CHAPTER 5
Compensation Directives

CHAPTER OUTLINE

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Federal statutes administered by the Department of Labor (DOL) play a primary role in public and private-sector compensation. As a general theme, the statutes are intended for the welfare of the worker. The National Labor Relations Act (NLRA) balanced economic power and mandated collective bargaining, whereas the Fair Labor Standards Act (FLSA) is intended to reduce the number of worker hours and to protect against child labor abuses. Workers' compensation and unemployment compensation are programs that apply to both public and private management schemes. Health insurance mandates apply to both sectors as well, but the public-sector retirement plans are normally legislated and are exempt from the *Employment Retirement and Security Act.*

5.1 FAIR LABOR STANDARDS ACT

Direct Pay Regulations

The Fair Labor Standards Act is an original cornerstone of human resource management. Until its enactment in 1938, the employer and employee negotiated the wage and hourly pay one-on-one.[1] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn1) After the Fair Labor Standards Act, Congress passed several other statutes to improve wages: Walsh-Healey Public Contracts Act,[2] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn2) Davis-Bacon Act,[3] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn3) Service Contract Act,[4] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn4) and Equal Pay Act,[5] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn5) to name a few.[6] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn6)

This section is concerned with the situations that frequently arise under the FLSA and the problems involved in compliance. Minimum wage requirements under the act involve a relatively small percentage of the gainfully employed, and have fewer compliance problems than other sections of the act. Therefore, they are not discussed in this chapter.[7] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn7)

Legal compliance and cost control under FLSA focus on determining compensable hours, determining eligibility for overtime pay, a worker's status as an **independent contractor** (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss077) , and pay for **meal periods** (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss089) [8] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn8) Managers accept these long-standing provisions as a necessary cost of doing business. The FLSA does restrict the freedom of the employer in the payment of wages, but it does not prevent the establishment of policies and procedures to control costs.[9] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn9)

Historically, violations under the FLSA can exist for a long time before anything happens. Often an employee does not protest an incidental violation because the violation is not known to be one. Or it may be more convenient for the employee to ignore the requirements of the act.[10] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn10) When "the honeymoon is over," the employer usually regrets the casual practice.

An investigation for compliance by the **Wage and Hour Division** of the Department of Labor can be caused by complaints from the employee, unions, or competitors. Most investigations are initiated through employee or union complaints. Seldom does the agency make spot-checks, unless it finds a flagrant violation in one company and wants to determine if it is a common practice throughout the industry. Compliance with most provisions of the act is not difficult if the employer knows the regulations, but sometimes it can be an employee relations problem. Often when a condition is questionable, such as an exempt or nonexempt classification (overtime premium pay or not), the employer takes the risk.

Coverage

The FLSA covers most employers, including:

- U.S. federal government
- State and local governments
- Private employers who have annual gross sales of at least $500,000
- Private employers engaged in interstate commerce[11] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn11)

Because this definition excludes small enterprises, most states have enacted "small" fair labor standards acts that cover employees not included in the federal act. For this reason, whenever an employer–employee relationship exists, it is rare that employees are not covered. Section 203 exempts enterprises such as religious organizations and mom-and-pop businesses where only the family is employed. Nonprofit organizations do not have a primary business purpose, and seasonal recreational

establishments are also exempted under the act. State and local governments are not exempt because of the Supreme Court decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985).

Exemptions are numerous under FLSA. The determination of when an employee comes under these exemptions is discussed in subsequent sections. There are special overtime rules for firefighters, law-enforcement personnel, and hospital and facility care people in residence. If a state law is stricter than the federal law, it will supersede the federal law; otherwise, the federal law controls. Any agreement between an employer and employee to waive coverage is illegal, void, and unenforceable, except under conditions that will be treated later in this chapter.

Penalties for Violation

The Fair Labor Standards Act is enforced by the Wage and Hour Division of the Department of Labor (DOL) and includes criminal and civil penalties for willful violations. In *Williams* v. *Tri County Growers, Inc.*, 747 F.2d 121 (3rd Cir. 1984), the court said that the lack of filed complaints does not mean that the employer did not intend to violate the law. Other courts were more liberal, and stated that if the employer merely knew that the FLSA was a consideration during the time the act was being violated, it was willful.

The Supreme Court in *Trans World Airlines* v. *Thurston*, 105 S.Ct. 613 (1985), rejected this concept and defined *willful* as where the "employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." If the employer didn't have knowledge, there was no reckless disregard. The Thurston thinking was adopted in *McLaughlin* v. *Richland Shoe Co.*, 108 S.Ct. 1677 (1988). The court stated that the employer acted willfully if it "knew or showed reckless disregard for the matter or whether its conduct was prohibited by the Fair Labor Standards Act."[12] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn12)**

The employer would not be charged with a willful violation unless it knew or should have known that the action was violating a statute and made no attempt to comply.[13] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn13)** This would make it very difficult to sustain a willful violation unless the employer intentionally violated the statute or totally disregarded it. Certainly, advice of counsel or serious consideration as to whether a statute was being violated would be sufficient to make any violation nonwillful."

Where no willful violation is found, the penalty is restitution in the form of back pay. The amount of back pay and liquidated damages awarded is discretionary with the court. In 2008, a "willful" determination cost *Wal-Mart* a settlement of $54 million. The company was charged with willfully compelling employees to work "off-the-clock" and depriving personnel of meal and **rest periods** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss123)** .[14] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn14)**

Often, it is difficult to determine damages incurred by an employee because of an employer's failure to pay overtime. The courts have stated that, in the absence of employer records, the employee's reasonable recollections of the hours worked is sufficient.[15] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn15)** In all situations under the act, the plaintiff has a right of jury trial; the successful plaintiff may obtain attorney fees and costs from the defendant.

5.2 COMPENSABLE TIME

The FLSA does not limit the hours that an employee can work, but does require that the employee be compensated for all the time worked. The act governs the procedural aspects of paying employees and establishes minimum standards. An employer w held to violate the FLSA when it paid wages to employees 14 to 15 days after payday.[16] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn16)**

In *Biggs*, the State of California paid state workers two weeks late because the state legislature had not approved funding and the governor had not signed the state budget. When the established payday was missed, William Biggs filed a class action lawsuit for highway maintenance workers. The state argued that the FLSA requires employers to pay a minimum wage, but it does not require that the wage be paid promptly. The court rejected this argument, stating that "shall pay" plainly connotes "shall make a payment." If a payday is missed, the employer has not met its obligation to pay.

The Fair Labor Standards Act also provides that the employee must be compensated at time-and-one-half for all hours over 40 in one work week. The act contains no definition of *work* and only a partial definition of *hours worked*.[17] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn17)** A study of the countless court cases on the subject of **compensable time** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss023)** discloses that if the employee is serving the interests of the employer, then it is considered time worked, according to the act. It is immaterial whether the work was requested by the employer or authorized, so long as it was performed or the employer had reason to believe that the work was being performed. If the work is performed, it is difficult for the employer to plead no knowledge. The work product is something the employer knows, or should know about, with reasonable effort. Whenever the employee worked and the employer failed to pay for the work done, there is an exposure to overtime back pay.

Sleep Time

Under the statute, an employee must receive at least five hours of sleep in a 24-hour period. It need not be contiguous,[18] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn18)** but **sleep time** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss127)** cannot be frequently interrupted or the entire period is compensable[19] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn19)** [2 CFR 553.223(c)].

Meal Periods

The FLSA does not require payment for meal periods when employees are serving their own interests [29 CFR 553.223(c)]. Mail carriers must remain in uniform during lunch hour, and are often subjected to job-related questions by patrons. These occasional questions do not substantially interfere with their personal time, warranting compensation for lunch hour.[20] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn20)**

However, in many work situations employees are working on behalf of the employer.[21] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn21)** A shipping clerk is not required to, but chooses to remain at the desk during meal periods, eating a brown bag lunch while directing the unloading of a truck and chewing on a sandwich. An administrative assistant works on crossword puzzles at her or his desk during lunch break; the supervisor asks for a file. A maintenance mechanic is called to repair a machine during lunch hour. In all these situations, the employer often does not pay for meal periods. But if these employees are acting on behalf of the employer during a substantial part of the meal period, the meal period is considered time worked.[22] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn22)**

Volunteering for Tasks

When the duties performed during lunch hour are related to the work normally assigned, the work is compensable. If work during meal periods is voluntary, it is not compensable; but often there is a fine line between what is voluntary and what is not. Many assignments appear to be voluntary; but if they are refused, seriously adverse consequences result. This makes them not truly voluntary.

These examples are common situations where the employer unknowingly has considerable exposure. An agreement to exclude sleep and meal time from compensable hours is not enforceable when the agreement is extracted by the threat of termination.[23]

(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn23) If the employee is never relieved from serving the employer's interest, all inactive hours and active hours are compensable.

Often an employer is not aware of tasks performed. If the actions taken are a matter of personal convenience or to please the employer, the time should not be counted as compensable work time. The agencies and the courts state that it must be shown that the work performed is not benefiting the employer to be held noncompensable.

The leading cases on meal periods are *Mumbower* v. *Callicott* and *Marshall* v *Valhalla*, 590 F.2d 306 (9th Cir. 1979). The general rule is that the employee does not have to be completely relieved from duty. But the personal time must be long enough to enable the employee to use the time for his or her own purpose.[24] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn24)** This often comes up when waiting time is involved. If the waiting time is part of the job, it is compensable; if the employee is free to use the time for his or her own purpose, it is not considered waiting time.[25] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn25)**

A distinction must be made between waiting to go to work and being engaged to wait to go to work. If it is the latter, then it is compensable. An employer required the workers to wait for customer flow before they were paid for working. The court held that this waiting time was compensable. The employees were ready, willing, and able to work when they arrived at the worksite. This is an example of being engaged to wait for work.[26] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn26)**

Another problem arises when the employee is required to be on call. The usual rule is that if the employee is not required to remain on the premises, but is required to remain available for contact by the company officials, it is not considered work time while on call. However, if the employee is required to remain on the employer's premises or in such close proximity that he or she cannot use the time effectively for his or her own purposes, it is work time on call. The controlling factor is whether employees can use the time for their own purposes.

Early to Work

Another common employer exposure occurs when an employee comes to work well before the regular starting time. For example, when a spouse drops an employee off, or with car pooling, the employee arrives at the worksite early. Being a good employee, he or she performs duties before being clocked in. This is compensable work time that the employer neither stops nor approves but tolerates. The work performed before starting time must be an integral part of the employee's duties. Pre-shift work is almost always held to be compensable. When a butcher sharpened his knives outside shift hours, the Supreme Court held it compensable.[27] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn27)**

A leading case involves employees who were required to fill out daily time and requisition sheets, assemble material to be used on the job, fuel the trucks, and pick up a daily work plan before starting work at 8:00 a.m. The court stated that the test in these cases is whether the activities are an "integral and indispensable" part of the performance of the regular work and is in the ordinary course of the business.[28] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn28)** Time spent is compensable if it is necessary in the performance of the job. For example, an electrician putting gas in a truck is not doing electrical work, but it is necessary to the business and it benefits the employer. This definition has been supported in other jurisdictions.[29] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn29)**

Rest Periods

Rest or snack periods are usually paid, as a policy matter. Under the Department of Labor interpretations (29 CFR Sect. 785.18), breaks less than 20 minutes are compensable. However, this interpretation can be successfully challenged.

Some courts, because employees are serving their own interests, do not support the Wage and Hour Division's position. In *Cole* v. *Farm Fresh Poultry, Inc.*, 824 F.2d 923 (11th Cir. 1987), the court stated that reliance on a Labor Department interpretive bulletin that is vague with broad concepts will not relieve the employer from paying for overtime. The statement in the bulletin making breaks of more than one-half hour noncompensable was not a defense when the employees could not use the time for their own purposes. In all these situations, a bulletin or a guideline is only a position of the department and can be challenged, and often the courts will not validate what the bulletin says. Unchallenged, these bulletins or guidelines are often treated as the law.

Other courts enforce the regulation on the presumption that rest periods promote efficiency, which is in the employer's interests. A safer approach, if the employer does not want to pay for rest periods or snack periods, would be to offset rest periods against other working time, so total hours worked do not exceed 40. This offset has been approved by at least two courts.[30]

(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn30) However, this is not always possible; and the employee relations situation could become problematic. See the case study *The 10-Minute Meal Period* later in this chapter.

Early Chores

If a nonexempt person is instructed to pick up mail or make coffee before clocking in, the time is compensable. The test is whether it is an integral part of the job. This is certainly an exposure to a complaint if the employee calls the Wage and Hour division. The employer, to avoid exposure, should either require an exempt employee to make the coffee or have it done after the start of the shift. Making it strictly voluntary on the part of the employee would greatly reduce the exposure.

There would be a serious exposure if the employee was required to be at the worksite 20 minutes before the start of the day to make coffee. If exempt and nonexempt personnel drank the coffee, the exposure would be even greater. Most offices make coffee. When they do it, and who drinks it, would probably influence the degree of exposure.[31] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn31)

Travel Time

Travel time (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss138) and walking time are not compensable under the Portal to Portal Act[32] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn32) unless there is a custom or practice that makes it compensable. In the building trades, most labor agreements have a clause that pays for portal-to-portal time. If travel time is integrated with work and does not involve merely getting to work, it is compensable. An example would be travel on company business by nonexempt field workers or repair personnel. If it is a routine assignment, the pay doesn't start until reaching the worksite. Under the Portal to Portal Act, this would be going to and from work and not compensable. The change in the worksite is a regular part of the job. If the same nonexempt employee had an occasional assignment in a distant city, travel time would be compensable.[33] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn33) This is not going to and from work as a regular part of the job.[34] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn34)

Travel time also must be considered on a weekly basis; the employer can avoid excessive overtime due to travel by giving **compensatory time** (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss023) off in the same work week in which the overtime was earned. Often, travel time is spent for meetings and training programs. The usual rule is that if time spent in the training program is not compensable, neither is the travel time.

Training and Overtime[35] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn35)

The criterion to determine if a nonexempt employee is to be paid for participating in a training program is whether or not the employee is performing any significant amount of work that benefits the employer.[36] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn36) Another important factor in this connection is whether or not the training is compulsory. (Related training in apprenticeship programs is an exception.) Being necessary for advancement or to prevent obsolescence doesn't imply that it is compulsory unless the employer tells the employee that she or he must take the training or be terminated. Another problem with formal training is whether or not a trainee must take a course to get a job. If so, overtime would be due for an employee if the training puts the employee over 40 hours for the week. IRS withholding and state workers' compensation and unemployment insurance coverage would have to be paid if the trainee were an employee.

The Wage and Hour Division criteria for determining whether or not a trainee is an employee have been accepted by most state and federal courts. These guidelines state that a trainee is not an employee if:

1. The training program is similar to that which would be offered at a vocational school although the employer facilities are being used.
2. The training is only for the benefit of the trainee.
3. The trainee does not displace regular employees.
4. There is no immediate benefit to the employer who provides the training, although the training or lack of it causes a disruption in the operations.

5. The trainees are not guaranteed a job at the end of their training period.

6. The trainees are informed that they will not be paid for the time spent in training.[37] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn37)**

In the airline industry, the question has been raised if flight attendants and reservation agents must take training before hiring. Most of these programs met the preceding criteria; and the trainees were not considered employees.[38] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn38)**

As for training programs for current employees,[39] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn39)** the criteria are similar. The time is not compensable under Wage and Hour Division rules if:

1. The session is held outside of working hours.

2. Attendance is, in fact, strictly voluntary.

3. The training session is not directly related to the employee's job.

4. The employee does not perform any productive work while attending the meeting or training session.

Change Time

The issue of **change time** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss016)** often comes up when the employer requires the shift going off to instruct the shift coming on about what has happened during the preceding shift. By rule, the instructions are for the benefit of the employer; therefore the work should be compensable. However, the courts have only rarely found such work to be compensable. A New York court so held in *Arcadi* v. *Nestle Food Corp.*, 38 F.3d 672 (2nd Cir. 1994). But it must be noted that, in this case, the union attempted to obtain an overtime payment provision for time spent changing into work uniforms through collective bargaining but subsequently dropped this request at the bargaining table.

The company denied a grievance over the issue and the employees filed suit in U.S. District Court alleging violation of the FLSA. On appeal, the Second Circuit Court held that the FLSA excluded changing time from coverage unless it was expressly included in the collective bargaining agreement or acknowledged by custom or past practice.

Preparation Time

Related to clothes changing time is the issue of "donning and doffing" at shift start and end.[40] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn40)** This is often an issue in the fresh meat businesses, and also among police who must "don" equipment. The *Dager* decision found that "donning" was not compensable but that change time during the shift would be. Other cases on this issue arising in San Leandro(CA), San Diego (CA), and Richmond (VA) resulted in conflicting decisions. In *Powell* v. *Carey International, Inc.*, limousine drivers were to be paid for customer waiting time and driving from one assignment to another, but not for donning and doffing uniforms.[41] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn41)** In food processing, the most recent case favored management's view that the practice is not compensable under FLSA.[42] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn42)**

Working at Home

Some employers treat individuals who perform work at home as independent contractors, not subject to the minimum wage and overtime provisions of FLSA. However, in almost every reported wage/hour case turning on their status, such "home workers" have been found to be employees covered by the FLSA. In deciding whether an individual is an "employee," the courts follow the directive of the U.S. Supreme Court that the "economic realities of the relationship govern,"[43] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn43)** and the focal point is whether the individual is economically dependent on the business to which he or she renders service.

Employers are required to keep certain records for home workers, in addition to those required for all nonexempt employees. These required records are described in 28 CFR Sect. 516.31. With respect to each lot of work, the employer must record (1) the date on which work is given out to, or begun by the worker, and the amount of such work given out or begun; and (2) the date on which work is turned in by worker, and the amount of the work turned in.

Normally, travel to and from the employer's place of business is commuting time, and not compensable (see 29 CFR Sect. 785.35). However, the Department of Labor's enforcement policy, in the case of home workers, is that time spent traveling to and from the employer's premises to obtain materials or equipment and/or to deliver finished work is primarily for the employer's benefit and therefore is compensable work time.

Overtime Eligibility

In most companies, the control of overtime costs hinges on the classification of employees into exempt and nonexempt (from overtime pay) classifications. Often, some employees may appear to be wrongly classified. An employer may classify an employee as exempt by job title.[44] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn44)** One manager, when challenged about a job title, remarked, "It's cheaper to give a job title than pay more money." Changing a classification downward may create an employee relations problem because of loss of prestige or the employee perception that he or she is being exploited. Other employees sometimes prefer to be classified as hourly to be eligible for the overtime pay premium.

Overtime Directives

The FLSA establishes a standard of 40 hours in a consecutive seven-day period beyond which employers are to pay an additional 50 percent of normal pay for hours worked. The number of hours is not limited, under FLSA. The extra cost serves as a deterrent to excessive hours. Public safety positions often have different work weeks; for example, police may be subject to 43 hours at "straight time" and firefighters are subject to 54 hours.

Almost all states have supplemented the FLSA. Employers not involved in Interstate Commerce and not subject to the federal law sometimes "march to their own tune." For instance, Kansas and Minnesota have higher hours (46 and 48, respectively) for a threshold before premium overtime pay is required. Alabama, California, Alaska, Nevada, and Wyoming require overtime premium pay after eight hours of work each day. Michigan has opened the option of compensatory time off in lieu of pay, and South Carolina also permits this policy for public employees.

Department of Labor guidelines and some case law provide guidance in dealing with such issues. Each case is decided on its own merits. Each company must decide to what degree it is in compliance with the FLSA. Is the exposure to a possible violation great enough to justify the employee relations problems that may be caused by making unpopular decisions? When dealing with questionable areas, management will sometimes take the position that the employee relations problem has more benefits than the potential cost of the exposure. Management will wait for the Wage and Hour Division or the courts to tell them that they are wrong.[45] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn45)**

The Salary Test

The Wage and Hour Division uses an annual **salary test** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss124)** amount to determine generally whether a position is included in any of the exemptions from overtime premium pay. If an employee is paid less than a certain salary (in 2010, $23,660 annually), that employee must be paid one-half the overtime premium. This is known as the "short test." An important provision of the salary test is that an exempt employee cannot be docked when working less than 40 hours per week.[46] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn46)** In *Abshire* v. *County of Kern*, 908 F.2d 483 (9th Cir. 1990), the court held that docking for absences of less than a day is "completely antithetical to the concept of salaried employees."[47] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn47)**

The salary test alone doesn't render a particular position exempt. In *Donovan* v. *United Video, Inc.*, 725 F.2d 577 (10th Cir. 1984), the court found that although salary level was very important, it alone does not make the position exempt.[48] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn48)** The duties of the job must also be considered. The position is not compensated for the time spent on the job, but for the value of services performed. A salary or a job title will not make an employee exempt. The key to whether an executive, professional, administrative, or outside sales position is exempt is the type of work that is being performed.[49] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn49)**

Outside Salespersons

Another exempt classification is **outside salespersons** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss102)** . Under Section 213(a)(1) of the FLSA, outside salespersons are exempted if they sell regularly, or obtain orders for goods or services, while off the employer's

premises. Comparatively speaking, this classification is less troublesome than administrative, professional, or executive classifications because the activities can be more readily defined.[50] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn50)**

Other exempt employees typically include professionals who have been hired because of their advanced training, creative abilities, or specialized technical skills; administrators who hold positions in which they apply independent judgment in support of management, such as purchasing agents and HR managers; computer specialists involved in systems analysis, programming, and software engineering who earn at least $27.63 or more per hour. Nonadministrative police officers, firefighters, and reserve public safety positions are normally not exempt.

Other Considerations

Most employees tend to stress the importance of their jobs. Often, when interviewed by a compliance officer, they rate their jobs at a level higher than their actual positions justify, thereby implying **exempt status** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss057)** .[51] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn51)** In fact, their positions are often nonexempt. There are many gray areas where exempt and nonexempt classifications are interpreted for reasons other than payment of overtime, such as simple convenience. As a result, the employer is continually exposed to violations. A business decision is often necessary about whether to risk the exposure for personnel relations or to comply with the FLSA and avoid potential back pay.

Case Law Exemptions

Several potential problems may determine nonexempt status. Some of the more common are:

1. Attempts to exempt "white-collar" employees based on the quantity, not the quality of their work performance
2. Compensation systems for exempt employees that do not focus on the work achievement of the position
3. Incentive compensation not based on factors that reward achievement of jobrelated goals
4. Any compensation system that uses hourly pay rates for every position (this will put the exempt status of all positions in jeopardy)

Applied Administration

A necessary step in exemption determination is to assign one position the responsibility for judging exemptions. This position should be given the authority to determine whether a position is exempt or nonexempt. Supervisors and managers often have a self-interest in making an employee exempt or nonexempt without a serious consideration of job content, so this can be a thankless assignment. It is necessary to educate supervisors regarding the basis for exempt and nonexempt classification decisions.[52] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn52)**

When determining exempt or nonexempt classifications, there is no exposure to violations if an employee is wrongly classified as nonexempt and paid overtime. It is only when the employer has liability for overtime pay. An employee can be misclassified as exempt for a considerable period of time but nothing will happen until there is a complaint. In anticipation of a Wage and Hour investigation, it is advisable to keep a record of hours worked by questionably exempt employees, although it is not necessary under the rules. Compliance with any statute starts with knowing the requirements of that statute. The employee relations consequences must be integrated with any policy of compliance. The decision then becomes a business decision, with consideration given to the legal exposure.

Subjectivity in Determinations

One reason why exempt classifications are troublesome is that in the final analysis, a part of the determination is subjective. One example was a fast-food chain that had all the assistant managers classified as exempt supervisors. Wage and Hour determined that they were nonexempt employees. The court gave the following rules to determine whether assistant managers were supervisors (executives).[53] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn53)**

1. They must recommend hiring and firing.
2. They must direct the work of two or more persons.

3. They must have management duties.

4. They must regularly and customarily exercise discretion.

In any given situation, subjective determination must be made whether management duties existed and if discretion was customarily and regularly exercised.

Three elements are necessary for an employee's position to have an exempt status:

1. Weight must be placed on job duties that are usually considered exempt, with less weight placed on job title. In *Blackmon* v. *Brookshire Grocery Co.*, 835 F.2d 1135 (5th Cir. 1988), the court held that meat department managers were not supervisors when they spent two-thirds of their time cutting meat.[54] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn54)**

2. The exempt duties must actually be performed, not just assigned or expected.

3. The level of compensation should be above the minimum required for the exempt classification.

When in doubt about an employee's status, it may be advisable to check with the local Wage and Hour office. The caller does not have to provide identification; but even if he or she does, the Wage and Hour Department is not likely to follow up with an investigation. It normally requires an employee complaint to trigger an investigation.

5.3 OVERTIME COST CONTROL

Often the employee's desire for overtime pay is stronger than the desire of the employer to limit overtime. This makes the cost of overtime difficult, but not impossible, to control. A waste control clerk or sales service expeditor can always find a reason to work overtime when money is needed.[55] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn55)** Overtime can be largely controlled by requiring authorization before overtime can be worked. However, the promulgation of a rule is not enough. The rule must be consistently enforced and if the employee works the overtime, then the overtime earnings must be paid.[56] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn56)** Wage and Hour takes the position that unauthorized overtime still must be paid if known or tolerated, and the courts have sustained this position.[57] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn57)**

Compensatory Time Off

The federal law requires that overtime be paid only after 40 hours are worked in one work week, but compensatory time off can be exchanged any time during the scheduled work week in order to avoid overtime. In the private sector, overtime hours worked in one week *cannot* be offset by granting compensatory time off in *another* week. However, in the public sector, the Wage and Hour Division grants exceptions. For public employees, compensatory time off may be approved in lieu of overtime pay for irregular or occasional overtime work by both exempt and nonexempt employees. Federal, state, and local governments can pay overtime hours in 1½ times pay, or hours of "comp" time.

Stabilizing Overtime Pay

A "Belo" contract is a guaranteed wage contract made with the nonexempt employee, where hours vary widely from week to week. It provides a fixed weekly pay. This is an effective method to control overtime, while the employee controls hours of work. It is widely used for field repair service, customer service jobs, and other situations where the job requires work off the premises by nonexempt employees.

The conditions necessary to qualify for a Belo contract were stated by the Supreme Court in *Walling* v. *Belo Corp.*, 317 U.S. 706 (1941). The court listed five requirements:

1. The duties of the job covered by the Belo contract must require working hours that fluctuate above and below 40 hours per week.[58] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn58)** This is the key requirement. The fluctuation must not be caused by economic conditions or employer control, but by job duties of the employee.
2. The contract must pay the employee a regular hourly rate above the statutory minimum wage requirements.
3. The weekly guarantees must pay at least one and one-half times the regular rate for all hours over 40.
4. The contract cannot cover more than 60 hours a week.
5. The total hours to be worked and paid for weekly must be agreed on in writing with an individual or union.
6. Records of actual hours must be maintained.

Exhibit 5.1 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec3#ch05fig01)** shows a Belo contract that complies with these requirements.

Applied Administration

(Company Name) hereby agrees to employ (Name of Employee) as _____ at a regular hourly rate of pay of $_____ per hour for the first forty (40) hours in any work week and at the rate of at least time and one-half or $_____ per hour for all hours in excess of forty (40 in any work week, with the guarantee that (Name of Employee) will receive in any work week in which he or she performs any work for the company the sum of $_____ as total compensation for all hours performed up to and including (insert the total hours agreed upon; however, hours agreed upon cannot exceed 60 hours per week) hours.

COMPANY NAME

By _____

Accepted:

Employee's Signature

EXHIBIT 5.1 A *Belo* Contract

The total hours inserted in the last line of the Belo contract must bear a "reasonable relationship to the hours an employee actually works." This is usually determined in the first contract by past overtime records. However, the actual hours worked before a Belo contract are usually greater than those worked after the Belo contract. When the incentive to work overtime is removed by the Belo contract, the overtime hours usually decrease with no effect on job performance. To anticipate a decrease in hours by entering less than the previous average would not be in violation of the Belo requirements, but may result in the employee not signing it. A better plan would be to review the contract in six months or a year, basing the average hours on the experience under the Belo contract.

In the second contract term, the hours could be reduced if the average justifies it. If the hours are reduced to the average, the employee is not being rewarded for efforts in doing the work in fewer hours.

Compliance and Overtime Control

Supervisors should be made aware that if the employee is required or permitted to work overtime for the employer's benefit, the employee must be paid. Management must authorize it, and the rule must be enforced. For the employer to control overtime, two strong positions must be taken. First, remove the control of hours from the employee. Second, if control of the overtime hours cannot be removed from the employee, and exempt status cannot be justified, the Belo contract or some other pay plan should be considered. If a Belo plan is not possible and there is an uncontrollable fluctuation in the hours worked, another plan should be submitted to the Wage and Hour Division for approval.

5.4 INDEPENDENT CONTRACTORS

Independent contractors are workers who are not employees. Typically, they are temporary consultants. Employers are sometimes tempted to avoid the costs and responsibilities associated with hiring an additional employee by claiming that those who perform certain services are independent contractors. Where the independent contractor relationship has been established, both parties enjoy certain advantages:

Employer Advantages

1. The requirements of the Fair Labor Standards Act do not apply. Overtime premiums need not be paid.
2. Unemployment compensation payroll taxes do not have to be paid.
3. Social Security taxes do not have to be paid.
4. City, state, and federal income taxes do not have to be withheld.
5. Compulsory workers' compensation coverage does not apply.

Worker Advantages

1. The worker has much greater flexibility with respect to the time, place, and manner of performance of services.
2. The independent contractor has enhanced flexibility with respect to the deduction of business-related expenses. For example, employees may deduct only those business and miscellaneous expenses that exceed 2 percent of their adjusted gross income, but independent contractors may deduct 100 percent of their expenses related to self-employment.
3. Independent contractors may establish individual pension and profit-sharing plans that may be more desirable than those offered by employers. Obviously, there is considerable economic advantage in avoiding the statutory requirements.

There is strong incentive for establishing an independent contractor relationship wherever possible, but there are also certain risks in doing so.[59] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn59)**

Risks in the Relationship

Although there are advantages, so are there risks if the Wage and Hour court finds that an independent contractor is, in fact, an employee.[60] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn60)** No statute defines the exact meaning of an independent contractor. The interpretation is left entirely to the courts, using agency principles. The principal liabilities, if it is determined that an independent contractor is an employee, are:

1. The amount of the employee's state and federal income tax, plus interest, due to the failure to withhold under IRS regulations
2. Unpaid overtime or minimum wages under the FLSA
3. Liability to the state for unemployment compensation insurance tax
4. Expenses incurred under the common law for a work-related injury, due to the failure to carry workers' compensation insurance
5. The employer's amount owed on the employee's Social Security taxes, plus what is owed by the employee, in addition to the interest on the entire amount, due to the failure to withhold

To determine whether an independent contractor relationship exists, one must look to the common law,[61] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn61)** the IRS code, National Labor Relations Board (NLRB) cases, decisions under the FLSA, state agencies' positions on workers' compensation coverage, and liability for unemployment insurance. Most of these agencies use either all or part of the common law definition, but some put more stress on certain factors than others. For example, the NLRB looks only at the control factor, whereas the IRS looks to see whether or not it was a businesslike operation.

Guidelines

The courts have said on numerous occasions that no one element establishes an independent contractor relationship.[62] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn62)** The historic base for determining if such a relationship exists comes from the law of agency. An attempt to define the distinction between an employee and an independent contractor was made by the *Restatement of the Law of Agency* (2nd, Sect. 220), which stated:

> While an employee acts under the direction and control of the employer, an independent contractor contracts to produce a certain result and has full control over the means and methods that shall be used in producing the result. He is usually said to carry on an independent business.

In *Nationwide Mutual Ins. Co.* v. *Darden*, 12 S.Ct. 1344 (1992), the Court held that an individual is an employee under the Employment Retirement Income Security Act (ERISA) unless Congress says otherwise. The Court used the common law person agency principle in determining whether there was an independent contractor. Under ERISA, the Court in *Darden* listed the factors to be considered when determining whether there is an independent contractor or employee relationship. The Court pointed out (at 1349) that no one factor is decisive.

The Fifth Circuit, in *Reich* v. *Circle C. Investments, Inc.*, 498 F.2d 824 (5th Circ. 1993), found one factor that would indicate topless dancers were independent contractors. But on balance, four other factors made them employees. In this situation, the dancers received no compensation from the club; they received only tips from customers. And, at the end of each night, the club received $20 from each dancer, regardless of how much the dancer made in tips from dancing on the tables. The club claimed this was rental. However, the club controlled the number of customers and tables.

The court focused on control, investments of the worker (costumes and a padlock), opportunity for profit (the club controlled the customer flow, where money could be made if the dancer was popular), skill and initiative required to perform the job (no training was needed), and permanency of the relationship (this was very short). This would indicate a nonemployee status, but the court decided other factors outweighed the short employment relationship, and found the dancers to be employees. The main factor was control.

The Supreme Court has identified two main conditions for finding that an independent contractor condition exists. First, there must be independent performance of the assigned job. Second, the initiative and decision-making authority must involve the performance of the work by the independent contractor.[63] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn63)** The major factor in the determination of independent contractor status is the degree of employer control. With a greater degree of employer control, it is more likely the worker will be found to be an employee. A person who is required to comply with instructions about when, where, and how to work is ordinarily an employee. Some employees who are experienced or proficient in their work need little instruction; however, this does not put them in an independent contractor status. The control element is present if the employer retains the right to instruct.

For the purpose of determining an employer–employee relationship under the National Labor Relations Act, the board applies only the right of control test. If the person for whom services are performed retains the right of control of the end result, in addition to the manner and reasoning to be used in reaching that result, the board will find that an employer–employee relationship exists.

The right to instruct a person who works for the employer eight hours a day in one job and cleans the office at night, or mows the lawn on Saturday, often makes a worker an employee. If an employer–employee relationship exists, overtime compensation is due for all hours worked over 40 per week, unless a flat fee is greater than time-and-a-half for hours worked. There is an implied right to instruct a person who works for the employer eight hours a day on one job and does additional work in off hours. If there is an employee–employer relationship, overtime compensation is due. If the flat fee exceeds the overtime rate for the hours worked, then there is compliance. If an employer assumes that an independent contractor relationship exists and in fact it does not, the exposure in other areas is far greater than the payment of overtime. Because of this exposure, the employer should be cautious when treating the relationship as an independent contractor status. Serious consideration should be given to requesting a determination from the appropriate regulatory agency. Most agencies will furnish a list of guidelines on request. Such a request may not trigger an investigation.

Examples of Relationships

To prevent exposure to liability, when an employer assumes an independent contractor relationship exists but an employer–employee relationship legally exists, some examples may be helpful.

When a gasoline distributor leased stations to operators, the court found that not only was the lessee an employee but those persons whom the lessee hired were also employees of the distributor. The evidence showed that the distributor controlled the hours of operation, the prices of major items, and the daily management of money, and took the risk of profits and loss. The court reasoned that the employees of the lessee were an integral part of the operation; therefore, they were also employees of the distributors and the lessee.[64] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn64)** Other cases where the court found an employee–employer relationship were where an agent who operated a retail cleaning outlet under a contract was held to be an employee of the owner[65] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn65)** and where crew leaders for a builder were registered under a state law as labor contractors but were, in practice, employees.[66] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn66)** In the Fifth Circuit, a contract laborer who was a mechanic and supervisor was held to be an employee; however, the contract laborer who was a subcontractor of this employee was held to be an independent contractor.[67] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn67)** The test in these cases is whether the party for whom the service is being performed retains control over the outcome.[68] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn68)**

Essential Elements

Because of the risks involved and the possibility of litigation, employers should have very strong reasons for attempting to establish an independent contractor relationship. If such a reason does exist, then it is advisable to state specifically in the agreement that:

1. The only supervision will be related to result and not to method.[69] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn69)**
2. As much as possible, the individual will make the investment in equipment.
3. The independent contractor will be responsible for the profit or loss of the operation.
4. In all other respects, the independent contractor will be performing as a separate business.
5. The employer does not provide benefits, such as holiday or vacation pay.
6. The person is to be employed for a specified length of time.
7. The method of pay is different than for employees.
8. The materials and equipment will be supplied by the contractor.[70] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn70)**
9. The parties enter into the relationship with a specific intent: to create an independent contractor relationship.
10. The work is either a distinct occupation or a business.

Use of Contracts

The economic reality of the relationship is the strongest element in establishing an independent contractor relationship that will stand the scrutiny of the courts and the regulatory bodies. If such a relationship is intended, it must be objectively established by a written agreement. The contract should be written with a careful eye toward common law and agency interpretation. The contract must emphasize the preceding 10 elements. Creating an independent contractor status is one way to control overtime. Extreme care should be taken to make certain that, although an independent contractor status was intended, an actual employee–employer relationship does not exist. Liability for uninsured workers' compensation and payment of unemployment, Social Security, and withholding taxes often offsets the advantages of establishing a questionable independent contractor status. Administrative agencies and the courts will give great weight to the agreement. However, they will also look to other factors that reflect the tasks of the individual, the terms and conditions of employment, and whether the parties are following the agreement. In questionable situations, professional advice should be considered. This demonstrates a good faith effort to comply with the law.

The Fair Labor Standards Act, as well worn as it is, still provides the media with frequent opportunities to publicly expose employers caught in noncompliance. To prevent any such negative situations:

1. Avoid hiring young people for the wrong hours and types of work.
2. Don't permit overtime-eligible employees to "come early," "stay late," or "take work home."
3. Demand accurate work time records, including work occurring during lunch time.
4. Be sure any designated independent contractor positions qualify as such.
5. In the private sector, don't apply compensatory time off that carries beyond the designated work week.
6. Pay overtime-eligible personnel for all work beyond the 40-hour work week.

5.5 EQUAL PAY ACT

The first direct involvement by the federal government in the payment of wages was in the original 1938 Fair Labor Standards Act. For the next 25 years, there was no further interference with the employers' right to determine wages of their employees.

Congress reacted to the perceived problem of gender pay inequity in 1963, when it amended Section 6 of the Fair Labor Standards Act, and created the Equal Pay Act (EPA).[71] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn71)** The EPA simply states that no employer shall discriminate in the payment of wages at a property, on the basis of sex, for equal work. Jobs that require comparable competencies and are performed under similar working conditions must have equal pay. If the differential is based on seniority,[72] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn72)** a merit system, an incentive pay system, experience,[73] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn73)** or any factor other than gender, there is no violation.[74] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn74)** Although the standards are clear, mistakes are common.[75] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn75)**

Sections 201 to 208 of Title II, CRA91 (the Glass Ceiling Act of 1991),[76] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn76)** established a study commission to address the national problem of underrepresentation and artificial barriers to women and minorities in management and in decision-making positions. One of the barriers, according to the Department of Labor, is the lack of management perception in determining compensation. The report of the commission improved conditions but didn't break the glass ceiling.[77] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn77)**

The EPA applies to state and local governments under a 1974 amendment to FLSA, most of the private sector and unions. Exceptions to coverage are few. As a Title VII issue, the pursuit of equal pay has the potential of extending to any worker who feels mistreated, let alone unequally compensated.

Definition of Equal Work

There is a wide variety of skills, responsibility, and effort in different jobs. That is the primary reason for the difference in wages; but the "going rate" is also a large determinant. The identification of differences in jobs is the purpose of job evaluation and **pay equity** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss105)** studies.

The first opportunity that the courts had to address these questions was in *Shultz* v. *Wheaton Glass Co.*, where male selector packers were receiving $.21 per hour more than female selector packers.[78] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn78)** Women performed substantially the same inspection work as men, except that approximately 18 percent of the time the male selectors performed materials handling tasks.[79] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn79)** Females were not permitted to perform these tasks because they were restricted from lifting anything over 35 pounds. The court, in a landmark opinion on the interpretation of EPA, established a legal principle in finding a violation. In view of the refusal of the Supreme Court to review this decision, these principles can be considered as controlling. These principles are sometimes called the *equal work standard* (see **Exhibit 5.2** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fig02)**).

1. The equal work standard requires only that the jobs be substantially equal and not identical. Small differences will not make them unequal.[80]
2. When a wage differential exists between men and women doing substantially equal work, the burden is on the employer to show that the differential is for some reason other than sex.
3. Where some, but not all, members of one sex performed extra duties in their jobs, these extra duties do not justify giving all members of that sex extra pay.
4. That men can perform extra duties does not justify extra pay unless women are also offered the opportunity to perform these duties.
5. Job titles and job descriptions are not material in showing that work is unequal unless they accurately reflect actual job content.

(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn80)

EXHIBIT 5.2 The Equal Work Standard

What is a substantially different job is decided on a case-by-case basis.[81] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn81) If there is a substantial difference in effort, skill, or responsibility, the courts permit a pay differential between the sexes. The principle followed in the Eighth Circuit is that job content, not job titles or job descriptions, determines whether jobs are equal.[82] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn82) Calling one employee a cleaner and another a custodian does not justify a wage differential.[83] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn83)

Another justification for an employer's wage differential between men and women is shift work. When all men worked the night shift and women the day shift, it was argued by employers that the differential was justified because of dissimilar working conditions. In this case, one of the few EPA cases to reach the Supreme Court, it was held that working conditions did not refer to the time of day when work is performed. Thus, different shifts do not justify a pay differential.[84] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn84)

This case also established the rule that equal pay violations could be remedied only by raising the women's wages, not by reducing the men's wages. But it left open the question of whether changes in job content could remedy the violation. Often, employers attempted to justify pay differentials between men and women by arguing that working conditions were not similar, or that the jobs performed by males were more hazardous tasks than the ones performed by females. There are situations where this might be a defense. However, such a defense should be used with extreme caution. Statistics show that 70 to 85 percent of all industrial accidents are not caused by physical conditions but by unsafe acts of the employee. Under these statistics, hazardous working conditions would not justify the differential, if accidents are caused by the employee, not the conditions.

Measuring Equality

When considering skills, such factors as experience, training, education, and ability are taken into account. Any one of these factors can justify a differential.[85] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn85) Possessing a skill is not enough; the person must necessarily apply that skill on the job.[86] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn86) A common "equal skill" situation that courts have struck down is when the employer trains men for promotional purposes but does not offer to train women. When the jobs are compared, the trained men have more skills than the untrained women.

Where male bank tellers were paid more than female bank tellers, the employer argued that the males were in a bona fide training program, being trained in all aspects of banking to replace senior officers. Such subjective evaluation of potential for promotion, standing alone, cannot justify pay differentials under EPA.[87] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn87) All such training programs should be put in writing and offered to all employees who qualify regardless of gender or race.

The following criteria must be met in order to justify pay differentials under EPA through a bona fide training program:

1. It must be open to all.
2. All employees must be notified of the training opportunities.
3. There must be a defined beginning and ending of the training program.
4. A definite course of study must be documented, and advancement opportunities, upon completion, must be available.

The Responsibility Rationale

The defense of a difference in responsibility to justify unequal pay occurs mostly in administrative, professional, and executive jobs. In one of the first cases under the responsibility defense, the employer claimed that men had to make decisions that women did not have to make. The court found that although men did make decisions that women did not, these decisions were subject to review by supervisors. Therefore, the differential was not justified under the responsibility defense.[88] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn88)

Often, the employer may justify a pay differential based on gender in the same job categories by claiming that one type of work is more difficult than another. For example, an employer claimed that management of soft-line departments such as clothing, historically managed by women, had less responsibility than hard-line departments such as sporting goods, usually managed by men. The court held that there is no substantial difference to justify less pay for women than for men.[89]

(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn89) In *EEOC* v. *Madison Community Unit School District No. 12*, 816 F.2d 577 (7th Cir. 1987), the court held that paying female coaches of girls' track and tennis teams less than male coaches of male track and tennis teams is a violation of the Equal Pay Act. More recently, in *Weber* v. *Infinity Broadcasting*, 2006 WL 891138 (E.D. Mich. 2006) a Michigan court found a female disk jockey was paid significantly less than two male disk jockeys in violation of the EPA.

Semantic Issues

A properly communicated, bona fide merit system that is applied without regard to sex is one of the factors that will justify differentials. All too often the term *merit pay* is used to include labor market increases, longevity increases, and general across-the-board increases that have no relationship to meritorious performance.[90] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn90)** Merit increases that will survive judicial review under EPA are individual increases in pay related to the demonstrable job performance of that individual.

Determining a wage level on some factor other than performance is a major fault with merit pay plans and a primary reason for being unable to withstand judicial scrutiny. In an inflationary period, the employer wants to keep earnings in line with the labor market conditions without setting a precedent by implying that pay increases are automatic, or based on labor market conditions. Rationalizations set in and any believable reason is given. In *Brock* v. *Georgia S.W. College*, 765 F.2d 1026 (11th Cir. 1985), although the employer argued that the wage difference was due to a merit system, the court found that the merit ratings were based on subjective personal judgment, ad hoc; that the wage difference was due to the merit system; and that, in many cases, the evaluators were ill informed.

For compensation to be based truly on merit, it should be delivered when some significant performance has been accomplished. A delay in reacting to special achievement can chill motivation. For production incentives, the previous two-week period should be the maximum waiting period. White-collar merit awards should also be awarded within two weeks of the period of accomplishment.

A Bona Fide Merit Plan

In order for a merit pay plan to be bona fide under the various statutes, it must be in writing and contain all or most of the following elements:[91] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn91)**

1. The employee must believe that good performance will result in additional compensation.
2. There should be a direct correlation between the amount of pay and the exceptional performance, without onerous caps. Upper limits tend to dampen the motivation of many workers.
3. The employee should understand the merit plan before it is adopted so that there are no surprises at evaluation time.
4. Performance should be accurately measured either by objective appraisals or by standards that the employee accepts. If agreement cannot be reached, the employer should be sure about what is fair and adopt it. Sometimes employees have to work with a plan before they are convinced they can earn additional money.
5. Base pay should not be less because an employee is on a merit system. Merit pay should be given when performance is above the norm.
6. The merit system must be updated periodically. Job content affects the performance; if not current, either the company or the employee can be unfairly affected.
7. Managers must believe in the system and be trained to properly administer it.
8. Follow-up procedures are necessary to prevent bias and leniency. Nothing will defeat a merit plan faster than leniency or bias.[92] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn92)**

Audit Compliance

It should not be surprising, in light of the preceding discussion, that many employers are in violation of the Equal Pay Act. When challenged, they face a lengthy and expensive lawsuit. The factors mentioned previously, although valid, offer very little defense. For this reason, it is good practice to audit compensation plans to determine the extent of exposure. Where serious compliance

problems are found, the corrections can be made. This is better than an equal pay complaint by the EEOC. An EPA auditor should:

1. Examine pay differentials among all jobs involving similar or equal skill, effort, responsibility, and working conditions. Finding any instance where a pay differential may be based on sex, eliminate the inequity by bringing the pay of the lower-paid employee to the level of the higher-paid individual.
2. Determine the distribution of pay percentages within each job category and whether they correspond with performance.
3. Analyze the average pay level within each job category by race and sex.
4. Study the average pay increase given by each supervisor within each job category.
5. Look for consistency in the application of hiring, promotion, and pay increase practices to avoid any inference of sex discrimination.

This is not an exhaustive checklist; the basic premise, equal pay for equal work (not necessarily identical work), must be kept in mind to avoid creating inequities and to rectify past inequities. If there is logic to the compensation system, it is much easier to defend when an equal pay charge is made by the EEOC. Programs and procedures that demonstrate good faith efforts to maintain fair pay among workers will minimize exposure to litigation.

In summary, management should do four things:

1. Have a rational reason for its compensation levels.
2. Explain to the employees how their wages are determined and changes to be instituted.
3. Document the sound reasons on which pay actions are based.
4. Correct unjustifiable wage differentials between sexes, rather than trying to rationalize them.

Comparable Pay for Comparable Worth

Despite EPA, there continues to be a substantial disparity in earnings between men and women. Although the Equal Pay Act didn't overcome gender wage disparity, the proponents of equal pay believe that combining the Equal Pay Act with Title VII and Executive Order 11246 goes far in achieving that goal. The concept is a very controversial equal employment issue.[93] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn93)**

The Birth of Pay Equity Law (Comparable Worth)

Edicts and statutory requirements by states have attempted to create pay equity based on the "**comparable worth (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/bm02#gloss022)** " of the job. Many cities now use a job evaluation system to determine the comparable work value of the work performed by each class of its employees. Evaluation system options include:

1. Use the state job match.
2. Use or modify systems used by other public employers.
3. Design your own system.
4. Purchase a privately owned (consultant's) system.[94] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn94)**

Several circuit courts have held that it is not up to the courts to determine the worth of an employee. The issue was apparently settled in *State of Washington* v. *Am. Federal, State and County and Municipal Employees*, 770 F.2d 1401 (9th Cir.1985). The court overturned a lower court decision supporting the "comparable worth" concept and held that Congress did not intend Title VII to interfere with the law of supply and demand, or prevent employees from competing in the labor market. Subsequently, a number of states have experienced active groups (Michigan, Massachusetts, Colorado, New Mexico, and others) pursuing political action to achieve greater equality.[95] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn95)** Minnesota has created legislation applicable only to the public sector.[96]

(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn96) In pursuit of improved equity, most Canadian provinces have also legislated for stricter equity laws.

Most large private-sector firms apply job evaluation and market studies to achieve fair pay opportunity across gender lines. Public-sector organizations use Civil Service Classification systems or job matching tools as a basis to determine comparable pay. Those advocating additional legislation charge that many job evaluation plans and market (valued) ranking systems are inherently (historically) biased.[97] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn97)** Nevertheless, positions can be compared only to other positions that should be similar in pay (i.e., similarly classified).

Job equity, however, doesn't necessarily equate with pay equity. Job equity deals with setting the pay guidelines for different positions. Pay equity is devoted to pay analysis for gender differentials. Pay disparity can still result from consciously biased decisions (disparate treatment) or unconscious (flawed) decisions about performance or job value perceptions (disparate impact) despite job value comparability. This is currently a developing issue in human resource law.[98] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn98)**

For almost 100 years, the federal government has pursued pay equity through the application of job classification (job ranking). Early landmark legislation in human resource law was directed at "standardizing the classification and grading of civil service positions according to duties in ascending order of responsibilities" (the Classification Act of 1923).[99] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn99)** In time, the ranking of jobs cascaded through states to many counties and municipalities. Over time, the application of job-ranking techniques progressed to large firms in the private sector, also. In order to arrive at a fair basis for pay, there must be a standard tool for measuring multitudes of jobs; job evaluation results in job classification.

Pay Replacement Obligations

Government bodies have sponsored financial support for employees who are injured at the workplace (workers' compensation), become unemployed (unemployment insurance), or who become unable to work because they are of retirement age or have suffered a total disability (Social Security). This legislation, along with the Fair Labor Standards Act, is the foundation for the financial sustenance of our workers.

5.6 UNEMPLOYMENT COMPENSATION

The stated purpose of unemployment compensation (UC) laws is to provide benefits for persons unemployed through no fault of their own. For more than 50 years, unemployment compensation insurance has been considered one of the most successful social insurance programs. Unemployment compensation insurance had a welfare origin. The early drafters of this legislation wanted the benefits to partially replace wages during periods of limited unemployment. Because wages were being replaced, workers would not have to meet the "needs test" of traditional welfare programs. The U.S. Congress usually extends the benefit period during an economic downturn. Congress generally supports the proposition that getting money into the economy at a time when it is most needed speeds up recovery.

Historical Basis for Unemployment Compensation

Unemployment compensation insurance is not a new idea. By 1800, trade unions were providing economic aid for members forced into temporary idleness. After 1850, supplemental UC benefits were provided in such European countries as Germany, Austria, Belgium, and most of Scandinavia. The first public UC insurance law was passed in 1898, when the city of Ghent in Belgium, passed a local ordinance that supplemented trade union benefits. In 1911, England established the first compulsory UC system.

In the United States, as in European countries, the beginnings of unemployment compensation are found in trade union benefit plans. The first plan was established by a New York printers' local in 1831. From this period to 1932, UC was provided either by trade unions or by joint plans produced by agreement between employers and unions. Private voluntary plans established by individual employers existed, but were not as common as trade unions' plans.

During the Progressive Era described in **Chapter 1 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch01#ch01)**, there was a movement to establish a public compulsory unemployment compensation plan. In 1916, limited UC was passed by the Massachusetts legislature. More than 20 other states followed. Some states hesitated to pass unemployment compensation legislation, perceiving it would put them at a competitive disadvantage.

This competitive concern of the various states caused pressure for legislation on the federal level. The debate over which governmental body should be responsible for the legislation delayed action by both federal and state legislative bodies. By 1935, the federal concept had won the battle. Unemployment compensation was included in the Social Security Act.

Taxation by Federal Government

Federal legislation is an example of the federal government's ability to use its taxing power to encourage states to adopt certain policies. The Social Security Act of 1935 provided that all employers who were not exempted had to pay a federal tax on wages, in part to fund the unemployment compensation program. The federal government would return over 90 percent of the tax if the state adopted an approved program. The UC section of the act provided that the federal government would set certain minimum standards. The states were to decide what type of plan best suited their needs. If a state had no plan, or if the state law was not in compliance with the federal law, the employers would still be taxed, but the tax would not be returned to the states. As anticipated, all 50 states passed laws.

It is not the purpose of this chapter to present the law in any particular jurisdiction. The chapter will provide only an overview. The administrative procedures are common to most jurisdictions. However, the law differs from state to state in the payment of benefits and level of state taxes. knowledge of both the federal and state law is essential for effective cost control.

Excluded Workers

Excluded workers under the federal law include:

1. Employees who are paid less than $1,500 in wages in a three-month period
2. Domestic workers
3. Farm workers
4. State, county, and city workers, with some exceptions
5. Employees of the federal government, if covered by another program

6. Employees of certain nonprofit organizations (religious, charitable, or educational organizations)

Financing Benefits

The unemployment compensation system is financed by two taxes. The state tax finances the benefits, and the federal tax finances state and federal administrative costs. The federal government taxes 6.2 percent of the first $7,000 in wages paid to each employee. A credit of 5.4 percent is returned. This leaves 0.8 percent to be used to finance state and federal administrative costs. The tax is also used to maintain a loan fund from which the states may borrow if they exhaust their funds available to pay benefits.

All states have adopted an experience rating system to encourage employers to maintain stable employment. These systems excuse employers with stable employment from paying all or part of the state unemployment tax, and grant a credit against the federal tax. State taxes are usually based on a "flexible" taxable wage base; increases in the wage base automatically follow increases in statewide wage levels. The taxable wage base ranges from $15,000 to $29,700. In all states, only the employer is taxed for unemployment compensation benefits.[100] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn100)

Although each state is free to develop its own plan, most states follow the model plan recommended by the federal government. Through funding regulations, the federal government retains a degree of control and forces some standardization among the various states.

Constitutional Restrictions

State unemployment compensation statutes are limited by the U.S. Constitution. One state denied benefits when an employee voluntarily quit for religious reasons. The Supreme Court held that this was a violation of the First Amendment.[101] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn101) The Supreme Court also struck down a Utah statute that denied benefits to pregnant women without regard to physical capacity to continue working. The court found this a violation of the Fourteenth Amendment.[102] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn102) However, the employee could continue to work after the baby was born. The court allowed the State of Missouri to deny benefits if the employee left the job due to pregnancy and there were no openings when she was able to return. The court in *Wimberly* v. *Labor and Industrial Relations Commission*, 107 S.Ct. 821 (1987), stated that pregnancy is not a job-related illness; and as long as pregnancy leaves are not treated differently from other illnesses, it is legal to deny benefits.

Courts generally hold that a state cannot deny benefits when the employee is protected by an antidiscrimination law. In one case, an employee joined a church 2 1/2 years after being employed. Her new religion prohibited working on Saturdays. She was discharged when she refused to work on Friday nights and Saturdays. The court held that denial of benefits would violate the First Amendment, although she had worked Saturdays until Saturday became her Sabbath. Whether or not she could be discharged was not an issue.[103] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn103)

States can deny benefits when an employee is discharged for religious use of drugs. The drug used in question was a violation of a state statute, although it was off duty conduct. The denial of benefits was not considered to be a First Amendment violation.[104] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn104) A state can deny benefits to claimants who are attending school. Night school students cannot be denied benefits because they would be available for work.[105] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn105)

When New York gave unemployment compensation benefits to strikers, the court held that it was not a violation of any clause in the Constitution and it was within the authority of the state to do so.[106] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn106) In *Brown* v. *A. J. Gerard Mfg. Co.*, 695 F.2d 1290 (11th Cir. 1983), the circuit court held that unemployment compensation could not be deducted from a Title VII back pay award.[107] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn107) The NLRB reached a similar conclusion in *NLRB* v. *Illinois Department of Employment and Security* 988 F.2d 735 (7th Cir. 1993).

Provisions of State Laws

The federal government requires certain conformity provisions before the employer as taxpayer is granted tax credits. However, the states have considerable flexibility to design their own program. To ensure that the UC payments are in keeping with the intent of the federal law, it is necessary for the states to establish eligibility requirements. The state must also establish benefit

amounts and reasons why an unemployed individual should be denied benefits or be disqualified from receiving further benefits.

In developing rules to determine the right to receive benefits, states have generally followed the principle that UC is intended to provide temporary financial assistance to persons who are out of work through no fault of their own.[108] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn108)** In order to carry out the intent of the act, state laws require eligible claimants to remain available for work and to be seeking work actively, or face the loss of benefits. This requirement is loosely administered in many states.

Variation of Benefit Levels

One way to instill an incentive to seek work is to establish benefit levels that pay only a portion of the wages that an employee would have received if fully employed. On the other hand, the states want the benefit level high enough to cover the claimant's non-deferrable expenses. Usually, this is a weekly benefit equal to about 50 percent of the claimant's normal weekly wage. Some states use the claimant's average weekly wage as a guideline for determining benefits.[109] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn109)**

Most states set the absolute minimum and maximum benefit amount based on the employee's weekly earnings. Others determine the minimum and maximum on the average statewide annual wage. The minimum benefit requires a certain level of earnings; if an employee earns below that level, no benefits are paid. The amount of benefits is usually a fixed sum, but in a few states it depends on the number of dependents.

More than 14 states provide for the payment of dependents' allowances. Although there is some variation, generally a dependent must be wholly or mainly supported by the claimant to qualify. In almost all states, the waiting period to receive benefits is one week, although a few states pay benefits on the first day of unemployment. All states have a maximum period for benefits. This varies from 26 to 36 weeks.[110] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn110)** Congress usually extends the period during an economic downturn.

Disqualifications for Benefits

The laws of various states follow the intent of the federal statute by establishing disqualification provisions. Each state has certain procedures to be followed for obtaining facts involved in a disputed claim. The state agency responsible for payment of compensation claims makes a determination whether the claimant is disqualified.[111] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn111)** The employer or claimant may appeal and request a hearing. The decision of the hearing referee as to disqualification may be appealed to a higher reviewing authority. Subsequent appeals then may be carried to the state courts. If a constitutional question is involved, the U.S. Supreme Court has jurisdiction. Some states merely disqualify the claimant for a period of time. Other states deny the benefits for the entire period of unemployment if certain facts exist.

Reporting Termination Information

Before information is reported to the agency, the reason for separation should be well established. The reason given by the employee for an involuntary quit is often quite different from that stated by the employer in response to a claim. When an employee is discharged, a documented statement should be given to the employee, stating the reason for the discharge. Nothing weakens a case more than a showing that one party changed the statement of the reason for the discharge after the claim was filed. The reason given to the employee should be the same as what will later be reported to the state agency.

When a claim is filed, the agency will request separation information. The person responding to this request should first make sure that the facts stated coincide with the material available in the personnel records. When reporting separation information, give facts, do not give conclusions. Avoid subjective terms such as *not cooperative, unsatisfactory*, and *poor worker*. They mean nothing to the person making the determination. It is also advisable to expand the reason given. For example, when reporting a voluntary quit, the reason for the quit might be:

1. To return to home duty
2. To seek other employment
3. To get married
4. Dissatisfaction with the job

5. Failed to report after ___ days contrary to policy

These are all reasons to disqualify the claimant. If the facts exist, it is wise to give a definitive reason that the agency has previously held to be disqualifying.

In discharge cases, the separation information should establish that the action was willful or detrimental to the employer's interest. If the employee had been previously warned, give the date and a report of what was said. Stay away from vague or undocumented recollections when reporting the information. If you do not have good documentation, do not make the statement. Rely instead on credible supervisor testimony in the event that you have to go to a hearing.

Claiming the employee was unable to perform the job is always damaging.[112] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn112)** It is better to say that employment rules were violated and then specify the rules that were violated, introducing evidence that the employee was aware of the violation when committing the act. Say when or how it was communicated, explaining that the employee had been previously warned, if such was the case. Claiming that the employee was "rude to customers" has very little meaning unless specific incidents are cited. If the employee was guilty of excessive absenteeism, give the dates of warnings and state the number of times absent. Show that the number is excessive in comparison with the records of other employees.

When answering an agency request for information, remember that separation information aids in getting the proper determination from the agency. This will reduce the number of appeals. Often, the person supplying the information limits the statement of information to the space provided in the form. Usually, this space is not enough. When it is not, attach another sheet and use all the space necessary. The information provided in response to the initial request guides the agency in making a determination whether the claimant is qualified. It also is the basic information that is used in the event of an appeal.

The appeal process seeks to obtain facts that verify the original position of the employer. For this reason, more time should be spent in providing complete information in the first step than in all the others. Time spent in supplying the original information will reduce the number of appeals.[113] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn113)**

If the person supplying the information has some doubts about what should be included in the initial response, he or she should get expert help. Often, so much damaging information has been reported in the first response that the employer is unable to rehabilitate its case.

Qualifications of Benefits

Whenever the claimant is receiving any type of income, the employer should question it. Such income is often disqualifying. Income such as holiday, vacation, and back pay may be disqualifying in some states. Even though the statute may not be specific as to kinds of income, any income should be considered.

The state laws typically require the claimant be unemployed and available for work. The receipt of any income from a physical disability would raise a question as to whether the claimant is available for work. Pension payments indicate retirement from the labor market; therefore the claimant is not available for work. The federal law requires the state to reduce the weekly benefit payments by the amount received per week from any source. States may reduce the benefits on less than a dollar-for-dollar basis in order to take into account any contributions that the worker must make to an employer-deferred compensation or retirement plan.

Voluntary Quit without Good Cause

Benefits are paid to persons who are out of work through no fault of their own. It would therefore follow that a voluntary quit would automatically disqualify. Every state will disqualify individuals who bring about or perpetuate their own unemployment. If they quit their job without good cause, commit work-related misconduct, or refuse suitable work, they have caused their own unemployment. Most states disqualify until the claimant meets earning requirements for a new base period.[114] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn114)** However, some states just reduce benefits.

The issue of whether the voluntary quit is without a cause attributable to the employer is important. If it is found that the quit was no fault of the employer, benefits may be still paid to the claimant, but in some states the employer's experience rating will not be charged. Most employers do not recognize this. They attempt to justify the discharge by misconduct, which is often difficult to prove. If they argue that it wasn't a cause attributable to the employer, they would have better employee relations. The employee would get the benefits, but the employer's account would not be charged. Accordingly, the employer's experience

rating would not be affected. The benefits come out of the general fund in some states. The referee takes a dim view of an employer who is trying to deny benefits solely to avoid a charge to its experience rating.

Quitting must be work related; otherwise good cause cannot be established. Sometimes a quit can be deemed a constructive discharge. To establish constructive discharge, the claimant must show that a prudent person would have quit under similar working conditions. Sexual harassment is a good example. Whether the claimant attempted to remedy the situation prior to quitting is highly relevant.

Some reasons for quitting that disqualify a claimant's request for benefits are:

1. To accept other work
2. To join or accompany a spouse or companion (some states will not disqualify)
3. To go to day school
4. To retire
5. To become self-employed

Often, there is a fine line between a voluntary quit and a discharge. In most states *a quit* is defined when the employee exercises, directly or indirectly, a free-will choice to terminate the employment relationship.[115] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn115)** Whenever possible, the employer should call a separation a voluntary quit, such as when the employee fails to report for work after a certain number of days. A *discharge* is usually defined as an employer action that indicates to the employee that his or her services are no longer wanted.

A supervisor had a heated argument with an employee; the employee walked away toward the door, and the supervisor said, "Keep on walking!" This was a discharge. If the supervisor had let him walk through the door, however, it would probably have been a voluntary quit.[116] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn116)** Resigning in order to avoid discharge is usually held to be a quit. Also, a good personal reason is not usually considered enough of a justification to leave a job; the claimant will be disqualified unless discrimination is involved.

Disqualification for Misconduct

Misconduct is the most common issue in disqualification proceedings. *Misconduct* that results in disqualification is defined as "conduct resulting in willful or wanton substantial disregard of the employer's interests." Misconduct was first defined in *Boynton Cab Co.* v. *Newbeck*, 296 N.W.2d 636 (Wis. 1941). It is one those rare decisions that has been adopted by all the states. Often the employer confuses willful misconduct with inability or negligence.[117] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn117)** If a school bus driver has three accidents in 30 days, this may not be misconduct; rather, it might be merely negligence. It is not disqualifying. If an employee throws paper, swears, and insults the boss, this may be misconduct, but it would have to be shown that the incident constituted a substantial disregard for the employer's interests.

Misconduct Schemes

In misconduct cases, the employer must have acted reasonably to control or prevent the employee's behavior. there must be no question that the employee was aware of the work rule violated. In determining what constitutes misconduct, the employer's condoning of similar behavior is relevant. This question often comes up where alleged discrimination has not been properly investigated. Misconduct usually means something different to the employer from what it means to the agency or appeal referee.

An employer should never let the possibility of unemployment compensation benefits interfere with the decision to discharge. Once that decision has been made, the method used in the discharge will sometimes determine whether the employee will receive benefits. It would be a mistake to argue that the employee should be denied benefits because of misconduct. It could be argued that it was a cause not attributable to the employer.

In misconduct cases, the employer must show that:

1. An existing rule was violated.
2. The rule was communicated to the employee prior to the violation.

3. A direct causal relationship existed between the offenses committed and the discharge.[118] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn118)

It is important to remember that the longer the interval between the offense and the discharge, the less chance there is for sustaining the termination before an appeal referee. Normally, an act is considered misconduct when:

1. It is not an isolated incident (unless gross misconduct, such as a felony, is involved).
2. It is detrimental to the employer's best interests (usually a monetary consideration).
3. It takes place during working hours on the employer's premises.
4. The employee's act disregards job duties that were previously defined and communicated by the employer.

If the action meets this definition and is well documented, it will usually be considered misconduct.

Gross Misconduct

Some states identify two levels of misconduct—gross misconduct and simple misconduct. In gross misconduct, the employer has no duty to warn or to show that the employee was aware of the work rule violated. Stealing from the employer, willful destruction of property, sabotage and unprovoked insubordination, for example, would be in this category.

Drug Testing

Employee drug testing has opened up a whole new set of problems in unemployment compensation law.[119] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn119) The issue in most of these cases is whether the refusal to take a drug test is misconduct. Different states have decided this issue differently.[120] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn120) The employer can avoid this exposure by adopting a policy that an employee's refusal to take a drug test is a voluntary quit. The employee has a choice of quitting or taking the test. Refusal to take a drug test can hardly be a willful or wanton substantial disregard for the employer's interest (misconduct definition). The employee's claim that drug testing is an invasion of off-duty privacy is not given credence in most state courts.[121] (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn121) If the employer's records show that the employee refuses to take the test, contrary to a communicated policy, a quit is much better than using misconduct as the reason. However, it must be made clear that the employee has an option to continue working if the test is taken.

If misconduct evidence is not strong, the employer should argue that the cause of the separation was not attributable to the employer. The burden is then on the claimant to show that he or she did not cause the separation. In controlling UC insurance costs, there is no substitute for a clearly communicated policy. The communication should be done in such a manner that there is no doubt that, if a violator is caught, disciplinary action will be taken.

The Use of Appeal Proceedings

If the claimant or the employer objects to a determination made by the agency, either party has the right to appeal. The most common type of appeal concerns rights to benefits. Issues such as ability to work, unavailability for work, or failure to accept suitable work may arise after benefits have been received, and the question of whether the employee is eligible for benefits must be considered periodically during the benefit period.

The appeal must be filed within a specified time, which varies from state to state. In all states, the time limit allows no exceptions. The agency loses jurisdiction if the appeal is not made within the time limits, and the right to appeal is lost forever. Failure to file an appeal within the specified time limits is one of the most common reasons that employers lose appeals. Often, the determination notice from the agency goes to the employer's tax or finance department. It may be put aside, or the person responsible may be away on vacation or sick. As a result, the opportunity to appeal is lost. When the person regularly responsible for appeals is not available, provision should be made for a trained substitute.

No Waiver or Agreement

The employer and claimant may decide to make an agreement or draft a waiver. The employer may agree to pay the benefits if the claimant agrees not to do certain things; or the employer may decide to pay benefits. This type of agreement is not valid. Only the agency decides when benefits will be paid.

Hearsay evidence is inadmissible in judicial proceedings. In an unemployment hearing, however, the referee may admit hearsay evidence but cannot use it as the sole basis for a decision. As a practical matter, the referee may treat hearsay evidence any way he or she wishes.

Preparations for an Appeal

To prepare for the presentation before the appeals referee, the first step is to examine the statement that the claimant made to the agency, comparing it with the one the employer made. If an inconsistency is apparent, as is usually the case, the employer must seek facts to support the validity of its statement.

Witnesses are often required. If so, they should be prepared before the hearing. Some referees question the claimant before the employer has a chance to do so. The proceeding is mostly fact-finding and is designed for laypersons. Formal rules of evidence usually are not observed. Seldom is any evidence excluded. When in doubt, put it in. Either party may object to the remarks or evidence admitted, but it is advisable to do so in a nonlegal way, since objections are commonly overruled. There is no substitute for the credible, direct testimony of a witness.

When it is difficult to get operating people to document their actions, the best way to ensure documentation in the future is to have the supervisor testify. Frequently, the testimony will induce the claimant to deny previous statements. The importance of the document becomes obvious. The employer will have fewer problems obtaining documentation when the claimant denies the supervisor's statements under oath.

If there are some legal arguments, it is best to present them in writing. It is a good idea to seek help in preparing the memorandum. if the argument is unusual, providing a short memorandum citing similar case law is advisable. One should also take advantage of the opportunity to make a summary—called a *closing statement* in legal proceedings. It is not necessary to quote a lot of authority, but it is useful to the referee for both parties to summarize their positions. The state agency personnel, other than a referee on the case, will usually give help in this area. After the hearing, the referee will take the case under advisement and render a decision. The proceedings are recorded on tape or by court reporters. In most states, however, a transcript is seldom made unless the case is appealed.

Employers should always consider an appeal when they receive an adverse decision that they believe is not sound. Sometimes certain witnesses were not available at the time of the hearing or certain evidence was overlooked. At the appeal level, it may be proper to ask for a remand in order for other evidence to be considered.

If a key person is not available for an extended period of time, and it is not possible to get the hearing postponed, the employer may have to go forward with the best effort possible. If the employer receives an adverse decision, the testimony of the unavailable key person might have changed the position of the referee. A request for a remand is in order, and will probably be granted.

The hearing at the appeal level follows the same nonlegal format as the first hearing. It is advisable to prepare a memorandum before the hearing. At this time, the employeer will state its position and the reasons for the appeal. This statement should not introduce any new evidence, but simply point out that based on the evidence presented, the determination of the referee was in error. If new evidence not previously available is to be introduced, the memorandum should request a remand. It is important to give a summary, in writing, at the close of the hearing.

Use of Attorneys in the Appeal Process

Unemployment compensation hearings and appeals are a quasi-judicial process, yet many employers feel more secure if an attorney represents them. The increased complexity of the appeals process has encouraged employers to seek legal representation. However, getting too legal in a process that is basically nonjudicial is often fatal.[122] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn122)** Many states—for instance, Michigan and New Jersey—do not permit attorneys to appear before the Employment Security Commission's referee hearing as representatives of employers. Even the courts recognize that non-attorneys can represent both parties before referees.

There are situations where parties, if made aware of the opposition's representation, would have chosen to also be represented by counsel. Usually, the referee does not know of attorney representation status until the hearing, thus making it even more difficult to determine whether representation is needed. A better procedure would be to call the opposing party to ask if he or she is going to be represented. Both parties may then decide what to do about representation.

The best role of an attorney in UC hearings is to help the client prepare the case, not to be present at the hearing. Representation at a fact-finding hearing often makes the proceeding too legal, which may be disadvantageous.

Reasons for Unsuccessful Appeals

Many cases are lost, not on the merits, but by the quality of the presentation. Often, the people directly involved in the case do not testify. Frequently, witnesses are not properly instructed on what the case is about, or they don't take the task seriously.[123] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn123)** The employer must present only the objective facts, eliminating all subjectivity. Most appeals proceedings are lost for the following reasons:

1. Witnesses do not have actual knowledge of the facts.
2. Proper documentation of facts is not available at the hearing.
3. The employer fails to give a clear reason for termination.

Policies and Practices to Reduce Costs

All unemployment compensation disputes start with the termination process. Although many states have laws that disqualify the claimants from receiving benefits if they quit voluntarily, many types of terminations can result in benefits being paid. Employers often invite this result by giving an ambiguous or incorrect reason for the termination. An employee is disqualified from benefits if the termination results from one of the following:

1. General job dissatisfaction because of lack of advancement
2. Low wages
3. Too much travel
4. Failure to request or return from a leave of absence
5. Failure to attempt to remedy a negative work situation with the employer (this is particularly damaging to the claim for benefits)
6. Marital or domestic situations

The following reasons for quits are considered a good basis for benefits, a cause not attributed to the employer, and may not be charged to the employer's experience rating in some states:

1. Health reasons
2. The employer moves outside the commuting area
3. Forced or requested resignation (opportunity to quit before being discharged)
4. Quitting because of smoking ban at the workplace

One of the most difficult and important problems is being sure that the proper procedure is followed in the discharge. Supervisors often do not think about the unemployment compensation consequences when they decide to discharge. This oversight can be damaging.

The Audit of Charges

One of the areas most often overlooked in the control of unemployment compensation insurance costs is the audit of the quarterly statement, where all the charges to the employer's account are listed. Even with advanced technology, many errors can creep into this statement. Because state tax rates are experience rated, finding these errors can be an important step in cost control.

Since the finance department usually pays the taxes, some employers leave the responsibility of the audit to the finance group. This is often a mistake; the finance department usually does not have the facts necessary to make the audit. Some errors to look for in an audit are the following:

1. In the extreme case, a charge may be made for an individual who was not even employed by the organization.

2. If an employee has not earned enough wages during the base period, no charge should be made, even though he or she may otherwise be qualified to receive the benefits.

3. Sometimes a charge to the employer's account is made when the employee has already been disqualified.

4. The appeal may be pending, in which case the account should not be charged, according to the law in most states.

5. In some situations, the employee may be suspended for a period of time, such as after being arrested and awaiting trial. Benefits should not be paid for this period until a determination has been made.

6. Some states have a disqualification waiting period. An audit may show that benefits were charged for this period.

The appeal procedure for incorrect charges is very simple. Usually, all the employer must do is to point out the mistake, and the agency immediately makes the correction. A hearing is rarely held over incorrect charges. The law and regulations are clear on the conditions under which charges should be made. If an undercharge is found in an audit, the employer has a moral duty to call it to the attention of the agency. In some states there is a statutory duty to report undercharges.[124] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn124)**

So many mistakes occur in the charges that outside consultants can make a good income by auditing reports for various organizations. They usually charge a percentage of the amount saved. Organizations that have a high experience rating that puts them at or near the maximum tax sometimes do not bother to audit the report. Wrong charges will not materially affect the tax rate, but this practice is shortsighted. If the tax rate does come down for the next rating period and the practice of auditing the charges has not been established, a great deal of money may be lost. Auditing the quarterly reports should be done as routinely and automatically as auditing the accounts receivable or checking material received at the shipping dock.

Claim Control Programs

It becomes extremely advantageous to keep benefits charged to the account at the lowest possible amount. This will not happen without some affirmative action through claim control programs and personnel policies. Some suggested policies and programs are as follows:

1. Plan manpower needs to avoid layoffs. Often, overtime is cheaper than hiring additional employees, when one considers the cost of hiring and training a new employee plus fringe benefit costs as well as unemployment compensation costs.

2. Where possible, cross-train or hire employees who have several skills. This allows lateral or upward transfers that not only save unemployment costs but also provide flexibility in work assignments.

3. Have one person that is knowledgeable of unemployment compensation rules and appeal procedures responsible for the entire program.

4. Have the person responsible for the program audit all charges to the account, such as quarterly reports. Often, wrong charges to the account are found. They can be corrected by a mere protest by the employer representative who is familiar with the employees.

5. When in doubt about a determination as to whether the claimant is entitled to benefits—*appeal it.* Over half of all initial benefit determinations appealed by the employer are reversed on appeal. It is particularly important to appeal determinations where a wrongful discharge claim is possible. Failure to appeal may imply that the wrongful discharge claim has merit.

6. Hold exit interviews for all terminations where possible. Attempt to reach a mutual agreement on the reason for termination. In unemployment compensation matters, employees may have a short memory.

It is in both parties' best interests to provide information concerning separations, to protest adverse claims, to document files, to attend appeal hearings with appropriate witnesses, and to have a basic understanding of the appeal process.[125] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn125)**

Becoming familiar with the unemployment compensation procedure requires little training, but the potential financial rewards are great. This is one area where the human resources department or other staff departments can show big savings with a little effort.[126] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn126)** After one has experience with a few cases, and is exposed to various situations, the process becomes easier. In rare cases, the practitioner should seek help. More attention to this area is long overdue in most organizations.

5.7 WORKERS' COMPENSATION

Workers' compensation (WC) is an old concept. The purpose and intent can be traced as far back as the time of Henry I of England. Workers, compensation laws provided that if a person is on a mission for another and death occurs in the course of the mission, the sender or creator of the mission is responsible for the death. Likewise, an early German law held masters liable for the death of their servants. A money payment had to be made for an injury or death.

The present WC system had its origin in German law. In 1838, the German state of Prussia passed a law making the railroads liable for injuries to their employees and passengers, unless caused by acts of God or negligence on the part of the injured employee. The first modern workers' compensation law was adopted in Germany in 1884. This law required compulsory insurance for industrial accidents. The reason for pressure to pass such a law was a socialist movement supporting it. The Iron Chancellor, Otto von Bismarck, wanted to head off the socialist movement and pushed the law through the Reichstag. The German approach to WC was a compulsory system. The common law defenses of assumption of risk, contributory negligence, and fellow-servant doctrine were too harsh for the social thinking of the late nineteenth century. The impetus was to treat workers' compensation as a part of a broad social insurance system.[127] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn127)**

The movement to require employer responsibility for their injured workers was part of the Progressive Era reforms discussed earlier. It was based on the belief that misfortunes, disability, and accidents of individuals are a social matter—that the state has a duty to take care of the injured, regardless of any other facts. In 1902, Maryland passed an act providing for a cooperative accident insurance fund. This was the first legislation embodying any degree of the compensation principle. This and later laws in Massachusetts and Montana were declared unconstitutional as a denial of due process. The first real workers' compensation law was passed in New York in 1910, but like the others it was declared unconstitutional.[128] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn128)** This decision was met with an explosion of opposition; President Theodore Roosevelt was so angry that he openly advocated changing the judicial system. Following this decision, states began to develop more liberal policies toward the injured worker. In 1911, Wisconsin passed the first WC law that stood a constitutional test.[129] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn129)** By 1925, 24 states had passed laws. The last state to do so (Mississippi) passed its law in 1948.

Space prevents this chapter from describing the current law of each jurisdiction. The law differs in each state with respect to benefits levels, administration, eligibility, and premium costs. This chapter provides only an overview workers' compensation law. Knowledge of the law in the state where the employee works is essential for effective cost control.

Basic Concepts

All workers are covered with the exception of railroad and maritime workers, other than seamen, who have never been covered by state laws.[130] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn130)** All the state laws have six basic concepts:

1. To provide benefits regardless of fault or financial condition of the employer[131] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn131)**
2. To reduce delays caused by litigation and controversy over responsibility for the injury, thereby reducing attorney's fees[132] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn132)**
3. To relieve public charities of the financial drain caused by occupational injuries or diseases. The legislative bodies reason that the employer is in a better position to pay for the social ills caused by occupational injury by passing the cost to the consumer than the government is through taxation (an astute political decision)
4. To encourage employer interest in reducing accidents by making the employer liable for all costs[133] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn133)**
5. To generate maximum employer interest in safety and rehabilitation through an appropriate experience-rating mechanism
6. To promote frank study of causes of accidents (rather than concealment of fault)—reducing preventable accidents and human suffering

There is a wide difference of opinion on whether these objectives have been achieved. However, the National Commission on State Workers, Compensation Laws concedes that reform is needed, but that the workers' compensation system is fundamentally sound. Both the National Commission on State Workers, Compensation Laws and a task force in the Department of Labor have rejected proposals to replace the various state systems with one federal program.

State Administration

The administrator of a workers' compensation system considers that the most important element in administration is to make the employer financially responsible for benefits. The second-most important element is to supply the employer with all the necessary data to control the cost. However, the biggest problem the state administrator of WC has is the lack of data for effective cost control. Employers must rely on a relationship with the employee and outside sources that have a substantial influence on the employer's costs. Once the employer learns how to establish the proper relationship with other related sources, policies or practices can be instituted that will reduce the costs. These policies and practices will be recommended in the last section of this chapter after many of the problems related to the system have been discussed.[134] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn134)**

Serious Injury

The employer should endeavor to assure that the best possible medical care is being provided to an injured employee.[135] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn135)** If financial assistance is necessary, it should be obtained. The employee should be assured that if he or she is not able to return to the old job, the employer will try to accommodate by finding other jobs or provide rehabilitation training for other vocations. This is the law.[136] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn136)**

For the seriously injured employee, suggested employer practices include:

1. Visit the hospital immediately and assess how or through whom the employee can best be relieved of any worry.
2. Contact the family; if the injured wants to be left alone, offer help indirectly through someone else if such help is needed.
3. Keep in touch with the employee, to show interest in the recovery progress and to assure the employee of returning to the job. Accommodation, rehabilitation, possible job vacancies, and so on, should be discussed.
4. Avoid any implication that it will be necessary to obtain legal counsel at the early stage of recovery. Explain the workers' compensation law and company employee benefits. If a lawyer becomes involved, establish a relationship with the employee's lawyer. Inform the attorney that the company is aware of the law and will keep the matter as nonlegal as possible.[137] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn137)**

A Doctor's Relationship

To reduce costs successfully, the employer must have the cooperation of the doctor or doctors involved. This is sometimes difficult due to the conflict of interest with the patient–doctor relationship. The doctor often aids the employee in continuing to be paid for not working when physically able to do so. Instances of no-work slips without seeing the doctor, diagnosis of a condition over the telephone, or light-work slips that do not define light work are not uncommon. These problems can be eliminated by an employer–doctor relationship. To establish an effective employer–doctor relationship, the following suggestions should be considered:

1. The employer should inform the doctor of the physical requirements of certain job categories. This can be done with a doctor's visit to the plant site. If this is not possible, send an accurate job description listing the physical requirements of the job. Often, bad medical opinions are caused by the doctor not being informed.
2. If a medical opinion is suspect, the employer should challenge it by sending the employee to another doctor. If the employee refuses, inform the employee that you are stopping the benefits unless she or he returns to work.
3. The employer should establish sound back-to-work procedures that are based on the physical condition of the employee.

A double standard for occupational and for nonoccupational injuries confuses the doctor. The return-to-work policy must not exclude any "make-work"—that is, a job that is created simply to give a worker something to do. The result is that there is no work time lost to an accident and the company's safety record appears to be unblemished. The job the employee returns to must

exist, and if the injured worker doesn't perform the work, some other worker must. The employer should inform the doctor about the employee's activities off the job after the injury. If the employer cannot get an accurate medical opinion, the employer should consider finding the right doctor. Without an accurate medical opinion about the employee's physical condition, back-to-work programs are useless.

Insurance Carrier Relationship

The proper relationship with the insurance carrier is extremely important, especially for small companies who do not have large legal staffs, human resources practitioners, and a security department to investigate doubtful claims.[138] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn138)** If the insurance carrier does the proper job, it can make a real contribution in controlling costs. Many times the insurance carrier, when trying to obtain a new account, will stress the effectiveness of its cost control department. An employer, in considering the selection of an insurance carrier, should attempt to evaluate how effective the carrier's claim control department is.

To develop an effective relationship with the insurance carrier for claim control it is suggested that when injuries are first reported to a state commission and insurance company, the employer should "flag" all doubtful claims and demand that they be thoroughly investigated. In almost yearly surveys by the National Institute for Occupational Safety and Health, it is reported that nationally less than 10 percent of workers' compensation claims are contested. When investigating a doubtful claim, the employer's representative should take an active part in the investigation. All pertinent facts must be given to the insurance carrier. The carrier must then make a thorough investigation. Contested claims should not be settled by the insurance carrier unless the employer approves. Settlements often have employee relations consequences. Sometimes it may be advisable to litigate, even though from at economic perspective the case should be settled. Many lawsuits are tried on other than an economic basis. It should be noted that many insurance carriers have no real interest in premium cost control. Experience-rated premiums usually have a percentage of add-on costs for administration. As premium costs increase, so do profits through administration charges.

Defining an Injury

For an injured worker to receive compensation benefits, there must be a showing that he or she was an employee of a covered employer—that an accidental injury occurred in the course of employment. In addition, the employee must give timely notice to the employer or provide some legitimate excuse for not doing so. The wage basis on which his or her compensation is paid must be agreed on, the duration of the disability must be determined, and if it is a permanent disability the degree of disability must be medically established.

Mental Condition

Early interpretations of an injury were limited to a traumatic physical injury. The courts, in keeping with the social welfare intent of the law, have expanded this definition to include various nontraumatic events. Some courts take the position that in order for a disabling mental condition or a nervous disorder to be compensable there has to be a traumatic incident. Other courts require only a mental stimulus, such as shock, to make a condition compensable.[139] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn139)**

Accidental Injury

All but six states require that an injury be accidental before it can be compensable. The basic element of an accident is that some part of the incident must be unexpected. Most states require that the injury be traceable to a reasonably definite time, place, and occasion or cause. This comes up often in heart, back, or other conditions that could happen off the job. Most courts require that the exertion has to be in some way unusual for the injured worker, although it may not be for other workers.

The accident requirement is also important for infectious diseases that result from unusual or unexpected events or exposure. If the disease follows the accident, it is usually considered an accident and there is little litigation over this. Some states make a disease compensable by statute without the requirement of an accident. Without a statute, the courts in other states have held that an unexpected contraction of an infectious disease is an injury by accident. Some courts reason that the invasion of the body by microbes is in itself the injury.[140] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn140)**

Injury Must Arise Out of Employment

The question of whether an injury must arise out of employment is the leading cause of litigation. Generally speaking, the injury must be work related and in the course of employment.[141] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn141)** One consideration is whether the job involves a risk. If the risk is personal, then it is not compensable. For example, it was considered a risk associated with the job when an employee was mugged while dropping off the mail on the way home from work.[142] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn142)**

Some courts will hold that if the risk is increased by the job assignment, it is compensable. If the employee was injured by an "act of God" (e.g., lightning or an earthquake), the large majority of the courts would hold that such an injury arose out of employment. Working conditions increased the probability of injury.

Sometimes the injury is related to the personal condition of the worker. The general rule is that this is compensable if the employment in any way contributed to the final disability. If the injury was caused by *placing the person* in a position where the condition was aggravated or was weakened by strain or trauma, it is compensable. Thus, if a person had a heart attack or an epileptic seizure and fell to the floor, this would probably be held to be personal. However, if, while in a high place, a worker fell due to an epileptic seizure, the employment would have contributed to the final injury.

The majority of the courts also hold that where the original injury was in the course of employment, every natural consequence that results from the injury is also compensable. However, there may be an intervening cause attributable to the employee's own intentional conduct. For example, if a driver runs over a child while driving in the course of employment and subsequently gets a divorce and has a nervous breakdown, it would be a question of fact. Did the incident of employment cause the condition? Was the divorce caused by the incident? Did either one cause the mental disorder? This is a situation where it would be difficult to avoid litigation unless employer wants to settle.

Definition of Course of Employment

The course of employment requirement is concerned primarily with the time and place of the injury, as well as the activity of the employee when the injury occurred. The hard-and-fast rule would be that only an injury received during working hours would be compensable. However, in line with the welfare concepts of WC, this has not been followed in all cases. Much has to do with the type of work being performed and whether there is a causal relationship between the work and the injury. Traveling between assignments has been found compensable.

When a salesperson was returning home from a call after normal hours, the court held that this was not compensable because there is nothing unusual about a salesperson returning home after normal hours. However, if this had been a person who normally quits at 4:30 p.m. and for some reason had to work overtime, the result might have been different.

Work Site Results in Differences

It also makes a difference if the person is an outside worker, an inside worker, or living on the premises. If the person is an inside worker, the course of employment starts the minute she or he steps on the premises. For an outside worker (such as a salesperson), the usual interpretation of course of employment is that when he or she leaves home, the work period starts and is covered until returning. If the employee is living on the premises, most state courts will call everything "course of employment" except eating, bathing, sleeping, and dressing.

Because a worker is injured on the premises doesn't always mean the injury is compensable. If the injury is caused by an activity that substantially departs from the usual employment duties, some courts will consider this outside the scope of employment.[143] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn143)** Other courts will hold that this is still the scope of employment.[144] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn144)** If an employee disobeys orders and is injured, it can be argued that this is outside the scope of employment and not compensable. Employers must also integrate workers' compensation coverage with the Americans with Disabilities Act (ADA). In the hiring procedures, they cannot ask about WC claims until a conditional job offer has been made.[145] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn145)** They must know the essential functions of the job to prevent injuries and provide for reasonable accommodation to the disabled. There is a serious exposure to a discrimination charge if the entire situation is not properly handled. The advice of an attorney may be needed.

Another problem is retaliation when the employee files a WC claim. The ADA and state statutes have resulted in an increase the frequency of retaliation charges. An employer will claim it is a disability, an employee will say it was because a WC claim was filed.

Drug-related accidents are often compensable when the injury occurs during the course of employment. If the employer enforces a strong policy of no use, possession, or sale of drugs, it appears that a good argument could be made for a discharge if the policy is violated. However, it is doubtful whether the employer would be relieved of paying WC benefits. Off-duty use of drugs should not be permitted if the employee comes to work under the influence (thus a testing policy is needed). The employer could make a strong case that there is too much danger of injury to self or co-workers and that such injury would be compensable.

An Injured Employee

An employee who is discharged and has a work-related injury often alleges that the discharge is wrongful. The employee seeks damages beyond the state workers' compensation statute through a wrongful discharge claim. In such a case, the lawsuit typically alleges that the discharge is in retaliation for filing a workers' compensation claim. Such a discharge would be contrary to public policy because the employee was exercising a statutory right in claiming compensation for an injury. When back injuries leading to frequent absences result in termination, the employer may defend its decision to discharge by alleging excessive absenteeism on the part of the employee. Since it is contrary to public policy in most states to discharge for exercising a right under a statute, a court must often determine whether the discharge was for excessive absenteeism or for filing a claim under the statute. The employer should make sure that the discharge was for a valid reason, and not for filing a workers' compensation claim.

A nurse technician injured her back while helping a patient into bed. She was ordered by her doctor not to work for three months. She returned to work after a month and her condition recurred seven months later. She was off for another long period. The next year she was absent 128 days, 29 days the following year, and 34 days the first five months of the third year. She was then discharged. The reason for discharge was excessive absenteeism. After her discharge, she filed a workers' compensation claim and sued. The statute prohibits discharge for filing a complaint under WC. The court held that her discharge was for excessive absenteeism that was caused in part by the work-related injury. The court noted that the statute protects the employee if the reason for discharge was for exercising a right under the statute. The real reason in this case was excessive absenteeism.[146] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn146)**

Another plaintiff sustained a series of work-related back injuries. After the second injury, he was asked to return to light duty for a short period and to delay filing a workers' compensation claim, since in 10 days the company would receive a six-month award for no lost time because of an accident.[147] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn147)** After a week of light duty, he returned to his old job of forklift operator. About a month later the plaintiff became ill at work and slipped and fell while descending stairs (a common case when the injury is not work related and the employee claims it is). Six months later the employee had back surgery, after which the doctor advised him to return to work. He was restricted to lifting less than 75 pounds. The personnel manager disputed the validity of the last injury as being work related. Rather than letting him return to work, he sent him to the company doctor. The company doctor sent the employee back to work, but restricted him to lifting to 50 to 60 pounds. After working for a short time, the employee was discharged because "he was physically unable to perform his job without causing a safety hazard to himself and fellow employees." The employee alleged the discharge was in retaliation for filing a WC claim. The jury awarded $50,000 in actual damages and $75,000 in punitive damages. The court held that the jury could reasonably find malice and intentional infliction of emotional distress. The verdict was especially damaging to the employer. The plant manager became angry when the employee reported the condition for the second time. He questioned the validity of the injury as being work related. *The court was displeased with the employer's action in disputing the claim* for disability payments.

The difference in the outcome of these cases is that in the one case the company didn't question the validity of the claim. The employee may have been using the back as a pretext to be off work, but the employer just waited until there was enough absenteeism to discharge. In the other case, the company first wanted to protect its safety record and asked the employee to cooperate. The company was creating a job and not making a back-to-work decision based on medical opinion. Some employers use a technique that says to the employee, "You and I know that you are not going back to work for some reason other than your back." This may be acceptable for a doctor, but not for an employer.

It often becomes a question of how far the employer has to go in accommodating the handicapped employee to avoid violation under ADA or a state law. Whether or not the injury is job related doesn't affect the duty to accommodate; however, as a practical matter the court may be more sympathetic to a job-related injury. In *Carr* v. *General Motors Corp.*, 389 N.W.2d 686 (Mich. 1986), the employee was operated on for a ruptured disk. After the operation, he was medically restricted from lifting 50 or more pounds. He requested a promotion to a job that required lifting more than 50 pounds. He was refused the promotion because of the lifting restrictions. He contended that the job required lifting only a small percentage of the time. Other workers in the department could lift for him. He argued that the employer could accommodate without undue hardship. The court held that in

the majority of the states, the employee must perform all the essential functions of the job. *The duty to accommodate is relevant only when the employee can perform the job.* A claim for discrimination under ADA is not valid unless the person is qualified to perform all functions of the job.

Identifying Pretext

When an employer receives notice of a back condition, it must be treated like any other physical condition. It must be assumed that the employee is willing to return to work as soon as it is medically possible. A bona fide effort on the part of the employer and the employee will be beneficial to both. If the effort is unsuccessful in returning the employee to work, the employer's posture may change. The employer should investigate whether the employee is developing a nonmedical reason not to return to the job. The employer must always be aware that there are a few employees who are not motivated to return to work. They use their physical condition as a pretext to collect benefits for not working. This type of employee should be handled differently from an employee with a bona fide injury.

The employer must be certain that the employee is falsely using the disability as a reason not to return to work. To treat a situation as a pretext when in fact it is a bona fide condition can be disastrous, especially if the condition is caused by a work-related accident.[148] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn148)** The employer should *treat all physical conditions as legitimate.* If substantial facts indicate that the physical condition alleged by the employee is not work related, the employer should treat the employee accordingly.

There is a certain pattern of events that may indicate pretext on the part of the employee:

1. The injury alleged is in the back or is a condition that is equally difficult to determine medically.
2. The exact date of the injury is not certain, but usually it occurs on Monday morning.
3. There were no employees present when the injury occurred. The incident is usually a fall or slipping in a remote place—the steps to the locker room, the parking lot, and so on. If a back injury, it could be from lifting as a regular part of the job. It is seldom the usual work-related incident that can be identified.
4. It was reported to the supervisor several days or even weeks after it happened. The employee usually states that at first the injury didn't seem to be severe enough to report.
5. The supervisor to whom it was reported is one known not to record incidents.
6. The employee never commits a major rule violation but does just enough to harass the supervisor (not wearing safety glasses, filing many grievances, taking long coffee breaks, going to the restroom often, and so on).
7. The employee's statements are not logically true but could be true, so that an investigation is required before action can be taken.

When the incident has these elements, there is at least a suspicion that it is not work related. When there is suspicion, several steps can be taken to validate your suspicion:

1. Investigate the employee's record. Determine whether there is a previous pattern either with other employers or in different jobs with the same employer.
2. When in doubt, get more than one medical opinion.
3. Make every effort to accommodate even where you believe that the condition is a pretext. Avoid adversity and give the employee the benefit of the doubt. If a good faith job offer is refused, the employer should immediately take steps to stop the benefits. Sometimes the insurance carrier will resist this but it is the only way the employer can determine whether the condition is a pretext for not returning to work.
4. Give medical leave or terminate where the employee has a recurring condition (on or off the job) after a bona fide attempt to return the employee to work. Under ADA and most state statutes, the employer would have to make an attempt to accommodate before termination. The courts have consistently held that under WC there is no obligation to treat the employee any differently from other employees. If the employee is excessively absent due to a work-related injury, he or she can be terminated like any other employee.

Some states have statutes that prohibit discharge while the employee is on WC. In this case, medical leave would be an answer. The courts hold that the employer is not expected to show different treatment because of a work-related injury. If the employee is not physically able to work, the remedy is benefits under WC and not special treatment at the work place.

5. Investigate all doubtful claims of disability. Often, the employee is at home doing physical work that medically he couldn't do when on the job. If another medical examination allows the employee to return to work, he or she should be terminated if he or she fails to do so. The termination record should state it is a voluntary quit for failure to report to work. In these doubtful situations, termination should be the last resort.

Physical therapy should be attempted. If accommodation is not possible or physical therapy fails, then a medical leave without pay is the best solution. A policy or labor agreement may permit termination because of the length of the absence or failure to return to work when medically authorized.

Return-to-Work Procedures

An important element in any back-to-work procedure is development of the proper atmosphere. The employer must be interested in the welfare of the injured employee and his or her family. The employer must immediately show some concern about the employee's condition.[149] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn149)** One of several ways to do this is to explain the benefits the injured is entitled to under WC and how to start receiving those benefits. There is nothing that will impede a back-to-work program more than creating an adverse situation. One of the most important aspects of recovery from any physical condition is the attitude of the worker. Nothing can happen until she or he wants to return to work.

Make sure the doctor understands the physical requirements of the job the employee was performing before the injury or the job you want him or her to return to. No back-to-work procedure should be considered without a valid medical opinion. Often, more than one opinion is needed to be assured it is medically sound and not influenced by the employee.[150] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn150)** To bring an employee back to work to protect a safety record is a short-term way of creating more costs. This creates an exposure to legal proceedings when up to that point the whole matter was nonlegal. On the other hand, some state laws tend to prefer some employment accommodation or transitional effort.

The next step is a good faith job offer, but the employer should be certain it is a job the employee can do. The job offer should be made even though the compensation is not the same or there is a belief that the employee will not accept. In most states, there is mitigation of damages if a suitable job offer is made. It doesn't have to be accepted. For purposes of mitigation of damages, most states define a suitable job as one that the employee can perform according to the employer's standards. It must also be within the employee's medical restrictions. It must restore the employee as close as possible to the economic status he or she had before the injury. Successful back-to-work procedures restore morale in an injured employee. They reduce WC or health-care costs and exposure to invalid claims.

Organize to Control Costs

Often, the employer gets so discouraged with the legal interpretation of the law that he or she gives up trying to do something about it.[151] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn151)** It is only when the employer decides to do something about it that costs can be controlled. The first step is to make someone responsible for being knowledgeable about workers' compensation and to carry out a program of action, including individual case management. Second, do what is possible to prevent injuries and illness.

Limit Workers

Limiting workers who are eligible is a technique applied in some states. Colorado, Montana, and North Carolina are among a few states where aliens can enjoy benefits if they are legally eligible to work. Others permit non-residents the benefits; others prohibit benefits and most are silent on the issue. In *Financial Executive*, Stephanie Sorenson noted increasing compensation, medical cost patterns and mentioned drug and hospital costs, chiropractic fees and government imposed treatment guidelines as contributing factors. She suggests, reviewing all bills, managing absenteeism, employer involvement in cost control and choice of providers.[152] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn152)**

The Delayed Recovery Syndrome

Delayed recovery is the situation where the employer becomes the most discouraged. The employee has a work-related injury and has been off work for three months. His doctor says he can come back to work. The employee says he has a terrible pain and insists that he cannot work. It is difficult to get someone back to work unless there is a desire to do so. The employee is getting some kind of gain from the injury that outweighs the benefits of getting well and going back to work. Researchers call this a delayed recovery syndrome, not malingering.[153] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn153)** They note that many serious accidents are caused by internal conflicts of a personal nature, such as divorce or separation, drug or alcohol abuse, sex problems, or pending litigation. These factors may delay recovery. The most important thing to remember, according to research, is that delayed recovery is an emotional problem. Although it is unconscious, it is real. For example, the golfer honestly believes that he cannot return to work but *can* play golf.[154] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn154)**

Stopping Malingering

There are employees who deceitfully manage to convince their doctors, employers, and insurance carrier that they are unable to function on the job. These people—often called *malingerers*—appear to prefer to stay at home and collect a modest income rather than return to work. Some even attempt to collect unemployment benefits at the same time as workers' compensation.[155] **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec8#ch05fn155)** Unlike the delayed recovery syndrome, true malingering is conscious avoidance of responsibility. Malingering is difficult to prove. A number of alternatives should be considered before resorting to termination:

1. Offer a suitable job that the person can medically perform. This is required by ADA and most state statutes. Work closely with the doctor, since the employee will often resist. Even work with a rehabilitation consultant if a good one is available.

2. Get the person active to help regain strength and psychological well-being. Most back injuries medically require only a few days of bed rest. If the employee resists, get a medical directive.

3. Offer relaxation training; stress and other psychological factors can aggravate back and neck conditions. Deep breathing and other techniques can relieve this. Get the doctor involved to encourage the employee to do something to help in recovery.

Steps to Reduce Costs

As an employer, let the employee know that you need her or him back on the job. Call or visit the employee during recovery. Strongly encourage treatment programs. If nothing works, then terminate her or him for being absent from work or not following medical directives. Some type of litigation will likely follow, so be prepared for it. Other steps to consider include:

1. Monitor early, especially in the case of a serious injury. Give the employee information before he or she seeks outside help. It is too late if the employee has to see a lawyer for necessary information. Keep in touch after the first contact.

2. Get a medical assessment as soon as possible. One way to do this without being defensive is to make a sympathetic inquiry about the employee's financial condition.

3. Make a job offer as soon as medically possible. This should not be a make-up job but one that is contributing and useful. Consider light-duty work, but only where there is not an exposure to doing other work that the employee is not physically capable of. In sports medicine, when an athlete is injured he or she must keep up with normal practice that is within the person's capacity, even though he or she is unable to play.

4. Get a rehabilitation assessment where necessary. It is possible that the injured may not be able to return to the old job but can do something else. It should be done within 30 days after the injury to be successful. This is an effective technique for the delayed recovery syndrome and complies with ADA.

5. Monitor the medical aspects; this is extremely important. Medical opinion and directives are given great weight in hearings and by the courts.

If the foregoing steps do not work and you cannot think of anything else, then terminate. Studies in all states have disclosed that litigation is second only to permanent and temporary disability costs in workers' compensation cases. Many researchers believe that the biggest contributing factor to WC costs is employer complacency.

The total cost of workers' compensation coverage (medical and disability benefits) was $57.6 billion in 2008. Some $29 billion was expended for medical expenses and $28.6 billion for cash (income replacement) benefits. Employers incurred costs of $89 billion. This information was reported by the National Academy of Social Insurance (NASI, 2010). As one employer put it, "This is worth going after."

CASE 5.1

The 10-Minute Meal Period

The employees made a deal with their manager that if they took a 10-minute lunch period they would be able to quit 20 minutes early and still work eight hours per day. (They also had two rest periods.) After a 3-year period, one employee evidently got indigestion or a nervous stomach and complained to the Wage and Hour Division.

The division took the position that under its regulations, CFR Sect. 785.18, this must be a paid period because it was less than 20 minutes. Investigation revealed that employees left their machines and went to the lunchroom for 10 minutes (one even stated that he went home for lunch). When the bell rang, they all returned to their machines. The Wage and Hour Division demanded two years' back pay (the maximum amount allowable under state statute) because employees worked 40 hours and 50 minutes per week under their interpretation. This amounted to over $12,000 for about 60 employees. The employer took the position that employees were serving their own interest for the 10-minute meal period, thus the break was not work time and therefore not compensable, refusing to pay. Wage and Hour threatened litigation.

Is the meal period compensable?

How might this problem have been avoided?

CASE 5.2

Employee or Contractor?

Lisa, the owner of a small company, decided that marketing the products of her machining company would benefit if the company had a product quality certification. She undertook the process to win a certification, which required the critical analysis and documentation of each task used in the processes. Her Uncle Jake had been an industrial engineer prior to his retirement 10 years ago and was capable of undertaking that aspect of the certifying procedure. She would have able and reliable help and Jake would enjoy a measure of independence if he worked as an independent contractor. Lisa agreed to pay Jake a daily rate for each work day. They signed an agreement stipulating the independent contractor status, pay rate and a monthly pay date. Jake agreed that he would pay any taxes. Family members were a little concerned about Jake's physical ability to undertake this project that was expected to require at least a full year, and possibly two, to complete the work. As a result Lisa had Jake enrolled in the company health plan. Lest he get injured on the job, she also added him to the workers' compensation insurance plan as a supervisor.

Jake and Lisa examined the methodology required by the certification system, agreed to what it required, and Jake set to work. Lisa assigned a data input clerical person to convert Jake's notes because Jake wasn't accomplished with a keyboard. The analytical work and documentation proceeded well. Jake did exercise some flexible scheduling to accommodate an occasional "sleep in." Other employees referred to him as "Uncle Jake." The only interruption in progress was a two-week period when Lisa had Jake oversee a night shift crew while the supervisor was on vacation.

Are there any reasons why the IRS would question Jake's independent contractor status? What supports that status? Do any conditions compromise that status?

What are "swing" factors that could establish Jake's status one way or another?

CASE 5.3

Exempt or Nonexempt

Fred Ball was an accountant in the finance department of the Little Italy Pasta Company and had been employed in that capacity for three years. Fred held a B.S.B. from Midwest State University and was enrolled in a Master of Accountancy program in a "weekend college" program at City University. Fred was paid $25 an hour for a 40-hour week. All company accountants were paid on an hourly basis, although the chief accountant was paid a monthly salary. Fred was also paid a premium of $50 a week for any new account that he was assigned. This premium was only paid for the first three months that he handled the new account because of the additional work required to set up and regularize these accounts.

Fred had no set hours and worked his own schedule. He was allowed to work flexible hours, Monday through Saturday and was not required to submit a time card. No one was allowed to work on Sundays without the express permission of the plant owner and manager. Fred was classified as an exempt employee for overtime purposes.

Is Fred properly classified as an exempt employee?

What potential exposure does the company have under the Fair Labor Standards Act?

How might this exposure be reduced?

CASE 5.4

Forced Vacation

Jack Franklin is an exempt employee working as a systems analyst for the McGuffey Company, a human resources services firm. Jack continually works more than 80 hours in a two-week period. However, due to some graduate classes he is taking, Jack works only 4 hours during the day every other Friday. Because Jack has worked less than 8 hours in a given day, the employer forces him to take 4 hours of vacation for each of the days that he worked less than 8 hours during a single day.

The issue from the employee's perspective is that he should not have to use vacation when taking a couple of hours off during the day. This is particularly true when the time off is to further his education. The employee is clearly an exempt employee in a professional role and puts in more than enough time working. Jack believes he should be paid for a full day's work for working less than 8 hours in a day.

The employer's argument is that there is a department policy stating that every employee must work a minimum of 8 hours during the day. This is an informal policy that is normally adhered to only when needed to please the controller of the company. Additionally, the company handbook states an employee will not be docked pay as long as he or she works a minimum of 4 hours in a day.

Can the company force Jack to use his vacation for the time that he attends classes on Fridays?

Can they reduce his pay if he runs out of vacation time?

CASE 5.5

Work-Related Injury?

The company safety director reads in the local paper that a softball team that Terry, one of the company's employees, plays for won the city championship on Saturday afternoon. The story also notes that there were three injuries during the game, but the names of those injured were not reported. Terry reports a back injury at work on Monday morning. The investigator tells the safety director that the injury probably happened while playing ball. However, the insurer is unlikely to dispute the claim.

What course of action should the employer follow?

Should the employer contest if the insurer denies the claim?

CASE 5.6

Mary Hogan's Back Injury

Paul Smith, department superintendent of Acme Bag Company, noticed that the conveyor belt was jammed with paper bags. He told Mary Hogan, a polypropylene (PE) inserter on the machine, to get a pallet and remove the bags from the belt. Mary replied, "I am not able to because my back is bothering me." Paul replied, "Get one that you are able to handle." Mary replied, "I will not do it." Paul said, "I think you can do it." Mary said, "No." Paul said, "You are terminated; clock out and leave the plant." Mary Hogan did just that.

Mary Hogan was initially employed by Acme as an unskilled worker; she worked in various unskilled positions throughout the plant during the 10 years of her employment. Eighteen months after her initial employment, Mary filed a charge with the Mill City Civil Rights Commission under the city ordinance alleging that the company discriminated because of her gender. She had been given a two-day suspension for refusing to mop the floor. She alleged that males and minorities were not required to do so. Mary did not file a grievance under the labor agreement over the suspension. A similar charge was filed with the EEOC under Title VII. The charge was investigated by the city. Before the investigation under the EEOC charge, Mary amended the charge, alleging that Acme had refused to allow her to return to light duty of lifting 10 pounds or less. She alleged that this was a violation of Title VII and state law. Acme had not received any medical report of Ms. Hogan's condition for 11 months. This amended complaint was based on the fact that Ms. Hogan was not given the opportunity to work for the 11-month period. The state civil rights specialist discovered that Ms. Hogan had not worked for 11 months and inquired about the absence. The specialist was told by Acme that Ms. Hogan was on a medical leave. Acme stated they would be glad to have her return to work if the company doctor approved it. Acme further stated, when questioned, that the reason Ms. Hogan had not returned to work was that she had not contacted Acme stating that she was physically able to perform the job in the plant that she had previously selected or that she could perform any other job.

Acme received a medical report from the company doctor stating that Ms. Hogan was able to lift only 5 to 20 pounds. Eleven months before her stated condition, Ms. Hogan had signed a statement that she would perform only the job as bottom feeder and table loader, jobs that required lifting 20 to 35 pounds and 60 to 75 pounds respectively. This is the reason Acme gave her medical leave.

Ms. Hogan had applied for unemployment insurance, which Acme originally contested on the grounds that the claimant was on medical leave. It was ruled that Hogan was available for work, and she received unemployment compensation. The notice to allow unemployment benefits was not received by the Acme plant. It was sent to the parent company's office, which failed to forward it and did not appeal. No medical leave was applied for by Ms. Hogan under the terms of the labor agreement. However, Ms. Hogan's status was considered a voluntary medical leave during the period she was off work. Premiums for her health insurance were paid by Acme rather than terminating her as permitted by the labor agreement. During the 11-month period Ms. Hogan was considered by Acme as not available for work but was never contacted to determine her status.

When Hogan was called to return to work after being contacted by the civil rights specialist, she stated that she was still under a doctor's care. After two weeks she inquired when she could see a company doctor. On advice of corporate counsel, the personnel coordinator arranged an appointment. The company doctor stated that she could return to light work, but lifting 40 to 50 pounds repetitively would cause back symptoms. Ms. Hogan was notified of her physical condition, which permitted her to return to work a week later. She agreed to return to her old job of bottom feeder (requiring the lifting of 25 to 40 pounds).

The next day she alleged that she hurt her back. A meeting was called to determine what job Hogan could do. With the union present, she was asked what she wanted to do. She selected the table loader job and was returned to that job for the remainder of the day. (This required the lifting of 40 to 50 pounds, which was contrary to the doctor's advice.) On the following day, her husband called and stated that she hurt her back on the previous day and wanted an appointment to see another doctor. Hogan assumed that this other doctor would be somebody other than the company doctor. She was told she could see any doctor whom she wanted. She requested the company doctor. An appointment was made with the company doctor the following day.

Nothing was heard from Hogan after her physical examination until her husband called five days later. He wanted to know what the doctor had found, stating that the doctor never told her the results of the recent examination. When told that nothing was wrong with her, she stated that she wanted to see another doctor. She went to see another doctor. Ten days after her most recent physical examination she was ordered to return to work in the next three days. Rather than return to work, she saw another doctor who authorized her to return to work. However, rather than return to work, she saw another doctor who authorized her to return the next day but no heavy lifting. She reported to work the next day. She told her supervisor that she could not load tables.

As a result of her statement, a meeting was held on the same day with the union and management. Hogan requested that she be taken off the table loader job and be assigned to PE inserting. It was explained to her that this job requires lifting 50 to 70 pounds. Hogan performed the job of PE inserting until she was discharged for refusing to get a pallet. Her complaint to the state

civil rights commission was again amended, stating that her discharge was due to retaliation for filing the original complaint. As a result of the discharge, a grievance was filed under the labor agreement and the dispute was submitted to arbitration. The arbitrator upheld the discharge for insubordination.

The state civil rights commission, after an investigation, determined that there was no basis for the gender discrimination charges regarding the suspension for refusing to mop the floor. However, the commission had reasonable cause to believe that Hogan was discriminated against for not returning to work for 11 months and that the discharge was in retaliation for filing a complaint. The civil rights commission in its conciliation proposal demanded $9,000 in back pay and reinstatement. A conciliation meeting is the next step. If this failed, the matter would go before the state civil rights commission hearing examiner; an appeal from that decision would be to the district court.

Management has to make a decision to settle or fight. What would you recommend? What are the bases for your recommendation?

What mistakes were made by the company in handling this matter?

Summary

Every aspect of employee compensation is affected by legislation in both the public and private sectors. This chapter addresses basic federal legislation concerning compensation. The Fair Labor Standards Act, adopted in 1938, defines employee activity that is compensable and eligible for overtime pay. An amendment to FLSA provides for equal pay for women. During the 1930s, the federal government in effect mandated workers' compensation and unemployment compensation, worker welfare initiatives that are administered by the states and that require cost control measures by employers. The chapter provides the legal foundation and describes some of the difficulties created for employers by these latter enactments.

Key Terms

independent contractor **120** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#page_120)**

meal periods **120** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#page_120)**

Wage and Hour Division **120** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#page_120)**

rest periods **121** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#page_121)**

compensable time **121** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#page_121)**

sleep time **122** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#page_122)**

travel time **124** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#page_124)**

compensatory time **124** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#page_124)**

change time **125** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#page_125)**

salary test **126** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#page_126)**

outside salesperson **127** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#page_127)**

exempt status **127** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#page_127)**

pay equity **134** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#page_134)**

comparable worth **138** **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#page_138)**

Questions for Discussion

1. What is considered compensable time under the Fair Labor Standards Act?
2. Describe the overtime requirements and stipulations under FLSA.
3. Is the FLSA applicable to working for an employer at home?
4. List five factors that distinguish an independent contractor and five factors indicating that an individual is an employee.
5. What is the "salary test"?
6. To what extent can workers work during breaks and lunch time without being paid?
7. Under what circumstances can compensatory time off be used?
8. Identify four reasons why an employer might appeal an unemployment compensation charge.
9. What is the meaning of the "course of employment" requirement in workers' compensation?
10. Under what circumstances might drug-related accidents be compensable?

Notes to Chapter 5

1 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn1a) . Stephen E. Condrey (Ed.), *Handbook of human resources management in government* (New York: John Wiley and Sons, 2005), p. 598.

2 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn2a) . 41 U.S.C. Sects. 35–45.

3 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn3a) . 40 U.S.C. Sect. 276.

4 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn4a) . 41 U.S.C. Sects. 351–358.

5 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn5a) . 29 U.S.C. Sect. 206 et seq.

6 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn6a) . See Stephen Light, "Interpreting the Fair Labor Standards Act," *Golden Gate Law Review*, 2, no. 1 (1991): 147.

7 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn7a) . The 1989 amendment deals mostly with minimum wage and certain tips on training.

8 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn8a) . See "Handy reference guide to the Fair Labor Standards Act," U.S. Dept. of Labor, WH Publication 1282, April 1990.

9 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn9a) . See *Labor Law Journal*, 46, no. 18 (August 1995): 469, 486.

10 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn10a) . The basic statutory *limitation* for liability is two years (three years for willful violations). As one manager told the author, "I have been doing it unintentionally for five years. I am already three years ahead if found wrong."

11 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn11a) . *Employee* has been interpreted to mean any individual who is "dependent upon the business to which they render service"; *Bartels* v. *Birmingham*, 332 U.S. 126 (1947); *Weisel* v. *Singapore Joint Venture, Inc.*, 602 F.2d 1185 (5th Cir. 1979).

12 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn12a) . The court in *Richland* virtually put to rest all appellate court conflicts over the definition of *willful* in all statutes relevant to FLSA, Equal Pay, Walsh-Healy, and so on.

13 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn13a) . *McLaughlin* v. *Richland Shoe Co.*, 108 S.Ct. 1677.

14 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn14a) . *Braun* v. *Wal-Mart, Inc.* Case No. 19 CO-01-9790 Mn. Dakota County, June 30, 2008.

15 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec1#ch05fn15a) . *Mumbower* v. *Callicott*, 526 F.2d 1183 at 1186 (8th Cir. 1975).

16 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn16a) . *Biggs* v. *Wilson*, 1 F.3d 1537 (9th Cir. 1993), *cert. denied*.

17 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn17a) . R. Doyle, Management: A process for building the work productivity and profitability throughout your organization (New York: American Management Association, 1992).

18 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn18a) . Where employees were required to remain on the premises, the employer had to pay for sleep time: *Agilar* v. *Association for Retarded Citizens*, 285 Cal. Reptr. 515 (Cal. App. 4th Dist. 1991).

19 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn19a) . Sleep time is compensable if interrupted by patient care: *Hillgren* v. *County of Lancaster*, 913 F.2nd 498 (8th Cir. 1990).

20 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn20a) . An occasional emergency interruption would not cause an employer to pay for meal time.

21 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn21a) . *Taylor-Callahan-Coleman Counties District Adult Probation Department* v. *Dole*, 948 F.2d 953 (5th Cir. 1991). See also *Henson* v. *Pulaski County Sheriff Dept.*, 6 F.3d 531 (1993).

22 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn22a) . A special arrangement could be made to allow a 45-minute lunch period, deducting 30 minutes per day for the meal period and paying for 15 minutes at an overtime rate.

23 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn23a) . *Johnson* v. *Columbia, S.C.*, 949 F.2d 127 (4th Cir. 1991).

24 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn24a) . *Owens* v. *Local 169, Association of Western Pulp and Paper Workers*, 971 F.2d 347 (9th Cir. 1992).

25 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn25a) . *Martin* v. *Ohio Turnpike Commission*, 968 F.2d 606 (6th Cir. 1992), *cert. denied* 1993.

26 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn26a) . In *Bright* v. *Houston Northwest Medical Center Survivors, Inc.*, 934 F.2d 671 (5th Cir. 1991), the employee had to wear a "beeper," stay sober, and be at the worksite 20 minutes after being called. The court said the employee still could use the time for own benefit, so call time was not compensable. Also *Smith* v. *City of Jackson, Miss.*, 954 F.2d 296 (5th Cir. 1992).

27 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn27a) . *Mitchell* v. *King Packing Co.*, 350 U.W. 260 (1956).

28 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn28a) . *Dunlop* v. *City Electric*, 527 F.2d.

29 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn29a) . *Marshall* v. *Gervill, Inc.*, 1195 F. Supp. 744 (D.C. Md. 1980).

30 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn30a) . *Mitchell* v. *Greinetz*, 235 F.2d 621 (10th Cir. 1956); *Ballard* v. *Consolidated Steel Corp.*, 61 F.Supp. 996 (S.D. Cal 1945).

31 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn31a) . A client once asked a woman in a law office to get him a cup of coffee. When she returned she asked him what she could do for him. Realizing he had mistaken his attorney for a secretary, he apologized. She said she didn't mind taking her time at $200 an hour. The cup of coffee cost him $50.

32 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn32a) . 29 U.S.C. Sects. 251-62, an amendment to the Fair Labor Standards Act.

33 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn33a) . Usually hours worked begin when the employee is required to be on the premises and perform work that is an integral part of the employee's assignment.

34 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn34a) . A management employee once asked the author if he could leave early to get ahead of the traffic. The author told him to leave when the author did at 6:00 p.m.; there was no traffic then.

35 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn35a) . The leading case is *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947).

36 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn36a) . There must be a benefit to the employer to be counted as overtime: *Martin* v. *Parker Protection District*, 774 F.Suppl. (D. Colo. 1991).

37 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn37a) . On time spent on meeting, see William L. Richmond and Daniel L. Reynolds, "The Fair Labor Standards Act: A Potential Legal Constraint upon Quality Circles and Other Employee Participation Programs," *Labor Law Journal*, 37, no. 4 (April 1986): 244.

38 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn38a) . See *Donovan* v. *American Airlines*, 686 F.2d 267 (5th Cir. 1982).

39 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn39a) . Under 29 CFR part 516 and 778, 56 Fed. Reg. 61100 (1991), employees who lack a high school or an eighth-grade education level are exempted from 10 hours per week overtime for training. The training time must be paid for at the regular rate and taken during working hours. This is called *a remedial education exemption*.

40 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn40a) . *Dager et al.* v. *City of Phoenix*, Case No. 2:06 cv-P1412 PHX - JWS (2009).

41 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn41a) . *Powell* v. *Corey Int'l Inc.* No. 05-21395-CIV, 2007 WL 49442 (S.D. Fla Feb 1, 2007).

42 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn42a) . *DeAsencio* v. *Tyson Foods, Inc.* 06-3502 3d Cir. Sept 6, 2007.

43 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn43a) . *Dole* v. *Snell*, 875 F.2d 802 (6th Cir. 1989). Also see *Brock* v. *M. W. Fireworks, Inc.* 871 F.2d 307 (8th Cir. 1989).

44 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn44a) . The state of Utah.

45 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn45a) . For further research on exempt classifications, see James A. Prozzi, "Overtime payment in the managerial employee—Still a twilight zone of uncertainty," *Labor Law Journal* (March 1991): 18.

46 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn46a) . See James A. Prozzi, "Docking pay of managerial employees: The Wage and Hour Law's trap for the employer," *Labor Law Journal*, 42, no. 7 (July 1991): 444.

47 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn47a) . Split in circuit courts.

48 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn48a) . *McDonnel* v. *City of Omaha*. 999 F.2d 1293 (8th Cir. 1993), *cert. denied*, 1994.

49 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn49a) . See K. Paco, "What it doesn't take to be a salaried employee: The future of docking," 215 LEXIS 49 (1993).

50 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn50a) . *Rorch v. Newspapers of New England Daily*, Labor Rev. No. 210 (NH 1993).

51 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn51a) . Some states issue a bulletin on how to determine exempt status. See Minn. Rules Chapter 5224-0010 and 5224-0340 (1989).

52 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn52a)** . For a questionable exempt employee, it is advisable to have the employee make his or her own job description. The WH is more likely to accept it.

53 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn53a)** . *Donovan* v. *Burger King*, 672 F.2d 221 (1st Cir. 1982).

54 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec2#ch05fn54a)** . In *Brock* v. *Norman's Country Market, Inc.*, 825 F.2d 823 (11th Cir. 1988), the court said time is not the only factor in determining executive duties; whether they are discretionary supervisory functions must be considered.

55 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec3#ch05fn55a)** . One author once made a study of overtime for nonexempt group leaders and found that their overtime increased before they went on vacation and before Christmas.

56 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec3#ch05fn56a)** . 29 CFR Sects. 778.316 and 785.11 and 785.13. Also see *Lindow* v. *United States*, 738 F.2d 1057 (9th Cir. 1984).

57 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec3#ch05fn57a)** . The author once discharged an employee on Christmas Day. One author knew that an employee was working overtime to keep up in his work without recording it but could never catch him. The employee never suspected somebody would be around on Christmas Day to find him working.

58 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec3#ch05fn58a)** . This is enforceable, although an agreement to waive the provisions of the FLSA is not.

59 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn59a)** . The IRS estimates that more than 3 million workers are misclassified as independent contractors and that $1.5 billion in taxes are lost each year.

60 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn60a)** . The IRS has information on how to identify an independent contractor. Most other agencies issue similar guidelines.

61 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn61a)** . M. Hulen et al., "Independent contractors, classification issues," *American Journal of Tax Policy*, 11 (1994): 13.

62 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn62a)** . For discussion on totality of circumstances, see *Oestman* v. *National Farmers Union Insurance*, 958 F.2d 363 (10th Cir. 1992); also IRS Rule 87–41.

63 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn63a)** . For a complete analysis of factors used by the Supreme Court in determining an independent contractor, see E. Delaney and R. Hollrah, "Independent contractor vs. employee," *Employer's Handbook* (Washington, DC: Thompson Publishing Group, 1992).

64 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn64a)** . *Marshall* v. *Truman Arnold Distribution Co.*, 640 F.2d 906 (8th Cir. 1981).

65 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn65a)** . *Donovan* v. *Sureway Cleaners*, 656 F.2d 1368 (9th Cir.).

66 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn66a)** . *Marshall* v. *Presidio Valley Farms, Inc.*, 512 F.Supp. 1195 (W.D. Tex. 1981).

67 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn67a)** . *Donovan* v. *Techo, Inc.* 642 F.2d 141 (5th Cir. 1981).

68 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn68a)** . *Reich* v. *Circle C. Investments, Inc.*, 498 F.2d 824 (5th Cir. 1993).

69 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn69a)** . *Fianti* v. *William Raveis Real Estate, Inc.* (233 Conn. 690, 1995).

70 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec4#ch05fn70a)** . *Varisco* v. *Gateway Science and Engineering* 2008 166 Cal. App. 4th 1099.

71 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn71a)** . *Katz* v. *School Dist. of Clayton, Missouri*, 557 F.2d 153 (8th Cir. 1977).

72 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn72a)** . Interpretative regulations were issued by EEOC. They give the EEOC position on all of these factors (29 CFR Part 1620). Case law is in accord.

73 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn73a)** . *Brinkley* v. *Harbour Recreation Club*, 180 F.3d 598 (4th Cir. 1999).

74 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn74a)** . *Warren* v. *Solo Cup Co*, 516 f.3d 627 (7th Cir. 2008).

75 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn75a)** . Civil Action No. 03-CF-4990, N.Y., 2003, (3-31-2009).

76 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn76a)** . See U.S. Glass Ceiling Comm. (Robert B. Reich, Chair), *A solid investment: Making use of the nation's human capital*. Washington, DC. Approved November 21, 1995.

77 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn77a)** . Ibid.

78 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn78a) . 21 F.2d 259 (3rd Cir. 1970), cert. denied, 398 U.S. 90 (1970).

79 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn79a) . Right after the enactment of EPA, the first loophole that employers conceived in EPA was to change the job content to include tasks that women did not normally perform.

80 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn80a) . Meryl Gordon, "Discrimination at the top," *Working Women* (September 1992): 8.

81 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn81a) . In *Glenn* v. *General Motors*, 841 F.2d 1567 (11th Cir. 1988), the court said that the difference in skills and duties must be substantial to justify a pay differential.

82 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn82a) . *Katz* v. *School Dist. of Clayton, Missouri*, 557 F.2d 153 (8th Cir. 1977).

83 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn83a) . *Aldrich* v. *Randolph Central School District*, 963 F.2d 520 (2nd Cir. 1991).

84 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn84a) . *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974).

85 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn85a) . In *EEOC* v. *McCarthy*, 768 F.2d 1 (1st Cir. 1985) the court held ability to be more important.

86 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn86a) . *Fowler* v. *Land Management Group, Inc.*, 978 F.2d 158 (4th Cir. 1992).

87 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn87a) . *Marshall* v. *Security Band & Trust Co.*, 572 F.2d 276 (10th Cir. 1978).

88 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn88a) . *Hodgson* v. *Fairmont Supply Co.*, 454 F.2d 490 (4th Cir. 1972).

89 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn89a) . *Brennan* v. *T. M. Fields, Inc.*, 488 F.2d 443 (5th Cir. 1973).

90 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn90a) . J. Kanin-Lovers and R. Bevan, "Don't evaluate performance—Manage it," *Compensation Benefits*, 1 (March–April 1992): 51–53; D. Guns II, "Merit pay—An unbalanced approach to pay for performance," *Personnel Journal*, 71 (April 1992): 16.

91 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn91a) . This usually happens when the employer does not want to set a precedent of granting cost-of-living increases or longevity increases, thus calling it merit. The misuse of the term becomes evident in EEO cases where a merit increase is given one month and an employee is discharged the next month for poor performance. Misuse of the term is widespread.

92 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn92a) . R. Selwitz, "Blueprint for performance pay," *ABA Bank Journal*, 82 (May 1990): 18; J. A. Parmele, "Five reasons why pay must be based on performance," *Supervision*, 52 (Fall 1991): 6–8; J. Feldman, "Another day, another dollar, needs another look," *Personnel*, 68 (January 1991): 9–11.

93 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn93a) . J. Hersch, "The impact of nonmarket work on market wages," *American Economic Review*, 81 (May 1991): 157; P. F. Orazem, "Comparable worth and factor point pay in state government," *Industrial Relations*, 31 (Winter 1992): 135–215.

94 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn94a) . *League of Minnesota Cities.*

95 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn95a) . Richard Stillman II, *Public administration* (Boston: Houghton Mifflin, 2000), p. 479.

96 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn96a) . State Government Pay Equity Act of 1982 (M.S. 43A) and Local Government Pay Equity Act of 1982 (M.S. 47.991-471.999).

97 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn97a) . J. Quinn, "Visibility and value: The rule of job evaluation in assuring equal pay for Wwmen," *Journal of International Business*, 25 (1994): 1403.

98 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn98a) . State Government Pay Equity Act of 1982 (M.S. 43A) and Local Government Pay Equity Act of 1982 (M.S. 47.991–471.999).

99 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec5#ch05fn99a) . Patton, David, *Human resource management: The public service perspective* (Boston: Houghton Mifflin, 2002), p. 39.

100 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn100a) . See "Highlights of state unemployment compensation laws" (Washington, DC: National Foundation for Unemployment compensation and Workers Compensation, January 1995).

101 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn101a) . *Thomas* v. *Review Board of Indiana Employment Security div.*, 101 S.Ct. 1425 (1981); see also *Frazee* v. *Illinois Dept. of employment and Security*, 109 S.Ct. 1514 (1989).

102 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn102a) . *Turner* v. *Department of Employment and Security of Utah*, 423 U.S. 44 (1975).

103 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn103a) . *Hobbie* v. *Unemployment Appeals Commission of Florida*, 107 S.Ct. 1046 (1987).

104 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn104a) . *Department of Human Resources of Oregon* v. *Alfred L. Smith*, 110 S.Ct. 1595 (1990). Usually drug use must be job related, but here the Supreme Court said that use didn't have to affect performance.

105 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn105a) . In *Idaho Dept. of Employment* v. *Smith*, 434 U.S. 100 (1977).

106 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn106a) . *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979).

107 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn107a) . This is well-settled law: *EEOC* v. *Enterprise Assn. Steamfitters Local 638*, 542 F.2d 579 (2nd Cir. 1979).

108 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn108a) . Matheny, K., "Labor dispute disqualification for unemployment compensation benefits," 95 *W. Va. L. Rev.* 791 (1993).

109 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn109a) . Benefit levels continually increase, although in some states tax rate schedules have decreased.

110 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn110a) . Unemployment Compensation Act of 1992 (P. L. 102–318).

111 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn111a) . For further information on disqualification, see "Highlights of state unemployment compensation laws," National Foundation for Unemployment Compensation and worker's Compensation, January 1992, pp. 63–86.

112 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn112a) . Most state case law holds that discharge for incompetence is not misconduct, and benefits are paid: *Larson* v. *Employment Appeal Board*, 474 N.W.2d 570 (Iowa 1991).

113 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn113a) . Malin, Martin H. "Unemployment compensation in a time of increasing work-family conflicts." 29 U.Mich.J.L.Ref. (1996).

114 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn114a) . A common disqualification is not earning sufficient wages during the base period.

115 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn115a) . See *Bongiovanni* v. *Vanlor Investments*, 370 N.W.2d 828 (Minn. App. 1985), for a discussion of a quit.

116 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn116a) . *Brown* v. *Port of Sunnyside Club, Inc.*, 304 N.W.2d 877 (Minn. 1981).

117 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn117a) . *Richers* v. *Iowa Dept. of Job Service*, 479 N.W.2d 308 (Iowa 1991), the court said that inability or incapacity is not intentional; it cannot be misconduct.

118 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn118a) . Some states hold that the loss of a driver's license necessary for performance of job duties is misconduct. In other states it would be exposure to litigation: *Markel* v. *City of Circle Pines*, 479 N.W.2d 382 (Minn. S.Ct. 1992).

119 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn119a) . Some states hold that refusal to take a drug test is misconduct: *Fowler* v. *Unemployment Compensation Appeals* 537 So.2d 162 (Fla. 5th DCA 1989); see also *Schwamb* v. *Administrator, Division of Employment Security*, 577 So.2d 343 (La. 1991).

120 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn120a) . Gary Coffey, "Ruling backs work-related drug testing," *Nashville Business Journal* (October 15–19, 1990): 1–24.

121 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn121a) . A state did not violate the First Amendment when it denied benefits where an employee was discharged for religious drug use on his own time. The drug use was a violation of a state statute.

122 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn122a) . For a complete discussion on the use of counsel in unemployment proceedings, see *The Labor Lawyer*, 4, no. 1 (Winter 1988): 69.

123 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn123a) . In the opinion of one commissioner's representative, the worst witnesses are accountants, the next worst witnesses are personnel directors, and the third worst witnesses are CEOs.

124 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn124a) . An employee's wages were overpaid one week and two weeks later were underpaid. He complained to the paymaster for being underpaid. The paymaster asked why he didn't complain when overpaid. The reply was that he could tolerate one mistake, but not two.

125 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn125a) . "Employers may reap savings from improved unemployment comp. benefits administration," *Employment Benefit News* (1992): 87.

126 (http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec6#ch05fn126a) . For several years the author had an undisclosed personal goal to save his employer four times his annual salary. Savings in workers' compensation and

unemployment compensation were two areas that greatly contributed to achieving this goal. Undisclosed goals of this nature afford job satisfaction when one attains them and do little harm if one fails.

127 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn127a)** . For a more complete discussion of workers' compensation in Europe, see Ralph H. Blanchard, *Liability and compensaton insurance* (East Norwalk, CT: Appleton-Century-Crofts, 1917); *Ives* v. *South Buffalo Railway Co.*, 94 N.E.2d 431 (N.Y. App. 1911).

128 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn128a)** . *Ives* v. *South Buffalo Railway Co.*, 94 N.E.2d 431 (N.Y. App. 1911).

129 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn129a)** . By 1920, nearly half the workers were covered by some sort of workers' compensation and the court rejected the employer's arguments of due process: *White* v. *New York Central Railroad*, 343 U.S. 188 (1917).

130 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn130a)** . Railroad workers are covered by the Federal Employer's Liability Act (FELA). FELA is not technically a compensation statute and requires injured workers to sue the employer

131 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn131a)** . Also see "An employer's guide to employment law issues," *Small Business Office*, Vol. II, 1994, 65. 432 E. Seventh St.

132 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn132a)** . Statutes in most of the states not only fail to reduce litigation but they also make litigation necessary to resolve the issues.

133 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn133a)** . The cost must be excessive in relation to other costs before the employer's interest is aroused beyond moral consideration. Minnesota, Massachusetts, and several other states have changed their laws to increase the incentive to return to work. They have cut costs in most areas, but have made some change in the benefit levels. This area is subjected to considerable lobbying pressure in every legislative session.

134 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn134a)** . For control of abuses under workers' compensation, see Bruce S. Vanner, "Cut beneath abuse of workers compensation," *Personnel Journal*, 67, no. 4 (April 1988): 30.

135 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn135a)** . To reduce costs, the Massachusetts legislature in 1992 established a fraud bureau for WC cases, and set up procedures for managed care. In 1995, Minnesota's objectives were to reduce costs.

136 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn136a)** . This concern should not imply a guilt complex on the part of the employer because this would have a chilling effect on anything that the employer does for the benefit of the employee. Avoiding a guilt complex is especially important when informing the next of kin of an occupational death, if emotional and legal consequences are to be avoided.

137 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn137a)** . Sometimes a lawyer becomes involved in a probably third-party product liability lawsuit against the manufacturer of the machine that caused the injury. The employer should not aid in such a lawsuit until the workers' compensation case is closed. Often cooperation in the third-party suit can adversely affect the employer's workers' compensation case.

138 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn138a)** . If the employer is self-insured, *insurance carrier*, as used herein, should be interpreted to mean the consulting organization or whoever is responsible for claim control.

139 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn139a)** . See *Kinney* v. *State Industrial Commission*, 423 P.2d 186 (Ore. 1967) for a view of not requiring a physical trauma and see *Sibley* v. *City of Iberia*, 813 P.2d 69 (Ore. 1991) for requiring a physical trauma. See also Derek R. Girdwood, "Can I collect workers compensation benefits if my job drives me crazy?" (comment), *Detroit Civil Law Review* (1992): 591.

140 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn140a)** . HIV has been found to be within the definition of *occupational disease* if it is acquired during the course of employment: *Hansen* v. *Gordon*, 602 A.2d 560 (Conn. S.Ct. 1992).

141 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn141a)** . A company picnic can be in the course of employment, *Ludwinski* v. *National Carrier*, 873 S.W.2d 890 (Mo. App. E.D. 1994).

142 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn142a)** . *Wayne Adams Buick, Inc.* v. *Ference*, 421 N.E.2d 733 (Ind. 1981).

143 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn143a)** . For a discussion in which horseplay was considered to be the course of employment, see G. Caruso and M. Alberty, "Worker's disability compensation," *Wayne Law Review*, 38 (1992): 1292.

144 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn144a)** . See *Hoyle* v. *Isenhour Brick & Tile Co.*, 293 S.E.2d 196 (N.C. 1982), where the employee was killed while driving a forklift truck in violation of rules and the court held it was compensable because he was acting in behalf of the employer.

145 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn145a)** . Some states deny WC benefits if the applicant lied on an application form about a disability.

146 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn146a)** . Majority opinion upholds discharge because of absenteeism due to work-related injury: *Johnson* v. *St. Francis Hospital*, 75 S.W.2d 925 (Tenn. App. 1988).

147 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn147a)** . *Malik* v. *Apex Intern. Alloys, Inc.*, 762 F.2d 77 (10th Cir. 1985).

148 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn148a)** . See "Hiring the handicapped: Overcoming physical and psychological barriers in the job market," *Journal of American Insurance* (3rd Quarter 1986): 13–14.

149 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn149a)** . Most states stress early employer response after an accident and good back-to-work procedures. See "Controlling workers' compensation costs," Minnesota Department of Labor and Industry, Research and Education Unit, July 1991; also J. Gardner, "Return to work incentives," Workers Compensation Research Institute, April 1989, p. 1.

150 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn150a)** . R. A. Deyo, A. K. Diehl, and M. Rosenthal, "How many days of bed rest for acute low back pain?" *New England Journal of Medicine*, 315, no. 17 (October 1986): 1064–1070.

151 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn151a)** . "Worker's compensation costs can be controlled by managed care," *Employment Alert* (Boston: Warren Gorham Lamon), 9, no. 22 (October 22, 1992): 5.

152 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn152a)** . "Controlling workers' compensation medical costs," *Financial Executive*, 22, no. 9 (November 2007): 29–32.

153 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn153a)** . E. Yehn, "The myth of malingering: Why individuals withdraw from work in the presence of illness," *Milbank Quarterly*, 64 (1986): 622.

154 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn154a)** . A 10-year study reported in 1991 made on 3020 Boeing Company employees reveals that 60 to 65 percent of back problems are due to psychological factors.

155 **(http://content.thuzelearning.com/books/Remington.4832.18.1/sections/ch05lev1sec7#ch05fn155a)** . Workers' Compensation for Illegal Aliens, "National underwriters/property and casualty risk and benefits management," 5/15/08, 112, no. 17, pp. 12–13. See also *Correa* v. *Waymouth Farms et al.*, 2003, Minn LEXIS 394 (Minn. July 3, 2003. Even fraud may not prohibit benefits. In this case, a worker was granted benefits even after it was determined that he used fraudulent documents to the job. *Benjamin Amoah* v. *Mallak Management LLC et al.*; N.Y. Supreme Court, Appellate Division 3rd Judicial Department No. 504220, October 30, 2008.