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## A Maine Guide to Employment Law

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# A Maine Guide to Employment Law



Second Edition



A publication of the  
Bureau of Labor Education  
University of Maine





# **A MAINE GUIDE TO EMPLOYMENT LAW**

**SECOND EDITION**

Researched and Compiled by:  
Gabrielle Berube and James Davitt, Esquire

Edited by:  
William C. Murphy

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Bureau of Labor Education

# A MAINE GUIDE TO EMPLOYMENT LAW

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“In complying with the letter and spirit of applicable laws and pursuing its own goals of diversity, the University of Maine shall not discriminate on the grounds of race, color, religion, sex, sexual orientation, including transgender status or gender expression, national origin, citizenship status, age, disability, or veteran's status in employment, education, and all other areas of the University System. The University provides reasonable accommodations to qualified individuals with disabilities upon request.

Questions and complaints about discrimination in any area of the University should be directed to the Director of Equal Opportunity, the University of Maine, 5754 North Stevens Hall, Room 101, Orono, ME 04469-5754, telephone (207) 581-1226, TTY (207) 581-9484.”

## ABOUT THIS GUIDE

This second edition of A Maine Guide to Employment Law is both a continuation and evolution of five previous editions of A Workers' Guide to Labor Law, first published by the Bureau of Labor Education in 1974. This present work, representing the collective efforts and contributions of many of the Bureau's staff—past and present, seeks to retain the readability and clarity that has been the hallmark of past editions. Our continuing objective is to provide important information on employee rights, protections, and responsibilities at the workplace or site, in easy-to-understand language.

Approximately seven hundred thousand people make up Maine's civilian labor force.\* In any year, many will be injured on the job, some will be killed, and others will suffer disability because of occupational health and safety hazards. Some workers will become unemployed, a number will experience employment discrimination such as sexual or racial harassment, and others will need to take time off from their work to care for a family member with a serious illness. These issues, and many more, are addressed by specific state and federal statutes that deal with work and employee/employer relations. Known as employment law, this evolving body of law changes based on political, administrative, and judicial processes at both the state and federal levels of government. Because of this reality, all too often employees and employers are unaware of many legal rights, protections, and responsibilities established through this area of public policy.

This publication has been reviewed for legal accuracy and clarity by attorneys specializing in employment law, government officials responsible for enforcing these statutes, and others knowledgeable about this legislation. However, it needs to be emphasized strongly that this book is only a Guide and it cannot in any way serve as a substitute for the competent legal advice which can be obtained from attorneys, government officials, and leaders of labor organizations.

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\*Source: Maine Dept. of Labor, Center for Workforce Research and Information, "Labor Market Digest," May 2008, p. 2

We extend our deep appreciation and thanks to the following individuals whose review, consultation, and information were extremely helpful in the development of this work:

- James Case, Wayne Whitney, Jeffrey Young, Stephanie Jazlowiecki, Patrick Kelly, and Benjamin Grant of McTeague, Higbee, Case, Cohen, Whitney & Toker, PA.
- Karen Kemble, Office of Equal Opportunity, University of Maine;
- John Gause, Maine Human Rights Commission;
- William Coffin, Occupational Safety and Health Administration;
- John Rohde, Maine Workers' Compensation Board;
- Rosemary Pye and Elizabeth Gemperline, National Labor Relations Board;
- Roger Putnam and Mark Ayotte, Maine Labor Relations Board;
- Lloyd Black, Maine Dept. of Labor, Bureau of Unemployment Compensation;
- John Hanson, Maine State Building & Construction Trades Council, and Director Emeritus, Bureau of Labor Education;
- Jane Crouch, Valerie Carter, and Gary McGrane, Bureau of Labor Education.

All of these individuals provided constructive insights and comments on the various chapters. Jim Case and associates were particularly helpful in reviewing and providing important revisions and suggestions on all of the chapters. John Hanson deserves strong commendation for his contributions not only for this edition, but also for all of the previous editions of this Guide. Special appreciation also is extended to the Bureau's administrative assistant, Kristina Cote, whose dedication and work on behalf of the Bureau always is exemplary, and to Ellen Campbell, Assistant to James Case, for her help in coordinating numerous e-mail transmissions in a very efficient fashion.

Gabrielle Berube, James Davitt, and William Murphy



## **A Note on Legal References:**

In reading this Guide references are made to both federal and state courts, statutes, and agencies. Decisions of the United States Supreme Court are cited, for example, as 502 U.S. 743 (2004), indicating the volume [502] of the United States Reports, [U.S.] the page [743] at which the opinion begins, and the year of the opinion (2004). These opinions may be found at the Supreme Court web site, <http://www.supremecourtus.gov>, or through the Find Law web site, <http://www.findlaw.com>. Decisions of the highest court in Maine, the Maine Supreme Judicial Court, are cited, for example, as 307 A.2d 38 (Me. 1997), indicating the volume, edition, and page of the Atlantic Reporter where the opinion is located. The parenthetical reference indicates that it is a decision of the highest court in Maine and the year of the opinion. These decisions can be found on the Find Law web site or in the bound volumes in most libraries across Maine. Reference to statutes of the United States are noted, for example, as 28 U.S.C. §1208, indicating the title number of the United States Code and the section where the particular statute is located. Likewise, Maine statutes are cited as 27 M.R.S.A. §567, indicating the volume and section of the Maine Revised Statutes Annotated where the law may be found. Both the U.S. Code and the Maine Statutes are readily available on the internet or in most libraries across Maine. References to internet web sites of federal and state agencies are noted throughout the Guide, either in the text or in the endnotes.

## **CHAPTER I**

### **EMPLOYMENT DISCRIMINATION**

#### **What Is Employment Discrimination?**

Discrimination in the workplace occurs when a person is treated differently than others in the employment relationship. State and federal anti-discrimination laws protect workers who have traditionally been excluded from employment opportunities. These laws prohibit discrimination on the basis of sex, race, color, religion, national origin or ancestry, mental or physical disability, sexual orientation, and age.

For discrimination to be illegal, the unequal treatment must be based on the fact that the worker is a member of a protected group or class. Other types of discriminatory treatment, such as refusing to hire someone with tattoos, are not illegal, since people with tattoos are not a protected group under the law.

#### **What Laws Protect Maine Workers?**

Most Maine workers are covered by the Maine Human Rights Act (MHRA) and by a series of federal laws and presidential executive orders. The federal laws include the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, Executive Order 11246 of 1965 (which applies to federal government contractors and subcontractors), the Age Discrimination in Employment Act (ADEA) of 1967, the Rehabilitation Act of 1973 (Rehab Act), the Americans with Disabilities Act (ADA) of 1990, and the Older Workers Benefit Protection Act (OWBPA) of 1990. The MHRA is similar to the federal laws, but there are some important differences, as is discussed in more detail below.

#### **Do These Laws Apply to All Employers?**

The Maine Human Rights Act applies to all employers, unions, and employment agencies in Maine, except federal employers. Not all employers in Maine are subject to the federal anti-discrimination laws. For example, Title VII and the ADA only apply to employers with fifteen or more employees. The ADEA only applies to employers with twenty or more employees. The Rehab Act applies to federal agencies, federal contractors, and to employers receiving federal financial assistance.

## What Questions Are Prohibited Prior to Hiring or Labor Membership?

It is unlawful for any employer, employment agency, or labor organization, prior to employment or admission to membership, to ask any questions directly or indirectly pertaining to race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry, national origin, or whether the worker ever brought a workers' compensation claim, whether the worker ever brought a claim under any laws prohibiting employment discrimination, or engaged in activity protected under the Whistleblowers' Protection Act.<sup>1</sup>

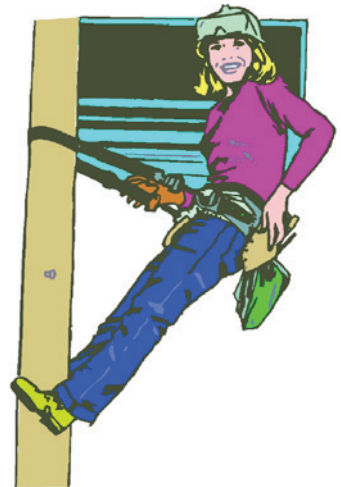
## What Kinds of Discrimination Are Covered by These Laws?

### Overt Discrimination

The easiest case of discrimination to identify is overt discrimination. In this instance, the employer will state, verbally or in writing, a clear intent to discriminate. For example, an employer who says, "We don't hire disabled workers," "I don't put blacks or women into management positions," or "I don't want a man as a flight attendant," is overtly and unlawfully discriminating. The only time an employer can legally exclude any protected group from employment opportunities is if there is a bona fide occupational qualification (BFOQ) for the job.

To prove a BFOQ an employer must show that all or nearly all of the members of a protected class (those people who have traditionally been excluded from job opportunities on the basis of race, sex, sexual orientation, color, age, religion, national origin, or disability) would be unable to perform the normal duties of the job. A BFOQ is a strict legal standard and cannot be based on the following:

- statistics about the comparative employment characteristics of the protected group the person belongs to (e.g., women generally have higher turnover rates than men);
- stereotyped characterizations (e.g., that elderly people are less capable of assembling intricate equipment);
- preference of customers, clients, co-workers or employers (e.g., customers won't like a disabled salesperson).



Race has never been held a BFOQ for any job and sex has only been held a BFOQ in those cases where it is essential for job performance, such as clothing model, sperm donor, or wet nurse.

## **Discriminatory Effect**

An employer may be guilty of discrimination even if she or he never intends to discriminate. The *effect* of a particular policy is considered, not the motivation. This means that if a policy looks neutral on its face, but has the effect of discriminating against a protected group of workers, the employer must prove that the policy is a necessity for the job. For example, if a requirement of a college degree excludes a disproportionate number of a protected class or group, or if a 5'6" height requirement excludes a disproportionate number of women, the employer must prove the requirement is necessary for the performance of the job. If there would be a less discriminatory means for selecting qualified applicants, then the policy is illegal.

## **Other Discriminatory Treatment**

In most cases of discrimination, the discriminatory reason will not be given even though a worker is treated differently because she or he belongs to a particular group. Sometimes a pattern of discriminatory treatment can be shown, for example: laying off women with more seniority than men, refusing to promote Franco-Americans or people with disabilities to management positions, or forcing elderly workers into retirement. This type of discrimination is more difficult to prove, but any worker who suspects discrimination is the reason for an employer's action should contact the Maine Human Rights Commission or the Equal Employment Opportunity Commission (EEOC).

## **Are Pregnant Workers Protected from Discrimination?**

Yes, both Title VII and the Maine Human Rights Act prohibit discrimination on the basis of pregnancy. This means that women affected by pregnancy, childbirth, or related medical conditions must be treated like any other temporarily disabled worker. Benefits such as paid disability leave, health insurance, guaranteed reinstatement to a former job, and transfer to light-duty work must be extended equally to all workers, regardless of the cause of the disability. It is also illegal to refuse to hire pregnant workers or to require pregnant workers to take a leave of absence if they are physically able to perform the job.

## What Is Sexual Harassment?

Sexual harassment is unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature which affects a person's employment, unreasonably interferes with work performance, or creates an intimidating, hostile or offensive work environment.<sup>2</sup> It is, in simple terms, "deliberate and/or repeated sexual or sex-based behavior that is not welcome, not asked for, and not returned."<sup>3</sup>

Although sexual harassment is usually repeated behavior, it could be one serious incident. Sexual harassment may be blatant, as in deliberate touching, pinching, caressing, attempts to fondle or kiss, pressure for dates or sex, requests for sex in exchange for grades or promotions. Or sexual harassment may be more subtle—like staring, sexual jokes, or teasing, sexually demeaning remarks. Although forms of harassment may be unintentional, words and behavior can be harassing if they are heard and seen as such by others. Sexual harassment usually occurs in situations where one person has power over another, but it can also occur between equals. Both men and women can be sexually harassed, though women are most often victimized. Through case law, the courts continue to define sexual harassment, the responsibilities of employers and employees and the remedies available to victims.<sup>4</sup>

## Does the Law Prohibit Sexual Harassment?

Yes, both Title VII and the Maine Human Rights Act prohibit sexual harassment in the workplace. While most cases of sexual harassment involve men and women, in the case of *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the U.S. Supreme Court held that sexual harassment is a violation of Title VII, even when the harasser(s) and the victim(s) are of the same sex.

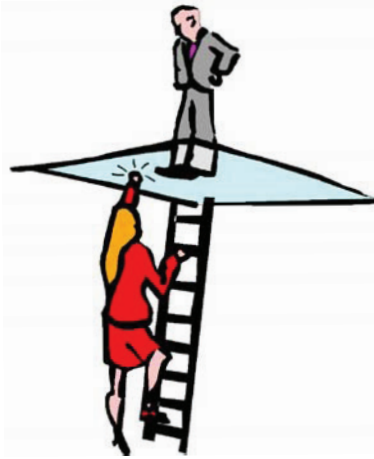
## What Does the Law Say about Sexual Harassment?

Regulations interpreting Title VII and the MHRA provide that unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute unlawful sexual harassment when:

- "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

- submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.”<sup>5</sup>

## **Are Women Workers Protected from Sex-based Wage Discrimination?**



Yes. Both the Equal Pay Act of 1963 and the Maine Human Rights Act require the same pay for men and women performing equal work. Equal work means work requiring substantially equal skill, effort, and responsibility, performed under similar working conditions.

Jobs do not have to be identical. For example, if a man and a woman work in the same establishment, and 95 percent of their time is spent in similar tasks, the fact that 5 percent of their jobs are different is not likely to justify different wages. This means that a male supermarket cashier who occasionally stocks shelves cannot be paid more than a female cashier who occasionally straightens out the cigarette rack.

## **What Laws Provide Legal Protection for People with Disabilities?**

The Maine Human Rights Act, Americans with Disabilities Act, and Rehabilitation Act all prohibit employment discrimination on the basis of disability.

## **Which Employers Are Covered?**

Employment discrimination against individuals with disabilities is illegal if practiced by any employer, including federal governmental agencies, private employers, state and local governments, employment agencies, labor organizations, or labor-management committees.

## Which Employees Are Covered?

Employees are protected from discrimination if they have a covered disability. The Maine Human Rights Act defines “physical or mental disability” as a physical or mental impairment that:

- “Substantially limits one or more of a person's major life activities;
- Significantly impairs physical or mental health; or
- Requires special education, vocational rehabilitation or related services.”<sup>6</sup>

In addition, the following conditions are always protected disabilities under Maine law: absent, artificial or replacement limbs, hands, feet or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn's disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; mental retardation; multiple sclerosis; muscular dystrophy; paralysis; Parkinson's disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury.<sup>7</sup>

The MHRA further defines “significantly impairs physical or mental health” as “having an actual or expected duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population.”<sup>8</sup> It is important to note that the Maine legislature specifically intended for the definition of physical or mental disability to be interpreted more broadly than the ADA in order to provide greater coverage to Maine workers.<sup>9</sup>

The ADA defines disability more narrowly as a physical or mental impairment that substantially limits one or more major life activities.<sup>10</sup> Individuals are also protected under the MHRA and the ADA if they have a record of a disability or are regarded as having a disability.<sup>11</sup>

In addition, to be protected by the ADA, a person with a disability must be qualified to do the job with or without “reasonable accommodation.” This means that the person with a disability must meet the employer’s job requirements such as education, employment experience, skill, or licenses.<sup>12</sup> The person with a disability must also be able to perform the essential functions of the job with or without “reasonable accommodation.” Denying a job to a qualified applicant who is disabled constitutes discrimination if the reason for that decision is based on fact that the individual is disabled, or

needs a reasonable accommodation to perform the essential functions of the job.

## **What about Work-Related Injuries or Disease?**

A worker who has experienced a job-related injury or disease may be covered by the MHRA and the ADA to the same extent as any other disability.

## **What Is Reasonable Accommodation?**

A “reasonable accommodation” is a modification that enables a qualified person with a disability to perform his or her job. Examples of “reasonable accommodations” include:

- making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
- job restructuring;
- part-time or modified work schedules;
- reassignment to a vacant position;
- acquisition or modification of equipment or devices;
- appropriate adjustment or modifications of examinations, training materials, or policies;
- the provision of qualified readers or interpreters.<sup>13</sup>

## **What Is Undue Hardship?**

An employer is not required to provide a “reasonable accommodation” if doing so would cause the employer an “undue hardship.” “Undue hardship” means an action requiring undue financial or administrative hardship.<sup>14</sup> In determining whether an action would result in an undue hardship, factors to be considered include the nature and cost of the accommodation needed, the size and resources of the employer, and the type of operation or operations of the employer.<sup>15</sup> In general, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer.<sup>16</sup>

## **What Employment Practices Are Covered?**

The MHRA and the ADA make it unlawful to discriminate in all aspects of the employment relationship, including recruitment, hiring, termination, training, job assignments, compensation, layoffs, promotions, benefits, leaves, and all other activities related to employment.



## **May a Manager or Supervisor Ask If an Employee or Prospective Employee Is Disabled?**

No. The MHRA and the ADA limit questions employers may ask before hiring to the applicant's or employee's ability to do the job.<sup>17</sup> An employer cannot legally ask an applicant or employee with a disability to perform the job without a reasonable accommodation. An employer may ask an applicant or employee with a disability to describe or demonstrate how they will perform the essential duties of the job.<sup>18</sup>

## **Does the Law Prohibit Medical Examinations?**

Before a job offer is made, the MHRA and the ADA bar medical examinations that seek information about physical or mental disabilities.<sup>19</sup> Following a job offer, employers may condition the offer on a medical examination, but only if all entering employees for that job category must take the examination and the results of the examination are not used to discriminate on the basis of disability.<sup>20</sup>

With respect to existing employees, the MHRA and ADA prohibit an employer from requiring employees to undergo a medical examination or answer medical inquiries unless the examination or inquiry is shown to be "job related and consistent with business necessity."<sup>21</sup> Generally, this means that the employer must have a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.<sup>22</sup> Employers may conduct voluntary medical examinations that are part of an employee health program.

## **Should Persons with a Disability Tell Their Employer?**

According to the U.S. Equal Employment Opportunity Commission, the employee or applicant is generally responsible for telling the employer when an accommodation is needed. If an applicant with a disability thinks that a reasonable accommodation will be needed to participate in the application process or to perform the essential duties of a job, then the employer should be informed. Employers are required to provide reasonable accommodations only for the physical and mental limitations of a qualified individual with a disability of which they are aware.<sup>23</sup>

## **Who Pays for Reasonable Accommodations?**

Employers are not required to provide personal-use items such as hearing aids or glasses. The ADA does require that the employer provide accommodations unless they pose an undue hardship. “If the cost of providing the needed accommodation would be an undue hardship, the employee must be given the choice of providing the accommodation or paying for the portion that causes the undue hardship.”<sup>24</sup> Assistance for defraying accommodation expenses may be available from government vocational rehabilitation agencies, as well as tax deductions and credits on the local, state, and federal government levels.

## **Can Employers Pay People with Disabilities Less Than Other Workers Doing the Same Job to Cover the Cost of Reasonable Accommodations?**

No. It is illegal for an employer to pay for the cost of reasonable accommodations by reducing the salary or wages of employees with disabilities, or providing them with less compensation than employees in similar positions within the establishment.<sup>25</sup>

## **Does an Employer Have to Make Employee Non-work Areas Accessible to Employees with Disabilities?**

“Yes. The requirement to provide reasonable accommodations covers all services, programs, and non-work facilities provided by the employer. If making an existing facility accessible would be an undue hardship, the employer must provide a comparable facility that will enable a person with a disability to enjoy benefits and privileges of employment similar to other employees, unless to do so would be an undue hardship.”<sup>26</sup>



## **Does the ADA Require Preferential Treatment In Hiring People with Disabilities?**

No. The ADA does not require that an employer hire an applicant with a disability over other applicants. An employer has the right to hire the most qualified applicant. The ADA simply prohibits discriminating against an applicant or employee because they are disabled, or because they need a

reasonable accommodation to be able to perform the essential functions of the job.<sup>27</sup>

### **Does the ADA Take Safety Issues into Account?**

The law permits an employer to refuse to hire an individual who presents a direct health or safety threat to themselves or others at work. However, under the ADA, the following factors apply:

- A direct threat constitutes “a significant risk of substantial harm.”
- When deciding if such a threat exists, the decision “must be based on objective, factual evidence regarding an individual’s present ability to perform the essential functions of a job.”
- An employer violates the law if he or she decides not to hire a qualified applicant who is disabled because of the perception that there is a “slightly increased risk or because of fears that there might be a significant risk sometime in the future.”
- The employer also has a legal obligation to “consider whether the risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.”<sup>28</sup>

In 2002 the U.S. Supreme Court upheld an EEOC regulation that “authorizes refusal to hire an individual because his [or her] performance on the job would endanger his [or her] own health, owing to a disability.”<sup>29</sup> A unanimous Court held that the EEOC Regulations allow an employer “...to screen out a potential worker with a disability not only for risks that he [or she] would pose to others in the workplace but for risks on the job to his [or her] own health or safety as well...”<sup>30</sup>

### **Are Alcoholics or Illegal Drug Users Considered Persons with Disabilities?**

The Maine Human Rights Act lists alcoholism as a covered disability.<sup>31</sup> Current illegal drug users are not covered, although a person who is seeking treatment or has successfully completed treatment is entitled to a reasonable accommodation.<sup>32</sup> Essentially, “employers may hold illegal drug users and alcoholics to the same performance standards as other employees.”<sup>33</sup>

## **Are People with AIDS or HIV Covered?**

The MHRA explicitly covers AIDS and HIV.<sup>34</sup> Legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV from discrimination. This protection was clarified and strengthened in the case of *Abbott v. Bragdon*, 524 U.S. 624 (1998), in which the U.S. Supreme Court ruled that individuals who are HIV positive could come under the coverage of the ADA, even if they are not experiencing any symptoms of the disease. The ADA and MHRA make it unlawful to discriminate against an individual, whether disabled or not, because of a relationship or association with an individual with a known disability.

## **What Are the Requirements Regarding Health Insurance Policy for Employees with Disabilities?**

The MHRA and ADA require that an employer provide an employee with a disability equal access to whatever health insurance coverage is provided to employees. Employers are not required to provide additional insurance for workers with disabilities, so long as decisions to underwrite, classify, or administer risks are based on, or are not inconsistent with, state law.<sup>35</sup>

## **Will the ADA Conflict with Collective Bargaining Agreements?**

Unionized employers may face the issue of how to reconcile potentially conflicting obligations under the ADA and contracts with labor organizations. The AFL-CIO and the National Education Association lobbied for passage of the ADA, and both have worked closely with groups representing people with disabilities. Unions do not appear to be overly concerned that the ADA will undermine contracts or their authority as collective bargaining agents. Rather, unions want to assure that individuals with disabilities, including those injured on the job, are able to work.

The final rules offer only limited guidance on how employers and unions may reconcile their differences under the ADA and labor relations acts. The ADA encourages alternative dispute mechanisms including grievance processes to resolve disputes.<sup>36</sup>

## **Can a Worker’s Request for “Reasonable Accommodation” under the ADA be denied if it Conflicts with the Seniority Rights of Another Worker under an Established Seniority System?**

Yes, if the proposed accommodation would be in direct violation of a collective bargaining agreement. In *U.S. Airways v. Barnett* (2002) the Supreme Court held that an employer’s demonstration “that a requested accommodation conflicts with a seniority rule is ordinarily sufficient to show, as a matter of law, that an ‘accommodation’ is not ‘reasonable.’”<sup>37</sup> The Court discussed the importance of the seniority system in creating and providing a method of fair, equal, and predictable treatment. If the employer were required to show something more than just a seniority system it “...might well undermine the employees’ expectations of consistent, uniform treatment—expectations upon which the seniority system’s benefits depend.”<sup>38</sup> “However, the employee remains free to present evidence of special circumstances that make reasonable a seniority rule exception in the particular case.”<sup>39</sup>

## **What Laws Provide Protection Against Age Discrimination?**



The MHRA protects workers of all ages from employment discrimination on the basis of age. The Age Discrimination Employment Act (ADEA) of 1967 makes it illegal for an employer with 20 or more employees to discriminate against individuals who are 40 and over on the basis of age.

## **Can Younger Workers Claim Protection from Discrimination For Employment Practice That Favor Older Workers?**

There is a difference between the MHRA and the ADEA on this issue. In *General Dynamics Land Systems, Inc. v. Cline, et al*, employees in their 40’s sued claiming protection under the ADEA because they were excluded from the employer’s obligation to provide health care benefits in a collective bargaining agreement, while under the same agreement employees age 50 and over were still eligible to receive the benefits. The Supreme Court ruled that the ADEA only covers practices that discriminate against relatively older workers. It does not offer protections to somewhat younger workers in cases where older workers receive preferential treatment.<sup>40</sup>

Under the Maine Human Rights Act, however, an employer cannot discriminate on the basis of age in either direction, meaning it is illegal to favor either younger or older workers.<sup>41</sup>

## **Can State Employees File Charges of Age Discrimination Against State Employers?**

Again, there is a difference between state and federal law. In a case in 2000, the Supreme Court held that the ADEA does not offer protection against age discrimination by state employers. Although the clear language of the ADEA was to prohibit age discrimination by state employers, the Court ruled Congress had no authority under the Eleventh Amendment to remove the states' immunity from lawsuit by private individuals, nor was Congress authorized by Section 5 of the Fourteenth Amendment to restrict the powers of the states.<sup>42</sup> However, the State can be sued for age discrimination under the Maine Human Rights Act.

## **What Should You Do if You Are Subject to Discrimination?**

If a person suspects employment discrimination, he or she should contact the agency responsible for enforcing the laws. Any worker covered by the Maine Human Rights Act who suspects being the victim of discriminatory treatment should contact the Maine Human Rights Commission. Complaints filed with the Maine Human Rights Commission are also deemed filed with the Equal Employment Opportunity Commission for purposes of Title VII, the ADEA, and the ADA. Federal employees should contact the Equal Employment Opportunity officer within their own agency or the Equal Employment Opportunity Commission:

Maine Human Rights Commission  
51 State House Station  
Augusta, Maine 04333-0051  
(207) 624-6050  
[www.state.me.us/mhrc/index.shtml](http://www.state.me.us/mhrc/index.shtml)

Equal Employment  
Opportunity Commission  
Boston Area Office  
John F. Kennedy  
475 Government Center  
Boston, Massachusetts  
02203  
(617) 565-3196;  
(800) 669-4000  
[www.eeoc.gov](http://www.eeoc.gov)

Filing a complaint with the agency has the effect of starting an investigation of an employment practice. It does not mean that the person filing the complaint has proven discrimination.

### **Is There a Time Limitation for Filing a Complaint?**

Yes. Claims under the Maine Human Rights Act must be filed with the Maine Human Rights Commission not more than six months after the alleged act of unlawful discrimination. The time limits under federal laws vary from law to law. Any worker who feels they have been discriminated against in violation of a federal law should contact the Equal Employment Opportunity Commission to determine the applicable filing deadline.

### **Can an Employer Legally Retaliate Against an Employee for Filing a Complaint?**

No. It is illegal to retaliate against an employee for filing a complaint, stating an intention to file a complaint, or for serving as a witness in proceedings of the Maine Human Rights Commission or the EEOC. If a person is fired, or discriminated against in any way, she or he should contact the enforcing agency immediately.

It is illegal for an employer to discriminate against an individual for exercising his or her rights under these laws, even after the employment relationship has ended, such as in a letter of reference. In the case of *Robinson v. Shell Oil Co.*, the U.S. Supreme Court ruled unanimously “that protection under Title VII also extends to former employees.”<sup>43</sup>

In two cases decided in May, 2008, the Supreme Court broadened worker’s rights by ruling that, under two federal civil rights statutes, employees are protected from retaliation when they complain about discrimination even if Congress did not explicitly say so in the statutes.<sup>44</sup>

### **What Happens After a Complaint Is Filed?**

After a worker files a complaint with the MHRC, the Commission will request information and documents from the employer, and then assign an investigator to the case. The investigator notifies both parties as to how the investigation will occur. Further action could include a fact finding conference, interviews with the parties by phone or in person, or a decision that there is enough information in the file from both parties to conclude the investigation and issue a report. It is important to note that the investigator

does not represent either party. Both parties may hire their own attorneys to represent them.

The MHRC encourages both sides to settle a case informally and the investigator will work to reach a settlement. If no settlement is reached, the investigator will write a report and make a recommendation as to whether there are reasonable grounds to believe that unlawful discrimination has occurred. The Commission then will schedule the matter for a meeting and make a determination as to whether or not discrimination occurred. If the Commission finds discrimination has occurred and if an agreement is not reached between the worker and the employer after this proceeding, the worker or the commission may take the case to court. A worker who wants to proceed directly to court without the Commission investigating may ask for a “Right-to-Sue” letter. Any worker who has been subjected to discrimination may file a civil lawsuit against the person or persons who committed the unlawful discrimination.<sup>45</sup>

When a worker brings a complaint under the ADA or the ADEA with the Equal Employment Opportunity Commission the procedures are similar to those of the Maine Human Rights Commission, with the exception that any enforcement action or lawsuit would be filed in federal court.

## ENDNOTES

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<sup>1</sup> 5 M.R.S.A. § 4572(1)(D)(1); Maine Human Rights Commission, “Pre-Employment Inquiry Guide,” [http://www.maine.gov/mhrc/publications/pre-employment\\_inquiry](http://www.maine.gov/mhrc/publications/pre-employment_inquiry)

<sup>2</sup> Equal Employment Opportunity Commission, “Facts About Sexual Harassment,” <http://www.eeoc.gov/facts/fs-sex.html>

<sup>3</sup> Susan L. Webb, *Step Forward, Sexual Harassment in the Workplace*, New York: Mastermedia, 1991, p. 35-36.

<sup>4</sup> Office of Equal Opportunity, University of Maine, “Stop Sexual Harassment,” Orono, Maine: Systems Office of Human Resources, University of Maine, 1991, p.1; Labor Notes, 1992, p. 8-9.

<sup>5</sup> Me. Hum. Rights Comm’n Reg. § 3.06(I)(1); 29 C.F.R. § 1604.11.

<sup>6</sup> 5 M.R.S.A. § 4553-A(1)(A).

<sup>7</sup> 5 M.R.S.A. § 4553-A(1)(B).

<sup>8</sup> *Ibid.* § 4553-A(2)(B)

<sup>9</sup> *Ibid.* §4554 (4)

<sup>10</sup> 42 U.S.C. § 12102(2)(A).

<sup>11</sup> 5 M.R.S.A. § 4553-A(1)(C, D); Commerce Clearing House, Inc. (CCHI) Americans with Disabilities Act (ADA) of 1990: Law and Explanation. Chicago, Il: CCH, 1990. pp. 12-15, 110.

<sup>12</sup> 29 C.F.R. § 1630.2(m)

<sup>13</sup> 5 M.R.S.A. § 4553(9-A); 29 C.F.R. 1630.2(o).



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<sup>14</sup> 5 M.R.S.A. § 4553(9-B).

<sup>15</sup> *Ibid.*

<sup>16</sup> EEOC and U.S. Dept. of Justice, Americans With Disabilities Act Handbook.

<sup>17</sup> EEOC, “Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations,” available online at

<http://www.eeoc.gov/policy/docs/preemp.html> (hereafter “EEOC Preemployment Guidance”); 5 M.R.S.A. § 4572(2)(B).

<sup>18</sup> *Ibid.*

<sup>19</sup> EEOC Preemployment Guidance; 5 M.R.S.A. § 4572(2)(B).

<sup>20</sup> 5 M.R.S.A. § 4572(2)(C).

<sup>21</sup> EEOC, “Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act,” (hereinafter “EEOC Employee Guidance”), available online at

<http://www.eeoc.gov/policy/docs/guidance-inquiries.html>; 5 M.R.S.A. § 4572(2)(D)

<sup>22</sup> EEOC Employee Guidance.

<sup>23</sup> 29 C.F.R. § 1630.9, App.; Americans With Disabilities Act Handbook, page 7.

<sup>24</sup> Americans With Disabilities Act Handbook, page 7.

<sup>25</sup> *Ibid.* at 7-8.

<sup>26</sup> *Ibid.* at 8.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* at 9.

<sup>29</sup> *Chevron U.S.A, Inc. v. Echazabel*, 536 U.S. 73, 76 (2002).

<sup>30</sup> *Ibid.* at 78.

<sup>31</sup> 5 M.R.S.A. § 4553-A(1)(B).

<sup>32</sup> 5 M.R.S.A. § 4553-A(3)(C).

<sup>33</sup> EEOC, “Facts About the Americans With Disabilities Act,” EEOC—FS/E-5, 1992, p.2. *See also* 5 M.R.S.A. § 4572(2)(F)(1).

<sup>34</sup> 5 M.R.S.A. § 4553-A(1)(B).

<sup>35</sup> EEOC, “The ADA: Your Employment Rights as an Individual With a Disability,” p.9; 5 M.R.S.A. § 4554(2).

<sup>36</sup> CCHI, ADA: Law and Explanation, p. 23.

<sup>37</sup> *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394 (2002)

<sup>38</sup> *Ibid.* at 404.

<sup>39</sup> *Ibid.* at 394.

<sup>40</sup> *General Dynamics Land Systems, Inc. v. Cline, et al*, 540 U.S. 581 (2004).

<sup>41</sup> *Maine Human Rights Com. v. Kennebec Water Power Co.*, 468 A.2d 307, 309 (Me. 1983).

<sup>42</sup> *Kimel v. Florida Bd. of Regents*, 528 U.S.62 (2000).

<sup>43</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

<sup>44</sup> *Gomez-Perez v. Potter*, 06- 1, \_\_\_U.S.\_\_\_\_(2008); *CBOCS West, Inc. v. Humphries*, 06-1431, \_\_\_U.S.\_\_\_\_(2008)

<sup>45</sup> Maine Human Rights Commission, “After a Charge Has Been Filed With the Maine Human Rights Commission,”

[http://www.maine.gov/mhrc/publications/after\\_charge\\_filed.html](http://www.maine.gov/mhrc/publications/after_charge_filed.html)

## CHAPTER II

### OCCUPATIONAL SAFETY AND HEALTH

In 1970, Congress passed the Occupational Safety and Health Act (OSHA) to achieve safe and healthful working conditions for workers.<sup>1</sup> Under the act, the Occupational Safety and Health Administration (OSHA) was created within the Department of Labor and given responsibility to establish and enforce health and safety standards in order to achieve the goals of this legislation.

#### Who Is Covered by This Law?

Essentially, OSHA covers all employers and employees in the private sector within the 50 states, as well as territories and jurisdictions under U.S. authority. Some examples include labor and management employed in construction, manufacturing, business, ship/boat building and repair, agriculture, law, private educational and health care facilities, charitable organizations, labor organizations, and private relief agencies. Maine has adopted the OSHA Standards and applies them to Maine public employees, a subject covered later in this chapter.



#### Who Is Not Covered By OSHA?

Those exempt from this law's coverage include: immediate family members employed on a farm which does not employ other employees; employment sectors regulated by other federal statute such as mining, certain truck and transportation sectors, and atomic energy; the self-employed; and public employees on the state and local levels of government including public education.

#### Who Is Responsible for Providing a Safe and Healthful Workplace?

The employer is responsible for providing a safe and healthful working environment. Specifically, OSHA stipulates that the employer "shall furnish to each of his [her] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm...."<sup>2</sup> Also, employers "shall

comply with occupational safety and health standards promulgated under this Act." The Secretary of Labor establishes the standards after notice and public hearings.

### **What Do These Employer Responsibilities Include?**

There are two basic responsibilities. The first is the "general duty" clause, designed to cover all hazards which don't fall under a specific standard or regulation. OSHA may cite violations of this employer duty directly from the language of the act, where no published or promulgated standard exists. The "general duty" clause, also known as section 5(a)(1), only can be enforced when OSHA has determined: (1) that there is no standard, (2) that it is a recognized industry hazard, (3) that the employer has knowledge of the unsafe condition; or that the condition is of a nature that could cause death or serious physical harm.

The second responsibility is compliance with existing federal occupational safety and health standards. These standards are detailed and technical, and cover nearly all aspects of the job environment with special standards for selected industries.

### **What Are the Responsibilities of Employees?**

Each employee also is required to comply with all of the provisions and standards of the law that apply to his or her own actions and conduct. This also includes following the employer's rules and policies pertaining to occupational health and safety. It is the employer's responsibility to ensure that employees have been properly informed and educated about all of these responsibilities.

### **What Rights Do Employees Have Under OSHA?**

In addition to the right to a healthy and safe workplace or worksite, other specific employee rights under this law include the right to know about the hazards of their job, the right to complain to OSHA to have their workplace or worksite inspected, and the right to refuse to work under certain very limited circumstances.

### **Right-to-Know**

OSHA's Hazard Communication Standard requires all employers to inform employees about workplace chemical hazards, the necessary

precautions for working around these hazards, and emergency procedures in the event of a spill or exposure. Other employer requirements include: developing and implementing a hazard communication plan to protect employees from workplace chemicals; utilizing and following up-to-date Material Safety Data Sheets (MSDS) on each hazardous chemical used at work; maintaining and providing access to records on employee exposure to hazardous chemicals, and providing employee training on working safely with hazardous chemicals and hazardous substances, including understanding and using MSDS effectively.

## **Right to Complain**

If a workplace or site is unsafe or unhealthful, a number of corrective actions can be taken. The fastest way to abate a hazard or correct a violation is to bring it to the attention of the employer. If this is not possible or has not worked, employees have the right to complain to OSHA, and request an inspection or investigation concerning an imminent danger or serious threat of injury. Employees can do this via the phone, mail, fax, email, or online. A complaint can be initiated by calling this federal agency at 1-800-321-OSHA (6742), or contacting the nearest regional, area, or state office of OSHA, or through an OSHA consultation office at [www.osha.gov](http://www.osha.gov).<sup>3</sup> Employees also have the right to have their name withheld from their employer if they file an OSHA complaint.

## **Right to Refuse**

Federal OSHA law stipulates that workers have a right to refuse to do a job under certain very limited circumstances when they believe “a danger exists which could reasonably be expected to cause death or serious physical harm immediately.” The hazard must be both serious and imminent. For example, a boiler about to explode is clearly an “imminent danger.” On the other hand, a long-term exposure to toxic substances may not meet the “imminent danger” classification because there would normally be sufficient time to have such a hazard abated through regular OSHA inspection procedures.

When an employee discovers an “imminent danger” condition, he or she should act immediately by contacting a supervisor and union representative if a member of a union. If the condition or act is not corrected, and the worker then chooses to exercise the right to refuse in this imminent danger situation, it is very important that he or she retell the supervisor in front of a witness, that while he or she is refusing to work at that location or

function which places his or her life in immediate imminent danger, he or she is willing to continue to work at another location or function that does not pose an imminent danger. Also, if an imminent danger situation is not remedied, the OSHA Area Office should be contacted. If the compliance officer determines an “imminent danger” exists, the official will attempt to have the employer abate the condition. Failing to accomplish such action, the OSHA official can then initiate legal action with the Secretary of Labor.

### **What are the addresses, phone, and fax numbers of the OSHA offices in Maine?**

U.S. Department of Labor  
 OSHA Augusta Area Office  
 40 Western Ave. Augusta, Me. 04330  
 Augusta, Me. 04330  
 Phone: 626-9160 Fax: 622-8213

U.S. Department of Labor  
 OSHA Bangor District Office  
 382 Harlow Street  
 Bangor, Maine 04401  
 Phone: 941-8177 Fax: 941-8179

### **What Do OSHA Standards Cover?**

In addition to the general-duty clause, OSHA has established safety and health standards that cover virtually all conceivable aspects of the work environment. Examples include: control of ventilation and noise levels; hazard communication; keeping the workplace clean and orderly; emergency exits, fire protection, sprinklers, and evacuation plans; confined spaces and excavations; medical and first-aid treatment; handling and storage of



compressed gas, radiation, flammable materials, and explosives; toxic materials, hazardous substances and wastes; personal protective equipment, and fall protection; training procedures; electrical standards; and general working conditions, including, but not limited to, waste disposal, toilets, showers, and dressing rooms.

The standards also set limits for air contaminants, fumes, and exposure to toxic chemicals. Periodic testing and monitoring of certain substances is required. Examples include asbestos, dust, radiation, and carbon monoxide. When monitoring is required,

employees have a right to observe the testing, and have access to the records that indicate exposure to toxic or harmful materials.

The requirements specified in OSHA standards go beyond the traditional use of personal protective equipment such as safety glasses, steel-toed shoes, and ear plugs. For example, OSHA standards can require changes in work practices, the environment, and machinery, not simply personal protective equipment, which also may be required. When the Occupational Safety and Health Act was passed, and as it has evolved, it has been accepted that the solution to occupational health and safety is not layer after layer of personal protection but also includes basic changes in job environments, practices, and other relevant factors.

### **How Are OSHA Standards Organized?**

Because the standards are quite voluminous and technical, it is very important that labor and management know how they are organized, so they can use them effectively and promptly. Title 29 (Chapter XVII) of the Federal Register, has been designated for the Occupational Safety and Health Administration. Under Chapter XVII, various OSHA regulations are broken down into Parts. For example, Part 1926 contains standards for the construction industry. Part 1910 contains standards applicable for both general industry and construction. OSHA standards are further broken down into subparts and sections.

### **How Can OSHA Standards Be Obtained?**

OSHA standards are grouped and published into four major areas: General Industry, Maritime, Construction, and Agriculture. Copies of these standards are available from the U.S. Government Printing Office ([www.gpo.gov/](http://www.gpo.gov/)) on a cost/purchase basis. OSHA's standards and other information on occupational health and safety, can be accessed on the internet at no cost through OSHA's home page: <http://www.osha.gov/>, and are also available through the Maine Department of Labor, Workplace Safety Division, [www.maine.gov/labor/workplace\\_safety/index.html](http://www.maine.gov/labor/workplace_safety/index.html).

### **What is a Leading Cause of Death and Injury in the Workplace or Worksites?**

Electrical hazards are one of the primary causes of occupationally related death and injuries. OSHA has placed a particularly strong priority on the development and enforcement of updated safety standards relating to

electrical hazards. Some of the important OSHA standards dealing with electrocution hazards and electrical work may be found at the OSHA home page.

## **What About OSHA Investigations and Inspections?**

### *Investigations*

OSHA responds to complaints by conducting either on-site inspections or off-site investigations. Generally, complaints involving “low-priority” hazards that are filed by phone, fax, email, or online, are dealt with through OSHA’s off-site, phone/fax investigation approach. The following summarizes OSHA’s procedures when conducting this approach:

After receiving this type of a complaint, OSHA contacts the employer by phone, describes the alleged hazard, and confirms the contact with a follow-up letter or fax to the employer. Within five days, the employer must provide a written response that describes any problem(s) and/or hazard(s) found along with the corrective actions initiated or planned. If OSHA finds the employer’s written response to be adequate in addressing and correcting the hazard, an inspection will not be conducted. OSHA also provides the employee or employee representative who filed the complaint with a copy of the employer’s written response. If this individual does not find the employer’s response and actions to be satisfactory for correcting the hazard, they have the legal right to request that an on-site OSHA inspection be conducted. According to OSHA, employees do not give up this inspection right if they are not satisfied with a phone/fax investigation.<sup>4</sup>

### *Inspections*

Any of the following conditions will trigger an OSHA inspection:

- a written, signed complaint, from an employee or employee representative claiming that an imminent danger exists, or that an OSHA violation exists that could cause serious harm or death;
- inadequate response from an employer to a previous OSHA phone/fax investigation;
- imminent danger situation or condition; (OSHA places a top priority on taking immediate and corrective actions in these cases);
- accident resulting in the death of an employee or the hospitalization of three or more workers;



- “planned or programmed inspections” in employment sectors with statistically high incidences of occupational hazards and related injuries;
- follow-up or check-up inspections to OSHA inspections conducted previously.<sup>5</sup>

## How Are OSHA Inspections Conducted?

An OSHA inspection consists of four parts. First, an OSHA compliance officer arrives at the workplace or site, where they present their credentials to a designated employer representative. Next, an opening conference is held with labor and management where this official explains the purpose of the inspection and why it is being conducted. Also, at this meeting the employer and employees select their representatives to accompany the compliance officer during the walk around part of the inspection. If employees are represented by a union, the union picks this employee representative.

The third part is the inspection itself, which may involve only an inspection of a specific complaint or problem area, or an inspection of the entire workplace (wall-to-wall). Work areas, processes and procedures, tools, equipment, machinery, and any other relevant factors are inspected for both hazards and violations. During this inspection, the compliance officer may consult with the employer and employee representatives, as well as other employees in both labor and management. This official also checks and monitors whether the employer has maintained records properly on work related injuries, deaths, and illnesses required by OSHA. Accident and health records are reviewed which may include employee exposure to hazardous substances and materials.



The fourth part consists of the closing conference where the compliance officer meets with the employer and employee representatives together or separately. At the conference(s) any unsafe conditions identified during the inspection are discussed, along with any “apparent violations” which may lead to a citation.<sup>6</sup> In addition, both employers and employees are informed of their respective rights and responsibilities after the inspection.<sup>7</sup>



## **What is an OSHA Citation?**

A citation is issued when a violation of OSHA rules and/or regulations are found as a result of an inspection. The citation informs both labor and management about the specific OSHA standards and regulations that have been violated. Also, it identifies any hazardous conditions that need to be abated that are covered by the general duty clause, the proposed time allowed for the violations and hazard(s) to be abated, and the proposed penalties to the employer.<sup>8</sup>

## **Can a Worker be Disciplined or Penalized for Filing an OSHA Complaint?**

It is illegal for a worker to be disciplined or punished for filing an OSHA complaint. Although a copy of the complaint is supplied to the employer, the person complaining may have his or her name kept confidential. Even if an employer knows who has filed the complaint, the employee is given legal protection. Section 11(c)(1) of the law “...prohibits any person from discharging or in any manner retaliating or discriminating against any employee because the employee has exercised rights under the Act.”<sup>9</sup> If the employee notifies the OSHA office within thirty days of any act of discrimination, OSHA investigates the complaint, and if necessary, can go to federal district court to get appropriate relief including rehiring and/or reinstatement with back pay.

## **What Is OSHA’s Role Regarding Whistleblower Protections?**

OSHA also is responsible for enforcing and administering 13 other statutes that provide whistleblower protections for workers employed in a variety of employment sectors, including airlines, trucking, nuclear, pipeline, the environment, corporations, and securities.<sup>10</sup> For more information contact an OSHA office or go to the OSHA website:  
[www.osha.gov/dep/oia/whistleblower](http://www.osha.gov/dep/oia/whistleblower).

## **Can OSHA Ever Give Employers Advance Notice of an Inspection?**

Yes, but only under special circumstances, which include:

- “imminent danger situations;
- inspections that must take place after regular business hours, or require special preparation;

- cases where OSHA must provide advance notice to assure that the employer and employee representative, or other personnel will be present; and
- situations in which OSHA determines that advance notice would produce a more thorough or effective inspection.

Employers receiving advance notice of an inspection must inform their employees' representative or arrange for OSHA to do so.”<sup>11</sup>

### **Can An OSHA Abatement Time Be Contested?**

Yes. Under the law, employees or their representatives can contest the abatement time, but “may not contest [OSHA] citations, penalties or lack of penalties.”<sup>12</sup> Employees have fifteen working days to file a notice of contest of the abatement time with the area director or the decision is final. The employer also has fifteen working days to appeal the citation, “abatement time,” or the penalty. If the employer appeals or asks for a hearing, employees must be notified and allowed to participate. After a hearing, the result may be appealed by anyone affected.

### **Determining and Evaluating Occupational Health Hazards through NIOSH.**

In addition to working with OSHA, workers also can utilize the resources of the National Institute for Occupational Safety and Health (NIOSH), a part of the Centers for Disease Control and Prevention, for identifying and evaluating new or challenging health hazards on the job. NIOSH can be extremely important in helping workers conduct a health-hazard evaluation of a particular workplace. According to NIOSH, an individual worker, group of workers, employee representative, or employer can request NIOSH to conduct a health hazard evaluation whenever any of the following exist:

- Employees have an illness from an unknown cause.
- Employees are exposed to an agent [chemical, physical, or biological matter] or working condition that is not regulated by OSHA.
- Employees experience adverse health effects from exposure to a regulated or unregulated agent or working condition, even though the permissible exposure limit is not being exceeded.
- Medical or epidemiological investigations are needed to evaluate the hazard.

- The incidence of disease or injury is higher than expected in a group of employees.
- The exposure is to a new or previously unrecognized hazard.
- The hazard seems to result from the combined effects of several agents.<sup>13</sup>

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

NIOSH, R-9  
4676 Columbia Parkway  
Cincinnati, Ohio 45226  
1-800-356-4674

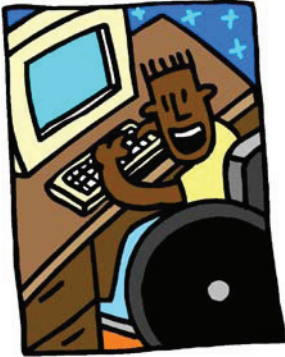
Copies of this form also can be accessed on the web at:  
<http://www.cdc.gov/niosh/hhe/Request.html>. A health hazard evaluation request also can be filed electronically through the NIOSH website.

### **Does Maine Law Also Cover Occupational Health and Safety?**

Yes. While federal law applies to all private sector employers, under Maine law, the Maine Bureau of Labor Standards has adopted the OSHA Regulations and applies them to the Maine public sector.<sup>14</sup> In addition, several Maine statutes cover the use of hazardous chemicals, waste matter, and other materials by Maine employers in both the public and private sectors. These laws are more stringent than OSHA's Hazard Communication standards to ensure that the chemical hazards are communicated to Maine employees and employers. This communication is achieved through a variety of approaches involving comprehensive employer-mandated hazard communication programs, container labeling, dissemination and utilization of material safety data sheets (MSDS), and employee training. The government agency that enforces this law is the:

Maine Department of Labor, Workplace Safety Division  
 45 State House Station  
 Augusta, Maine, 04333-0045  
 1-877-SAFE-345      TTY: 1-800-794-1110

## **Does Maine Law Cover Video Display Terminals?**



Yes. The Video Display Terminal Operators statute provides specific legal protections for employees whose primary tasks involve operating a VDT for “more than four consecutive hours exclusive of breaks, on a daily basis.”<sup>15</sup> Public- and private-sector employers in Maine, who operate two or more computer terminals at one location, must provide employees covered by the law with education on:

- proper use of computer terminals and operations, as well as protective measures to be taken in order to abate “symptoms or conditions that may result from extended or improper use of terminals;”
- the importance of maintaining proper posture when using VDTs and utilizing adjustable workstation equipment to achieve safe and healthy posture.

This legislation also is enforced by the Maine Dept. of Labor, Workplace Safety Division.

## **Does Maine Law Regulate Smoking in the Workplace?**

Yes. An employers’ obligation to control smoking in the workplace is governed by the Workplace Smoking Act, enacted in 1985, which requires every employer to establish or negotiate through the collective bargaining process a written policy requiring that smoking in designated areas be “physically separated” from common work areas.<sup>16</sup> This Maine law covers all employers and requires written policies prohibiting smoking except in areas designated by posted signs. The designated smoking area, the Bureau of Health has determined, must prevent any smoke from entering the common work area. An employer is free to prohibit smoking altogether. The employer must post the written policy in a conspicuous place, provide a copy of it to any employee upon request, and supervise its implementation. This statute is

enforced by the: Maine Center for Disease Control, Dept. of Health and Human Services, Partnership for a Tobacco Free Maine which can be reached by telephone at 207-287-6027, TTY 207-287-8015.

## Do Smokers Have Any Rights?

Yes. The Maine legislature has enacted a statute which prohibits an employer from requiring, as a condition of employment, that any employee or perspective employee refrain from using tobacco products outside the course of employment, so long as the employee complies with the employer's workplace policy concerning the use of tobacco. Also, an employer legally cannot discriminate against an employee for using tobacco outside of their job.<sup>17</sup>

## ENDNOTES

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<sup>1</sup> 29 U.S.C. §651, et seq.

<sup>2</sup> *Ibid.* §654

<sup>3</sup> OSHA, U.S. Dept. of Labor, All About OSHA, Occupational Safety and Health Administration, OSHA 3302-06N, 2006. P. 17

<sup>4</sup> OSHA, U.S. Dept. of Labor, All About OSHA, Occupational Safety and Health Administration, OSHA 2056-08R, 2003, pp. 7, 22. (This section is a summary of the detailed OSHA inspection procedures cited on these pages.)

<sup>5</sup> *Ibid.* at 22-23

<sup>6</sup> *Ibid.* at 25

<sup>7</sup> *Ibid.* at 23-26 (This section provides detailed information on the entire OSHA inspection process.)

<sup>8</sup> *Ibid.* at 25

<sup>9</sup> OSHA, U.S. Dept. of Labor, All About OSHA, Occupational Safety and Health Administration, OSHA 3302-06N, 2006. p. 16.

<sup>10</sup> *Ibid.* at 17

<sup>11</sup> OSHA, U.S. Dept. of Labor, All About OSHA, Occupational Safety and Health Administration, OSHA 2056-08R, 2003, pp. 21-22

<sup>12</sup> *Ibid.* at 28

<sup>13</sup> NIOSH, "Health Hazard Evaluations,"

<http://www.cdc.gov/niosh/hhe/HHEprogram.html>, 1/29/08, p.2

<sup>14</sup> 26 M.R.S.A. §565

<sup>15</sup> *Ibid.* § 251, et seq.

<sup>16</sup> 22 M.R.S.A. §1580-A

<sup>17</sup> 26 M.R.S.A. §597

**For Notes:**

## CHAPTER III

### WORK-RELATED INJURIES AND DISEASES

Every day Maine citizens are injured on the job or suffer from occupational diseases. Under current Maine law, there are three possible paths of relief for the employee: Workers' Compensation, Social Security disability benefits, and where there is third-party negligence, the common-law right to sue. Depending on the situation, an employee may be eligible for all three paths or may have no relief at all.

#### **What is Workers' Compensation?**

Since 1915, the primary source of benefits for injured Maine workers is Workers' Compensation, which is designed to provide compensation for injured employees without regard to who is at fault. At the same time, employees eligible for workers' compensation may not sue their employer in the courts if their employer has provided workers' compensation insurance.

The system is administered by:

Maine Workers' Compensation Board  
State House Station 27  
Augusta, Maine 04333-0027  
(207) 287-3751  
(877) 832-5525 (TTY)  
[www.maine.gov/wcb](http://www.maine.gov/wcb)

Benefits are funded primarily through private insurance companies who contract with Maine employers. Many employers have their own self-insured workers' compensation system or are part of a group self-insurance scheme. There is no cost to employees for this coverage. Workers' compensation benefits are not set by the employer or the insurance company, but defined by the law itself, and evolving decisions made by the Workers' Compensation Board and the courts. Therefore, it is particularly important to consult knowledgeable authorities about the most recent changes in this body of law.<sup>1</sup>

#### **Who Is Covered by Workers' Compensation?**

Virtually all Maine workers, whether publicly or privately employed, are covered by workers' compensation. The law states that employers in Maine, no matter how small, are required to have workers' compensation

coverage for their employees. The only exceptions that remain are those engaged in domestic services, seasonal or casual farm or aquacultural



laborers, and farm or aquacultural laborers working for an establishment that employs six or fewer persons.<sup>2</sup> Self-employed persons also are eligible to come under the coverage of this law if they make their own workers' compensation insurance arrangements. Civil penalties of up to 108% of the premium that should have been paid, as well as criminal penalties, can be assessed on employers who fail to provide workers' compensation coverage. Special provisions also exist for family-owned businesses and corporations by which parents, spouses, and children employed by such businesses may waive their rights to claim workers' compensation benefits.<sup>3</sup>

Some occupations are not covered by state law, but rather by parallel federal laws. These include the Federal Employees Liability Act (railroad workers), the Federal Employee Compensation Act (federal government employees), the Longshoremen and Harborworkers Compensation Act (some shipyard employees and longshoremen) and the Jones Act and Seaman's Remedies (the crew of any vessel, including fish and lobster boats, while on the water). Shipyard employees may have an option of coming under the coverage of the Maine Workers' Compensation Act or the Longshoremen and Harborworkers Compensation Act. Further information can be obtained from a union representative, an attorney, or the government agencies administering these laws.

## **What Is Covered in Relation to Work?**

Injuries "arising out of and in the course of employment" are covered by workers' compensation. Work must be a cause of the injury or occupational disease but need not be the root or the only cause. For example, a worker's heart may be weakened due to work but if he or she suffers an attack at home it may be covered by the law. Conversely, a person with a non-work-related history of a weak heart may suffer an attack at work due to work activity. Since these injuries may be work related they may be compensable under workers' compensation. Any questions regarding workers' compensation should be discussed with an attorney familiar with this law.<sup>4</sup>



Also covered by the law are “gradual” injuries, which result from repeated work activity over a period of time. Examples of gradual injuries are tennis elbow, arthritis, carpal tunnel syndrome, and arthritis of the back or other bodily joints resulting from or aggravated by repeated work activities. The causal connection between work and the injury determines workers’ compensation eligibility.<sup>5</sup>

### **What Work-Related Injuries or Diseases are Eligible for Workers’ Compensation Benefits?**

Any physical impairment or disease which meets the work-relationship test is potentially compensable under workers’ compensation. This is true whether or not it results in loss of work.

Items that are covered include any kind of burn, scrape, cut, strain, fall or gradual injury; total or partial loss of sight, hearing, or any other bodily function; total or partial loss of any body member; disfigurement; and injurious exposure to dangerous chemicals. Heart attacks, arthritis, cerebral hemorrhage, and cancer may be covered if caused or aggravated by work activity or stress. Psychological illnesses are covered but require a higher standard of proof in terms of being job related.

### **What about Old Injuries that Recur Because of Work?**

The law stipulates that if a work-related injury aggravates, accelerates or combines with a preexisting physical condition, “it is compensable only if contributed to by the employment in a significant manner.”<sup>6</sup>

### **Is Hearing Loss Covered by Workers’ Compensation?**

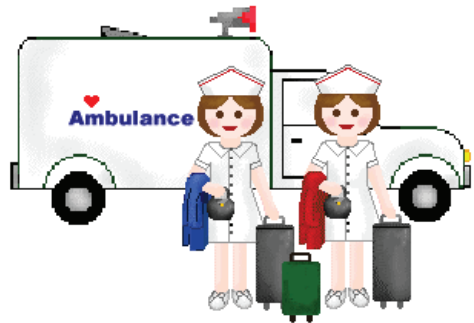
Workers who have experienced a loss of hearing arising from their employment may be eligible for compensation. Workers filing a claim under this provision of the law must have been separated or isolated from the noisy work environment for at least thirty days. This requirement may be met in one of several ways including the consistent use of hearing protection devices or equipment in the work area for at least thirty days. The law regarding hearing loss is complex. An injured worker considering filing a claim under this section of the law should consult with an attorney and a medical professional specializing in hearing loss.

## What Benefits Can Be Received?

Benefits depend on the extent of the injury. Generally, an employee can recover the costs (which will be paid based on a fee schedule) of doctor's care, hospitalization, medical care, and other related treatment arising from the injury and costs for any necessary rehabilitation. An employee also may be eligible to receive weekly wage-replacement benefits depending on whether the disability is temporary or permanent, total or partial. The specific amount of compensation benefits will vary with each employee because weekly compensation is based on the worker's lost earning capacity.<sup>7</sup> All employee benefits are calculated based on the injured worker's after-tax average weekly wage. An employee may also receive "scheduled," or fixed, benefits for loss of an organ, limb, or other body part or function. These benefits, however, can be offset by the payment of incapacity benefits. Death benefits are available to the spouse and dependent children of a worker killed on or as a result of the job. The law also provides for the payment of medical expenses and often covers therapy and, occasionally, retraining costs for an employee who can no longer perform his or her previous job due to the injury or occupational disease. The next sections discuss these benefits in more detail.<sup>8</sup>

## How is Medical Care Managed Under Workers' Compensation?

The law establishes very specific procedures in this area.<sup>9</sup> An employer has the right to choose the injured worker's healthcare provider for the first ten days after the injury.



Following this period, the employee may receive treatment from any medical doctor, chiropractor, podiatrist, osteopath, or other accredited medical professional of their choice. This includes treatment from an accredited practitioner who provides care through prayer or spiritual means.

If an employee's choice of a healthcare provider is different from the employer's, the employee is legally obligated to notify the employer. The Maine Workers' Compensation Board will provide mediation services or conduct a hearing to resolve any disputes over the choice of a healthcare provider. If the employer's position prevails and it is shown that care should not be continued by the provider of the employee's choice, the employee will

be obligated to pay for treatments by that provider from the date the board's order is mailed. The law also allows employees to change approved healthcare providers of their choice once. Before another change can be made, permission must be obtained from either the Workers' Compensation Board or the employer.

An approved healthcare provider can refer an injured worker to a medical specialist for treatment. Once this specialist begins treatment, the employee must obtain approval from either the employer or the Workers' Compensation Board before receiving treatment from a different medical specialist practicing in the same specialty area.

An injured worker also is entitled to receive reimbursement for mileage expenses at the rate of fifty and one-half cents per mile (as of 1/1/08) when commuting to obtain approved healthcare treatment.

The employer is entitled to review reports on medical treatment relating to the employee's injury. This can be done with no medical authorization. The law also requires an employee to purchase generic drugs in the treatment of their injury if the physician says they may be used and they are available. If an employee is able to purchase generic drugs and chooses not to, they must pay the difference in price between the generic brand and the one purchased.<sup>10</sup>

### **Are Benefits Available for Wage-Replacement?**

Injured workers out of work for more than seven days are eligible to receive weekly wage-replacement benefits. Any employee who is out of work for more than fourteen days will be paid for the initial seven days, as well. These need not be whole days or consecutive days. The only exception in this section of the law is for firefighters whose eligibility begins their first lost day. Both volunteer and paid firefighters who develop heart and lung damage within six months of fighting fires are presumed to have received such damage in the course of their work.<sup>11</sup>

Weekly wage-replacement benefits equal 80 percent of the injured worker's after-tax average weekly wage. The worker's total wages, earnings, or salary for the fifty-two weeks prior to the injury are used in determining their average weekly wage. If the employee was engaged in more than one job during this period, the average weekly wage and basis upon which weekly wage-replacement benefits is calculated considers all the injured worker's jobs, not just the job in which the injury occurred.

## **Maximum Weekly Wage-Replacement Benefits**

For injuries occurring on or after January 1, 1993: The maximum weekly wage replacement benefit allowed is \$596.42 (as of 7/01/08) or 90 percent of the state average weekly wage, whichever is higher. Maine's average weekly wage is adjusted annually utilizing the state average weekly wage data determined by the Maine Department of Labor.<sup>12</sup> Benefit tables, covering from 7/1/89 to 6/30/09) are available at the Workers' Compensation Board Website: [www.maine.gov/wcb/departments/payments/sawwmax.htm](http://www.maine.gov/wcb/departments/payments/sawwmax.htm).

## **Weekly Wage-Replacement Benefits for Partial Disability**

Injured workers only partially disabled are entitled to 80 percent of the difference between their after-tax average weekly wage before the injury, and the after-tax average weekly wage they are able to earn after the injury.

For example, an employee with an after-tax average weekly wage of \$500 would receive \$400 in weekly wage replacement benefits during the period that they are totally disabled from engaging in any work. After six months the employee recovers in part and is able to engage in "light work" that pays an after-tax average weekly wage of \$300. This employee would be entitled to workers' compensation benefits for partial disability at the rate of 80 percent of the wage loss of \$200 per week or \$160. Wage-replacement benefits for partial disability cannot exceed the same maximum weekly rate of compensation for full disability.<sup>13</sup> The Workers' Compensation Board publishes annually a weekly benefits table.

## **Penalty for Delay**

According to the law, if there is no ongoing dispute and weekly compensation benefits are not paid within thirty days after being due and payable, "\$50 per day must be added and paid to the worker for each day over thirty days in which the benefits are not paid," up to a maximum limit of \$1500.<sup>14</sup>

## **How Long Can Workers' Compensation Benefits be Received?**

### **Total Incapacity**

Present law specifies the cases where permanent total incapacity is "conclusively presumed" to exist for eight hundred weeks from the date of the worker's injury.<sup>15</sup> The cases include:

- Total and permanent loss of sight of both eyes;

- Actual loss of both legs or both feet at or above the ankle;
- Actual loss of both arms or both hands at or above the wrist;
- Actual loss of any two of the members or faculties already mentioned;
- Permanent and complete paralysis of both legs or both arms or one leg and one arm;
- Incurable insanity or imbecility; and
- Permanent and total loss of industrial use of both legs or both hands or both arms or one leg and one arm.

Thereafter, permanent and total incapacity must be determined in accordance with the facts. The Maine Workers' Compensation Board, through the dispute resolution process, is responsible for making a final determination regarding an injured worker's permanent and total incapacity based on the facts of each case. This determination must be made within five hundred weeks of the date of injury. If the board finds that total permanent incapacity does exist, workers' compensation benefits have to be provided to the injured employee for the duration of his or her incapacity.



### **Partial Incapacity**

Pursuant to Board rules, employees with dates of injury from January 1, 1993 to December 31, 2001 are eligible to receive benefits for the duration of their incapacity if their permanent impairment rating is in excess of 11.8% to the body. Employees with dates of injury on or after January 1, 2002 through and including December 31, 2003, are eligible to receive benefits for the duration of their incapacity if their permanent impairment rating is in excess of 13.2% to the body. Employees with dates of injury on or after January 1, 2004 and prior to the effective date of the next adjustment are eligible to receive benefits for the duration of their incapacity if their permanent impairment rating is in excess of 13.4% to the body. Injured workers experiencing less than the applicable percent impairment only are eligible to receive workers' compensation benefits for up to a maximum of 416 weeks. The Maine Workers' Compensation Board can extend benefits beyond this maximum period in cases involving "extreme financial hardship" resulting from an injured worker's "inability to return to gainful employment."<sup>16</sup> The 416 weeks of benefits may also be increased from year to year up to a maximum of 520 weeks.

**Can an Employer Withhold General Health Insurance Benefits if an Employee Files for Workers’ Compensation?**

No. If an employee is eligible to receive benefits under an employer-insured, non-occupational disability plan due to a personal injury or disease, the employer cannot delay or refuse payment of those benefits because the employee has filed a workers’ compensation claim.

If an injured employee does receive benefits under an employer-insured, non-occupational disability program and later obtains workers’ compensation based on the same injury or disease, the disability benefits received by the injured worker may be offset by the employer or insurance company against the workers’ compensation benefits.

**What Benefits are Available for the Loss of a Body Part?**

Workers who lose a specific body part resulting from a work-related injury are eligible to receive workers’ compensation benefits. Under the law, compensation payable is 80 percent of the after-tax average weekly wage of the injured worker, based on the following schedule:

<u>Specific Body Part</u>	<u>Weekly Benefit Schedule</u>
Hand	215 weeks
Arm	269 weeks
Foot	162 weeks
Leg	215 weeks
Eye	162 weeks
Thumb	65 weeks
First Finger	38 weeks
Second Finger	33 weeks
Third Finger	22 weeks
Fourth Finger	16 weeks

Wage-replacement benefits for the loss of a specific body part cannot exceed the same maximum weekly rate of compensation for full disability and may be offset by the payment of weekly incapacity benefits.<sup>17</sup>

**What About Rehabilitation and Job Retraining?**

If, as a result of an injury, employees are unable to perform the work for which they had previous training, education, and experience, they are entitled to receive rehabilitation services. The goal of these services, which

include retraining and job placement, is to help restore the injured worker to suitable employment.

Rehabilitation services can be provided by the employer voluntarily. If they are not, in some cases rehabilitation services may be available through the Employment Rehabilitation Fund, subject to review and approval by the Maine Workers' Compensation Board.<sup>18</sup> An employer who refuses to pay for these services voluntarily will be required to pay 180% of the cost of these rehabilitation services to the Fund if the employee returns to suitable employment.<sup>19</sup>



### **Are Workers' Compensation Benefits Available to Surviving Family Members if an Employee Dies on the Job or as a Result of the Job?**

Yes. Benefits to the dependents of a worker killed in the course of employment include up to \$4,000 for burial expenses, and an additional \$3,000 in "incidental compensation."<sup>20</sup> A weekly wage-replacement benefit equal to 80 percent of the deceased worker's after-tax average wage (with the same upward limits cited previously) shall be paid to the employee's dependents for up to five hundred weeks after the death of the employee. (Spousal benefits are terminated if the spouse remarries.) Even after this five-hundred-week benefit period has passed, dependent children of the deceased worker are eligible to receive workers' compensation wage-replacement benefits until their eighteenth birthday. Mentally or physically incapacitated children are eligible to receive workers' compensation wage-replacement benefits for as long as they are incapacitated. In the event there is more than one dependent entitled to the weekly payment, the amount of the payment is divided in equal shares among them.<sup>21</sup>

### **Are Employers Required to Pay for Damage to Personal Medical Aids?**

Work-related damage or destruction to artificial limbs, eyes, teeth, eyeglasses, hearing aids, orthopedic devices, and other physical aids is treated like an injury under the law. At its discretion, the board can require the employer to repair or replace these aids.<sup>22</sup>

## **Can Any Benefits Be Attached by Creditors?**

No, the Maine Workers' Compensation Law forbids it.

## **What If the Employer Goes out of Business or Moves?**

The law is intended to protect injured workers regardless if an employer goes out of business or moves. There are statutory provisions against potential employer defaults under the system. The insurance company or self-insured system remains responsible for the claim regardless of what happens to the employer.<sup>23</sup>

## **How Does an Injured Employee Apply?**

The most important thing an injured worker should do is immediately notify the employer of the injury. Notification should be as simple and accurate as possible. Lengthy descriptions of how the injury happened should be avoided. The law generally allows up to ninety days after the injury happens or the disease appears for a notice to be filed, but the sooner the notification the better. Extension of the notice period beyond ninety days, for reasons of physical or mental incapacity, or mistake of fact, are possible but rare.

When giving notice, injured workers must provide the following specific information: "time, place, cause, and nature of the injury" along with their name and address. This information must either be supplied by the employee or the legal representative of the employee.

An employer must electronically report a worker's injury to the Maine Workers' Compensation Board within seven days after an employee has informed them that their work related injury has resulted in one or more days of lost work time.

Within fourteen days after the reported injury, the employer's insurance company or self-insured system must either begin providing workers' compensation payments to the injured worker, or file notice with the Workers' Compensation Board and the employee that they are disputing the claim.<sup>24</sup>



## **How Is a Disputed Claim Handled?**

The following sequential procedures are followed when a workers' compensation claim is disputed:

1. The insurer must electronically file a notice of controversy (NOC) or denial of claim with the Maine Workers' Compensation Board and injured worker within fourteen days after the reported injury.

2. The employee has the right to file a petition with the board requesting an award of compensation. The Statute of Limitations requires this petition to be filed within two years from when the employer's first report of injury was filed. "If the employer...pays benefits...within the [two year period]...the employee must file a petition 6 years from the date of the most recent payment."<sup>25</sup>

Once a petition is filed, the Workers' Compensation Board first refers the case to a claims resolution specialist or "troubleshooter" who attempts to resolve the case informally and quickly. If this step does not resolve the dispute then the Workers' Compensation Board refers the case to mediation.

## **How is Mediation Utilized?**

If issues of controversy are not resolved through troubleshooting, the Board will assign the opposing parties a mediator to meet with each party to resolve the dispute informally. If mediation fails, the case is referred to a hearing officer responsible for reviewing the case for a formal hearing and final decision which is binding on both the employer and employee unless it is overturned on appeal.<sup>26</sup>

The hearing officer's decision can be appealed two ways:

1. The officer can refer the case to the Workers' Compensation Board. If a majority of members decide to review it, the board will issue its own written decision "affirming, reversing, or modifying" the hearing officer's decision.

2. Either party in the dispute may file an appeal of the Board's decision to Maine's highest court of appeals, the Maine Supreme Judicial Court, which may or may not choose to hear the appeal.<sup>27</sup>

## What about Arbitration?

Instead of a formal hearing, the disputing parties can use arbitration. The two parties must agree to a mutually acceptable arbitrator in writing.



After conducting a hearing on the case, the arbitrator will issue a final decision “having the force of law.” The arbitrator’s decision can only be appealed to the Maine Supreme Judicial Court, which chooses the appeals it will hear.<sup>28</sup>

## Can an Insurer Stop Compensation Payments?

Yes, compensation payments can be stopped for a variety of reasons. Some specific examples when an insurer can discontinue benefits are if the employee:

- resumes work at a pay level equal to or greater than the pay provided by the job in which they were injured;
- refuses or neglects to submit to a “reasonable and permissible” medical examination (they can lose benefits during the period of refusal);
- is convicted and imprisoned as a result of a crime (he or she cannot receive workers’ compensation benefits during the time they are incarcerated);
- is offered “reasonable employment” from the place of employment where they were injured, a different employer, or through the Maine Job Service.

According to the Maine Workers’ Compensation Act, “reasonable employment means any job that is within the employee’s capacity to perform and does not present a clear and immediate threat to his or her health or safety, and is within a reasonable commuting distance.” The Act also maintains that “reasonable employment” is not limited to employment just suitable to the worker’s education, training, and qualifications.<sup>29</sup>

A letter providing 21 days notice must be sent to the employee if the insurer or employer reduces or terminates benefits for reasons other than those listed in the preceding paragraph. Other detailed and complicated reasons for discontinuing or reducing compensation payments are included in the law.<sup>30</sup> An injured worker should contact the Maine Workers’ Compensation Board or an attorney for more details as well as information on the rights to appeal in certain cases and circumstances.

## **Which Party Pays for Attorney Fees in a Workers' Compensation Dispute?**

Injured employees with injury dates after December 31, 1992 are responsible for paying their attorney's fees. For injuries earlier than December 31, 1992, the insurer may have to pay. The law stipulates that an attorney's fees cannot be more than 30 percent of the benefits obtained, "after deducting reasonable expenses incurred on behalf of the employee." Attorney fees for lump sum settlements also are regulated closely by the law.<sup>31</sup> In cases of discrimination, employers have to pay employee attorney fees regardless of the date of injury if the case is successful. All attorney fees are subject to review and approval by the Maine Workers' Compensation Board. Any attorney found to be in violation of this provision of the law not only forfeits the fee in the case, but also is liable in court to pay the client an amount equal to two times the fee charged.

## **What Statements Should the Injured Worker Sign?**

While the employee should cooperate with the insurance company processing the employee's claim, an employee is not obligated to sign any statements. As in any serious matter, the injured worker should be very careful in signing any document relating to his or her claim. What might seem to be an insignificant scratch on the arm one week could become a major infection the next. An employee should at least discuss the medical condition with his or her personal doctor and the board or an attorney before signing any statement.

## **Is There Anything an Employer or Insurance Agent Must Tell the Injured Employee?**

Yes, The law stipulates that no statement of any kind (whether oral, written, recorded, or unrecorded), which is made by an employee to an insurance adjuster or employer representative, can be admissible as evidence or considered in any way under this statute unless:

- It is in writing;
- A true copy of the statement is delivered to the employee by certified mail;
- The employee has been advised previously in writing of the following:
  - any statement may be used against him/her;
  - the employer or the insurance company may have a financial interest opposed to the worker;
  - the worker may consult his or her lawyer;

- the worker can decline to make any statement; and
- the employer may not discriminate against the worker for refusing to make a statement or for exercising any of his or her rights under the law.

Statements made by an employee are admissible if the disputed issue in the case is whether or not a ninety-day notice was given to the employer.<sup>32</sup>

### **Is It Legal to Fire or Demote an Employee for Filing a Workers' Compensation Claim?**

No, the law protects employees from *any* discriminating action by an employer for exercising their rights under the law.<sup>33</sup> Any employee who encounters this type of discrimination has the right to file a petition before the Workers' Compensation Board alleging a violation of this section of the law. A formal hearing will be held and if the employee prevails, "the hearing officer may award the employee reinstatement to their previous job, payment of back wages, reestablishment of employee benefits, and reasonable attorney's fees." Further employee protections from discrimination for filing Workers' Compensation claims are guaranteed by the Americans with Disabilities Act (ADA).

### **Must the Law Be Posted?**

Yes. The Maine Workers' Compensation Law poster summarizing the rights of workers must be displayed by employers in a prominent place for all employees.

### **What about Reinstatement Rights?**

Upon request, a worker with a compensable injury is entitled to reinstatement to his or her former job, providing the job is still available and "suitable" to their physical condition. If the employee's former job is not available or suitable they are entitled to any other job which is suitable to their physical condition and available in the establishment where they had been employed. Additional protections on employee reinstatement rights also are provided through the Americans with Disabilities Act.<sup>34</sup>

Both the Maine Workers' Compensation Law and the ADA require employers to make "reasonable accommodations" for the physical condition of the employee unless the employer demonstrates that no reasonable accommodation exists or that the accommodation would pose an undue hardship.

Maine's Workers' Compensation Law establishes specific time limits regarding an employer's obligation to rehire an injured worker. For employers with fewer than two hundred employees, this legal obligation lasts for one year. For all other employers, it is for three years. Employers also can create "light-duty work pools" in order to facilitate injured employees' return to work.<sup>35</sup>

## **Do Workers have the Right to Sue their Employers?**

Under common law, any person had the right to sue any other person or organization which negligently caused them harm. Early in the twentieth century, a trade-off was made under which injured workers were given compensation in exchange for losing the right to sue their employers. Historically, workers' compensation laws were enacted to ensure prompt treatment and compensation for work related injuries and disease. However, the trade-off was not absolute and workers may still have the right to sue under certain circumstances.



- **Not Covered by Workers' Compensation**

Any employer who fails to provide workers' compensation may be sued in court by an injured employee. This is also true for seasonal, agricultural, aquacultural, and domestic workers exempted from the law, but it is more difficult. An attorney is essential in such cases.<sup>36</sup>

- **Covered by Workers' Compensation**

Employees covered by workers' compensation may not sue their employer. However, they may sue a negligent third party that causes them injury. For example, if a worker is injured when a belt snaps off a defectively produced machine, he or she may be able to sue the manufacturer of that machine even though he or she cannot sue the employer. Another example: a highway worker covered by workers' compensation is injured when a negligent driver hits him/her. The worker may sue the driver and the driver's insurance company. The right to sue is important and should be considered carefully in consultation with an attorney who is competent to handle such cases. In any event, a worker should apply immediately for workers' compensation in order to be sure to receive prompt attention and

compensation for an injury. It should be emphasized that if a worker does win a settlement through a court action, the Maine Workers' Compensation Law requires him/her to repay the employer or insurer the workers' compensation benefits received.<sup>37</sup>

## **Social Security Disability Benefits**

Workers disabled from any cause, work related or not, are eligible for Social Security benefits if they have worked long enough and recently enough under Social Security. The standards for eligibility are available at a regional office of the Social Security Administration. Information and referral services can be obtained by calling: 1-800-772-1213.

### **How is “Disability” Defined for Social Security Disability Benefits?**

The Social Security Administration (SSA) examines five criteria in deciding a workers' eligibility for disability benefits. These criteria are aimed at determining whether an individual is disabled to the extent that they cannot participate in gainful employment. These criteria are as follows:

- Whether the individual is working at the time of the claim; Claimants are not generally considered disabled if they make more than a variable monthly income cap that is determined annually.
- The severity of an individual's medical condition; Generally, a claimant must demonstrate a severe limitation on life or work functions that persists for at least a year to be eligible for Social Security disability benefits.
- The SSA maintains a list of impairments which it uses to determine the presence and severity of a disability. An individual's disability does not need to be on the list for a claim to be approved. The list is a guide for claims agents to assess whether an ailment is severe enough to qualify as compensable disability.
- An individual's ability to perform the work of their previous jobs;
- And an individual's ability to perform the work of a new job; Claimants who are capable of performing their previous job or new work are likely to be denied Social Security Disability benefits.<sup>38</sup>

### **When and How Should a Disabled Worker Apply for Social Security Disability?**

An individual who has become disabled should apply at any Social Security office. The application process can be initiated by phone, mail, or

by visiting the nearest Social Security office listed in the phone book. Social Security regulations stipulate that applicants filing for disability benefits must wait five full months before benefits can start. Thus, once the Social Security Administration has determined that a claimant is disabled, they will begin receiving benefits starting with the sixth full month from the date in which their disability began.

### **How Can a Disabled Worker Assist in the Claims Process?**

Usually, the Social Security's claims process for disability benefits takes anywhere from 60 to 90 days. An applicant can shorten this process by supplying copies of the following documents when they apply:

- Social security numbers as well as proof of age of everyone applying for benefits, including the disabled worker, his or her spouse, and children;
- Names, addresses, and phone numbers for all medical professionals treating the claimant, and the dates of the treatment (i.e. physicians, hospitals, outpatient treatment centers, clinics, and any other healthcare facilities; the medical records from these individuals and organizations also should be provided);
- Names of all medications prescribed for and taken by the disabled worker;
- Results obtained from medical laboratory tests;
- Employment history of where the claimant worked during the past fifteen years, including a brief description of the type of work they performed;
- The claimant's W-2 wage and tax form from the past year;
- If applicable, dates of the disabled worker's past marriages, if their current spouse is applying for benefits;
- Any other medical records and information documenting their disability.<sup>39</sup>



### **How Much Will be Paid in Social Security Disability Benefits?**

The specific amount that an eligible disabled worker will receive in monthly benefits is based directly on his or her lifetime earnings covered by

Social Security. Anyone can receive an estimate of this benefit by contacting the Social Security Administration and requesting the information.

### **How Will Other Disability Benefits Be Affected by Social Security Disability Benefits?**

The amount paid in Social Security disability benefits is affected by other disability programs such as workers' compensation and civil service disability programs for public workers in all levels of government. Generally, total combined payments to an eligible worker and his or her dependents cannot exceed 80 percent of the worker's average earnings before the disability began.

### **Can a Disabled Worker Appeal a Denied Social Security Claim?**

Yes. If an applicant's claim is denied they have the right to appeal that decision or any other decision made by the Social Security Administration regarding their case. This can be done by contacting the Social Security office to obtain and complete the necessary paperwork. The appeals process consists of four progressive steps/levels. An injured worker has 60 days from the time they receive a decision to file an appeal to the next level. Often in such cases, it is advisable (and increasingly necessary) to acquire the representation of an attorney specialized in this area of the law.

### **ENDNOTES**

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<sup>1</sup> 39-A M.R.S.A. §151-A.

<sup>2</sup> *Ibid.* §104.

<sup>3</sup> Maine Workers' Compensation Board, Facts About Maine's Workers' Compensation Laws, 2006, p. 18. Available online at: <http://www.maine.gov/wcb/facts.htm>.

<sup>4</sup> 39-A M.R.S.A. §201.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* (4).

<sup>7</sup> Maine Workers' Compensation Board, Rules and Regulations, 2007, ch. 1.

<sup>8</sup> 39-A M.R.S.A. ch. 5.

<sup>9</sup> Maine Workers' Compensation Board, Rules and Regulations, 2007, ch. 5.

<sup>10</sup> 39-A M.R.S.A. §206.

<sup>11</sup> *Ibid.* §204.

<sup>12</sup> *Ibid.* §211.

<sup>13</sup> *Ibid.* §213.

<sup>14</sup> *Ibid.* §205 (3).

<sup>15</sup> *Ibid.* §212 (2).



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<sup>16</sup> *Ibid.* §213.

<sup>17</sup> *Ibid.* §212 (3).

<sup>18</sup> *Ibid.* §217.

<sup>19</sup> *Ibid.* §355(7).

<sup>20</sup> *Ibid.* §216.

<sup>21</sup> *Ibid.* §215.

<sup>22</sup> *Ibid.* §206 (8).

<sup>23</sup> 39-A M.S.R.A. ch. 9.

<sup>24</sup> Maine Workers' Compensation Board, Rules and Regulations. 2007, ch. 1.

<sup>25</sup> 39-A M.R.S.A. §306 (2).

<sup>26</sup> *Ibid.* §318.

<sup>27</sup> *Ibid.* (2).

<sup>28</sup> *Ibid.* §314.

<sup>29</sup> *Ibid.* §218.

<sup>30</sup> *Ibid.* §205(9).

<sup>31</sup> *Ibid.* §325(4).

<sup>32</sup> *Ibid.* §310.

<sup>33</sup> *Ibid.* §353.

<sup>34</sup> *Ibid.* §218.

<sup>35</sup> *Ibid.* §219.

<sup>36</sup> *Ibid.* §401(1).

<sup>37</sup> 39-A M.R.S.A. §103.

<sup>38</sup> Social Security Administration, Disability Benefits. Pub. No. 05-10029. p. 7, January 2006.

<sup>39</sup> *Ibid.* at 6.

## CHAPTER IV

### UNEMPLOYMENT COMPENSATION

#### What Is Unemployment Insurance?

Unemployment insurance (UI) is a program for insuring covered employees against lost wages during periods of temporary unemployment.



Benefits can last up to twenty-six weeks, with certain limited exceptions. The insurance program is paid for by employers and is not welfare or “relief.”

Maine’s unemployment insurance program began in the 1930s in response to the unemployment insurance sections of the federal Social Security Act of 1935, part of the comprehensive social

legislation introduced by President Roosevelt during the Great Depression. It is intended to moderate Maine’s economy and insulate it from brief periods of economic hardship.

Maine’s program is run by the Maine Department of Labor (MDOL) which has branches throughout the state. MDOL can be reached at:

Maine Department of Labor  
Bureau of Unemployment Compensation  
47 State House Station  
Augusta, Maine 04333-0047  
[www.maine.gov/labor](http://www.maine.gov/labor)  
(207) 623-7981

MDOL representatives for unemployment compensation and workforce reentry programs can also be reached at CareerCenters across Maine. For more information on Maine’s CareerCenters, or to find one in your area, visit: [www.mainecareercenter.com](http://www.mainecareercenter.com) or call the CareerCenter hotline: 1-888-457-8883.

## **Who Pays for Unemployment Insurance?**

Unemployment insurance is financed by employer contributions on the first \$12,000 of each employee's wages paid into a trust fund for unemployment benefits. Unlike the Social Security program, no deduction can be made from an employee's wages for any part of an employer's contribution. Civil and or criminal penalties may be imposed if the employer evades the tax or takes the money out of an employee's paycheck.<sup>1</sup>

## **Who is Eligible for Unemployment Benefits?**

There are seven general requirements for an unemployed worker to receive weekly benefits. He or she must:

- have filed a claim at a MDOL CareerCenter;
- have earned a specified minimum amount during their base period;
- be totally or partially unemployed through no fault of their own;
- be able to work;
- be available to work;
- be actively seeking work (with limited exceptions);
- have served a waiting period of one week during which he or she was otherwise eligible for unemployment benefits.<sup>2</sup>

Each of these requirements is described in the following sections.

## **How Does an Unemployed Worker File a Claim?**

A worker who becomes unemployed and wishes to file a claim has several ways available to file an initial claim:

- An unemployed worker may file an initial claim via the internet by visiting [www.file4ui.com](http://www.file4ui.com) and selecting "File an Unemployment Claim" from the available options.
- Claims may be filed over the telephone as well, by calling an Unemployment Compensation Claims Center (UCCC) and filing a claim with a claims representative. The UCCC can be reached at 1-800-593-7660.
- Finally, a worker can file a claim through the mail by obtaining and completing the necessary Unemployment Insurance forms from an area CareerCenter, online at [www.file4ui.com](http://www.file4ui.com), or at many city and town offices. Completed forms can be mailed to the nearest UCCC listed on the form.<sup>3</sup>

When filing an initial claim, workers should have on hand the following information and documents:

- The claimant's Social Security or Alien Registration Number;
- The names, addresses, and phone numbers for all businesses or employers the claimant has worked for in the past 18 months; and
- Job titles and dates worked for each business or employer.<sup>4</sup>

After completing an application for UI, a worker will receive a “monetary determination letter” that will outline the worker’s “weekly benefit amount” and “maximum benefit amount” if he or she is found eligible for UI compensation. Additional information on filing weekly UI benefit claims will be available to workers through the informational and instructional booklet cited throughout this chapter and published by MDOL, “What Every Worker Should Know about Unemployment Insurance”, as well through a benefit rights and responsibilities video shown at various times on Maine Public Broadcasting Network television stations. Both the benefits rights and responsibilities video and instructional booklet are also available at CareerCenters statewide.<sup>5</sup>

### **How Much Must a Worker Have Earned?**

In terms of earnings, eligibility for unemployment insurance benefits is based strictly on what a claimant has earned during his or her “base period.” The “regular” base period is defined in terms of the last five calendar quarters (3 month periods) prior to a worker’s unemployment. The wages considered for this period are those earned in the first four quarters of the regular base period. During at least two calendar quarters in this base period, a worker must have been paid wages equal to two times Maine’s annual average weekly wage and, during the entire base period (the twelve months prior to unemployment), a claimant must have been paid wages totaling at least six times Maine’s annual average weekly wage. As of July 1, 2008 the Maine Department of Labor reported the state average weekly wage (SAWW) to be \$662.69. This figure is adjusted annually. Contemporary reports of the SAWW are available through this state government department.<sup>6</sup>



Under some circumstances, the worker may not qualify using regular base period wages. MDOL will use the worker’s wages under an “alternate base period” to determine if a worker will qualify for unemployment

insurance benefits by using more recent earnings. The alternate base period is comprised of the four most recent calendar quarters prior to a worker's unemployment compensation claim, which reflects a worker's most recent wages.<sup>7</sup>

## **How Does the Law Define Total or Partial Unemployment?**

In order to be eligible for weekly unemployment insurance benefits a worker must be either totally or partially unemployed through no fault of his or her own. The law and the MDOL consider a claimant totally unemployed in any week he or she received no wages and performed no services in the full-time occupation or industry in which he or she had been working. The law specifies that workers are considered partially unemployed if they "are working less than full time and do not earn \$5 or more above their weekly [unemployment insurance] benefit amount." Anyone who is self-employed, or employed on a full-time basis through individual contract-work, generally cannot be considered totally or partially unemployed by the MDOL for the purposes of UI.<sup>8</sup>

## **When Is an Applicant "Able" to Work?**

An applicant is "able" to work if physically and mentally capable of performing his or her usual occupation or any other occupation for which he or she has previous training or experience.<sup>9</sup>

If an individual is not "able" or "available" to work for a portion of the week due to good cause, such as illness or military obligations, the weekly benefits may be pro-rated for the days the individual was "able" and "available" to work. As in the case of persons not able to work for part of the week, persons who are not available for part of the week for good cause are entitled to receive benefits for that part of the week for which they are actually available.

## **When Is a Worker "Available" to Work?**

An applicant is considered "available" for work when ready and willing to accept any employment he or she is suited for by training and experience. Applicants cannot be found ineligible solely because they are unable to accept work on a shift, the greater part of which falls between the hours of midnight to 5:00 a.m., are unavailable because of parental obligation, the need to care for an immediate family member, or because of the unavailability of a personal-care attendant required to assist them because

they are disabled. Furthermore, an applicant cannot be found completely ineligible for benefits if they are not pursuing full time reemployment for the following reasons:

1. He or she was not employed full time prior to filing for benefits and is seeking reemployment for comparable working hours to her/his previous employment; or
2. He or she was previously employed full time, but for reasons of safety or protection from abuse, or to care for a sick member of the individual's immediate family, the applicant is now seeking part time reemployment.<sup>10</sup>

## **Why Can Benefits Be Denied?**

Benefits can be denied if the applicant:

- is unable to work;
- is unavailable for work;
- doesn't actively seek work;
- was discharged for misconduct;
- has voluntarily left work without cause arising from the job (with certain exceptions);
- has refused to accept a suitable job;
- is on strike (with certain exceptions);
- is absent or unavailable to work due to incarceration;
- fails to report on the day assigned without good cause;
- is receiving unemployment from another state;
- is receiving a pension from an employer cited in their base period earnings (benefits may be prorated dependent upon employer contributions to the pension).

The first three reasons are simply the continuing requirements for eligibility which must be met each week. The other reasons for disqualification are explained in the following sections.<sup>11</sup>

## **Can Employees Who Voluntarily Leave a Job Receive Unemployment Compensation?**

Unemployment insurance is based on the assumption that benefit recipients want to work and will be unemployed for as brief a time as possible. Anyone who voluntarily quits a job, with certain exceptions discussed below, is ineligible for benefits because he or she violated this basic assumption. Individuals who are disqualified for voluntarily quitting their job can regain eligibility by earning four times their weekly unemployment

insurance benefit amount following the quit with an employer covered by the unemployment law, provided they leave the new job for a non-disqualifying reason.

The disqualification does not apply when the quit occurred because:

- The job was not the claimant's "regular" employment. "Regular" employment is work in the individual's customary trade or occupation or work in a field where he or she has significant training or experience as opposed to temporary, odd-job employment outside of this occupation.
- The claimant had good cause for quitting that was attributable to the employment. "Good cause" is generally considered to mean a reason that would compel a reasonably prudent person to leave work under similar circumstances. Part of the good-cause determination will involve looking at whether the claimant made reasonable attempts to remedy the problem before leaving. Examples of "good cause" for leaving a job are outlined in the following sections and in the state statutes. However this list is not exhaustive and final determination of "good cause" is made on a case-by-case basis:
  - The claimant or an immediate family member became ill or disabled. For this exception to apply the claimant must have taken all reasonable precautions to protect his or her employment by promptly notifying the employer of the illness and promptly requesting reemployment when again able to work.
  - It was necessary for the claimant to accompany or join his or her spouse in another location. For this exception to apply the claimant must have been married to the spouse at the time of the quit and show that he or she is able, available, and actively seeking work within fourteen days of arrival at the new location.
  - The claimant had to leave the job to protect him or herself from domestic abuse.
  - The claimant volunteered to leave the job after an employer announced plans, in writing, for layoffs or workforce reduction at the place of work.<sup>12</sup>

## **How Does the Benefit Recipient Show He or She Is Actively Seeking Work?**

In order to remain eligible for a weekly check, the recipient must give evidence of seriously wanting to work. The way one goes about looking for employment is very important in casting light on his or her sincerity. When in an unfamiliar labor market especially, the recipient must be persistent in efforts to find a job and must show a readiness to accept the kind of work that

is available under the prevailing economic conditions. A mere token search does not satisfy the test. Unemployed workers should seek out the resources of their local CareerCenter and its “Job Bank” as well as searching for jobs online and in newspapers.

Furthermore, claimants are required to maintain and update a “Work Search Log” from the MDOL every few weeks highlighting employer contacts and employment opportunities explored. This log will need to be mailed or faxed to the MDOL every few weeks and will be periodically reviewed, checked, and affirmed by the MDOL for accuracy.



### **Are All UI Recipients Required to Complete a Weekly Work Search?**

No. Some workers are eligible for work search waivers issued to claimants with extenuating circumstances, which make it impractical to start a search for a new job. Waivers are generally granted for a short period of time (usually two to six weeks) and allow workers to refrain from searching for a job.<sup>13</sup>

Workers who are waiting for a recall to their previous jobs (due to temporary layoffs), and who have been given a definite recall date by their employer (no more than six weeks from the date of the layoff) should apply for a waiver. Those who have accepted a job offer for full time employment (within two weeks of the requested waiver) or are in job training approved by the Unemployment Insurance Commission may also be eligible for a weekly work search waiver. Those conducting job searches through trade unions; or those who are laid off due to a strike, lockout, or other labor dispute resulting in a stoppage of work may also be eligible for a work search waiver. (Please refer to the section in this chapter on strikers’ eligibility for UI for more information on this issue.) For more information on work search waivers, workers should contact their local Unemployment Claims Center.<sup>14</sup>

### **What Does It Mean to Be Fired for Misconduct?**

The fact that a person has been fired from his or her job does not necessarily mean that he or she will be denied unemployment compensation benefits, although it may. In order for a person who has been fired to lose benefits it must be found that he or she was discharged for “misconduct” connected with the work.



“Misconduct” normally involves an incident, or a pattern of behavior, that is detrimental to the employer. It generally applies to actions that were deliberate, rather than accidental or unintentional. Inefficiency, unsatisfactory performance, or occasional minor negligence are not generally considered to be misconduct.<sup>15</sup>

Individuals disqualified for misconduct can regain eligibility by earning four times their weekly benefit amount with an employer covered by unemployment law, provided they leave the new job for a non-disqualifying reason.

## **What Is “Suitable” Work?**

Refusal to take “suitable” work can be grounds for denying benefits, but a recipient has the right to refuse certain unsuitable jobs and still remain eligible for benefits. The MDOL, however, decides what is “suitable” based on law and rule.

In determining whether or not a particular job is “suitable” for a particular worker, the MDOL considers the risk involved to the recipient’s health, safety, and morals. It must also consider the worker’s physical fitness, prior training and experience; as well as prior earnings, the duration of unemployment, the prospects for securing local work in his or her usual occupation, and the distance of the available job from the recipient’s residence. In addition, the MDOL also considers the local economy as well as overall opportunities for employment when finding work for applicants. After 12 weeks the MDOL expects claimants to revise their job requirements and may require workers experiencing extended unemployment to:

- Seek work outside of a field for which they have prior training and/or work experience;
- Consider a job which offers wages lower than those earned at a claimants previous job (but not one offering wages less than the MDOL’s “average weekly wage”).<sup>16</sup>

However, the MDOL cannot deny a worker benefits for refusing a job:

- which is available as a result of a labor dispute (strike or lockout);
- which does not provide comparable wages, hours, or working conditions to similar jobs in the field;
- where, as a condition of working, the employee must join a company union, or resign from or refrain from joining any bona fide labor organization;
- that is the same job or type of work that a claimant left for “good cause” related to the job or the type of work; or

- which requires shift work the greater part of which falls between midnight and 5 a.m., and the claimant refuses employment due to parental obligations or the need to care for an immediate family member, or the worker requires the assistance of a care attendant unavailable during those hours.<sup>17</sup>

## Are Strikers Eligible for Unemployment Insurance?

Generally speaking, workers on strike are not eligible for unemployment insurance. However, there are certain exceptions when a worker on strike will be found eligible. These are:

- Substantially normal operations have resumed at the plant as the result of newly hired individuals performing the tasks of the striking workers.
- The strike is a result of the employer's willful failure to observe the health and safety provisions of a collective bargaining agreement, to comply with an official citation for violation of a health and safety law, or because of the existence of an abnormally dangerous condition of work.
- The claimant is not a member of the union on strike, does not do the type of work performed by the striking workers, and does not have any work as a result of the strike. For example, an office worker who is not a member of the striking union and who is temporarily laid off because of lack of work due to the strike would be allowed benefits.
- The claimant is unemployed because of a lock out by the employer in an attempt to resist the demands of his or her employees, or to gain concessions from them.



A worker on strike may become eligible for benefits if he or she is employed by another employer covered by the law after the beginning of the strike for five full weeks, or earns eight times his or her weekly unemployment insurance benefit amount, provided he or she leaves the new job for a non-disqualifying reason.<sup>18</sup>

## What Happens If the Applicant Fails to Report to MDOL on a Weekly Basis?

Benefits can be denied for any week in which an applicant does not report. Weekly claims must be filed within 14 days of receiving a claims form. Claim forms will be mailed on a weekly basis. Failure to report for a good reason is excusable and will not result in denial, and the period for claims may be extended for good cause. If one is unable to report, the MDOL should be contacted through the nearest UCCC.<sup>19</sup>

## **How Is an Applicant Informed of Eligibility?**

If found eligible, the worker will be informed in writing of the eligibility date, where and when to report each week, and the recipient's benefit level. If found ineligible, the worker will be informed in writing why he or she was found ineligible, the period of ineligibility, the eligibility standards which must be met, and the right to appeal.

## **What Rights of Appeal Does an Applicant Have?**

From the above description of the law, it is obvious many decisions could go either way. For this reason, the law gives every unsatisfied applicant the right to appeal a decision to "deny" or "disqualify" a claimant UI benefits within the MDOL and, if necessary, to the courts.

The law allows any claimant the right to be represented by an attorney. The claimant must pay the lawyer for representing them within the MDOL. If the appeal is won in the courts, however, the state of Maine will pay reasonable legal costs including lawyer fees. At the administrative appeal level the claimant can be represented by anyone he or she wants, including a union representative. No claimant's benefits may be terminated or reduced without the opportunity for a fair hearing.

All appeals must be filed within the time limit noted on the eligibility decision. This period is usually fifteen days, but can be extended for another fifteen days for good cause.

The MDOL provides five different means by which a claimant can file an appeal: online at the MDOL website: [www.maine.gov/labor/appeals](http://www.maine.gov/labor/appeals); by telephone (207-621-5001, TTY: 1-800-794-1110); by fax (207-287-5949); by mail (Division of Administrative Hearings P.O. Box 259 Augusta, ME 04332-0259); or by hand delivery directly to the MDOL.<sup>20</sup> All claimants will need to furnish the deputy decision number, the claimant's Social Security Number and the date of the benefit year ending.<sup>21</sup> It is important to note that claimants should continue to file UI claims while an appeal is being processed, as UI payments cannot be disbursed retroactively for claims that are not filed in a "timely manner."<sup>22</sup>

## **How Is the Weekly Benefit Amount Computed?**

The wages earned by a claimant in the highest quarter of his or her base year are divided by twenty-two to determine their weekly unemployment

insurance benefit amount (WBA). The maximum weekly benefit amount cannot exceed 52 percent of the state's annual average weekly wage. The maximum benefit amount allowed in a year is the lesser of the following: either twenty-six times the claimant's weekly benefit amount or one-third of his or her total base period wages, plus any supplemental benefits for dependents for which they are entitled.

Supplemental benefits available to an unemployed worker equal \$10 per dependent child per week, not to exceed 50 percent of that person's weekly benefit amount. For further details, claimants can discuss procedures for obtaining this benefit with an unemployment insurance representative at the MDOL.<sup>23</sup>

### **Are Benefits Available for Partial Unemployment?**

Yes. Adjustments in the benefit level are made so that it is worthwhile for a worker to accept part-time employment. The adjustment occurs for wages earned during a particular claims week in excess of \$25.<sup>24</sup>

### **May a Retired Person Ever Receive Unemployment Compensation?**

Yes. Many retired citizens who work part-time are laid off for lack of work. Unemployment compensation is possible if all criteria are met. Pension income must be reported and may be deductible. Social Security payments also must be reported and 50 percent of these payments are deductible; however these deductions are only necessary if the claimant worked for an employer who paid Social Security taxes during his or her base period.<sup>25</sup>

### **Are These Benefits Protected?**

Yes. Benefits received, so long as they are mingled with other funds, are exempt from garnishment or attachment except for debts incurred while unemployed and child-support obligations. UI benefits are, however, subject to state and federal income taxes and claimants should be made aware of this fact at the time they apply for unemployment compensation.<sup>26</sup>

### **How Are Non-fraudulently Obtained Unemployment Insurance Overpayments Treated?**

In the case of non-fraudulently obtained benefits involving a mistake made by either the claimant or the MDOL, an amount equal to 10 percent of the claimant's unemployment insurance check can be withheld weekly until the debt is paid. Non-fraud overpayments can be waived by the MDOL when

the person was without fault in receiving them and recovering the payments would be against equity and good conscience because of the claimant's situation.<sup>27</sup>

### **Who Should a Recipient Notify of an Address Change?**

A recipient should, of course, notify the local MDOL office of any address change. Also, they should notify the employer if he or she is expecting to be called back to work. Failure to do so could mean loss of benefits.

### **Must All Earned Income Be Reported to the MDOL?**

Yes. All gross earnings, including tips and bonuses, must be reported in the week in which they are earned. Failure to do so can result in ineligibility plus repayment of wrongfully collected benefits.<sup>28</sup>

### **Can a Claimant Be Punished for Violation of the Employment Security Law?**

Yes. If a person knowingly makes a false statement, commits misrepresentation, or fails to disclose a material fact to the MDOL, he or she will be refused benefits for not less than six months nor more than one year. In addition to being found ineligible, fraudulently obtained benefits must be repaid to the MDOL. A claimant found to have knowingly received benefits for which he or she was not entitled also is subject to civil and criminal prosecution and, if convicted, can receive a fine of not more than \$1000 and/or a jail term of not more than 364 days for each count. Each week of fraudulently obtained benefits is equal to one count.<sup>29</sup>

### **Are Other Benefits Available from the MDOL?**

Yes. The MDOL administers reemployment and job search services through CareerCenters around the state. CareerCenters also provide information on local job trainings and career fairs, and apprenticeships, as well as providing assistance to individuals who wish to seek post-secondary education to broaden their career opportunities. Furthermore,



CareerCenters provide assistance for veterans, disabled workers, and Maine people starting small businesses. These services are available for all Maine workers, regardless of employment status. For more information on CareerCenters go to: [www.mainecareercenter.com](http://www.mainecareercenter.com), or call 1-888-457-8883.<sup>30</sup>

## **What Other Unemployment Programs are Available?**

Maine workers may be eligible for additional or alternative unemployment benefits, retraining, and/or business start-up assistance depending on the nature of their unemployment. Individuals who have become unemployed due to outsourcing of labor overseas or imports, those whose jobs have been affected by a disaster, or those who wish to start their own business may be eligible for Dislocated Worker Benefits (DWB), Trade Readjustment Allowances (TRA) like Trade Adjustment Assistance (TAA) or Alternative Trade Adjustment Assistance (ATAA), Health Coverage Tax Credits (HCTC), Extended Benefits (EB), Disaster Unemployment Assistance (DUA), or Maine Enterprise Options (MEO). More information on these programs can be obtained from the MDOL or a local CareerCenter.<sup>31</sup>

## **Can a Worker Receive Benefits While Enrolled in a Training Program?**

Yes. If a worker is enrolled and participating in a training program approved by the MDOL, then he or she can receive unemployment benefits, even though he or she is not available for or actively seeking work, provided he or she meets all of the other eligibility criteria listed previously. Under the Dislocated Worker Benefit Program, an unemployed worker may be eligible for an additional twenty-six weeks of benefits if he or she is enrolled in an approved training program.<sup>32</sup>

## **ENDNOTES**

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<sup>1</sup> 26 M.R.S.A. §1221.

<sup>2</sup> Maine Department of Labor. What Every Worker Should Know About Unemployment Insurance. Pub No. ME I-3 (web). pp. 7-9. Available online at: [http://www.maine.gov/tools/whatsnew/index.php?topic=unemployment\\_forms&id=16954](http://www.maine.gov/tools/whatsnew/index.php?topic=unemployment_forms&id=16954).

<sup>3</sup> *Ibid.* at 4.

<sup>4</sup> Maine Department of Labor. How to File Unemployment Benefits. Available online at: <http://www.maine.gov/labor/unemployment/howtofile.html>.

<sup>5</sup> *Ibid.* at 8-9.

<sup>6</sup> 26 M.R.S.A. §1192 (5).

<sup>7</sup> Maine Department of Labor. What Every Worker Should Know About Unemployment Insurance. Pub No. ME I-3 (web). p. 7.

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<sup>8</sup> 26 M.R.S.A. §1043 (17).

<sup>9</sup> *Ibid.* §1192 (3)

<sup>10</sup> *Ibid.* (3)A.

<sup>11</sup> 26 M.R.S.A. §1193.

<sup>12</sup> *Ibid.* (1)

<sup>13</sup> *Ibid.* §1192 (6)

<sup>14</sup> Maine Department of Labor. What Every Worker Should Know About Unemployment Insurance. Pub No. ME I-3 (web) p. 11.

<sup>15</sup> 26 M.R.S.A. §1043 (23).

<sup>16</sup> Maine Department of Labor. What Every Worker Should Know About Unemployment Insurance. Pub No. ME I-3 (web) at 20-21

<sup>17</sup> 26 M.R.S.A. §1193 (3)

<sup>18</sup> *Ibid.* (4)

<sup>19</sup> Maine Department of Labor. “Frequently Asked Questions about Unemployment”. Available at: <http://www.maine.gov/labor/unemployment/faqs.html>.

<sup>20</sup> Maine Department of Labor. What Every Worker Should Know About Unemployment Insurance. Pub No. ME I-3 (web) at 22.

<sup>21</sup> Maine Department of Labor, Division of Administrative Hearings. Website: <http://www.maine.gov/labor/appeals/filing.htm>.

<sup>22</sup> Maine Department of Labor. What Every Worker Should Know About Unemployment Insurance. Pub No. ME I-3 (web) at 21.

<sup>23</sup> 26 M.S.R.A. §1191 (2).

<sup>24</sup> *Ibid.* (3)

<sup>25</sup> Maine Department of Labor. What Every Worker Should Know About Unemployment Insurance. Pub No. ME I-3 (web) at 13.

<sup>26</sup> 26 M.S.R.A. §1191.

<sup>27</sup> *Ibid.* §1051.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Maine Department of Labor. Maine CareerCenters website: [www.mainecareercenter.com](http://www.mainecareercenter.com).

<sup>31</sup> Maine Department of Labor. What Every Worker Should Know About Unemployment Insurance. Pub No. ME I-3 (web) at 24-25.

<sup>32</sup> 26 M.S.R.A. §1195, §1196, §1197.



## CHAPTER V

### ORGANIZING AND COLLECTIVE BARGAINING

#### NATIONAL LABOR RELATIONS ACT

History has shown that organizing has been an effective way for working people to change their social and economic environment to protect their interests. The story of workers' efforts to form labor organizations is long and filled with struggles. From a legal point of view, labor organizations have moved from being outlawed as criminal conspiracies in the nineteenth century to being highly regulated by law today.

However, despite the progress of organized labor, the vast majority of workers in the United States, including Maine, are not represented by unions and are subject to the legal doctrine of "Employment at Will." This doctrine simply means that if there is no union agreement, an employer may legally fire an employee without notice and without cause. The only protection for non-unionized employees in Maine come from specific laws that prohibit an employer from discriminating against an employee because of race, color, sex, sexual orientation, age, physical or mental disability, genetic predisposition, religion, ancestry or national origin, or because the employee exercised rights granted under other federal or state statutes.<sup>1</sup> For more information on "Employment at Will" and its effect on Maine workers, see Chapter Seven.

#### What Led to the Passage of the National Labor Relations Act?

The National Labor Relations Act of 1935, also referred to as the Wagner Act, was established by the federal government and recognized the right of workers to organize and to bargain collectively in the private sector. It followed a great wave of strikes, mass organizing, and industrial violence, and was a product of two competing forces in this turbulent period of American history. First, it was the culmination of efforts by workers to exercise their rights. And secondly, the act was an effort by government to contain industrial strife by





channeling it into legal and more controllable paths. Following the passage of the NLRA there was a significant upsurge in labor organizing until the end of World War II. Then in 1947, Congress amended the Wagner Act by passing the Taft-Hartley Act. Taft-Hartley places significant restrictions on unions as well as union organizing efforts. While the Taft-Hartley Act technically renamed the law as the Labor Management Relations Act (LMRA),<sup>2</sup> the title “National Labor Relations Act” (NLRA) is still used widely in labor, management, and government circles as the name of the law. As a matter of fact, the federal agency responsible for enforcing this law, the National Labor Relations Board (NLRB) still refers to it as the NLRA in its literature and on its web site, [www.nlrb.gov](http://www.nlrb.gov). Today, this legislation controls the basic formation and operation of labor unions in the private sector.

### **What Are the Basic Rights of Employees?**

The National Labor Relations Act clearly defines the rights of workers in the United States: “Employees shall have the right to self-organization; to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...”<sup>3</sup> The law also protects workers’ rights to join labor unions that will best represent their interests and/or to take other collective action to defend their rights in the workplace. The Act officially recognizes “the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers...,”<sup>4</sup> defines the rights of employees and employers in this process, and as a declared national policy, seeks “to eliminate the causes of ...substantial obstruction to the free flow of commerce...by encouraging the practice and procedure of collective bargaining...”<sup>5</sup> The Taft-Hartley Act added a proviso that employees “shall also have the right to refrain from any or all such activities.”<sup>6</sup>

### **What Are the Rights of Employers?**

The rights of employers are succinctly summarized (along with those of employees) in the following excerpts from the National Labor Relations Board: “...Experience has shown that labor disputes can be lessened if the parties involved recognize the legitimate rights of each other in their relations with one another... Further, to protect the rights of employees and employers, and to prevent labor disputes that would adversely affect the rights of the public, Congress has defined certain practices of employers and unions as unfair labor practices.”<sup>7</sup>

## **How is the NLRA Administered and Enforced?**

The National Labor Relations Board (NLRB), a federal agency, is responsible for administering and enforcing the NLRA. The NLRB fulfills this responsibility by: (1) determining whether employees have decided to have union representation through secret ballot elections; and (2) preventing and remedying unfair labor practices. In performing these duties, the NLRB takes appropriate legal action based upon petitions filed for employee union elections, handling unfair labor practice charges filed by employees, labor organizations, or management, and dealing with other labor relations matters necessary for implementing the law.

## **How is the NLRB Structured and Organized?**

The NLRB has two major, separate parts, beginning with the Board itself. The Board has five members, acting as a quasi-judicial body, deciding cases on the basis of formal records in administrative proceedings. Board members, nominated by the President and confirmed by the Senate, serve five year staggered terms.<sup>8</sup> The second part is the General Counsel, who is independent of the Board, and is responsible for the investigation and prosecution of unfair labor practices. The General Counsel also supervises the NLRB's regional field offices.<sup>9</sup>

Each Regional Office, with its own Director, is responsible for “making the initial determination in unfair labor practice and representation cases” within its respective geographic regional areas, including any resident or subregional offices in the area.<sup>10</sup>

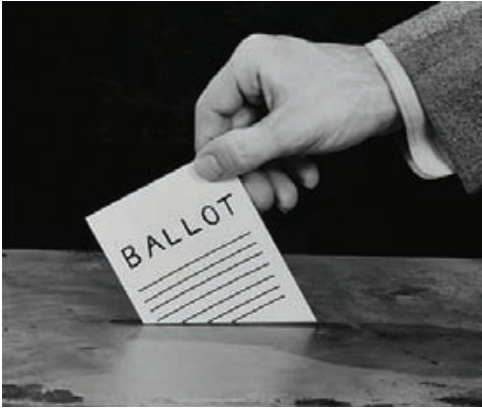
The NLRB website (<http://www.nlr.gov>) has extensive information and links concerning its structure, functioning, and resources. In addition to the NLRB homepage, see “About the NLRB” at: <http://www.nlr.gov/nlr/about/default.asp> for more information.

The NLRB national office is located in Washington, D.C., and can be reached at:

The National Labor Relations Board  
Franklin Court Building, Suite 5530  
1099 14<sup>th</sup> Street, NW  
Washington, D.C. 20570-0001  
(202) 208-3000  
Toll free: 866-667-6572; TTY: 866-315-6572

## What Kind of Acts Are Employer Unfair Labor Practices?

The National Labor Relations Act places legal restrictions on the kinds of actions employers can take. Violations of this law are called unfair labor practices. In general, an employer unfair labor practice is any act that interferes with, restrains, or coerces employees in the exercise of their rights to organize guaranteed by Section 7 of the act.<sup>11</sup> It is an unfair labor practice for an employer to discriminate or retaliate in any way against a worker for exercising his or her rights as a union member, or for taking lawful collective



action around workplace issues.

This applies to workers in both organized and unorganized workplaces, and covers all aspects of employment, such as hiring, firing, job assignment, promotions, benefits, and discipline.

Some examples of employer unfair labor practices include “threatening employees with loss of jobs or benefits if they join or vote for a union or engage in protected

concerted activity; threatening to close the plant if employees select a union to represent them; questioning employees about their union sympathies or activities in circumstances that tend to interfere with, restrain or coerce employees in the exercise of their rights under the Act.”<sup>12</sup> Other unfair labor practices include harassing union activists, refusing to reinstate employees to open jobs because they took part in a lawful strike, or demoting a worker for testifying in support of a co-worker’s grievance or complaint to the National Labor Relations Board.

## Who is Covered by the National Labor Relations Act (NLRA)?

While the NLRA covers most workers in the private sector, the size of the work establishment and its affect on interstate commerce are also determining factors. For more information on this aspect of the NLRA and its enforcement see *Appendix II*. Workers in any place of employment covered by the NLRA have the legal right to join an existing organization or start their own. Workers can join an international union, an area association, or start an organization in just one work site.

It is an unfair labor practice for an employer to control or favor a particular labor organization.<sup>13</sup> “Company unions” are definitely against federal law. Labor organizations must be free, independent, and worker controlled.

### **Who is Not Covered by the NLRA?**

The NLRA specifically excludes from its coverage individuals who are employed:

- as agricultural laborers,
- in the domestic service of any person or family in a home,
- by a parent or spouse,
- as an independent contractor,
- as a supervisor,
- by an employer subject to the Railway Labor Act,
- by a Federal, State or local government,
- by any other person who is not an employer as defined in the NLRA.<sup>14</sup>

While the NLRA specifically excludes from the definition of employer any state or federal agency and any person subject to the Railway Labor Act,<sup>15</sup> employees of the United States Postal Service are governed by the NLRA and are free to join a labor organization of their choice.<sup>16</sup> Under the Postal Reorganization Act of 1970, the NLRB has the authority to supervise and certify labor elections for postal employees.<sup>17</sup>

### **Who is a Supervisor Under the NLRA?**

The issue of who is a supervisor is critically important to the coverage of the NLRA. The Act provides:

“The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”<sup>18</sup>

In 2001, the Supreme Court ruled that individuals are statutory supervisors if:

- they hold the authority to engage in any one of the twelve supervisory functions (e.g., “assign” and “responsibly to direct”) listed in the Act;
- their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and
- their authority is held “in the interest of the employer.”<sup>19</sup>

The ruling in that case effectively held that registered nurses working in a health care facility may be considered statutory supervisors. Following this decision, the National Labor Relations Board found that certain charge nurses should be excluded from a bargaining unit because they were actually exercising supervisory authority.<sup>20</sup> As a result of the Supreme Court’s decision and its application by the NLRB, the definition of “supervisor” has been broadened to such an extent that several millions of workers have no collective bargaining rights.<sup>21</sup>

### **Can University or College Graduate Assistants Engage in Collective Bargaining?**

No. In 2004, the National Labor Relations Board, in a 3-2 decision involving Brown University, ruled that graduate student assistants are not statutory employees “within the meaning of Section 2(3) of the National Labor Relations Act.” The majority of the Board argued that graduate assistants are primarily students in their relationship to the university, and therefore cannot engage in collective bargaining.<sup>22</sup>

### **Is “Talking Union” Protected?**

The right to form a labor organization is protected by the National Labor Relations Act. This means it is illegal for an employer to ban discussion about unions or to retaliate against a worker for trying to organize. Generally, on their own time, workers have the right to talk about organizing, and to pass out union membership cards in work and non-work areas, providing it does not disrupt production. Handing out leaflets is legally protected as long as it is done on a worker’s own time and in non-work areas like the cafeteria, locker rooms, or parking lot.

If a union election is to be held, employers are required to provide the union with the names and addresses of workers who are eligible to vote in the bargaining unit. It is illegal for an employer to threaten or intimidate employees or try to bribe them with pay raises or other special benefits in order to discourage unionization.

## How Is a Labor Organization Formed?

The National Labor Relations Act sets up a straightforward procedure for an election process. The first step is to demonstrate that a labor organization has support. This is usually done through the use of “authorization cards” or petitions that are signed by workers who want to join the union. Usually, these are presented to the National Labor Relations Board as evidence of the workers’ desire to join a labor organization when they petition for an election.

If the employer sees that the majority of the employees have indicated a desire to join the union, the employer may voluntarily agree to bargain collectively with the organization and the process is

FOR THE INFORMATION OF THE NATIONAL LABOR RELATIONS BOARD

NAME \_\_\_\_\_ (Please Print) PHONE NO. \_\_\_\_\_

ADDRESS \_\_\_\_\_ Street \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

I, the undersigned, employee of:

COMPANY \_\_\_\_\_

JOB CLASSIFICATION \_\_\_\_\_

of my own free will authorize the Teamsters Union, Local 371, their agents or representatives, to act for me as a collective bargaining agency in all matters pertaining to pay rates, wages, hours of work, and other conditions of employment. Affiliated with I.B.T.

DATE \_\_\_\_\_ SIGNATURE \_\_\_\_\_

(MAIL TODAY)

ALL APPLICATIONS STRICTLY CONFIDENTIAL

complete. However, few employers choose this voluntary route, and there are many legal and illegal tactics utilized by employers to delay or prevent recognition of the union. When an employer refuses to recognize the labor organization voluntarily, the labor organization can file a “representation petition,” requesting an election, with the regional office of the National Labor Relations Board. “A representation petition filed by a union must be supported by a ‘showing of interest’ that at least 30 percent of the employees in the proposed bargaining unit want an election.”<sup>23</sup> This showing of interest must be documented either through employee signed authorization cards or a petition. Based on the validity of the cards or petition submitted, the NLRB determines if there is sufficient interest among the workers (30%) in forming a union. If so, the Board will determine the appropriate bargaining unit and set the date for an election. Determining who should be in the bargaining unit is sometimes a complicated and time-consuming process, with both the employer and the labor organization trying to increase their strengths. The basic test is that all unit members have a “community of interest” in terms of job responsibilities, wage rates, benefits, and other common aspects of work. According to the NLRB, “a bargaining unit is a group of two or more employees who share a ‘community of interest’ and may be reasonably grouped for collective bargaining purposes.”<sup>24</sup>

## **How Is an Election Held?**

The National Labor Relations Board works to ensure a fair election. There are many rules surrounding an election and if an employer, union, or Board agent violates these rules, it is grounds for objections to the validity of the election or an unfair labor practice charge. The Board may set aside an election and order a rerun but only if the “facts raise a reasonable doubt as to the fairness and validity of the election.”<sup>25</sup> If a union obtains proper authorization cards from a majority of employees in the bargaining unit and the employer subsequently commits serious unfair labor practices, which preclude a fair election, the board can order the employer to bargain with the union.<sup>26</sup>

When an election is held, it is administered by secret ballot. Workers may vote for any union that has qualified to be on the ballot or for no union representation. (Another union can be on the ballot by obtaining union authorization cards from 10% of the employees in the bargaining unit.)

## **What Happens after the Election?**

If over 50 percent of the employees voting choose a particular union, that organization legally becomes the certified exclusive bargaining agent for all employees in the bargaining unit, and the employer is required by law to bargain collectively with that employee organization.

## **If the Union Loses, Can There Be Another Election?**

Yes, another election can take place a minimum of twelve months after the first valid election. In cases where the National Labor Relations Board finds that the employer engaged in objectionable conduct, a rerun election will be ordered without the waiting period.

## **If the Union Wins, Can There Be Another Election?**

Yes. Twelve months after certification of representation, a decertification election can be held, or another union can seek to represent the workers. Any worker or employee group can request it as long as 30% of the represented employees sign the petition.

The methods for initiating and conducting an election to change the bargaining agent (union), or to return to “no representation,” are the same as the original election. In such an election, if a majority of the employees vote



against the labor organization, it is “decertified,” i.e., eliminated. However, if the union and employer have negotiated a contract within twelve months from when the union was certified, then no election can be held until after the expiration of that contract, or three years, whichever comes first. It is illegal for an employer to sponsor any action encouraging a union’s decertification.

## **What is Collective Bargaining?**



Collective bargaining is the process by which representatives of labor and management meet and negotiate over wages, hours, and working condition. Usually, this process involves many sessions, spread out over a period of several months or longer. Under the law,

collective bargaining is “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith.”<sup>27</sup>

## **What are the Responsibilities of Labor and Management to Bargain?**

The law requires the designated representative of both labor and management to bargain collectively in “good faith.” Collective bargaining can be divided into three separate areas: the duty to meet and confer; the duty to bargain in good faith; and the duty to cover certain subjects. The employer is not required to agree to any particular contract provision, no matter how reasonable or fair it appears to the union. However, refusing to meet at reasonable times, refusing to discuss grievances, refusing to discuss wages, benefits, or other mandatory subjects of bargaining, “take it or leave it” bargaining, or attempts to make deals behind the backs of the negotiating committee are all considered unfair labor practices.

## **Does the Employer Have to Supply Information?**

Yes. The National Labor Relations Act requires that an employer, upon request, supply the union with relevant information needed for



bargaining as well as maintaining the contract. This means, for example, that the union can obtain the cost of wage and benefit packages from the employer during contract negotiations. A particularly significant rule is that a company claiming financial inability to meet a union's demands may be required to prove its claim by showing its financial records to the union.

In addition, the duties of the employer extend beyond the period of contract negotiations and can be an effective tool for resolving problems that arise during the life of the contract. For example, a union may be entitled to personnel records or other relevant information it needs to represent its members in grievance proceedings. The National Labor Relations Board has also held that an employer planning to subcontract work or close a plant may be required to give the union the financial data on which it is basing its decision, and an opportunity to bargain over the decision. In some cases, the National Labor Relations Board has required an employer to provide the union with statistics on employment of women and minorities, which can be used to fight discrimination.

It should be emphasized, however, in terms of collective bargaining and contract maintenance, the duty to supply information only arises if the union requests it. An employer does not have any legal duty to supply information voluntarily.

### **What Is a Labor Contract?**

A labor contract is a private agreement entered into by an employer and a labor organization for the purpose of regulating certain work-related issues. The provisions of the labor contract are binding on both sides for a mutually acceptable period of time and are enforceable through the grievance procedure, arbitration, the National Labor Relations Board, or finally, state or federal courts.

This agreement takes the form of a legal contract for several reasons. Employees need to know in advance about wages, fringe benefits, discipline proceedings, and other matters. Employers need to know the same things, plus want protection from strikes for a certain period of time. In the vast majority of cases both parties to the agreement comply with its contents and the law never enters the picture. In some cases serious abuses do occur, and workers may turn to the National Labor Relations Board or the courts to seek protection.

## What Are Required Subjects of Bargaining?

Both the employer and the employee representative are required to bargain over “wages, hours, and other terms and conditions of employment.” This has been defined over the years to include wages and benefits, grievance procedures, arbitration, health and safety, nondiscrimination clauses, no-strike clauses, length of contract, management rights, discipline, seniority, and union security.

### *Wages, Hours, and Benefits*

While wages and hours continue to be important to both labor and management, changes in both the U.S. workforce and workplace have given rise to a number of other issues and priorities for negotiations. For example, in addition to the usual benefits involving vacations, holidays, pensions, and health insurance, other innovations have been negotiated in areas dealing with but not limited to: child care, flex-time, dental care, financial and counseling services through Employee Assistance Programs (EAP's), educational opportunities and sabbaticals. Possible benefits are limited only by the imagination of labor and management. All of these subjects are proper topics of the give and take of negotiations.



### *Occupational Health and Safety*

An increasing number of contracts include health and safety provisions. For example, collectively bargained joint health and safety committee activities have proven to be a useful way for labor and management to establish on-going programs for identifying and abating workplace hazards. Both federal and state statutes also cover occupational health and safety issues. Like other laws, labor and management can negotiate contract provisions which improve upon the law, but cannot legally negotiate any provisions that negate the law, or provide for practices or conditions which are less than legal requirements.

### *Non-discrimination Clauses*

There is also a duty to bargain over elimination of discriminatory employment practices. A good non-discrimination clause can often provide the fastest remedy for a worker who is discriminated against by reason of age, race, sex, color, religion, disability, national origin or ancestry, or sexual orientation. This type of clause can be used as the basis for a grievance about any of these discrimination issues, including sexual and racial harassment,

discriminatory health benefits relating to pregnancy, or lower pay jobs traditionally held by many women.

Regarding discrimination cases and contractual non-discrimination clauses, the courts have issued conflicting decisions concerning an employee's right to pursue statutory remedies even if arbitration was required under the collective bargaining agreement. However, in the case of *EEOC v. Waffle House*, the U.S. Supreme Court ruled that an agreement between an employer and an employee to arbitrate employment disputes does not bar the Equal Employment Opportunity Commission, acting on behalf of the employee, from pursuing victim-specific judicial relief, such as back pay, reinstatement, and damages in an ADA enforcement action.<sup>28</sup>

### *Length of Contract*

An important item of every contract is how long it will be binding. This is strategically important for both sides and often must be determined in light of the rate of inflation, the financial health of the employer, and other similar considerations.

### *Management Rights*

Employers traditionally work to retain broad control over the operational activities of their business. Management rights usually include decisions such as corporate structure, production levels, and plant size. What is and what is not a "management right" is negotiable, and may be defined in the contract.

### *Discipline*

Contracts usually include a clause reserving the right of the employer to discipline workers by firing, suspension, notation on work records, and other forms of reprimand. Labor organizations traditionally try to limit this clause by requiring that "just cause" be shown for the discipline. Unions also work for procedural safeguards such as notice, hearings, and review in an attempt to protect the employee. These safeguards are often written in conjunction with the grievance procedure. The goal of the discipline clause is to ensure that all facts are heard and that the punishment is not arbitrary or unfair. In addition, upon request an employee represented by a union has the legal right to have a union representative present at any investigatory meeting or interview with an employer, if the employee reasonably believes the meeting may result in discipline, or finds the session escalating to disciplinary purposes.<sup>29</sup>

However, this right does not apply to non-union employees. In an important decision, the National Labor Relations Board ruled that employees who work in a non-unionized workplace are not entitled under Section 7 of the National Labor Relations Act “to have a coworker present at an investigatory interview that the employee reasonably believed might result in discipline.”<sup>30</sup>

### *Seniority*

The seniority clause is a method by which senior employees protect their jobs in work areas involving transfers, promotions, bumping, filling vacancies, and layoffs. Seniority rights can be established on a department or plant-wide basis and may be conditioned on the worker’s ability to perform on the job. These clauses are often the most complicated in a contract and vary with the kind of work.

### *Dues Collection*

Union and management may negotiate a mutually agreeable means of union dues collection. The most convenient method is the “check-off” system by which the company automatically deducts the amount from the employee’s paycheck. Such a practice is negotiable.

### *Union Security*

Labor organizations often seek to protect their strength by negotiating a union security clause. Long ago, the closed-shop agreement, which specified that an employer could only hire members of a particular union, was declared illegal. Management and labor can negotiate contract language dealing with the issue of union security. Essentially, a union security clause insures that all employees covered by a union’s representation, share in the expenses the union incurs in negotiating and maintaining a contract, as well as representing all members in the bargaining unit, as the union is legally required to do. Examples of union security provisions include union shop, agency shop, fair share, and maintenance of membership. The existence of these provisions varies from contract to contract and employment sector. Often they do not exist at all. Under the Taft-Hartley Act, a state may enact a so-called “right-to-work” law, which restricts labor and management from negotiating any type of union security clause by making them illegal. Maine has no such law.

Case law has played a significant role concerning union security. The U.S. Supreme Court has ruled that “financial core membership,” not full union membership can be required under a union security clause in states where these provisions can be legally negotiated.<sup>31</sup> In the case of *NLRB v.*

*General Motors Corp.*, the Court found that a worker cannot legally be required to join a union as long as they pay union initiation fees and monthly dues.<sup>32</sup> A worker who decides to do this and not become a full union member is considered under law to be a “financial core member.”<sup>33</sup> Such members have all the rights and protections provided through the collective bargaining agreement, but they have no right to participate in any of the workings and functions of the union organization itself. Financial core members do not have the right to vote on the ratification of the collective bargaining agreement. Nor do they have any right to participate in the election of union officers, to hold union office themselves, or to have any say or input in any other union activities and policies.

### *Grievance Procedure*

Because contracts cannot foresee every problem that will arise at work, most collective bargaining agreements include the establishment of a mutually agreeable procedure to settle differences in contract interpretation and application. Essentially, the grievance procedure is usually the means a worker has of enforcing the contract.



### *Arbitration*

If the parties cannot agree on contract interpretation or proper enforcement, they may wish to call in an impartial outsider, or “arbitrator,” to settle the question. This is only possible when an “arbitration clause” is negotiated into the contract. An arbitration clause provides an alternative to time-consuming lawsuits.

This category of contract language will often define how the arbitrator will be selected, who will pay what share, and the arbitrator’s scope of authority. Often, both sides will agree that the arbitrator’s decision is final or “binding.” This means the courts ordinarily cannot review and reverse the arbitrator’s decision if the decision is based upon the terms of the contract. Under both Federal and Maine law an award may be vacated only upon showing it was the result of corruption, fraud, evident partiality, or the arbitrators exceeded their authority.<sup>34</sup> If none of these factors have been found to apply, the courts will enforce the decision of the arbitrators even if the courts would have decided the case differently.

### *No-Strike Clause*

Most employers insist that the labor organization agree not to strike for the duration of a contract. This agreement is enforceable in court and

enables the employer to plan production without fear of work stoppages. This makes “wildcat strikes” illegal and may require that the union discipline such strikers. (A wildcat strike is an unauthorized work stoppage while a contract is still in effect).

No-strike clauses have been interpreted to ban almost all strikes during the life of the contract, except strikes in response to a serious employer unfair labor practice, or an abnormally dangerous working condition (see Chapter II on OSHA). Strikes are still legal when the contract expires.

### **Can An Employer Insist That Collective Bargaining Sessions Be Conducted Via Video-conferencing?**

No. In a case reported by the Office of the General Counsel, the General Counsel ruled, “the use of a videoconferencing system to negotiate an initial collective-bargaining agreement with [a] union is not comparable to face-to-face bargaining.” The ruling also stated that: “Absent agreement, sound policies require in-person collective bargaining negotiations.”<sup>35</sup> An employer’s insistence on using videoconferencing for this purpose violates the NLRA requirement that it meet and confer in good faith with the union.

### **What Kinds of Acts Are Union Unfair Labor Practices?**

Since the passage of the Taft-Hartley Act, labor organizations have been restricted in ways similar to employers. This amendment to the National Labor Relations Act makes it illegal for a union to:

- coerce people to become union members;
- use threats, intimidation, or violence;
- force an employer to punish a worker because he or she doesn’t get along with the union;
- charge excessive union dues;
- refuse to bargain in good faith with the employer.<sup>36</sup>

In addition, a union cannot force a worker to use the union grievance procedure, although it may have a representative present at the grievance meeting. Any worker who wants to try to settle a problem directly with the employer may do so unless specifically prohibited by the bargaining agreement.

## **Can Unions Punish Employees Who Disagree with Union Policy?**

Unions commit an unfair labor practice if they “restrain or coerce” any organizational rights of employees. For example, if an employee seeks to decertify a bargaining unit (i.e., kick out the union by a new election), there is nothing the union can legally do to get the worker fired or to harm his or her job status. In this instance, the union also could not fine the member. However, after a proper hearing providing for due process, the employee could be expelled from the union. Where union membership is a condition of employment, as with a union shop, expulsion from the union cannot lead to termination from the job, except for failure to pay the legally required dues or fair share fee. As long as an employee continues to pay dues or the fair share fee, discharging the employee for violating union rules would be an unfair labor practice against the employer. It is an unfair labor practice for the union to request the employer to discipline an employee for violating union rules.

A labor organization does have broad power to make and enforce its own rules, and such rules can provide for fines or expulsion from membership for anti-union activity. However, these sanctions are totally internal affairs. A union cannot legally have a person fired for breaking union rules or refusing to pay union fines.

## **What Is the Union’s Responsibility to the Members of the Bargaining Unit?**

The union must represent all the workers in the bargaining unit fairly and equally, whether or not they belong to the union. This is known as the duty of fair representation, and a union that violates this duty may be subject to an unfair labor practice charge or lawsuit by an aggrieved member.

A union can meet its responsibilities under the duty of fair representation by representing everyone in the bargaining unit equally and fairly, handling similar cases consistently, investigating each grievance and problem thoroughly, keeping written records, observing time limits, and maintaining an internal process of appeal.

## **What If the Union Violates the Duty of Fair Representation?**

An employee who has been treated unlawfully by his or her union can file an unfair labor practice charge with the National Labor Relations Board or sue the union and/or employer in state or federal court. If the board or courts uphold an employee’s charge of unfair treatment by the union, lost

pay, reinstatement, or other compensation can be awarded. (The Landrum-Griffin Act, described later on in this chapter provides and protects additional rights of individual union members within their unions.)

### **What If an Unfair Labor Practice Has Taken Place?**

Any employer, employee, or group of employees who believe a violation of the law has occurred, can file an unfair labor practice charge with the nearest regional office of the National Labor Relations Board. The address of the regional office for Maine is:

Regional Director  
National Labor Relations Board, Region 1  
Thomas P. O'Neill Federal Building  
10 Causeway Street, Room 601  
Boston, Massachusetts 02222-1072  
(617) 565-6700

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

### **How Are Unfair Labor Practice (ULP) Charges Processed?**

Unfair labor practice charges are filed with the appropriate regional NLRB field office according to geographic jurisdiction. The office conducts a full investigation by researching the facts of the case, interviewing the charging party, labor and management, as well as other witnesses. If the Director of Regional Office “finds reasonable cause to believe” the law has been violated, the office will work “to remedy” the violation through a voluntary settlement. If this approach fails, the regional office issues a formal complaint and submits the case for a hearing before a NLRB Administrative Law Judge. After the hearing and deliberations are conducted the judge makes a decision that may be appealed to the full National Relations Board in Washington, D.C. The Board in turn issues a “final agency determination” on the case, which can be appealed to the U.S. District Court.<sup>37</sup>



## What If an Unfair Labor Practice Has Been Determined?

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

Common remedies ordered by the Board include reinstatement to a job with or without back pay, ordering new elections, or requiring employers to post notices concerning the rights of their employees. Each party has the right to appeal any of these orders to the U.S. District Court.



## What Other Laws Protect the Rights of Union Members Within Their Unions?

The Landrum-Griffin Act (officially called the Labor-Management Reporting and Disclosure Act of 1959) is the basic federal law protecting individual rights of union members. It contains a “bill of rights” for union members and sets up procedures for union elections, discipline, and financial reporting.<sup>38</sup>

## Who Is Covered by the Landrum-Griffin Act?

The Landrum-Griffin Act applies to all members of unions in the private sector, and to those federal, state, or local government employees who belong to unions representing both public and private employees. The law covering unions representing postal workers, the Postal Reorganization Act, administered by the NLRB, also incorporates the legal principles of the Landrum-Griffin Act.<sup>39</sup>

## Must a Union Be Run as a Democracy?

Yes. The Landrum-Griffin Act insures all union members a voice in the affairs of the union. Subject to reasonable rules of order and decorum, employees have complete freedom to “express any views, arguments, or opinions” at union meetings or functions without punishment. This includes the right to hand out leaflets to other union members or to seek publicity, as long as the union member doesn’t advocate supporting a rival union or

breaking the contract with the employer. Freedom of assembly also is protected. Union members may meet outside of regular union meetings and discuss union affairs without fear of reprisals from union officials.

### **Can a Union Discipline a Member?**

A union cannot discipline a member for exercising the right to free speech, or even for suing the union in court or at the National Labor Relations Board. However, a member can be disciplined for activities such as crossing the union's lawful picket line in a primary strike, disrupting union meetings, misusing funds, or not paying dues or fees that are legally required. Landrum-Griffin provides a right to written charges, a full and fair hearing, and an impartial trial board before discipline can be imposed. The union cannot force or even encourage the employer to fire a worker for any reason except failure to pay legally required union dues or fees.

### **How Does Federal Law Affect Elections Held within Unions?**

Elections are closely regulated. Local union elections must be held every three years by secret ballot with all full union members in good standing eligible to vote. Financial core members and agency fee members are not eligible to vote in union elections. All candidates must have an equal opportunity to distribute campaign literature and are entitled to have an observer at the polls and at the counting of ballots. All union members must be notified fifteen days before the election and ballots must be preserved for one year.



When notified, the Secretary of Labor investigates violations of election rules. If the Secretary of Labor goes to court, he or she must prove that the violation “may have affected the outcome” of the election. If proved, a new election may be called and supervised by the government.

## **Must Labor Organizations Disclose Their Records?**

Every labor organization must file its constitution, by-laws, and names of officers, dues levels, and detailed accounts of all activities with the U.S. Department of Labor. Annual financial reports must reveal all expenses and receipts including salaries and loans. Each officer or employee of a labor organization must also report any financial transactions with the employer, and account for all union investments. The Secretary of Labor enforces these reporting rules, and union members are entitled to see copies of these records.

## **How Can a Union Member Enforce These Rights?**

The Landrum-Griffin Act grants union members the right to sue their unions for violation of their rights, but may require the member to pursue internal union procedures first. A union member is almost always better off trying to resolve matters internally. If unsuccessful, the member may be entitled to sue the union in federal court or may file a complaint with the U.S. Department of Labor. The court may award attorney's fees. A union member who thinks his or her rights have been violated should contact:

U.S. Department of Labor  
Office of Labor/Management Standards  
John F. Kennedy Federal Building  
Suite E-365  
Boston, Massachusetts 02203  
(617) 624-6690

## **How Does the Law Affect Labor/Management Participation Committees?**

Over the past forty years, the courts and the NLRB have developed an important body of law, which has influenced labor/management participation committees and programs. Both the law and the courts acknowledge that labor and management have “contrary and to an extent...antagonistic concepts of self-interest.”<sup>40</sup> In order to protect the interests of workers, the law stipulates that it is illegal for management to engage in bargaining directly with employees instead of the union over conditions of employment.<sup>41</sup>

In workplaces where there is no recognized union and a group of employees deals with management on working conditions, they are, under the law, a labor organization.<sup>42</sup> Legally, an employer cannot establish or interfere

with this group.<sup>43</sup> In unionized workplaces, any efforts by the employer to dominate employee committees also are illegal. For example, in the case of *NLRB v. Cabot Carbon Co.*, the U.S. Supreme Court upheld an NLRB ruling that disbanded several illegal employer dominated employee participation committees, which had been established and operating in “unionized plants without objection from the unions.”<sup>44</sup> The Court ruled that any such representation plan, which is controlled by the employer, is a management dominated or “company union” and is therefore, illegal.<sup>45</sup>

In the *Electromation, Inc.* case, the NLRB ruled that a non-union employer violated the NLRA by “establishing and dominating” employee committees, which were formed to deal with the employer on working conditions.<sup>46</sup> In conjunction with the NLRB’s ruling in the *Electromation* case, additional Board case law decisions have served to clarify and reinforce these legal principles: An employer has the right to form an employee committee whose purpose is to obtain information on working conditions or serve as a committee for brainstorming.<sup>47</sup> But, under the NLRA this type of employee committee is illegal if it functions to deal with the employer over working conditions by establishing “a bilateral mechanism between the employer and the employees involving a pattern or practice in which the employees over time make proposals to management, which it may accept or reject. Isolated instances in which a committee primarily serving as an information-gathering or brainstorming mechanism submits proposals to the employer are insufficient for such a committee to constitute a labor organization.”<sup>48</sup>

The case of *E.I. DuPont* involved a unionized employer that formed employee participation committees. The NLRB found that these committees were illegal because they were employer dominated as demonstrated by the fact that “the Respondent [employer] ultimately retains veto power over any action the committee may wish to take.”<sup>49</sup> A joint labor/management committee is legal providing: a) labor has voluntarily agreed to it, and retains control over the selection and make up of its committee members; b) the committee is not controlled or dominated by management; and c) the committee is not used by management as a way to circumvent or undermine the union, collective bargaining, and the maintenance of the contract.

These legal protections and principles have continued to be reargued and subject to change both by the NLRB and the courts to the present time. Since the whole field of labor-management law is a creature of statute, agency, and court interpretation, it is constantly changing.

## ENDNOTES

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<sup>1</sup> Maine Department of Labor, “Frequently Asked Questions,”

[http://www.maine.gov/labor\\_laws/faqs.html](http://www.maine.gov/labor_laws/faqs.html)

<sup>2</sup> 29 U.S.C. § 141, et seq.

<sup>3</sup> *Ibid.* § 157

<sup>4</sup> *Ibid.* § 151

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> National Labor Relations Board, Basic Guide to the National Labor Relations Act, Washington, D.C., U.S. Government Printing Office, 1997, p.1

<sup>8</sup> NLRB, “About Us”, [http://www.nlr.gov/about\\_us/overview/board/index.aspx](http://www.nlr.gov/about_us/overview/board/index.aspx)

<sup>9</sup> NLRB, “The NRLB, What it Is, What it Does”, Washington D.C., U.S. Government Printing Office, p. 3

<sup>10</sup> *Ibid.*

<sup>11</sup> 29 U.S.C. § 158 (a)(1)

<sup>12</sup> NLRB, “The National Relations Labor Relations Board and YOU: Unfair Labor Practices,” <http://www.nlr.gov/publications/guides/index.aspx>

<sup>13</sup> 29 U.S.C. § 158 (a)(2)

<sup>14</sup> *Supra*, NLRB, “The National Relations Labor Relations Board and YOU: Unfair Labor Practices.” It should be noted that under the *Maine Agricultural Employees Labor Relations Act*, 26 M.R.S. § 1, et seq., Maine’s agricultural workers have the right to form, join, or assist a labor organization in collective bargaining with their employer over wages, hours, and working conditions.

<sup>15</sup> 29 U.S.C. § 152(2)

<sup>16</sup> 39 U.S.C. §1202, et seq.

<sup>17</sup> *Ibid.*

<sup>18</sup> 29 U.S.C. §152(11)

<sup>19</sup> *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001)

<sup>20</sup> NLRB; *Oakwood Health Care, Inc.*, 348 NLRB 37 (2006)

<sup>21</sup> Populist Progressive, Editorial, Vol. 12, No. 19, p. 2, November 1, 2006

<sup>22</sup> NLRB; *Brown University*, 342 NLRB 483 (2004)

<sup>23</sup> Feldacker, Bruce; *Labor Guide to Labor law*, 4<sup>th</sup> Ed.; N.J. Prentice Hall, 2000; p. 26

<sup>24</sup> NLRB, “The National Relations Labor Board and YOU: Representation Cases,” <http://www.nlr.gov/publications/guides/index.aspx>

<sup>25</sup> Feldackder, *op.cit.*, p. 120

<sup>26</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)

<sup>27</sup> 29 U.S.C. 7, § 158 (d)

<sup>28</sup> *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)

<sup>29</sup> *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) This right is known as the “Weingarten right.”

<sup>30</sup> NLRB; *IBM Corp.*, 341 NLRB 1288 (2004)

<sup>31</sup> *NLRB v. General Motors Corporation*, 373 U.S. 734 (1963)

<sup>32</sup> *Id.*

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<sup>33</sup> Feldacker, *op.cit.*, p. 426. How much a "financial core member" has to pay in monthly union fees also has been an area of considerable legal controversy. For a more thorough discussion of this issue see Feldacker, pp. 427-431.

<sup>34</sup> 9 U.S.C. 1 §10; 14 M.R.S.A. §5938

<sup>35</sup> NLRB, Report of the General counsel; "NLRB General Counsel Arthur Rosenfeld Issues Report on Recent Case Developments, April 5, 2004; pp. 5-7

<sup>36</sup> 29 U.S.C. 7 §158 (b)

<sup>37</sup> *Supra*, NLRB, "The NLRB, What it Is, What it Does", p. 4

<sup>38</sup> 29 U.S.C. 11 §§401 et seq.

<sup>39</sup> 39 U.S.C. §§401 et seq.

<sup>40</sup> *NLRB v. Insurance Agents Union*, 361 U.S. 477, 488 (1960)

<sup>41</sup> *Emporium Capwell v. Western Addition Commun.Org.*, 420 U.S. 51 (1975)

<sup>42</sup> 29 U.S.C. 7 §152 (2)(5)

<sup>43</sup> *Id.* §152 (8)(a)(2)

<sup>44</sup> *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959)

<sup>45</sup> *Id.*

<sup>46</sup> *Electromation, Inc.*, 309 NLRB 990 (1992); *aff'd*, *Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7<sup>th</sup> Cir. 1994)

<sup>47</sup> Feldacker, *Labor Guide to Labor Law*, p. 182

<sup>48</sup> *Id.* pp. 182-183

<sup>49</sup> *E.I. DuPont*, 311 NLRB 893 at 896.

## CHAPTER VI

### MAINE PUBLIC-SECTOR COLLECTIVE BARGAINING LAWS

#### What Statutes Extend Collective Bargaining Rights to Public Employees in Maine?

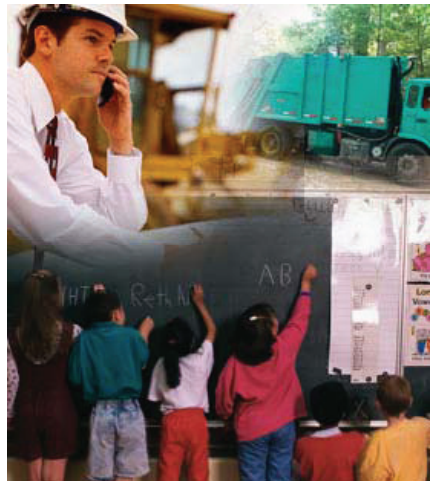
There are four state laws that enable different groups of public employees in Maine to form labor organizations and to bargain collectively with their respective employers: the Municipal Public Employees Labor Relations Act, enacted in 1969; the State Employees Labor Relations Act, enacted in 1974; the University of Maine Employees Labor Relations Act, enacted in 1975; and the Judicial Employees Labor Relations Act, enacted in 1984.

County employees were given collective bargaining rights in 1981 by adding them to the municipal employees statute. In 1986 the vocational technical colleges, now the Maine Community College System, were established as a separate, system-wide entity with their own board of trustees, and although remaining under the University of Maine Labor Relations Act, new bargaining units were established and elections held.

#### Who Is Covered by Each of These Laws?

The Municipal Public Employees Labor Relations Act covers employees who work for “[a]ny officer, board, council, committee, or other persons or body acting on behalf of any municipality or town or any subdivision of a municipality; any school, water, sewer, or other district; the Maine Turnpike Authority; any county or subdivision of a county; the Maine State Retirement System; or the Maine Educational Center for The Deaf and Hard of Hearing and the Governor Baxter School for the Deaf.”<sup>1</sup>

Included are professional as well as non-professional employees. The State Employees Labor Relations Act provides coverage for employees who work for “all the departments, agencies, and commissions of the executive branch of the state of





Maine...and any employee of the legislature...”<sup>2</sup> The University of Maine Labor Relations Act extends rights to employees of the University of Maine System, both professionals and nonprofessionals<sup>3</sup> as well as those employed by the Maine Community College System and employees of the Maine Maritime Academy. The Judicial Employee Labor Relations Act provides collective bargaining rights and protections to any employee of the Judicial Department of Maine.<sup>4</sup>

These laws do not cover certain employees including department heads, persons who have been employed less than six months, temporary, seasonal or on-call workers, and workers having a confidential relationship to the employer. In addition, the state employee act also excludes certain policy-making and policy-influencing positions. The judicial employee act also excludes the court administrator, law clerks, interns, and those employees appointed by the governor. However, Maine’s public-employee bargaining statutes cover some supervisory employees whose private-sector counterparts are excluded from the National Labor Relations Act.

### **What Is the Purpose of These Laws?**

The specific intent of each of these laws is to improve the relations between employer and employees. Improved relations are insured by recognizing the right of the public employees to join labor organizations and to be represented by these labor organizations in collective bargaining and contract maintenance.

This is done by establishing a system of rules and procedures similar to those in the National Labor Relations Act. All of these laws contain sections that deal with bargaining unit determination, representation elections, the collective bargaining process, and impasse resolution.

### **Who Is Responsible for the Enforcement of These Laws?**

The Maine Labor Relations Board is a three-member board that administers and enforces the state’s laws that govern collective bargaining for public sector employees and employers. The chairperson is a representative of the public interest, the second member is an employee representative, and the third member is the employer representative. The executive director and a support staff handle the daily activities of the MLRB.



The Maine Labor Relations Board can be reached at:

Maine Labor Relations Board  
2<sup>nd</sup> Floor, Elkins Building, AMHI Complex  
90 State House Station  
Augusta, Maine 04330-0090  
(207) 287-2015

### **If Employees Decide to Organize, Must They Seek Established Labor Groups to Represent Them?**

No. Employees may form their own labor group and do their own bargaining. Many labor groups, however, seek to merge, or “affiliate,” with larger state and national labor organizations for support and assistance.

Examples of labor organizations representing public employees in Maine include Teamsters Union Local 340, the Maine Education Association (MEA), Service Employees International Union (SEIU), American Federation of State, County and Municipal Employees (AFSCME), International Association of Firefighters (IAFF), American Federation of Teachers (AFT), American Federation of Government Employees (AFGE), Maine Nurses Association, and the International Brotherhood of Police Officers. All of these unions are affiliated with national and/or international organizations. Examples of independent employee organizations that do not have any other organizational affiliation include the Maine State Troopers Association and the Maine Association of Police.

### **How Can Public Employees Form a Labor Organization?**

The laws protect public employees when they organize labor organizations for their mutual employment interests. But, before a labor

organization can require the employer to negotiate a contract, the union must show that all jobs it seeks to represent form an appropriate “bargaining unit.” Administrative machinery solves disputes over which jobs belong in a single “bargaining unit.” This makes it clear which employees will be represented by the labor union in the negotiation of a contract.



## **How Is a Bargaining Unit Determined?**

A bargaining unit is composed of employees with a similar community of interest. This is extremely important for two reasons. First, the inclusion or exclusion of different job classifications from a particular unit can go a great way in strengthening or diluting a particular labor organization's support. Second, this can be an extremely lengthy process.

The laws encourage the public employer and labor organization to voluntarily agree on which job categories should be in the bargaining unit. If this occurs, an "Agreement on Appropriate Bargaining Unit", signed by both parties, is filed with the Maine Labor Relations Board. If the parties cannot reach an agreement, either party can petition the Executive Director of the Maine Labor Relations Board for a determination of an appropriate bargaining unit. All four laws require that such determination consider the employees' community of interest. The State Employees and University Employees acts also protect the interest of the public employer by cautioning the MLRB against "excessive fragmentation" of units.

The Executive Director or his or her professional staff designee, as the initial decision maker in this process, must examine evidence given by either side concerning job description, job location, rating schemes, type of supervision, wage rates, benefit structures, promotional sequence, amount of job interchange, or other aspects of the work to make sure the unit employees will have enough in common.

## **Can Professionals Be Included in the Same Unit with Nonprofessionals?**

Under the municipal employees statute, professional employees can be included in a bargaining unit with nonprofessional employees only after a majority of the professional employees vote that they wish to be included in the unit. The reason for this is that professional and nonprofessional employees may have different interests and goals in their employment.

A professional employee is defined as a person whose work is predominately intellectual and varied, involving the consistent exercise of discretion and judgment, and which requires advanced learning in science or study in an institution of higher learning.<sup>5</sup> Quite often this is difficult to determine and the Executive Director will conduct a hearing to make the determination. Both sides must be ready to defend their position at the hearing with factual evidence about the job in controversy.

Under the other public-employee statutes, professional employees have been placed in their own separate units or joined in units with either administrative or technical employees.

### **Do Supervisory Personnel Have Bargaining Rights?**

Supervisory employees may form a separate unit or be included in a bargaining unit with the employees, depending on the type of managerial function performed. At the unit determination hearing, the executive director or designee must balance the managerial aspects of the supervisory job against the similarity the job may have with other unit jobs. A supervisory job should be examined to find out if the supervisor exercises real authority over the jobs of others. It must be determined whether the job requires making personnel policy, handling grievances, deciding hiring and firing policies, etc.

Unlike private sector supervisory positions under the NLRA, supervisory employees under Maine public-sector law have the same organizational rights as other employees. The only basis for denying a supervisory employee rights under the law would be when the position has a confidential relationship with respect to labor-relations matters.

The Municipal Public Employees Labor Relations Act specifically provides that school principals, assistant principals, and nurses in supervisory positions are not necessarily excluded from inclusion in a bargaining unit of the employees they supervise.

### **If a Bargaining Unit Has Been Established, Must an Election Be Held?**

No. If both the public employer and the group of employees wish to start collective bargaining voluntarily, they may do so without an election. A special “Voluntary Recognition Form” from the Maine Labor Relations Board must be signed and filed with the MLRB before any negotiation takes place. If there is disagreement, an election is the proper means of deciding who, if anyone, will represent the unit members.

Under the rules of the MLRB, a voluntary agreement on the bargaining unit may not be challenged for a period of one year. Nothing in the rules or the law addresses the question of how long an employer must continue to recognize a bargaining unit that it has voluntarily recognized. Case law suggests that an employer must continue to recognize the bargaining agent until either the employer or the bargaining agent (or other organization

seeking recognition) files for an election. An employer may file for an election or withhold continued recognition when it has a good-faith belief based upon objective considerations that the union no longer represents a majority of its employees. Most likely, an employer could not take either action for a reasonable period of time following recognition which might well be construed to be a period at least of one year. When a labor organization wins an election, the employer must recognize the labor organization and bargain with it for at least a one-year period.

## **When Can an Election Be Called?**

If a member of a bargaining unit of public employees requests the Maine Labor Relations Board to hold an election and if at least 30 percent of an appropriate unit shows support for a representative, an election is in order.

If there is a dispute as to whether 30 percent of the employees wish to be represented, then it may be proved by signed membership or authorization cards of a labor union, or by other showing of interest documents. All methods must show at least 30 percent, however, and most organizing drives show more.

The showing of interest is considered confidential and will not be disclosed by the board unless the petitioner consents.



## **How Are Representation Elections Conducted?**

### *Eligible Voters*

Those eligible to vote in a representation election include unit members who were on the payroll at the date of the election request, are still on the payroll on the date of the election, and have been employed in the public-sector workplace for at least six months. The employer must supply the Maine Labor Relations Board and the labor organization with a list of all eligible voters.

### *Balloting*

The voting is secret. Special ballots are prepared and issued by the board. On the ballot, unit members may vote for the labor organization, or perhaps for a second listed labor organization, or for “no representation.”

Notice of the election date and place is sent out ten to twenty days ahead of time. Employers must post the notice and sample ballots at the workplace.

The Executive Director has discretion to hold a mail-ballot election and this procedure may be utilized when groups of voters are spread out over broad geographic areas of the state. As a result of state budgetary cuts, most elections are now conducted through the mail-ballot process. Election observers from either side are allowed to check the status of each voter and watch as the votes are counted. They may also be present when the mail ballots are opened. This part of the election process is called contesting ballots.

### *Determining the Outcome*

If the labor organization receives a majority of the votes cast (more than 50 percent), the Executive Director of the Maine Labor Relations Board will certify it as the sole bargaining agent for all employees in the unit.

If labor groups compete against each other, and neither receives a majority, a run-off may be required. If a labor organization is successful in the runoff, it will be certified by the executive director as the sole bargaining agent for the employees of the unit.



### *Election Finality*

A new election, or a change in the bargaining unit, cannot be considered less than one year after the election. The method of requesting and conducting an election to change the bargaining agent, or to return to “no representation,” are the same as for the original election.

### **Can the Employer Threaten or Punish Employees to Discourage Labor Organizations?**

No. The employer is prohibited from interfering with any organizing rights or activities exercised under the Municipal Public Employees Labor Relations Act, the State Employees Labor Relations Act, the University of Maine Labor Relations Act, and the Judicial Employees Labor Relations Act.

Public-employer prohibitions are similar to private-employer unfair labor practices under the National Labor Relations Act. It is illegal for the public employer to discriminate in any way against employees on account of union activity. Some examples of protected employee activities are signing authorization cards or petitions, filing complaints, giving evidence at a hearing, or working for a labor organization as an organizer. The employer also is prohibited from blacklisting “any employee organization or its members for the purpose of denying them employment.”<sup>6</sup>

Employees are still subject to dismissal or punishment for reasons other than labor organizing. However, what appears as a typical disciplinary action by the employer may sometimes be motivated by anti-union desires and would therefore be subject to redress under the law.

### **What Happens When an Employer Discriminates?**

If anyone suspects employer discrimination, he or she should contact the Maine Labor Relations Board. Employees may file written complaints up to six months after an act of discrimination. A hearing can be held to discover all the facts. Attorneys are not required at these hearings, but are helpful. The MLRB can order reinstatement, back pay, or other appropriate relief. The board has complaint forms and rules for these hearings, found in its publication “Prohibited Practice Rules,” and are available on-line from the MLRB at its website: <http://janus.state.me.us/mlrb> or by calling the Board.

Under the governing statutes the MLRB does not investigate these complaints, but sits much as a court in hearing and deciding complaints filed by individuals, labor organizations, or employers.

### **Must a Labor Organization Represent All the Workers in the Bargaining Unit Fairly?**

Yes. The duty of fair representation required by the National Labor Relations Act as well as NLRB decisions and court case law also applies to labor organizations of public employees.

### **Are Employers and Employee Labor Organizations Required to Negotiate?**

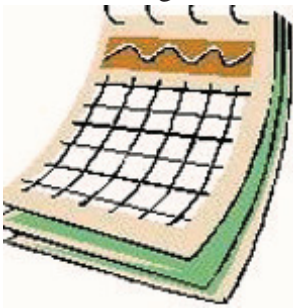
Yes. As is true under the NLRA, Maine’s public sector collective bargaining statutes require employers and employee labor organizations to negotiate wages, hours, working conditions, and contract grievance

arbitration if either side requests. Refusal to bargain on these subjects is illegal although neither side is required to agree to a proposal.

### **Do Employees Need to Give Advance Notice on Some Subjects of Negotiation?**

All four laws require that a ten-day notice be sent from one party to the other requesting a collective-bargaining session. This usually occurs when two parties are bargaining a first contract. Many times, the parties will set a renewed bargaining date for the next contract in the current agreement in order to bring about a smooth transition between agreements.

When cost items (wages, insurance, and pensions) are to be bargained, the Municipal Public Employees Labor Relations Act requires that the labor organization notify the employer at least 120 days (four months)



before the end of the current fiscal operating budget. Employee groups must be very careful to observe this technicality, for it may be easily overlooked—especially when employees approach their first contract negotiations. The requirement is waived, however, if a newly formed unit is recognized or certified during the 120-day period (but not less than thirty days) prior to the end of the fiscal period. In this case, notice of intent to negotiate over cost

issues must be given to the employer at least 30 days before the end of the employer's fiscal year.<sup>7</sup>

### **Do Special Rules Govern the Bargaining Relationship between State Employees and the State Government?**

Yes. The State Employees Labor Relations Act specifically states that the “rules for personnel administration” are mandatory items for collective bargaining.<sup>8</sup> In 1985, the legislature specifically provided for the negotiability of the compensation system, including factors to evaluate jobs for pay purposes; appeal procedures regarding allocation of jobs to specific pay grades; and the implementation of the compensation system. However, bargaining over these subjects may not be compelled sooner than ten years after the parties’ last agreement to revise the compensation system and is otherwise subject to certain limitations. Also, these provisions cannot “be construed to ... contravene the spirit and intent of the merit system principles and personnel law.”<sup>9</sup>

## **Do Special Rules Control Teacher Negotiations?**

Yes. Under the Municipal Public Employees Labor Relations Act, school boards and other public employers of teachers must meet and discuss educational policies with teacher representatives but are prohibited from negotiating on those policies.<sup>10</sup>

Public school boards are still required to negotiate wages, hours, working conditions, and contract grievance arbitration with their teachers. The educational policy limitation is hard to define since most problems of teacher employment will touch on some aspect of educational policy.

The problem of balancing “educational policy” and “working conditions” must be done on a case-by-case basis. For example, class size has been held non-negotiable as a matter of educational policy, whereas the use of teacher aides has been held to be negotiable as a working condition.

The line between “educational policy” and “working conditions” is still elusive but becomes better understood as the board and courts decide more cases, and as negotiators gain experience. The decision on whether an employer will voluntarily agree to negotiate over “educational policy” will sometimes depend on the aggressiveness and persuasiveness of the parties in each case. In any event, an employer always is required to negotiate on the “impact” of “educational policy.”

## **Can Public Employees Strike?**

No. All four laws prohibit work stoppage, slowdowns, and strikes by workers covered by these statutes. Dismissals, fines, court-ordered injunctions, and even jail sentences could result from such actions.<sup>11</sup>

## **What Alternatives Do Public Employees and Public Employers Have When They Cannot Voluntarily Reach an Agreement?**

When the parties cannot agree, negotiations come to an impasse. The public-bargaining laws encourage settlement of the impasse by enforcing the use of certain settlement methods. These methods, in order of their usual sequence are: mediation, fact-finding, and interest dispute arbitration. The alternative dispute resolution mechanisms are considered alternatives to the right to strike in the public sector.



## What Is Mediation?

The law requires mediation when either party or the executive director of the Maine Labor Relations Board requests mediation help. Mediation is available to the parties at any time in the process, but typically is utilized prior to fact-finding. However, both labor and management do not have to be at impasse in their negotiations in order to utilize the services of a mediator.

Mediators attempt to coax the opposing parties into agreement by offering compromise solutions or by acting as confidential go-betweens. Sometimes mediators can persuade the parties to arbitrate voluntarily. Mediation is difficult if one party refuses to cooperate, since mediators cannot require agreement. The mediators attempt to arrange conferences, encourage settlement of the impasse by persuasion, and let the parties know of their services. Mediators must keep their conversations with the parties confidential.

The mediators may be from the State Panel of Mediators, or from another established mediation service, or may be a mutually acceptable neutral person. The costs for a state mediator are shared equally by both parties and are significantly less than the costs for private mediation services. The State Panel of Mediators handles the vast majority of public-sector mediations in this state. However, mediation services also may be obtained from the Federal Mediation and Conciliation Service and the Conciliation Service of the American Arbitration Association. The services of the FMCS are free of charge.

## What Is Fact-Finding?

Either party may request the executive director to assign a fact-finding panel from a list of persons kept by the executive director. The panel is composed of three members; one representing the employees' interests, one representing the employer's interests, and



the third, the chairperson, representing the public interest.

Fact-finders collect information about the labor dispute by conducting a hearing where both labor and management present evidence and information supporting their positions. A short time after the hearing, the fact finders meet in an “executive session” to develop a report containing recommendations for settling the dispute. This report must be provided to the parties within 30 days of the hearing. Hopefully, the report and recommendations will affect the attitude of the bargaining parties.

Fact-finding can be a costly process. A long fact-finding session can mean a good sum of money to the parties who share equally in the total cost. If the fact-finding does not result in a settlement within thirty days from when the fact-finder’s report is issued, the findings and recommendations of the fact-finder can be made public.<sup>12</sup> The purpose of public disclosure is to arouse public opinion and perhaps aid in contract settlement. Fact-finders themselves cannot force an agreement.

### **What Is Interest Arbitration?**

Interest arbitration is the final effort to settle an impasse over contract terms after mediation and fact-finding have failed to persuade the parties to agree. As authorized by law, the arbitrator(s) hold hearings, administer oaths, subpoena witnesses and evidence, and make other inquiries.

After considering arguments by both sides, the arbitrator(s) make a determination that may be made public at a later date. On some subjects the determination of the arbitrators is advisory only, while on other contested issues the determination is binding and may be enforced by court order.

The Maine Board of Arbitration and Conciliation provides both fact-finding and interest arbitration services at a substantially reduced cost. Arrangements for these services can be made through the executive director of the Maine Labor Relations Board upon the joint request of the parties.

### **How Is Compulsory Interest Arbitration Initiated?**

As with mediation and fact-finding, either side or both sides may request interest arbitration. In either case, the statute provides detailed procedures for choosing a three-person arbitration panel. Each side chooses one person, and these two choose a third.

The federal law also provides for mediation-arbitration when the parties jointly agreed. In this case, the mediator-arbitrator first attempts mediation and then proceeds with formal arbitration if mediation fails. Mediation-arbitration services also are available to all Maine public-sector labor and management by mutual consent.

### **On What Subjects Are Interest Arbitrators' Decisions Binding?**

On negotiable subjects other than salaries, pensions, and insurance, majority decisions of the arbitrators are binding.<sup>13</sup> The parties are then obliged to enter into the arbitrated agreement or take appropriate actions to carry out the arbitrators' ruling.

In controversies over salaries, pensions, and insurance, the arbitrators can only investigate and recommend solutions. On these subjects the arbitrators' decisions are only advisory although they may make the advice public in order to influence public opinion. The two parties must then continue bargaining for a reasonable period of time in attempting to reach a settlement over these unresolved issues.

By the mutual consent of both parties, the State Board of Arbitration and Conciliation can provide interest arbitration services at a significantly reduced cost over private arbitration. Lists of private arbitrators are available through both the American Arbitration Association (AAA) and the MLRB. The fees and expenses of arbitrators are the responsibilities of labor and management.

### **How Is Interest Arbitration Decided?**

The state, university and judicial laws list criteria that must be considered by the arbitrator(s) when a decision is to be reached on the provisions of a contract. These include such factors as the ability of the employer to pay; the level of wages and benefits paid by other employers for similar work; and the need of state government, the University of Maine, and the Judicial Department of Maine for qualified employees. Under the municipal law, arbitrators are free of similar constraints and fashion settlements that they feel are fair to both parties.

### **What is the Last Best Offer Rule?**

Under both the NLRA and the Maine statutes, during the bargaining process both sides are prevented from unilaterally changing hours, wages or

working conditions. However, both the NLRB and the MLRB have adopted an impasse exception to the process. “This exception allows a party [management] to unilaterally implement its last best offer when negotiations have reached a bona fide impasse...Once the parties have in good faith exhausted the prospects of reaching an agreement, [including the utilization of all impasse procedures,] unilateral change that is reasonably comprehended within the pre-impasse proposals no longer violates the Act. After impasse, however, the duty to bargain is not extinguished. Rather, it is temporarily suspended until...the parties are no longer...deadlocked.”<sup>14</sup>

## **What Is the Distinction between Interest Arbitration and Grievance Arbitration?**

Interest arbitration is part of the dispute resolution process which attempts to settle the terms and provisions of the collective-bargaining agreement itself. Grievance arbitration is arbitration of a dispute that arises over the application or interpretation of the agreement, and is referred to the grievance resolution process contained in the agreement.

## **ENDNOTES**

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<sup>1</sup> 26 M.R.S.A §7-A

<sup>2</sup> *Ibid.* §979-A

<sup>3</sup> *Ibid.* §1021

<sup>4</sup> *Ibid.* §1281

<sup>5</sup> *Ibid.* §962 (7)

<sup>6</sup> *Ibid.* §964 (1)(F)

<sup>7</sup> *Ibid.* §965(1)

<sup>8</sup> *Ibid.* §979 D (E)(1)(f)

<sup>9</sup> *Ibid.* §(E)(2)

<sup>10</sup> *Ibid.* 965 1 (C)

<sup>11</sup> However, in *Sanford Highway Unit 481 v. Town of Sanford*, 411 A.2d 1010 (Me. 1980), the Maine Supreme Judicial Court ruled that where a municipal employer engaged in bad faith bargaining and the public employees then went on strike, the employer committed a further unfair labor practice by discharging them. The Court also upheld the MLRB finding that the union had engaged in an unfair labor practice by calling the strike and that the employees, while entitled to reinstatement were not entitled to reimbursement.

<sup>12</sup> 26 M.R.S.A. §965 (3) (C)

<sup>13</sup> *Ibid.* § (4)

<sup>14</sup> *Mountain Valley Education Assoc. v. MSAD 43 Board of Directors*, 655 A.2d 348, 352 (Me. 1995)

## CHAPTER VII

### OTHER STATE AND FEDERAL EMPLOYMENT LAWS

#### EMPLOYMENT-AT-WILL

##### What is Employment-At-Will?

Employment-at-will means that an employer in the state of Maine may discharge an employee who is not protected by union agreement, at any time for any reason, or for no reason at all, providing the termination is not based upon the employee being a member of a protected class (see Chapter I), or because the employee exercised rights granted under federal or state statutes.

This legal doctrine, an outgrowth of the common law, created by the courts, has been consistently applied in Maine for more than one hundred fifty years.<sup>1</sup> The doctrine applies to both employers and employees. In a contemporary case on the issue, the Maine Supreme Judicial Court stated: “It is well settled that a contract of employment for an indefinite length of time is terminable at will by either party.”<sup>2</sup> However, although an employee is at liberty to terminate her or his employment for no reason at all, the doctrine gives the real power to the employer.



##### Does an Employer have to Inform His/Her Employees that They are Employed At-Will?

No. An employer does not need to inform their employees that their employment is on an at-will basis. Additionally, any oral or written statements made by an employer to an employee about job security may be nullified if the employer clearly states, in writing, as a disclaimer (usually in an employee handbook or manual), that employees are hired on an at-will basis.

## **EMPLOYMENT RIGHTS OF MILITARY RESERVE AND NATIONAL GUARD MEMBERS**

### **Do Any Laws Protect Reemployment of Members of the Military Reserves or National Guard Who Return from Active Service?**

Yes. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)<sup>3</sup> guarantees the reemployment of persons who have been absent from a position of employment because of “service in the uniformed services.”<sup>4</sup> Also, Maine has a similar statute that protects the right of Maine Reserve or National Guard members to their employment following military service.<sup>5</sup>

### **Must Employers Grant Leave to Employees Called to Duty by the National Guard or Reserve?**

Yes, an employee must be granted a leave of unpaid absence to perform military service.<sup>6</sup>

### **What are the Basic Reemployment Rights of an Employee Returning from Military Service?**

The employer must promptly reemploy the service member. “Promptly” means within days, not months. Generally the reemployment position should be the one the person would have kept or attained had he or she remained continuously employed during the military service.<sup>7</sup>

### **Where Can a Veteran Find Assistance with Employment and Reemployment Rights?**

The Department of Labor’s Veterans’ Employment and Training Service (VETS) administers and enforces USERRA. Information can be obtained from a local VETS office or a complaint may be filed if a service member believes his/her rights have been violated. In addition, the National Committee for Employer Support of the Guard and Reserve, an organization within the Department of Defense, can provide information and informal mediation services. This office can be reached at:

ESGR  
1555 Wilson Boulevard  
Suite 200  
Arlington, Virginia 22209-2405

Contact also can be made via telephone at: 1-800-336-4590 and on the internet at: <http://www.esgr.org>.

## **What Protections Govern Reserve Military and National Guard Family Members?**

Under Maine law, family members of a person called to active duty are entitled to employment leave of up to 15 days either when the service member is deployed for duty or returns from deployment. During this leave the family member is entitled to all benefits but the leave itself may be unpaid.<sup>8</sup>

## **FAMILY AND MEDICAL LEAVE**

### **What Is the Family and Medical Leave Act (FMLA)?**

The FMLA became a national law in 1993. It is designed to provide some public- and private-sector employees with limited rights to annual unpaid leave of absence for up to twelve weeks in order to meet certain family care and personal medical needs.<sup>9</sup> Maine has a law with very similar provisions to the FMLA.<sup>10</sup> Major differences between the two laws are noted in the following sections.

### **Who Are Covered by These Laws?**

#### *Employers*

Covered FMLA employers include any enterprise that is engaged in commerce or an activity which affects commerce, and employs fifty or more people for at least twenty calendar work weeks “in the current or preceding calendar year;”<sup>11</sup> any public employer including the U.S. Government, the U.S. Postal Service, states, municipalities, counties, and any other subdivisions of states; and private schools on the elementary and secondary levels. The Maine statute applies to any private employer with 15 or more workers at one location in the state, the State of Maine, and any municipality with 25 or more employees.<sup>12</sup>

#### *Employees*

Under the FMLA, “Employees are eligible for leave if they have worked for the employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employees 50 or more employees within 75 miles.”<sup>13</sup> The Maine law applies to employees who



have worked for 12 months for an employer with at least 15 employees at any single worksite.<sup>14</sup>

## How Are These Acts Enforced?

The Wage and Hour Division of the U.S. Department of Labor is responsible for administering and enforcing the FMLA by investigating and resolving complaints of violations concerning this law. In addition, covered employees also have the right to initiate a civil court action against any employer for violations of the FMLA. Although the Maine Department of Labor will counsel employers and employees concerning their respective rights and obligations under the Maine Family Medical Leave Act, enforcement of the Act is accomplished by a civil action filed by the employee.<sup>15</sup>

## For What Reasons Can Leave Be Taken under the FMLA?

The FMLA requires a covered employer to grant an eligible employee up to twelve weeks of unpaid, job-protected leave for any of these reasons:

- to care for the employee's son or daughter after birth;
- placement of a child with the employee through adoption or foster care;
- to provide care for the employee's child, spouse, or parent because of a serious health condition;
- the employee has a serious health condition which prevents them from performing their job;
- or any qualifying emergency, as determined by the Secretary of Labor, arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty in the Armed Forces (or has been notified of an impending call or order to active duty) in support of a contingency operation.<sup>16</sup>



Leaves also can be taken in smaller time-frame increments (i.e., a few hours



for medical exams, hospitals, or doctor visits), and on an intermittent or reduced work-schedule basis. Intermittent leave for the placement, adoption, or foster care of a child, or for the birth and care of a child is subject to the employer's approval.<sup>17</sup>

## **For What Reasons Can Leave Be Taken Under Maine Law?**

Family medical leave may be requested for:

- “Serious health condition of the employee;
- The birth of the employee's child or the employee's domestic partner's child;
- The placement of a child 16 years of age or less with the employee or the employee's domestic partner in connection with the adoption of the child;
- A child, parent, spouse, domestic partner, or sibling with a serious health condition;
- The death or serious health condition of the employee's spouse, domestic partner, parent or child if the spouse, domestic partner, sibling, parent or child as a member of the state military forces...or the United States Armed Forces...dies or incurs a serious health condition while on active duty.”<sup>18</sup>

## **What Advance Notice/Medical Certification Requirements Exist Under the Law?**

### *Notice*

Under the FMLA, when leave is “foreseeable” employees are required to give their employers thirty days’ advance notice. If the leave is not foreseeable, employees are expected to give notice as soon as possible.<sup>19</sup> Under the Maine law, thirty days’ notice is required unless prevented by a medical emergency.<sup>20</sup>

### *Certification*

In the case of a serious health condition, an employer can require medical certification which documents and supports the leave request. At its expense, the employer also may require second and third medical opinions. When an employee who has had a serious health condition wishes to return to work, an employer also can require the employee to provide a medical “fitness for duty report to return to work.”<sup>21</sup>

## What Is a “Serious Health Condition?”

Under the FMLA a “serious health condition” constitutes any illness, injury, impairment, or physical or mental condition that involves any of the following: “any period of incapacity or treatment in connection with or consequent to inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility; any period of incapacity requiring absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health-care provider; or continuing treatment by (or under the supervision of) a health-care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days; or for pregnancy and prenatal care.”<sup>22</sup> Maine law employs a similar definition.

## What Employee Rights and Protections Are Established by These Acts?

There are three basic employee rights and protections established by the Medical Leave Acts:

- During the full duration that an employee utilizes a FMLA leave, the employer must continue providing for the employee’s health-care coverage under any group health-insurance plan. This means that both the employee and employer must continue to pay whatever share they had been paying prior to the start of the leave. “If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/same benefits...as if the employee were not on leave.”<sup>23</sup> Under the Maine FMLA the employer “shall make it possible for employees to continue their employee benefits at the employee’s expense.”<sup>24</sup>
- Upon return from an FMLA leave, most covered employees are entitled to either the position they had at the start of their leave, or an “equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.”<sup>25</sup> This is virtually identical to the rights of employees under Maine law.<sup>26</sup>
- An employee cannot lose any employment benefits that accrued prior to the start of their leave. For example, any accumulated benefits involving paid vacation or sick leave must be available to an employee upon returning from a FMLA or Maine FMLA leave.

## **What Employer Acts Are Unlawful?**

It is illegal under both the FMLA and Maine law for an employer to restrain, interfere, or deny an employee the exercise of any right established under these acts. Discharge and/or discrimination of an employee for exercising his or her rights also violates both laws.

## **What Impact Does the FMLA have on Existing Federal, State, or Local Law and Collective-Bargaining Contracts?**

The FMLA does not affect any existing federal or state statutes prohibiting employment discrimination. In addition, the FMLA does not supersede “a provision of state law that is more beneficial to the employee, and employers must comply with the more beneficial provision.”<sup>27</sup> When the Maine statute or a collective bargaining agreement provides “greater family or medical-leave rights” to employees, employers must comply with Maine law or the collective bargaining agreement.<sup>28</sup>

## **Can Paid Leave Be Substituted For Family and Medical Leave?**

Yes. According to the U.S. Wage and Hour Division, “employees may choose to use **or** employers may require the employee to use, accrued **paid** leave to cover some or all of the FMLA leave taken. Employees may choose, or employers may require, the substitution of accrued **paid** vacation or personal leave for any of the situations covered by FMLA. The substitution of accrued sick or family leave is limited by the employer’s policies governing the use of such leave.”<sup>29</sup> Also, the U.S. Supreme Court has ruled that the U.S. Department of Labor does not have legal authority to require an employer to provide more than 12 weeks of FMLA in one year, even though ‘the employer did not comply with the DOL requirement that it must inform the employee that a previous leave of absence would count against her FMLA entitlement.’<sup>30</sup> The Maine statute does not allow the use of accrued paid leave, vacation leave, or personal leave to be substituted for medical leave. In that respect the Maine law is more beneficial to the employee and must be applied in Maine.

## **Can an Employee Receive Time Off to Deal with Issues of Domestic Abuse?**

Yes, an employee who is a victim of domestic abuse, or whose child, spouse, or parent falls victim to domestic abuse, must be granted time off from work (with or without pay) to resolve issues surrounding domestic

violence, sexual assault, and/or stalking. Leave must be granted for employees seeking to prepare for and attend court proceedings, for employees seeking medical treatment, and for employees seeking other necessary services to mitigate domestic abuse crises.<sup>31</sup>

### **Does Time Spent On Military Leave By Employees In The Reserves Or National Guard Count Toward the Time Requirements For Family and Medical Leave?**

Yes. In 2002, the Department of Labor issued a memorandum stating that under the USERRA (the Uniformed Services Employment and Reemployment Rights Act of 1994), “the months and hours that the employee would have worked, but for his or her military service, should be combined with the months employed and the hours actually worked to meet the 12-months and the 1250 hours required by the FMLA.”<sup>32</sup>



### **WHAT IF AN EMPLOYEE IS SUMMONED FOR JURY DUTY?**

An employer cannot deprive a worker of their employment or health insurance coverage, or threaten them with the loss of these, because: a) they receive or respond to a summons for jury service, and b) serve as a juror or attend court for prospective jury service. An employer found guilty of these actions is subject to a fine of \$1,000 and/or six months imprisonment. In addition to the criminal penalties, the employee can file a civil action within 90 days against the employer for recovery of lost wages (up to 6 weeks) or health insurance benefits lost, and an order requiring reinstatement of the employee. If the employee is successful in the civil action the court must allow for reimbursement of a reasonable attorney’s fee.<sup>33</sup> The amount of the fee is determined by the court and paid by the employer.

## **HOURS, WAGES, AND LABOR STANDARDS**

### **What Laws Cover Wages?**

The most important law affecting a worker’s wage and hour rate is the U.S. Fair Labor Standards Act (FLSA), enacted in 1938 in reaction to the

economic crisis and difficult working conditions that materialized during the Great Depression. The FLSA provides the legal foundation for basic employment concepts such as the federal minimum wage, restrictions of child labor, the forty-hour work week, and overtime pay.<sup>34</sup>

In Maine, the issues of minimum wages, overtime, child labor, and the forty-hour work-week also are governed by the Employment Practices Chapter of the Maine Labor and Industry statutes.<sup>35</sup>

### **Which Employees Are Covered by FLSA?**

Employees engaged in interstate commerce, including import and export; those engaged in the “production” of goods for interstate commerce; and employees in an “enterprise engaged in” interstate commerce are covered by the FLSA.

In addition to covering many employees in the private sector, over the years the law has been amended and extended to include most federal employees, state and local government employees, employees of state and local hospitals and some employees of educational institutions, and domestic service workers who meet U.S. Department of Labor qualification regulations. If certain employees are not covered by FLSA, they may be covered by similar state laws that regulate minimum wage and overtime compensation. Further information on this issue may be obtained from the Wage and Hour Division of the United States Department of Labor or the Maine Bureau of Labor Standards at the addresses provided later in this chapter.

### **Are Any Employees Exempt from FLSA Coverage?**

Yes. Some employees are exempt from both minimum wage and overtime provisions, and others are exempt from only the overtime provisions of the FLSA. The following illustrate the type of employees in each area but *these lists are not all inclusive*. Specific questions should be directed to the nearest Wage and Hour division of the U.S. Department of Labor.

#### **Employees Exempted from Both Minimum Wage and Overtime Pay**

Employees in this group include:

1. “Executives, administrative, and professional employees (including teachers and academic personnel in elementary and secondary schools, but these employees must be ‘on salary’ which means that

- their weekly pay cannot change even if they miss some work), outside sales employees, and employees in certain computer related occupations, as defined by the U.S. Dept. of Labor Regulations;
2. Employees of certain seasonal amusement or recreational establishments, employees of certain small newspapers, seamen [and women] employed on foreign vessels, employees engaged in fishing operations, and employees engaged in newspaper delivery;
  3. Farm workers employed by anyone who used no more than 500 'man-days' of farm labor in any calendar quarter of the preceding calendar year;
  1. Casual babysitters and persons employed as companions to the elderly or infirmed.”<sup>36</sup>

### Employees Exempted from Overtime Pay Only

Employees in this group include:

1. “Certain commissioned employees of retail or service establishments; auto, truck, trailer, farm implement, boat, or aircraft salesworkers, or parts-clerks and mechanics servicing autos, trucks, or farm implements, who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers;
2. Employees of railroads and air carriers, taxi drivers, certain employees of motor carriers, seamen [and women] on American vessels, and local delivery employees paid on approved trip rate plans;
3. Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations;
4. Domestic service workers living in the employer’s residence;
5. Employees of motion picture theaters; and
6. Agricultural workers.”<sup>37</sup>

### Who Is Exempt from Overtime Pay Under Maine Law?

In Maine, employees exempt from overtime compensation include those processing agricultural produce, meat and fish products, and perishable food products; mariners; public employees such as fire and police departments (but not employees of the executive or judicial branches); and automobile salespeople and mechanics who are paid on a flat-rate basis.<sup>38</sup>

## **What Happens if an Employee Performs Work, Some of Which is Covered by Overtime Pay Requirements, and Some of Which is Exempted?**

If the employee performs both kinds of work in the same work week, the employer loses the exemption and is legally obligated to pay the employee overtime for all hours worked over 40.

## **What Are Minimum Wages?**

Minimum wages are the gross minimum hourly rates employers must pay covered workers as set by federal wage and hour laws established since 1938. Maine employees and employers also are covered by state laws relating to minimum wages, hours, and mandatory overtime provisions.



According to both federal and state law, employers must pay all covered employees not less than the minimum wage. Along with the payment of wages, every employer also must provide a statement showing the date of the pay period, hours worked, total earnings, and itemized deductions.

## **What Sources of Income Are Creditable Toward the Federal Minimum Wage?**

Employers may count as wages paid to their employees the reasonable cost to the employer of meals, lodging, transportation, and other services as long as the facilities or services are for the employee's benefit and are customarily provided to employees in the industry. Employers cannot count towards the minimum wage the cost of tools provided for the employee's use in the employer's business, the cost of purchasing, renting, or laundering of required uniforms, or the cost of transportation which is provided for the employer's benefit.

## **Can a Company Be Required to Pay More Than the Current National Minimum Wage Set by the FLSA?**

Yes. The FLSA says that if a state wishes to require a higher minimum compensation than that demanded by the federal law, the state



legislature may do so. Currently, the Maine minimum wage is higher than the federal minimum.

### **Can an Employee Voluntarily Agree to Certain Deductions from His or Her Minimum Wage Compensation?**

FLSA allows for some voluntary deductions from an employee's pay, such as union dues, but prohibits deductions that bring the employee's earnings below the minimum wage.

### **Are Tips, Commissions, and Piece Rates Subject to Minimum Wage Calculations?**

Yes. Both the federal government and the state of Maine have detailed and complicated laws surrounding minimum wage requirements for workers garnering some or all of their wages from tips, commissions, and piece rates. Federal laws establish national minimum wage requirements for all workers, but a provision in those laws mandates that employees be covered by the state or federal minimum wage law that is most beneficial to the worker. In the state of Maine, that law is the state's minimum wage requirements, discussed below. For further information on the federal minimum wage, refer to the U.S Wage and Hour Division's *Handy Reference Guide to the Fair Labor Standards Act*,<sup>39</sup> as well as the section at the bottom of this page denoted with an asterisk.\*

In the state of Maine, the minimum wage for workers receiving tips in excess of \$30 a month is one half of the state minimum wage; that is to say, an employer must pay a cash wage of at least one-half of the regular minimum wage for workers earning tips (as defined by their monthly tip earnings in excess of \$30).<sup>40</sup> If the employee does not make minimum wage

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\* The U.S. Wage and Hour Division states that employers can legally consider tips as part of wages for tipped employees "who customarily and regularly receive more than \$30 a month in tips." In these cases the employer must provide the tipped employee with at least \$2.13 an hour in direct wages. The following additional requirements must also be met: "The employer who elects to use the tip credit provision must inform the employee in advance and must be able to show that the employee receives at least the minimum wage when direct wages and the tip allowance are combined. If the employee's tips combined with the employer's direct wages of \$2.13 an hour do not equal the minimum hourly wage, the employer must make up the difference. Also, employees must retain all of their tips, except to the extent that they participate in a valid tip pooling or sharing arrangement." More information about federal minimum wage requirements can be found online at: <http://www.dol.gov/esa/whd/>.



for a particular shift, the employer must compensate the worker at a rate that ensures the worker is making at least the minimum hourly wage. As of October 1, 2008 Maine state hourly minimum wage is \$7.25. Starting October 1, 2009 Maine's minimum hourly wage is \$7.50. Up-to-date information on the state minimum wage can be found at the MDOL website: [www.maine.gov/labor](http://www.maine.gov/labor).<sup>41</sup>

For salespersons, the amount of their earned commissions, coupled with the wages paid, must also equal at least the minimum wage. Similarly, the earnings of employees compensated on a piece rate must average out to at least the minimum wage.

### **How Are Employer-Furnished Facilities Treated Under the Law?**

The law stipulates that the “reasonable cost or fair value” of lodging, board, and other facilities furnished by the employer for the benefit of the employee can be legally considered part of wages.

### **When Can Subminimum Wages be Applied?**

Provisions in the FLSA allow for the employment of some groups to be paid at wage levels that are below the minimum, but these exemptions require very specific and exacting conditions to be met. Groups which may be paid subminimum wages under these limited conditions include: student learners such as vocational education students, full-time students working in service establishments, agriculture, and higher educational institutions; and individuals whose earning capacity is impaired by a mental or physical disability. Also, it is important to note that employment and payment at below the minimum wage is legally permitted only through certificates issued by the U.S. Department of Labor's Wage and Hour Division.

### **Are Benefits, Premium Pay, and Other Employment Practices Regulated or Required by the FLSA?**

No. There are a number of employment provisions and practices that are not regulated or required by the FLSA. Examples include:

- vacation, holiday, severance, and sick pay;
- meal or rest period time and/or pay;
- premium pay for holiday or weekend work;
- pay raises or other benefits based on seniority or longevity;
- discharge notice, or immediate payment of final wages;

- just cause protections relating to disciplinary issues.<sup>42</sup>

Maine law requires minimum unpaid time to be provided for meal and/or break time and is discussed later in this chapter. In addition, Maine has adopted laws dealing with discharge or severance notice, reasons for discharge, severance pay, and the payment of final wages or salary upon termination.

### **Can a Worker Be Required to Work More Than Forty Hours in One Week?**

Yes. Neither federal nor state laws place any restrictions on the number of hours an adult employee, 16 years of age or older, can be required to work. However, in Maine an employer may not require an employee to work more than 80 hours of overtime in any two consecutive weeks, with a few exceptions.<sup>43</sup> Limitations on compulsory overtime can be established by collective bargaining agreements.

### **Must an Employer Pay Overtime Pay?**

Yes. Except for the exempted occupations cited earlier, a worker is entitled to overtime wages of one and a half times his or her normal hourly rate for working more than forty hours in one week. An employer must pay this overtime rate, and legally an employee cannot agree to work for less.

### **When Must Overtime Wages be Paid?**

Along with regular weekly wages, overtime pay must be included in the next payroll check.

### **What Are the Penalties if the Employer Violates the Law?**

The Maine Department of Labor can assist employees in obtaining illegally withheld pay or overtime. Each year the department obtains thousands of dollars of illegally withheld wages for employees. Under Maine law, either an employee or the Department of Labor may file a lawsuit to recover any illegally withheld pay or overtime, as well as an amount equal to this for “liquidated damages,” and legal fees involving attorney and court costs.<sup>44</sup> In addition to these civil remedies, criminal penalties also may be imposed.

The U.S. Department of Labor can initiate legal action involving a court injunction to stop anyone from violating the FLSA. Willful violators of the law can be subject to criminal prosecution and fines of up to \$10,000. Civil violations can lead to penalties of up to \$1,000 per violation.

### **Can Employees Legally Be Discriminated Against for Exercising Their Rights Under the FLSA?**

No. An employer is in violation of this law if they discharge or discriminate against a worker in any way because he or she has exercised his or her rights under this statute.

### **Who Enforces the FLSA and How Can Additional Information About This Law Be Obtained?**

The U.S. Department of Labor's Wage and Hour Division, part of the Employment Standards Administration (ESA), enforces the FLSA and standards. Also, the Wage and Hour Division (WHD) is responsible for administering and enforcing a number of other comprehensive federal labor laws, including: the Family and Medical Leave Act (FMLA); the Migrant and Seasonal Agricultural Worker Protection Act (MSPA); worker protections provided in several temporary visa programs; and the prevailing wage requirements of the Davis-Bacon Act (DBA) and the Service Contract Act (SCVA). More detailed information can be obtained online on the DOL Wage and Hour Division's website,<sup>45</sup> or by contacting the regional office of the DOL Wage & Hour Division at:



U.S. Department of Labor  
ESA Wage & Hour Division  
1750 Elm Street, Suite 111  
Manchester, N.H. 03104-2907  
(603) 666-7716

### **Who Enforces Maine Wage and Hour Standards?**

Maine statutes pertaining to wage and hours and employment practices are enforced by:

Maine Bureau of Labor Standards  
 State House Station 45  
 Augusta, Maine 04333  
 (207) 623-7900  
 TTY: 1-800-794-1110  
[www.maine.gov/labor/bls/index.shtml](http://www.maine.gov/labor/bls/index.shtml)

## **Are There Any Laws Affecting Youth Who Are Employed?**

Yes. There are a number of federal and state labor laws and regulations which apply to young workers between the ages of fourteen and eighteen and their employers. These laws, which are complex and ever-changing, deal with such issues as coverage, minimum age requirements according to type of work, certificate of age and work permit requirements, standards for hours, wages, hazardous occupations, farm work, and penalties.

For further information on these subjects and other wage, hour, and labor-standard topics contact the Maine Bureau of Labor Standards or the U.S. Department of Labor, Wage & Hour Division, at the addresses listed previously.

## **What Benefits Are Workers Eligible For If a Plant or Company Shuts Down?**

The Maine “Severance Pay Law” provides assistance in some circumstances when a company shuts down. Workers may be eligible for one week’s severance pay for each year employed if:

- the company employed more than one hundred people at that location at some time in the past twelve months;
- the company shuts down or moves more than one hundred miles away; and
- a worker has been employed by the company for at least three years.

This money is in addition to any regular paychecks received—and it must be paid within one regular pay period of the last day of work.<sup>46</sup> This statute is enforced by the Maine Bureau of Labor Standards.

## **Are Workers Entitled to Back Wages and Other Earned Benefits?**

Except in certain bankruptcy cases, wages and earned vacation pay must be paid to the worker on the regular payday or within two weeks from the time the worker requests the payment.

An employer cannot hold a paycheck or set off a debt (such as a wage advance or money owed for damage to company property) without the worker's written consent. The only exception is when the worker's contract specifically allows the company to withhold the money.

## **What If an Employer Owes the Worker Back Wages, But Has Filed Bankruptcy?**

If the employer who owes a worker back wages has filed for bankruptcy, the worker may qualify for two weeks' back wages through the Wage Assurance Fund administered by the Maine Bureau of Labor Standards. In addition, workers may be able to file as a creditor in bankruptcy court, and receive at least a portion of the back wages.

## **Are Employers Required to Give Reasons for Job Terminations?**

Yes. If a worker requests in writing the reason for dismissal or layoff, state law requires an employer to give a written explanation within fifteen days from the request.

## **Are Workers Entitled to Any Rest Periods or Meal Breaks?**

The number of rest periods or breaktime an employee receives, and whether or not the employer pays for these breaks, is commonly established through collective bargaining. Where there is no collective-bargaining contract or labor/management agreement, in a Maine business with three (3) or more employees working at one time, employees have the right to take a 30-minute, unpaid, break after six (6) consecutive hours of work.<sup>47</sup> This is intended to provide employees with a rest break which can be used as a mealtime.

## **Are Workers Entitled to Any Paid Holidays or Vacations?**

There are no federal or state laws guaranteeing or requiring paid holidays or vacations. The fact that these benefits and others exist at all is because of what unions and employers have negotiated through collective

bargaining agreements. In many cases, these contracts have set the precedent for the establishment and development of benefits in other workplaces, both union and non-union.

## **Do Employees Have a Right to Review Their Own Personnel Files?**

Yes. Maine law states that upon request employers must provide employees, former employees, or their duly authorized representatives with an opportunity to review and copy their personnel files.<sup>48</sup> This review shall be done at the location where the personnel files are maintained and during normal working hours. At their discretion, employers may allow the review to be done at a location and time that is more convenient for employees. Under this section of the law, a personnel file is defined as including, but not limited to, the following: “any formal or informal employer evaluations and reports relating to the employee’s character, credit, work habits, compensation and benefits, and nonprivileged medical records or nurses’ station notes relating to the employee” in the possession of the employer. If an employer fails to provide an employee with access to his or her personnel file without good cause and within ten days of receipt of an employee request, they may be subject to a civil penalty of \$25 for each day the failure continues. The total penalty may not exceed \$500.



## **Can an Employee or Job Applicant Be Required to Take a Polygraph or “Lie Detector” Test?**

No. An employer or prospective employer may not even suggest that a person take such a test as a condition of obtaining or keeping a job. The only exception to this law pertains to people who work for law-enforcement agencies. These individuals can be required to take the test.<sup>49</sup>

## **What If a Worker Wants to Take a Lie-Detector Test on a Work-related Issue?**

Any worker has a right to request a lie-detector test. The employer can use the results of the requested test—but not against the worker.

If an employee requests a test, the employer must provide a copy of the state law that covers lie-detector tests. The employee can request that the results be recorded and may also arrange to have a witness of his or her choice present during the test.

## **Are There Any Legal Restrictions on Drug and Alcohol Testing?**

Yes. Constitutional law, common-law theories, and statutory restrictions provide the basis for challenging testing programs. Constitutional challenges include First Amendment (freedom of religion); the Fourth Amendment (search and seizure); the Fifth Amendment (privilege against self-incrimination and due process); and the Fourteenth Amendment (due process and equal protection). In addition to constitutional challenges relating to drug testing, an employee can assert numerous common-law causes of action, including invasion of privacy, wrongful discharge, negligence, defamation, and intentional infliction of emotional distress.

Apart from the potential constitutional and common-law challenges, employers also must abide by federal, state, and local regulations which require them to institute drug-testing programs or policies, or which may place limitations on their ability to conduct drug testing. The most significant federal legislation is the Drug-Free Workplace Act,<sup>50</sup> which requires specific actions, such as publishing a policy statement notifying employees that drug abuse in the workplace is prohibited, establishing a drug awareness program to educate employees, and taking disciplinary action against employees who violate the employer's drug-abuse policy statement.

## **Do the Maine State Statutes Limit Employers' Ability to Test Employees for Drugs and Alcohol?**

Yes. Maine currently is one of several states to do so. Maine allows pre-employment drug-testing after a conditional offer of employment has been extended, or selections are made. Employees also may be required or requested to submit to a test for probable cause or while undergoing treatment in a substance-abuse rehabilitation program. Random or arbitrary testing is permitted if provided for in collective bargaining agreements and for employment in positions that could affect the health or safety of the public or co-workers.

## **Can an Employer Place Video Cameras in the Work Area to Monitor Workers' Performance?**

Generally, yes. It is not against federal law, and Maine state law permits it.

## Can an Employer Monitor Electronic Communications?

Yes, in limited circumstances. Title III of the federal Omnibus Control and Safe Streets Act of 1968 prohibits all private individuals and organizations, including employers, from intercepting wire, oral, or electronic communications of others. This law has been loosened by the “extension phone exemption,” which enables employers to monitor employee conversations by listening on an extension to the employer’s telephone system, if the monitoring is done in the ordinary course of the employer’s business, and if employees are advised that their conversations may be monitored. Most states, including Maine, prohibit wiretapping or the interception of messages transmitted by telegraph or telephone.

This law has also been narrowly construed so as to allow the monitoring of *stored* e-mail. Employers may reduce an employee’s expectation of privacy by putting them on notice that electronic communications are to be used solely for the employer’s business, and that the employer may monitor or access all employee Internet or e-mail usage.



## Are Professional Strikebreakers Legal?

No. Maine law prohibits the recruiting of professional strikebreakers. A professional strikebreaker is defined as a person who repeatedly (at least on two previous occasions) has offered to take the jobs of striking workers. Both the employer and the strikebreaker are subject to criminal penalties for violations of this law.

## WHISTLEBLOWER PROTECTIONS

### What Is the Whistleblower Protection Act?

The Maine Whistleblower Protection Act <sup>51</sup> prohibits employers, both public and private, from discriminating, discharging, or threatening an employee because they have taken any of the following actions on a good-faith basis:

- reporting (orally or in writing) to the employer or a public body that they believe a law has been violated, or that a condition or practice exists that poses a health and safety risk to that employee or any other individual(s);



- participating “in an investigation, hearing, or inquiry held by that public body or in a court action;”
- “refusing to carry out a directive that would expose the employee or any individual to a condition that would result in serious injury or death, after having sought and been unable to obtain a correction of the dangerous condition from the employer.”<sup>52</sup>

The Federal Whistleblower Protection Act prohibits discrimination by federal agencies against any employee because of the disclosure of information which the employee reasonably believes evidences a violation of any law, rule or regulation, or gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.<sup>53</sup> Each agency is responsible for ensuring that the Act is enforced within the particular agency and, through the Government Accountability Office, given some limited oversight on the monitoring of agency compliance with the Act.<sup>54</sup> The U.S. Office of Special Counsel, an independent federal investigative and prosecutorial agency, has been given basic authority to protect federal employees from prohibited personnel practices, especially reprisal for whistleblowing.<sup>55</sup>

### **How Is The Maine Law Enforced?**

Before an employee reports a legal violation or unsafe condition or practice to a public body, the Maine Whistleblower Protection Act requires that the violation first be reported to the employer or his or her supervisor, and the employer be allowed a “reasonable opportunity” to correct it.<sup>56</sup> However, this prior notice to the employer is not required if the employee has specific reason to believe the employer will not correct the violation.

Anyone who believes his or her rights have been violated under this statute has the right to file a complaint with the Maine Human Rights Commission, which is responsible for enforcing this law. The address and phone number of this commission is as follows:

Maine Human Rights Commission  
State House Station 51  
Augusta, Maine 04333  
(207) 624-6054

## ENDNOTES

<sup>1</sup> *Blaisdell v. Lewis*, 32 Me. 515 (1851)

<sup>2</sup> *Burnell v. Town of Kingfield*, 686 A.2d 1072, 1073 (Me. 1996), citing *Terrio v. Millinocket Community Hosp.*, 379 A.2d , 137 (Me. 1977)

<sup>3</sup> 38 U.S.C. §4301, et seq.

<sup>4</sup> U.S. Department of Labor, Veterans Employment and Training Service, “A Non-Technical Resource Guide to the Uniformed Service Employment and Reemployment Rights Act” March, 2003, p. 2

<sup>5</sup> 22 M.R.S.A. §811

<sup>6</sup> U.S. Department of Labor, “Frequently Asked Questions About Veterans Rights”, <http://www.dol.gov/dolfaq>.

<sup>7</sup> *Ibid.*

<sup>8</sup> 22 M.R.S.A. §814

<sup>9</sup> 29 U.S.C. §2601, et seq.

<sup>10</sup> 26 M.R.S.A. §843, et seq.

<sup>11</sup> 26 U.S.C §2611 (4)(A)(i).

<sup>12</sup> 26 M.R.S.A. §843 (3)

<sup>13</sup> U. S. Dept. of Labor, Employment Standards Administration, Wage and Hour Division, “Leave Benefits – Family and Medical Leave,” <http://www.dol.gov/topic/benefits-leave/fmla.htm>

<sup>14</sup> 26 M.R.S. §844

<sup>15</sup> *Ibid.* §848

<sup>16</sup> 29 U.S.C. § 2612 (a)(1)(E); amended by Public Law 103-3, January 28, 2008

<sup>17</sup> U.S. Dept. of Labor, Employment Standards Administration, Wage and Hour Division, Employment Law Guide - Family and Medical Leave, <http://www/dol.gov/compliance/guide/fmla.htm>

<sup>18</sup> 26 M.R.S.A. §843 (4) this section was amended on March 27, 2008, to include siblings.

<sup>19</sup> U.S. Dept. of Labor, Employment Standards Administration, Wage and Hour Division, Employment Law Guide - Family and Medical Leave, <http://www/dol.gov/compliance/guide/fmla.htm>

<sup>20</sup> 26 M.R.S.A. §844(1)(A)

<sup>21</sup> *Ibid.*

<sup>22</sup> 29 C.F.R. §825.114

<sup>23</sup> *Ibid.* §825.209 (c)

<sup>24</sup> 26 M.R.S.A. §845 (1)

<sup>25</sup> 29 U.S.C. §2614(a)(1)(B) This section of the law also stipulates that an employer, upon timely notice, may deny job restoration if “such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;...and in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.”

<sup>26</sup> 26 M.R.S.A. §845 (1)

<sup>27</sup> U.S. Dept. of Labor, Employment Standards Adm., Wage and Hour Division, Employment Law Guide - Family and Medical Leave, <http://www/dol.gov/compliance/guide/fmla.htm>

<sup>28</sup> *Ibid.*

<sup>29</sup> U.S. Department of Labor, Wage and Hours Division, FMLA: Compliance Guide; <http://www.dol.gov/esa/regs/compliance/whd/1421>

<sup>30</sup> *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002); cited in Ross Runkel, “Supreme Court Review: 2001-2002 Employment Law Cases,” Lawmemo.com; <http://www.lawmemo.com/emp/articles/2001-2002.htm> (August, 2004)

<sup>31</sup> Maine Department of Labor, “Maine Employee Rights Guide”. April, 2006. p. 6.

<sup>32</sup> U.S. Department of Labor, Veterans Employment and Training Service; “USERRA Protects Family and Medical Leave Rights of Reservists and National Guard,” <http://www.dol.gov/vets/media/fmlr.pdf>, 2002

<sup>33</sup> 14 M.R.S.A. §1218

<sup>34</sup> 29 U.S.C. §201 et seq.

<sup>35</sup> 26 M.R.S.A. §661 et seq.

<sup>36</sup> U.S. Dept. of Labor, Employment Standards Administration, Wage and Hour Division, Handy Reference Guide to the Fair Labor Standards Act, WH Publication 1282, U.S. Government Printing Office, 2007, p. 6. The source for the legal information contained in this section on the FLSA is derived from this government publication.

<sup>37</sup> *Ibid.*

<sup>38</sup> 26 M.R.S.A. §664 (3)

<sup>39</sup> U.S. Dept. of Labor, Employment Standards Administration, Wage and Hour Division, Handy Reference Guide to the Fair Labor Standards Act, WH Publication 1282, U.S. Government Printing Office, 2007, p. 4

<sup>40</sup> 26 M.R.S.A. §664 (2)

<sup>41</sup> Maine Dept. of Labor, Labor Laws: Frequently Asked Questions. Available at: [http://www.maine.gov/labor/labor\\_laws/faqs.html](http://www.maine.gov/labor/labor_laws/faqs.html).

<sup>42</sup> *Ibid.*, p. 1

<sup>43</sup> 26 M.R.S.A. §603

<sup>44</sup> *Ibid.* §626-A

<sup>45</sup> U.S. Department of Labor, Wage and Hours Division; <http://www.dol.gov/dol/esa/public/whd>

<sup>46</sup> 26 M.R.S.A. §625-B

<sup>47</sup> 26 M.R.S.A. §621; Maine Department of Labor, Maine Employee Rights Guide, [http://www.maine.gov/labor/labor\\_laws/publications/employeeightsguide.html](http://www.maine.gov/labor/labor_laws/publications/employeeightsguide.html), October, 2005, p. 1

<sup>48</sup> 26 M.R.S.A. §631

<sup>49</sup> 32 M.R.S.A. §7166

<sup>50</sup> 41 U.S.C. §701, et seq.

<sup>51</sup> 26 M.R.S.A. § 831, et seq.

<sup>52</sup> *Ibid.* § 833 (1)

<sup>53</sup> 5 U.S.C. § 2302 (b)(8)

<sup>54</sup> *Id.*, §2304

<sup>55</sup> U.S. Office of Special Counsel, “Introduction to the OSC”, <http://www.osc.gov.htm>

<sup>56</sup> 26 M.R.S.A. § 831 (2)

## **APPENDIX I: SUMMARY OF U.S. EMPLOYMENT LAWS**

This appendix serves as a quick reference by providing a summary of these statutes, along with the name of the federal agency responsible for enforcing each law.<sup>1</sup>

**Age Discrimination in Employment Act (ADEA)**--Legislation which prohibits employers, with 20 or more employees, from discriminating against individuals who are 40 years of age or older in the following areas: hiring, firing, compensation, terms, conditions, and privileges of employment. The law was amended in 1990 with the **Older Workers Benefit Protection Act**, which prohibits covered employers from discriminating on the basis of an individual's age with respect to employee benefits and early retirement incentive programs. Both of these laws are administered and enforced by the Equal Employment Opportunity Commission (EEOC).

**Americans with Disabilities Act (ADA)**—prohibits employers with 15 or more employees from discriminating against qualified disabled individuals in employment areas involving hiring, firing, training, assignments, compensation, layoffs, promotions, benefits, leaves, and other employment related terms, conditions, and activities. The ADA is administered and enforced by the EEOC.

**Civil Rights Act**—Title VII of this law prohibits employers with 15 or more employees from discriminating on the basis of an individual's sex, race, color, religion, age, national origin or ancestry. Since its passage, this law has been amended to include age and mental or physical disability as protected classes. The EEOC enforces this statute.

**Contract Work Hours and Safety Standards Act**—Through this law, the U.S. Department of Labor's Wage and Hour Division establishes overtime standards for contracts in service and construction.

**Davis-Bacon Act**—Requires employers receiving federal construction and repair contracts amounting to over \$2,000 to pay their employees wage and fringe benefit rates prevailing for similar work in that geographic area. The U.S. Secretary of Labor determines these prevailing wage and benefit rates. This law is enforced by the U.S. Department of Labor's Wage and Hour Division.

**Economic Dislocation and Worker Adjustment Assistance Act**—Through federal funding, this legislation is designed to enable states to provide retraining and readjustment services for workers who have lost their jobs

because of layoffs or plant closures. This program is administered by the U.S. Department of Labor's Employment Standards Administration.

**Employee Polygraph Protection Act**—Legislation which prohibits employers in the private sector from utilizing lie detector tests for either of the following: screening of job applicants, and testing of employees during their employment. The Wage and Hour Division enforces this law.

**Employee Retirement Income Security Act (ERISA)**—This law covers pension and retirement benefit programs established between employers and employees in the private sector. ERISA governs these pension plans by establishing fiduciary rules, requirements for financial audits, and specific standards regarding the vesting of employee pension benefits. ERISA is administered and enforced by the U.S. Department of Labor's Pension and Welfare Benefits Administration.

**Equal Pay Act**—Originally passed in 1963, this Act requires the same pay for men and women performing equal work. Under this law, equal work means requiring substantially equal skill, effort, and responsibility performed under similar working conditions. Jobs do not have to be identical for this law to apply. This law is administered and enforced by the EEOC.

**Fair Labor Standards Act (FLSA)**—This law establishes federal standards for the minimum wage, overtime, child labor and the forty hour work week. It is enforced by the Wage and Hour Division.

**Family and Medical Leave Act (FMLA)**—Covering employees in the public and private sectors, this law provides limited rights to annual unpaid leave of absence for up to 12 weeks in order to meet certain family care and personal medical needs. The Wage and Hour Division is responsible for the enforcement of this statute.

**Job Training Partnership Act**—Under this legislation, partnerships consisting of representatives of business, industry, local and state governments and organized labor, work on the development, implementation, and review of job training programs. The Employment and Training Administration of the U.S. Department of Labor administers this legislative program.

**Labor/Management Cooperation Act**—Through services, contracts, and grants provided by the Federal Mediation and Conciliation Service (FMCS),

this legislation seeks to facilitate the establishment and successful functioning of joint labor/management committees.

**Landrum-Griffin Act**—Also known as the Labor Management Reporting and Disclosure Act, this statute serves to protect the individual rights of union members by establishing a “bill of rights” for these members within their own organization. The law also specifies requirements and procedures governing union elections, member free speech, discipline, and financial reporting and disclosure. The office of Labor-Management Standards of the U.S. Department of Labor enforces this statute.

**Migrant and Seasonal Agricultural Protection Act**—Administered by the Wage and Hour Division, this law protects migrant and seasonal farm workers by governing the employment practices of employees, associations, and contractors in the agricultural sector.

**National Labor Relations Act (NLRA)**—Comprised of the both the Wagner Act and the Taft-Hartley act, this law provides the legal foundation for labor/management relations in the unionized private sector. Administered by the National Labor Relations Board (NLRB), the law provides employees with rights to “self-organization, to form, join, or assist labor organizations through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The Taft-Hartley Act also stipulates that employees also have the right “to refrain from any or all of these activities.”

**Occupational Safety and Health Act (OSHA)**—Passed by Congress in 1970, the goal of this legislation is to assure, as far as possible, safe and healthful working conditions for workers in the United States. The entire act rests on the duty of the employer to provide safe and healthy working condition. First, the employer “shall furnish to each of his/her employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm...” Second, employers “shall comply with occupational safety and health standards promulgated under this act.” The standards are set by the Secretary of Labor, after notice and public hearings. Everything else in the act focuses on these two obligations. OSHA is enforced by the Occupational Safety and Health Administration of the U.S. Department of Labor.

**Pregnancy Discrimination Act**—By amending Title VII of the Civil Rights Act, this law prohibits employer discrimination on the basis of pregnancy or child-birth.

**Service Contract Act**—This legislation, enforced by the Wage and Hour Division, requires prevailing wage rates and fringe benefits to be paid on contracts providing services to the U.S. Federal Government.

**Uniformed Services Employment and Reemployment Rights Act (USERRA)**—This law protects the employment of reserve members of the armed services and the National Guard who are called to active duty and prohibits employers from discriminating against returning employees who serve on active duty or training.

**Wage Garnishment Law**—This legislation provides two important legal protections: (1) limits the amount that an individual's income can be garnished; and (2) prohibits an employee from being fired because their pay has been garnished for a debt. The Wage and Hour Division of the U.S. Department of Labor enforces this law.

**Walsh-Healy Public Contracts Act**—Provisions in this legislation require the payment of minimum wage rates and fringe benefits on construction projects which are federally financed. The Wage and Hour Division also enforces this statute.

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<sup>1</sup> The source for many of the descriptions utilized in this appendix was derived from: U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Handy Reference Guide to the Fair Labor Standards Act, WH Publication 1282, U.S. Government Printing Office, 2007

## **APPENDIX II: NLRA/NLRB JURISDICTION**<sup>1</sup>

The National Labor Relations Act is based on a congressional finding that labor unrest has a direct effect on interstate commerce. As a result, the National Labor Relations Board only has jurisdiction over employers whose operations affect interstate commerce. However, there are very few employers or businesses that have no effect on interstate commerce and exempt from the Act. Since the NLRA is written in very broad terms the number of potential cases that could be brought before the Board would quickly make it impossible for the Board to function. In order to alleviate this problem the NLRB has set monetary jurisdictional standards that must be met before it will accept a case.

The monetary standards set by the Board “vary by industry and may be based on either the amount of sales or gross revenue. Nonretail businesses must either have \$50,000 in direct or indirect sales outside their state or make direct or indirect purchases of supplies from businesses in other states in that amount...A nonretail business must meet either the sales or supply standard” and cannot combine the two to meet the \$50,000 standard.

“The general retail enterprise standard is at least \$500,000 annual volume of business. Hotels and taxicab companies must also meet the \$500,000 standard. Other industries have different annual volume of business jurisdictional requirements: \$250,000 for public utilities and transportation companies; \$200,000 for newspapers; \$100,000 for communications companies; \$100,000 for nursing homes, \$250,000 for all other health care institutions; and \$1,000,000 for private colleges and symphony orchestras.”

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<sup>1</sup> Source: Bruce Feldacker, *Labor Guide to Labor Law*, 4<sup>th</sup> Ed.; N.J., Prentice Hall, 2000; pp. 13 -14



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## **Bureau of Labor Education**

**The University of Maine**

**Orono, Maine**

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The Bureau of Labor Education (BLE) was established in 1966 by the 102nd Maine Legislature and the Trustees of the University of Maine. The staff of the Bureau conduct educational programs, courses, presentations, and research on labor related issues of interest to workers, educators, students, public policy makers, and leaders in government, labor, and education. General topics include labor history, employment law, occupational health and safety, women and work, labor relations, leadership development, labor and the economy. The BLE's staff also analyze and speak on timely issues involving such topics as: employment discrimination; attaining health and safety through education, engineering, and enforcement; the pitfalls of privatization; and the employment outlook for Maine's women workers. More information on the Bureau is available on the web at: <http://dll.umaine.edu/ble> or by calling 207-581-4124.

