, they should be contacted.

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TABLE OF CONTENTS

<u>DISCLAIMER</u>	<i>i</i>
<u>INTRODUCTION</u>	<i>ii</i>
<u>TABLE OF CONTENTS</u>	<i>iii</i>

CHAPTER 1 - PUBLIC PROCESSES

<u>POLICY DEVELOPMENT</u>	1-1
<u>Policy</u>	1-1
<u>Procedures</u>	1-1
<u>OPEN MEETINGS</u>	1-1
<u>Meeting Notices</u>	1-2
<u>Special or Emergency Meetings</u>	1-3
<u>Closed Meetings (Executive Session)</u>	1-3
<u>Meeting Minutes</u>	1-3
<u>ROBERT’S RULES OF ORDER</u>	1-4
<u>OPEN RECORDS</u>	1-4
<u>Classification of Public Records</u>	1-4
<u>Open Records Exceptions</u>	1-5
<u>Examples of Confidential Records</u>	1-6
<u>Responding to a Request for Open Records</u>	1-6
<u>Fees for Providing Copies of Records</u>	1-7
<u>ELECTED AND/OR APPOINTED OFFICIALS</u>	1-7
<u>CONFIDENTIALITY AND MAINTENANCE OF PERSONNEL RECORDS</u>	1-7
<u>Personnel Record Should Include</u>	1-8
<u>Employee Information That Should Be Maintained in a Separate, Locked File</u>	1-8
<u>Information That Should Be Maintained for Applicants Not Hired</u>	1-9
<u>RECORD RETENTION GUIDELINES</u>	1-9

CHAPTER 2 – RECRUITMENT AND SELECTION

<u>OVERVIEW</u>	2-1
<u>CHILD LABOR</u>	2-1
<u>JOB ANALYSIS</u>	2-2
<u>JOB DESCRIPTIONS</u>	2-2
<u>JOB NOTICES/ADVERTISING</u>	2-3
<u>POSTING JOB OPENINGS</u>	2-4
<u>Internal Recruitment/Announcements</u>	2-4
<u>External Recruitment/Announcements</u>	2-4
<u>APPLICATION PROCESS</u>	2-6
<u>VETERANS’ PREFERENCE</u>	2-7
<u>OPTIONAL NOTICE OF INDIAN PREFERENCE</u>	2-8
<u>SELECTION PROCESS</u>	2-8
<u>Screening</u>	2-8
<u>Skills Testing</u>	2-8
<u>Pre-Employment Internet Screening</u>	2-9
<u>Interviewing</u>	2-9
<u>BACKGROUND CHECKS</u>	2-10
<u>Prior Employment/Education Verification</u>	2-10
<u>Post Offer Background Checks</u>	2-13
<u>HIRING</u>	2-15
<u>Letter of Offer</u>	2-15
<u>NEPOTISM IN LOCAL GOVERNMENT</u>	2-15
<u>POST-EMPLOYMENT REPORTING REQUIREMENTS</u>	2-16
<u>Employment Eligibility Verification I-9 Form</u>	2-16
<u>E-Verify</u>	2-16
<u>Employee’s Withholding Allowance Certificate (Form W-4)</u>	2-17
<u>New Hire Reporting</u>	2-17
<u>LEGAL REQUIREMENTS RELATED TO RECRUITMENT/SELECTION</u>	2-17

CHAPTER 3 – COMPENSATION AND BENEFITS

<u>OVERVIEW</u>	3-1
<u>COMPENSATION</u>	3-1
<u>Components of a Compensation Plan</u>	3-2
<u>Job Analysis and Classification</u>	3-2
<u>Wages</u>	3-3
<u>Salary/Wage Adjustments</u>	3-4
<u>Methods of Payment</u>	3-5
<u>Meal Breaks</u>	3-5
<u>Work Breaks</u>	3-5
<u>Withholdings</u>	3-5
<u>Limitations on Withholdings</u>	3-7
<u>OTHER REQUIREMENTS</u>	3-7
<u>Consolidated Omnibus Reconciliation Act (COBRA) of 1985</u>	3-7
<u>Continuation of Health Benefits for ND Employers With Less Than 20 Employees</u>	3-8
<u>Family Medical Leave Act (FMLA)</u>	3-8
<u>Health Care Benefits</u>	3-9
<u>Jury Leave</u>	3-10
<u>Military Leave</u>	3-10
<u>Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994</u>	3-10
<u>Workers Compensation</u>	3-10
<u>OPTIONAL BENEFITS</u>	3-11
<u>Bereavement Leave (Funeral Leave)</u>	3-11
<u>Cafeteria Plan</u>	3-12
<u>Disability Benefits</u>	3-12
<u>Early Retirement Programs</u>	3-12
<u>Employee Assistance Programs</u>	3-13
<u>Flexible Spending Accounts</u>	3-13
<u>Holiday Pay</u>	3-13
<u>Leave Donation Plan</u>	3-13

<u>Leave of Absence Without Pay</u>	3-13
<u>Liability Protection</u>	3-13
<u>Life Insurance</u>	3-14
<u>Paid Time Off</u>	3-14
<u>Retirement Plans</u>	3-14
<u>Sick Leave</u>	3-15
<u>Vacation Leave (Annual Leave)</u>	3-15
<u>Wellness Plans</u>	3-15
<u>Other Optional Benefits</u>	3-16
<u>FAIR LABOR STANDARDS ACT (FLSA)</u>	3-16
<u>Exemptions From Overtime Requirements</u>	3-16
<u>Other Exemptions</u>	3-18
<u>On-call Time</u>	3-18

CHAPTER 4 – EMPLOYMENT RELATIONS

<u>EMPLOYMENT RELATIONSHIP</u>	4-1
<u>“AT-WILL” EMPLOYMENT – IN THEORY</u>	4-1
<u>CODE OF ETHICS</u>	4-2
<u>EMPLOYEE HANDBOOKS</u>	4-2
<u>TRAINING AND DEVELOPMENT</u>	4-3
<u>New Employee Orientation</u>	4-3
<u>Training</u>	4-3
<u>Professional Continuing Credits/Accreditation/Licensing</u>	4-3
<u>Mandated Training</u>	4-3
<u>PRIVACY IN THE WORKPLACE</u>	4-4
<u>Employee Medical Information</u>	4-4
<u>Federal Wiretapping Act/Electronic Communications Privacy Act</u>	4-5
<u>Telephone Monitoring</u>	4-5
<u>Technology Policies</u>	4-5
<u>Possession of a Secured Firearm</u>	4-6

<u>Surreptitious Intrusion</u>	4-8
<u>Women’s Right to Breastfeed</u>	4-8
<u>EMPLOYMENT DISCRIMINATION</u>	4-8
<u>What Is Discrimination?</u>	4-8
<u>Affirmative Action Plans</u>	4-10
<u>Age Discrimination in Employment Act (ADEA)</u>	4-10
<u>Americans with Disabilities Act (ADA) of 1990</u>	4-10
<u>ADAAA – The ADA Amendments Act of 2008</u>	4-12
<u>Benefit Discrimination</u>	4-12
<u>Civil Rights Act of 1866, Section 1981</u>	4-13
<u>Civil Rights Act of 1964</u>	4-13
<u>Civil Rights Act of 1991</u>	4-13
<u>Equal Pay Act of 1963</u>	4-13
<u>Executive Order 11246 of 1965</u>	4-13
<u>North Dakota Human Rights Act</u>	4-14
<u>Pregnancy Discrimination Act (PDA) of 1978</u>	4-14
<u>Rehabilitation Act of 1973</u>	4-14
<u>Service Animals</u>	4-14
<u>GRIEVANCES</u>	4-14
<u>Written Grievance Policy</u>	4-14
<u>Alternative Dispute Resolution (ADR)</u>	4-15
<u>Retaliation</u>	4-15
<u>HARASSMENT</u>	4-16
<u>Sexual Harassment</u>	4-16
<u>SUBSTANCE ABUSE AND TESTING</u>	4-17
<u>Substance Abuse Testing</u>	4-18
<u>SAFETY AWARENESS TRAINING</u>	4-19
<u>WORKPLACE VIOLENCE</u>	4-19
<u>WORKERS COMPENSATION</u>	4-19
<u>Prevention</u>	4-20

<u>Policy Development and Implementation</u>	4-20
<u>Reporting</u>	4-20
<u>Return to Work Program</u>	4-20
<u>RISK MANAGEMENT</u>	4-20
<u>Elements of a Risk Management Program</u>	4-21
<u>COMMUNICABLE DISEASES</u>	4-21
<u>SECURITY PROCEDURES</u>	4-22
<u>ND DISASTER/EMERGENCY PLAN</u>	4-22
<u>EMERGENCY PREPAREDNESS</u>	4-23
<u>WORKPLACE WELLNESS PROGRAMS</u>	4-24

CHAPTER 5 – PERFORMANCE MANAGEMENT

<u>OVERVIEW</u>	5-1
<u>DISCIPLINE</u>	5-2
<u>QUICK REFERENCE GUIDE FOR DOCUMENTATION</u>	5-3
<u>TERMINATION</u>	5-4
<u>Options for Terminating Employment</u>	5-5
<u>REDUCTION IN FORCE (RIF)</u>	5-6
<u>FINAL PAYCHECK AND BENEFITS UPON TERMINATION</u>	5-6
<u>Final Paycheck</u>	5-6
<u>Consolidated Omnibus Budget Reconciliation Act (COBRA)</u>	5-7
<u>Continuation of Health Benefits for ND Employers With Less Than 20 Employees</u>	5-7
<u>Leave Balances</u>	5-7
<u>Severance Pay</u>	5-8
<u>Unemployment Insurance</u>	5-8
<u>EXIT INTERVIEWS</u>	5-8

RESOURCES

<u>LEGAL REQUIREMENTS FOR RECRUITMENT / SELECTION</u>	R-2
<u>REQUIRED POSTINGS</u>	R-3
<u>FMLA REFERENCE MATERIALS</u>	R-4
<u>MEMO TO FILE</u>	R-5
<u>SAMPLE SPECIFIC INCIDENT MEMO</u>	R-3
<u>SAMPLE SUMMARY MEMO W/SPECIFIC DIRECTIVES</u>	R-4
<u>SAMPLE SUMMARY MEMO W/SPECIFIC DIRECTIVES AND CONSEQUENCES</u>	R-5
<u>DISCRIMINATION & HARASSMENT GRIEVANCE PROCEDURE</u>	R-7
<u>EXIT INTERVIEW QUESTIONNAIRE</u>	R-10

CHAPTER 1

PUBLIC PROCESSES

POLICY DEVELOPMENT

Policy

A policy is a broad statement of an organization's philosophy, objectives or standards and needs to be specific to the employer. Policies should be simple, thorough, easy to understand, and easy to implement. Using sample policies may be time-saving, but should be adjusted to the unique needs of an organization. All policies need to be routinely reviewed and updated. Policy titles should reflect the content of the policy. Employers should provide training to all supervisors and employees on the policies.

Some employers use the term "employee handbook" that may include all policies or portions of the policies that are targeted for the use by employees. For more information on employee handbooks, see Chapter 4.

Governing boards should approve all human resource policies in accordance with applicable laws and procedures and should routinely receive training on human resource issues.

To see several model policy or employee handbooks, go to:

Cass County: <https://www.casscountynd.gov/home/showdocument?id=3194>

Grand Forks County: <http://www.gfcounty.nd.gov/?q=node/109>

Burleigh County: <http://www.burleighco.com/uploads/resources/141/personnel-manual-book-for-website.pdf>

Procedures

Procedures are more specific than policies and are step-by-step descriptions of accomplishing a policy. Written policies and procedures should be reviewed on a regular basis to revise as needed or as laws change and affect a policy or procedure.

OPEN MEETINGS

Section 44-04-19 of the North Dakota Century Code states in part: Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public. The definition of what constitutes a "meeting" is very expansive and can include gatherings not typically thought of as a formal meeting. See N.D.C.C. § 44-04-17.1(19). For instance, an Attorney General's Opinion on this subject has determined that a school board "retreat" was a

public meeting. In addition, the law requires committee meetings of a public entity to be open because a committee is a governing body as a result of the authority it received from the board to perform a function on behalf of the governing body. E-mails between members of a governing body may also be deemed a “meeting” and subject to open meeting requirements if communication involves a quorum of members and involves public business. The manual for open meetings is available at the North Dakota Attorney General website: <https://attorneygeneral.nd.gov/open-records-meetings>

Meeting Notices

Notice is a mandatory prerequisite for the conducting of any public meeting. Subsection 1 of Section [44-04-20](#) states: Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity as defined in section 44-04-17.1, including executive sessions, conference call meetings, and video conferences. Unless otherwise specified by law, resolution, or ordinance, or as decided by the public entity, notices required by this section need not be published.

The remaining subsections of [44-04-20](#) delineate the contents, posting, and filing requirements for all public meetings. A 2011 amendment to meeting notice requirements allows public bodies to post notice of meetings on their websites in lieu of filing notice with city or county officials listed in law. An open meeting checklist, found at:

<https://attorneygeneral.nd.gov/sites/ag/files/documents/NoticeChecklist.pdf> and sample meeting notice, found

at: <https://attorneygeneral.nd.gov/sites/ag/files/documents/SAMPLEMEETINGNOTICE.pdf> are provided for your convenience.

It is noteworthy that the public entity’s official newspaper must be notified before any special or emergency meeting, even if such a notice has not been requested. This is a notification requirement, not a publication requirement. It is also important to limit the scope of all special and emergency meetings to only those topics contained on the agenda, which must be included in the notice provided to the media. Indicate if executive session is anticipated on one or more agenda items.

The general filing and content requirements for meeting notices are as follows:

- File meeting notice with
 - City Auditor for cities
 - County Auditor for all other entities
 - Public entity’s official newspaper

- Content of Notice

The statute states that the notice must contain the date, time, and location of the meeting and, if practicable, the topics to be considered. However, the lack of an agenda in the notice, or a departure from, or addition to, the agenda at the meeting, does not affect the validity of the meeting or the actions taken thereat. The notice must also contain the general subject matter of any executive session expected to be held during the meeting. See:

<https://attorneygeneral.nd.gov/sites/ag/files/documents/SAMPLEMEETINGNOTICE.pdf>

Special or Emergency Meetings

- Notice posted in official newspaper at the time of notice to governing bodies
- Topics at a special or emergency meeting are limited to those included in the notice

Closed Meetings (Executive Session)

Any public entity intending to utilize an executive session must first identify a lawful basis for going into executive session. A governing body may close a meeting to discuss pending or a reasonably predictable lawsuit with its attorney, to discuss negotiations strategy (when a governing body is involved in litigation, adversarial administrative proceedings, discuss closed or confidential records, or contracts which are currently being negotiated, provided that an open meeting would have an adverse fiscal effect on the bargaining or litigation), to discuss confidential economic development information, the nonrenewal and discharge of a superintendent, administrator, director of multidistrict units or teacher, and school expulsions. **It is recommended that legal counsel be contacted prior to closing a meeting in order to ensure a proper legal basis for doing so.**

To close a meeting and go into executive session, the following steps are to be taken:

- Convene a properly noticed open meeting (unless a confidential meeting is required) and pass a motion to hold an executive session;
- Announce during the open portion of the meeting the topics to be considered during the executive session and the legal authority for holding an executive session on those topics;
- Record the session electronically or on audiotape or videotape;
- Discuss only the topics announced in the motion during the executive session;
- Take final action on topics considered during the executive session in open portion of meeting, unless final action is required by law to be taken in a closed or confidential meeting.

See: <https://attorneygeneral.nd.gov/sites/ag/files/documents/EXECUTIVESESSIONFORMAT.pdf>

Meeting Minutes

N.D.C.C. § 44-04-21 <http://www.legis.nd.gov/cencode/t44c04.pdf?20150415121852> specifically prescribes the voting requirements for public meetings, as well as the contents of the minutes of those meetings, stating:

Open voting at public meetings required—Results recorded in minutes.

Unless otherwise specifically provided by law, all votes of whatever kind taken at any public meeting governed by the provisions of section 44-04-19 must be open, public votes, and all nonprocedural votes must be recorded roll call votes, with the votes of each member being made public at the open meeting. Procedural votes must be recorded roll call votes upon the request of any member of a governing body holding a meeting subject to this section. As used in this section, “nonprocedural” should be broadly interpreted and includes all votes that pertain to the merits of the matter before the governing body.

Minutes must be kept of all open meetings and are records subject to section 44-04-18. The minutes must include, at a minimum:

- The names of the members attending the meeting;
- The date and time the meeting was called to order and adjourned;

- A list of topics discussed regarding public business;
- A description of each motion made at the meeting and whether the motion was seconded;
- The results of every vote taken at the meeting; and
- The vote of each member on every recorded roll call vote.

Notwithstanding subsection 8 of section 44-04-18, the disclosure of minutes kept under this subsection may not be conditioned on the approval of the minutes by the governing body.

Please note that minutes of city governing boards may have additional requirements under N.D.C.C. 40-01-09.1. See: <http://www.legis.nd.gov/cencode/t40c01.pdf>

ROBERT’S RULES OF ORDER

Robert’s Rules of Order provide rules governing the structure and process of a meeting. The rules help facilitate the meeting. See: <http://www.robertsrules.org>

OPEN RECORDS

All records of a public entity are open to the public unless a statute makes the record or part of it confidential or exempt. The manual for open records is available at the North Dakota Attorney General website:

<https://attorneygeneral.nd.gov/sites/ag/files/documents/OpenRecordsManual.pdf>

Personnel records are generally open to the public unless a specific exception applies. Public entities seeking to protect and avoid disclosure of employee-related records from public scrutiny would be well advised to seek legal counsel and identify the specific statutory authority upon which they choose to “hang their hat.” Minutes from public meetings are open to the public, even if not formally approved. Financial records of a public entity and contracts are also generally open to the public.

A “record” means recorded information of any kind regardless of the physical form or characteristics by which the information is stored, recorded or reproduced, which is the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information regarding public business.

Classification of Public Records

The records of a public entity are classified as either open, exempt, or confidential:

Open – must be released upon request.

Exempt – may be released at discretion of the public entity. Exemptions must be specifically provided by law. “Law” includes federal statutes, federal regulations and state statutes and administrative rule.

Confidential – records and information that cannot be released.

Open Records Exceptions

The following sources of exceptions to public records are of particular relevance to North Dakota public employers:

- N.D.C.C. § [44-04-18.1\(1\)](#): Certain public employee personal, medical, and employee assistance records are confidential or exempt.
- N.D.C.C. § [44-04-28\(1\)](#): Social security numbers in the possession of a public entity are confidential.
- N.D.C.C. § [44-04-18.1\(2\)](#): The following personal information in an employee's personnel record is exempt: month and date of birth; home address; home telephone number or personal cell phone number; photograph; medical information; motor vehicle operator's identification number; public employee identification number; payroll deduction information; the name, address, telephone number, and date of birth of any dependent or emergency contact; any credit, debit, or electronic fund transfer card number; and any account number at a bank or other financial institution. Information regarding the type of leave taken by an employee is exempt, although the amount of leave taken or accrued, and the dates of the leave taken, is public record. Information regarding leave applied for but not yet taken is exempt until the leave is taken.

The definition of personal information makes it clear that the rest of the information in a public employee's personnel file (performance reviews, investigations, etc.) is not exempt or confidential.

- N.D.C.C. § [44-04-19.1](#): "Attorney work product" (documents prepared by an attorney representing a public entity for civil or criminal litigation or adversarial administrative proceedings) is exempt from the open records law. However, once the legal proceedings and possible appeals are complete, the attorney work product may become a public record.
- N.D.C.C. § [15.1-07-25\(2\)](#): If a complaint is filed concerning a school district employee and an administrative investigation is conducted, any record or document generated as part of the administrative investigation is confidential until the investigation is completed. The investigation and any determination of disciplinary action may not exceed sixty days from the date the complaint is filed.
- N.D.C.C. § [44-04-18.3](#): Any telephone number and the home address of a juvenile court director or probation officer, an employee of a law enforcement agency, employee of a state or local correctional facility, and an employee of the department of corrections and rehabilitation are confidential. Information contained in a personnel record of a law enforcement officer of a state or local law enforcement agency or in the personnel record of a correctional employee of a correctional facility subject to chapter 12-44.1 may not be disclosed to an inmate confined in a state correctional facility or correctional facility subject to chapter 12-44.1 unless authorized by the employing agency.
- N.D.C.C. § [44-04-18.1\(6\)](#): Records relating to a public entity's internal investigation of a complaint against a public entity or employee for misconduct are exempt until the

investigation of the complaint is complete, but no longer than seventy-five calendar days from the date of the complaint.

Additional exceptions to the open record law can be found in the Open Record Summary at <https://attorneygeneral.nd.gov/sites/ag/files/documents/Open-Records-Guide.pdf> Answers to common open records questions can be found in the Attorney General's Open Records Manual at <https://attorneygeneral.nd.gov/sites/ag/files/documents/OpenRecordsManual.pdf>.

Examples of Confidential Records

- Reports of child abuse or neglect
- Personal medical and health records (including employee assistance records, and most ADA, FMLA and Worker's Compensation documents) possessed by public entities
- Social Security Numbers
- Student records (exceptions for directory information under FERPA)
- Fire investigations until completion of investigation
- Attorney work product until the legal proceedings and possible appeals are complete then it may become a public record
- Records or documents generated as part of an administration investigation of complaint concerning a school district employee are confidential until the investigation is complete

Responding to a Request for Open Records

Upon receipt of a request for public records, the public entity must:

- Respond within a reasonable time by either providing the requested records or explaining why the requested records are not being provided.
 - Whether records have been produced within a reasonable time will depend on the facts of a given situation. A delay may be appropriate for a number of reasons, including reviewing large volumes of documents to respond to a request, excising closed or confidential information, availability and workload of staff who can respond to the request, balancing other responsibilities of the public entity that demand immediate attention, accessing the records requested, consulting with an attorney when there is reasonable doubt whether the records are open to the public, sorting out what has previously been provided to a requester, and seeking clarification on vague requests.
 - If the employer cannot respond to a request in a reasonable time, it must provide an explanation for the delay.
- Denial of a request must describe the legal authority and must inform the requester that no records are available.
- May charge for time in locating, redacting, and making copies of records after one hour.

Requests for records do not have to be made in person or in writing unless a statute requires otherwise. Written clarification may be requested when needed. In addition, an entity can require separate periodic requests rather than complying with a continuing request. Nothing requires an entity to create a new record, disclose records which do not exist, or disclose records it does not have in its possession. Requesters may be referred to an entity's website if information is available there; however, copies must be provided if the requester has no way to access to the website.

Fees for Providing Copies of Records

- A public entity may charge up to \$25 per hour for locating records after the first hour of time. The public entity may also charge twenty-five cents per page of paper copy and the actual cost of postage
- Payment may be required before responding to a request

ELECTED AND / OR APPOINTED OFFICIALS

Elected officials are voted into office by the voting public. Elected officials may appoint individuals to certain positions. When there is a change by the voters of the elected officials, the new incumbents may appoint different individuals to fill appointed positions and may remove the previously appointed official.

Elected and appointed officials are not generally considered to be employees. They can only be removed according to statute. Removal from office can be accomplished in different ways depending on the office and circumstances, as discussed in N.D.C.C. § 44-02-01, <http://www.legis.nd.gov/cencode/t44c02.pdf> or by recall as outlined in the North Dakota Constitution Article III, Section 10 and in N.D.C.C. § 44-08-21. <http://www.legis.nd.gov/cencode/t44c08.pdf>

Appointed officials can be removed by their supervising appointing official at any time unless otherwise protected.

Although not “employees,” public officials are required to comply with state and federal laws, such as discrimination laws. While they are responsible to assure their offices and employees comply with local, state, and federal law, many of the laws exclude elected officials from their definition of an employee (for example, N.D.C.C. § 14-02.4; ADEA, FLSA, Civil rights laws). However, they are included as employees for other laws (for example, IRS withholding, N.D.C.C. §§ 32-12.1-02, 54-52-01, 65-01-02)

For additional information, see: <https://www.eeoc.gov/policy/docs/threshold.html#2-III>

CONFIDENTIALITY AND MAINTENANCE OF PERSONNEL RECORDS

The individual responsible for human resources in a local jurisdiction normally has the responsibility to insure confidentiality of personnel records to the extent appropriate and lawful. The employer should have a written policy regarding the maintenance of personnel records that should include how they are kept, where they are kept, who can access the records, and who in the organization has authorization to respond to open records requests. The policy should also address how employees may access their own records.

If an employee disagrees with information contained in their personnel file, there should be a procedure for allowing the employee to address that either by correcting the information or submitting a written document of disagreement to be included in the record.

Personnel records should be created, retained, and destroyed in accordance with federal and state laws and acceptable professional and business practices. Personnel records may be retained in paper or electronic format. In most cases, if there are charges filed or known potential issues against an employer or lawsuit; keep the records until final disposition. There can be serious consequences attached to destroying documents that are relevant to a lawsuit including an award of monetary damages or a presumption of guilt or liability.

It is important to safeguard employees' personal information to protect them from identity theft. In particular, social security numbers must be safeguarded. When records are destroyed, they should be shredded, not simply thrown away intact.

The Personnel Record Should Include the Following Information:

Pre-employment information

- Application/resume
- References/verification of previous employment
- Transcripts

Employment information

- Records relating to hiring
- Performance evaluations, development plans
- Training records
- Employer actions such as promotion, demotion, disciplinary actions, termination, layoffs, exit interviews
- Payroll information such as compensation, deductions, hours worked, rates of pay, employment dates, timekeeping records
- Job history
- Leave time taken
- Personal information such as address and emergency contact information

Employee Information That Should Be Maintained in a Separate, Locked File

- I-9 form
- Criminal background information
- Benefit plan enrollment forms
- Employee medical records
- Safety records and worker's compensation records
- Employee drug test results
- Health records relating to requests for FMLA leave
- EEOC self-reporting information
- Veteran disability information

- Requests for accommodation and document produced to verify disability information or requests for accommodation
- Garnishments for child support or other reasons

Information That Should Be Maintained for Applicants Not Hired

- Applications for positions
- Interview records

RECORD RETENTION GUIDELINES

N.D.C.C. § 54-46 provides information on records management. See: <http://www.legis.nd.gov/cencode/t54c46.pdf?20160330135718>

The North Dakota Information Technology Department publishes record retention and destruction guidelines which specifically address city and county records. It may be accessed at the following website: <https://www.nd.gov/itd/standards/electronic-records-management-guidelines>

ND Association of Counties
<https://www.ndaco.org/?id=513>

ND Association of Counties General Schedule
<https://apps.nd.gov/itd/recmgmt/rm/recSer/search/results?selectedDepartment=8990&selectedDivision=016&disposed=Y>

ND League of Cities
<https://apps.nd.gov/itd/recmgmt/rm/recSer/retention.pdf>

<https://www.nd.gov/itd/services/records-management-program/records-management-program-maintenance>

CHAPTER 2

RECRUITMENT AND SELECTION

OVERVIEW

Recruitment and selection of new employees is the first step in building a relationship between an employer and an employee. This process must be understandable, fair, and most critically, legal. In addition to several federal laws, the North Dakota Human Rights Act prohibits a broad range of discriminatory practices, stating at N.D.C.C. § 14-02.4-03: “It is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color religion, sex, national origin, age, physical or mental handicap, status with respect to marriage or public assistance, or participation in lawful activity off the employer’s premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.” Local jurisdictions may include a non-discrimination policy based on sexual orientation or gender identity. See: <http://applyonline.hr.cityoffargo.com/> **It is essential that public employers carefully examine all aspects of their hiring process to identify potentially discriminating hiring practices.** For more information, see: <http://www.legis.nd.gov/cencode/t14c02-4.pdf>

The North Dakota Department of Labor has developed a brochure that provides an explanation of “when” and “how” the above law applies and can be accessed by clicking: <https://www.nd.gov/labor/sites/www/files/documents/Brochures/Wage%26Hour%20and%20Equal%20Emp.pdf>

Hiring qualified individuals to fill positions contributes to the overall strategic success of an organization. The overall goal of the recruitment and selection process is to hire the most qualified individuals for positions. Job analysis, job descriptions, recruitment plan, etc. are all things that are not required by law; however, they are useful/helpful management tools and provide evidence to support non-discriminatory decisions.

CHILD LABOR

State child labor provisions establish a minimum age of 14 to be employed and regulate the employment of teens ages 14 and 15. Generally, persons age 14 and 15 are required to file an Employment and Age Certificate (<http://www.nd.gov/eforms/Doc/sfn04598.pdf>) with the North Dakota Department of Labor, are limited in the hours they can work and are prohibited from performing certain types of work. See: www.legis.nd.gov/cencode/t34c07.pdf and

also: <https://www.nd.gov/labor/sites/www/files/documents/Brochures/Youth%20Employment%20in%20ND.pdf>

Federal child labor laws further limit the types of work that can be performed by teens 14 and 15 years of age and prohibit teens ages 16 and 17 from working in certain occupations the U.S. Department of Labor deems to be hazardous.

See: <http://www.dol.gov/dol/topic/youthlabor/index.htm>

When state and federal child labor provisions differ, the more “stringent” standard prevails and must be followed. For example, if federal law prohibits a type of employment that is allowed under state law, the federal law would apply and the work would be prohibited.

JOB ANALYSIS

When a position becomes available or is created, a comprehensive review of the position should be completed before it is advertised. This will help determine the required qualifications for the position to use in advertisement. A job analysis is a systemic way to gather and analyze information about the requirements of the position. Job analysis involves collecting information on the characteristics of a job that differentiate it from other jobs. Information that can be helpful in making that distinction include the following:

- Work activities and behaviors
- Interaction with others
- Performance standards
- Financial and budgeting impacts
- Machines and equipment used
- Working conditions
- Supervision given and received
- Education, knowledge, skills, and abilities needed

JOB DESCRIPTIONS

Prior to posting a position, the employer needs to determine what is expected of the job. Job descriptions are a useful tool in determining job duties; employee qualifications necessary to perform the position, such as skills, experience, and education; and other job related information. It is best practice to review and update job descriptions on a regular basis.

Job descriptions should have key elements including, but not limited to:

- General purpose of the position;
- Position title and location;
- Minimum requirements for the position including knowledge, skills, and abilities, physical demands (i.e. ability to lift), keystroke rate, valid driver’s license, or educational levels must be defined;
- Working conditions, such as travel requirements, on-call status, any physical exposures;

- Identification of essential job duties;
- Management or supervisory responsibilities;
- Additional preferred qualifications may be added (i.e. years of experience, higher level of education, specific work experience); and,
- Include a “catch-all” statement, such as “perform other reasonable duties as assigned.”

See sample job descriptions:

- Fargo Public School
<https://www.applitrack.com/fargo/onlineapp/1BrowseFile.aspx?id=110403>

If a local government has a classification system, there should be an analysis of the position based on the established job description to determine appropriate salary. If the employing unit does not have a classification system, then a salary range should be identified based on duties of the position, comparable positions in the organization and the prevailing community wage. **School districts have distinct regulations for contract employees such as teachers.**

A best practice under the American’s with Disabilities Act (ADA) is that all positions identify essential functions and those duties that are classified as marginal. The review of tasks and determination of essential duties should be routinely completed when a job description is written or modified. If the minimum qualifications aren’t job related or critical to business, it could disproportionately screen out individuals in a protected category.

JOB NOTICES/ADVERTISING

When a vacancy occurs, a recruitment plan should be developed including steps that will be taken to secure qualified applicants for the position. A vacancy announcement about the openings should be written and posted so that eligible candidates may apply. Local policies may define when and how vacancy announcements of positions will be advertised with options including posting with the local governments, websites, job services, professional journals and newspapers.

If background checks, tests, or other examinations are required of candidates and employment is contingent on the results of such checks, that information should be identified in a job announcement.

The advertisement should contain a statement that the entity is an Equal Employment Opportunity employer. See sample job announcements:

- City of Fargo http://apps.cityoffargo.com/hr/apply/Postings.aspx?cookies_ok=1&check_date=6/29/2009%2012:44:14%20PM#286
- Fargo Public Schools <http://www.applitrack.com/fargo/onlineapp/jobpostings/view.asp?internaltransferform.Url=&all=1>

POSTING JOB OPENINGS

Job postings provide notification that positions are available and provide a process for the employer to recruit the most qualified employees. The entity must assure that individuals with disabilities have equal access to job announcements.

An advertisement may include the following:

- Position title
- Contact person and information
- Application deadline
- Application process-what is required (i.e., application form, resume)
- Skills, education, experience requirements
- Starting pay or salary range
- Position status (i.e. full time, part-time, temporary, exempt/non-exempt)
- Pre-testing requirements
- Post-offer requirements such as drug tests, credit checks, background checks, criminal record checks, drivers license checks
- Essential job functions
- Notice of Veterans' Preference or Veterans' Preference exemption
- Statement that the entity does not discriminate (The U.S. Office of Civil Rights (OCR) advises that public schools are required to include a statement of nondiscriminatory policy in any bulletins, announcements, publications, catalogs, and application forms that are made available to participants, students, applicants, or employees.)
- Closing date

Internal Recruitment/Announcements

Employers may want to announce positions within the organization before advertising outside of the organization to show commitment to the current employees and offer eligible employees advancement and promotional opportunities. Some jurisdictions have local requirements on recruitment procedures.

External Recruitment/Announcements

There are a variety of sources available to recruit qualified applicants for a position vacancy. Employers should gear the recruitment source to the type of position to be filled and may consider non-traditional sources such as posting with tribal entities.

Media

Newspapers

- Newspaper advertisements can be useful in some situations. In addition to using local newspapers, the North Dakota Newspaper Association provides advertisement options for newspapers throughout North Dakota under their NorthSCAN services. For additional information see: www.ndna.com

Radio and Television

- Radio and television advertising targets a specific audience in a specific area. The stations in the employer's area can provide the employer with information regarding the demographics of the listeners and the station's broadcasting range.
- Some radio and television stations have public service announcements free of charge that may be used to advertise job announcements.

Internet Sites (examples include)

External

- www.Monster.com
- www.Indeed.com
- www.ZipRecruiter.com
- www.NDClassifieds.com
- www.Jobdig.com
- www.commerce.nd.gov
- www.Craigslist.com
- Employers may also choose to advertise on web sites that are geared toward specific industries or professions or other dimensions of diversity.

Internal

- The entity's website and/or Facebook page

Government Services, Such as Job Service of ND

- Post job openings with Job Service ND at no cost: <http://www.jobsnd.com/>

Colleges, Universities, Technical Schools, High Schools and Career Services Offices

- Schools can provide an excellent source of new graduates with formal education. The applicants typically have limited experience.
- Employers may want to check with schools in the area to see if they have school-to-work programs. School-to-work programs typically involve partnerships between businesses and school districts. It might not work with government employers. The student typically spends part of the day in school and part of the day on the job.

Job Fairs

- Some universities or communities have job fairs in which employers may choose to participate.

Employment Agencies/Search Consultants

- Before using the services of an employment agency/search consultant, employers should assure that the agency does not discriminate.
- Private employment agencies work on a contingent fee which can either be paid by the employer or applicant when hired.
- Employers should inquire about their fee system.

Professional Journals

- Professional journals publicize a position on a wider basis and target a specific profession.

APPLICATION PROCESS

The application process may include completion of a standardized application form, submission of a resume, or both. Application forms may be on paper or web-based. A paper option should also be available even if web is preferred to assure reasonable accommodation. The content of application forms should be limited to job related information. Application forms should have legal review prior to use to assure that no illegal information is being asked. If the employer establishes an application timeline, the dates should be followed strictly. Applications received after the closing date should be returned to the applicant with an explanation regarding why the individual will not be considered. See the ND Department of Labor's Employment Applications and Interviews Brochure:

<https://www.nd.gov/labor/sites/www/files/documents/Brochures/Employment%20Applications%20%26%20Interviews%20-%20color.pdf>

Elements that may be included in an employment application form include:

- Basic personal information
- Education or training
- Special skills
- Work history
- Criminal conviction information
- Equal Employment Opportunity statement
- Statement signed by applicant certifying that the information provided is true and acknowledging that providing inaccurate information may lead to rejection of their application or, if employed, termination of their employment

Items that **should not be included** on the application form are:

- Age (Date of Birth)
- Sex / Gender
- Questions regarding disability/health
- Marital status
- Arrest record
- Race
- Color
- Dependent/child care arrangements
- Religion
- National Origin

For sample application forms:

Cass County

<https://www.casscountynd.gov/our-county/human-resources/job-openings>

Bismarck Parks & Recreation

<http://www.bisparks.org/wp-content/uploads/BPRD-Job-Application-2017.pdf>

VETERANS' PREFERENCE

North Dakota law (N.D.C.C. § [37-19.1](#)) provides employment preferences for **North Dakota residents** and/or their spouses who have served in a qualifying active military forces campaign during a period of war or received the armed forces expeditionary or other campaign service medal during an emergency condition. A disabled veteran is entitled to the position without regard to an examination grade unless there is a justifiable cause documented in writing for not making such selection. If two or more disabled veterans apply for the position, the one with the highest examination grade is first entitled to the position.

The preference applies to all public employers including political subdivisions. Veterans' preference does not apply to internal recruitment and selection. Internal refers to an employer who hires within their own organization. For instance, if an applicant is employed by County X and applies to County Z, the preference would be given by County Z. If the applicant applies for a different position in County X, the preference would not be applied. Certain positions are exempt from Veterans' Preference, including teachers and school superintendents. N.D.C.C. § 37.1-19.1-02 requires advertisements for positions exempt from Veterans' Preference contain notice of this exemption.

An eligible spouse means an un-remarried spouse of a deceased veteran who died while in service, or later died from a service-connected cause or causes; or the spouse of a disabled veteran who, because of his or her disability, is unable to exercise his or her right to employment preference.

To receive preference, the veteran must include proof of their veteran status. If claiming disabled veterans' preference, the veteran must include proof of disability.

Document requirements:

1. An applicant claiming veterans' preference shall provide a copy of report of separation DD-214.
2. An applicant claiming disabled veterans' preference shall provide a copy of report of separation DD-214 and a letter less than one year old from the Veterans' Administration indicating the veterans' disability status.
3. An applicant claiming veterans' preference as an eligible spouse of a deceased veteran shall provide a copy of the marriage certificate, the veteran's report of separation DD-214, and the veteran's death certificate.

To receive preference, the spouse must provide a copy of the marriage certificate, the DD-214, and the veteran's death certificate. The spouse of a disabled veteran needs to also provide a letter less than one year old from the Veteran's Administration indicating the disability status.

If the employer has an established personnel system, the scoring method must include additional points for veterans and disabled veterans and applicants (other than disabled veterans) may be considered rank order. If the employer does not have an established personnel system, the veteran who meets the minimum qualifications and is physically and mentally able to perform the job is to be employed (with the disabled veteran given preference over a veteran).

For more information and for a link to the qualifying war periods and campaign medals, see: <http://www.legis.nd.gov/cencode/t37c19-1.pdf>

OPTIONAL NOTICE OF INDIAN PREFERENCE

Employers located on or near an Indian reservation may give preference to an Indian living on or near a reservation if this preference is publically announced. See: [EEOC Notice 915.027](#) for more details.

SELECTION PROCESS

Screening

The first stage of selection is to screen the applicant's application or resume in order to identify the most suitable candidates. The individual assigned with the task of screening applicants should take into account the position description/vacancy announcement in order to:

- Eliminate applicants who don't meet minimal requirements
- Identify the most qualified candidates based upon information provided

Factors to consider during the screening process:

- Content and appearance of application and/or resume
- Blanks/missing information
- Inconsistent information
- Salary requirements

State law mandates that schools conduct criminal history records checks on school employees and service providers who have unsupervised contact with students. See NDCC 15.1-06-06(1f) and NDCC 12-60-24(y). The North Dakota Attorney General has developed guidance to assist public employers with conducting criminal history checks. See www.ag.state.nd.us/BCI/CHR/CHR.html. Criminal conviction history should not automatically disqualify an applicant. See: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#I

Skills Testing

Skills testing may be necessary to determine if an applicant qualifies for a position, especially if Veterans' Preference applies and the employer has opted to not use a competitive personnel system. Skills testing may be offered through technical schools or temporary staffing agencies. Skills testing must be outlined in the recruitment requirements and job postings and all applicants must be required to participate in order to avoid discrimination.

Pre-employment Internet Screening

Using internet search engines, social networking sites or the World Wide Web for screening and verification purposes as part of a background screening process may lead to serious liability issues for employers. The employer can't guarantee if the identity of the candidate from a social media account is the same as that of the applicant. In addition, the employer cannot be guaranteed that the information placed in the individual's social media account was drafted and posted by the actual applicant.

Searching the internet/social media sites for information about an applicant may open an employer up to allegations that it discriminated against the applicant based on information the employer learned inadvertently. Most people who join a social networking site post a picture of themselves. A photo can give information on the applicant's sex and race, an estimate of the applicant's age, and whether he has any obvious disabilities. Often they can reveal their marital or family status, and their religious or other group affiliations. Such information can skew hiring professionals' perceptions of a candidate and, once the hiring employer has that information, it could be subject to potential discrimination claims for gender, race, age, disability and even religious discrimination.

Anyone involved in reviewing applications or interviewing applicants should treat everyone the same. An employer should develop a policy or procedure for conducting application reviews and be consistent in its use. The Internet can be a useful tool but it should be used wisely and within legal boundaries.

Interviewing

Interviews are an important component of the selection process. It serves as a primary means of gathering additional information from an applicant and determining whether the applicant will be a "good fit" in the position. It also allows the employer to describe the position in greater detail and answer any questions the applicant may have. Because interviews are, by nature, more spontaneous than the written application process, the interviewer must avoid asking for certain information.

There are great benefits and risks to the interview process. Interviewing should be a structured process. All interviews should be conducted consistently by the same interviewer(s) using a standard set of interview questions. Interview questions must be job-related. For example, if the position requires being on call some evenings or week-ends and the employer wants to find out if the applicant is able to provide that coverage, especially if the applicant is a young female,

Don't ask "do you have children," or "are you married," or "are you planning to have a child"

May ask "The position requires being on call some evenings and week-ends. Will you be able to be available during those times?"

It is important to not ask personal questions that may violate an individual's privacy or other rights, or may be discriminatory in nature. It is unlawful to discriminate or make employment

decisions based on race, color, gender, national origin, disability, religion, pregnancy, military status, marital status or public assistance.

As a general rule, questions regarding the following should be avoided:

- Age/date of birth
- Sex/gender
- Race, birthplace and national origin
- Marital status, dependents or child care arrangements
- Arrest record (may ask about felony convictions)
- Height and weight
- Religion
- Public assistance
- Lawful activity
- Medical questions that may reveal a disability

A standardized rating system may be used during interviews. The ratings given each applicant should be documented and retained for use in the event that an employment decision is challenged. Interviewers should not make any types of promises during the interview process.

See the following websites for additional information and sample interview questions:

ND HRMS: <https://www.nd.gov/omb/agency/state-government-human-resource-management/recruitment-and-hiring/interview>

ND Department of Labor:

<https://www.nd.gov/labor/sites/www/files/documents/Brochures/Employment%20Applications%20%26%20Interviews%20-%20color.pdf>

EEOC Guidance on Pre-employment Disability Related Questions and Medical Examinations: <https://www.eeoc.gov/policy/docs/qanda-inquiries.html>

BACKGROUND CHECKS

There are a variety of background checks that can be conducted that an employer may use for potential hires. If background checks are required for the position, the employer should make an offer of employment conditional upon the results of those checks.

The employer should conduct an inquiry into the applicant's background taking into account the nature and requirements of the position. The employer should keep a written record verifying that the employer checked the applicant's references, past employers and criminal background (if conducted). The written record should include the person, responses and dates contacted.

All applicants must be notified of background check requirements and provide written authorization for relevant background checks.

Prior Employment/Education Verification

Past employment information, such as dates and duties, should be verified.

Education records can also be verified by contacting schools or by requesting transcripts from the applicant that include graduation information. Professional credentials may be verified through the issuing organization.

Performance and Reference Checks

Past performance is an indicator of future performance so it is important to verify employment references and obtain information about past performance from prior employers. Personal references identified by the applicant may also be contacted.

Employers should gear questions toward the type of work to be performed. For instance, an applicant for a police officer should be checked for past instances of aggression or violence to avoid hiring an individual that may pose a risk to the public. Public records from applicable licensing boards may also be obtained to see if there have been disciplinary or suspension actions.

North Dakota statute (34-02-18) provides protection to employers who provide employment related information in good faith.

See: <http://www.legis.nd.gov/cencode/t34c02.pdf>

Federal law prohibits an employer from giving a negative or false employment reference (or refusing to give a reference) because of a person's race, color, national origin, sex, religion, age, or disability. Employers may consider only providing the dates of employment when asked to provide a reference.

Credit Checks

Credit checks may be used for individuals with significant financial responsibilities or who handle significant amounts of currency or other valuables. Written procedures describing the process and use of the information should be established. Credit checks require written individual authorization. If an employer relies on the credit check to deny a job, the employer must do the following:

Adverse Action Procedures

If the employer relies on a consumer report for an "adverse action" – denying a job application, reassigning or terminating an employee, or denying a promotion – be aware that:

Step 1: Before the employer takes an adverse action, the employer must give the individual a pre-adverse action disclosure that includes a copy of the individual's consumer report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" – a document prescribed by the Federal Trade Commission. The Credit Reporting Agency (CRA) that furnishes the individual's report will give the employer the summary of consumer rights.

Step 2: After the employer's taken an adverse action, the employer must give the individual notice – orally, in writing, or electronically – that the action has been taken in an adverse action notice. It must include:

- The name, address, and phone number of the CRA that supplied the report;
- A statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and

- A notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.

For additional information, see: <http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know>

Criminal Background Checks

Criminal background checks are required for some individuals such as social workers and law enforcement. They are recommended for individuals who work closely with vulnerable populations such as children and the elderly, and individuals who handle funds. Only entities listed in [N.D.C.C. § 12-60-24](#) are permitted to conduct fingerprint-based and biometric-based federal background checks on prospective employees through the Bureau of Criminal Investigation. (**NOTE:** State law mandates that many public employers conduct criminal history record checks (i.e. public schools, law enforcement, and social services). The North Dakota Attorney General has developed guidance to assist public employers with conducting criminal history checks. See: <https://attorneygeneral.nd.gov/public-safety/criminal-history-records/requesting-criminal-history-record-check>

Investigations should be conducted through the Bureau of Criminal Investigation (BCI), the FBI or private organizations that provide this service to employers at a reasonable fee. Written procedures for criminal background checks should be maintained and a standard protocol for use of criminal history should be established. Federal Equal Employment Opportunity laws do prohibit employers from discriminating when they use criminal history information.

See: http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm

When criminal background information is received, the employer needs to have a procedure for evaluating the information and deciding how to use the information. Convictions may not be an absolute bar to employment but should be considered on an individual basis in relationship to the job requirements and business necessity. The federal government provides guidance for reviewing the information and applying it to various situations. See sample federal review standards and background information: www.eeoc.gov/policy/docs/convict1.html

Driving Record

Driving records may be requested when driving is an essential requirement of the position. If a position requires a Commercial Driver's License, driving records must be obtained. An employer should also periodically request updated driver's records for those employees who must have a valid driver's license. Employers should assure that all employees/volunteers who drive have the appropriate classification of driver's license.

Driving records are required for "contract carriers." A "contract carrier" means a person engaged in the business of carrying passengers for hire and in that business does not operate on a fixed route. The term does not include a person who makes a single daily round trip to commute to and from work, a person transporting only schoolchildren and teachers, a person operating ambulance or funeral services, a person who, on occasion and not as a regular business enterprise, transports one or more passengers for pay, a

person operating stretched sedan-type limousines, nor a person operating a taxicab service using vehicles with a seating capacity of fewer than seven passengers. **School districts must ensure that their drivers are competent and responsible.**

Written procedures for driving record checks should be maintained and a standard protocol used. To obtain a driver's record, the employee should sign a written consent.

Post Offer Background Checks

The following checks, tests or examinations may be conducted **after** an employment offer. The applicant must be informed that the offer of employment is conditional based on the results of those checks, tests or examinations.

Alcohol and Drug Screening

Employers have an interest in requiring employees to be free of substance abuse problems, to avoid lost production time and expense, to avoid workplace accidents, and to comply with state and/or federal laws. As a result, many employers have initiated applicant drug testing programs prior to employment. Some employers limit pre-employment drug testing to applicants being hired into positions with safety, security or fiduciary concerns and those required by law.

The Omnibus Transportation Employee Testing Act of 1991 (49 Code of Federal Regulations (CFR) Part 40) mandates drug and alcohol testing for all persons who operate a commercial motor vehicle as a requirement of their jobs and who have a commercial driver's license are subject to the Act which includes pre-employment drug testing. See: www.dot.gov/ost/dapc/odapc/v3_slide0001.htm

Employers should consult with legal counsel prior to implementing a pre-employment drug testing program.

Medical Examinations

- **DO NOT** require a medical examination before offering employment. Standard physical / agility tests may be required for positions such as fire fighters/law enforcement if they directly relate to the job duties of a position. See: [EEOC Notice 915.002](#) for more details.
- **DO NOT** ask about health or disabilities prior to offering employment. The employer should explain any physical requirements of the job and the employer may ask the applicant if he/she can perform the requirements.

If applicant initiates a conversation regarding a disability, an employer may ask if there is an accommodation that will allow the person to perform the essential job functions.

The Americans with Disabilities Act (ADA) states that a covered entity shall not discriminate against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge, compensation, job training, and other terms, conditions, and privileges of employment. Under the ADA, an employer may not ask disability-related questions until after making a conditional job offer to the applicant.

Employers may, however, ask an applicant to perform specific job tasks as part of the job interview or inform the applicant of essential job functions and ask whether the individual is able to perform the requirements of the position with or without reasonable accommodation.

To protect against discrimination in hiring, medical examinations should not be performed prior to an offer of employment. Notice for the position should indicate whether a medical examination is required or whether the applicant must pass physical/psychological tests to be considered for the position. Medical exams may be conducted post-offer provided it would be required of all applicants for that position and that the examination is job-related and consistent with business necessity. Such examinations may be required of positions to determine fitness for job performance functions.

Generally, a medical examination may be performed by a physician or licensed medical facility designated or approved by the employer. (N.D.C.C. § 34.1-15)
See: <http://www.legis.nd.gov/cencode/t34c01.pdf>

Medical information on applicants or employees must be kept confidential. The information contained therein can be used for the limited purposes of making the final hiring decision and determining reasonable accommodations for the individual. Medical information is not subject to North Dakota open records law and should be maintained separately from the general personnel file.

Workforce Safety & Insurance Record

- **DO NOT** ask for worker safety records **prior** to offering employment

Employers have the opportunity to promote their commitment to a safe workplace environment. A safe work environment, accompanied by effective hiring practices, demonstrates an employer's commitment to its employees and prevention of workplace accidents. Employers who maintain effective hiring practices that focus on safety conscious employees will be better equipped to prevent injuries, protect their employees and actively promote a safe workplace.

Post offer pre-employment opportunities for employers can include employee screenings for safety-sensitive positions. At the conditional job offer stage, background checks may include workers compensation claims and employers can ask medical questions, including workers' compensation questions, but must ensure that the questions are job-related and are asked of all applicants in the same job classification.

Information contained in Workforce Safety & Insurance claim files is confidential and not open to the public with the exception of the claimant's name, date of birth, injury date, employer name, type of injury, whether claim was accepted, denied or still pending and whether the claim is in active or inactive pay status. To obtain any additional information, the employer must have the individual sign a release.

HIRING

Letter of Offer

It is critical to clarify the basic employment relationship. This can be accomplished through a written offer of employment. The written offer should inform the individual of the following:

- his/her employment status (i.e., at-will)
- whether or not there is a probationary period
- Fair Labor Standard Act classification (exempt/non-exempt status)
- the hours of work
- rate of pay
- benefits
- job duties/and/or title
- start date and time
- person to contact with questions
- date acceptance required by (date offer expires)
- any other relevant details
- if employment is conditional on meeting any other checks and/or examinations
- items to bring on the first day of employment (for I-9 verification and payroll information)
- deadline to accept offer of employment and how acceptance should be communicated to the employer, whether in writing or otherwise.

Applicants applying for North Dakota Veterans' Preference must be notified in accordance with veterans' preference laws. See: [N.D.C.C. § 37-19.1](#) and [Veterans' Preference](#)

If employers want to maintain a prospective employee's at-will status, the employer should be careful not to make representations or promises regarding duration of employment. See Chapter 4 – Employee Relations for more information regarding at-will employment status.

NEPOTISM IN LOCAL GOVERNMENT

Nepotism is the practice of allowing relatives to work for the same employer. Many employers have policies that restrict nepotism. Other employers require that relatives not work directly for or with each other or be placed in a position where potential collusion or conflict could occur. The policies most frequently cover spouses, brothers, sisters, mothers, fathers, sons, and daughters.

The head of an executive or an administrative department of a city may not appoint that individual's spouse, son, daughter, brother or sister to any position under the control or direction of that individual unless the appointment has been approved by the governing body of the city. See: [N.D.C.C. 40-13-13](#)

An agency or administrative head cannot appoint a county official's immediate family member to a position under the control or direction of that official. Such appointment may be made with an approved resolution by the board of county commissioners (see N.D.C.C. § 11-10-25 at <http://www.legis.nd.gov/cencode/t11c10.pdf>). Also see N.D.C.C. § 15.1-07-17 at <http://www.legis.nd.gov/cencode/t15-1c07.pdf> which has been interpreted to prohibit school districts from employing their spouse or relative. The North Dakota Century Code §15.1-30-12 states that the board may not enter a contract for transportation with a board member. Some local jurisdictions have local ordinances or regulations on nepotism.

POST-EMPLOYMENT REPORTING REQUIREMENTS

Employment Eligibility Verification I-9 Form

Employers must complete and retain an Employment Eligibility Verification I-9 Form for every employee hired to verify that the employee is eligible to work in the United States.

The form can be found at: <https://www.uscis.gov/i-9>

- Newly hired employees must complete and sign Section 1 of Form I-9 **no later than the first day of employment** and Section 2 must be completed by the employer **on or before the third day of employment**

See: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=409e1921c6898210VgnVCM100000082ca60aRCRD&vgnnextchannel=409e1921c6898210VgnVCM100000082ca60aRCRD>

The last page of the form lists the acceptable documents that may be used to verify employment eligibility. See: <https://www.uscis.gov/i-9> Employers CANNOT specify which document(s) they will accept from an employee.

- An employee may present either one document from list A or one document from list B **and** one document from list C
 - The employer may make copies of the document(s) to be retained with the I-9 Form but is not required to do so
- Once the individual's employment ends, the employer must retain the form for 3 years following the hire date or 1 year after termination, whichever is later. NOTE: This form is not filed with any government agency. It is retained by the employer to be made available to U.S. government officials of the Department of Homeland Security, Department of Labor, and Office of Special Counsel for Immigration Related Unfair Employment Practices.

E-Verify

Employers may voluntarily participate in this federal program, which screens applicants based on information contained on the I-9 to determine their eligibility for employment in the U.S. Some employers who are federal contractors may be required to participate in this program. More information about this program can be accessed by [clicking here](#).

The new electronic form cannot be signed electronically. Employers wishing to move to a fully electronic I-9 process generally must use a third party vendor to meet these requirements. Otherwise, employers and employees may fill out the new I-9 via the digital form, but when it comes to signing the form, the otherwise completed form will still need to be printed and signed manually. Once signed, the physical copy may be scanned and stored digitally.

Employee's Withholding Allowance Certificate (Form W-4)

Each employee must complete a Federal Form W-4 so that the employer can withhold the correct state and federal income tax from the employee's pay. Form W-4 can be found at: <http://www.irs.gov/pub/irs-pdf/fw4.pdf> The W-4 form may be used for state withholding elections unless otherwise specified by the employee.

New Hire Reporting

All employers must report all newly-hired employees no later than 20 days after the employee's first day of work to the North Dakota Child Support Enforcement Division. This includes full time, part time, and temporary employees, both adults and minors ([N.D.C.C. § 34-15-03](#)). Failure to report may result in civil penalties ([N.D.C.C. § 34-15-05](#)). Law requires employers with 24 or more employees to submit these reports electronically unless the employer applies and receives a waiver from the North Dakota Child Support Enforcement Division. Information can be submitted on-line at: <http://www.nd.gov/dhs/services/childsupport/empinfo/newhire/>

The following information is required:

- Employee's Name, Address, Social Security Number
- Employer's Name, Address, Federal Tax Identification Number
- Whether or not the employer offers health insurance to the employee

Legal Requirements Related to Recruitment / Selection – now found under the Resource Section on page R-2.

CHAPTER 3

COMPENSATION AND BENEFITS

OVERVIEW

Employer payment systems compensate employees by job category based on factors such as the skills, education and abilities required of the different jobs. Wages should be competitive and need to comply with state and federal laws and regulations affecting compensation.

A benefit is a form of direct or indirect compensation that provides added protection for employees, promotes goodwill, and allows the employer to be competitive in the marketplace. Although most benefits are provided by the employer on a voluntary basis, some are required by laws and regulations.

COMPENSATION

The goal of a compensation plan is to provide competitive wages for attracting new employees and retaining current employees on an equitable basis. It also assures compliance with organizational policies to provide consistent administration for wages and benefits, along with state and federal laws. A compensation plan may include an overall pay philosophy and policies and procedures that govern the operation of the compensation plan. Local governments should routinely review their compensation plan and salary range schedule.

Employer payment systems compensate employees by job category based on factors such as the skills, education, and abilities required for different jobs. The employer may also identify how an employee may receive a wage increase however, if the employer does this, it should clarify that wage increases are given at the discretion of the employer and dependent upon the entity's financial status. Teacher's salaries are negotiated between the board and the teacher's association. The board cannot deviate from the negotiated salary. The same is true for school administrators and superintendents. Some appointed and elected officials salaries may be negotiated.

Pay plans cannot discriminate based on factors such as sex, age, race, religion, national origin, disability or marital status, or public assistance status. The Equal Pay Act of 1963 prohibits unequal pay for equal or substantially equal work performed by men and women. To avoid liability, an employer should evaluate its pay plan and correct pay disparities. See: <http://www.dol.gov/whd/regs/compliance/hrg.htm>

Components of a Compensation Plan May Include:

- Job classification system: A job classification system groups jobs into categories based on the type of work involved with each job. These categories can then be linked to salary ranges. For instance, all jobs classified at the same level will be paid within the same salary range. A job classification system could involve:
 - Descriptions for each level or category of classification;
 - Descriptions for each position (see section on job descriptions);
 - Assignment of pay grade for each specific job classification or assignment of pay ranges for each specific job classification;
 - Description of how or when modifications will be made to the classification or pay.
- Required work hours and /or the availability of flexible schedules
- Pay periods
- Starting salary
- Probationary period, if applicable
- Process for salary adjustments
- Annual increases
- Performance based increases
- Promotion
- Lateral transfers
- Demotions
- Overtime payment or overtime compensatory time
- Time records (hours worked)
- Pay differentials which typically relates to non-performance based pay usually given to accommodate a specific working condition, (i.e. travel pay, on-call pay, or shift pay)
- Paid time off (sick leave or vacation leave)

Job Analysis and Classification

Assessing the relative worth of jobs and establishing salary levels that fairly reflect the job requirements are critical to an organization. The job analysis is a process that includes gathering information about the duties of each job, assessing the required qualifications, the work environment and physical requirements for job performance. Factors to consider include knowledge, education, skills, supervision given and received, physical requirements and other demands.

The federal government has an extensive resource for a variety of occupations and is available at O*Net. (<http://www.onetcenter.org>) It is an excellent starting point when conducting a job analysis.

The following are common methods used to classify jobs:

Job Ranking Method

Jobs are compared to each other and ranked based on the importance to the organization based on the requirements of the job and level of expertise needed for the job. Jobs are evaluated on the basis of the whole job. This is the simplest, quickest and most inexpensive method used to classify jobs.

Classification or Grading Method

Jobs are grouped into a predetermined number of grades or categories based on duties and responsibilities required of the positions.

Factor-comparison Method

This is a complex method that ranks each job by selected compensable factors and then dollar values for each level of each factor is assigned to each.

Point-factor Method

Points are assigned to various compensable factors typically including skill, responsibility, effort and working conditions. The total point value is compared with salary grades and assigned to the appropriate salary. Well-known examples include the Hay Plan and Broadband method. See:

<http://humanresources.about.com/od/glossary/j/job-classification.htm>

Information regarding a job may come from:

- **Observation** – visiting the job site and watching workers perform their job tasks;
- **Work sample** – taking a small segment of the total job that represents the typical tasks and duties performed to determine what the job entails – this information can come from observing the employee or reviewing work product such as reports
- **Work log** – having employees record their daily activities - noting the frequency of each task and the time required to perform each task
- **Interview** – interviewing current employees, managers, or other individuals who have information about the job;
- **Questionnaire** – having employees answer a standardized form with questions about the job. This provides a great deal of information in a relatively short time and is the most common method used. The responses are collected and compared to determine what the job entails
- **Perform the job** – performing the tasks of the job;
- **Other information** – conducting a review of the existing records in the organization such as current job descriptions, organizational charts, training manuals, policies and procedures and payroll records to get a sense of what the job entails; or
- **Multiple methods** – combining the above mentioned methods.

The method an employer uses depends on several factors including the purpose for the job analysis, the cost, the time frame, the accessibility of the job site, the repetition of job tasks, the number of employees, the amount of training needed to conduct the analysis and the availability of staff to conduct the analysis.

Once jobs are evaluated and pay ranges are established, individual employees may be evaluated to determine their pay within the established pay range. It is important that an employer retains the ability to modify an employee's salary. **Teachers and school administrators have unique rules and regulations for determination and modification of salary and wages.**

Wages

The current minimum wage in North Dakota is \$7.25 per hour. For more information, see: <http://www.nd.gov/labor/sites/www/files/documents/Min%20Wage%20Poster%20>

[%20Aug%202015.pdf](#) and [Federal poster](#)). Employees are entitled to compensation for all hours worked including preparation time, closing time, and any required meetings or training. North Dakota does not have a training wage. The minimum wage applies to all employees, regardless of age, unless the position is exempted by law or administrative rule.

The following must be paid at the employee's regular rate of pay:

- Time spent in mandatory meetings and training, except training required by the federal, state, or local government;
- Standby time on the employer's premises;
- On-call time when the employee is engaged to wait;
- Time spent putting on uniform or gear that is unique protective gear and/or integral and indispensable to the job,
- Travel time during the employee's regular work hours other than travel between home and work (passengers are excluded from this requirement). Time spent traveling on nonworking days during regular working hours is considered "work time." The driver of a vehicle is working at any time when required to travel by the employer.

See: <http://www.dol.gov/whd/regs/compliance/whdfs22.htm>

Payment of wages must be paid at least once every calendar month. Employers cannot pay different wages for comparable work based on sex. (N.D.C.C. § 34-06.1) For more information on wages, see: <http://www.legis.nd.gov/cencode/t34c06-1.pdf>

A work week is a seven consecutive-day period defined by the employer. Law enforcement requirements may be found at: <https://www.dol.gov/whd/regs/compliance/whdfs8.pdf>

When an employee's employment ends (whether voluntarily or involuntarily), any unpaid wages or compensation, unused accrued annual leave and earned overtime/compensation time becomes due and payable at the regular paydays established in advance by the employer for the periods worked by the employee. If the employee is terminated by the employer, wages payable shall be mailed by certified mail at an address designated by the employee or as otherwise agreed upon by both parties. If the employer fails to pay the wages within the stated time, the employee may charge and collect wages in the sum agreed upon in the contract of employment for each day the employer is in default until the employer has paid in full without rendering any service therefore, except the employee shall cease to draw wages or salary 30 days after such default. See: N.D.C.C. § 34-14-03 at <http://www.legis.nd.gov/cencode/t34c14.pdf?20130828083504>

Salary/Wage Adjustments

Policies may address under what circumstances salaries/wages may be increased. Some reasons for an increase are positive job performance reviews, cost of living adjustments, market comparisons, or promotions. Another basis for a salary/wage increase may be to correct inequities within the organization.

Policies should also address under what circumstances salaries/wages may be decreased, such as demotion or voluntary change of positions. Employees must receive written notification of any salary decrease.

Methods of Payment

Payment of wages is to be handled in a prompt and accurate manner in accordance with applicable state regulations. Policies should address how an employee will be paid as well as how an employer may recover overpayment of wages to an employee.

Wages must be paid in lawful money of the United States with checks convenient to the place of employment; with direct deposit in the financial institution of the employee's choice; or, at the election of the employee when offered by the employer, by delivery to the employee of a stored value card that meets the requirements of this section. (N.D.C.C. § [34-14-02](#))

Meal Breaks

North Dakota requires that an employee be offered a thirty minute unpaid meal break after a shift of five hours if there are at least two employees on duty. An employee may waive the meal break but it should be in writing and approved by the supervisor. If the employee is not completely relieved of duties during the meal break, the time must be paid and must apply to the 40-hour work week. See ND administrative rules:

<http://www.legis.nd.gov/information/acdata/pdf/46-02-07.pdf?20130425110833>

Work Breaks

Employers may allow employees to take breaks for a designated period of time while at work. If an employer allows employees to take breaks, they should indicate when these breaks should be taken – for example one in the morning and one in the afternoon – the length of break allowed and the permissible break locations.

Withholdings

Employers are required to deduct certain taxes from employees' wages/salaries such as federal income tax, social security and Medicare taxes, unemployment taxes and other tax withholding as may be required by state or federal law. Other deductions may be made pursuant to a court order or voluntary deductions as authorized in writing by the employee.

Several benefits are required by law to be provided by employers for employees, such as FICA taxes (Social Security, Medicare), unemployment insurance, and workers compensation.

Social Security

Employees contribute a percentage of wages and the employer matches the contribution. If the employee is paid more than the annually established wage base for the year, deductions will no longer be made. For example, in 2018, the wage base for Social Security tax is \$128,400. Once the maximum wage is earned, the tax is no longer deducted. See: <http://www.ssa.gov/employer>

Medicare

Employees contribute a percentage of wages and the employer matches it. There are no maximum wage bases for the Medicare portion of the FICA tax.

Unemployment Insurance

Unemployment insurance is intended to compensate the unemployed. Generally, workers are eligible for unemployment insurance benefits if they are out of work through no fault of their own. For that reason, the burden is on the employer to prove disqualifying circumstances. Proving disqualifying circumstances must be done by the deadline established by ND Job Service on the unemployment claim form or **the employer will forfeit his/her appeal rights.**

Disqualifying Circumstances

The burden is on the employer to establish that a disqualification exists. The two most common grounds for disqualification from unemployment compensation are:

- 1) Voluntary quits: Resignation (coupled with a waiver of hearing rights for certain public employees such as school employees with continuing contract rights), is the most successful employer defense; and
- 2) Discharge for misconduct: Where the grounds for discharge are substantially more than simple unsatisfactory performance. Misconduct may be a defense if it is sufficiently egregious.

For more information on reasons for disqualification, the unemployment claims process, and calculating unemployment benefits, see:

<http://www.jobsnd.com/resources/employers-guide>

Posting of Notice

Job Service North Dakota provides a poster that satisfies the mandatory notice requirement. See:

<http://www.jobsnd.com/sites/default/files/Employer%20Compensation%20Law%20Poster.pdf>.

Garnishment for Debt

Employers are required to comply with court orders to garnish employee's wages. Both federal and state law prohibits employers from terminating an employee because their wages have been garnished. (N.D.C.C. § 32-09.1-18) An order cannot be for less than \$25.00 and is in effect for one year but may be extended for 270 days. Because of potential penalties for non-compliance, legal counsel should be consulted when garnishment orders are received.

See federal link: <http://www.dol.gov/compliance/guide/garnish.htm>

See North Dakota link: <http://www.legis.nd.gov/cencode/t32c09-1.pdf>

Child Support Garnishment

Child Support income withholding orders may be issued to an employer and must be complied with. An employer who willfully fails to comply with the orders may be subject to penalties. See: <http://www.legis.nd.gov/cencode/t14c12-2.pdf> Employers with more than 24 employees and more than four income-withholding orders are required to submit payments electronically to the child support agency. An employer with four or fewer

income withholding orders may opt out of electronic payment in writing. (N.D.C.C. § [14-09](#))

Nonresident Employees

Income earned by a nonresident employee is excluded from state income tax if the nonresident has no other income from sources in North Dakota for the pertinent tax year and is present and working in North Dakota for fewer than 20 days a year. Additionally, the nonresident employee's home state must have a substantially similar exclusion or no state income tax. There are various exclusions to the statute, including persons performing construction work to improve real property. (N.D.C.C. § [57-38-59.3](#))

Limitations on Withholdings

Except for those amounts that are required under state or federal law to be withheld from employee compensation or where a court has ordered the employer to withhold compensation, an employer may only withhold from the compensation due employees:

1. Advances paid to employees, other than undocumented cash.
2. A recurring deduction authorized in writing.
3. A nonrecurring deduction authorized in writing, when the source of the deduction is cited specifically.
4. A nonrecurring deduction for damage, breakage, shortage, or negligence must be authorized by the employee at the time of the deduction.

See: <http://www.legis.nd.gov/cencode/t34c14.pdf?20151101112024>

OTHER REQUIREMENTS

Consolidated Omnibus Reconciliation Act (COBRA) of 1985

The Act provides certain former employees, retirees, spouses, former spouses, and dependent children the right to temporary continuation of health coverage at group rates for a limited period of 18 or 36 months, depending on the type of qualifying event that gave rise to the COBRA rights. This coverage, however, is only available when coverage is lost due to qualifying events. Employers with 20 or more employees on more than 50% of its typical business days in the previous calendar year who maintain group health plans must provide qualifying employees the option to continue health care coverage under the employer's plan. The employee pays for the cost of the health insurance and the employer may require up to a two-percent administrative fee.

For an overview of specific events that qualify an employee for COBRA and an overview of the law, see: <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/cobra-continuation-health-coverage-compliance>

Continuation of Health Benefits for ND Employers with Less Than 20 Employees

As explained by the ND Insurance Commissioner's website, if an employer has less than 20 employees, his/her employees will fall under North Dakota state law [N.D.C.C. § 26.1-36-23](#), which identifies the specific rules and regulations to continue an employee's group health coverage after termination of employment. Like COBRA, coverage is only temporary—39 weeks. Employees must also pay the entire premium to the employer.

Family Medical Leave Act of 1993 with 2008 Amendments (FMLA)

FMLA is a continuously changing requirement. Please see the local government legal counsel or the Department of Labor website: <http://www.dol.gov/whd/fmla/> for current information.

The FMLA requires all public employers to provide eligible employees with up to 12 weeks of unpaid leave in a 12 month period if the leave is for a qualifying personal or family medical condition necessary. FMLA also provides 26 weeks of unpaid leave to care for a family member who is a covered veteran with a qualifying condition (military caregiver leave). In order to be eligible to take leave under the FMLA, an employee must:

- work for a covered employer;
- have worked 1,250 hours during the 12 months prior to the start of leave;
- work at a location where the employer has 50 or more employees within 75 miles; and
- worked for the employer for 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave. If an employee has a break in service lasting 7 years or more, the time worked before the break will not count unless the break in service is (1) due to an employee's fulfillment of military obligations, or (2) governed by a collective bargaining agreement or other written agreement.

Note: the hours of service requirement include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included.

When can an eligible employee use FMLA leave?

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid, job-protected leave in a 12-month period for one or more of the following reasons:

- for the birth of a son or daughter, and to bond with the newborn child;
- for the placement with the employee of a child for adoption or foster care, and to bond with that child;
- to care for an immediate family member (spouse, child, or parent – but not a parent “in-law”) with a serious health condition;
- to take medical leave when the employee is unable to work because of a serious health condition; or

- for qualifying exigencies arising out of the fact that the employee’s spouse, son, daughter, or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces.

What benefits must be offered through FMLA?

Job restoration, group health insurance coverage on the same terms as before the leave, and maintenance of paid leave are required benefits. For additional information, see: <http://www.dol.gov/whd/regs/compliance/whdfs28a.htm>.

What are the notice requirements for both employees and employers regarding FMLA?

Communication is critical in the determination process of eligibility for FMLA benefits and in the development of a FMLA plan. Both employees and employers have responsibilities. For specifics, see: <http://www.dol.gov/whd/regs/compliance/whdfs28e.pdf> and <http://www.dol.gov/whd/regs/compliance/whdfs28d.pdf>.

Leave under the FMLA for Spouses Working for the Same Employer

When spouses work for the same employer and each spouse is eligible to take FMLA leave, the FMLA limits the combined amount of leave they may take for some, but not all, FMLA-qualifying leave reasons. See: <http://www.dol.gov/whd/regs/compliance/whdfs28l.pdf>

Health Care Benefits

All employers have legal responsibilities regarding health care benefits and reporting requirements under the Affordable Care Act (ACA). For additional information regarding these requirements, see:

<http://www.irs.gov/Affordable-Care-Act/Employers>

<http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>

<https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers>

Other optional health care insurance plans that may be offered to and paid by employees include long-term care insurance, dental, vision and cancer care coverage.

Health Insurance Portability and Accountability Act (HIPAA)

The Health Insurance Portability and Accountability Act (HIPAA) is a federal law that imposes portability, non-discrimination, and certain other requirements on employer-sponsored health plans. As discussed elsewhere in this guide, HIPAA includes regulations covering how employers must protect employees’ medical privacy rights as well as the electronic disclosure of employees’ medical information. HIPAA also applies to group health plans maintained by employers with two or more employees and requires employers to cover employees’ and their dependents’ pre-existing health conditions under certain circumstances.

Jury Leave

North Dakota law provides that an employer may not deprive an employee of employment because of serving as a juror or attends court in response to a subpoena. See: <http://www.legis.nd.gov/cencode/t27c09-1.pdf> (N.D.C.C. § 27-09.1-17). There is no requirement that the employee must be paid for time absent by the employer.

Military Leave

N.D.C.C. § 37-01-25 addresses employees of state or political subdivisions who are members of the National Guard or other military service. An employee, who has been employed for 90 days, is entitled to receive 20 workdays each calendar year without loss of pay for military service. There are also clear re-employment rights for veterans that must be followed.

See: <http://www.legis.nd.gov/cencode/t37c01.pdf?20151101130624>

Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994

USERRA provides reemployment rights if an employee is absent for up to five years for military service. An employee eligible for reemployment must be restored to the job or comparable job and benefits that would have been attained without the absence for military service. For specific information, see: <https://webapps.dol.gov/elaws/userra.htm>

Workers Compensation

Workers compensation benefits provide protection for employees in the event of a work-related injury or illness. The program provides medical coverage and a portion of lost wages due to a job-related injury or illness. North Dakota law requires every employer doing business within the state to carry workers compensation coverage. Coverage is required from the first day. The only business exceptions are farmers and clergy.

In North Dakota, workers compensation is handled by the Workforce Safety and Insurance agency. An employer should have appropriate forms and a procedure to file a claim.

See: <https://www.workforcesafety.com/employers/online-services>

Benefits

Workers who are injured or become unable to work as a result of work-related activity may be entitled to six types of benefits:

- Necessary and reasonable care;
- Wage loss if unable to work for five days or more on doctor's order;
- Wage loss due to loss of use of 16 percent or more of whole body;
- Vocational rehabilitation;
- Death benefits to surviving spouse and dependents; and
- Liaison services of the Office of Independent Review.

Reporting and Assessment Fee

An employer is responsible for the first \$250 or \$350 of medical expenses for each worker's compensation claim filed with WSI. Employers are billed monthly for assessable claims costs paid during the previous month. WSI offers an early reporting incentive and may waive the assessment charge if:

- A claim is filed with WSI by midnight (central time) of the next WSI business day following the injury date.
- A worker reports an incident, but does not seek immediate medical attention, the employer should file an Incident Report online on WSI's website. In order to qualify for the \$250 waiver, the incident should be filed by midnight (central time) of the next WSI business day following the injury date. If that worker later seeks medical attention and claim is received by WSI within 14 calendar days of the incident, the \$250 assessment charge will be waived. Without the filing of the Incident Report, the \$250/\$350 medical assessment will still be charged if a claim is eventually filed.
- Employer pays \$250 if an injury occurs and the claim is received by WSI or filed by a medical facility within 2 – 14 calendar days after the injury date, the employer is responsible for the first \$250 of medical expenses.
- Employer pays \$350 if an injury occurs and the claim is received by WSI or filed by a medical facility more than 14 calendar days after the employer notification date the employer will be charged the first \$350 of medical expenses.

Posting of Notice

N.D.C.C. § [65-04-04](#) requires that you post your "Certificate of Premium Payment" and WSI's Fraud and Safety Hotline number in a conspicuous place for your workers to see (**NOTE:** the Certificate displays the required Fraud and Safety Hotline number). WSI also encourages you to post the Important Notice to Employees Poster in a conspicuous place for workers to see.

<https://www.workforcesafety.com/sites/default/files/employers/ImportantNoticetoWorkersPoster.pdf>

ND FRAUD AND SAFETY HOTLINE (1-800-243-3331)

Number for reporting fraud and unsafe work conditions; calls are confidential.

OPTIONAL BENEFITS

Bereavement Leave (Funeral Leave)

Some employers provide employees with paid funeral leave if someone from their immediate family dies. If an employer provides the benefit, the policy should define the amount of time allowed (usually two to three days) and it should specify eligibility based on the relationship of the deceased to the employee.

Cafeteria Plan

A cafeteria plan is a separate written plan maintained by an employer for employees that meets the specific requirements and regulations of Section 125 of the Internal Revenue Code. It provides participants an opportunity to receive certain benefits on a pretax basis. Participants in a cafeteria plan must be permitted to choose among at least one taxable benefit (such as cash) and one qualified benefit.

A qualified benefit is a benefit that does not defer compensation and is excludable from an employee's gross income under a specific provision of the Code, without being subject to the principles of constructive receipt. Qualified benefits include the following:

- Accident and health benefits (but not Archer medical savings accounts or long-term care insurance)
- Adoption assistance
- Dependent care assistance
- Group-term life insurance coverage
- Health savings accounts, including distributions to pay long-term care services

The written plan must specifically describe all benefits and establish rules for eligibility and elections.

A Section 125 plan is the only means by which an employer can offer employees a choice between taxable and nontaxable benefits without the choice causing the benefits to become taxable. A plan offering only a choice between taxable benefits is not a Section 125 plan. For more information, refer to: <https://www.irs.gov/government-entities/federal-state-local-governments/faqs-for-government-entities-regarding-cafeteria-plans>

Disability Benefits

Disability plans provide income for an employee who becomes disabled (non-work related) and is unable to work. Some disability plans may provide income for a deceased individual's family member should the employee die prematurely. The employer may provide and pay for this benefit or it may be acquired and paid for by the employee.

Early Retirement Programs

Many public employers have created what are perceived to be mutually beneficial early retirement programs. Employers must assure that incentive programs do not violate the federal Older Workers Benefit Protection Act (OWBPA). For more information, see: <http://topics.hrhero.com/older-workers-benefit-protection-act-owbpa/#>

These age-based early retirement programs are currently the subject of litigation and EEOC audits, with expensive damage awards being imposed on well-intentioned public employers. One way to avoid such discriminatory practices is to develop an incentive program that ties eligibility to years of service.

Employee Assistance Programs

Employee assistance programs provide an array of professional counseling services for employees and their family members including substance abuse, marital and family difficulties, financial problems and emotional distress. Generally, a limited number of appointments are provided at no charge to the employee. An employer contracts for this service. No information related to an individual employee's participation is provided to the employer unless authorized by the employee. However, an employer may receive a summary utilization report without individual identification.

Flexible Spending Accounts

Flexible spending accounts allow employees to set aside money to be used for group-sponsored medical, dental, vision and group term life plan premiums, along with eligible medical/dental/vision expenses, including some over-the-counter (OTC) items or drugs not paid by insurance, and eligible dependent care expenses. The money set aside is deducted prior to taxes, thereby reducing the employee's taxable income. The plans are governed by Section 125 of the Internal Revenue Code. See: <https://www.irs.gov/government-entities/federal-state-local-governments/faqs-for-government-entities-regarding-cafeteria-plans>

Holiday Pay

Employers often pay employees who are not required to work on certain national/state holidays. A list of designated holidays should be provided to all employees prior to the year in which the holidays fall. Employees who are scheduled to work on designated holidays may be provided an alternative day off.

Leave Donation Plan

A leave donation plan provides that an employee may donate sick leave or vacation leave to another employee who is unable to work because of a medical situation or because of a family member's medical situation or other situations defined by local policy. Eligibility criteria should be developed and adhered to in a non-discriminatory manner. Restrictions on donation and use of the plan should also be explained in the policy. Employers may release the name of the employee requesting leave with written permission but they should never release the medical reason for the request unless the employee authorizes disclosure.

Leave of Absence Without Pay

An employer may provide for extended periods of absence for an employee. The employer should have a written policy and approval criteria. While absent, the employee may be responsible to pay for all benefits.

Liability Protection

For information regarding liability protection for employees of political subdivisions, refer to [N.D.C.C. § 32-12.1](#).

[TABLE OF CONTENTS](#)

Life Insurance

Life insurance plans may be offered through an employer with a group plan.

Paid Time Off

Most employers provide some type of time off with pay. In lieu of providing both sick leave and vacation leave, some employers combine sick leave and vacation leave into what is called personal time, paid time off (PTO), or paid leave. Employees may use the time accrued for either an illness when they are not able to work or for paid vacation time. Paid time off, once earned or awarded, is considered wages upon separation from employment. If the paid time off is available for use at the time of separation from employment, the employer must pay the employee for that time at the regular rate of pay earned by the employee prior to separation.

Retirement Plans

Most employers provide retirement plans for employees as a method for employees to invest for their future financial security. Having a good retirement plan can make the employer competitive in the labor market. Retirement plans may provide for contributions from the employee or contributions from both employer and employee. Public employers may choose to participate in the **Public Employees Retirement System (PERS)**. See: <http://www.legis.nd.gov/cencode/t54c52.pdf>. **Public school teachers are required to be covered under the Teachers Fund for Retirement (TFFR)**. See: <http://www.legis.nd.gov/cencode/t15c39-1.pdf>

A *defined benefit plan*, also known as a traditional pension plan, promises the participant a specified monthly benefit at retirement. Often, the benefit is based on factors such as the participant's salary, age and the number of years he or she worked for the employer. The plan may state this promised benefit as an exact dollar amount, such as \$100 per month at retirement. Or, more commonly, it may calculate a benefit through a plan formula that considers such factors as salary and service. See: <https://www.irs.gov/retirement-plans/choosing-a-retirement-plan-defined-benefit-plan>

A *defined contribution plan* is a retirement plan in which the employee and/or the employer contribute to the employee's individual account under the plan. The amount in the account at distribution includes the contributions and investment gains or losses, minus any investment and administrative fees. Generally, the contributions and earnings are not taxed until distribution. The value of the account will change based on contributions and the value and performance of the investments. Examples of defined contribution plans include 401(k) plans, 403(b) plans, employee stock ownership plans and profit-sharing plans. A defined contribution plan provides more portability when employees move from one employer to another. See: <http://www.irs.gov/Retirement-Plans/A-Guide-to-Common-Qualified-Plan-Requirements> and <http://www.irs.gov/Retirement-Plans/Choosing-a-Retirement-Plan-Profit-Sharing-Plan>

A *deferred compensation plan*, as described in IRC section 457, is available for certain state and local governments and non-governmental entities tax exempt under IRC 501. The plans can be either eligible plans under IRC 457(b) or ineligible plans under IRC 457(f). Plans eligible under 457(b) allow employees of sponsoring organizations to defer income taxation on retirement

savings into future years. Ineligible plans may trigger different tax treatment under IRC 457(f). An employer may also contribute a portion to the employee's plan. See: <https://www.irs.gov/retirement-plans/irc-457b-deferred-compensation-plans>

Sick Leave

Employers may provide sick leave benefits by paying wages for an employee who is ill and unable to work. (NOTE: [N.D.C.C. § 15.1-16-19](#) requires schools to provide teachers with sick leave.) Sick leave time is generally earned based on time worked, (for example, eight hours of sick leave earned for every month of full-time employment). Employers may place a cap on the number of sick leave hours an employee can earn and retain.

If an employee is away from work for a specified period of time (typically 3 – 5 business days) due to sickness or an illness, an employer may request that an employee provide documentation from a physician.

Some employers allow a specified amount of sick leave that can be used by an employee to care for a member of the family who is ill.

Employers may want to consider the following issues when drafting sick leave policies:

- Determine eligibility for sick leave – for example, full time/part time/temporary or based on hours worked
- How employees accrue time – part-time employees accrue less than full-time
- How employees can use the leave – for their illness or a family member(s) illness
- What the employee's responsibilities are – such as calling in before shift
- When verification will be required – providing documentation from physician if asked
- What will be done with unused sick leave – can employees trade or donate sick leave
- Sick leave usage may also be applied to FMLA leave

Vacation Leave (Annual Leave)

Most employers provide some type of vacation time off with pay. Vacation time is accrued usually based on time worked. An employer may increase the amount of vacation time earned based upon the length of time the employee has been with the employer. An employer should provide a written policy that describes how leave is earned and used and who is eligible for these benefits. Unused accumulated vacation leave must be paid upon termination of employment.

An employer may require approval, in advance, of the employee planning to be absent from work. An employer may deny the leave if the absence would disrupt the operations of the entity or for other business-related purpose.

Wellness Plans

Many employers encourage their employees to stay healthy through wellness programs. Such programs may provide health risk assessments, access to smoking cessation programs, health screenings, and a variety of other health related programs.

Other Optional Benefits

Although not required, employers may offer employees additional benefits such as flexible schedules, professional development/educational opportunities or supplemental insurance options to make their place of employment more attractive for employees to stay and for recruiting new hires.

FAIR LABOR STANDARDS ACT OF 1938 (FLSA)

FLSA addresses child labor, minimum wage, overtime provisions, and recordkeeping requirements for employees. See: https://www.dol.gov/whd/regs/compliance/ca_main.htm and North Dakota requirements at: [ND Administrative Code 46-02-07 \(4\)](#)

- **Child Labor:** The Act establishes employment limitations for youth labor and prohibits their employment in certain jobs in conditions that may be detrimental to their health and well-being.
- **Minimum Wage:** The Act requires employers to pay a minimum wage to its employees. If the state has enacted a higher minimum wage amount than the federal provision, the employer must pay the higher minimum wage.
- **Overtime:** Covered nonexempt employees must receive overtime pay for hours worked over 40 hours per work week at a rate not less than one and one-half times the regular rate of pay. A public employer may allow employees to earn compensatory time at the equivalent rate. Paid time off, such as holidays, vacation time and sick leave time is not included in determining hours worked. An employer must define the work week for overtime purposes.
- **Recordkeeping:** Employers must display an official poster containing the requirements of the FLSA. Employers must also keep records regarding employees' time worked and pay received for at least 3 years.

Link to FLSA poster: <http://www.dol.gov/whd/regs/compliance/posters/minwagebwp.pdf>

Some employees are exempt from the FLSA's overtime requirements and do not have to be paid for hours worked over 40 hours per workweek.

Exemptions from Overtime Requirements

NOTE: The Department of Labor proposed revisions to the exemptions in 2015 which will increase the current minimum salary requirement to \$913/week or \$47,476/year; increase the threshold for the highly compensated employee to at least \$134,004. Final rules from the U.S. Department of Labor are still pending. See: <https://www.dol.gov/whd/overtime/final2016/faq.htm>

Current FLSA standards are as follows:

Executive Exemption

- The employee is compensated on a salary basis at a rate not less than \$455 weekly (\$23,660 annually);

- The employee's primary duty must consist of managing the organization or a customarily recognized department of the organization;
- The employee must customarily and regularly direct the work of two or more full-time employees or equivalents;
- The employee has the authority to hire or fire other employees or make recommendations that carry weight on significant employment decisions.
Examples: executive officer, controller, vice president, director

Administrative Exemption

- The employee is compensated on a salary basis at a rate not less than \$455 weekly;
- The employee's primary duty must consist of performing office or non-manual work directly related to the management or general business operations of the company;
- The employee's job includes the exercise of discretion and independent judgment with respect to matters of significance.
- Examples: manager, supervisor, administrator

Professional Exemption

- The employee is compensated on a salary basis at a rate not less than \$455 weekly;
- The employee's primary duty consists of the performance of work that requires advanced knowledge defined as work which is primarily intellectual in character and includes the exercise of discretion and independent judgment;
- The advanced knowledge is in a field of science or learning; and
- The advanced knowledge was acquired by a prolonged course of specialized intellectual instruction (appropriate academic degree or combination of degree and experience).
- Examples: accountant, nurse, engineer

Creative Professional

- The employee is compensated on a salary basis at a rate not less than \$455 weekly; and
- The employee's primary duty consists of the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, or physical work.
- Examples: composer, singer, graphic designer, web designer

Computer Exemption

- The employee is compensated on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee's primary duty consists of one of the following or a combination of the duties:
- The application of system-analyst techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;

- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems.
- Examples: network analyst, developer, software engineer

Highly Compensated Employee

- Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more.
- The \$100,000 annual may consist of commissions, non-discretionary bonuses and other non-discretionary compensation.
- Customarily and regularly performs at least one of the exempt duties or responsibilities of the Executive, Administrative or Professional exemptions.

Other Exemptions

The exemptions provided by the FLSA from the overtime requirement do not apply to “blue collar” workers no matter how high their pay. The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling, or extinguishing fires of any type; rescuing fire, crime or accident victims, preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work. See: <https://www.dol.gov/whd/regs/compliance/whdfs8.pdf>

On-call Time

An employee who is required to remain on his or her employer’s premises or so close thereto that he or she cannot use the time effectively for his or her own purposes is working while on-call and must be paid for the time. An employee who is required to remain at home or provide contact information is not considered to be working and the time is generally not paid time.

Whether hours spent on call are hours worked is a question of fact that is decided on a case-by-case basis. All on-call time is not hours worked for purposes of determining overtime pay. The DOL has developed an on-line advisor to assist employers in determining whether on-call time must be compensated or included for calculations of overtime pay. See: <http://www.dol.gov/whd/regs/compliance/whdfs22.htm> and [N.D.C.C. 46-02-07-02\(6\)](http://www.dol.gov/whd/regs/compliance/whdfs22.htm)

CHAPTER 4

EMPLOYMENT RELATIONS

EMPLOYMENT RELATIONSHIP

An employment relationship generally refers to the relationship between an employee and an employer. The employee works for the employer for remuneration and benefits and under certain conditions. An independent contractor is not considered an employee. A contractor is usually hired for a specific job or for a certain amount of time, and is not usually covered by most employer benefits, including worker's compensation programs. For a checklist on independent contractors, see: http://www.twc.state.tx.us/news/efte/appx_d_irs_ic_test.html

“AT-WILL” EMPLOYMENT – IN THEORY

The simple rule of “at-will” employment is that the employee may leave employment at any time and, likewise, the employer may terminate that employment at any time with or without cause. [N.D.C.C. § 34-03-01](#) states “An employment having no specified term may be terminated at the will of either party on notice to the other, except when otherwise provided by this title.” However, it is the exceptions to “the rule” that can create problems.

While termination may occur without good cause, it is best to have a reason to show that employment decisions are NOT based on unlawful discrimination. Employees are at-will unless they are subject to a merit system or civil service laws or by local policy.

North Dakota State law allows cities and political subdivisions to contract with the state Human Resource Management Services (HRMS) to administer their personnel services. (N.D.C.C. § 54-44.3-18) An entity may also be subject to HRMS if it is receiving federal grants-in-aid that require a merit system of employment. County Social Services is an example of an entity subject to HRMS. However, such an entity may request to administer its own merit system of employment through the Department of Human Services.

See: <http://www.legis.nd.gov/cencode/t54c44-3.pdf>

Teachers are under contract with a local board of education and can only be terminated in accordance with N.D.C.C. § 15.1-15. See: <http://www.legis.nd.gov/cencode/t15-1c15.pdf>

Cities with a population over 4,000 may adopt a civil service personnel system. If a city has not adopted a civil service, the voters may file a written petition demanding that the city adopt the system or place the option on a ballot. N.D.C.C. § 40-44. See: <http://www.legis.nd.gov/cencode/t40c44.pdf>

Merit and civil service employers may not consider employees at-will and must provide a notice of termination and a hearing process.

CODE OF ETHICS

An organization may establish a code of ethics which describes its culture and values. It provides guidance for conduct and for making decisions. A code of ethics should be individualized to the organization and may specify expected conduct examples.

A policy may include, in addition to the organization's values, adherence to laws, protection of confidential information, use of company assets, acceptance of gifts from clients, how misconduct is addressed, and that retaliation against reporters of questionable ethical activities will not be tolerated. For examples, see:

Cass County: <https://www.casscountynd.gov/home/showdocument?id=3194> page *i*

Burleigh County – (pages 140-148): <http://burleighco.com/uploads/resources/141/personnel-manual-book.pdf>

School board members should reference the ND School Board Association Manual:
<http://ndsba.org/Handbook/01-10-13%20Board%20Ethics.pdf>

EMPLOYEE HANDBOOKS

Employee handbooks provide employees with a reference source for an organization's policies and procedures. It may include, for example, personnel management policies, attendance requirements, wage and benefit requirements, dress code policies, leave and absence policies, drug testing policies, security and privacy issues, use of company electronic devices including computers and phones, sexual harassment/anti-discrimination policies, disciplinary processes, training and development opportunities, performance review, and a grievance policy, among others. If the employee handbook is not inclusive of all personnel policies, the employee should be notified about how to access those.

The handbook should contain a disclaimer that it is not to be construed as a contract or an exhaustive list of all employee responsibilities. It should also specify that the employer reserves the right to change policies or procedures as necessary. The disclaimer should be clear, conspicuous and reasonably easy to understand.

Many organizations require that new employees review the handbook and sign an acknowledgement that they have reviewed the policies and that they understand it is not a contract. Handbooks should be reviewed on a regular basis and changed as necessary. Employees should be notified of all changes and how to access a current employee handbook.

TRAINING AND DEVELOPMENT

Training and development may be provided for employees in support of the employer's goals. It should be made available to employees in accordance with equal opportunity employment laws.

New Employee Orientation

New employee orientation provides on-the-job training or work-related instruction that prepares employees to perform their jobs and to become familiar with the employer's policies, procedures, technology use, and other important aspects of the job and organization.

Training

Training provides knowledge, skills, and abilities that employees need to carry out their present work duties efficiently and effectively and is job/task specific. Training activities tend to be short-term in nature.

Activities involve programs and/or experiences designed to help employees become more efficient, or to equip them with the knowledge and skills that improve career advancement opportunities. Goals tend to have a long-term focus. Individual development plans can be established with annual performance evaluations.

Employee development may include tuition assistance, depending on needs of the organization, and is subject to budgets.

A written policy identifies the philosophy of the employer and outlines how needs are identified and describes the strategy for addressing those needs. Management needs to assure that all training is non-discriminatory and that all staff has equal opportunity for development. All training should be documented and placed in the employee's personnel file.

Professional Continuing Credits/Accreditation/Licensing

Whether an organization may financially assist professional staff with required credentialing and licensing expenses is dependent on its budget. If an organization allows assistance for such activities, keep in mind EEOC guidelines.

Mandated Training

In some instances, training is required by law, i.e., a covered entity under HIPAA is required to train all new employees. Employers are encouraged to provide routine training on key policy issues such as FLSA, FMLA, ADA, harassment and anti-discrimination.

Employee safety is a concern for all employees and training is often required by insurance carriers or workers compensation programs.

PRIVACY IN THE WORKPLACE

Public employees should have a limited expectation of privacy in the workplace. Specific privacy issues such as electronic monitoring, breast feeding arrangements, and HIPAA should be addressed in the organization's policy.

Written policies should be specific about the use of the entity's equipment and that the organization may monitor computer usage. The policy needs to include the fact that employees should have no expectation of privacy when using the organization's electronic or other equipment.

It is important for the employer to identify job-related reasons for search or surveillance policies and emphasize the purpose of such policies to protect employee safety and security and, in addition, to protect employer assets and liabilities.

Employers may conduct a search of an employee's workspace, desk, locker, or personal vehicle parked on employer grounds if the search is reasonable in scope and that there are reasonable grounds for the search. The same principle applies to a company-owned vehicle used by an employee.

The policy should also address how personal medical information is protected by the employer.

Employee Medical Information

Any medical information pertaining to an employee must be kept confidential and may not be disclosed without authorization from the employee. Most employers maintain separate medical files from personnel files in locked storage or electronic files with access to only those who need the information. This is especially important with public employees' personnel records because they are subject to open records laws. The employer should designate an employee(s) to assure confidentiality of medical information and HIPAA compliance.

Examples of medical information are drug test results, medical examinations for fitness of duty, documentation of disabilities, health insurance information, and some worker's compensation information.

Health Insurance Portability and Accountability Act (HIPAA) Privacy

- Regulates the use and disclosure of protected health information by employers with health plans.
- If an employer has any kind of health clinic operations available to employees, provides a self-insured health plan for employees, or acts as the intermediary between its employees and health care providers, it may handle the kind of health information that is protected by the HIPAA privacy rule.

North Dakota Open Records

- Medical information of public employees which has been provided in the course of employment is confidential and therefore not subject to open records

requirements. An employee's medical treatment or use of an employee assistance program is confidential. Medical records obtained as a result of enrollment in a uniform group insurance plan are confidential.

- Medical, psychological, and treatment records of inmates in the custody of the DOCR or local jails are confidential.
- Disclosure of confidential records is generally a class C felony.

Federal Wiretapping Act/Electronic Communications Privacy Act

This Act prohibits the intentional interception or disclosure of any wire, oral or electronic communication where there is a reasonable expectation of privacy. There are two exceptions:

1. if one party consents to the monitoring; and
2. businesses are permitted to use telephone equipment to monitor communications within the ordinary course of business.

Title I bans interception or disclosure of electronic communications.

Title II - Stored Communications Act regulates access to stored electronic communications.

See also the North Dakota statute N.D.C.C. § [12.1-15-02](#).

Telephone Monitoring

Employers may monitor calls with customers for quality-control purposes. Customers should be informed that the call is being monitored or recorded.

Technology Policies

Computer Use

Employers should have clearly defined computer use policies including prohibited activities, i.e. harassing others, violation of copy right laws, damaging computers, sharing proprietary information, social media (Facebook), or any unlawful use. Policies should inform employees of use monitoring policies and that there is no reasonable expectation of privacy. Employers may use computer software programs to allow them to see what is on the screen or stored in each employee's computer and file folders. Employers may monitor Internet usage, such as the various web sites the employee accesses. Employees who perform word processing or data entry may have their keystroke speed and volume monitored.

Mandatory Reporting of Child Abuse

A person who discovers images of child sexual activity on a workplace computer and suspects or knows a child is being abused or neglected must report the circumstances to the North Dakota Department of Human Services or its designee. See: <http://www.legis.nd.gov/cencode/t50c25-1.pdf>

Searches of Public Employees' Electronic Communications

An emerging question in the realm of public employment is if public employers have authority to search employee's electronic communication. Under the Fourth Amendment

of the U.S. Constitution, a government employer is permitted to conduct a workplace search without a warrant where the search is justified at inception (i.e., conducted for non-investigatory, work-related purposes or to investigate work-related misconduct), and the search is reasonable in scope (i.e., the employer only searches to the extent necessary). In a recent ruling, the Supreme Court determined that a police department's search of a pager issued by the department to an employee was not a violation of the employee's Fourth Amendment rights (*City of Ontario v. Quon*) and that the search was not excessively intrusive. The Supreme Court ruled that the department conducted the search for a legitimate work-related reason (to determine why the employee continually accrued texting overage fees) and not excessively intrusive because the police department reviewed only text messages sent while the employee was on duty.

The Supreme Court ruling in this case was narrow and case specific. Therefore, public employers should take the following precautions before searching an employee's electronic communications:

- Ensure workplace policies governing electronic communications on employer owned/issued technology state that employees have no reasonable expectation of privacy when using such technology.
- Provide policies governing electronic communications to all employees and have them sign an acknowledgement form that they have and read and agree to the policy.
- Consult your attorney **BEFORE** searching an employee's electronic device. Ask your attorney if the search is justified and what can reasonably be searched.
- Keep in mind that the Supreme Court only addressed searches of employer-issued electronic devices. Searching an employee-owned electronic device is uncharted territory. Consult your attorney **BEFORE** considering it.

Remember that the ND Open Records law applies to electronic communications and, if an open records request is made for e-mail or text messages, it must be honored. Protected information must be redacted.

Distracted Driving

Distracted driving is any activity that could divert a person's attention away from the primary task of driving. All distractions endanger driver, passenger, and bystander safety. It is illegal to text on a wireless communication device while driving in North Dakota. Exceptions include obtaining emergency assistance, to report a traffic accident, a medical emergency, serious traffic hazard, or immediate danger to someone's life, or to prevent a crime. Texting is allowed in an authorized emergency vehicle in the course of the user's official duties. For more information on distracted driving laws in North Dakota, see: <https://www.dot.nd.gov/divisions/safety/streetskills/distracteddriving.htm>

Possession of a Secured Firearm (N.D.C.C. § 62.1-02-13)

Effective August 1, 2015, no employer (public or private) may:

- Prohibit any customer, employee, or invitee from possessing any legally owned firearm, if the firearm is lawfully possessed and locked inside or locked to a private motor vehicle in a parking lot and if the customer, employee, or invitee is lawfully in the area.

- Make a verbal or written inquiry regarding the presence of a firearm inside or locked to a private motor vehicle in a parking lot or make an actual search of a private motor vehicle in a parking lot to ascertain the presence of a firearm within the vehicle. In addition, a public or private employer may not take any action against a customer, employee, or invitee based upon verbal or written statements of any party concerning possession of a firearm stored inside a private motor vehicle in a parking lot for lawful purposes. A search of a private motor vehicle in the parking lot of a public or private employer to ascertain the presence of a firearm within the vehicle may only be conducted by an on-duty law enforcement officer.
- Condition employment upon the fact that an employee or prospective employee holds or does not hold a concealed weapons license or any agreement by an employee or a prospective employee that prohibits an employee from keeping a legal firearm locked inside or locked to a private motor vehicle in a parking lot, if the firearm is kept for lawful purposes.
- Prohibit or attempt to prevent any customer, employee, or invitee from entering the parking lot or the employer's place of business because the customer's, employee's, or invitee's private motor vehicle contains a legal firearm being carried for lawful purposes, that is out of sight within the customer's, employee's, or invitee's private motor vehicle.
- Terminate the employment of or otherwise discriminate against an employee, or expel a customer or invitee for exercising the constitutional right to keep and bear arms or for exercising the right of self-defense as long as a firearm is never exhibited on company property for any reason other than lawful defensive purposes.

Note that the prohibitions listed above do not apply to:

- Any public or nonpublic elementary school, middle school, or high school property.
- Any correctional facility or institution.
- Property owned or leased by a public or private employer or the landlord of a public or private employer upon which are conducted substantial activities involving national defense, aerospace, or homeland security.
- Property owned or leased by a public or private employer or the landlord of a public or private employer upon which the primary business conducted is the manufacture, use, storage, or transportation of combustible or explosive materials regulated under state or federal law, or property owned or leased by an employer who has obtained a permit required under 18 U.S.C 842 to engage in the business of importing, manufacturing, or dealing in explosive materials on the property.
- A motor vehicle owned, leased, or rented by a public or private employer or the landlord of a public or private employer.
- Any other property owned or leased by a public or private employer or the landlord of a public or private employer upon which possession of a firearm or other legal product by a customer, employee, or invitee is prohibited under any federal law, contract with a federal governmental entity, or other law of this state.
- The state hospital.

See: <http://www.legis.nd.gov/cencode/t62-1c02.pdf>

Surreptitious Intrusion (N.D.C.C. § 12.1-31-14)

It is a Class B misdemeanor if an individual enters, intrudes on or interferes with another's privacy by surreptitiously gazing, staring, or peeping, with or without a device to observe, photograph or record events in a tanning booth, hotel room, or other place where an individual has an expectation of privacy. This law affects all employers with onsite restrooms, locker rooms, and changing areas. See: <http://www.legis.nd.gov/cencode/t12-1c31.pdf>

Women's Right to Breastfeed (N.D.C.C. § 23-12-17)

This statute gives women the right to breastfeed, in a discreet and modest manner, in any location where the woman and child are otherwise authorized to be and defines what constitutes an "infant friendly" employer for purposes of an employer's promotional material. The employer may use the designation "infant friendly" if it adopts a workplace breastfeeding policy that includes specific points outlined in the statute. See: <http://www.legis.nd.gov/cencode/t23c12.pdf>

EMPLOYMENT DISCRIMINATION

What is Discrimination?

North Dakota law defines discrimination as an act that results in unequal treatment of a protected class and that adversely affects enjoyment of employment or labor union membership. The protected classes include:

- Race, color, and national origin;
- Religion;
- Sex;
- Age;
- Physical or mental disability;
- Marital status;
- Public assistance status; or
- Participation in lawful acts off the employer's premises during non-working hours.

Local jurisdictions may include a non-discrimination policy based on sexual orientation or gender identity. See: <http://applyonline.hr.cityoffargo.com/>

The term "discrimination" also includes sexual harassment ([N.D.C.C. § 14-02.4-02](#)).

State and federal law prohibits discriminatory practices in any aspect of employment, including the following:

- Hiring and firing;
- Denying employment opportunities to a person because of marriage to or association with an individual of a particular race, religion, national origin, or an individual with a disability.

- Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities, or based on myths or assumptions about an individual's genetic information;
- 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;
- Other terms and conditions of employment.

Law also prohibits:

- Harassment on the basis of race, color, religion, sex, national origin, disability, genetic information, age or mental impairment;
- Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
- Discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

In addition to discrimination and harassment policies, many employers develop a discrimination and harassment complaint form to assist with investigating internal complaints. [The University of North Dakota has developed a sample form.](#)

Public schools are required to develop non-discrimination and anti-harassment policies under several federal laws. See: www.ed.gov/policy/rights/reg/ocr/index.html for more details. **State law also requires public schools to adopt a policy on bullying, which should be applicable to both students and staff.** See: [N.D.C.C. § 15.1-19-17 through N.D.C.C. § 15.1-19-22](#) for more details.

Other entities receiving federal funds should check with the state or federal agency from which such funds are disseminated to determine if they are required to adopt harassment and discrimination grievance procedures.

Discrimination policies should contain:

- An explanation of rights afforded to employees under civil rights laws
- An internal complaint filing procedure
- An explanation of the right to file a complaint with the ND Department of Labor or in state court. The process for filing a discrimination complaint with the ND Department of Labor is outlined in the How to File a Discrimination Complaint in North Dakota Brochure. See: <https://www.nd.gov/labor/sites/www/files/documents/Brochures/How%20to%20File%20a%20Discrimination%20Complaint%20in%20ND.pdf>

Affirmative Action Plans

Affirmative action involves proactive efforts to achieve and maintain a statistically balanced workforce with respect to various protected classes of applicants and employees.

Three federal laws require certain employers that do business with the federal government to implement Affirmative Action Plans: Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act, and the Rehabilitation Act. Federal contractors and subcontractors that employ 50 or more employees and enter into at least one contract of \$50,000 or more with the federal government must prepare and maintain a written affirmative action program for the recruitment, hiring, and promotion of women, minorities, disabled individuals, and protected veterans. See: <https://www.dol.gov/ofccp/regs/compliance/AAPs/AAPs.htm>

Age Discrimination in Employment Act (ADEA)

The ADEA protects individuals who are 40 years of age or older from employment discrimination based on age. See: <https://www.eeoc.gov/laws/statutes/adea.cfm>

Americans with Disabilities Act (ADA) of 1990

Employers are prohibited from discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities. The ADA also establishes requirements for telecommunications relay services. Employers are required to provide reasonable accommodations.

Title I = Employment Discrimination

Title II = Public Services

Title III = Public Accommodations

Title IV = Telecommunications

TITLE I – Employment Discrimination

The individual must be able to perform the essential functions of the job with or without reasonable accommodation.

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

Note: The Equal Employment Opportunity Commission has issued formal guidance to advise employees of their legal rights in the workplace regarding depression, post-traumatic stress disorder (PTSD) and other mental health conditions. For more information, see: https://www.eeoc.gov/eeoc/publications/mental_health.cfm

Medical Examinations – Pre-employment

It is generally unlawful for the employer to require medical examinations or to make inquiries as to whether an applicant or employee is an individual with a disability or as to the nature or severity of such disability.

What an Employer Can Ask

An employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation; the applicant will be able to perform the essential functions of the job.

Post Offer of Employment

After making a job offer, an employer may ask any disability-related questions and conduct medical examinations as long as it is required for everybody in the same job category.

An employer may withdraw an offer from an applicant with a disability only if it becomes clear that the individual cannot perform the essential functions of the job or would pose a direct threat (a significant risk of substantial harm) to the health or safety of him/herself or others.

Essential Functions of the Position

An employer should identify the essential functions of a position (as opposed to marginal functions) and physical and mental requirements necessary to perform the positions. Essential functions are those performed with frequency, or those that make up the essence of the position (the position exists to carry out those functions and are important to the organization). Essential functions need to be tied into the job description for each position.

Reasonable Accommodation

Employers are required to provide accommodations that will allow an individual with a disability to perform the essential functions of the position unless it imposes an undue hardship to the employer.

A reasonable accommodation is a reasonable adjustment to the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. Accommodations are to be made in the hiring process (application, tests and interview), performance of essential functions of the job, and equal opportunities in benefits and promotions. A [Reasonable Accommodation Request Form](#) from the University of North Dakota is also provided for use by public employers.

Undue Hardship

An undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.

Retaliation

It is also unlawful to retaliate against an individual 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.

Drug and Alcohol Abuse

Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations.

Individuals with alcoholism may be persons with disabilities; however, employers may hold illegal drug users and alcoholics to the same performance standards as other employees and employers may take actions to assure its compliance with the Drug Free Workplace Act.

ADAAA -The ADA Amendments Act of 2008

The 2008 Amendment to ADA makes changes to the ADA definition of disability that applies to both ADA and Section 503 of the Rehabilitation Act. Updated information is available at: https://www.eeoc.gov/laws/statutes/adaaa_info.cfm

A major life activity has been expanded to include major bodily function such as functions of the immune system, digestive function, and neurological and brain functions.

The definition of “regarded as” disabled has been expanded. The impairment does not need to have been perceived to limit or substantially limit a major life activity but cannot be one that is transitory or minor (duration of 6 months or less).

Employers are not required by ADAAA to reasonably accommodate a “regarded as” disability.

Benefit Discrimination

Benefit discrimination occurs where an individual has been denied benefits—or has received lower benefits—because of his/her age, disability, race, color, sex, national origin, or religion, or motivated by retaliation. Benefits covered include life insurance benefits, health insurance benefits, long-term or short-term disability benefits, disability retirement benefits, severance benefits, service retirement benefits, and early retirement incentives.

Under Title VII, an employer may never base benefit decisions on race, color, sex, national origin, or religion. An employer is also prohibited from excluding pregnancy, childbirth, or related medical conditions from its benefit plans or from singling out those conditions for different treatment. Complete guidance on avoiding benefits discrimination can be found at: <http://www.eeoc.gov/policy/docs/benefits.html>

Civil Rights Act of 1866, Section 1981

Prohibits racial discrimination in the making and enforcement of contracts among public and private employers. See: <http://finduslaw.com/civil-rights-act-1866-civil-rights-act-1871-cra-42-us-code-21-1981-1981a-1983-1988>

Civil Rights Act of 1964

- Prohibits discrimination on basis of race, color, religion, national origin and sex
- Includes an anti-retaliation provision that protects individuals who oppose illegal employment practices
- Requires filing of an annual EEO-1 Report (federal contractors with 50 or more employees, non-contract employers with 100 or more). For current reporting requirements, see: <https://www.eeoc.gov/employers/eo1survey/faq.cfm>
- Under Public Law 88-352, Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, all state and local governments that have 15 or more employees are required to keep records and to make such reports to the Equal Employment Opportunity Commission
See: <http://www.eeoc.gov/laws/statutes/titlevii.cfm>

Civil Rights Act of 1991

Allows employees who file suit for intentional discrimination under certain laws to have a jury trial and to collect compensation and punitive damages.
See: <http://www.eeoc.gov/laws/statutes/cra-1991.cfm>

Equal Pay Act of 1963

Requires payment of equal wages to male and female employees within the same entity who are performing equal work, requiring equal skill, effort, and responsibility and performed under similar working conditions. See: <https://www.eeoc.gov/laws/statutes/epa.cfm>

Executive Order 11246 of 1965

The Executive Order prohibits federal contractors and federally-assisted construction contractors and subcontractors, who do over \$10,000 in Government business in one year, from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin. The Executive Order also requires Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. Additionally, Executive Order 11246 prohibits federal contractors and subcontractors from, under certain circumstances, taking adverse employment actions against applicants and employees for asking about, discussing, or sharing information about their pay or the pay of their co-workers.

- Requires Affirmative Action Plan for minorities and women
See: <https://www.dol.gov/ofccp/regs/statutes/eo11246.htm>

North Dakota Human Rights Act

The North Dakota Human Rights Act extends employment discrimination to include prohibition on the basis of marital status, public assistance, and lawful activity off the employer's premises during non-working hours which are not in direct conflict with the essential business-related functions of the employer.(N.D.C.C. § 14-02.4) See: <http://www.legis.nd.gov/cencode/t14c02-4.pdf>

Pregnancy Discrimination Act (PDA) of 1978

Employers cannot refuse to hire a woman because of her pregnancy as long as she is able to perform the essential functions of the job. The Act requires employer short-term disability plans apply to pregnancy. This Act also requires equal treatment of pregnant employees in the administration of medical benefits. See: <http://www.eeoc.gov/laws/statutes/pregnancy.cfm>

Rehabilitation Act of 1973

- Prohibits employers who receive federal government contracts or financial assistance from practicing employment discrimination against individuals with disabilities
 - Requires an Affirmative Action Plan for individuals with disabilities for those organizations that have over \$50,000 in federal contracts
- See: <http://www.dol.gov/oasam/regs/statutes/sec504.htm>

Service Animals

It is the policy of this state that individuals who are blind, visually impaired, or otherwise disabled shall be employed in the state service, the service of the political subdivisions of the state, the public schools, and all other employment supported in whole or in part by public funds on the same terms and conditions as individuals who are not disabled, unless the particular disability prevents the performance of the work involved. An individual with a disability is entitled to be accompanied by a service animal in places of public accommodations. See: <http://www.legis.nd.gov/cencode/t25c13.pdf>

GRIEVANCES

A grievance is a complaint of dissatisfaction from an employee or group of employees concerning a variety of employment related issues. An employee grievance procedure should start with the immediate supervisor with additional levels of review to management who is authorized to make a final determination/resolution within the organization.

Employees should not be penalized or retaliated against for using the complaint procedure.

Written Grievance Policy

- Define the scope by identifying the actions that may be grieved
- Levels of review

- Time frames to file a grievance (i.e., 5 working days following event or action)
- Time frames for management review and response (i.e. 7 working days after receiving grievance)
- Retaliation statement

Alternative Dispute Resolution (ADR)

ADR are methods to resolve disputes by other means than litigation. The most commonly used methods include arbitration and mediation.

Arbitration

Arbitration is a proceeding in which a dispute is resolved by an impartial third person, chosen by the parties, and whose decision will be final, as agreed to by the parties.

Mediation

Mediation is a proceeding in which the parties meet with a third person, chosen by the parties, who facilitates the parties to arrive at a settlement or agreement. The mediator does not impose a resolution.

Retaliation

Retaliation is when an employer takes an adverse employment action against an employee because the employee engaged in certain activities. Employees have been given rights against retaliation under certain employment laws. Basically, an employer may not terminate employment, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding. Retaliation protection applies to the complainant even if the complaint is unfounded.

Employment Laws That Provide for Protection Against Retaliation

- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- Civil Rights Act of 1964 (Title VII)
- Equal Pay Act (EPA)
- Fair Labor Standards Act (FLSA)
- Family and Medical Leave Act (FMLA)
- North Dakota Human Rights Act (NDHRA)

Whistleblower Statute

Relates to conduct that may threaten public safety, is in violation of laws or financial waste in government. Retaliation complaints pertain to an employer's illegal interference with the rights of an individual to enforce their personal legal rights under the law and to support others who enforce their personal legal rights under the law (N.D.C.C. § 34-11.1-04). See: <http://www.legis.nd.gov/cencode/t34c11-1.pdf?20150917121116>

HARASSMENT

Harassment is defined as unwelcome conduct or actions, based on race, religion, sex, national origin, age, disability, military membership or veteran status, severe or pervasive enough to create a hostile, abusive or intimidating work environment for a reasonable person. Additional protected categories in North Dakota include marital status and public assistance status. Additionally, sexual orientation and gender identity have been ruled as protected under the sex category by some courts. All harassment should be prohibited and employees should be trained on harassment and anti-discrimination. An employer may also want to provide basic civility training.

Examples of harassment may include derogatory remarks, epithets, offensive jokes, display or circulation of offensive material (written or electronic), inappropriate touching and negative, non-verbal communication.

Public schools are required to develop non-discrimination and anti-harassment policies under several federal laws. See: www.ed.gov/policy/rights/reg/ocr/index.html for more details. The North Dakota School Boards Association has developed a [model procedure](#) to assist schools with compliance. State law also requires public schools to adopt a policy on bullying, which should be applicable to both students and staff. See: [N.D.C.C. § 15.1-19-17 through N.D.C.C. § 15.1-19-22](#) for more details.

Other entities receiving federal funds should check with the state or federal agency from which such funds are disseminated to determine if they are required to adopt harassment and discrimination grievance procedures.

Sexual Harassment

Unwelcome sexual advances or requests for sexual favors constitutes sexual harassment when submission to the conduct is required as a term or condition of employment or is the basis for employment action, or the conduct unreasonably interferes with an individual's work performance or creates an intimidating and/or hostile workplace environment. The victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

Sexual harassment can occur in a variety of circumstances including, but not limited to:

- The victim, as well as the harasser, may be a woman or a man.
- The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 and North Dakota law.

Quid Pro Quo

Quid pro quo is a form of sexual harassment when a manager/supervisor or a person of authority gives or withholds a work-related benefit in exchange for sexual favors from an employee or applicant.

Hostile Environment

Employees have a right to a safe and secure workplace where they are not subjected to unwanted advances or implied or actual threats. A hostile work environment can arise when speech or conduct is so severe and pervasive that it creates an intimidating or demeaning environment or situation that negatively affects a person's job performance. This type of harassment can be committed by anyone in the work environment such as a peer, supervisor, subordinate, vendor, customer, contractor or board member.

A policy should address the definition of harassment and that any harassment that creates an intimidating, hostile, or offensive work environment will not be tolerated. It should also address a complaint or grievance process and include several different reporting options. The policy should be posted conspicuously and provided to every employee. Harassment training should be provided to all employees and supervisors. For additional information, see: [Section V of EEOC Notice 915.002](#).

For a sample policy regarding sexual harassment, see Burleigh County Personnel Manual (pages 71-74): <http://burleighco.com/uploads/resources/141/personnel-manual-book.pdf>

The U.S. Equal Employment Opportunity Commission (EEOC) enforces federal discrimination laws, including harassment. An employee may file a complaint with EEOC but should be encouraged to notify an employer of complaints before filing a formal complaint with the EEOC. See: <http://www.eeoc.gov/employees/howtofile.cfm>

The North Dakota Department of Labor has developed a brochure to help employers and employees identify and respond to sexual harassment in the workplace. See: <https://www.nd.gov/labor/sites/www/files/documents/Brochures/Sexual%20Harassment%20in%20the%20Workplace.pdf>

SUBSTANCE ABUSE AND TESTING

The Drug-Free Workplace Act of 1988 requires *some* federal contractors and *all* federal grantees to agree that they will provide drug-free workplaces as a condition of receiving a contract or grant from a federal agency. See: <http://www.dol.gov/elaws/drugfree.htm>

Covered employers must have a policy prohibiting the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the workplace and specifying what actions will be taken in the event of violations.

Employers are required to provide the drug-free workplace policy to the employees including the requirement to notify the employer within five days if convicted of a criminal drug offense occurrence within the workplace. Employers must also provide communication to employees about the dangers of drugs in the workplace and the availability of employee assistance programs.

If an employee is convicted of a drug crime that occurred in the employer's workplace, the employer must take certain actions against the employee and notify the contracting or granting government agency. Failure to comply with these provisions or any of the Drug Free Workplace Act's other requirements can result in serious consequences. If a contractor violates the above-stated requirements, its contract may be suspended or even terminated.

Additionally, if enough of a contractor's employees have been convicted of criminal drug offenses for conduct occurring in the workplace, a federal agency can conclude that the contractor has failed to make a good-faith effort to provide a drug-free workplace and the same serious consequences of contract suspension or termination may follow.

Current North Dakota law will allow for use of medical marijuana. Additional information will be provided when the law becomes effective.

Substance Abuse Testing

There are several types of testing not mandated under the Drug-Free Workplace Act but are optional to the employer. When adopting a substance testing program, the employer should have a written policy that includes the process, confidentiality of records, and the ramifications of a positive drug test. The policy should identify that drug testing requirements are administered in an equitable and non-discriminatory manner.

Pre-employment Testing

Policy should identify if all new employees will be required to take a drug test for specific job categories. The policy should identify consequences of refusing, such as being denied employment.

Random Testing

Policy could apply to all employees or just those in safety sensitive functions or medical staff dealing with medications. The policy should identify how employees will be selected.

Probable Cause Testing

If an employee's conduct or work performance gives reasonable suspicion to believe that the employee may be under the influence of drugs or alcohol while at work or when representing the employer, the employee may be asked to take a drug test. Refusal to test may be grounds for termination.

Post-Accident Testing

An employee involved in an on-the-job accident or vehicular accident performing work for the employer may be asked to take a drug test.

SAFETY AWARENESS TRAINING

In North Dakota, the Workforce Safety and Insurance Agency (WSI) implements the Safety and Health program for the state. See: <http://www.workforcesafety.com/>

In North Dakota, OSHA exempts governmental units and political subdivisions from its jurisdiction.

Safety and health awareness training includes the following subjects:

- Hazard Communication (Employees Right to Know Chemicals used at work)
- Substance Abuse and Testing
- Workplace Violence
- Safe Operating Procedures
- Workplace Safety
- Ergonomics
- Defensive Driving

WORKPLACE VIOLENCE

The safety and security of employees and individuals served by the employer should be free from violence of any kind, such as abusive language, intimidation, threats, harassment, bullying or physical acts of violence. Workplace violence can occur from employees or from the outside, including customers, employee family members, or from terrorism activities.

The employer should conduct a worksite analysis to identify existing or potential hazards. From that analysis, a zero-tolerance policy should be developed including appropriate reporting, training, and safety procedures for employees to follow when threats or violence have occurred. Training of employees should include how to protect themselves and co-workers and protocols should be in place to secure law enforcement assistance, when necessary. A crisis communication policy may also be developed. For more information regarding workplace violence prevention and intervention, see: <https://www.osha.gov/SLTC/workplaceviolence/>

WORKERS COMPENSATION

Workers Compensation (WC) Insurance is an insurance program required by each state, paid for by the employer, and designed to protect the workers involved in a workplace injury and illness by providing reimbursement toward their medical bills and lost income.

In North Dakota, the Workforce Safety and Insurance Agency (WSI) manages the program for the state, including government agencies and political subdivisions.

An effective WC program needs to be based upon a strong safety program with emphasis on reduction or minimizing accidents, injuries, and illnesses. WC costs or premiums are strongly based upon an organization's number of past losses history: the fewer number of WC claims/losses, the lower the premium and the greater the claims/losses, the higher the WC premium/costs. Workers compensation costs are controlled by implementing a strong prevention component (safety) and a strong or aggressive reactive component (claims management).

See: <http://www.workforcesafety.com/>

Prevention

An important aspect of a WC program is identifying workplace hazards and correcting them before they cause an injury or accident.

Policy Development and Implementation

Policy development and implementation in areas such as light-duty and return to work, early or immediate reporting of workplace accidents/injuries, employee accountability, and close and rigorous tracking of WC claims by management are a few methods in proving effective claims management techniques.

Reporting

A workplace injury or accident needs to be reported to WSI within specific time frames. The type of form and time frames are dependent on whether the employee or client required medical attention. Requirements are available at the WSI webpage: <http://www.workforcesafety.com/>

Return to Work Program

An employer can help an employee return to work after a work-related injury through a modified work schedule or reassignment to another position on a temporary basis.

RISK MANAGEMENT

Risk management is the identification, assessment, and prioritization of risk followed by coordinated and economical application of resources to minimize, monitor, and control the probability and/or impact of unfortunate events. Insurance carriers often require entities to implement a risk management program.

Risks can come from uncertainty in financial markets, project failures, legal liabilities, credit risk, accidents, natural causes and disasters as well as deliberate attacks from an adversary. Several risk management standards have been developed. Methods, definitions and goals vary widely according to whether the risk management method is in the context of project management, security, engineering, industrial processes, financial portfolios, actuarial assessments, or public and private organizational health and safety.

Elements of a Risk Management Program

- identify, characterize, and assess threats or hazards
- assess the vulnerability of critical assets to specific threats
- determine the risk (i.e. the expected consequences of specific types of attacks on specific assets)
- identify ways to reduce those risks
- prioritize risk reduction measures based on a strategy
- disaster response and evacuation plans that provide for accounting of personnel

In North Dakota, the ND Insurance Reserve Fund is a not-for-profit organization owned by its members and offers a source of risk services to North Dakota's political subdivisions by providing cost effective liability coverage. For additional information, contact the NDIRF Risk Management staff at 1-800 421-1988 or go to: www.ndirf.com

COMMUNICABLE DISEASES

The employer may have a policy on how it will address the issue of employees with communicable disease. The policy should include:

- **Definition of communicable disease** – i.e. measles, influenza, viral hepatitis-A (infectious hepatitis), viral hepatitis-B (serum hepatitis), human immunodeficiency virus (HIV infection), AIDS, AIDS-Related Complex (ARC), leprosy, Severe Acute Respiratory Syndrome (SARS) and tuberculosis
 - additional information may be obtained from the Centers for Disease Control and Prevention
- **Non-discrimination statement** – i.e. Applicants and employees shall not be denied access to the workplace solely on the grounds that they have a communicable disease.
- **Employer rights** – i.e. The organization has the right to exclude a person with a communicable disease from the workplace facilities, programs and functions if the organization finds that, based on a medical determination, such restriction is necessary for the welfare of the person who has the communicable disease and/or the welfare of others within the workplace.
- **Confidentiality** – Like any other confidential medical information, an employee's personal health information must be kept confidential.
- **Pandemic** – A pandemic is a worldwide epidemic. Organizations should have a plan to address how an epidemic will be handled as part of its disaster plan.
- **Control** – Identify methods to limit the spread of communicable disease in the event of an epidemic or influenza break out.
- **Blood borne pathogens** – An organization should have a policy and procedure for responding to and cleaning up spills of blood or other body fluids that occur at the workplace. Such fluids should not be cleaned without appropriate protective gear and/or equipment.

SECURITY PROCEDURES

Workplace security involves the physical and procedural measures used to protect people, property, and information.

Security programs can be contracted with private security firms or provided by internal employees. In any event, sound and structured policies should be developed to address the security issues and needs of the organization.

Some security issues that should be addressed include the following:

- construction related issues of the physical plant, e.g. adequate lighting and closed-circuit surveillance
- office lay out - the employer should position desks so that employees' backs don't face the door
- personal security awareness training such as precautions to take when working after hours and workplace violence procedures in the event of co-worker threats
- security guards
- preventative security audits
- structural barriers e.g. fences, gates
- security hardware like keys, alarms, sensor systems
- theft and fraud safeguards
 - including computer protections and passwords, which may also include levels of access for employees dependent on work functions and need to access information
- internal financial procedures
- comprehensive investigations

ND DISASTER/EMERGENCY PLAN

As a result of events occurring September 11, 2001, and the many emergency operations which followed, President Bush issued Homeland Security Presidential Directive/HSPD-5, which mandated all federal agencies adopt the National Incident Management System (NIMS).

NIMS provides a consistent nationwide template to enable federal, state, tribal and local governments, non-governmental organizations, and the private sector to work together to prevent, protect against, respond to, recover from, and mitigate the effects of incidents regardless of cause, size, location, or complexity in order to reduce the loss of life and property and harm to the environment. It was originally published on March 1, 2004 and has been revised continually since. States not adopting and implementing NIMS will suffer the loss of Federal Disaster funding and support.

Former North Dakota Governor John Hoeven issued an executive order stating local and state emergency operations plans must incorporate the principals of NIMS to provide efficient and

effective emergency management coordination. This includes all units of emergency operations through state agencies, county emergency managers to the local level.

See: www.nd.gov/des/disaster

EMERGENCY PREPAREDNESS

An organization should develop a plan that describes actions to be taken by all personnel to respond to situations at the workplace that pose a threat to human health and the environment. In North Dakota, the Department of Emergency Services provides emergency planning and coordination on a state level however each local unit of government should have an internal operational plan to address provision of both essential and emergency response services.

A disaster plan is usually coordinated with local business, civic resources, government agencies, and disaster relief organizations. It addresses an agency's response to a disaster specific to the organization or to a community disaster.

In creating a disaster plan, an organization should address the following:

- identify a person to be in charge of coordinating an organization disaster response
- establish priorities in an emergency, i.e., protect lives, minimize the risk of injury, protect physical assets, minimize losses, resume normal operations
- test the plan-drills

A disaster response plan should include:

- orderly actions (i.e. evacuation)
- clear communication
- decision making
- priorities
- process to maintain accurate employee emergency contact information
- communication mechanisms to maintain contact with employees or clients (i.e. web site, phone chain, recorded phone messages, radio and TV announcements)
- retrieval of critical information
- relocation
- recovery plan

Emergency situations could include natural and human disasters such as:

Natural Disasters

- Floods
- Fires
- Hurricanes
- Earthquakes
- Tornados

Human Disasters

- Civil disasters

- Chemical/gas leaks
- Explosions/blackouts
- Epidemics
- Workplace violence
- Labor disturbances

WORKPLACE WELLNESS PROGRAMS

Many organizations have found it beneficial to employees' overall productivity by providing wellness programs. It tends to improve employees' health and physical well-being, on or off the job, improves morale and job satisfaction; reduces absenteeism, drug abuse, stress, and workplace violence.

These programs usually focus on prevention of health problems and may include on-site exercise programs, discounts at off-site gyms, smoking cessation, stress reduction, weight management and blood pressure management. A program can be as simple as providing information to employees as complex as providing medical screenings.

Wellness programs must adhere to all applicable laws such as the following:

Perfect Attendance Awards: FMLA impacts how perfect attendance awards are treated. If an organization encourages and awards employee's perfect attendance it may deny a perfect attendance award to any employee who does not have perfect attendance because of taking FMLA as long as other employees taking non-FMLA leave are treated in an identical way.

Under Health Coverage Portability and HIPAA regulations for wellness programs, employers must, among other things, offer a reasonable alternative such as enrolling in a smoking cessation program that allows employees to gain access to that better premium rate. Eligible individuals must have an opportunity to qualify for available discounts at least once a year. Employers must provide a reasonable alternative standard or waive the standard for individuals with a medical reason as to why they cannot achieve the goal.

CHAPTER 5

PERFORMANCE MANAGEMENT

OVERVIEW

Best Practice Quick Points:

- Establish a written policy and procedures
- Provide performance feedback
- Provide direction
- Identify employee development and goals
- **DON'T** wait to discuss performance problems!

Performance evaluations are not required, however they are a good way to identify performance expectations for each employee and provide feedback about the employee's attainment of those expectations.

Some employers, such as school districts, have a legal duty to conduct performance evaluations and must follow the applicable requirements, as follows:

- a. School superintendents (evaluations must be completed twice a year in accordance with [N.D.C.C. § 15.1-14-03](#).)
- b. Teachers and principals employed three or less years (evaluations must be completed twice in accordance with [N.D.C.C. § 15.1-15-01 \(1\)](#).)
- c. Teachers and principals employed four or more years must be evaluated at least once a year in accordance with [N.D.C.C. § 15.1-15-01 \(2\)](#).

The evaluation process, if the employer chooses to adopt one, should include feedback to employees about their performance, reinforcing their strengths, identifying any deficiencies or areas needing improvement, and providing assistance to help employees attain the employer's expectations. A successful improvement plan should include goals, a plan for achieving those goals, and a plan for re-evaluation to determine if the goals have been met.

Identifying the level of employee performance is a useful tool for management's use in making decisions regarding, for example, salary increases, promotions, terminations, organizational training needs and succession planning. Employees benefit by becoming aware of any problems, knowing how they are performing, receiving clarification about job expectations, and receiving reinforcement about their roles and contribution to the success of the organization.

If an employer develops a program to provide performance evaluations, it should apply to all employees and be completed at least annually. A standard form should be used throughout the

organization and a common rating system applied to all employees. The employer should train supervisors on the evaluation and rating system to ensure that it is applied uniformly.

The performance evaluation should be retained and placed in the employee's personnel file. The form should be completed by the supervisor, contain a section for employee comments, and be signed by the employee and supervisor.

If supervisors notice employee performance problems, they should not wait for the annual evaluation to inform employees. Problems should be brought to the attention of employees so that they have an opportunity to make corrections and to not continue undesirable performance. It is very important to maintain a record of performance issues.

The employer may adopt a mechanism for employees to request a review of their evaluations if they disagree. If the employer chooses to adopt such a policy, it should be in writing, identify the process, and include time frames for making the final determination. North Dakota law does not afford teachers the ability to request a review of their annual performance evaluation. See: N.D.C.C. § 15.1-17-03 available at: <http://www.legis.nd.gov/cencode/t15-1c17.pdf>

DISCIPLINE

When employee behavior or productivity does not comply with the employer's policies, requirements and/or job expectations, it is necessary to bring those deficiencies to the attention of the employees to give them an opportunity to improve. Most employers use progressive discipline which starts with a less severe approach, such as a meeting with the employee, and progresses with verbal warnings, written warnings and, if there is no improvement, termination. However, there are situations when immediate termination of an employee may be necessary based on egregious behavior. The level of discipline should be proportionate to the offense by considering the severity of the offense, performance history of the employee and the impact of the offense.

An employer may place the employee on a performance improvement plan which identifies the problems, goals, and time frame to achieve the goals. It is recommended that the supervisor conduct regularly scheduled meetings with the employee to assess progress towards meeting the goals.

All disciplinary actions should be documented, including verbal warnings or communications. It is also important to address undesirable behavior or other problems immediately. If there is a delay in dealing with problems, it could send a message that the behavior is acceptable or the behavior could intensify. It is also important for supervisors to apply policies and rules consistently.

When taking disciplinary steps, it is important to note the following:

- Employees need to know what the problem is
- Employees need to know how to fix the problem
- Employees need to have time to fix the problem
- Employees need to understand the consequences of inactions

Quick Reference Guide for Documentation of Disciplinary Action

Components Necessary for Supervisory Documentation:

- Date of Documentation
- Name of Person Completing Documentation (along with signature if possible)
- Name of Complainant and Witnesses
- Retain Witness Statements if Possible
- Describe the Incident
- Describe the Inappropriate Actions of Employee
- Describe Policy, Procedure, Standards that were Violated
- Describe the Impact of Incident

Components for Progressive Disciplinary Memo

- Date of memo
- Employee Name
- Factual Description of Incident
- Quick Summary of Prior Performance History (to show a pattern if negative in nature)
- Policy, Procedure or Standard Violated
- Performance Improvement Standards / Plan
- Consequences for Future Violations
- Employee Response Options
- Appeal/Grievance Process and Associated Timeframe
- Employee Acknowledgement Signature/Date and Supervisory Signature/Date

Sample documentation system:

- [Incident Memo to File](#)
- [Specific Incident Memo](#)
- [Summary Memo \(general\)](#)
- [Summary Memo \(with directives and consequences\)](#)

[Click here for guidance on evaluating a disabled employee's performance.](#)

The one **solution** that may reduce the likelihood of being sued and increase the chances of winning if sued is **documentation**. The first thing a plaintiff's lawyer wants to review is a terminated employee's personnel file. If it is full of "raises and praises" rather than "notice and need to improve," the probability of a lawsuit goes up markedly. Documentation of unsatisfactory job performance does not need to be perfect; **it just needs to be!** Documentation of the reasons for discipline or termination provide evidence that the actions taken by the employer were not motivated by any discriminatory reasons but rather based on performance.

TERMINATION

If the employee has failed to comply with disciplinary measures, it may be necessary to terminate employment of the individual. Just as an employee can terminate his or her employment with the company at any time for any reason, the company can terminate an employee at any time, with or without cause. **However, merit and civil service employers are required to implement a progressive disciplinary process prior to termination.** It is always a good practice to terminate employment for “just cause”.

Common categories of just cause discharges include poor job performance, violation of basic conditions of employment, and unprofessional behavior.

Some forms of misconduct can be grounds for immediate/automatic discharge such as:

- Making false statements on employment application
- Threatening, assaulting, fighting, or harassing employees, supervisors, or members of the public during course of business
- Theft of property
- Possessing a weapon inside a public building, based on local policy
- Reporting to work under the influence of alcohol or illegal drugs
- Falsifying or destroying company documents or computer files
- Breaching confidentiality
- Absenteeism without notification to employer

The policy may identify specific reasons for termination, such as the following:

- Inadequate quantity of work
- Violation of basic conditions of employment
- Poor attendance
- Insubordination - An employee's failure or refusal to follow a supervisor's instructions
- Poor interactions with co-workers and member of the public
- Failure to meet new policy standards
- Unprofessional behavior and misconduct
- Violation of work rules - such as violating work rules prohibiting conduct such as sexual harassment, intoxication, sleeping, smoking, or conducting personal business on the job
- Endangering health and safety of other employees and/or the general public
- Illegal conduct

An employer may terminate an employee for illegal conduct on the job, such as theft of money or property, using company computer to harass another individual or to obtain illegal porn, being under the influence of an illegal drug or possessing illegal drugs, or acts of violence in the workplace.

An employer may terminate an employee for illegal conduct off the job however, it is best to consult with legal counsel prior to termination. In some instances the illegal activity adversely impacts the entity’s reputation, ethical code of conduct, or diminishes the public’s trust in the employee. If the illegal activity results in the employee losing a required license or credential

necessary for performing the position for which he/she was hired, the employee is no longer able to meet the qualifications of the job.

The terminated employee should be given a written notice of termination, informed of any options to continue benefits, if applicable, given an opportunity to gather personal items from the work station, and informed of any grievance rights and time frames. An employer should also make arrangements for the final paycheck distribution.

Terminations should be treated in a confidential, professional manner by all concerned. However, all personnel records are open to the public.

Options for Terminating Employment

It is best practice to discipline and terminate an employee in accordance with the entity's policies. If the employee asks to submit a voluntary resignation instead of being terminated, it is best to seek legal counsel before making the decision to accept a resignation. The employee may later claim he/she was coerced into resigning against his will and may make a claim of constructive discharge or discrimination. However, there may be limited circumstances when the employer may want to consider allowing the employee to submit a resignation in lieu of termination. If an employee is allowed to resign, the following options may be considered.

Resignation

An employment relationship may be ended by mutual agreement through the use of a resignation. This option may enhance the employee's "re-employability" by providing a viable explanation for leaving prior employment (i.e., "I resigned" is preferable to "I was fired"). If it is truly a **voluntary** resignation, then the likelihood of a lawsuit is also substantially reduced if two prerequisites are met:

- A written resignation is obtained with a reason from the employee; and
- A waiver of all hearing rights (for certain public employees such as school personnel with continuing contract rights) is helpful in defending against unemployment compensation claims.

Early Retirement Plans

Early retirement is a form of "resignation with pay" that can be an effective means of ending employment on a friendly, mutually advantageous basis. The money paid out is often recouped over a short period of time by employing a less-experienced replacement at a lower salary. However, the problem of age discriminatory plans that violate the federal Older Workers Benefit Protection Act (OWBPA) must be addressed (see Chapter 3, Retirement Plans Section.)

Severance Agreement

A third option is the severance agreement. Similar to early retirement in some respects, this option should definitely include the use of a written document. That agreement should include:

- A payment provision;
- Withholding of income taxes (state and federal);
- Withholding of FICA;

- A voluntary resignation; and
- A statement that the employee is not eligible and will not apply for employment with the employer in the future.

It is recommended that legal counsel be used in all severance agreements.

REDUCTION IN FORCE (RIF)

A reduction in force generally occurs when an organization's conditions (i.e., economics, changing priorities, government mandates, or changes that impact positions) lead to decisions to reduce personnel.

Other measures may be taken to avoid terminations, such as not filling current vacancies, terminating temporary employees, cutting hours and overtime, or offering early retirement programs to those eligible.

The employer may develop a policy for making reduction in force decisions. If the employer adopts such a policy, it must strictly adhere to the policy it adopts. The policy should identify an evaluation process for determining the employer's needs by evaluating the work to be performed and the skills, knowledge and productivity of current staff. Other factors that may be considered include length of service and performance ratings. The employer must use non-discriminatory criteria to make reduction in force decisions.

School districts must comply with the non-renewal for reduction in force requirements contained in N.D.C.C. § 15.1-15-05. See: <http://www.legis.nd.gov/cencode/t15-1c15.pdf>

FINAL PAYCHECK AND BENEFITS UPON TERMINATION

Final Paycheck

No deductions should be made from an employee's wages, including withholding an entire paycheck, unless written authorization is obtained, pursuant to the applicable statute.

North Dakota Century Code § 34-14-04.1 states: "Except for those amounts that are required under state or federal law to be withheld from employee compensation or where a court has ordered the employer to withhold compensation, an employer only may withhold from the compensation due employees:

1. Advances paid to employees, other than undocumented cash.
2. A recurring deduction authorized in writing.
3. A nonrecurring deduction authorized in writing, when the source of the deduction is cited specifically.

A nonrecurring deduction for damage, breakage, shortage, or negligence must be authorized by the employee at the time of the deduction.”

Consolidated Omnibus Budget Reconciliation Act (COBRA)

COBRA provides employees and their families the right to choose to continue group health benefits provided by the employer for a limited period of time after termination or other specific events. Employees pay the premium for coverage.

Employers with 20 or more employees on more than 50% of its typical business days in the previous calendar year who maintain group health plans must provide qualifying employees the option to continue health care coverage under the employer’s plan. Employees must qualify for the benefit which is limited to 18 or 36 months, depending on the type of qualifying event that gave rise to the COBRA rights. The employee pays for the cost of the health insurance and the employer may require up to a two-percent administrative fee.

See: <http://www.dol.gov/ebsa/pdf/cobraemployer.pdf>

Continuation of Health Benefits for ND Employers with Less Than 20 Employees

As explained by the ND Insurance Commissioner’s website, if an employer has less than 20 employees, his/her employees will fall under North Dakota state law [N.D.C.C. § 26.1-36-23](#), which identifies the specific requirements to continue an employee’s group health coverage after termination of employment. Like COBRA, coverage is only temporary—39 weeks. Employees must also pay the entire premium to the employer.

Leave Balances

Paid time off, once earned or awarded, is considered wages upon separation from employment. If the paid time off is available for use at the time of separation from employment, the employer must pay the employee for that time at the regular rate of pay earned by the employee prior to separation. No employment contract or policy may provide for forfeiture of earned paid time off upon separation. An employment contract or policy may require an employee to take vacation by a certain date or lose the vacation (use it or lose it), provided that the employee is given a reasonable opportunity to take the vacation. The employer must demonstrate that the employee had notice of such contract or policy provision. (This language comes from [ND Administrative Code § 46-02-07-02 \(12\)](#).)

NOTE: A 2011 amendment to [N.D.C.C. § 34-14-09.2](#), which allows for certain exceptions to the paid time off pay-out requirements above, is **not applicable to public employers**.

Compensation time must be paid upon termination for all non-exempt employees and accrued sick leave benefits may be paid depending upon local policy.

Severance Pay

An employer is NOT required to pay severance pay. An employer may provide severance pay for employees subject to the reduction in force (RIF). The employer can use its discretion to determine the amount of severance pay it will provide. The employer's decision can be guided by the employee's rate of pay prior to the decision to reduce staff and the employee's length of service. The employer must use non-discriminatory criteria to determine whether severance pay will be awarded and the amount of the award.

Unemployment Insurance

Employees separated from employment because of a reduction in force are eligible for unemployment insurance, provided they meet the regular eligibility requirements. See Chapter 3.

EXIT INTERVIEWS

It is recommended that an exit interview/survey be conducted and documented whenever an employee terminates employment. Documenting the exit interview is particularly helpful when subsequent charges of constructive discharge are raised on grounds such as sexual harassment where no prior complaints were made or voiced during the exit interview. The interview should also contain documentation as to the reason the employee is leaving the entity. A standardized form can also be developed to determine why the employee is leaving, as well as any dissatisfaction with the workplace and working conditions. See sample [Exit Interview Questionnaire](#) under the Resources Section.

RESOURCES

The resources included in this section are provided as samples only. It is recommended that you consult legal counsel when developing documents for your respective entity.

SAMPLE

LEGAL REQUIREMENTS FOR RECRUITMENT / SELECTION

There are a variety of legal requirements in hiring practices including, but not limited to, the following federal and state laws:

Federal Laws

Age Discrimination in Employment Act (ADEA) of 1967 and amended in 1978
Americans with Disabilities Act (ADA) of 1990 and amended in 2008 ADA
Child-labor law, Civil Rights Act of 1964
Civil Rights Act of 1964
Drug Free Workplace Act of 1988
Equal Employment Opportunity Act
Equal Pay Act of 1963
Fair Credit Reporting Act (FCRA) of 1969
Fair Labor Standards Act (FLSA) of 1938
Freedom of Information Act (FOIA) of 1966
Genetic Information Nondiscrimination Act (GINA) of 2008
Glass Ceiling Act of 1991
Immigration Reform and Control Act (IRCA) of 1986
Pregnancy Discrimination Act (PDA) of 1978
Sex Discrimination Act of 1975
Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994
Veterans Benefit Improvement Act of 2004
Veterans Employment Opportunities Act

North Dakota State Laws

Child Support Reporting N.D.C.C. § 34-15-03
Civil Service in Cities N.D.C.C. § 40-44
Labor and Employment Including Child Labor Laws N.D.C.C. Title 34
Nepotism for County Government N.D.C.C. § 11-10-25
North Dakota Human Rights Act N.D.C.C. § 14-02.4
Peace Officer Standards N.D.A.C. Article 109-02
Protection in Providing Employment References N.D.C.C. § 34-02-18
School Board Standards and Requirements N.D.C.C. § 15.1
Veterans' Preference N.D.C.C. § 37-19.1

REQUIRED POSTINGS

The following are items that must be posted at the worksite. Many are required to be physically displayed in conspicuous places so they are easily visible to employees. Most required posters can be obtained at no cost through the ND Department of Labor. See: <https://www.nd.gov/labor/required-employer-posters>

Public sector employers do not need to post the “Employee Polygraph Protection Act Poster” or the “OSHA You Have a Right to a Safe and Healthful Workplace Poster”. Nonfederal employers that receive economic stimulus funds under ARRA are required to post the “Stimulus Fund Abuse Whistleblower Protections” poster.

Equal Employment Opportunity is the Law

Consolidated poster includes Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act, ADA, Equal Pay Act, and Veterans Discrimination protections. See: <http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm>

Family and Medical Leave Act (FMLA)

A notice explaining an employee's rights and responsibilities under the FMLA, including eligibility for leave, notice requirements, job protection, health benefit continuation, and contact information for DOL. See federal poster example at: <http://www.dol.gov/whd/regs/compliance/posters/fmla.htm>

North Dakota Minimum Wage & Work Conditions Summary

A notice about minimum wage, overtime pay, child labor laws, enforcement of the FLSA, and contact information for the U.S. Department of Labor (DOL) and North Dakota Department of Labor, can be found at: <http://www.dol.gov/whd/regs/compliance/posters/flsa.htm> and <https://www.nd.gov/labor/sites/www/files/documents/Min%20Wage%20Poster%20-%20Aug%202015.pdf>

Unemployment Compensation Law

The North Dakota Unemployment Compensation Law requires subject employers to post this notice near the location(s) where worker's services are performed. Employers are prohibited from posting this notice if they are not currently liable for coverage (N.D.C.C. § 52-06-35 and N.D.A.C. § 27-02-04-01). See: <http://www.jobsnd.com/sites/default/files/Employer%20Compensation%20Law%20Poster.pdf>

Uniform Services Employment and Reemployment Rights Act (USERRA)

Poster explains the rights, benefits, and obligations of employees covered under USERRA. See at: http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf

Workforce Safety & Insurance Certificate of Premium Payment

WSI does not issue an insurance policy. A Certificate of Premium Payment is the employer's proof of coverage and is issued upon receipt of premium payment. The certificate must be posted. **WSI encourages you to post the Important Notice to Workers poster** (<https://www.workforcesafety.com/sites/default/files/employers/ImportantNoticetoWorkersPoster.pdf>) in a conspicuous place for workers to see.

FMLA REFERENCE MATERIALS

[Fact Sheet # 28: The Family and Medical Leave Act of 1993](#)

[Fact Sheet #28A: Employee Protections under the Family and Medical Leave Act](#)

[Fact Sheet # 28B: FMLA leave for birth, bonding, or to care for a child with a serious health condition on the basis of an "in loco parentis" relationship](#)

[Fact Sheet # 28C: FMLA leave to care for a parent with a serious health condition on the basis of an "in loco parentis" relationship](#)

[Fact Sheet # 28D: Employer Notification Requirements under the Family and Medical Leave Act \(FMLA\)](#)

[Fact Sheet # 28E: Employee Notice Requirements under the Family and Medical Leave Act](#)

[Fact Sheet # 28F: Qualifying Reasons for Leave under the Family and Medical Leave Act](#)

[Fact Sheet # 28G: Certification of a Serious Health Condition under the Family and Medical Leave Act](#)

[Fact Sheet # 28H: 12-month period under the Family and Medical Leave Act \(FMLA\)](#)

[Fact Sheet # 28I: Calculation of Leave under the Family and Medical Leave Act](#)

[Fact Sheet # 28K: "Son or Daughter" 18 years of age or older under the Family and Medical Leave Act](#)

[Fact Sheet # 28M: The Military Family Leave Provisions under the Family and Medical Leave Act](#)

[Fact Sheet # 28M\(a\): Military Caregiver Leave for a Current Servicemember under the Family and Medical Leave Act](#)

[Fact Sheet # 28M\(b\): Military Caregiver Leave for a Veteran under the Family and Medical Leave Act](#)

[Fact Sheet # 28M\(c\): Qualifying Exigency Leave under the Family and Medical Leave Act](#)

[Fact Sheet # 44: Visits to Employers](#)

[Fact Sheet # 77B: Protection for Individuals Under the Family and Medical Leave Act](#)

INCIDENT MEMO TO FILE

Employee Name: _____

Date	Time	Incident	Notes	Supervisor's Initials
Sept. 9, 2017	7:50 am	Failed to sign in		
Sept. 23, 2017	N/a	Did not sign in		
Oct. 25, 2017	N/a	Did not sign out		
Nov. 23, 2017	8:00 am	Arrived late		

SAMPLE SPECIFIC INCIDENT MEMO

To: Employee name

From: Supervisor's name and signature

Date:

RE: Procedure for Student Grading

At the beginning of the 2017-18 school year, I gave you a copy of the high school faculty handbook and asked you to read and familiarize yourself with its contents.

On October 1, 2017, you and I met to discuss your grading system for the first six weeks of the 2017-18 school year. I expressed my concern to you that you did not comply with the high school faculty handbook regarding the student grading system. The handbook specifies that students are to have at least twelve daily grades and three test grades per six weeks in addition to a six-week examination grade. While you used the correct formula to compute grades, your English II students received only ten daily grades and two test grades for the first six weeks. This was not discovered until the six weeks had ended.

You explained that at your last place of employment, Minnesota Public School, the high school had no procedure regarding grades, and you assumed that this year you could establish your own grading system.

This memo's purpose is to explain that you are expected to follow all requirements in the high school faculty handbook as stated, including all directives regarding grading. In all future six-week periods, you will record a minimum of twelve daily grades for your students and a minimum of three test grades in addition to the six-week examination. We have found this system to be one that allows students ample opportunity to do their best in class. Compliance with this system is mandatory for all teachers.

I will be periodically monitoring your grade book to check for compliance. Please review your handbook thoroughly and make sure that you understand the requirements in it. You are also directed to turn in grades in a timely manner in accordance with timelines in the faculty handbook. If you have any questions, I will be happy to discuss them with you.

If you disagree with the facts, conclusions, or directives in this memo, please advise me in writing no later than _____ so that we can meet to work out any differences.

I have received a copy of this memo. I understand that my signature does not necessarily constitute agreement with its contents and that I have an opportunity to respond to it if I disagree.

Employee's Signature

Date

SAMPLE SUMMARY MEMO

SPECIFIC DIRECTIVES

To: Employee name

From: Supervisor's name and signature

Date:

RE: Conference on Oct. 7, 2017

On Oct. 7, 2017, you and I met to discuss some of my concerns regarding your performance. During this conference, I expressed concern because on two occasions this past fall, you arrived late to school and almost missed the beginning of your first period class. These incidents occurred on Sept. 9 and Oct. 7, 2017.

The faculty handbook states that teachers are to sign in by 7:40 am each day and be outside their classroom doors by 7:55 am. On both mornings that you were late, the office had to assign a teacher on conference period to your class in case you did not arrive. In the future, I expect you to comply with attendance requirements.

In addition, on Sept. 25 and Sept. 30, 2017, you failed to sign in upon arrival at school. It is required that teachers sign in upon arrival at school in the morning to ensure all classes are attended and supervised.

In the future, I expect you to sign in at school at least by 7:40 am each weekday morning and be in your room by 7:55 am. I will be monitoring you to determine if you are complying with this directive. If you disagree with the facts, conclusions, or directives in this memo, please advise me in writing no later than _____ so that we can meet to work out any differences.

I have received a copy of this memo. I understand that my signature does not necessarily constitute agreement with its contents and that I have an opportunity to respond to it if I disagree.

Employee's Signature

Date

SAMPLE SUMMARY MEMO

SPECIFIC DIRECTIVES AND CONSEQUENCES

To: Employee name

From: Supervisor's name and signature

Date:

RE: Performance during the 2017-18 school year and expectations for the 2018-19 school year

On May 28, 2018, you and I met to discuss your performance for the 2017-18 school year. This memo serves to summarize our discussion and provide directives for the 2018-19 school year.

- 1. Compliance with the grading system:** On October 4, 2017, you and I met to discuss your grading system for the first six weeks of the 2017-18 school year and a summary of our discussion was provided to you in a memo dated _____. The faculty handbook specifies that students are to have at least twelve daily grades and three test grades per six weeks in addition to a six-week examination grade. Your English II students received only ten daily grades and two test grades for the first six weeks. This was not discovered until the six weeks had ended. I directed you to comply with the grading system in the faculty handbook going forward and have monitored your compliance with this directive. You have made no further grading errors this school year, and you assured me that you would continue to comply with district grading requirements.
- 2. Arriving late:** On two occasions this past fall, you arrived late to school and almost missed the beginning of your first period class. You and I discussed this in a conference on Oct. 7, 2017, and I confirmed our conference in a memo dated _____. You were late on one more occasion, April 8, 2018. We talked on that same date, and you explained that you were late due to a traffic accident. It is essential that you arrive at school by 7:40 each day.
- 3. Failure to sign in and out:** Seven times this year, you failed to follow the proper procedure for signing in and out of school. The first two incidents on Sept. 25, 2017 and Sept. 30, 2017 were discussed in our conference on Oct. 7, 2017 and in my memo to you dated _____. The next three instances were on Oct. 25, 2017; Nov. 12, 2017; and Nov. 29, 2017. These instances were addressed in a conference on Dec. 4, 2017. Two instances have occurred this spring on Apr. 9, 2018 and May 6, 2018. In both of those instances, you informed me the next morning that you had forgotten to sign out during the previous afternoon and asked me to correct the mistake. It is essential for teachers to sign in upon arrival at school in the morning to ensure all classes are attended and supervised. Failure to sign in may result in an administrator needlessly going to your class to cover it. It is also essential to sign out in the afternoon. This allows us to monitor who is on campus and respond to calls about your whereabouts.

Directives for the _____ school year

You are expected to do the following for the _____ school year:

1. Follow all requirements in the faculty handbook regarding grading exactly as stated.
2. Sign in by 7:40 am each morning and be outside your classroom door by 7:55 to greet students and monitor hallways.
3. Sign out each afternoon before you leave the building.
4. Follow all other requirements in the faculty handbook.

If you violate this directive, I may recommend contemplated nonrenewal to the school board.

I appreciate your willingness to work toward total correction of all these matters. I look forward to a good and productive _____ school year with you. If you disagree with the facts, conclusions, or directives in this memo, please advise me in writing no later than _____ so that we can meet to work out any differences.

I have received a copy of this memo. I understand that my signature does not necessarily constitute agreement with its contents and that I have an opportunity to respond to it if I disagree.

Employee's Signature

Date

DISCRIMINATION & HARASSMENT GRIEVANCE PROCEDURE

The following procedure is designed to resolve harassment and discrimination complaints as defined in board policy in a prompt and equitable manner. Board policy requires all students and staff to fully cooperate when asked to participate in a harassment investigation.

The procedure contained in these regulations supersedes the district's Complaints about Personnel.

Retaliation Prohibited

The District prohibits retaliation for an individual's participation in and/or initiation of a harassment/discrimination complaint investigation, including instances when a complaint is not substantiated. The consequences for violating this prohibition are delineated in policy.

Complaint Filing Format and Deadlines

Complaints can be filed verbally or in writing and should be filed as soon as a victim or witness of alleged harassment and/or discrimination becomes aware that alleged harassment or discrimination occurred. Complaints must be filed within statutory deadlines contained in law.

Informal Complaint Procedure

An informal harassment or discrimination complaint shall be filed using the following procedure:

1. The complainant files the complaint with **[an immediate supervisor, principal, school counselor, Superintendent, or Title IX Coordinator]**.
2. The individual receiving the complaint shall document receipt and forward the complaint to the Superintendent who shall designate an investigator. If the Superintendent is the subject of the complaint, the recipient shall forward it to the Board President who shall designate an investigator.
3. The designated investigator shall meet with each party individually and collect information needed to arrive at an equitable solution. At no time shall the complainant be required to work out the problem directly with the accused.
4. Within 30 calendar days of the complaint being filed or as soon as practical, the investigator shall issue a written notice of recommendations to both parties. Prior to issuing this notice, the investigator shall meet with the Superintendent or Board President (if the Superintendent is the subject of the complaint) to receive his/her concurrence on the recommendations and receive his/her approval on any disciplinary recommendations. Disciplinary recommendations shall be carried out in accordance with policy, law, and, when applicable, the negotiated agreement.
5. The investigator or designee shall monitor the implementation and effectiveness of recommendations and shall notify the Superintendent or Board President (if the Superintendent is the subject of the complaint) if harassment/discrimination persists.

Both the complainant and the accused have the right to terminate the informal procedure at any time to pursue a remedy under the formal grievance procedure.

Formal Grievance Procedure

1. Filing a Complaint:

- a. A victim or witness of alleged harassment or discrimination may file a formal complaint either orally or in writing to the **[principal, Superintendent, or Title IX Coordinator]**. If any of these individuals is the subject of the complaint, it should be filed with an alternative source. Harassment/discrimination complaints about the Superintendent shall be filed with the Board President.
- b. Upon receipt of the complaint, the recipient shall document the date, time, and nature of the complaint and shall request the complainant's signature on this document.
- c. Within five school days of receiving the complaint or as soon as practical, the recipient of the complaint shall issue a notice to the complainant and the accused that a complaint has been filed.

2. Investigation Process:

- a. The recipient of the complaint shall confer with the Superintendent or Board President (if the Superintendent is the subject of the complaint) about who will be best suited to investigate the complaint. The investigation may be conducted by school personnel or a third party designated by the District.
- b. Before the investigation commences, the investigator in coordination with the Superintendent or Board President (if the Superintendent is the subject of the complaint) shall determine if interim measures must be taken to prevent harassment/ discrimination during the course of the investigation and whether law enforcement or other applicable officials should be notified.
- c. The investigation shall consist of interviews with the complainant, the accused, and any others who may have witnessed or otherwise have knowledge of the circumstances giving rise to the alleged complaint and may involve gathering and review of information relevant to the complaint. Witnesses shall be instructed not to discuss this matter with others. At no time during the investigation shall the complainant be required to meet with the accused to discuss the complaint.
- d. The investigator shall complete his/her investigation within 15 calendar days or as soon as practical.
- e. Any deviation from the investigation procedure should be documented with an explanation. Reasons for delays in the investigation also should be documented.

3. Investigation Report:

- a. After the investigator has completed the investigation, s/he shall complete a written report containing a determination of whether allegations were substantiated, whether the discrimination/ harassment policy was violated,

and recommendations for corrective action, if any. These determinations shall be made on a case-by-case basis based on, but not limited to, the following criteria:

- i. Whether evidence suggests a pattern of conduct supporting of disproving the allegations or harassment or discrimination
 - ii. Whether behavior meets the definition of harassment, sexual harassment, and/or discrimination as defined in board policy
 - iii. Ages of the parties involved
 - iv. Relationship between the parties involved
 - v. Severity of the conduct
 - vi. How often the conduct occurred, if applicable
 - vii. How the District resolved similar complaints, if any, in the past.
- b. The investigator shall submit his/her report to the Superintendent or Board President (if the Superintendent is the subject of the complaint). This individual shall review the report, determine if the recommendations are appropriate, implement the portions of the report s/he approves, and develop a monitoring plan to evaluate the effectiveness of the recommendations and help prevent recurrence. Any disciplinary action shall be carried out in accordance with board policy, law, and, when applicable, the negotiated agreement.
- c. Prior to implementing the recommendations, the Superintendent or Board President (if the Superintendent is the subject of the complaint) shall issue his/her decisions in writing to the complainant and accused. These decisions shall be final and binding; however, nothing shall prevent the parties from seeking judicial redress through a court of compensate jurisdiction.
- d. The entire complaint filing, investigation, and reporting process should be completed within 30 calendar days or as soon as practical not to exceed 60 calendar days.

End of (Name of District) Board Reg. AAC-BR Approved:

Exit Interview Questionnaire

It is our company policy to conduct an exit interview with each employee upon separation. We would appreciate your honest opinions about your employment with ABC Company. Your feedback can help us to improve workplace conditions and make this company a better place to work. Please complete this questionnaire and return it to the CEO. Thank you for your cooperation!

Employee Name: _____ Separation Date: _____

Position Title: _____ Department: _____

Check which best describes your feelings regarding the following aspects of your employment experience with ABC Company.

	Very Satisfied	Satisfied	Dissatisfied
Nature of the job	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Utilization of skills and experiences	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Workload	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Performance appraisal process	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Training and development programs	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Opportunities for advancement	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Company policies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Salary/Wage	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Benefits	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Immediate supervisor	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Company management	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Overall, as a place to work	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you marked dissatisfied for any of the categories, please explain: _____

The main reason(s) I am leaving ABC Company is/are: _____

Did you ever feel you were treated unfairly? _____. If so, did you report it and was appropriate action taken? _____

Has ABC Company and/or your supervisor provided enough recognition for your work achievement?
Yes _____ No _____ If not, please describe how you would have preferred to be recognized:

Did you feel there was good communication between you and your supervisor and within your department? _____ If not, why? _____

Did you feel there was good communication within the company? _____ If not, why? _____

Do you have any suggestions for overall improvement of the company? _____

Employee's Signature: _____ Date: _____