

CHAPTER 4
EMPLOYMENT ISSUES

About The Author

Rowena Jones has been Managing Attorney of the Employment and Benefits Unit at Southeast Louisiana Legal Services (SLLS) since 1993. She received a B.A. from Tulane University, a J.D. from Louisiana State University, and is a member of the Louisiana, Texas and Oregon Bars..

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1. INTRODUCTION

This chapter covers select employment issues within the priorities of LSC-funded poverty law programs (see www.lsc.gov). The focus of the chapter is to help advocates handle those issues they can, recognize other claims that clients may be able to pursue elsewhere, and ensure that clients are referred to appropriate external resources. How extensively an issue is covered depends on the author's understanding of availability of other treatises, poverty advocates' priorities, external resource availability, and limitations of space. Feedback by users of this revised chapter is welcome.

2. WHY EMPLOYMENT LAW KNOWLEDGE IS IMPORTANT FOR POVERTY LAW ADVOCATES

Low-income workers are routinely subject to wage theft, arbitrary or discriminatory firing, and other abuses. Public awareness of possible claims and resources is low. Appropriate intervention may help clients retain or recover their jobs. Once employment is lost, clients usually face other pressing legal needs (e.g., foreclosure, collection defense or need for bankruptcy, family law issues, and need for survival benefits such as food stamps and unemployment compensation). Job-related complaints often reveal underlying issues (e.g., disability, criminal records, mis-classification as independent contractor) interfering with steady employment and related benefits. It is critical to the people we serve that employment-related complaints be received and addressed within the limits of our resources.

3. THE EMPLOYMENT RELATIONSHIP AND THE PROBLEM OF MIS-CLASSIFICATION

This chapter addresses common problems arising between an *employee* and *employer*. For clients to obtain desired relief as employees, relevant definitions under particular statutes or controlling case law must be met.¹ Generally, an employee's immigration status is not relevant to the availability of a remedy; it may be relevant to your ability to help, depending on your funding sources (local resources usually exist if you need to refer; check the legal services directory on <http://louisianalawhelp.org>). Clients who call themselves "independent contractors" should be screened for possible mis-classification (i.e., the employer may be mislabeling the relationship to avoid financial obligations or potential liabilities). Mis-classification of employees is a widespread problem, with harmful effects to the government as well as individuals. See Clearinghouse Review articles on <http://povertylaw.org> and U.S. Department of Labor, Wage and Hour Division resources on www.dol.gov/whd.

¹ If a statute has no specific controlling definition, deciding whether a client is an employee or independent contractor is a factual, case-by-case determination. The most important factor is whether the principal retains the right to control and supervise the work (regardless of the degree to which it is actually exercised). Other factors include selection and engagement, payment of wages, and power of dismissal. *E.g.*, *Hillman v. Comm-Care, Inc.*, 01-1140 (La. 1/15/02) 805 So.2d 1157; *Tate v. Progressive Sec. Ins. Co.*, 4 So.3d 915 (La. App. 4 Cir. 1/28/09).

4. REMOVING EXTERNAL BARRIERS TO EMPLOYMENT

4.1 THE PROBLEM OF CRIMINAL RECORDS.

Many Louisianians are unable to get jobs and occupational licenses due to pervasive discrimination against those with arrest or conviction records. Employers lack legal protection from “negligent hiring” lawsuits based on use or non-use of background checks, and it is not illegal for employers to ask about, or consider, someone’s criminal record, even if it’s old or unrelated to the job. *See* R.S. 23:291. It is not illegal to fire even a good employee for failing to disclose a record. Some employers are affirmatively required by law to deny jobs or licenses to people with certain criminal records. Louisiana also being the prison capital of the world, huge numbers of able-bodied formerly incarcerated annually join the ranks of the unemployed. This entire unfortunate situation has a disproportionate impact on people of color. You may be able to help by:

- **Challenging** a job denial on constitutional or other grounds;
- **Correcting** inaccurate information or removing unauthorized information from government or private databases; or
- **Removing** the record through expungement.

4.1.1 Challenging criminal record job barriers.

Laws on some occupations may explicitly exclude those with certain records. A general “morality” or “suitability” provision may also be invoked as a bar. R.S. 37:2950(A) provides that disqualifications from any licensed occupation cannot be based solely on prior criminal record, except for a felony conviction “directly” related to the job. However, quite a few occupations are exempt, and contrary law may be held to override its provisions. *See, e.g., Hall v. State*, 729 So.2d 772 (La. App. 1 Cir. 4/1/99) (gaming licensing restriction upheld although contrary to R.S. 37:2950).

Occupational restrictions may be subject to challenge on statutory or constitutional grounds. The Equal Employment Opportunity Commission (EEOC) has recognized that denial of employment solely on the basis of a criminal history has a disparate impact on African Americans and Latinos and may thus be actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. www.eeoc.gov/laws/guidance/arrest_conviction.cfm. *See also, Glessman v. Saenz*, No. CGC-02-403255 and *Doe v. Saenz*, No. CGC-02-407530 (Cal. Sup. Ct. 12/19/03) (state Dep’t of Social Services forced to make case-by-case determinations about class members’ eligibility for employment); *AFSCME v. State*, 789 So.2d 1263 (La. 6/29/01) (state law defining felony conviction during employment as mandatory cause for termination of classified civil service employees, found unconstitutional in part); *Gordon v. La. State Board of Nursing*, 804 So.2d 34 (La. App. 1 Cir. 6/22/01) (denial of license to paroled and pardoned felony narcotics offender held illegal); *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003) (state law barring persons with criminal records, even those with decades-old convictions unrelated to their ability to perform the jobs, from employment in any facility catering to older adults, found unconstitutional [PA law comparable to La. R.S. 40:1300.51 *et seq.*]). *Cf. In re Carr*, 2011 WL 5412783 (La. App. 1 Cir. 11/9/11) (rational basis found for board’s denial of waiver); *In re King* 33 So.3d 873 (La. 1/8/10), *rehearing denied* (4/5/10) (expunged conviction used to disbar attorney).

4.1.2 Correcting inaccurate or unauthorized information.

R.S. 15:588 gives a right to access and seek correction of state criminal history information retained by the Louisiana Department of Public Safety's Louisiana Bureau of Criminal Identification and Information. Tools for helping clients with these problems may also be found in the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.* and applicable state law (see this manual's Consumer Law chapter and Clearinghouse Review articles on <http://povertylaw.org>). See, e.g., *Henderson v. HireRight Solutions, Inc.* Not reported in Fed.Supp.2d, 2010 WL 2349661 (E.D. Pa. 6/7/10). If the information provider is not a consumer reporting agency or governmental body, you may have to be creative in seeking relief in other ways, e.g., under tort provisions or anti-discrimination laws. Your assistance in correcting reports can help clients find or keep jobs.

4.1.3 Removing records through expungement.

In Louisiana, expungement generally means the removal of a record from *public access* only, although in some cases, records may also be destroyed. R.S. 44:9(G). After expungement, most private employers should no longer have access to the record from *official* sources. However, it usually stays available to law enforcement and criminal justice agencies, and many state boards and agencies. Also, expungement does not automatically remove data maintained by private data collection companies (they must be individually approached to have a record removed) or available online. For these reasons, expungement is clearly a very limited remedy. Still, it can help some clients get or keep jobs.

The first step is to determine what the record is. Some courts provide online access to these records. If not, you or your client may get the needed information from the office of your local public defender or D.A., or a law enforcement agency.

Second, once you have the actual record, determine if it can be expunged. If it's federal, it usually cannot be expunged. See *U.S. v. Tyler*, 670 F.Supp.2d 1346 (M.D. Fla. 2009). As to Louisiana records, at the time this chapter was written the legislature has instructed the State Law Institute to examine and recommend revision of the expungement law. So, this chapter defers discussion on the details at this step - review the current law carefully to decide if your client's record may be expunged. Revision should not change the remedial purpose of Louisiana's expungement law. See *State v. Boniface*, 369 So.2d 115, 116-17 (La. 1979).

Finally, if a record *can* be expunged, many clients can easily handle the process themselves. For those needing help, there may be a local advocacy group, law student clinic, or community organization that offers this kind of aid <http://louisianalawhelp.org>. At the time of this chapter's writing, there is a limited cost exemption in the statute; otherwise, courts charge varying fees which clients may or may not be able to afford. The process may be *ex parte* or may require a contradictory hearing with law enforcement and the D.A., but each record must be addressed in the parish of arrest. In the future there may well be uniform state court forms, but at the time of this chapter's writing, courts either formulate their own or don't provide any. Cases requiring contradictory hearing, a local refusal to honor the limited statutory fee exemption, or a refusal by the state central criminal records repository to honor an expungement order, may require attorney intervention. You should find practice guides, *pro se* information, and a resources directory on either www.probono.net/la or <http://louisianalawhelp.org>.

4.1.4 Questions from prospective employers or licensing bodies.

Clients with criminal records may ask you what to say on an application, or may come to you with problems resulting from their answers. Louisiana currently has no state law preventing questions about expunged criminal records (another reason why expungement is a very limited remedy). Lying about a criminal record may lead to criminal prosecution (e.g., federal employer) or other adverse consequences, such as denial of unemployment compensation. R.S. 44:9(I) provides that generally, a person whose arrest or conviction has been expunged under that law is not required to disclose the record or the fact that it has been expunged. However, the obligation to disclose is not always so clear, and other laws may be held to trump. See, e.g., *Twin B. Casinos v. State*, 809 So.2d 995 (La. App. 1 Cir. 9/28/01) (license denied due to applicant's failure to answer honestly question about expunged arrest record); *In re Gavin*, 8 So.3d 556 (La. 5/15/09) (attorney applicant's failure to disclose arrests a factor in denying LA license).

4.2 OCCUPATIONAL LICENSES.

Many low-income workers rely on occupational licenses or certification for their preferred employment. They face denial, suspension, termination, or non-renewal for a variety of reasons. They may present initially on a completely different issue; they may be unaware that loss of a license could be imminent, or that you (or an associate) may be able to help retain it.

This is an area in which you can often offer concrete help. Licensees generally have established appeal, hearing, and judicial review rights under the relevant occupation's statutory and regulatory provisions. The number of regulated professions is very high, so research your client's particular occupation. Laws governing most licensing bodies are in Title 37 of the Louisiana Revised Statutes; the Louisiana Administrative Procedures Act, R.S. 49:950 *et seq.* (which applies to certain actions taken by certain administrative agencies); and the Louisiana Administrative Code.

Don't limit analysis to substantive issue(s); licensing bodies often commit procedural errors which may be successfully challenged. E.g., *Schackai v. La. Board of Massage Therapy*, 767 So.2d 955 (La. App. 1 Cir. 9/22/00), *writ denied*, 776 So.2d 464 (La. 12/8/00). R.S. 37:21 provides certain general time limitations on initiating disciplinary and concluding proceedings; special laws may also apply. The standard of judicial review after administrative proceedings are final is narrower than in civil appeals, but adverse agency actions may still be set aside under R.S. 49:964(G).

Clients may also be entitled to constitutional protections. Someone who already has a license - a vested *property* interest - cannot be deprived of it without due process. See, e.g., *Pailot v. Wooton*, 559 So.2d 758 (La. 1990); *Williams v. Parish of St. Bernard*, 2007-1316 (La. App. 4 Cir 5/28/2008), 984 So.2d 937; *Lord v. State Board of Chiropractic Examiners*, 739 So.2d 273 (La. App. 1 Cir. 6/26/99) (*renewal* applicant distinguished). However, even a job *applicant* may have a constitutionally-protected *liberty* interest affording due process. See, e.g., *Cronin v. O'Leary*, 2001 WL 919969, 13 Mass.L.Rptr. 405, not reported in N.E.2d (MA Superior Court 2001). Other protections (e.g., equal protection) may also apply. See, e.g., *State v. Weaver*, 805 So.2d 166 (La. 1/15/02); *Reaux v. LA Board of M.E.*, 850 So.2d 723 (La. App. 4 Cir. 5/21/03).

4.3 DRIVER'S LICENSES.

Driver's license problems can interfere with employment. The state must comply with statutory, regulatory *and* constitutional requirements in suspending or revoking a license. You may be able to help your client get the action stayed during appeal, and/or reduced or reversed. R.S. 32:401 et seq. See, e.g., *Fontenot v. Department of Public Safety*, 92-1874 (La. App. 1 Cir. 1993), 625 So.2d 1122. Through separate procedures, you may be able to help clients suffering financial hardship get a restricted license. See R.S. 9:315.34; 32:414 et seq.; 430; 667 et seq.; *Moore v. State of Louisiana, Department of Public Safety*, 655 So.2d 644 (La. App. 2 Cir. 5/10/95). Details are deferred in this chapter because there is a hardship practice guide on www.probono.net/la; <http://louisianalawhelp.org>.

4.4 CREDIT PROBLEMS.

More and more employers run credit checks on potential employees, and use adverse information in making hiring decisions. Generally, this is not illegal, provided employers give appropriate notice and opportunity to respond to incorrect information. A poor credit history, whether caused by identity theft or clients themselves, can thus unfortunately interfere with the ability to get and keep a job. Help clients resolve the credit problem if you can, or refer them to other sources of help (see the Consumer Law chapter). As with the denial of a job due to a criminal record, if the credit history is not relevant to the job requirements, its use may raise a Title VII disparate impact claim.

5. "AT-WILL" EMPLOYMENT DISCHARGE.

The vast majority of Louisiana employees have virtually no effective job protection whatsoever. Arbitrary firing is usually completely un-actionable because of the prevailing employment **at-will** doctrine, based on C.C. Art. 2747. If there is no specific contract and an employee is hired for an indefinite period, then the employment relationship is considered terminable at the will of either party. *Deus v. Allstate Ins. Co., Inc.*, 15 F.3d 506 (5th Cir. 1994) cert. denied, 513 U.S. 1014; *Quebedeaux v. Dow Chemical Co.*, 820 So.2d 542 (La. 6/21/02); *Wallace v. Shreve Memorial Library*, 79 F.3d 427 (5th Cir. 1996), cert. quest. den. 673 So.2d 602 (La. 5/17/96), appeal decided 97 F.3d 746 (5th Cir. 1996).

However, you can still help. Advising clients about the at-will doctrine may help end a fruitless search for legal redress or help in future job situations. Complaints about dismissals often focus on unfairness, lack of advance notice, or that a decision was based on inaccurate information. These are not exceptions to the at-will doctrine. *Tolliver v. Concordia Waterworks District #1*, 735 So.2d 680, 684 (La. App. 3 Cir. 2/10/99); *Johnson v. Delchamps, Inc.*, 897 F.2d 808 (5th Cir. 1994) reh. den. *Wusthoff v. Bally's Casino Lakeshore Resort, Inc.*, 709 So.2d 913 (La. App. 4 Cir. 2/25/98). An employer may give a wrong reason, or none at all. Personnel handbook provisions also do not create an exception to at-will status. *Mix v. University of New Orleans*, 609 So.2d 958 (La. App. 4 Cir. 1992), writ den. 612 So.2d 83 (1993). Even an employer's violation of a law may not necessarily be an exception. See, e.g., *Sanchez v. Georgia Gulf Corp.*, 860 S.2d 277 (La. App. 1 Cir. 11/12/03), Judges Kuhn and Whipple, dissenting; writ denied, 2004-0185 (La. 4/2/04) (violation of mandatory drug testing provisions under R.S. 49:1001 et seq. held not to support a claim for wrongful termination).

For what little it's worth, very large employers should (absent "unforeseeable business circumstances") provide advance notice under The Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §2101 *et seq.* Employers with 100 or more employees must give 60 days written advance notice of mass layoffs or plant closings to employees, the chief local elected official, and to the appropriate state agency. Separate layoffs may sometimes be aggregated. Noncompliant employers may be sued for back pay for each day of the violation. §2104; *United Food and Commercial Workers Union Local 751 v. Brown Group*, 517 U.S. 544 (1996). Unlike some other states, Louisiana has no state counterpart to WARN.

Lawsuits for wrongful discharge where no contract is alleged (and where no other time period is applicable) are held to sound in tort, and governed by a 1 year prescriptive period. *Young v. Martin Marietta Corp.*, 701 F. Supp. 567 (E.D.La. 1988); *Maquar v. Transit Management of Southeast Louisiana, Inc.*, 593 So.2d 365 (La. 1992).

5.1 AT-WILL EXCEPTIONS.

Despite at-will status, there may still be a cause of action. Even if you can't represent the client due to your limited resources, you may help by identifying possible claims and referring to possible help elsewhere (e.g., government agency or the private bar). Other lawyers may see claims you miss, so encourage clients to get other opinions through free consultations.

5.1.1 Unionized employees.

This type of employee is rarely seen by poverty law advocates in Louisiana. Getting involved with terminations covered by a collective bargaining agreement (contractual agreement that usually specifies cause for job loss and provides a process to challenge adverse employment decisions) is unlikely for a Louisiana poverty law advocate. However, you can give clients some advice, and make appropriate referrals.

If an employee and employer are unable to resolve their dispute, the union has the right to submit the matter to an arbitrator. The arbitrator's decision is enforceable in court. Clients may find legal representation through the union, or through the private bar. Sometimes clients complaints include the union as well as the employer. In that instance, you should also advise clients about a union's duty of fair representation. *See, e.g.*, 29 U.S.C. §§141; 151-169. The National Labor Relations Board (www.nlrb.gov) may be a potential agency referral. The scope of a union's representation may not include related claims such as unemployment compensation, so be sure to screen and advise clients about issues like that which flow from job loss.

5.1.2 Employees under individual contract.

This category of employee, based on C.C. Arts. 2746-50, is also rarely seen by the poverty law advocate. In a limited duration employment contract, the parties agree to be bound for a certain period of time during which neither party is free to end the relationship without cause, and reasonable notice must be given prior to termination. *See, e.g., Finkle v. Majik Market*, 628 So.2d 259 (La. App. 5 Cir. 1993); *Hughes v. Muckelroy*, 700 So.2d 995. (La. App. 1 Cir. 1997), These relationships may be found in public as well as private employment. *See, e.g., Wallace*

v. Shreve Memorial Library, 79 F.3d 427 (5th Cir. 1996), certified question denied 673 So.2d 602, 96-0792 (La. 4/17/96), appeal decided 97 F.3d 746 (5th Cir. 1996). While a contract may be oral or written, any ambiguity will be construed in favor of employment at-will. *Wallace, Id.*; *Schwarz v. Administrators of Tulane Educational Fund*, 97-0222 (La. App. 4 Cir. 9/10/97), 699 So.2d 895. An unjustly discharged employee may seek recovery of all “salaries” due for the term’s remainder. An action for discharge is governed by the 10 year prescriptive period of C.C. Art. 3499.

Clients may sometimes be sued for violation of **non-compete agreements**. These are governed by R.S. 23:921. Look carefully at the agreement; it must be strictly construed against the party seeking its enforcement, and it may not comply with statutory requirements (e.g., specification of geographic scope, valid time limit). Contracts executed under this law are disfavored as a matter of public policy. See, *USI Ins. Services, LLC v. Tappel*, 09-CA-149 (La. App. 5 Cir. 11/10/09), 28 So.3d 419, writ denied, 2009-2697 (La. 2/26/10), 28 So.3d 271.

5.1.3 Violation of public policy.

A public policy exception (“Abuse of Right” doctrine) is very occasionally argued in wrongful discharge cases (although it has gained little traction in Louisiana). See, e.g., *Sinclair v. Allen Parish School Board*, Not reported in Fed.Supp.2d, 2011 WL 4896474 (W.D. La. 2011); *Gil v. Metal Service Corp.*, 412 So.2d 706 (La. App. 4 Cir. 1982); *Franz v. Iolab, Inc.*, 801 F.Supp. 1537 (E.D. La. 1992); *Guillory v. St. Landry Parish Police Jury*, 802 F.2d 822 (5th Cir. 1986). The necessary elements of this type of claim are said to be: (1) the exercise of rights exclusively for the purpose of harming another or with the predominant motive to cause harm; (2) exercise of rights without serious or legitimate reasons; (3) the use of the right in violation of moral rules, good faith or fundamental fairness; or (4) the exercise of the right for a purpose other than that for which it was granted. See, e.g., *Morse v. J. Ray McDermott & Co.*, 344 So.2d 1353 (La. 1977); *Truschinger v. Pak*, 513 So.2d 115 (La. 1987); *Illinois Central Railroad Co. v. International Harvester*, 368 So.2d 1009 (La. 1979); *Jones v. New Orleans Legal Assistance*, 568 So.2d 663 (La. App. 4 Cir. 1990) (no public policy violation); *Capone v. Kenny*, 94-0888 (La. App. 4 Cir. 11/30/94), 646 So.2d 518 (should be limited to contractual situations); *Ballaron v. Equitable Shipyards, Inc.*, 521 So.2d 481 (La. App. 4 Cir. 1988) (doctrine inapplicable where employer’s request for polygraph in embezzlement investigation reasonable).

5.1.4 Protected activity/protected rights/discrimination.

Violation of **statutory or constitutional** provisions may give rise to a cause of action. See, e.g., *Howard v. Town of Jonesville*, 935 F.Supp. 855 (W.D. La. 1996); *Sampson v. Wendy’s Management, Inc.*, 593 So.2d 336 (La. 1992). The table below lists major statutes which may provide a basis for challenging an at-will termination when discrimination is involved. What follows is a very brief (many treatises and other resources are available) discussion of the more common complaints. *Many other laws exist which may give an aggrieved employee a cause of action.* Research other possibilities which may apply. Although as a poverty law advocate you likely lack the resources to represent clients on these types of claims, recognize the possibility of existing claims and refer clients to appropriate agencies and to other legal resources.

5.1.4.1 Race, color, religion, sex and national origin discrimination.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, prohibits discrimination because of a person's race, color, sex,² religion or national origin in many aspects of the employment relationship, including: pre-hiring procedures, working conditions, performance reviews, post-employment references, harassment on the job, and retaliation. A claim may also be raised under sections 1981 and 1983 of the Civil Rights Act of 1866 (**42 U.S.C. §1981 and §1983**) and the later addition, **42 U.S.C. §1981a**. See, e.g., *Sommer v. State*, 97-1929 (La. App. 4 Cir. 3/29/00), 758 So.2d 923; *Smith v. Ouachita Parish School Board*, 29873 (La. App. 2 Cir. 9/24/97), 702 So.2d 727; *Graham v. St. Landry Parish*, 96-904 (La. App. 3 Cir. 2/5/97), 689 So.2d 595.

In cases of national origin or race discrimination, the **Immigration Reform and Control Act of 1986 ("IRCA")**, Pub.L.No. 99-603, 100 Stat. 3359, may apply. IRCA prohibits employers from hiring persons who are not legally entitled to work in the U.S. and requires that employers verify employees' eligibility and identity. IRCA also prohibits discrimination in hiring, firing or recruiting or referring for a fee, based on national origin and/or citizenship status by covered employers against those who may legally work in the U.S. 8 U.S.C. §1324b. Protection is given to U.S. citizens, U.S. nationals, and aliens who have work authorization: lawful permanent residents, lawful temporary residents, refugees, and asylees. Some employer actions which may constitute illegal discrimination or be otherwise illegal under this statute include:

- Treating people differently in the hiring process.
- Exempting some from proving genuineness of a identity or eligibility document.
- Requiring submission of documents not listed on the "I-9" form.
- Citizen or resident only policies when not required by law or government contract.
- Basing decisions on appearance, accent, name, etc. rather than work-related criteria.
- Retaliation or other reaction against exercise of rights under the statute.

IRCA complaints must be filed with the Department of Justice's Office of Special Counsel (OSC) (unless brought before the EEOC within the scope of a Title VII charge) within 180 days of the unlawful action. OSC will investigate and decide whether to bring the complaint before a special administrative law judge (ALJ). If OSC declines, the complainant may do so. Anyone dissatisfied with an ALJ's decision may, within 60 days, appeal to the U.S. Court of Appeal for the circuit in which the violation occurred, or where the employer resides or transacts business. §1324b(I).

Louisiana's Employment Discrimination Law, R.S. 23:301 et seq., also provides a cause of action, at 23:332 et seq., to plaintiffs who have suffered intentional employment discrimination because of their race, color, religion, sex, or national origin. The law generally covers employment agencies, labor organiza-

² Sexual orientation discrimination is not covered by federal law at present, although same-sex harassment based on sex is prohibited. See, e.g., *Williams v. Waffle House*, 2010 WL 4512819 (M.D. La. 2010). Louisiana state law also provides no protection, but check your local laws.

tions, public and private employers with 20 or more employees, who provide compensation and receive services. Religious institutions, nonprofit organizations, domestic servants, and relatives are exempted from coverage. There is no provision prohibiting retaliation, and plaintiffs found to have pursued “frivolous” claims may be held liable for damages, costs and attorney fees. The applicable prescriptive period, 1 year, is subject to suspension for limited periods of investigation by the EEOC or its Louisiana counterpart. R.S. 23:303, 332.

5.1.4.2 Age discrimination.

The federal **Age Discrimination in Employment Act (ADEA)**, statute, 29 U.S.C. §621 *et seq.*, prohibits discrimination because of their advanced age against employees 40 and over in any aspect of employment, and prohibits retaliation. Enforcement lies with the EEOC. Administrative filing is required at least 60 days before filing suit, but a plaintiff need not wait for issuance of a “right to sue” notice before filing suit. Upon issuance, however, the 90 day time period to bring a suit begins to run. 29 U.S.C. §626(c).

Louisiana’s Employment Discrimination Law, at R.S. 23:311 *et seq.*, also deals with age discrimination and is construed in light of federal precedent. *O’Boyle v. Louisiana Tech University*, 32,212 (La. App. 2 Cir. 10/1/99); 741 So.2d 1289; *LaBove v. Raftery*, 2000-1394 (La. 11/28/01), 802 So.2d 566; *Eastin v. Entergy Corp.* 09-293 (La. App. 5 Cir. 7/27/10), 42 So.3d 1163. Domestic servants and relatives are excluded from coverage. The one year prescriptive period applies. *Benton v. Zapata Protein, Inc.*, 1998 U.S. LEXIS 756 (E.D. La. 1/21/98); *Jay v. International Salt Co.*, 694 F. Supp. 207 (W.D. La. 1988), *affirmed* 868 F.2d 179; *Harris Savings and Loan Ass’n*, 95-223 (La. App. 3 Cir. 7/27/95), 663 So.2d 92, *writ denied* 664 So.2d 405.

The **Older Workers Benefit Protection Act** (1990), 29 U.S.C. §§623, 626 & 630, amended the ADEA to prohibit the use of an employee’s age as basis for discrimination in benefits or layoffs. It also requires covered employers to give employees 21 days to decide whether or not to sign a waiver of right to sue. In group waivers, each employee must get 45 days. After signing, an employee has 7 days to revoke consent. 29 U.S.C. §626(f); *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998). An effective waiver must:

- Be knowing and voluntary;
- Use language understandable to the average person;
- Specify that it applies to the ADEA;
- Not cover any rights discovered by the employee after signing;
- Provide something of value, over and above what is already owed to the employee;
- Advise of employee’s right to consult an attorney before signing;
- Include a fixed time to make a decision; and
- If made to a group, group must be defined, with job titles and ages of all in the group, and ages of all in same job classification or unit to whom the offer is not being made.

5.1.4.3 Disability discrimination.

Title I of the **Americans with Disabilities Act of 1990 (ADA)**, 42 U.S.C. §12102 *et seq.* prohibits discrimination by covered employers in any aspect of employment against qualified individuals on the basis of a qualified disability. §12112(a), (b), (d). The law requires notices and prohibits retaliation, and was amended to overcome restrictive jurisprudential interpretations. ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553. A covered individual is one who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. §12111(8). If a disability and need for accommodation is obvious, an employee need not expressly or formally request accommodation. The fact that a person has applied for, or is even receiving, Social Security or other disability benefits based on the inability to work, does not automatically bar an ADA claim. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).³

“Reasonable accommodation” may include, but is not limited to, job restructuring; modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; modification of examinations, training materials or policies; provision of qualified readers or interpreters. §12111(9)(B). What is reasonable accommodation is a highly specific and individualized fact inquiry, focusing on the employee’s and employer’s particular circumstances. So long as the accommodation offered is reasonable, an employer does not have to provide something that the employee prefers more.

Accommodation that causes “undue hardship,” i.e., “significant difficulty or expense,” is not required. §12111(10). If a disability would in the work at issue endanger the person’s health, the employer’s refusal to hire does not violate the ADA. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002). It is not a reasonable accommodation to exempt an employee from an essential function of their job. *Jones v. Kerrville State Hospital*, 142 F.3d 263 (5th Cir. 1998). It is ordinarily not reasonable to expect the employer to change seniority rules. *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). Title I of the ADA is enforced by the Equal Employment Opportunity Commission (EEOC). §12117. Private lawsuits are authorized, but administrative exhaustion is required.

Section 504 of the Rehabilitation Act, 29 U.S.C. 793 *et seq.* is similar to the ADA. It prohibits discrimination on the basis of disability by most employers receiving federal assistance. It may protect employees of federally funded private employers who are too small to be covered by the ADA. § 504 also requires certain affirmative hiring efforts. It is enforced by the U.S. Department of Labor’s Office of Federal Contract Compliance Programs. Private suits are authorized, and administrative exhaustion is not required except for federal employees. *Carter v. Orleans Parish Public Schools*, 725 F.2d 261 (5th Cir. 1984); *Doe v. Garrett*, 903 F.2d 455 (11th Cir. 1990).

Louisiana’s Employment Discrimination Law provides a cause of action in R.S. 23:322 *et seq* which is very similar to that available under the ADA. *See, e.g. Lindsey v. Foti*, 2011-0426 (La. App. 1 Cir. 11/9/11), 81 So.3d 41; *Harvey v. Wal-Mart Louisiana L.L.C.*, 665 F.Supp.2d 655 (W.D.La. 2009). Employers cannot dis-

³ You’ll also want to advise your client as to how other laws may interact. A good place in which to start your research is the Clearinghouse Review Journal of Poverty Law and Policy, <http://povertylaw.org>.

criminate against “an otherwise qualified disabled person on the basis of disability” when that disability is “unrelated to the person’s ability, with reasonable accommodation” to perform job duties.

5.1.4.4 Pregnancy discrimination.

It’s a common mis-perception that it is illegal discrimination for an employer to refuse pregnancy leave or fail to guarantee job security after delivery. That’s not necessarily the case. The **Pregnancy Discrimination Act, 42 U.S.C. 2000e(k)**, amended Title VII to protect employees and job applicants from discrimination in any aspect of employment *based on* pregnancy, childbirth, or any related medical condition. *Laxton v. Gap, Inc.*, 333 F.3d 572 (5th Cir. 2003); *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204 (5th Cir.), *cert. denied* 525 U.S. 1000 (1998). It is enforced by the EEOC. Private suits are authorized. Actions prohibited by the statute include:

- Treating pregnant employees and those recovering from abortion who need time off from work or certain job duties differently than all other temporarily disabled employees.
- Forcing employees to take leave because of pregnancy if they remain able to do the essential functions of the job.
- Hiring or refusing to hire solely because a woman is pregnant.
- Denying health care coverage for pregnancy if other medical conditions are covered. However, an employer may exclude coverage for abortion unless the life of woman would be endangered or there are medical complications after the abortion.

Louisiana’s Employment Discrimination Law addresses “pregnancy, childbirth and related medical conditions” in R.S. 23:341 *et seq.* The statute covers public and larger private employers and prohibits employment discrimination *because of* these conditions unless based on a “bona fide occupational qualification.” It also requires *state* employers to provide leave for up to four months. There is no retaliation provision. *Allison-LeBlanc v. Department of Public Safety and Corrections, Office of State Police*, 95-0295 (La. App. 1 Cir. 10/6/95), 671 So.2d 448 (predecessor statute raised in context of civil service appeal). Administration exhaustion is not required.

5.1.4.5 Labor union membership.

Both federal and state statutes prohibit discrimination against workers for belonging or refusing to belong to a labor union. 29 U.S.C. § 141 *et seq.*; R.S. 23:881 *et seq.* and 981 *et seq.* (“Right to Work” law). Activities which can be characterized as organizing are also protected.

5.1.4.6 Other laws.

This chapter is intended to give you an overview only, not a comprehensive list, of the most common potential claims. Other laws may exist which give your client a cause of action. Research other possibilities that may apply.

6. PUBLIC EMPLOYMENT LOSS

6.1 PROTECTIVE CONSTITUTIONAL AND STATUTORY FRAMEWORK.

Enjoying some limited job protection are public employees covered by a state, parish, or municipal civil service system (under which non-policy forming employees are selected on the basis of merit and discharged only for reasons connected to work performance), *Bannister v. Department of Streets*, 95-0404 (La. 1/16/96), 666 So.2d 641, 646, or by other legal protections. Civil service systems are governed by a constitutional and statutory framework. La. Const. Art. 10; R.S. Title 33.

As a public employee dismissible only for cause possesses a constitutionally-protected property interest, to satisfy procedural due process the employee is generally entitled to a limited pre-deprivation hearing, with an opportunity for a more comprehensive post-deprivation hearing. See *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 545-46 (1985).

Most civil service employees who've been fired or suspended will be financially eligible for free legal aid, and your representation can make a very real difference. For that reason, this chapter explores in some detail the principles applicable to Louisiana civil service systems in general, and offers some practice guidelines. Federal employees are rarely seen by poverty law advocates, and treatises are available elsewhere.

Civil service protections apply to members of the *classified* service. See, e.g., *Wallace v. Shreve Memorial Library*, 79 F.3d 427 (5th Cir. 1996), *cert. den.* 673 So.2d 602, 96-0792 (La. 5/17/96), *app. dec.* 97 F.3d 746 (5th Cir. 1996); *Knecht v. Board of Trustees for State Colleges and Universities and Northwestern State University*, 91-C-0751 (La. 12/2/1991), 591 So.2d 690; *Department of State Civil Service v. Housing Authority of East Baton Rouge*, 95-1959 (La. App. 1 Cir. 5/10/96), 673 So. 2d 726, *writ den.* 679 So.2d 434 (La. 9/20/96). Classified employees with permanent status may be disciplined only for cause expressed in writing. La. Const. art. X, §8. Those with non-permanent status have less protection.

The *unclassified* service includes persons in a variety of positions, including elected officials, registrars of voters, etc. La. Const. Art. 10, 2(B); La. R.S. 33:2401 *et seq.* *Unclassified* service members without employment contracts may usually be discharged without cause, being essentially at-will employees. *Tolliver v. Concordia Waterworks District #1*, 98-00449 (La. App. 3 Cir. 2/10/99), 735 So.2d 680, 684; *Manuel v. Town of Mamou*, 97-651 (La. App. 3 Cir. 12/10/97), 704 So.2d 358; *Mix v. University of New Orleans*, 609 So.2d 958 (La. App. 4 Cir. 1992), *writ den.* 612 So.2d 83 (1992).

Most civil service systems are governed by commissions or boards, quasi-legislative bodies "vested with broad and general rule-making and subpoena powers for the administration and regulation of the classified service." La. Const. Art. 10, §10; §3 (state); §2 (cities); R.S. 33:2396, 2397. A director provides the executive and administrative leadership. Art. 10, §§6-7; R.S. 33:2399, 2400. Most if not all systems enact their own rules, which must be published and made available to the public on request. These rules have the effect of law and prevail over contradictory statutory provisions unless they are unreasonable or unconstitutional. *Bannister v. Department of Streets*, 95-0404, p. 4 (La. 1/16/96), 666 So.2d 641; *Hudson v. Department of Public Safety and Corrections, Louisiana State Penitentiary*, 96 0499 (La. App. 1 Cir. 11/8/96), 682 So.2d 1314, *writ den.* 687

So.2d 408. The interpretation and meaning of civil service rules is purely a question of law. *Perkins v. Director of Personnel*, 197 So.2d 116 (La. App. 1 Cir. 1967), *writ ref.* 199 So.2d 924.

6.2 ISSUES TO EXPLORE IN EVALUATING A CIVIL SERVICE CASE.

- **What is the employee's status?**

Classified or unclassified? Permanent, temporary, probationary, or other? The employer's characterization may not be correct. Reference to personnel or civil service department records may be needed to resolve the issue.

- **How severe is the employee's loss?**

Job loss, either through termination or "non-disciplinary" removal, is a severe economic blow, as are long-term suspensions (30 days or more). If you don't take a case because the loss isn't severe enough to justify use of limited resources, clients can be advised on how to exercise their rights *pro se*, or referred to a law school clinic or the private bar.

- **Was the discipline taken by the appropriate person?**

If the person who took the action lacked authority, the action is null and void. *Lane v. Dept. of Public Safety and Corrections*, 00-2010 (La. App. 1 Cir. 2/15/02), 808 So.2d 811; *Department of Agriculture and Forestry v. Jones*, 93-0128 (La. App. 1 Cir. 3/11/94), 633 So.2d 900, *writ denied* 637 So.2d 482. If a disciplinary letter is not signed by the agency's head official, the issue should be raised before hearing, and the appointing authority ("AA") must present sufficient documentary evidence of appropriate authority (direct or delegated).

- **Has the AA illegally punished twice for the same conduct?**

Determine prior disciplinary history, and the sequence of events leading to the current charge; check central and departmental personnel files if possible. Suspension *pending investigation*, followed by termination based upon the same charge, is valid. *Ayio v. Parish of West Baton Rouge School Bd.*, 569 So.2d 234 (La. App. 1 Cir. 1990). Punishment twice for the same offense is *not* valid (even if civil service rule purports to allow it). *Bruno v. Jefferson Parish Library Dept*, 04-504 (La. App. 5 Cir. 11/30/04), 890 So.2d 604; *Lundy v. University of New Orleans*, 98-0054 (La. App. 1 Cir. 2/19/99), 728 So.2d 927. If discipline is voided due to procedural defects, the same conduct may properly be used to support subsequent discipline. *Baker v. Southern University*, 590 So.2d 1313 (La. App. 1 Cir. 1991); *Usun v. LSU Health Sciences Center Medical Center of Louisiana at New Orleans*, 2002 CA 0295, 0296 (La. App. 1 Cir. 02/14/03), 845 So.2d 491. Meantime, the employee must be reinstated and reimbursed for lost wages and emoluments. Raise the issue before hearing if possible.

- **Are the charges impermissibly stale?**

The AA is not estopped from discipline on a *current* act of misconduct just because it has failed to discipline for similar infractions in the past, nor is it required to put an employee on notice that its practice of toleration will be changed. *Bolar v. Department of Public Works-Water*, 95-346 (La. App. 5 Cir. 10/31/95), 663 So.2d 876, *writ den.* 666 So.2d 680). However, it should

be estopped from using *stale* charges when the delay is not imputable to the employee. *See, e.g., Board of Trustees, State Employee Group Benefits Program v. Moncrieff*, 644 So.2d 679 (La. App. 1 Cir. 1994); *Lombas v. Department of Police*, 467 So.2d 1273 (La. App. 4 Cir. 1985); *Letteff v. Department of Corrections, Headquarters*, 462 So.2d 254 (La. App. 1 Cir. 1984); *Cartwright v. Department of Revenue and Taxation*, 460 So.2d 1066 (La. App. 1 Cir. 1984); *Robbins v. New Orleans Public Library*, 208 So.2d 25 (La. App. 4 Cir. 1968). The AA may also use old misconduct in support of the severity of its punishment on a current offense. Raise this issue before hearing if possible.

- **Were there rule or due process violations?**

Raise any procedural violations before hearing, if possible (most civil service systems allow for summary disposition or other pre-hearing motions). If the AA failed to follow applicable procedures (whether required by statutes, rules, or constitutional principles), the action should be voided. *Perkins v. Sewerage and Water Board*, 95-1031 (La. App. 1 Cir. 2/29/96), 669 So.2d 726, *reh'g den*; *Baker v. Southern University*, 590 So.2d 1313 (La. App. 1 Cir. 1991); *Shortess v. Department of Public Safety and Corrections*, 2006-2013 (La. App. 1 Cir. 9/14/07), 971 So.2d 1051 (“non-disciplinary” removal). You can recover needed income for your client, even though the AA may start over. *See, e.g., Usun v. LSU Health Sciences Center Medical Center of Louisiana at New Orleans*, 2002-0295 (La. App. 1 Cir. 2/14/03), 845 So.2d 491, 496.

As mentioned above, a property right in continued employment entitles most public employees to procedural due process. The critical elements to procedural due process are notice and an opportunity to respond. *Loudermill, supra*; *Moore v. Ware*, 01-3341 (La. 2/25/03), 839 So.2d 940; *Wallace v. Shreve Memorial Library*, 79 F.3d 427 (5th Cir. 1996), *certified question denied* 96-0792 (La. 5/17/96), 673 So.2d 602, *appeal decided* 97 F.3d 746 (5th Cir. 1996); *Murray v. Department of Revenue and Taxation*, 504 So.2d 561 (La. App. 1 Cir. 1986).

Due process protections attach even if the AA incorrectly characterizes the job separation as voluntary on the employee’s part. *Paul v. New Orleans Police Dept.*, 96-1441 (La. App. 4 Cir. 1/15/97), 687 So.2d 589, *writ denied* 692 So.2d 447. Don’t take the AA characterization of a client’s status at face value. The AA may make a mistake, or your client may be unaware of her legal status. *See, e.g., Carroll v. N.O.P.D.*, 2002-2230 (La. App. 4 Cir. 3/25/03), 844 So.2d 148 (reinstatement ordered because commission failed to meet its burden of proving probationary status); *Robinson v. Natchitoches Parish Housing Authority*, 554 So.2d 1384 (La. App. 1 Cir. 1989), *writ den.* 558.2d 583. **Due process is a flexible standard and what protections are required depends upon the particular situation.** *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Moore v. Ware, supra*.

Before non-disciplinary removal, termination, suspension or other deprivation, some type of notice and opportunity to respond is generally required for due process. *Department of Public Safety and Corrections, Office of Youth Services v. Savoie*, 569 So.2d 139 (La. App. 1 Cir. 1990). If the property deprivation is relatively short, or emergency suspension is necessary due to financial exigency, safety concerns or health hazards, there doesn’t have to be pre-deprivation process. Exactly when due process protections attach is

not precisely defined. *See, e.g., Frye v. Louisiana State University Medical Center in New Orleans*, 584 So.2d 259 (La. App. 1 Cir. 1991) (property interest in 1 day's pay not sufficient to require due process notice and hearing before suspension); *Monier v. St. Charles Parish School Board*, 10-526 (La. App. 5 Cir. 5/10/11), 65 So.2d 731 (ditto 2 days); *Casse v. Sumrall*, 547 So.2d 1381 (La. App. 1 Cir. 1989), *writ den.* 551 So.2d 1322 (layoff due to financial exigency did not implicate due process). No formal "hearing" is required; just notice (oral or written) of the proposed action, an explanation of the nature of the evidence, and the opportunity to present arguments against the proposed action. The notice need not always provide complete details, but enough to inform the employee. *Danny Beck v. City of Baker*, 2011 CW 0803 (La. App. 1 Cir. 9/10/12), 102 So.3d 887. Still, it's not uncommon for the AA to make mistakes that can void the action. *See, e.g., Bell v. Department of Health and Human Resources*, 477 So.2d 91 (La. 1985), *reh'g den.* 483 So.2d 945 (La. 1986), *cert. denied*, 479 U.S. 827 (1986); *Henderson v. Sewerage and Water Board*, 99-1508 (La. App. 4 Cir. 12/22/99), 752 So.2d 252; *Patterson v. Personnel Bd., City of Baton Rouge and Parish of Baton Rouge*, 95-1603 (La. App. 1 Cir. 4/4/96), 672 So.2d 1118, *reh'g den., writ den.* 679 So.2d 1348.

Final notice affecting property rights must also comport with due process by providing sufficient notice of the complained-of action and possible appeal rights. It must be in writing. La. Const. Art. 10, §8. An employee must be informed of the time, place and nature of any alleged misconduct in sufficient detail to adequately prepare a defense. *See, e.g., George v. Department of Fire*, 92-2421 (La. App. 4 Cir. 4/17/94) 637 So.2d 1097; *Maurello v. Department of Health and Human Resource, Office of Management and Finance*, 510 So.2d 458 (La. App. 1 Cir. 1987), *writ den.* 514 So.2d 460, *app. after rem.* 546 So.2d 545. An employee who resigns to avoid disciplinary action is not entitled to such notice. *Pugh v. Department of Culture, Recreation and Tourism, Sabine River Authority*, 597 So.2d 38 (La. App. 1 Cir. 1992).

- **Can the appointing authority meet its burden of proof to show legal cause?**

Under La. Const. Art. 10, §8(A), a permanent classified civil service employee may only be disciplined for cause expressed in writing. The AA bears the burden of proving, by a preponderance of evidence, that the conduct complained of "impairs the efficiency of the public service and bears a real and substantial relation to efficient operation of the public service in which the employee is engaged." *Leggett v. Northwestern State College*, 140 So. 2d 5 (La. 1962); *Mathieu v. New Orleans Public Library*, 2009-2746 (La. 10/19/10), 50 So.3d 1259; *Shields v. City of Shreveport*, 579 So.2d 961, 964 (La. 1994); *Walters v. Department of Police of the City of New Orleans*, 454 So.2d 106, 113 (La. 1984). There is no presumption of correctness attached to an AA's action. *Aufdemorte v. Department of Police*, 437 So.2d 364 (La. App. 4 Cir. 1983). Furthermore, not every rule violation is sufficient to support disciplinary action. *Johnson v. New Orleans Fire Department*, 95-0546 (La. App. 4 Cir. 11/16/95), 665 So.2d 126. An employee may also not be disciplined for exercising a constitutional right. *Normand v. City of Baton Rouge, Police Dept.*, 572 So.2d 1123 (La. App. 1 Cir. 1990). Research case law to find factual situations similar to your client's case. However, three issues are spotlighted below.

Drug or alcohol use. Don't assume the validity of a test request. It may have violated applicable system rules, or be constitutionally flawed. See, e.g., *Richard v. Lafayette Fire and Police Civil Service Bd.*, 2008-1044 (La. 2/6/09), 8 So.3d 509; *Lemoine v. D.O.P.W.*, 2002-2532 (La. App. 1 Cir. 9/26/03), 857 So.2d 550. Refusal to take a test may be justified. See, e.g., *Safford v. Department of Fire*, 627 So.2d 708 (La. App. 4 Cir. 1993). Cf. *Razor v. New Orleans Dept. of Police*, 2004-2002 (La. App. 4 Cir. 2/15/06), 926 So.2d 1; *George v. Department of Fire*, 93-2421 (La. App. 4 Cir. 5/17/94), 637 So. 2d 1097 (plaintiffs lost constitutional arguments). There may also be another defense, or an argument for mitigation. See, e.g., *Small v. Department of Police*, 98-0292 (La. App. 4 Cir. 10/21/98), 720 So.2d 751 (officer given wrong pain medication by daughter; termination reduced to suspension). Second, look for flaws in the test procedure. Finally, if a test result is the only basis for discipline, the AA must prove "with great care" the chain of custody and that proper procedures were followed. See, e.g., *Krupp v. Department of Fire*, 2007-1260 (La. App. 4 Cir. 11/19/08), 995 So.2d 686; *Ruddock v. Jefferson Parish Fire Civil Service Bd.*, 96-831 (La. App. 5 Cir. 1/28/97), 688 So.2d 112. Question your client closely and review documents carefully to see if errors in obtaining or handling a sample may have taken place. The AA may fail to meet its burden of proof. See, e.g., *Carroll v. N.O. Police Dept.*, 04-0122 (La. App. 4 Cir. 9/29/04), 885 So.2d 636; *Blappert v. Department of Police*, 94-1284 (La. App. 4 Cir. 12/15/94), 647 So.2d 1339 (failure to rebut employee testimony that sample mislabeled). Cf. *Murray v. Department of Police*, 97-2650 (La. App. 4 Cir. 5/27/98), 713 So. 2d 838, *writ den.*, 98-1730 (La. 10/9/98), 713 So.2d 838.

Criminal conduct. Conduct that constitutes violation of a criminal statute may constitute cause for dismissal or other discipline. *Roy v. Alexandria Civil Service Commission*, 2007-1458 (La. App. 3 Cir. 4/2/08), 980 So.2d 225 (appeals court affirmed Commission ruling that battery off-duty not cause to terminate); *AFSCME v. State*, 01-0422 (La. 6/29/01), 789 So.2d 1263 (statute mandating felony conviction as cause for termination from service only constitutional *vis-a-vis* unclassified state employees); *Caldwell v. Caddo Levee Dist.*, 554 So.2d 1245 (La. App. 1 Cir. 1989), *writ den.* 559 So.2d 126 (unjust to dismiss when exonerated of criminal charges). The burden of proof is less than in criminal proceedings; although the facts must be clearly established they need not be established beyond a reasonable doubt. *Blackwell v. Sumrall*, 97-0084 (La. App. 1 Cir. 2/20/98), 708 So.2d 1147.

Non-disciplinary removals. This can be a subterfuge by an AA seeking to avoid the closer scrutiny given to disciplinary removals. Look carefully at relevant rules. Non-civil service laws may also give your client additional rights. See, e.g., *Shortess v. Department of Public Safety and Corrections, supra.* (non-disciplinary removal under state system subject to the ADA).

- **Is the punishment appropriate or should it be modified?**

A civil service commission or board must not only determine whether the AA had legal cause for the action, but also whether the punishment

imposed is commensurate with the offense. *Mathieu v. New Orleans Public Library*, 2009-2746 (La. 10/19/10), 50 So.3d 1259; *Walters v. Dept. of Police*, 454 So.2d 106 (La. 1984). Discipline should be modified if it was arbitrary, capricious, or characterized by an abuse of discretion. Factors to be considered include the nature of the offense, work record (performance evaluations, usually annual), and prior disciplinary record. Because of its extreme nature, termination is often reversed for lesser punishment. For that reason, an appeal should almost always request a reduction in discipline as alternative relief, and be sure that relevant evidentiary support gets into the record. Search court decisions and civil service opinions for cases involving conduct similar to your client's, and bring them to the attention of adjudicator(s).

- **If your client was not a permanent employee, can he prove a discriminatory or retaliatory reason for the discipline?**

Your client has the burden of proof in this situation, and it is not often easy to meet. La. Const. Art. 10, 8(B) requires that in the case of employees who are temporary, provisional or probationary, the AA must give the real reason for dismissal or other discipline, and that action must be nondiscriminatory and not in retaliation for exercising a legal right. See, e.g. *Preen v. Dep't of Welfare*, 93-1278 (La. App. 4 Cir. 4/28/94), 636 So.2d 1127 (successful claim of racial discrimination); *Department of Public Safety and Corrections v. Thornton*, 625 So.2d 713 (La. App. 1 Cir. 1993) (violation of civil service rule found in termination of probationary employee without obtaining input about work performance from immediate supervisor); *Ray v. City of Bossier City*, 37,708 (La. App. 2 Cir. 10/24/03), 859 So.2d 264, writ denied 2003-3214 (La. 2/13/04) (summary judgment in favor of employer reversed; employees allegedly fired for exercising First Amendment right to free expression).

Not all types of discrimination can be raised in the civil service context. Certain categories of prohibited discrimination are listed in La. Const. 10, §8(B). It has been held that this is an exclusive listing of bases for civil service appeals based on discrimination. See, e.g., *Tennessee v. Department of Police*, 2009-1461 (La. App. 4 Cir. 2/24/10), 33 So. 3d 354. Employees may pursue other claims in an appropriate judicial forum. See *McCain v. City of Lafayette*, 98-1902 (La. App. 3 Cir. 5/5/99), 741 So.2d 720 (district court held to have jurisdiction over age-discrimination plaintiff's state law claims for general damages and loss of reputation); *Louisiana Department of Agriculture and Forestry v. Sumrall*, 98-1587 (La. 3/2/99), 728 So.2d 1254 (finding invalid state civil service rules allowing appeals on additional bases of discrimination). If you are only taking a civil service appeal but other claims may exist, confirm the limited scope of your representation in writing.

6.3 FILING THE ADMINISTRATIVE APPEAL.

Classified employees have the right to appeal disciplinary action to the appropriate commission. La. Const. Art. 10, §8,12. The civil service department may have an appeal form or a letter may suffice; check the rules. Disciplinary action must generally be appealed within the time limits and in the manner specified by the applicable statute or rule. R.S. 33:2424. If the AA is at fault for your client missing the time limit, proof of a rule violation or equitable argument such as laches or contra non valentem may be held to interrupt the running of the appeal period. See, e.g., *Sterne v. Department of State Civil Service*, 98-0525 (La. App. 1

Cir. 4/1/99), 731 So.2d 505 (doctrine rejected); *Adams v. Dept. of Health and Hospitals, Office of Mental Health*, 97-0750 (La. App. 1 Cir. 4/8/98), 710 So.2d 1176 (appeal time delays do not begin to run until proper written notice is received, even if employee "aware"); *Hudson v. Department of Public Safety and Corrections, Louisiana State Penitentiary*, 96-0499, (La. App. 1 Cir. 1996), 682 So.2d 1314 (alleged misrepresentations by Commission employee).

What to include in an administrative appeal. Review the system's rules. In some cases a simple statement that the client wants to appeal a particular AA action could be enough. But, clients seeking a reduction in penalty in the alternative should explicitly request it, and clients alleging discrimination or retaliation must provide sufficient specifics to enable the AA to prepare a defense. R.S. 33:2424 *et seq.* and applicable system rules; *Griffen v. Department of Health and Human Resources*, 599 So.2d 294 (La. 1992). Attorney's fees can be requested. Remember, as discussed above certain claims can't be raised within a civil service employee appeal.

- ☞ Review as quickly as possible any appeal filed before your intervention; amendment may be needed and the right to do so time-limited. *See, e.g., Brown v. Department of Health and Hospitals Eastern Louisiana Mental Health System*, 2004-2038 (La. App. 1 Cir. 11/4/05), 917 So.2d 522; *Carter v. Department of Revenue and Taxation*, 563 So.2d 920 (La. App. 1 Cir. 1990).

6.4 THE ADMINISTRATIVE APPEAL PROCESS.

State and city civil service commissions are constitutionally authorized to appoint referees or hearing examiners to conduct hearings on appeals. Art. 10, §12(A), (B). Depending on the system, these officers may have the power to make decisions (which may then be appealed to the full commission) or merely the power to make reports and recommendations to the appointing commission (which makes the actual decision). R.S. 33:2424, 2426 and system rules. Learn the rules applicable to the system with which you are dealing, as options and time limits for exercising them will vary. Whether you'll want to present your own witnesses or documentary evidence will depend on the facts of your case and who carries the burden of proof. While hearsay and other incompetent evidence may be admissible at hearing, make objections as appropriate. Incompetent evidence should be disregarded by the adjudicator and by a reviewing court, but are not always. *Harrell v. Dept. of Health and Hospitals*, 2010-1281 (La. App. 1 Cir. 9/10/10), 48 So.3d 297; *Berger v. New Orleans Police Dept.*, 95-1668 (La. App. 4 Cir. 12/28/95), 666 So.2d 709. If you fail to make an evidentiary objection at hearing, a court may find it waived.

On reversal or modification of AA action, an employee should be reinstated to his former position; receive back pay, benefits and emoluments; and have attorney's fees awarded if requested. *See, e.g., Blappert v. Department of Police*, 94-1284 (La. App. 4 Cir. 12/14/94), 647 So.2d 1339; *Baker v. Southern University*, 590 So.2d 1313 (La. App. 1 Cir. 1991). Reimbursable benefits and emoluments have been held to include:

- Merit step-increases. *Hays v. Louisiana Wildlife and Fisheries Commission*, 165 So.2d 556 (La. App. 1 Cir. 1964).
- State supplemental pay. *Hebbler v. New Orleans Fire Dept.*, 310 So.2d 113 (La. 1975); *Johnson v. Department of Police*, 97-2748 (La. App. 4 Cir. 4/22/98), 715 So.2d 12.

- Annual leave time that would have accrued. *Lombas v. New Orleans Police Department*, 501 So.2d 790 (La. App. 4 Cir. 1986).
- Pay for overtime reasonably certain to have been required. *Carroll v. N.O. Police Department*, 04-0122 (La. App. 4 Cir. 9/29/04) 946 So.2d 674.
- Private health insurance. *Noya v. Department of Fire*, 611 So.2d 746 (La. App. 4 Cir. 1992).

Not reimbursable is the employee's increased tax liability incurred as a result of lump-sum payment of back wages. *Christoffer v. Department of Fire*, 98-2408 (La. 5/18/99), 757 So.2d 863. It is also OK for system rules to allow for set off of wages and other income the employee received while off the job, such as unemployment compensation benefits. However, income earned from work during what would have been off-hours should not be set off. *Patterson v. Personnel Bd., City of Baton Rouge and Parish of Baton Rouge*, 95-1603 (La. App. 1 Cir. 4/4/96), 672 So.2d 1118, *reh'g den., writ den.* 679 So.2d 1348 (La. 9/27/96).

6.5 JUDICIAL REVIEW.

Review by a court of appeal of any final commission decision may be sought within 30 calendar days. La. Const. art. 10, §12; La. C.C.P. art. 5059. Which court has jurisdiction depends on the commission involved. Indigents may prosecute civil service appeals *in forma pauperis*. Commission action reversing disciplinary action must be promptly executed even if the AA appeals, unless there is authority to appeal suspensively. See *Danforth v. DPW*, 02-0529 (La. App. 4 Cir. 5/14/03), 845 So.2d 650; *Mouton v. Department of Fire*, 97-2709 (La. App. 4 Cir. 3/25/98), 713 So.2d 494.

7. EVALUATING FOR BENEFITS ELIGIBILITY.

Clients with employment-related complaints should be screened for benefits eligibility. Helping jobless people and families get benefits due from an employer or from the government should be a high priority for poverty law advocates. However, even if your practice is in a completely different area, the ability to recognize benefits issues, and point them out to your clients, can greatly help the people you are trying to serve.

Clients can have mistaken ideas about benefits eligibility (e.g., erroneously believing that they must possess a separation notice (commonly called a "pink slip") to apply for unemployment compensation benefits). Others, particularly formerly middle class families who've dropped into poverty, may not be aware of what benefits exist, or how to apply.

Summary of post-separation issues to cover with clients

- Eligibility for unemployment compensation benefits.
- Job-linked health insurance or pension benefits.
- Unpaid wages or other amounts may be due.
- If client has poor health, eligibility for Social Security disability insurance benefits and/or Supplemental Security Income (SSI) (separate chapter).

- Minor children in the household may allow for Temporary Assistance for Needy Families, Kinship Care Subsidy Program benefits, child support or other available -benefits from an absent parent (e.g., veterans or Social Security benefits) (separate chapters).
- Eligibility for food stamps or other food program benefits.

8. UNEMPLOYMENT COMPENSATION BENEFITS.

8.1 BACKGROUND.

All states have an unemployment compensation (UC) or insurance system, originating in federal relief programs begun in the world-wide depression of the 1930's. Participating states accept federal money for administrative costs, and must comply with federal requirements to avoid financial penalties. 26 U.S.C. §3301 *et seq.*, 42 U.S.C. §501 *et seq.* and 26 C.F.R. §3301 *et seq.* Regular unemployment compensation benefits are weekly cash payments provided by the state to eligible persons who have lost a job under qualifying circumstances, for a limited period of time. Most low-wage workers have little or no savings, and few have family members able and willing to help out for long, so the UC program offers the primary safety net.

Louisiana's UC program is run by the agency currently called the Louisiana Workforce Commission (LWC). The state statutory provisions governing Louisiana's program are found at R.S. 23:1471 *et seq.*, the "Louisiana Employment Security Law." The LWC also has regulations in the Administrative Code. Not all employers and jobs are covered. R.S. 23:1472(11), (12). Excluded are many religious, charitable and political jobs; federally-financed work-relief or training programs; inmate programs; domestic service; and jobs in certain rehabilitation facilities.

☞ **Practice tip** While helping a client get UC should be a high priority in itself, doing so can also provide an opportunity to better evaluate the merits of another claim (e.g., civil service appeal).

The express purpose of the UC program is not to reward the employee or to punish the employer, but to protect the stability of the state and the family in a time of hardship. R.S. 23:1471. Thus, the law is remedial in nature and **its provisions must be liberally construed in favor of awarding benefits.** *Parker v. Gerace*, 354 So.2d 1022 (La. 1978); *National Gypsum Co. v. Administrator*, 313 So.2d 239 (La. 1975). Don't hesitate to remind adjudicators of that.

8.2 DISASTER UNEMPLOYMENT ASSISTANCE ("DUA")

DUA is different from regular UC, being fully funded by the federal government, and may be available if regular benefits are not payable after a presidentially declared disaster. DUA is authorized during a disaster period, pursuant to the Stafford Act, 42 U.S.C.5177, 20 C.F.R. §625.1 *et seq.*, to those unemployed workers and the self-employed who lived, worked or were scheduled to work in a disaster area, and due to a federally declared disaster:

- No longer have a job or place to work;
- Can't reach the job or place of work;

- Can't work due to damage to the place of work; or
- Can't work due to injury caused by the disaster.
- Have become the head of the household and must now seek work due to the disaster-related death of the former household head.

The DUA program is administered in Louisiana by the agency currently called the Louisiana Workforce Commission. Louisiana residents who are dispersed by disaster to another state should contact that state's unemployment system administering agency for information.

8.3 REGULAR UC ELIGIBILITY.

Federal law mandates some eligibility restrictions and allows states to impose others at their option. An unemployed person is eligible to receive non-disaster UC in Louisiana if she:

- makes a proper claim;
- has sufficient "base period" wages;
- registers for work with the agency;
- is able to work, available for work, and conducting an active search for work;
- is unemployed for a 1 week waiting period;
- is a U.S. citizen, an alien lawfully admitted for permanent residence, or "permanently residing in the U.S. under color of law"; and
- is not otherwise disqualified.

Some of these requirements repeatedly cause problems for clients, particularly in light of the unreasonably short appeal periods; the agency's reliance on internet and overburdened phone systems, with very little help available for the non-English speaker; mobility of many claimants; and the agency's bias toward employers (e.g., if an employer and employee offer conflicting statements, the agency will almost always accept the employer's version).

8.3.1 Monetary eligibility determinations.

After a claim is filed, the agency determines whether a claimant is monetarily eligible. A claimant must have worked long enough and earned enough within a certain period of time. This "base period" is the first four calendar quarters of the last five complete calendar quarters preceding the week of benefit application. R.S. 23:1472(4)(7). The amount of wages earned during the base period, subject to a statutory maximum, determines a claimant's weekly benefit amount (WBA). R.S. 23:1592(B). Any of a claimant's employers during the base period has standing to oppose a claim.

The agency's Notice of Monetary Determination is supposed to be mailed to the claimant and base period employers within 30 days after a claim is filed. R.S. 23:1624. A monetary determination may be reconsidered at any time within the subsequent year. R.S. 23:1626. The claimant may work after filing a claim and still draw some UCB, if he or she does not earn in excess of the WBA. R.S. 23:1593.

Review monetary decisions carefully. **They are often wrong**, either because a claimant's earnings are under-reported or miscalculated, or because of an arguably unconstitutional "high quarter ratio" requirement in R.S. 23:1600(5).

That wage spread formula is likely to unfairly impact those with sporadic employment. Monetary eligibility is based on a claimant's work history during a "base period,") . The base period generally excludes the calendar quarter in which a claim is filed, and the preceding quarter. There are two state statutory requirements for base period wage sufficiency:

- A minimum earnings requirement found in R.S. 23:1592(A) (currently, \$1200).
- Total base period wages must be at least one and a half times the amount earned in the highest calendar quarter of the base period. R.S. 23:1600(5). This "high quarter ratio" requirement is a historical "left-over" from earlier statutory revisions. The result is that some workers need only \$1200 in the base period to be eligible (if their wages are spread among quarters), but others can be found ineligible, as having "insufficient wages," even though they earned several times the \$1200 minimum, because "too much" of their wages are concentrated in a single quarter. This arguably denies equal protection of laws.

Review the notice with your client. Find out: (1) the amount generally earned per pay period, in the base period and since; (2) how many times your client filed for UC during and since the base period, and to what end; (3) whether base period wages are truly his and are correct; and (4) whether any employers or earned wages are excluded from the base period. If the claimant is not making weekly reports to the agency as to continued unemployment and availability for work as required, try to correct that situation.

What you can do **if a monetary ineligibility determination is incorrect:**

- If the base period is missing earned wages, supply earnings documentation. This could be helpful in increasing the WBA, even if the client is already eligible. If earnings were not reported, your client may also want to provide the documentation to the Social Security Administration. If the client does not have documentation, you can ask the LWC to investigate the employer; you can also supply affidavit evidence.
- If it would make a client eligible to count wages when earned rather than when paid, the LWC can shift wages from one payperiod to another. R.S. 23:1598. This can often shift one paycheck from one quarter to another, because paychecks are usually issued about two weeks after the relevant work period.
- The client may still eligible on an earlier claim (e.g., regular benefits were exhausted and client didn't file for extended benefits, or client was previously disqualified on the merits but should now be requalified with new earnings).
- Filing a new claim in the next calendar quarter (or even later) may result in monetary eligibility (if your client has additional recent earnings which are not in the base period). This would drop the first quarter in the prior claim, and add a new quarter.

Act quickly to protect your client's rights. A monetary determination may be reconsidered at any time within the subsequent year. R.S. 23:1626. However, this generous time period arguably only applies to situations of wage under-reporting or miscalculations. To make a legal challenge such as a 'high quarter ratio' denial, it's best to act within the usual 15 calendar day appeal period, whether pursuing an administrative appeal or filing a federal lawsuit.

8.3.2 Able to work, available for suitable work, and actively searching.

This is an eligibility condition that applies separately to each week of a claim. R.S. 23:1600(3)(a). Your client may work and still draw some UC, if she does not earn in excess of her WBA. R.S. 23:1593. Conversely, a client may be subsequently disqualified if he is found to have failed, without good cause, to apply or accept available, suitable work. R.S. 23:1601(3). Currently, the LWC requires claimants to weekly document this eligibility condition by phone or internet.

☞ **Practice Tip** Disability or non-English accommodation is potentially available but might need your active intervention through the agency's Legal Division to arrange. You may also be able to document your client's eligibility retroactively, if he failed to comply due to disability or agency misrepresentation or other error (e.g., the agency's internet claims system, which leaves the printing of its rules optional, allows for claimants unaware of their reporting or other requirements to remain uninformed, and likely to make mistakes).

- **Able and available for work.** Registration for work and subsequent reporting searches make a prima facie showing that he is able and available for work. *Chrysler Corp. v. Doyal*, 352 So.2d 322 (La. App. 4 Cir. 1977). Claimants unable because of medical or other problems to perform prior work may still be available for *other* work. On the other hand, claimants may not arbitrarily remove themselves from available work with unreasonable conditions such as certain hours or conditions not usual or customary in the occupation, trade or industry. *Lykes Bros. S.S. Co., Inc. v. Doyal*, 338 So.2d 594 (La. 1976).⁴
- **Suitability of work.** Claimants may not have to accept work offered that is not in their customary occupation or is below the range of the prevailing wage scale. In a challenge on this issue, the agency carries the initial burden of proving these two factors. This creates a presumption of suitability which a claimant can rebut. *Lykes Bros. S.S. Co. v. Doyal, Id.* (work not "suitable" if acceptance of it would force the claimant to forego seniority-secured rights or benefits); *Johnson v. Administrator*, 166 So.2d 366 (La. App. 3 Cir. 1964) (job paying two-thirds of prior wages not suitable). *Cf. Lee v. Whitfield*, 506 So.2d 638 (La. App. 4 Cir. 1987) (see strong dissent); *Mason v. Administrator*, 486 So.2d 1171 (La. App. 3 Cir. 1986) (un-investigated assumptions re: job duties improper); *Wilson v. Doyal*, 215 So.2d 213 (La. App. 3 Cir. 1968) (claimant failed to rebut presumption).
- **Search for work.** Claimants have the burden of proof to show weekly search for work. *South Central Bell Telephone Co. v. Louisiana Dept. Of Labor*, 527 So.2d 1113 (La. App. 1 Cir. 1988), *writ denied* 532 So.2d 153; *McCullers v. OES*, 405 So.2d 631 (La. App. 3 Cir. 1981).

8.3.3 Claim determinations.

In addition to monetary and other eligibility questions, LWC determines whether a claimant is "qualified" based on the circumstances of job separation. La. R.S. 23:1625; 1601. The agency solicits information from both the claimant

⁴ A person with health problems and few options may have applied for disability benefits, either through the Social Security Administration or an insurance company. Counsel your client about the inherent conflict such claims usually present, and the potential consequences.

and the employer. One source is the separation notice (commonly called a “pink slip”) that R.S. 23:1576 requires employers to file with the LWC (and copy to the employee) within three days of a separation, providing a “full explanation” of the cause of separation. Another source of course is the explanation solicited from the claimant on filing.

A not-uncommon query from clients is whether employers can be held liable for untrue statements made in the UC claim process. The defense of qualified privilege applies to untrue and defamatory statements in this context; proof would be required of prior knowledge, acting in reckless disregard, or negligence in failing to ascertain the truth. *See, e.g., Nolan v. Jefferson Parish Hosp. Service Dist. No. 2*, 11-291 (La. App. 5 Cir. 3/13/12), 90 So.3d 1178.

Base period employers get another opportunity after receiving notice of a claim filed. R.S. 23:1625.1 mandates that any protest must be filed within 10 days. An employer who fails to timely respond is deemed to have abandoned their right to appeal. R.S. 23:1625.1(B). The agency is not supposed to consider a late response unless the employer shows “good cause.” This is a relatively new (2009) law which is not consistently followed by the agency. Be sure to investigate the facts on this issue and vigorously protect your clients’ rights. Either get a copy of the claim file before, or review the file during, any subsequent appeal hearing so as to challenge any employer response that was not timely.

The agency may ask claimants or employers for additional information before making a decision. Once a decision is made, the agency issues a “Notice of Claim Determination” to the claimant and base period employers. Neither state nor federal law set a specific time limit in which the agency must act. The notice must include reasons and may be contested. Louisiana allows only 15 days after notification is given or mailed to file an appeal.

Both federal and state law require that benefits be “promptly” paid upon any initial determination that UC is payable (whether at the local office, ALJ, Board of Review, or court level). 42 U.S.C. §503(a)(1); R.S. 23:1635; *see also California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971) and progeny. You can contest unreasonable delays or suspension of benefits pending appeals taken against your client.

8.3.4 Disqualifications based on discharge: Issues and Arguments.

R.S. 23:1601(2) disqualifies a claimant if she is found to have been discharged by a base period or subsequent employer for “misconduct connected with his employment”. The burden to prove misconduct is on the employer. *Charbonnet v. Gerace*, 457 So.2d 676, 679 (La. 1984); *Banks v Administrator*, 393 So.2d 696, 699 (La. 1981). Prior to 1990, there was no UC statutory definition of misconduct. The 1990 statutory definition is more restrictive than prior jurisprudential definitions. For some time, Louisiana courts continued to interpret the statutory definition in light of pre-amendment jurisprudence and the statute’s remedial purpose. Recently, arguments in favor of applying the statutory definition literally have gained favor in the First Circuit. *See, e.g., Fontenot v. Cypress Bayou Casino*, 2006-0300 (La. App. 1 Cir. 6/8/07), 964 So.2d 1035. Other circuits have declined to follow the First Circuit’s path. *See, e.g., New Orleans Private Patrol Service, Inc. v. Kuykendall*, 2011-1052 (La. App. 4 Cir. 2/29/12), 85 So.3d 793; *Johnson v. Dykes Oil Co.*, 46,462 (La. App. 2 Cir. 8/10/11), 72 So.3d 418.

Regardless of the circuit in which you find yourself, parse the statutory definition carefully, remember that the Louisiana Employment Security Law is a remedial statute, and note whether the adjudicator cited the statutory definition of misconduct. In the unpublished decision of *St. Tammany Parish Sheriff's Office v. Administrator, Louisiana Workforce Comm'n*, 2012-0092 (La. App. 1 Cir. 9/21/12), 2012 WL 4337735, this approach was sufficient to preserve a claimant's UC.

Helpful arguments from past cases could still help your client defeat a disqualifying misconduct determination:

- Violation of an employer's rule is **not** *per se* misconduct; it depends on the facts. See, e.g., *Brandon v. Lockheed Martin Corp.*, 2003-1917 (La. App. 4 Cir. 4/14/04), 872 So.2d 1272; *Bowden v. Reliant Energy Resource Corp.* 46,048 (La. App. 2 Cir. 1/26/11), 57 So.3d 513. Some employers cannot prove that their employees even knew of a policy or rule; if your client didn't know about it, be sure to develop or highlight that fact.
- Misconduct should be connected with employment. See, e.g., *Morris v. Gerace*, 353 So.2d 986 (La. 1977). Cases involving adverse publicity can be tricky. *South Central Bell Telephone Co. v. Sumrall*, 414 So.2d 876 (La. App. 4 Cir. 1982) and *Sensley v. Administrator*, 552 So.2d 787 (1st Cir. 1989) (drug charges). Compare the connection to employment requirement in R.S. 23:1601(1) (voluntary quits) - it's only right that the same requirement apply in termination cases.
- Misconduct cited by an employer must be the actual reason for the discharge. *Randle v. Administrator*, 499 So.2d 488 (La. App. 2 Cir. 1986).
- The totality of the circumstances should be considered. See, e.g., *Brandon v. Lockheed Martin*, *supra*; *Raymond v. OES*, 551 So.2d 844 (La. App. 3 Cir. 1989). The case law is extensive and varied on the issue of misconduct; review the jurisprudence carefully in light of the facts of your client's case. Be sure to develop or highlight any favorable circumstances.
- Employers should be required to prove wrongdoing intentional. See, e.g., *Cadwallader v. Administrator*, 559 So.2d 1346 (La. 1990); *Charbonnet v. Gerace*, 457 So.2d 676 (La. 1984); *Banks v. Administrator*, 393 So.2d 696, 699 (La. 1981); *New Orleans Private Patrol Service, Inc. v. Kuykendall*, *supra*; *Lafitte v. Reliant Energy Resource Corp.*, 37,709 (La. App. 2 Cir. 10/17/03), 859 So.2d 253; *Brinson v. Administrator, Div. of Employment Sec.*, 34,988 (La. App. 2 Cir. 8/22/01), 793 So.2d 522; *Harsco Corp. v. Victoria*, 01-1486 (La. App. 3 Cir. 3/20/02), 812 So.2d 871. Most employers do a poor job of presenting evidence of wrongful intent; if you represent the client at hearing, you'd likely want to ask him the question, so his denial of any intent to do wrong is on the record.
- A single, isolated incident has often been found insufficient to justify denial of benefits, even if the employer credibly shows wrongful intent. This is most effective when the claimant's record on the job is otherwise fairly good. The nature of the violation, the type of job, and other circumstances are important facts. See, e.g., *Associated Catholic Charities of N.O. v. Repath*, 522 So.2d 1272 (La. App. 4 Cir. 1988); *Canty v. Administrator*, 517 So.2d 1240 (La. App. 4 Cir. 1987); *ConAgra Broiler Co. v. Gerace*, 657 So.2d 391 (La. App. 3 Cir. 1995).

- A “hot-headed” incident is sometimes excused. See, e.g., *Toney v. Francis*, 618 So.2d 597 (La. App. 2 Cir. 1993); *French v. Whitfield*, 561 So.2d 977 (La. App. 4 Cir. 1990); *Collins v. Blache*, 509 So.2d 718 (La. App. 3 Cir. 1987). But see, e.g., *Kliebert v. Peavey*, 503 So.2d 1011 (La. 1987); *Murdock v. Felix’s Restaurant, Inc.*, 743 So.2d 716 (La. App. 4 Cir. 1999); *Emke v. Mouton*, 617 So.2d 31 (La. App. 4 Cir. 1993); *Bell v. Berg*, 559 So.2d 33 (La. App. 4 Cir. 1990); *Carter v. Blache*, 476 So.2d 873, 879 (La. App. 2 Cir.1985). An argument, confrontation, insubordination, or even a fight may often be successfully framed this way. Any favorable circumstance should be developed or highlighted as many factors could be relevant.
- Incidents involving poor judgment or negligence have been held to lack the requisite element of wrongful intent. See, e.g., *Raymond v. OES*, 551 So.2d 844 (La. App. 3 Cir. 1989); *Hypolite v. Blache*, 482 So.2d 940 (La. App. 3 Cir. 1986), writ denied, 485 So.2d 65; *Jacobs v. Gerace*, 381 So.2d 935 (La. App. 3 Cir. 1980); *Simmons v. Gerace*, 377 So.2d 407, 410 (La. App. 2 Cir. 1979); *Biddle v. Administrator*, 539 So.2d 795 (La. App. 3 Cir. 1989); *Brown v. Whitfield*, 537 So.2d 1257 (La. App. 4 Cir. 1989); *Jacquet v. Consolidated Cos., Inc.*, 499 So.2d 1002 (La. App. 3 Cir. 1986); *Joseph v. Blache*, 525 So.2d 597 (3d Cir. 1988); *Wesley v. Whitfield*, 508 So.2d 968 (La. App. 4 Cir. 1987); *Brewington v. Administrator*, 497 So.2d 418 (La. App. 3 Cir. 1986). Don’t give up even if there were multiple errors; these do not necessarily prove intentional wrongdoing and all relevant factors should be considered. A sympathetic court has noted that “over a significant period of time mistakes may happen as a result of human error.” *Harsco Corp. v. Victoria*, 01-1486 (La. App. 3 Cir. 3/20/02), 812 So.2d 871.
- Poor work performance, or the simple inability to meet job standards has often been found non-disqualifying. See, e.g., *Harsco Corp. v. Victoria*, *supra*; *St. Tammany Parish School Board v. State of Louisiana Department of Labor*, 01-0757 (La. App. 1 Cir. 5/10/02), 818 So.2d 914; *Martin Mills, Inc. v. Leon*, 576 So.2d 1165 (La. App. 3 Cir. 1991); *Lowery v. Whitfield*, 521 So.2d 815 (La. App. 2 Cir. 1988); *Thomas v. Blache*, 488 So.2d 1282 (La. App. 4 Cir. 1986). But see, *Thibeaux v. Our Lady of Lourdes Med. Ctr.*, 591 So.2d 1290 (La. App. 3 Cir. 1991) (five warnings about substandard work held to constitute disqualifying misconduct). Unsatisfactory work performance may sometimes be explicitly cited in a pink slip or employer protest, which can be helpful. But even policy violations may be successfully framed as simple inability or incapacity. See, e.g., *Lafitte v. Reliant Energy Resource*, 37,709 (La. App. 2 Cir. 10/17/03), 859 So.2d 233. Relevant factors should be highlighted or developed (e.g., ask your client at hearing if they were trying their best, and elicit facts impacting their physical or mental capacities).
- Another employee’s primary fault may exculpate your client. See, e.g., *Charbonnet v. Gerace*, 457 So.2d 676 (La. 1984); *Popularas v. Dep’t of Labor*, 488 So.2d 1242 (La. App. 4 Cir.1986); *Toney v. Francis*, 618 So.2d 597 (La. App. 2 Cir. 1993); *Jacobs v. Gerace*, 381 So.2d 935 (La. App. 3 Cir. 1980).
- There may have been a reasonable basis for disobedience. See, e.g., *Raymond v. OES*, 551 So.2d 844 (La. App. 3 Cir. 1989); *Pixley v. Blache*, 488 So.2d 1126 (La. App. 2 Cir. 1986); *Hypolite v. Blache*, 482 So.2d 940 (La. App. 3 Cir. 1986), writ denied, 485 So.2d 65 (1986). E.g., did your client think their action was serving the employer’s interest? If so, bring that out.

- Proving common practice may preclude disqualification. See, e.g., *Brown v. Whitfield*, 537 So.2d 1257 (La. App. 4 Cir. 1989); *Ealy v. Sumrall*, 401 So.2d 520 (La. App. 2 Cir. 1981); *La. Hospital Service, Inc. v. Bookter*, 317 So.2d 282, 285 (La. App. 1 Cir. 1975), application denied, 320 So.2d 561 (La. 1975).

Common “offenses” in discharge cases include:

- **Absences** and being tardy. The reason is often crucial. If your client had reasons beyond her control, be sure they get in the record. See *Banks v. Administrator*, 393 So.2d 696 (La. 1981) (fifteen absences in six months not sufficient to disqualify); *City of Monroe v. Tolliver*, 41,969 (La. App. 2 Cir. 3/7/07), 954 So.2d 203 (city notified of incarceration on charges that were later dropped); *Harris v. Houston*, 97-2847 (La. App. 4 Cir. 11/4/98), 722 So.2d 1042 (health problems, unreliable automobile, and single parent with young child; no misconduct despite prior warnings); *Brister v. Whitfield*, 522 So.2d 1254 (La. App. 4 Cir. 1988) (public transportation problems); *Jefferson Parish D.A. v. Whitfield*, 515 So.2d 1143 (La. App. 5 Cir. 1987), writ denied, 519 So.2d 146 (absence after hurricane and home flooded); *Bridges v. Sumrall*, 430 So.2d 218 (La. App. 4 Cir. 1983) (illness induced by job stress); *Gunderson v. Libby Glass*, 412 So.2d 656 (La. App. 2 Cir. 1982). However, there are some cases in which the mere fact of prior warnings has led to a disqualification, despite the reasons. E.g., *Jones v. Truly*, 670 So.2d 1294 (La. App. 5 Cir. 1996).
- **Drinking** off the job should not disqualify a claimant because misconduct should be connected with the employment. However, evidence of actually drinking, or being intoxicated, on the job is usually sufficient to disqualify. *Sanders v. Administrator*, 520 So.2d 1091 (La. App. 3 Cir. 1987) (employee discharged for consuming alcohol while on call).
- Where discharge is based on “the use of **illegal drugs**,” an employer attempting to use test *results* under R.S. 23:1601(10)(a) must show that testing was done pursuant to a written substance abuse rule or policy, and that collection and testing were performed under certain conditions. If the employer’s test violated its own policies, the test result should not be considered. In that instance, use a comparable case in the workers’ compensation area, *Israel v. Gray Ins. Co.*, 98-525 (La. App. 3 Cir. 10/28/98), 720 So.2d 803, which has been relied on by an Orleans Parish district court in ruling for the claimant (neither the LWC nor the employer appealed the decision). The burden on employers to show statutory compliance otherwise is not too strict. See, e.g., *Glazer Steel Corp. v. Administrator, Office of Employment Security*, 98-0441 (La. App. 4 Cir. 9/30/98), 719 So.2d 674; *CEG Welding Supply, Inc. v. Moore*, 31,167 (La. App. 2 Cir. 12/14/98), 723 So.2d 524. An employer may also use other acts as a basis for urging disqualification. See, e.g., *Landry v. Shell Oil Co.*, 597 So.2d 521 (La. App. 1 Cir. 1992) (employee pled guilty to possession of marijuana which also violated policy). Refusal to take a drug test has been held to be misconduct in one case, *Chiles Offshore Inc. v. Administrator*, 551 So.2d 849 (La. App. 3 Cir. 1989), but it is not necessarily disqualifying misconduct. Refusal on valid constitutional grounds, or even a positive result if the request is not in accordance

with the employer's policy, should not result in disqualification. There has been success at the district court level on these issues. See www.probono.net/la Library.

8.3.5 Disqualifications based on voluntary quit.

Employees who leave part-time or interim work to protect full-time or regular employment are protected from disqualification. R.S. 23:1601(1)(c). However, the statute is very restrictive toward employees who leave their jobs for other reasons. A claimant is disqualified if he voluntarily left a base period or subsequent employer "without good cause *attributable to a substantial change made to the employment by the employer.*" R.S. 23:1601(1)(a) (emphasis added). *Dupre v. State Board of Review*, 2003-0153 (La. App. 4 Cir. 9/24/03). Prior to 1988 and 1990 amendments, the statute merely required good cause connected to the employment. Older case law, which did not require the second element, should be considered carefully. The burden of proof in quit cases is on claimants.

This section of the law considers not just base period, but also subsequent employers. However, leaving a job with a subsequent employer cannot be disqualifying if it pays less than one's UC. *Billingsley v. Office of Emp. Sec.*, 537 So.2d 826 (La. App. 5 Cir. 1989); *Franks v. Administrator*, 493 So.2d 699 (La. App. 2 Cir. 1986). The following are some issues to keep in mind.

- If leaving was not completely voluntary it could be a **constructive discharge**. Employees prevented from reporting to work or replaced without their consent have not left the job voluntarily. *Simmons v. Houston*, 98-2662 (La. App. 4 Cir. 5/12/99), 737 So.2d 220; *Shoennagel v. La. Office of Emp. Sec.*, 413 So.2d 652, 654 (La. App. 1 Cir. 1982); *Piggly-Wiggly v. Gerace*, 370 So.2d 1327 (La. App. 2 Cir. 1979); *Towner v. Dept. of Emp. Sec.*, 364 So.2d 1362 (La. App. 3 Cir.1978). Similarly, an employee who is forced to resign in lieu of discharge or who would be discharged if he did not resign, has not voluntarily left his employment. *Wood v. La. Dept. of Empl. Sec.* 632 So.2d 899 (La. App. 2 Cir. 1994); *Ray v. Whitfield*, 521 So.2d 726 (La. App. 2 Cir. 1988); *Southern Bell Telephone and Telegraph Co. v. Admin.*, 200 So.2d 761, 763 (La. App. 3 Cir. 1967).
- In determining **good cause**, a court should **use a standard of reasonableness** as applied to the average man or woman, not the supersensitive. *Gonzalez Home Health Care, LLC v. Felder*, 20088-0798 (La. App. 1 Cir. 9/26/08), 994 So.2d 687, *writ not cons.*, 2008-2568 (La. 1/9/09), 998 So.2d 730); *Coleman v. Blache*, 566 So.2d 181, 184 (La. App. 2 Cir. 1990); *Clemons v. Blache*, 501 So.2d 1020 (La. App. 2 Cir. 1987); *Nason v. Administrator*, 475 So.2d 85 (La. App. 2 Cir. 1985), *writ denied*, 478 So.2d 149 (La. 1985). Dissatisfaction with (initially-agreed upon) working conditions is not generally considered "good cause" for leaving. *Dupre v. State Board of Review*, 2003-0153 (La. App. 4 Cir. 9/24/03), 857 So.2d 1135, *writ denied* 862 So.2d 991 (La. 1/9/04).
- A **change in work conditions** by the employer, such as **work schedules or pay**, can be "good cause." *King v. LWC*, 2009-0526 (La. App. 3 Cir. 10/7/09), 20 So.3d 1211; *Banks v. Elledge*, 535 So.2d 808 (La. App. 2 Cir. 1988); *La. Dept. of Corrections v. Administrator*, 457 So.2d 825(La. App. 1 Cir. 1984); *Jantzen of La., Inc. v. Blache*, 464 So.2d 33 (La. App. 3 Cir.1985). *Cf. Marchand v. Forster*, 37,222 (La. App. 2 Cir. 6/25/03), 850 So.2d 941 (new owner's

change in adopting payroll tax withholding, effectively reducing employee's take-home pay, and refusal to give employee a raise, not sufficient to meet the standard); *Davis v. La. State Office of Emp. Sec.*, 555 So.2d 649 (La. App. 4th Cir. 1989) (new conditions, although unwelcome, were within the written job description); *Ortega v. Administrator*, 626 So.2d 959 (La. App. 3 Cir.1993) (reduction in overtime not substantial change by employer when evidence showed prior variations in employee's overtime and employee was still full-time when resigned).

- **Discriminatory or unsafe treatment** uncorrected by an employer can meet the "good cause" and "substantial change" requirements as an employee is entitled to expect a workplace that complies with applicable legal standards. *See, e.g., Harris v. Curt Eysink, Executive Director LWC and Piccadilly Restaurants LLC*, 2011-1636 (La. App. 4 Cir. 6/27/12), ___ So.3d ___, 2012 WL 2446147 (uncorrected sexual harassment good cause); *Gautreaux v. Whitfield*, 520 So.2d 979 (La. App. 3 Cir. 1987) (sexual discrimination); *Buckley v. State of La.*, 383 So.2d 52 (La. App. 2 Cir. 1980) (series of unfair and discriminatory actions); *Murphy v. State Through Dept. of Empl. Security*, 385 So.2d 338 (La. App. 1 Cir. 1980) (multiple obscene phone calls and no immediate employer solution); *Southern Hardware and Lumber Co. v. Vesich*, 250 So.2d 780 (La. App. 4 Cir. 1971) (failure to stand up for employee after customer battery). *Cf. Gonzales Home Health Care v. Felder*, 994 So.2d 687, *supra*; *McClodden v. Gerace*, 522 So.2d 1379 (La. App. 2 Cir.1988).
- A claimant who quits due to **adverse health reactions** from the job or because of a job injury should not be disqualified if causation adequately proven. *See, e.g., Chalik v. Gerace*, 459 So.2d 82, 86 (La. App. 2 Cir. 1984) (increased workload caused headaches); *Campbell v. Blache*, 499 So.2d 412 (La. App. 4 Cir. 1986) (no showing of causal connection between employment and employee's heart disease). But these cases may be dated by the later change to the statutory quit standard.

8.3.6 Disqualification of temporary employees.

A new (2012) provision, R.S. 23:1601(1)(b) mandates that a temporary employee working for a staffing firm is disqualified (i.e., deemed to have voluntarily quit) if:

- "At the time of hire," he was advised by the staffing firm that he must report for reassignment at the conclusion of each assignment and that UC benefits may be denied for failure to do so; and
- He fails, "without good cause," to contact the firm for a reassignment at the conclusion of the current assignment.

8.3.7 Disqualification due to labor disputes.

A claimant will be disqualified for any week in which the unemployment is due to a labor strike. R.S. 23:1601(4). The burden of proof is on the claimant to show that he is not "participating in or interested in" the strike, or to show that his unemployment was actually due to a labor lockout. *National Gypsum Co. v. Administrator*, 313 So.2d 230 (La. 1975), appeal dismissed, 423 U.S. 1009 (otherwise available and reported for work); *General Motors Corp. v. Darby*, 31,516 (La. App. 2 Cir. 1/22/99), 728 So.2d 516 (no active role in work stoppage and

reported to work); *Piggly-Wiggly of Springhill, Inc. v. Gerace*, 370 So.2d 1327 (La. App. 2 Cir. 1979) (labor dispute no longer in active progress; unconditionally offered to return to work); *Senegal v. Lake Charles Stevedores*, 197 So.2d 648 (La. 1967) (non-union claimant still “interested in” labor dispute due to benefits received); *Amstar Corp. v. Administrator*, 388 So.2d 1167 (La. App. 4 Cir.1980) (non-striking union members refusing to cross picket line disqualified); *Cities Service Oil Co. v. Administrator*, 383 So.2d 1315 (La. App. 3 Cir. 1980) (refusal to cross picket lines because of reasonable and genuine fear of injury or violence is not disqualifying); *Elmer Candy v. Administrator*, 286 So.2d 423 (La. App. 1 Cir.1973) (claimants failed to show they were “not interested” in dispute); *Cf. Local 730 v. Com., Unemp. Comp. Bd. of Rev.*, 480 A.2d 1000 (Pa. 1984) (employer’s unilateral actions in raising pay and benefits after expiration of contract were a disruption of status quo which brought about work stoppage within definition of a lockout); *Sunstar Foods, Inc. v. Uhlendorf*, 310 N.W. 2d 80 (Minn. 1981) (reduction in wages of 25-26%, unilaterally imposed by the employer, is condition so unreasonable as to constitute a lockout).

8.4 APPEAL & REVIEW.

An appeal of a Notice of Claim Determination, as with most UC actions, must be filed within 15 calendar days. R.S. 23:1629, 1630. There are issues in the administrative appeals process which advocates commonly encounter.

8.4.1 Untimely appeals.

This is a common problem because clients may fail to update their address, their mail may not be delivered even if they do, and the agency isn’t statutorily required to use any communication means but regular mail. However, don’t give up just because your client has missed a deadline - determine where the fault lies. The agency’s position will be that peremption applies and that the right to appeal expires at the end of the 15 day appeal period. *Baughman v. Covenant Transp., Inc.*, 45,122 (La. App. 2 Cir. 4/14/10), 34 So.3d 1087. However, courts have likened it to prescription and recognized that a claimant may rebut the presumption that a decision was mailed on the date it was said to have been mailed, or to present evidence that a notice was misleading or that the agency committed fraud. *See, e.g. Bailey v. Cajun Insulation*, 453 So.2d 237, 241 (La. 1984); *Jones v. Whitfield*, 529 So.2d 885 (4th Cir. 1988), *writ denied*, 533 So.2d 375 (1988); *Doescher v. Administrator*, 353 So.2d 388 (4th Cir. 1977). *Cf. Harding v. Raising Canes USA L.L.C.*, 10-320 (La. App. 5 Cir. 11/23/10), 55 So.3d 837; *Hughes v. Louisiana Power & Light Co.*, 98-1007 (La. App. 5 Cir. 3/10/99), 735 So.2d 44. Furthermore, if your client did not get a notice the agency claims to have mailed, the agency should prove its claim. *Duron v. Albertson’s LLC*, 560 F.3d 288 (5th Cir. 2009) (presumption of mailing requires sufficient evidence of record that letter actually mailed). Preserve the issue by referencing it in your pleadings and attaching claimant affidavit and other supporting evidence.

8.4.2 Administrative appeals process.

An administrative appeal is heard by an administrative law judge (ALJ) within the “Appeals Tribunal.” R.S. 23:1628 *et seq.* However, the LWC may contract with the State’s Division of Administrative Law (DAL) to conduct your client’s hearing. Under R.S. 49:992(D)(4), the LWC is currently exempt from mandatory

use of the DAL's centralized administrative hearings panel. The ALJ hearing is fairly informal (the ALJ, sometimes a non-lawyer, reviews the exhibits, questions the witnesses, and allows cross-examination), but it is recorded.

Claimants' **right to a "fair hearing"** is protected by federal and state law. 42 U.S.C. 503(a)(3); R.S. 23:1629(B). Also, agency rules set forth hearing procedures which must be followed. LAC 40:IV:101 *et seq.* The traditional elements of due process must be provided. Your clients' rights include adequate notice of the issues; the right to view exhibits before the hearing; to subpoena witnesses and evidence; and to cross-examine adverse witnesses. You or your client should **request a copy of the hearing office file before the hearing**; it is free. The agency isn't required to mail administrative decisions to a legal representative. Due process or "fair hearing" issues can arise in different contexts, including:

- Claimants often seek help with hearings at **short notice**, because agency rules only require that hearing notices be sent 10 days in advance. LAC 40:IV:111. You can ask for postponement, under LAC:IV:113.
- Notices don't give much detail about the issues to be addressed at the hearing. This might give grounds for postponement, if your client wants it, or grounds for evidentiary objections at the hearing. **The ALJ is precluded from addressing issues not contained in the notice of hearing.** *Daniel v. Wal-Mart Assoc., Inc.*, 2003-0441 (La. App. 1 Cir. 12/31/03), 868 So.2d 137; *Barber v. Administrator*, 664 So.2d 844 (La. App. 3 Cir. 1995); *Banks v. Administrator*, 393 So.2d 696, 699 (La. 1981); *Murray v. City of New Orleans*, 517 So.2d 1200 (La. App. 4 Cir. 1987); *Randle v. Administrator*, 499 So.2d 488 (2d Cir. 1986) (employer not entitled to remand to prove different reason for discharge).
- **Telephone hearings** are now the norm, and can be difficult for a variety of reasons. If you need an in-person hearing, request a change in writing and explain your reasons. Ask for exhibits to be delivered before the hearing; if they are not, object on the record and/or ask for postponement.
- **Evidence at ALJ hearings** presents special challenges. Strict rules of evidence are not followed, but keep in mind that the ALJ decision must be based on sufficient competent evidence. *Banks v. Administrator*, 393 So.2d 696 (La. 1981). Hearsay, though admissible, is not competent evidence. *DeJean v. Adm'r, Office of Employment Security*, 04-327 (La. App. 3 Cir. 9/29/04), 883 So.2d 493; *Schlesinger v. Administrator*, 583 So.2d 100 (La. App. 3 Cir. 1991); *Cole Oil and Tire Co., Inc. v. Davis*, 567 So.2d 122 (La. App. 2 Cir. 1990); *French v. Whitfield*, 561 So.2d 977 (La. App. 4 Cir. 1990) (direct contradictory testimony by employee cannot be overcome by hearsay evidence from another employee). Hearsay may be used for corroboration. *Jackson v. Louisiana Bd. of Review*, 41,862 (La. App. 2 Cir. 1/10/07), 948 So.2d 327; *Flagg v. State*, 494 So.2d 1305 (La. App. 2 Cir. 1986). It is vital that you **make appropriate evidentiary objections on the record** (although sometimes an ALJ may get snippy about it). An objection may remind an ALJ that certain evidence may not be relied on, and it should keep a court from finding that you have waived objection. *See, e.g., Woods v. Cameco Industries, Inc.*, 2001 0298 (La. App. 1 Cir. 3/28/02), 815 So.2d 370 (*pro se claimant* was held to have waived hearsay objection; but see strong dissent by Judge J. Downing); *Bush v. Winn-Dixie of Louisiana, Inc.*, 573 So.2d 508 (La. App. 4 Cir. 1990) and *Chalik v. Gerace*, 459 So.2d 82 (La. App. 2 Cir. 1984) (failure to object meant issue preclusion on appeal).

- **Missed ALJ hearings** easily happen with telephone hearings in particular. Fault may lie with a claimant's malfunctioning phone, an ALJ misdialing, and known problems with the ability of LWC phones to connect to certain cell carriers. Under LAC 40:IV:113, a fifteen minute delay is given appellants not initially present for in-person hearings, and you could argue that the same grace period should apply in phone situations. See *Schexnider v. Blache*, 504 So.2d 864 (La. 1987) (emphasizes due process requirements applicable in telephone hearings). Under Rule 113, the time limit to ask for reopening - in writing and specifying the "good cause" - is five days from the date of the ALJ decision. If appealing, you can ask for a remand for a new hearing. Preserve the issue by submitting an affidavit or other evidence (e.g., phone records).
- Clients who handle hearings *pro se* often may make poor appeal records. You may be able to get **new hearings on remand** if you present a good case that clients, through no fault of their own, did not get a fair hearing (e.g., language barriers; the ALJ excluded or prevented the presentation of relevant evidence, or acted as an advocate for the employer by making objections to the claimant's evidence or prompting the employer). A new hearing request has to involve more than a "second chance" argument that the state lost in *Holmes v. Forster*, 2000-0632 (La. App. 4 Cir. 2/14/01), 781 So.2d 656. Compare *Marchand v. Forster*, 37,222 (La. App. 2 Cir. 6/25/03), 850 So.2d 941 (remand ordered).

After an ALJ decision, claimants have two options: request reopening/new hearing (discussed above), or appeal to the Board of Review (BOR), a group of political appointees based in Baton Rouge. There are only 15 calendar days to appeal an ALJ's decision. R.S. 23:1652; 1630. Advance or defend your client's case before the BOR with a letter.

Aggrieved employers can also appeal and sometimes send new evidence that is not just to support remand, but is merely to supplement their case presented at hearing. In that situation, you should object, and point out that this violates the law and due process by improperly considering evidence not received at the ALJ hearing. If the BOR wants to consider new evidence, it is required to have a good reason for reopening, and to have a new hearing for all parties to address it.

The BOR must issue a written decision no later than 60 days after receipt of the appeal. R.S. 23:1630(B). Its decision becomes the final agency decision, which may be appealed to state district court.

8.4.3 Judicial review.

R.S. 23:1634 governs judicial review. Review is limited to 1) whether the facts are supported by sufficient (competent) evidence, and 2) whether the facts justify the decision as a matter of law. *Charbonnet v. Gerace*, 457 So.2d 676 (La. 1984). Filing in the appropriate state district court must be accomplished within the 15 calendar day period. Venue is in the parish of your client's residence, or, if he now lives out of state, in Baton Rouge or the parish where the claimant lived when he or she originally filed for UC. Service of the service of the petition on the agency director is deemed to be completed service on the employer also. R.S. 23:1634(B). The agency notifies any employer defendant.

R.S. 23:1692 exempts a claimant (whether pursuing a claim or defending, at district or appellate level) from fees and costs, unless, after contradictory hearing, the claim is found to be frivolous. *Ford v. Patin*, 534 So.2d 1003, 1006 (La. App. 3 Cir. 1988); *Joiner v. La. Dept. of Labor Emp.*, 525 So.2d 608, 611 (La. App. 3 Cir. 1988), writ denied, 530 So.2d 570 (1988). Court and sheriff staff are sometimes unaware of this law, or mistakenly believe that it only exempts UC claimants as petitioners, not defendants.

Although the court may remand the case to the agency to take additional evidence, judicial review is limited to the existing record. R.S. 23:1634(B). *Dupre v. State Board of Review*, 2003-0153 (La. App. 4 Cir. 9/24/03), 857 So.2d 1135; *Clark v. American Bldg. Mnt.*, 02-1609 (La. App. 1 Cir. 4/2/03); 844 So.2d 409.

☞ **Practice tip** The LWC or an employer may seek remand just to put on a better case. Unless it is to your client's advantage, vigorously oppose it as a violation of §1634 and an abuse of the court's discretion. See, e.g., *Holmes v. Forster*, 2000-0632 (La. App. 4 Cir. 2/14/01), 781 So.2d 656 (agency's request for remand to allow employer opportunity to present a better case soundly rejected; court reviews prior remand case law). The www.probono.net/la Civil Law Library has a sample brief in opposition.

The agency is supposed to file an answer and a copy of the administrative record with the court (and send a copy to the claimant or his attorney) within 60 days of being served with the petition. If it fails to do so, a claimant may seek the payment of interim benefits if "sufficient evidence" on record supports it. R.S. 23:1634(A); *Toney v. Whitfield*, 531 So.2d 445 (La. 1988). For sample briefs and pleadings on this issue, see www.probono.net/la.

☞ **Practice tip** The administrator routinely fails to meet this deadline, and sometimes files an *ex parte* "motion for extension." This motion, whether or not granted by a judge, is irrelevant to the issue of interim benefits. A judgment favorable to the claimant on application for interim benefits should result in prompt payment of benefits under R.S. 23:1635 and 42 U.S.C. §503.

If you obtain a remand from the court, request the court set a reasonable time limit for remand proceedings in the judgment. Otherwise, the agency is likely to put the case at the end of its adjudication queue, even though the 60 day time limit of R.S. 23:1630(B) arguably should apply. If a court orders remand for a new hearing, but does not retain jurisdiction, a favorable decision or Board "recommendation" could be interpreted as an administrative determination that payments are due your client, invoking the prompt payment ("when due") provisions of 42 U.S.C. §503 and R.S. 23:1635.

8.5 OVERPAID UNEMPLOYMENT COMPENSATION BENEFITS.

As required by federal law, Louisiana has a process to detect, establish and recover overpaid benefits. R.S. 23:1740 *et seq.* The agency may discover an error on its own, through federal audit, or through a third party (e.g. fraud report). Prescriptive period for collection is five years, ten for fraud, with generous interruptions allowed. See R.S. 23:1713(C)(2); 23:1601(8)(b). In an effort to comply with the 2010 Improper Payments Elimination and Recovery Act (IPERA), P. L. 111-204, the U.S. Department of Labor issued new performance standards for state

recovery efforts. IPERA also expanded the Treasury Offset Program, one means of collection (see below). Clients who get a notice of overpayment must appeal within 15 calendar days. R.S. 23:1713(A). The notice should include a total amount and the week(s) overpaid, and indicate whether it is fraud or non-fraud.

If an appeal is timely filed, the issue of waiver of collection should be automatically considered at the hearing. R.S. 23:1713(B). Those interested in seeking waiver should document their expenses, obligations, and limited resources, and show how repayment would adversely affect them for at least the next six months. Some may not bring sufficient evidence of their finances to the hearing. Some ALJs may not address waiver if a *pro se* claimant fails to bring it up (because they didn't know what the term "waiver" meant, or because the ALJ intimidated them). If your client should have been eligible for a waiver, and the issue was not thoroughly and appropriately addressed at hearing and in the decision, pursue it on further appeal.

Waiver should be granted when (1) fraud is not involved; (2) the overpayment was "without fault of the claimant," and (3) recovery would "defeat the purpose" of the benefits already authorized or would "be against equity and good conscience." For definitions of these terms see R.S. 23:1713(B) and LAC 40:IV.371. The agency's strategy is to find claimant at "fault" (which is not defined in the authorizing statute or implementing regulation) in any way possible. Be prepared to vigorously advocate for your client on this issue. An unpublished, favorable 4th Circuit decision, and the brief that led to it, is available on www.probono.net/la.

Fraud overpayments, which are a very small percentage (at this time less than 3%) of overall benefits paid nationally, require the agency to prove *intentional* misrepresentation or concealment of a material fact. A finding of fraud has more serious consequences for your client. Waiver of repayment and avoidance of penalties are not options. R.S. 23:1713(B); 1714.

UI Program Integrity Provisions of Trade Act (P.L. 112-140), signed October 21, 2011, imposes new state requirements for overpayments. Overpaid claims will be assessed to those employers (and third-party representatives of employers) who fail to respond "timely or adequately" to an agency's information request.

Collection procedures. The notice of overpayment should explain repayment options. If a beneficiary does not arrange payment, the agency has several options under R.S. 23:1740 *et seq.*:

- Offset from future claims payable (which often happens without written notice, to the puzzlement of those who may have forgotten a long-ago overpayment notice, or who are the victim of agency error). (Due process requires notice of the action.)
- Civil action.
- Offset from state income tax refunds.
- Treasury Offset Program (TOP) (federal income tax refund offset). IPERA expanded the pre-existing TOP to include non-fraud UC overpayments, eliminated the 10 year time limit on collection, and requires that offset notice recipients be given 60 days to provide evidence to show that a UC debt is not past due and legally enforceable. 31 C.F.R. §285.58(3) (i) (ii).

9. HEALTH, RETIREMENT AND OTHER EMPLOYEE BENEFITS

The **Employee Retirement Income Security Act of 1974 (ERISA)**, 29 U.S.C. §301 *et seq.* sets uniform minimum standards in an attempt to ensure that employee benefit plans (e.g., pensions, health care, disability, prepaid legal services, scholarship funds, daycare centers, training benefits) are fairly administered and remain financially sound. The law applies to plans provided by most private employers, other than religious entities. ERISA preempts most, but not all, state and local laws relating to employee benefit plans. 29 U.S.C. §1144. Some provisions of interest include:

- Employers may not discriminate against lower paid workers. §§401(a)(4), 410(b).
- Uniform and shorter vesting schedules in pension plans are required.
- Assignment or alienation of pension benefits, with the exception of qualified domestic relations orders, are generally prohibited.

Two federal agencies have jurisdiction: the U.S. Department of Labor (DOL), through its Pension and Welfare Benefits Administration, and the Treasury Department's Internal Revenue Service. ERISA confers enforcement authority on the DOL, which may pursue certain investigations, bring a civil action to correct violations, and impose criminal penalties on willful violators. Individuals may also sue, and may seek injunctive relief, payment of benefits due, other equitable relief, and attorney's fees and costs. §1132.

The **Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, 29 U.S.C. §1181 *et seq.* amended ERISA to provide for improved portability and continuity of employment-connected health insurance coverage. It requires insurers to cover workers who change jobs if their last employers provided insurance. The law also prohibits discrimination in coverage based on certain health status-related factors, such as medical history and claims experience. It limits the length of time insurers may refuse to cover pre-existing medical conditions to 12 months for most persons. What may be considered a pre-existing condition, and for how long, is also restricted. Insurers of departing plan participants must also provide written certificates of coverage.

The **Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)**, 29 U.S.C. §1161 *et seq.* amended ERISA to provide employees and other beneficiaries of employment-related group health care plans with an opportunity to elect continuation of coverage at group plan rates in the event of certain "qualifying events" (such as job loss or reduction of hours). A qualified beneficiary is entitled to exercise their rights under the statute even if they are covered under another health care plan. *See, e.g., Geissal v. Moore Medical Corp.*, 524 U.S. 74 (1998).

COBRA applies to group health plans of employers with 20 or more employees on the typical work day in the previous year. The employer is obligated to notify the plan administrator, who must then notify the employee or other beneficiary of their right to elect continuation of coverage. §1166. The employee or other beneficiary has 60 days of the qualifying event to make an election. Generally, coverage must continue only for 18 months, although the statute allows for longer coverage in certain circumstances. §1162(2)(A). Many employers fail to comply with COBRA notice requirements.

R.S. 22:1045 provides for **continuing insurance for older surviving spouses after decease of their worker spouse**. The surviving spouse must notify the insurer of her exercise of the option within 90 days of the death, and meet other conditions in the statute.

10. WAGE ISSUES

10.1 UNPAID WAGE CLAIMS.

Getting the “last paycheck may be resolvable with a phone call or letter to the employer. Most employees separated from a job in Louisiana have a right to prompt payment of “the amount then due under the terms of the employment.” Louisiana Wage Payment Law, R.S. 23:631 *et seq.* Payment is due within 15 days or the next regular payday, which ever comes first. R.S. 23:631(A)(1). Payment is effective on actual delivery at the customary place of payment, or on mailing. R.S. 23:631(A)(2). The main purpose of this law is to compel employers to timely pay all amounts owed employees promptly on dismissal or resignation (regardless of reason), and to protect discharged Louisiana employees from unfair and dilatory wage practices by employers. *See, e.g., Berard v. L-3 Communications Vertex Aerospace, LLC*, 2009-1202 (La. App. 1 Cir. 2/12/10), 35 So.3d 334, *writ denied* 38 So.3d 302 (La. 2010).

Not all workers are covered. The statute covers employees only, which excludes independent contractors. Remember not to automatically accept the employer’s label. *See, e.g., Jeansonne v. Schmolke*, 2009-1467 (La. App. 4 Cir. 5/19/10), 40 So.3d 347 (contractor’s general manager found to be employee despite employer’s use of 1099 form). The law applies to public as well as private employers, *Stafford v. City of Baton Rouge*, 403 So.2d 733 (La. 1981), but it does not apply to those covered by collective bargaining agreements which provide otherwise. R.S. 23:631(A)(3). The statute requires that the pay period have been by the “hour, day, week or month” and does not cover relationships that lack a term of pay period. *Slaughter v. Board of Sup’rs of Southern University and Agr. and Mechanical College*, 2010-1049 (La. App. 1 Cir. 8/2/11), 76 So.3d 438, *cert. den.*; *Franklin v. Ram, Inc.*, 576 So.2d 546 (La. App. 2 Cir. 1991); *Keith v. Little*, 434 So.2d 548 (La. App. 2 Cir. 1983). Citizenship status is irrelevant. *Agusiegbe v. Petroleum Associates of Lafayette, Inc.*, 486 So.2d 314 (La. App. 3 Cir. 1986); *Baca v. Brother’s Fried Chicken*, 2009 WL 1349783 (E.D. La. 5/13/09).

Not all payments are covered:

- Only compensation earned during the pay period. *See, e.g., Slaughter v. Board of Sup’rs of Southern University and Agr. and Mechanical College*, 2010-1049 (La. App. 1 Cir. 8/2/11), 76 So.3d 438; *Boudreaux v. Hamilton Medical Group, Inc.*, 94-0879 (La. 10/17/93), 644 So.2d 619 (severance not “wages”); *Delaney v. Whitney Nat. Bank*, 96-2144, 97-0254 (La. App. 4 Cir. 11/12/98), 703 So.2d 709 (retirement benefits not “wages”); *Boyd v. Gynecologic Associates of Jefferson Parish, Inc.*, 08-1263 (La. App. 5 Cir. 5/26/09), 15 So.3d 268 (advances not “wages”).
- Vacation and other pay only if earned or vested under employer policies, and not forfeited by employer “use it or lose it” policies. *See, e.g., Wyatt v. Avoyelles Parish School Board*, 2001-3180 (La. 12/4/02), 831 So.2d 906; *Beard v. Summit Institute of Pulmonary Medicine and Rehabilitation, Inc.*, 97-1784 (La.

3/4/98), 707 So.2d 1233; *Semien v. GEO Group, Inc.*, 10-642 (La. App. 3 Cir. 12/8/10), 52 So.3d 1019, *writ denied*, 11-0083 (La. 2/25/11), 58 So.3d 458 (PTO and LTI not payable under policy description as unearned); *Kately v. Global Data Sys., Inc.*, 2005-1227 (La. App. 3 Cir. 4/5/06), 926 So.2d 145 (ambiguity in vacation policy interpreted against employer who drafted it).

- Commissions and bonuses *often*, but not always. See, e.g., *Kaplon v. Rimkus Consulting Group, Inc. of Louisiana*, 2009-1275 (La. App. 4 Cir. 4/28/10), 39 So.3d 725, *writ denied* 2010-1207 (La. 7/2/10), 39 So.3d 587 (bonus forfeiture policy deemed illegal); *Jeansonne v. Schmolke, supra*; *Herbert v. Insurance Center, Inc.*, 97-298 (La. App. 3 Cir. 1/7/98), 706 So.2d 1007, *writ denied* (forfeiture of commissions permissible absent proof that they were “actually earned” upon date of separation); *Patterson v. Alexander & Hamilton, Inc.*, 02-1230 (La. App. 1 Cir. 4/2/03), 844 So.2d 412 (where only collection of the fee is outstanding, and collection is beyond the control of the employee, he has earned his commission); *Graves v. Automated Commercial Fueling Corp.*, 2005-2561 (La. App. 1 Cir. 11/3/06), 950 So.2d 759 (commissions considered earned where no written policy existed on commissions post-separation).
- Fringe benefits if payable under collective bargaining agreements. R.S. 23:640.

The law allows for penalties of 90 days’ wages or full wages from demand until payment, whichever is less, on an employer who fails or refuses on demand to pay all undisputed amounts. The penalty provision is strictly construed, and good faith defenses by an employer will preclude imposition of penalties. *Kaplon v. Rimkus Consulting Group, Inc. of Louisiana*, 2009-1275 (La. App. 4 Cir. 4/28/10), 39 So.3d 725, *writ denied* 2010-1207 (La. 7/2/10), 39 So.3d 587. The law also requires reasonable **attorney’s fees** if a well-founded suit must be filed. R.S. 23:632.

The right to payment is **non-waivable**. R.S. 23:634. Contracts or policies requiring an employee to forfeit actual wages earned are generally unlawful. *Beard v. Summit Institute of Pulmonary Medicine and Rehabilitation, Inc.*, 97-1784 (La. 3/4/98), 707 So.2d 1233 (personnel policy requiring forfeiture of accrued vacation unlawful); *Herbert v. Insurance Center, Inc.*, 97-298 (La. App. 3 Cir. 1/7/98), 706 So.2d 1007, *writ denied* (forfeiture of commissions permissible absent proof that they were “actually earned” upon date of resignation); *see also Wirtz v. William H. LaDew of Louisiana, Inc.*, 282 F.Supp. 742 (E.D.La. 1968) (forfeiture of overtime pay unlawful under FLSA). The validity of contractual extensions of the statutory time limit has been raised, but not decided. *See Becht v. Morgan Bldg. & Spas*, 02-2047 (La. 4/23/03), 843 So.2d 1109.

Demand for payment is necessary. The obligation to pay exists irrespective of demand. However, sufficient demand is necessary for an employee to invoke the enforcement and penalty provisions of the statute. Oral demand *may* be sufficient, if it is ‘fairly precise and certain.’ *See, e.g., Monroe Firefighters Ass’n v. City of Monroe, CIV.A*, 2009 WL 805132 (W.D.La. 2009); *Lambert v. Usry & Weeks*, 94-216 (La. App. 5 Cir. 9/14/94), 643 So.2d 1280; *Hughes v. Cooter Brown’s Tavern, Inc.*, 591 So.2d 1334 (La. App. 4 Cir. 1991), *writ denied* 594 So.2d 1318 (girlfriend’s appearance insufficient). It has also been held that an employer who files a general denial waives technical deficiencies in pre-suit demand. *Carriere v. Pee Wee’s*

Equipment Co., 364 So.2d 555 (La. 1978). *And see Carmichael v. Galliano Marine Service, L.L.C.*, 2010 WL 1416555 (E.D.La. 2010) (filing of lawsuit deemed sufficient demand).

☞ **Practice tip** Avoid dispute about the sufficiency of prior oral requests and send written demand by mail (consider sending a copy by regular and certified mail - the refusal of the employer to sign for the certified letter will undercut any argument of good faith if you have to sue) or by fax - if you have a receipt with the employer's fax number).

Filing suit. A suit must be filed within 3 years. C.C. Art. 3494. Venue is appropriate in any of the locations authorized by the Code of Civil Procedure, and also in the parish where the work was performed. R.S. 23:639. A suit seeking only penalties and attorneys fees states a cause of action, if wages were paid but not paid timely. *Sifers v. Exxon Corp.*, 338 So.2d 763 (La. App. 4 Cir. 1976).

Employer defenses. The statute is strictly construed, being penal in nature, and its provisions may yield to equitable defenses. *Boudreaux v. Hamilton Medical Group, Inc.*, 94-0879 (La. 10/17/93), 644 So.2d 619; *Smith v. Acadiana Mortg. of Louisiana, Inc.*, 42,795 (La. App. 2 Cir. 1/30/08), 975 So.2d 143 (defenses must be in good faith and non-arbitrary). An employer who shows an equitable defense may avoid penalties, but not attorney's fees, if wages are actually due. *Robledo v. Otr Motors of Louisiana, Inc.*, 582 So.2d 892 (La. App. 2 Cir. 1991); *Berard v. L-3 Communications Vertex Aerospace, LLC*, 35 So.3d 334, *supra*.

Some recognized defenses **to payment** include:

- Prior overpayments which could be offset against wages due. *King v. American Rice Growers Exchange*, 417 So.2d 904 (La. App. 3 Cir. 1982), *writ denied* 421 So.2d 909.
- Property loss or damage. *Slaughter v. Board of Sup'rs of Southern University and Agr. and Mechanical College*, 2010-1049 (La. App. 1 Cir. 8/2/11), 76 So.3d 438, *cert. den.*; *Moore v. Fleming Subway Restaurants, Inc.*, 28,543 (La. App. 2 Cir. 8/21/96), 680 So.2d 78. While R.S. 23:635 prohibits an employer from deducting "fines" from wages (e.g. for violating a work rule), that doesn't apply to willful or negligent damage of employer property.
- R.S. 23:634(B) allows withholding of preemployment medical exam or drug test costs from wages due an employee who resigns within 90 days.

Some recognized defenses **to penalties** include:

- Inability to locate an employee. *Byrnes v. Orkin Exterminating Co., Inc.*, 562 F. Supp. 892 (E.D. La. 1983).
- Good faith error (e.g., true clerical error). *Williams v. Lafayette School Board*, 533 So.2d 1359 (La. App. 3d Cir. 1989); *Houser v. Carruth Mortg. Corp.*, 476 So.2d 830 (La. App. 5 Cir. 1985); *cf. Carmichael v. Galliano Marine Serv. LLC, CIVA*, 09-3098, 2010 WL 1416555 (E.D.La. 2010) (admitted clerical error not allowed as defense given 4 months' lapse between complaint filing and employer's payment).
- Bona fide dispute about the amount due. *Thomas v. Orleans Private Industry Council, Inc.*, 95-157 (La. App. 4 Cir. 2/15/96), 669 So.2d 1275, *writ denied* 96-0686 (La. 4/26/96), 672 So.2d 671; *Kearney v. Lee Med. Int'l, Inc.*, 06-597 (La. App. 5 Cir. 1/16/07), 951 So.2d 417, *writ denied*, 2007-0344 (La. 3/30/07), 953 So.2d 70.

- Perceived or actual need to offset amounts due from employee. *Stall v. Prof'l Divers of New Orleans, Inc.*, 99-262 (La. App. 5 Cir. 8/31/99), 739 So.2d 1005, writ denied, 99-2869 (La. 12/10/99), 755 So.2d 855; *Menard v. Roy Young, Inc.*, 441 So.2d 28 (La. App. 3 Cir. 1983), writ denied 444 So.2d 122; *Crowley v. Old River Towing Co.*, 664 F.Supp. 1008 (E.D. La. 1987).
- Employment did not end in resignation or termination. *Smith v. Dishman & Bennett*, 35,682 (La. App. 2 Cir. 1/23/02), 805 So.2d 1220.

Rejected defenses include the following sample:

- Poor bookkeeping practices or other negligence on part of the employer. *Graves v. Automated Commercial Fueling Corp.*, *supra*; *Metrailer v. Cameron Cable & Cordage, Inc.*, 440 So.2d 976 (La. App. 3 Cir.1976), writ denied, 445 So.2d 436, *Pace v. Parker Drilling Co. and Subsidiaries*, 382 So.2d 988 (La. App. 1 Cir. 1980), writ denied 383 So.2d 1016.
- Employee's abrupt resignation. *Martin v. Sterling Associates, Inc.*, 46,461 (La. App. 2d Cir. 8/10/11), 72 So.3d 411 (notes that resolution of most defenses involved credibility issues not suitable for summary judgment); *Harrison v. CD Consulting, Inc.*, 2005-1087 (La. App. 1 Cir. 5/5/06), 934 So.2d 166.
- Employee's refusal to pick up check when mailing requested. *Simon v. Crowley Industries, Inc.*, 287 So.2d 549 (La. App. 3 Cir. 1973), writ denied 290 So.2d 331.
- Employee's failure to complete tax withholding forms or to sign receipt acknowledging payment. *Krajcer v. D.H. Holmes, Co., Ltd.*, 571 So.2d 171 (La. App. 4 Cir. 1990), writ denied 573 So.2d 1141; *Holmes v. Tradigrain, Inc.*, 411 So.2d 1132 (La. App. 4 Cir. 1982), writ denied 414 So.2d 1252.
- Reliance on unlawful company policy. *Patterson v. Alexander & Hamilton, Inc.*, 02-1230 (La. App. 1 Cir. 4/2/03), 844 So.2d 412; *Beard v. Summit Institute of Pulmonary Medicine and Rehabilitation, Inc.*, 97-1784 (La. 3/4/98), 707 So.2d 1233; *Kaplon v. Rimkus Consulting Group, Inc. of Louisiana*, 39 So.3d 725, *supra*.
- Reliance on legal advice and illegal post-resignation contract trying to avoid statutory obligations. *Goulas v. B&B Oilfield Services, Inc.* 2010-934 (La. App. 3d Cir. 8/10/11), 69 So.3d 750.

Defenses to attorneys fees. An award of reasonable attorney's fees is mandatory if a suit is well-founded, irrespective of any equitable defenses to payment or penalties which are raised by an employer. *Jeansonne v. Schmolke*, 40 So.3d at 362, *supra*; *Ginsburg v. Radio Group/Access 1 Communications Corp. of New York*, 35,624 (La. App. 2 Cir. 1/23/02), 806 So.2d 937; *Beard v. Summit Institute of Pulmonary Medicine and Rehabilitation, Inc.*, 97-1784 (La. 3/4/98), 707 So.2d 1233. A suit is "well-founded" if judgment is entered in favor of the employee entitling him to past due wages. *Herbert v. Insurance Center, Inc.*, 97-298 (La. App. 3 Cir. 1/7/98), 706 So.2d 1007, writ denied 98-0353 (La. 3/27/98), 716 So.2d 888; *Blaney v. Hulsey, Harwood & Hulsey*, 27,983 (La. App. 2 Cir. 2/28/96), 669 So.2d 661.

10.2 OVERTIME AND MINIMUM WAGE VIOLATIONS.

The primary⁵ federal wage and hour law is the **Fair Labor Standards Act of 1938 (FLSA)**, 29 U.S.C. §201 et seq. FLSA was enacted to protect against the “evils of overwork and underpay.” *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). It sets forth federal requirements for a minimum wage, overtime payments and record-keeping, and restricts child labor. An employee’s citizenship status (or lack of it) is irrelevant to statutory coverage. *In re Reyes*, 814 F.2d 168 (5th Cir. 1987). FLSA has its own test for determining employee vs. independent contractor status. *See, e.g., Cromwell v. Driftwood Elec. Contractors*, 348 Fed. Appx. 57 (5 Cir. 2009); *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324 (5th Cir. 1993). As a remedial statute, it must be liberally construed. *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207 (1959); *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190 (5th Cir.1983), *cert. denied* 463 U.S. 1207. FLSA’s provisions are **non-waivable**. *Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975); *Wirtz v. Williams H. LaDew of Louisiana, Inc.*, 282 F.Supp. 742 (E.D. La. 1968).

10.2.1 Minimum Wage.

Not all employers and employees are covered. In general, covered employers must have annual sales totaling \$500,000 or more, or be engaged in interstate commerce. The law covers private employers as well as federal, state and local governments.⁶ However, employees even of exempted firms may sometimes be individually covered in workweeks during which they have engaged in interstate commerce, the production of goods for interstate commerce, or an activity that is closely related and directly essential to the production of such goods.

Many statutory exemptions. Many workers are explicitly excluded from the statute’s protection regarding either minimum wage, overtime, or both. 29 U.S.C. §§213, 214. Employees exempted from the minimum wage *and* overtime provisions include, *but are not limited to*, executive, administrative and professional workers; taxi cab drivers; employees of most seasonal amusement or recreational facilities or camps; seafood industry workers; small newspaper employees and those who deliver newspapers; casual babysitters; students; apprentices; and handicapped workers. Statutory exemptions are narrowly construed, and the employer bears the burden of proving that an employee fits within the terms of an exemption. *Johnson v. Big Lots Stores, Inc.*, 604 F.Supp. 2d 903 (E.D. La. 2009); *Spradling v. City of Tulsa, Okl.*, 95 F.3d 1492 (10th Cir. 1996), *cert. denied*; *Auer v. Robbins*, 519 U.S. 452 (1997); *Dole v. Mr. W. Fireworks, Inc.*, 889 F.2d 543 (5th Cir. 1989), *cert. denied* 495 U.S. 929.

Pay provisions. The federal minimum wage for covered employees, effective July 24, 2009, is \$7.25 per hour. 29 U.S.C. §206(a)(1)(C). Special wage rates may apply to particular workers. For example:

- Tipped employees (whose hourly rate is only \$2.13 per hour).⁷ Special rules govern tipped employees. They must customarily and regularly receive at

⁵ There are other federal wage payment laws enforced by the U.S. Department of Labor, including the Davis-Bacon and related Acts, which regulate wage payment and fringe benefits on federally-financed or assisted construction. A full list and detailed information about all federal wage and hour laws can be found on www.dol.gov.

⁶ Although a state employee may no longer bring a private action against the state without its consent. *Alden v. Maine*, 527 U.S. 706 (1999).

⁷ Many employers violate the rule that the \$2.13 only applies to time actually spent on activity for which the employee receives tips. For example, a waiter must be paid minimum wage for time spent cleaning up the kitchen.

least \$30 per month in tips, they must be allowed to keep all tips, tips combined with hourly wage must at least equal the minimum wage, and certain other conditions must be met. §203(m), (t).

- Employees under 20 years of age may be paid \$4.25 per hour for the first 90 days on the job. §206(g).
- Others, such as student learners, full-time students, and handicapped workers, may be paid less than the minimum wage under certificates issued by the Department of Labor.

Issues arise around transportation, travel time, and on-call or waiting time. FLSA covers only time on the job working. §203(o); 29 U.S.C. §251 *et seq.* (Portal-to-Portal Pay Act). Time on-call or on stand-by is covered only if an employee cannot use that time as they wish (e.g., they are geographically or otherwise limited). *Service Employees Intern. Union, Local 102 v. County of San Diego*, 60 F.3d 1346 (9th Cir. 1997), *cert. denied* 516 U.S. 1072. If travel or transportation is necessary to the employment and for the benefit of the employer, the employee must be compensated for that time. Mandatory training of nonexempt employees must also be compensated.

FLSA requires payment in cash or cash equivalent (e.g., food and lodging). §203(m). The regular rate of pay includes base pay plus premiums, cost of living allowances, bonuses, and fair value of anything the employer provides as part of pay, so long as the employee voluntarily receives the benefit, it is primarily for the employee's benefit, and it is not illegal. The rate of pay does not include benefit plan contributions, paid vacations, discretionary bonuses, and so on. §207(e). Generally, uniforms and essential tools may not be deducted from an employee's minimum wage.

Retaliation prohibited. It is illegal to discharge or "in any manner discriminate" against an employee because the employee has filed a complaint or instituted any proceeding under FLSA. 29 U.S.C. §215. This anti-retaliation provision protects both written and oral complaints. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 113 S.Ct. 1325 (2011).

Remedies. FLSA is enforced by the Wage and Hour Division of the U.S. Department of Labor (DOL). 29 U.S.C. §204. The New Orleans DOL office has jurisdiction over FLSA complaints in Louisiana. DOL may pursue criminal charges for willful violations or a civil lawsuit for back pay, penalties and injunctive relief on an employee's behalf. *Powell v. State of Florida*, 132 F.3d 677 (11 Cir. 1998). However, DOL backlogs may make pursuit of a private enforcement action preferable.

An employee may file his own lawsuit to recover lost wages, penalties, attorney's fees, and costs. 29 U.S.C. §§216, 217, 260. There is no exhaustion of administrative remedies requirement. Suit under FLSA must be brought within two years of the accrual of a cause of action, or within three years in the event of a "willful" violation. 29 U.S.C. §255. The latter statute of limitations requires a showing of knowledge or reckless disregard by the employer. *McLaughlin v. Rickland Shoe Co.*, 486 U.S. 128 (1988); *Johnson v. Big Lots Stores, Inc.*, 604 F. Supp. 2d 903 (E.D. La. 2009).

A collective action may also be brought to enforce the FLSA. §216(b). *See, e.g., Green v. Plantation of Louisiana LLC*, 2010 WL 5256354 (E.D. La. 2010). Cur-

rent LSC restrictions do not bar legal services advocates from bringing this type of group action. However, your clients should be able to find private counsel for most FLSA actions.

Louisiana minimum wage laws. While unlikely to exist, always check on the possible applicability of other state or local wage laws. FLSA does not restrict states or municipalities from establishing a higher minimum wage, but Louisiana has not joined others that have enacted a higher minimum wage. In fact, in 1997 the Louisiana legislature, responding to attempts in New Orleans to place a referendum for a higher minimum wage on the local ballot, passed R.S. 23:642, preventing municipalities from establishing a higher minimum wage, and its validity was upheld by the La. Supreme Court in *N. O. Campaign for a Living Wage v. City of New Orleans*, 02-0991 (La. 9/4/02), 825 So.2d 1098. Particular occupations may also be covered by specific laws (or union contracts) that set a special rate of pay. *E.g.*, R.S. 33:1702 (constables and justices of the peace); R.S. 33:1991 *et seq.* (firefighters); R.S. 33:2211 *et seq.* (police officers).

10.2.2 Overtime Complaints.

FLSA does not restrict the number of hours an employee may work, unless child labor under 16 is involved. However, it does require that overtime (1 ½ regular rate of pay, or time and a half) be paid any covered employee for any hour worked in excess of 40 hours in a workweek. 29 U.S.C. §207. As with the minimum wage, some employees are exempt (*e.g.*, taxi drivers, live-in domestic help, truck drivers). §213(b). Employers do make mistakes on exemptions. Of particular note for poverty advocates is the fact that some employees who work irregular work schedules (*e.g.*, many healthcare workers) may be entitled to overtime even if they work less than 40 hours in a week. §207(f). For overtime purposes, tips are not counted as part of the regular rate of pay. If a terminated “exempt” employee worked overtime, the exempt status may have been lost through employer actions or policies (*e.g.*, docking pay for absences or discipline).

Louisiana law. There is no generally-applicable state law on overtime. However, certain occupations may be governed by special statutory provisions. *See, e.g.*, R.S. 33:1999 (firefighters). Also, employer policies or customs may confer enforceable rights.

10.3 COMPENSATORY TIME.

Comp time in lieu of payment is usually not legal. 29 U.S.C. §207(o). Only state or government agencies may give time off in place of wages, and only under restricted conditions. *See, e.g.*, R.S. 33:2213.1 (police officers); *Knecht v. Board of Trustees for State Colleges and Universities and Northwestern State University*, 591 So.2d 690 (La. 1991); *Jones v. City Parish of East Baton Rouge*, 526 So.2d 462 (La. App. 1 Cir.1988); *Klein v. Rush-Presbyterian-St. Luke’s Medical Center*, 990 F.2d 279 (7th Cir. 1993).

10.4 UNEQUAL PAY BASED ON GENDER.

Low wages for women continue to persist, despite the 1963 passage of the **Equal Pay Act (“EPA”)**, 29 U.S.C. §206(d), an amendment to the FLSA. The national average for women is 77% of what men earn; among the states, Louisiana is almost at the bottom (and worse than all other southern states), with 69%. Although as a poverty advocate you are unlikely to have the resources to pursue

litigation to correct an inequity, you should certainly inform your female clients of possible remedies for their situation and make appropriate referrals (unequal pay claims may be pursued under other federal laws, too, e.g. Title VII).

The EPA requires that men and women doing “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, be compensated with equal pay and benefits.” §206(d)(1). It covers most of the same employers as FLSA, and more employees, but the law is strictly applied. To establish a prima facie case under the Equal Pay Act, an employee must establish by a preponderance of the evidence that the employees being compared are:

- working in the same place;
- doing equal work (“substantially” equal level of skill, effort or responsibility and performed under similar conditions, and job titles or descriptions are not determinative); and
- receiving less pay than employees of the opposite sex.

To rebut a prima facie case, a defendant need only prove that the pay differential is due to a seniority system, a merit system, a system which measures earnings by quantity or quality of production; or a differential based on “any other factor other than sex” which is adopted for legitimate business reasons. *See, e.g., Spears v. Louisiana*, 767 F.Supp. 2d 629 (M.D. La. 2011); *Wallace v. Louisiana Bd. of Sup’rs for Louisiana State Univ. Agr. & Mech. Coll.*, 364 F.Appx. 902 (5th Cir. 2010); *E.E.O.C. v. Louisiana Network, Inc.*, 809 F.Supp. 1210 (M.D.La. 1992). To prevail, a plaintiff would need to show that the employer’s non-discriminatory reason is pretextual. *McMillan v. Massachusetts Soc. for Prevention of Cruelty to Animals*, 140 F.3d 288 (1st Cir. 1998).

The EEOC can enforce this law, but there is no administrative exhaustion requirement prior to filing a private lawsuit. Suit must be brought within two years; three with a willful violation. 29 U.S.C. §255. Relief available includes backpay, injunction, liquidated damages, attorney’s fees, and costs. *Mitchell v. Jefferson County Bd. Of Education*, 936 F.2d 539 (11 Cir. 1991), rehearing denied 946 F.2d 1549.

10.5 FAMILY OR MEDICAL LEAVE.

There is no generally applicable state law providing the average at-will employee with *paid* sick or personal leave. However, particular occupations may have special statutes giving them payment rights. *E.g.*, R.S. 17:46 *et seq.*; 17:411 *et seq.* (certain teachers). Client complaints would require you to do some research. Employer policies and customs may also provide an employee with enforceable rights. Some laws provide rights to *unpaid* leave (e.g., the FMLA, discussed below). Unpaid leave laws can help preserve a job and related benefits.

The **Family and Medical Leave Act of 1993 (“FMLA”)**, 29 U.S.C. §2601 *et seq.*, provides covered employees with up to 12 weeks of *unpaid* leave during a year’s time, for: (a) the birth or adoption or foster placement of child; (b) family health needs; (c) an employee’s health needs; or (d) a qualified exigency related to the employee or family member’s duty in the Armed Forces. §2612. During FMLA leave, an employer must maintain pre-existing employment benefits for the employee. Of course, an employer may voluntarily, or through contract, provide greater benefits.

The FMLA covers most private and government employers. However, private sector employers are not covered unless they employed at least 50 employees in a 75 mile radius in 20 or more workweeks in the current or preceding calendar year and they are engaged in commerce or any activity affecting commerce. Employees are generally covered if they work for a covered employer; have been employed at the same workplace for 12 months or more (whether consecutive or not); and have worked at least 1250 hours (about 24 hours/week) during the year before taking leave. However, employers may exempt certain otherwise eligible employees or set conditions on leave for others. For example, teachers and instructors may be required to wait for leave until the end of a teaching period. §2618. Also, unless leave is necessary for a personal medical problem, spouses who work for the same employer must aggregate their leave time. §2612(f).

Birth, adoption or foster placement of a child. Leave must be taken within 1 year of a child's arrival, and consecutively unless the employer agrees to a different arrangement. §2612(b)(1). Clients should be warned: working while on authorized FMLA leave for a new baby led to termination of a state civil service employee in *Sterling v. Department of Public Safety and Corrections, Louisiana State Penitentiary*, 97-1960, 97-1959, 97-1961 (La. App. 1 Cir. 9/25/98), 723 So.2 448.

Family or employee's health needs. Employees seeking leave because of their own health problems may have additional rights under the Americans with Disabilities Act (ADA). Employees covered by the ADA may be able to secure additional leave as an accommodation of their disabilities. Elements to permissible FMLA leave under this category include:

- Limited to "serious" health conditions. §§2612(a), 2611(11). This means an illness, injury, impairment or condition that involves inpatient care or continuing treatment by a recognized health care provider. §2611(6). However, an employee need not be physically unable to work. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998).
- Employer may require certification by a health professional; second or even third opinions at the employer's expense; and recertifications on a reasonable basis. §2613. See, e.g., *Parsley v. City of Columbus, Ohio Dept. of Public Safety*, 471 F.Supp. 2d 858 (S.D. Ohio 2006) (chronic back condition entitled employer to recertification every 30 days).
- The leave may be for an employee's own health needs, or for certain immediate family members: (i) legal spouse, (ii) parent, or (iii) child (who must be either under 18 or if older, not able to take care of themselves; stepchild or one for whom the employee is the legal guardian, or child for whom the employee acts in the place of a parent). §2612.
- It may be taken on an intermittent basis when medically necessary. §2612(b)(1). If intermittent leave significantly impacts an employer's business, it may transfer an employee to a different position or require that leave no longer be intermittent. See, e.g., *Covey v. Methodist Hosp. of Dyersburg, Inc.*, 56 F.Supp. 2d 965 (W.D. Tenn. 1999).
- Employers may require, or employees may elect, to use up paid leave prior to taking FMLA leave. §2612(d)(2).

Employee notice. An eligible employee seeking to use FMLA leave must provide 30-day advance notice, unless the need for leave was not foreseeable and/or notice not practicable. §2612(e). While notice need not be in writing, it is well-advised. When requesting leave, the FMLA need not be mentioned by name; notice will be sufficient under the act if the employee provides the employer with enough information to put the employer on notice that FMLA-qualifying leave is needed. *See, e.g., Stoops v. One Call Communications, Inc.*, 141 F.3d 309 (7th Cir. 1998). An employer may place an employee on involuntary FMLA leave if the employee has given notice to the employer of a qualifying reason for absence that would trigger FMLA rights. *Willis v. Coca-Cola Enterprises, Inc.*, 445 F.3d 413 (5th Cir. 2006).

Right to return. An employee generally has the right to return to the same or equivalent (terms, conditions, pay and privileges must be the same) position. §§ 2612(b)(2), 2614(a). Under certain very limited circumstances and conditions involving highly-paid “key” employees, an employer may refuse reinstatement. An employee may be fired during FMLA leave if the employer has reasons unrelated to the taking of leave. *Anderson v. New Orleans Jazz & Heritage Festival & Found., Inc.*, 464 F.Supp. 2d 562 (E.D. La. 2006). During the leave, an employer must make the same insurance benefit contributions. However, seniority and pension benefits need not accrue during leave. If an employee does not return to work at the end of approved leave, the employer may recover health insurance premiums paid.

Retaliation or interference prohibited. Section 2615 makes it illegal for an employer to:

- Interfere with, restrain, or deny the exercise of any right under the law. Failure to provide adequate notice of FMLA procedures may constitute prohibited interference. *See, e.g., Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002); *Downey v. Strain*, 510 F.3d 534 (5th Cir. 2007); *Dodgens v. Kent Mfg. Co.*, 955 F.Supp. 560 (D.S.C. 1997).
- Discharge or discriminate against an employee because he has filed a complaint or instituted or been involved in any proceeding under the statute. An employee must show that: (1) he availed himself of a protected right under the FMLA; (2) he was adversely affected by an employment decision; and (3) there was a causal connection between the protected activity and the adverse employment action. *See, e.g., Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998). An employer may raise a legitimate nondiscriminatory reason, but an employee may prevail by showing that it was pretextual.

Remedies. The U.S. Department of Labor enforces the law. Most federal employees must seek enforcement through the U.S. Office of Personnel Management. DOL will investigate and may bring suit on its own. §§2616, 2617(b). A suit under the act may be brought within two years of a violation; three years if willful. §2617(C).

Louisiana leave laws. Louisiana law does not provide employees with any other generally-applicable statutory option except in cases of pregnancy, childbirth, or related medical conditions. *See* R.S. 23:342. However, R.S. 23:1015 et seq. does allow employers to provide up to 16 unpaid hours per year leave to parents or legal guardians to attend or participate in school conferences and activities

for a child if these activities cannot be scheduled during non-working hours. R.S. 23:341 requires employers with 25 or more employees to provide up to four months of unpaid leave for “pregnancy, childbirth, or related medical conditions.” R.S. 23:965 requires employers to grant at least 1 day of paid leave for jury duty.

10.6 WORKER’S COMPENSATION.

Louisiana’s Worker’s Compensation Law, R.S. 23:1021-1415, is the general statutory scheme for compensating employees who have suffered a work-related injury, regardless of citizenship status. *Rodriguez v. Integrity Contracting*, 09-1537 (La. App. 3 Cir. 5/5/10), 38 So.3d 511, *writs denied*, 10-1296-1307 (La. 9/24/10), 45 So.3d 1074. The Louisiana Workforce Commission, www.laworks.net, has some useful information. Certain occupations or classes of employees may be covered by special laws (e.g., the Jones Act, 46 U.S.C. §688; the Longshore and Harbor Worker’s Compensation Act, 33 U.S.C. §901 *et seq.*; the Federal Employer’s Liability Act, 45 U.S.C. §51 *et seq.*, and others).

There is an **anti-retaliation provision**. An employer is not precluded from hiring or firing an employee who has made a claim, but from acting “because of” that claim. *Sampson v. Wendy’s Management, Inc.*, 593 So.2d 336 (La. 1992). To recover for retaliatory discharge, the employee must prove by a preponderance of the evidence that the claim was the reason. *Penn v. Louisiana-1 Gaming*, 06-928 (La. App. 5 Cir. 4/11/07), 954 So.2d 925. Merely showing close proximity in time between a claim and discharge is not enough. *Hansford v. St. Francis Med. Ctr., Inc.*, 43,984 (La. App. 2 Cir. 1/14/09), 999 So.2d 1238. A discharge is not retaliatory or unlawful if it is based on the employee’s inability to perform his employment duties because of injury. *Murphey v. Glenwood Regional Medical Center*, 535 So.2d 1036 (La. App. 2 Cir. 1988), *writ denied* 536 So.2d 1203. However, an employer who is aware of an employee’s intent to file a claim cannot escape liability under the statute by preemptive discharge. *Rholdon v. Bio-Medical Applications of Louisiana, Inc.*, 868 F.Supp. 179 (E.D. La. 1994). An aggrieved plaintiff may sue in a civil suit for penalties up to one year’s earnings, reasonable attorneys fees, and court costs. R.S. 23:1361. The claim is subject to a one year prescriptive period. *Maquar v. Transit Management of Southeast Louisiana, Inc.*, 593 So.2d 365 (La. 1992).

10.7 SOME OTHER STATE PAYMENT AND LEAVE LAWS.

Jury duty. Employers cannot discharge employees for taking time off for jury service, and must provide at least one day of paid leave (although employer policies or custom may provide more). R.S. 23:965. Some occupations may have special statutes relating to jury duty leave. *E.g.*, R.S. 17:1210 (teachers).

Voting. There is no general Louisiana law requiring employers to provide paid leave for voting during work hours. Employer policies or civil service rules may allow it.

Military service. Louisiana law requires that public employees be paid 15 days of leave per year for reserve or National Guard duty. R.S. 42:392, 394. Other employees are entitled to unpaid leaves of absence for such service. R.S. 29:38. Employees who leave work for the armed services also enjoy certain re-employment rights. R.S. 29:38; 29:410; 42:401; *see also* the **Uniform Services Employment & Reemployment Rights Act**, 38 U.S.C. §4301 *et seq.* Certain employees in particular occupations may have other rights provided by special statutes. *E.g.*, R.S. 17:49 (teachers in special schools).

Rest, meal and smoking breaks. Contrary to popular belief, there is no general law requiring employers to set time aside, paid or unpaid, for rest breaks or meals. Louisiana statutes restrict workplace and school smoking, but protect employees from discrimination *because of* their status as smokers or nonsmokers. R.S. 23:966; 17:240.

Miscellaneous other payment provisions. Check the laws for particular laws that may apply to your client's circumstances. The following are only a *sample*:

- unpaid wages from non-resident plantation owner, R.S. 23:637.
- payment under retirement or other benefit plans, R.S. 23:638, 651, 652 and 653.
- payments to door to door solicitors, R.S. 23:641.
- prohibition against employers lending or advancing money to employees at an interest rate greater than 8%, R.S. 23:691.
- voluntary and involuntary assignment of earnings and under what circumstances an employer may discharge an employee for garnishments, R.S. 23:731.
- requires employers to pay at least 4% annual interest on employees' cash performance deposits, R.S. 23:891.
- prohibits requiring employee to pay costs of fingerprinting, medical exams, drug tests, or furnishing of any records available to or required by the employer, R.S. 23:897.
- wage requirements under the "Youth Corps Litter Control and Incentive Employment Program," R.S. 23:1830.

11. WORK CONDITIONS

11.1 HEALTH AND SAFETY.

The **Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.***, requires covered employers to maintain a reasonably safe work environment. Traditionally it has been used to address work-related hazards. However, it may also be used to address problems with violence on the job, either from coworkers, supervisors, or from domestic partners. Most private employers are covered, but not federal, state or local government employers, the self-employed, family farms, and those whose occupations are covered by other specific federal statutes (such as mining, segments of the transportation industries, and nuclear energy). The law also imposes certain record-keeping and notice requirements, and prohibits retaliation against an employee who complains to the enforcing agency, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA). A complainant is entitled to have his identity kept confidential from his employer, to participate in workplace inspections, and to contest OSHA's response.

Workplace standards fall into four major categories: general industry (29 C.F.R. §1910); construction (§1926); maritime (§§1915-19); and agriculture (§1928). Where OSHA has not promulgated a specific standard, an employer may still be responsible for violating the statute's "general duty" clause, which requires employers to furnish a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. §654(a).

Certain standards are generally applicable to all industry sectors:

- Access to an employee's medical and toxic exposure records;
- Personal protective equipment at no cost to the employee; and
- Product hazard evaluation and labeling, and employee hazard training.

There is no private right of action, but complaints to OSHA may result in required changes or fines. Employers may also be subject to criminal penalties for record-keeping violations or interfering with a compliance officer. Retaliation complaints must be filed within 30 days. Violation of OSHA standards generally does not create civil liability under other remedies, but may be relevant or helpful in pursuing another cause of action.

The **Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1801 *et seq.***, addresses many aspects of the employment relationship for most migrant and seasonal agricultural workers. In addition to requiring contractor registration, written disclosure of terms and conditions of employment, certain record-keeping, and certain wage and supply arrangements, the law mandates compliance with certain health and safety standards in housing and transportation. Retaliation is prohibited. The statute is enforced by the Wage and Hour Division of the U.S. Department of Labor, which is authorized to conduct site and record inspections, conduct interviews, and pursue civil or criminal actions against violators. §1851 *et seq.* Private actions are also allowed. §1854.

Louisiana does not have an OSHA-approved job safety and health program. However, it **does have laws setting forth health and safety provisions for certain occupations.** See, e.g., R.S. 30:2027; 30:2351.55; 23:481 *et seq.* It **also prohibits retaliation** against an employee for testifying about or providing information for the enforcement of labor laws. R.S. 23:964, 967. State law also prohibits retaliation for testifying about or providing information for the enforcement of environmental violations. R.S. 30:2027; *Brown v. Catalyst Recovery*, 01-1370 (La. App. 3 Cir. 4/3/02), 813 So.2d 1156. This statute protects employees who report violations not just by their employer, but also by a third party. *Bartlett v. Reese*, 526 So.2d 475 (La. App. 1 Cir. 1988), writ denied 532 So.2d 177, appeal after remand 569 So.2d 195, writ denied 572 So.2d 72.

The employee must prove that the adverse action was motivated by the employee's action. *Overton v. Shell Oil Co.*, 2005-1001 (La. App. 4 Cir. 7/19/06), 937 So.2d 404, writ denied, 2006-2093 (La. 11/3/06), 940 So.2d 674 (protected activity need not be sole reason for termination); *Powers v. Vista Chemical Co.*, 109 F.3d 1089 (5th Cir. 1997); *Bernofsky v. Tulane University Medical School*, 962 F.Supp. 895 (E.D.La. 1997). This and other similar "whistleblower" statutes require that reports of violations have provided sufficient information to allow the agency to investigate the alleged violation. See, e.g., *Garrie v. James L. Gray, Inc.*, 912 F.2d 808 (5 Cir. 1990), rehearing denied, cert. denied 499 U.S. 907.

11.2 CHILD LABOR.

The **Fair Labor Standards Act, 29 U.S.C. §201 *et seq.***, limits the categories and hours of work for minors. Children under age 16 are prohibited from working in most non-farm jobs or during school hours. §213. There are specific statutory exceptions such as working for parents, newspaper delivery, and provisions for

temporary waiver and special certificates of apprenticeship by DOL. §§213, 214. Certain jobs declared hazardous by DOL are entirely off-limits to minors.

Under age 14, work outside school hours is generally prohibited (with several exceptions), and the hours of youths 14 and 15 years old are restricted to no more than 3 hours per school day or 18 hours per school week and 8 hours per non-school day or 40 hours per non-school week. Except during the summer, work for these youths may only be between 7 a.m. and 7 p.m. Violators are subject to civil or criminal action by DOL.

Louisiana also regulates the employment of minors. R.S. 23:151 *et seq.* It limits the occupations of minors, and restrict their hours and days on the job. R.S. 23:161-171, 211, 213-215, 251-258. Employers are required to maintain employment certificates or work permits and other documentation for most minors. R.S. 23:181-192, 217, 254-258. These laws are enforceable by the state's labor agency, currently called the Louisiana Workforce Commission, and violators are subject to certain penalties, including fines, imprisonment, attorneys fees and interest. R.S. 23:231 *et seq.* R.S. 23:381-392 provide for certain exceptions to job restrictions through the apprenticeship system.

11.3 DRUG AND ALCOHOL TESTING.

The right of employers to require drug testing is limited by the U.S. and state constitutions. Drug or alcohol testing is considered a search and seizure covered by the Fourth Amendment to the U.S. Constitution (and its state counterpart), which prohibits unreasonable searches and seizures. Unfortunately, this constitutional protection applies only to governmental employers and to private employers acting for the Government. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). Drug testing must be supported by individualized "reasonable suspicion" unless the employee is in a position of 'special needs' such as law enforcement or 'safety-sensitive' positions such as railroad workers. *Id.*; *Chandler v. Miller*, 520 U.S. 305 (1997); *United Teachers of New Orleans, et al. v. Orleans Parish School Board, et al.*, 142 F.3d 853 (5th Cir. 1998); *Aubrey v. School Bd. of Lafayette Parish*, 92 F.3d 316 (5th Cir. 1996). R.S. 49:1015 and 1021 require drug testing of state employees and "persons entering into contracts with the state to provide goods and services." Some employers have written policies on drug testing which may confer other rights.

Employees unhappy with substance abuse testing, or how their employer has reacted, may also have other claims. R.S. 49:1001 *et seq.* sets forth certain standards and procedures which must be followed in drug testing by most employers. Employers must give employees a right of access to records relating to positive drug test results. R.S. 49:1011. Employees have a very limited cause of action in tort against employers and testing entities for wrongful disclosure of test results. R.S. 49:1012. R.S. 23:8997 prohibits employers in most cases from requiring employees to pay for costs of drug tests (as well as certain other procedures). Unfortunately, a claim for damages for an employer's violation of drug testing requirements under R.S. 49:1001 *et seq.* has been rejected. *Sanchez v. Georgia Gulf Corp.*, 02-0904 (La. App. 1 Cir. 11/12/03), 860 S.2d 277, Judges Kuhn and Whipple, dissenting; *writ denied*, 2004-0185 (La. 4/2/04).

11.4 POLYGRAPH TESTING.

The **Employee Polygraph Protection Act (EPPA)**, 29 U.S.C. §2001 *et seq.*, prohibits most **private** employers from using polygraph or “lie detector” tests either for pre-employment screening or during the course of employment, with an exception in certain circumstances such as investigations into theft or sabotage. §2006(d). Governmental employers, and those in the security or pharmaceutical fields, are exempted. §2006.

Covered employers are also precluded from discharging, disciplining or discriminating against an employee or an applicant based on the result of any test, or for exercising their rights under the statute. §2002. A polygraph examiner retained by an employer is also potentially liable under this law. *Calbillo v. Caverder Oldsmobile, Inc.*, 288 F.3d 721 (5th Cir. 2002). Employers are required to post notices to advise employees of their rights. §2003. Employees’ rights are **non-waivable**. §2005(d). The law also sets certain testing standards, and limits disclosure of information obtained from a test. §§2007, 2008. The law is enforced by the U.S. DOL, Wage and Hour Division, which may seek injunctive relief or penalties. §§ 2004, 2005. Employees may also bring a private action within 3 years of a violation to recover back pay, benefits, reinstatement, and other relief. §2005(c).

Unlike many other states, **Louisiana has no state counterpart** to this federal statute. It has been held that an employer has the right to ask an employee to submit to a polygraph examination when investigating suspected personnel violations. *Ballaron v. Equitable Shipyards*, 521 So.2d 481 (La. App. 4 Cir. 1988), *writ denied* 522 So.2d 571. Even a civil service employee may be discharged for refusing to take a polygraph examination. *See, e.g., Jones v. Department of Public Safety and Corrections*, 2004 CA 1766 (La. App. 1 Cir. 9/23/05), 923 So.2d 699. Furthermore, it has been held that an employer is not liable in tort for discharging an employee at will after a polygraph exam that indicated he lied, even if the polygraph was negligently performed. *Johnson v. Delchamps, Inc.*, 897 F.2d 808 (5th Cir. 1990).

11.5 INTERFERENCE WITH POLITICAL RIGHTS.

R.S. 23:961 *et seq.* prohibits employers with 20 or more employees from interfering with certain political rights of employees. *Davis v. Louisiana Computing Corp.*, 394 So.2d 678 (La. App. 4 Cir. 1981), *writ denied* 400 So.2d 668. However, there are limits to political activities of certain governmental employees.

**APPENDIX A:
FREQUENT JOB-RELATED COMPLAINTS BY LOW-INCOME CLIENTS,
WITH STATUTORY CHECKLIST**

- A. Wrongful discharge.** A client's rights depend upon the nature of the employment relationship, the reason for the discharge, and other factors. *See, e.g.:*
- LSA-C.C. Arts. 2747 (employment at will doctrine)
 - C.C. Arts. 2746, 2748-50 (limited duration employment contract)
 - La. Const. Art. 10 (public officials and employees)
 - R.S. 33:2391 *et seq.* (city, parish, fire and police civil service)
 - Miscellaneous federal and state statutes and rules provide other remedies for various occupations or employee categories or for discharge based on particular acts - e.g., discrimination and retaliation. Look at the particular circumstances of the client to determine if any other special statutes may apply. Additionally, state or federal constitutional protections such as due process or equal protection may apply.
- B. Acts associated with discharge.**
- 1. Humiliating treatment by employer.**
 - May have right to sue in tort - C.C. Art. 2315. The three elements of a claim for intentional infliction of emotional distress are laid out in *White v. Monsanto Co.*, 585 So.2d 1205, 1209 (La. 1991). In general, a plaintiff must show outrageous conduct causing serious emotional harm.
 - 2. No reason or prior notice given.**
 - Under Louisiana law, an at-will employee may be terminated at any time with no reason given at all. *Mix v. University of New Orleans*, 609 So.2d 958 (La. App. 4 Cir.1992), writ denied 612 So.2d 83 (1993).
 - R.S. 23:1576 - requires state employers to file notice giving the cause, within three days of separation; state LWC regulations require this of all employers; there are no private enforcement mechanisms, however.
 - Civil service and certain other public employees have various rights to notice, based on statute, rule, or constitutional right.
 - Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §2101 *et seq.* - prior notice required of plant closings and mass layoffs.
 - 3. Poor references/negative comments to third persons.**
 - May have right to sue in tort - C.C. Art. 2315. The five elements of a defamatory action (libel or slander) are laid out in *Brannan v. Wyeth Laboratories, Inc.*, 526 So.2d 1101, 1105 (La. 1988). Words imputing a crime to another are defamatory *per se* and proof of malice is not required. *Williams v. Touro Infirmary*, 578 So.2d 1006 (La. App. 4 Cir. 1991).
 - R.S. 23:291 - possible cause of action if employer disclosure not in good faith or inaccurate; *see also* R.S. 23:1012 regarding drug testing.

- If discriminatory, may have action based on federal or state discrimination statutes.

4. Occupational license revocation or suspension.

- Occupations licensed by federal and state law are numerous; most Louisiana licensing schemes are found in Title 37 of the revised statutes (Professions and Occupations). These statutory schemes typically provide license holders with administrative and judicial review rights, designed to provide constitutionally-mandated due process.

C. Post-separation benefits.

1. Unemployment compensation benefits.

- R.S. 23:1471 *et seq.* - Louisiana Employment Security Law
- 42 U.S.C. §501 *et seq.* - federal administrative standards for state unemployment schemes.

2. Pension benefits and continuing health insurance.

- Employee Retirement Income Security Act (ERISA), 29 U.S.C. §301 *et seq.*
- Health Insurance Portability and Accountability Act, 29 U.S.C. §1181 *et seq.*
- Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. §1162
- R.S. 22:215.7 - surviving spouses

D. Payment and leave issues.

1. Unpaid wages or other amounts due.

- Louisiana Wage Payment Act, R.S. 23:631 *et seq.* .

2. Minimum wage and overtime.

- FLSA, 29 U.S.C. §201 *et seq.* - sets federal standards for many employers and employees
- R.S. 23:642 - prohibits higher minimum wage by local entities
- Certain occupations or categories of employees may have the benefit of special wage statutes (e.g., firefighters, police officers, certain public officials, federal contract construction workers).

3. Gender disparity in pay.

- Equal Pay Act, 29 U.S.C. §206(d)
- Title VII, Civil Rights Act, 42 U.S.C. §§ 1981a, 2000e

4. Garnishment.

- R.S. 23:731 - limits discharge because of garnishments
- Consumer Credit Protection Act, 15 U.S.C. §1671 - same

5. Leave.

- Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 *et seq.*
- R.S. 23:965 - jury leave allowed; also prohibits discharge because of jury duty
- R.S. 23:1015 - permits leave for school conferences and activities
- Certain categories of employees have leave rights provided by special statute or rule (e.g., teachers, firefighters, civil service employees, veterans, military personnel).

6. Worker's compensation benefits.

- R.S. 23:1021 *et seq.* - Louisiana workers' compensation scheme
- Miscellaneous other statutes provide remedies for particular occupations or classes of employees, such as the Federal Employer's Liability Act, 45 U.S.C. §51 *et seq.*

E. Employment discrimination or retaliation based on:

1. Race or color.

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*
- 42 U.S.C. §1981, 1983
- Executive Order 11246, 41 C.F.R. 60 (tracks Title VII categories)
- R.S. 23:332
- Local laws may exist - R.S. 51:2236

2. National origin or immigration status.

- Title VII
- Immigration Reform and Control Act (IRCA), at 8 U.S.C. §1324b
- R.S. 23:332
- Local laws may exist - R.S. 51:2236

3. Gender.

- Title VII
- 42 U.S.C. § 1981a Equal Pay Act of 1963, 29 U.S.C. §206(d)
- R.S. 23:332
- Local laws may exist - R.S. 51:2236

4. Pregnancy.

- Title VII
- Pregnancy Discrimination Act, 42 U.S.C. §2000e(k)
- R.S. 23:341 *et seq.*
- Local laws may exist - LSA-R.S. 51:2236

5. Religious beliefs.

- Title VII
- R.S. 23:332
- Local laws may exist - LSA-R.S. 51:2236

6. Age.

- Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.*
- Older Workers Benefit Protection Act, 29 U.S.C. §§623, 626, 630.
- R.S. 23:311 *et seq.*
- R.S. 51:2236 - parishes and municipalities may adopt and enforce additional laws prohibiting "all forms of" discrimination and prescribing penalties

7. Handicap or disability.

- Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*
- Rehabilitation Act of 1973, 29 U.S.C. §794
- R.S. 23:323
- Local laws may exist - LSA-R.S. 51:2236

- Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. §4212
- 8. Sickle cell trait.**
- R.S. 23:351 *et seq.*
 - Local laws may exist - R.S. 51:2236
- 9. Labor union** - membership in or refusal to join.
- National Labor Relations Act (NLRA), 29 U.S.C. §151 *et seq.*
 - R.S. 23:823, 824; 881 *et seq.*; 981 *et seq.* ("right to work" laws)
 - Local laws may exist - R.S. 51:2236
- 10. Military service.**
- Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §4301 *et seq.*
- 11. Exercising rights**

Many federal and state statutes prohibit retaliation for an employee's exercise of rights thereunder. Even in the absence of a statutory provision, the U.S. Supreme Court has found such protections implied in recent cases. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). Statutes with such provisions include, *but are not limited to*, the following:

- Political rights, R.S. 23:961, 962
- Enforcement of labor laws in Louisiana, R.S. 23:964, 967
- Refusal to participate in abortion, R.S. 40:1291.31
- National Guard service, R.S. 29:38
- Unemployment compensation benefits, R.S. 23:1691
- Worker's compensation claim, R.S. 23:1361
- "Right to work" laws, R.S. 23:881, 981
- ERISA, 29 U.S.C. §1001 *et seq.*
- Jury duty, R.S. 23:965
- Fair Labor Standards Act, 29 U.S.C. §215
- Family and Medical Leave Act, 29 U.S.C. §2615
- Occupational Safety and Health Act, 29 U.S.C. §651 *et seq.*
- National Labor Relations Act, 29 U.S.C. §151 *et seq.*
- Consumer Credit Protection Act, 15 U.S.C. §1674
- Fair Credit Reporting Act, 15 U.S.C. §1681
- Garnishments, R.S. 23:731
- USERRA, 38 U.S.C. §4301 *et seq.*
- Clean Air Act (whistleblower provisions), 42 U.S.C. §7622
- Louisiana Environmental Whistleblowers Law, R. S. 30:2027
- Smoking or nonsmoking, R. S. 23:966
- Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610
- Energy Reorganization Act of 1974, 42 U.S.C. §5851
- Safe Drinking Water Act, 42 U.S.C. §300j-9(l)
- Solid Waste Disposal Act, 42 U.S.C. §6971
- Toxic Substance Control Act, 15 U.S.C. §2622
- Federal Water Pollution Control Act, 33 U.S.C. §1367
- Fair Housing Act, 42 U.S.C. 3601 *et seq.*

F. Work conditions.

1. Health and safety.

- Occupational Safety and Health Act (OSHA), 29 U.S.C. §651 *et seq.*
- Agricultural Worker Protection Act (AWPA), 29 U.S.C. §1801 *et seq.*
- R.S. 40:1300.41; 40:1300.1; 23:966 (state smoking laws)
- Local laws may exist

2. Child labor.

- Fair Labor Standards Act (FLSA), 29 U.S.C. §201 *et seq.*
- R.S. 23:231 *et seq.*; 23:151 *et seq.*; 23:381-392

3. Drug/alcohol testing.

- ADA or Title VII if discriminatory
- May have right to sue in tort - C.C. 2315
- R.S. 49:1001 - state testing standards and procedures
- U.S. Const. Amends. 4, 5, 14; La. Const. Art. I, §5
- R.S. 23:634 - restriction on employee payment of testing costs

4. Polygraph testing.

- 29 U.S.C. §2001 (Employee Polygraph Protection Act)
- R.S. 37:283 (Polygraphist's Act) - affords no private right of action. *Ballaron v. Equitable Shipyards, Inc.*, 521 So.2d 481 (La. App. 4 Cir. 1988) (requiring employee consent to test not invasion of privacy)

5. Privacy violations.

- May have right to sue in tort - C.C. Art. 2315
- Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.* (improper sharing of information)
- Electronic Communications Privacy Act (ECPA), 18 U.S.C. §2510 *et seq.*
- Electronic Surveillance Act, LSA-R.S. 15:1301 *et seq.*
- May have criminal complaint (e.g., R.S. 14:283 - video voyeurism)
- Privacy Act, 5 U.S.C. §552a (as to federal agencies only)

6. Dress or grooming codes.

- FLSA, 29 U.S.C. §201 *et seq.* - cost of clothing deductions may violate the statute
- Title VII or ADA or other similar law if discriminatory
- May have suit in tort for privacy violation - C.C. Art. 2315

7. Workplace harassment or violence.

- State or federal criminal laws
- Title VII, if discriminatory
- May have right to sue in tort - C.C. Art. 2315

8. Access to personnel information.

- R.S. 23:1016 (toxic exposure records only)
- R.S. 49:1011 (positive employee drug test records)
- There is no general state statute providing employee right of access; may be able to get information desired through administrative or other proceedings, such as unemployment compensation claim

APPENDIX B:
ADMINISTRATIVE ENFORCEMENT AGENCIES:
EEOC AND LOUISIANA COMMISSION ON HUMAN RIGHTS

1. Equal Employment Opportunity Commission (EEOC).

The Equal Employment Opportunity Commission (EEOC) (www.eeoc.gov) was established by Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e-16(b). The EEOC enforces the principal federal statutes prohibiting employment discrimination, usually through investigation of administrative charges brought by individuals who believe they have been discriminated against (although it may also pursue an investigation independently). The EEOC brings a lawsuit in only a small percentage of cases.⁸ EEOC regulations are found at 29 C.F.R. §1600 *et seq.* The agency issues enforcement guidelines which do not have the force of law, but which are used in investigating charges.

The EEOC may order a variety of relief including hiring, reinstatement or upgrading of employees; restoration of back pay; promotion; reasonable accommodation; posting of notices; any corrective action; fees and costs. If intentional discrimination is found, compensatory and punitive damages may be awarded under most EEOC-enforced laws. Claims not addressed in the charge generally may not be raised in subsequent litigation.

All laws enforced by the EEOC, except for the Equal Pay Act and retaliation claims, generally require the timely filing of an EEOC charge before a private lawsuit may be filed in court. Equitable tolling of the filing period is judicially allowed only under certain limited circumstances. *St. Louis v. Texas Worker's Compensation Com'n*, 65 F.3d 43 (5th Cir. 1995), *cert. denied* 518 U.S. 1024. For example:

- When the defendant (actively or through the failure to post notices required by the statute), EEOC, or state agency has deceived or misled the plaintiff, equitable tolling may be permissible. *See, e.g., Anderson v. Unisys Corp.*, 47 F.3d 302 (8th Cir. 1995), *cert. denied* 516 U.S. 913.
- Mental incompetence may be sufficient to toll the period. *Bassett v. Sterling Drug, Inc.*, 578 F.Supp. 1244 (S.D. Ohio 1984), appeal dismissed 770 F.2d 165; *Persons v. Runyon*, 998 F.Supp. 1166 (D.Kan. 1998).
- Generally, the process of an EEOC complaint in Louisiana is as follows:
- An aggrieved party files a charge within 180 days of the alleged unlawful action (300 days if the charge is also covered by a state or, with all laws but the ADEA, local anti-discrimination law, and, as is the case in Louisiana, a state agency exists to enforce the charge).
- The commission "dual files" the charge with the Louisiana Commission on Human Rights if it is also covered by state or local law.
- The commission prioritizes the charge and may investigate. While it may dismiss a complaint for lack of merit on its face, without conducting an investigation, the EEOC *must* accept all charges of discrimination. A complainant has the right to file and should not be turned away.

⁸ Each EEOC office has priorities for impact litigation. If your client's case falls within those priorities, the EEOC should provide considerable assistance. Retaliation is almost always viewed as a high priority.

- The commission either finds a violation or dismisses the complaint.
- If a charge is dismissed for insufficiency of evidence, a complainant may institute a civil action within 90 days of a charge's dismissal, after a 'right to sue' notice is issued.
- If the commission finds that discrimination has occurred, it will attempt mediation or settlement; if unsuccessful, it will decide whether to pursue the charge itself in federal district court.
- If it decides not to pursue a charge itself, it will issue a "right to sue" letter giving the complainant 90 days to file a lawsuit himself. If the action involves Title VII or ADA charges against state or local governments, the Department of Justice makes this last decision.

EEOC in Louisiana. The only office in Louisiana is located in New Orleans, at 1555 Poydras, Suite 1900, New Orleans, LA 70112; 1-800-669-4000. Charges can be made in person or by mail.

2. **The Louisiana Commission on Human Rights (LCHR).**

R.S. 51:2231 *et seq.*, the Louisiana Commission on Human Rights Act, provides for a commission ostensibly empowered to investigate and enforce complaints about employment practices arising under state discrimination laws. §2231(C). A plaintiff under Louisiana's discrimination statutes is *not* required to file with the LCHR or the EEOC prior to filing a civil lawsuit in state court. *Coutcher v. Louisiana Lottery Corp.*, 97 0666 (La. App. 1 Cir. 11/7/97), 710 So.2d 259, writ denied 709 So.2d 758. The process of an LCHR complaint is essentially the same as with the EEOC, and the time limits for filing are the same. The LCHR will also "dual file" with EEOC any complaint which is also covered by federal law. Any party may seek judicial review of commission action in accordance with the Administrative Procedure Act, R.S. 49:964 (i.e., within 30 days).

Reaching the LCHR. Although it receives some EEOC funding as a "deferral agency" to handle complaints alleging violations of both federal and state laws, the LCHR is inadequately funded by the state. Its practical function is merely to extend the EEOC filing deadline to 300 days. The LCHR does not conduct independent investigations and there are no field offices in the state. There is thus no real practical reason to file with the LCHR. To get complaint filing forms, find the current contact information for the agency on www.gov.state.la.us.

