

## *The Legal Rights of Women in Vermont*

# Employment Rights

## Chapter 5

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Workers have many state and federal legal rights that are relevant to various stages in employment. These include discrimination, harassment, parental and family leave, earned sick time, pregnancy and breastfeeding, drug testing, minimum wage, overtime, military and National Guard duty, unemployment compensation, workers' compensation, labor trafficking as well as others.

In general, Vermont law applies to more employers than federal law does. If you suspect discrimination in the workplace, contact the Civil Rights Division of the Vermont Attorney General's Office. If you are a state employee, contact the Vermont Human Rights Commission. ([See VCW's Resource Directory – Employment section for contact information.](#))

## **Wages**

### **Minimum Wage**

**The Federal Fair Labor Standards Act (FLSA), and the Vermont Minimum Wage Act, set the minimum hourly wage rates for all “covered employees.”**

Covered employees are all individuals employed or permitted to work by an employer except the following: casual baby sitters and companions for the aged and infirm; executive, administrative, and professional employees; outside sales people; employees of certain small, local retail or service establishments; and some agricultural workers.

### **Tipped Minimum Wage**

**If you work in a hotel, motel, tourist place or restaurant and customarily and regularly receive more than \$120 per month in tips for direct and personal customer service you may be considered a tipped employee.**

Examples of tipped employees include wait staff, bartenders, housekeepers, counter servers and bellhops.

The basic hourly wage for tipped employees in Vermont for 2017 is \$5.00. The tipped worker's total earnings from wages and tips during a pay period must equal or be larger than the minimum wage (\$10.00 in 2017). If the combined amount of the basic wage and tips does not meet that requirement, the employer must make up the difference.

### **Other Wage Regulations**

Annual increases in both the state minimum and tipped minimum wage rate are based on increases in the August Consumer Price Index (CPI) or five percent, whichever is smaller. Vermont law does not allow the minimum wage to go down.

**The minimum hourly rate for all covered employees for 2017 is 10.00.** The wage will increase to \$10.50, effective 01/01/2018. You should check with the Vermont Department of Labor and Industry to find out if the state or federal rates have been changed by the time you consult this guide.

**Under certain conditions, lower rates may be paid to learners, workers with disabilities, and students.** A learning wage of 85% of minimum wage may be paid for a total of 240 hours only and the person must be 20 years old or younger. This does not include the hotel, motel, tourist place, or restaurant industry. Only retail, wholesale, and service establishments are covered.

Both federal and state laws permit lodging, board or other facilities provided by an employer to be considered as a part of wages.

### **Overtime Pay**

**Many covered workers are entitled to one and a half times their regular rate of pay when they work more than 40 hours per week.**

Vermont law exempts from this overtime requirement employees of:

- retail or service establishments;
- hotels, motels or restaurants;

- the state and political subdivisions of the state;
- certain amusement or recreational establishments;
- certain employees engaged in transportation.

Your employer must pay you overtime wages for any time over 40 hours in a work week and cannot require you to take compensatory time or time off at a later time instead.

If your 40 hours includes working on the weekend, this “weekend work” is not entitled to overtime pay. Neither federal nor state law requires time-and-a-half pay for weekends or holiday work or, generally, for daily overtime, if these are part of your basic 40 hours.

### **Wage Supplements/Benefits**

An employer is not required to provide you with paid or unpaid holidays (such as Memorial Day or Thanksgiving), paid or unpaid sick leave (except as provided by state and federal parental and family leave laws), paid or unpaid vacation time or severance pay when you leave the business. However, if your employer has given you a written agreement in the form of an employee handbook, memorandum, or correspondence, etc., providing for vacation time, sick leave, holidays and/or severance pay, then the employer must give you those benefits.

In the case where benefits and/or wage supplements are offered in a collective bargaining agreement (union contract), you should contact your union representative.

If you have concerns about unpaid retirement or profit sharing plans, you should contact the Employee Benefits Security Administration Division of the U.S. Department of Labor.

### **Termination and Severance Pay**

Vermont is considered an “**employment at will**” state. **You can be terminated from your job for any reason as long as you are over 18 and the termination was not due to your being a member of a “protected class” as described in the discrimination section of this chapter, e.g. race, color, national origin, religion, sex, age or mental or physical disability.**

It is also unlawful to retaliate or discriminate against employees or applicants that have alleged employment discrimination.

Vermont law also prohibits discrimination based on sexual orientation, HIV status, and place of birth. If you feel you have been discharged due to discrimination, you should contact the Vermont Attorney General's office, Civil Rights Division.

As noted in the previous section, the law does not require discharge notices or severance pay (pay given in place of notice). However, if your Vermont employer has offered vacation, sick, or severance pay to you, in writing, Vermont law will help you receive these “wage supplements.”

## **Addressing Violations of Minimum Wage and Overtime Law**

For help with addressing violations of minimum wage and overtime law violations, you can:

- consult with a private attorney;
- contact the Vermont Department of Labor, Wage and Hour Division;
- contact the U.S. Department of Labor, Wage and Hour Division.

For contact information and other resources, [see VCW's Resource Directory – Employment section](#).

## **Flexible Working Arrangements**

**Vermont employees have the right to request flexible working arrangements and employers must discuss and consider these requests.**

The law defines flexible working arrangements as “intermediate or long-term changes in the employee’s regular working arrangements, including changes in the number of days or hours worked, changes in the time the employee arrives at or departs from work, work from home, or job-sharing.” This law applies to all Vermont employees and gives them the right to request a flexible working arrangement for any reason and requires employers to discuss and consider such requests at least twice per calendar year.

The law does not change existing legal rights of employers and employees to create, terminate, or modify flexible working arrangements. Instead, it provides the framework for meaningful dialogue about whether such arrangements would work for both parties. Importantly, the law also protects employees seeking flexible working arrangements from retaliation or discrimination.

This law doesn’t apply to other forms of leave that may already be required by Vermont or federal law, such as parental or family leave, accommodations for disabilities, or workers’ compensation injuries. The law does not diminish rights set forth in labor contracts. It also doesn’t apply to routine shift scheduling or vacation requests.

Employees may make the request verbally or in writing. The request should be as specific as possible, and employees should be prepared to discuss how the arrangement would still allow the employer to meet business needs.

The employer must then discuss the request in good faith, a legal term meaning honestly and fairly. The discussion can take place in person or over the telephone. During the discussion, either party may propose alternatives to the arrangement requested.

The employer has the duty to consider in good faith whether the requested arrangement could be granted in a manner that is not inconsistent with its business operations or its legal or contractual obligations. The law identifies several factors the employer may consider: (1) the burden of additional costs; (2) the effect on aggregate employee

morale; (3) the effect on ability to meet consumer demand; (4) an inability to reorganize work among existing staff; (5) an inability to recruit additional staff; (6) a detrimental impact on business quality or performance; (7) an insufficiency of work during periods the employee proposes to work; and (8) planned structural changes to the business.

The law requires employers to notify employees of their decision. If the request was submitted in writing, the employer must state any complete or partial denial of the request in writing.

## **Parental, Medical, Earned Sick, and Other Types of Work Leave**

Federal and State law ensures that employees have the legal right to take long-term and short-term leaves from their jobs. Under the Family and Medical Leave Act (FMLA) and Vermont's Parental and Family Leave Act, covered employers must provide leave for pregnancy, the birth or adoption of a child, serious illness of yourself or a family member, some school activities, and some medical appointments. **Since federal and state law differ, especially in their application to employers of different sizes and for different kinds of leave, it is important to read the following descriptions carefully.**

### **Parental Leave**

**If you have worked for your current employer for an average of at least 30 hours a week for twelve months and your employer has at least 10 employees who work a minimum average of 30 hours per week during a year, you are entitled to take a parental leave.** You can take a parental leave at any of the following times: during your pregnancy, following the birth of your child, or within a year after a child up to the age of 16 years has been placed in your home for adoption.

### **Family (Medical) Leave**

The Family and Medical Leave Act (FMLA) allows eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons.

**If you have worked for your current employer for an average of at least 30 hours a week for twelve months and your employer has at least 15 employees who work a minimum average of 30 hours per week during a year, you are entitled to take a family (medical) leave.**

You can take a family leave for your own serious illness or the serious illness of your child, stepchild, ward who lives with you, foster child, parent, spouse, or your spouse's parent. The U.S. Department of Labor clarified the definition of "son and daughter" under the Family and Medical Leave Act to ensure that an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship. A "serious illness" is defined in the Vermont law as an accident, disease or physical or mental condition that poses imminent danger of death, requires

inpatient care in a hospital or requires continuing in-home care under the direction of a physician.

Family Leave cannot be extended past 12 weeks, either alone or in combination with Parental Leave.

### **Length and Conditions of Parental or Family Leave**

**Parental or family leave can be taken for up to 12 weeks during any 12-month period.** You can take more than one leave during a 12-month period but you are not entitled to take more than a total of 12 weeks unless your employer is willing to give it to you. Both parental leave and family leave run concurrently, allowing you a maximum of 12 weeks leave between both categories.

**Employees are guaranteed up to 12 weeks of unpaid leave during pregnancy and/ or following the birth of an employee's child.** It is important that you give reasonable written notice to your employer that you want to take a leave, including when you want the leave to start and when you plan to return to work.

**Vermont law only requires that your employer provide you with an unpaid leave, unless you would otherwise be entitled to take paid leave under existing policies or collective bargaining agreements.** In addition, if you have any unused leave time coming to you at work (whether it is accrued vacation, sick leave, or other form of paid leave) you have the right to use up to six weeks of that paid leave as part of your parental or family leave. After six weeks, it is up to the employer to choose whether or not to apply accumulated paid leave time.

If you are taking a leave due to serious illness, and your employer requests it, you are required to provide information from a certified health provider explaining why you need to take the leave and for how long. Your employer may also ask your health provider for certification that you are fit to return to work.

**Your employer is required to continue your employment benefits while you are on leave and under the same conditions as if you had been working.** However, your employer can require you to pay the "employee's contribution" to those benefits, which is the amount that would normally come out of your paycheck. When you return to work, you are entitled to the same or comparable job that you left.

In 2012, the Vermont Supreme Court ruled that annual and sick leave accruals are not employee benefits. **Therefore, your employer is not required to accrue vacation and sick leave hours for the unpaid hours that you take off for either short-term or long-term family or parental leave.** However, your employer may continue to allow you to accrue vacation and sick time during either short or long-term leave.

If you work for an employer who employs 50 or more employees, you might have some additional rights under the federal Family and Medical Leave Act.

## **Short-Term Family Leave**

Vermont law also allows you to take a number of short-term leaves each year if they are related to certain school activities or medical appointments of you or your family members. The law covering short-term family leaves applies to employees who have worked an average of at least 30 hours a week for a year for an employer that employs 15 or more employees.

**Short-term leaves may be taken by an employee to participate in the academically-related preschool or school activities of that person's child, stepchild, foster child or ward.** These include such things as parent-teacher conferences.

**An employee may also use a short-term leave to attend routine medical or dental appointments, or to respond to medical emergencies, of their child, stepchild, foster child or ward, and of their parent, spouse or parent-in-law.** The law also allows an employee to go with a parent, spouse or parent-in-law to other types of appointments for professional services relating to their care and well-being. Examples might include accompanying the family member to meetings with nursing homes or home health care providers.

The law allows an employee to take up to 4 hours of unpaid leave in any 30-day period as long as not more than 24 hours are taken in any 12-month period. An employer can require an employee to take off at least two hours for each requested leave, even if the employee believes the activity or appointment will take less time. An employee can choose to use any accrued paid vacation or personal leave rather than taking the time off as unpaid leave.

If an employee wishes to take a short-term family leave, after trying to schedule the appointment outside of regular working hours, she must tell her employer as soon as possible. The notice to the employer cannot be less than seven days before the leave is to be taken. This prior notice requirement does not apply in emergencies, when being held to at least a seven-day notice would have a negative impact on the family member.

## **Retaliation Prohibited**

An employer cannot fire or retaliate in any other manner against an employee who exercises the right to take any leave as defined in these laws.

## **Earned Sick Leave**

A state law effective January 2017 requires employers to provide earned paid sick time to their employees who work an average of 18 hours per week or more (excluding seasonal workers who work fewer than 20 weeks per year, temporary employees scheduled to work fewer than 20 weeks, and certain per diem or intermittent workers). Small businesses with fewer than five full time workers have an extension until January 1, 2018. Employers may institute a one-year waiting period for all employees in the first

year this act is effective. New businesses are exempt for one year after hiring their first employee.

Employees must earn the equivalent of at least 1 hour of paid time for every 52 hours worked. Employers can limit employees to using 40 hours of earned paid sick time per year. Employers can also opt to require a one-year waiting period for new-hires, during which they must earn but may not use earned sick time.

Employees may use their earned time off:

- if they are ill or injured;
- to obtain professional health care;
- to care for a sick or injured parent, grandparent, child, brother, sister, parent-in-law, grandchild, or foster child, including to help them obtain health care;
- to arrange for social or legal services, obtain medical care or counseling for themselves, a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or a foster child who is a victim of, or who is relocating as a result of domestic violence, sexual assault, or stalking; or
- to care for a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child because the school or business where that individual is normally located during the employee's workday is closed for public health or safety reasons.

## **Military and National Guard Leave**

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides employees who are called up to perform military service with reemployment rights. **If you miss work because you are called to military service, USERRA protects you for up to five years.**

If your military leave lasts less than 90 days, your employer must promptly return you to the job you would have had during that time. If your leave lasts more than 90 days, your employer may substitute a different job with the same pay, status, and seniority as the job you would have had. You continue to accrue seniority while on military leave and must be given any raises and promotions associated with that seniority. If you have health insurance, your employer must continue to offer it for up to 18 months after military leave, with restrictions on how much your employer can charge for continued coverage.

If you are a member of the reserve components of the armed forces (e.g. National Guard), Vermont law entitles you to 15 calendar days of employment leave. Your employer may not deduct sick leave or vacation days during this period. Your employer must reinstate you to the same position, with the same status, pay and seniority as you previously had. Whether this leave is paid is up to your employer.

Whether you are a member or reserve member of the armed forces, you must provide your employer with a reasonable notification of your military leave, if possible.

## **Military Family Leave Entitlements**

**The Family and Medical Leave Act (FMLA) also provides employment leave for parents, spouses, and children of members of the armed forces.** The FMLA allows qualified employees to take up to 12 weeks leave in a 12-month period for any “qualifying exigency” arising out of the active duty of their parent, child or spouse. “Qualifying exigencies” arising out of active duty include:

- short-notice deployment (deployment on 7 days or less notice) allows for seven calendar days off, beginning on the day the military member receives notice of deployment;
- military events and related activities;
- childcare and related activities;
- making financial and legal arrangements to address the military member’s absence such as preparing and executing financial and healthcare powers of attorney or obtaining military identification cards;
- rest and recuperation before deployment (15-day maximum leave);
- attending qualified post-deployment activities up to 90 days following the termination of the military member’s covered active duty;
- attending counseling arising from the active duty status of the military member.

**The FMLA allows qualified employees up to 26 weeks of job-protected leave in a 12-month period to care for a service member with a serious injury or illness.** This leave may be used intermittently whenever medically necessary to care for a covered service member.

To qualify for either of the above military family leave entitlements, you must:

- work for a covered employer (all public agencies, local schools, and private employers with 50 or more employees in 20 or more work weeks during the year);
- have worked for the employer for at least 12 months;
- have worked at least 1,250 hours over the last 12 months; and
- Work at a location where at least 50 employees are employed within 75 miles of the employer.

## **Uniformed Services Discrimination Prohibited**

Under federal law, it is illegal for an employer to discriminate against a member of the uniformed services in relation to employment, promotion, or any workplace benefits.

## **Preference in Hiring of Ex-service Personnel for State Positions**

Vermont law requires that ex-service personnel who have a service-connected disability, their spouses, or their spouses who have a disability in their own right, be given

preference in hiring and retention for positions funded by state payroll dollars. This preference also extends to the unmarried widows and widowers of ex-service personnel. Preference must also be given to ex-service personnel who were on active duty during a war or campaign for which a campaign badge has been authorized and have been honorably discharged.

### **Teacher's Sick Leave**

Full-time public school teachers under contract to teach the regular school year are allowed a minimum of ten school days' sick leave with full pay during each school year. Any unused sick leave will accumulate up to a minimum of twenty days, for the duration of employment in the same school district.

### **Juror and Witness Leave**

Employees in Vermont are considered employed while serving as a juror, for purposes of determining seniority, fringe benefits, credit toward vacations and other rights, privileges, and benefits of employment. **Your employer cannot discriminate against you or lay you off because of your jury service.**

The same law applies to employees serving as witnesses to any legal proceeding at which the state is authorized to hear testimony under oath. **If you or a family member has been a victim of a listed crime, or you are a representative of a victim, your employer may not discharge or discipline you for honoring a subpoena to testify.**

### **Town Meeting**

Vermont law makes town meeting a holiday for employees of state government. **The law also gives Vermont employees the right to take unpaid leave from work for town meeting.** You must provide your employer with notice 7 days prior to your absence, and your absence cannot interfere with the essential operations of the business or entity that you work for. Students over 18 also have the right to attend town meeting, unless they are in state custody at a secure facility. These students may not be treated as truants for missing school to attend town meetings.

### **Addressing an Employer's Violation of the Parental and Family Leave Law**

For help with addressing an employer's violation of these laws, you can:

- file a complaint with the Vermont Attorney General's Office, Civil Rights Unit;
- file a complaint with your county's State's Attorney;
- file a complaint with the Vermont Human Rights Commission (only for employees of state government agencies);
- file a complaint with the U.S. Department of Labor, Wage and Hour Division (under the federal FMLA, if you work for an employer that has 50 or more employees);
- Consult with a private attorney.

For contact information and other resources, [see VCW's Resource Directory – Employment section](#).

## Workplace Health and Hygiene

**Under Vermont law, your employer must provide you with “reasonable opportunity” to eat and use toilet facilities in order to protect your health and hygiene.** Federal law mandates that if your employer provides a lunch period, it is counted as “hours worked” and must be paid unless the lunch period lasts at least thirty minutes and you are completely uninterrupted and free from work.

## Drug Testing

**Vermont law prohibits employers from requiring, or even asking, their employees or prospective employees to submit to drug or alcohol testing, except under specific circumstances.** (There may be exceptions for some kinds of jobs that are subject to federal regulations.)

An employer can prohibit an employee from using illegal drugs or alcohol during work hours or being under the influence during work hours.

Employers in Vermont are not allowed to do random or company-wide drug testing of their employees unless a federal law or regulation requires it. An employer can require an employee to undergo a drug test if all of the following conditions are met:

- there is a very strong reason (“probable cause”) to believe that the particular employee is using, or is under the influence of drugs;
- the employer has an employee assistance program for treatment of drug or alcohol abuse, or makes such treatment available through insurance coverage; and
- the employer does not terminate the employee for having a positive test result if the employee agrees to attend and successfully completes a rehabilitation program (although employees can be suspended for up to three months in order to do the program).

Employers are not prohibited from firing employees who engage in a treatment program and later test positive for drug use.

If you are applying for a job, employers can only require you to take a drug test if they have offered you a job and then made it contingent on your having a negative drug test as part of a comprehensive medical exam. Don't worry if you are taking a prescription drug or over-the-counter drugs for treatment of an illness or condition, since these are not allowed to be included in the test results.

If your employer is allowed to administer a drug test, there are some restrictions. First, the test can only be used to detect alcohol or drugs at nontherapeutic levels. Drugs detected at a therapeutic level are considered a negative test result. Second, the test

cannot require a blood sample. Finally, if the laboratory finds a positive result, a second test must be performed to confirm the test results.

## **Unemployment Compensation**

You might be eligible to receive unemployment compensation benefits if you have been laid off from your job or, under some circumstances, if you quit or were fired. Whether you can receive unemployment compensation benefits will depend on many factors. These can include why you were terminated, how long you worked and how much you have been paid over a particular time period.

To find out if you qualify for unemployment compensation benefits, contact the Vermont Department of Labor. ([See VCW's Resource Directory – Employment section for contact information.](#))

## **Domestic and Sexual Violence Transitional Employment Benefits**

You may be eligible for up to 26 weeks of unemployment payments (a state-funded program) if:

- you leave your job due to circumstances directly resulting from domestic violence, sexual assault or stalking;
- you fear that the violence will continue at, or on the way to or from work; and you intend to move away to protect yourself and/or your family; or
- you are fired from your job because of the violence.

To be eligible you need to try to find reasonable alternatives before quitting, such as asking your employer to transfer you to another (safer) job location. You also need to provide documentation of the domestic or sexual violence including a sworn statement from you, police records, court records, such as a relief from abuse order, or other documentation of the violence from an attorney, clergy person, or health care provider.

If you are denied unemployment benefits and you feel that you qualify under this program, contact the Vermont Department of Labor. ([See VCW's Resource Directory – Employment section.](#))

## **Workers' Compensation**

**If you have suffered a work-related injury or an occupation-related disease, you might be able to receive workers' compensation benefits.** A work injury is an injury that arises out of and in the course of employment. Injuries that are not covered under workers' compensation include an employee intentionally hurting themselves, injury while intoxicated at work, and an employee's failure to use a safety appliance.

**If you think you might be eligible, you must notify your employer, who then has 72 hours to report the injury to the Workers' Compensation Division of the Vermont Department of Labor.** At the same time, your employer's insurance adjuster is notified, who then has 21 days to investigate and decide whether or not to accept your claim. Make sure when you seek medical care for your injury or your illness that the doctor/medical facility knows that you believe that your injury/illness is work-related.

If you are injured on the job, you may be entitled to:

- payment of medical bills associated with that injury, including mileage to and from the doctor;
- temporary total or partial disability payments between the time of your injury and the time you can either return to work or you have improved medically as much as you are going to improve;
- permanent partial or total disability benefits for any permanent injury you have suffered;
- prescription drugs, medical equipment and reasonably necessary assistive devices and modifications to employee's home or car;
- vocational rehabilitation services to help you return to the work force;
- reinstatement to the first suitable, available position when you are able to return to work following your injury (as long as your recovery occurs within two years of the injury and you work for an employer who has at least 10 employees).

It is unlawful for your employer to retaliate because of a workers' compensation claim. See the section Retaliation and Whistleblower Protection below. If your claim is denied, you have the right to contest it by contacting the Workers' Compensation Division of the Vermont Department of Labor. ([See VCW's Resource Directory – Employment section.](#))

## **Discrimination and Harassment**

**Employment discrimination occurs when an employer treats applicants or employees unfavorably because of certain protected characteristics (e.g., age, race, or sex) or because they engage in certain legally-protected activities (e.g., opposing or complaining of discrimination or requesting workplace accommodations).** In many instances, employment discrimination is an intentional act. However, discrimination may also occur even if the employer is acting in good faith — such as when (i) neutral employment standards unnecessarily screen out certain classes of employees or applicants or (ii) employees of different sexes are not paid the same for performing the same work.

Employment discrimination is prohibited under both federal and state law. The five major federal laws are:

- Title VII of the federal Civil Rights Act of 1964, which prohibits employment discrimination based on the employee's race, color, religion, sex or national origin.

The Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing Title VII, has taken the position that Title VII prohibits discrimination against LGBTQ individuals on the ground that it is a form of unlawful sex discrimination;

- The Pregnancy Discrimination Act (PDA), which amended Title VII to clarify that pregnancy discrimination is a form of sex discrimination, and requires workplace accommodations for pregnant individuals on the same basis as those provided other workers facing similar physical limitations;
- The Equal Pay Act of 1963 (EPA), which requires equal pay for equal work;
- The Americans with Disabilities Act (ADA), which prohibits employment discrimination against qualified individuals with disabilities and requires reasonable accommodation of individuals; and
- the Age Discrimination in Employment Act (ADEA), which prohibits discrimination against individuals 40 and older.

In most instances, whether a federal law applies to an employer depends upon the size of the employer. Title VII, the PDA, and the ADA apply to employers with 15 or more employees. The ADEA applies to employers with 20 or more employees. However, the EPA applies to employers of any size, provided they are involved in interstate commerce.

Federal prohibitions against employment discrimination may also apply under Executive Orders. Specifically, Executive Orders 11246 and 11375 require entities that receive federal contracts or grants of at least \$10,000 to maintain workplaces free of discrimination on the basis of sex, race, color, religion and national origin.

Vermont's employment discrimination laws are similar to the federal laws but apply to all Vermont employers, regardless of size. The principal Vermont law is referred to as the Fair Employment Practices Act (FEPA).

The FEPA prohibits the same categories of discrimination as federal laws and adds a few additional categories:

- Sexual orientation;
- Gender identity;
- Place of birth;
- Ancestry; and
- HIV status

In addition, FEPA protects the same workplace activities protected by federal law (e.g., complaints of discrimination, requests for reasonable accommodation) and adds additional protected activities such as inquiring about, disclosing, and discussing wages. Some examples of prohibited employment policies and/or practices:

- **Job advertisements.** It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job based on

their protected category. For example, a help-wanted ad that seeks "females" or "recent college graduates" may discourage men and people over 40 from applying and may violate the law;

- **Recruitment.** It is illegal for an employer to recruit new employees in a way that discriminates against the protected class. For example, an employer's reliance on word-of-mouth recruitment by its mostly Hispanic work force may violate the law if the result is that almost all new hires are Hispanic;
- **Application and hiring.** It is illegal for an employer to discriminate against a job applicant because of his/ her protected class. For example, an employer may not refuse to give employment applications to people of a certain race;
- **Job referrals.** It is illegal for an employer, employment agency or union to take into account a person's protected class when making decisions about job referrals;
- **Job assignment and promotion.** It is illegal for an employer to make decisions about job assignments and promotions based on an employee's protected class. For example, an employer may not give preference to employees of a certain race when making shift assignments and may not segregate employees of a particular national origin from other employees or from customers;
- **Pay and benefits.** It is illegal for an employer to discriminate against an employee in the payment of wages or employee benefits on the basis of a person's protected class. For example, an employer may not pay Hispanic workers less than African-American workers because of their national origin; and men and women in the same workplace must be given equal pay for equal work;
- **Discipline and discharge.** An employer may not take into account a person's protected class when making decisions about discipline or discharge. For example, if two employees commit a similar offense, an employer may not discipline them differently because of their race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information;
- **Employment references.** It is illegal for an employer to give a negative or false employment reference because of a person's protected class.

## Sex or Gender Discrimination

**Sex or gender discrimination is treating an employee or applicant unfavorably because of that person's sex or gender.** Unlawful sex discrimination can occur at any stage of the employment process. Sex or gender discrimination may have taken place if employees are treated unequally or are subjected to different terms or conditions because of being a woman in any of the following areas of employment:

- **Recruitment.** For example, only recruiting from male-dominated fields;
- **Hiring.** For example, discouraging women from applying; not giving equal consideration to or refusing to hire;
- **Firing.** For example, using different standards for women and men in deciding whether to terminate;
- **Training.** For example, not providing equal training opportunities to women and men;

- **Job assignments.** For example, making assumptions about what work women can do;
- **Promotions.** For example, promoting a man over a more qualified woman; routinely passing over women for promotion;
- **Pay.** For example, paying women at a different rate than men for the same or substantially similar work;
- **Benefits.** For example, providing different benefits to women than men, such as pension and life insurance plans, health insurance and dates of optional retirement;
- **Layoffs.** For example, applying sexist and unequal standards when making lay-off decisions, such as thinking it would be harder on a family for a man to lose his job than a woman to lose hers;
- **Leave.** For example, not allowing women to take leaves in the same way or for the same reasons as men;
- **Treatment on the job,** e.g. discipline, harassment (see the section on Sexual Harassment later in this chapter);
- **All other employment-related activities.**

### **Questions Employers May Ask**

Employer questions that are not a per se violation of the law, but might be indicative of an intent to discriminate and therefore not wise to ask or answer:

- Are you pregnant?
- Are you married?
- Do you have children or plan to?
- What is your race, color, or ethnicity?
- What is your religious affiliation? There are exceptions for religious organizations, e.g., a Catholic high school could lawfully prefer Catholic employees.
- How old are you? (Age can be a legitimate hiring criterion for certain jobs, for example: wait staff may need to be 21 to serve alcohol.)

### **Employer questions that are illegal to ask:**

**Are you disabled?** Under the ADA (Americans with Disabilities Act), it is illegal to inquire about disability status before extending a conditional job offer. Once a job offer has been extended, the employer may make medical-related inquiries, including physical exams, as consistent with business necessity. For example, a candidate offered the position of police officer may be told that employment is contingent upon passing a physical exam, which may include inquiries about the person's medical history.

**Do you socially drink or smoke?** Under federal and Vermont law, smokers are not a legally protected category, however, asking about drinking may elicit disability-related answers ("No, I'm an alcoholic") and thus could be a violation of the ADA.

## Pay Discrimination

**Pay discrimination occurs when an employer pays lower compensation to an employee on the basis of sex for jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment.** Compensation can include salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses and benefits. If you earn less than a male coworker for equal work that requires equal skill, effort, and responsibility, and is performed under similar work conditions, your employer may be engaging in pay discrimination.

Employers may pay different wages based on seniority, merits, or other earning systems, but cannot arbitrarily pay women less than men.

Vermont's Fair Employment Practices Act, Title VII of the federal Civil Rights Act of 1964 and the federal Equal Pay Act of 1963 all offer protection from pay discrimination, depending on the circumstances of your case. The federal government also passed the Lilly Ledbetter Fair Pay Act of 2009. This Act gives employees a new cause of action against their employer each time discriminatory wages or compensation is paid. It allows victims of pay discrimination to challenge unequal wages well after the employee was first hired.

**Vermont law also prohibits employers from denying their employees the right to disclose wages and to discuss wages with co-workers.** Any attempt to punish or silence you or another employee, regardless of their sex, for disclosing wages or inquiring about a coworkers' wages is also considered pay discrimination. An employer cannot require you to sign a statement as a condition of employment that you will not disclose your wages to anyone, nor can they put a clause in their personnel manual that forbids you from discussing your salary with other employees.

## Sexual Harassment

**Employers are responsible for maintaining a workplace free of sexual harassment.**

The U.S. Equal Employment Opportunity Commission (EEOC) publishes guidelines on sexual harassment. These guidelines help form the basis of sexual harassment law that has been developing in state and federal courts.

Vermont law defines sexual harassment as follows: a form of sex discrimination and means unwelcome sexual advances, requests for sexual favors, or offensive comments about a person's sex when:

- (1) submission to that conduct is made either explicitly or implicitly a term or condition of employment; or

- (2) submission to or rejection of such conduct by an individual is used as a component of the basis for employment decisions affecting that individual; or
- (3) the conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

There are two forms of sexual harassment:

(1.) **“Quid pro quo”** (“this for that”) sexual harassment involves situations where an employer or supervisory level employee requests or requires a person (most often a woman) to exchange sexual favors for some job benefit (for example, being hired, promoted, getting some fringe benefit) or to prevent some negative job-related action (for example, being fired, getting a bad evaluation, not being allowed to go for special training). An employer can be held responsible for quid pro quo harassment whether or not the employer was aware that it had occurred.

(2.) **“Hostile environment”** sexual harassment occurs when the conduct of behavior is:

- either sexual in nature or directed at only one sex; and
- frequent or repeated behavior, or a single severe incident (otherwise referred to as either “severe or pervasive”); and
- unwelcome; and
- unreasonably interfering with a person's ability to perform work, or creating an abusive environment within which to work.

**You do not need to be the “victim” of the harassment in order to claim a “hostile environment.”**

An employer will usually be held responsible for harassment that is committed by a supervisor or manager, especially if some adverse action happens to you or to another employee as part of the harassment, or as punishment for not giving in to the harassment.

If a coworker causes the harassment, the employer may be held liable if the employer knew or should have known of the harassment and failed to take prompt and appropriate action in response to this knowledge.

If harassment by a supervisor/manager has occurred, but there hasn't been any adverse action by the supervisor/manager, the employer can only escape liability if it has taken reasonable steps to prevent harassment, has promptly and appropriately addressed claims of harassment, and the victim unreasonably fails to use the employer's grievance or complaint process.

**Under Vermont's Sexual Harassment in Employment Act, all employers are required to have a sexual harassment policy.** Employers must provide it to every employee and display it on a poster that describes the employer's policy against sexual harassment. The policy and poster also must include a description of how an employee

could file a complaint with an appropriate state and federal agency. If the employer has more than five employees, the policy and poster are also required to provide a description of how an employee could file an internal complaint with the employer.

## **Pregnancy Discrimination**

Pregnancy discrimination is treating a woman unfavorably because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. **Discrimination that is directed at women because they are pregnant is another form of unlawful sex discrimination in employment.** Congress enacted the Pregnancy Discrimination Act, making it clear that a woman cannot be discriminated against in employment simply because she is pregnant. This means that an employer cannot make assumptions about what types of jobs a pregnant woman is capable of performing, cannot refuse to hire a pregnant woman and cannot fire a woman because she is pregnant. Furthermore, if a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, she must be treated the same way as any other temporarily disabled employee. This includes allowing her to take a disability leave, or leave without pay.

A recent U.S. Supreme Court case, *Young v. UPS*, ruled that employers couldn't intentionally discriminate against pregnant employees, but the employer is only obligated to accommodate pregnant workers to the extent they accommodate other employees who are similarly situated in their ability to work.

The Vermont Supreme Court specifically recognized that sex discrimination under Vermont's Fair Employment Practices Act also covers discrimination on the basis of pregnancy.

**A new Vermont law, effective January 1, 2018 requires employers to provide reasonable accommodations to pregnant workers who request them, unless it would be an undue hardship on the employer.** Those accommodations include, but are not limited to, a seat, access to water, lift restrictions, and climbing restrictions. The new law extends the same rights and standards with respect to the provision of a reasonable accommodation as a qualified individual with a disability, regardless of whether the pregnant individual qualifies as a person with a disability.

## **Nursing Mothers in the Workplace**

Vermont law protects nursing mothers in the workplace for up to three years following the birth of a child. Employers must provide a reasonable time and place for mothers to express breast milk in privacy throughout the day, unless it would substantially disrupt the employer's operations. A reasonable place does not include a bathroom stall. Whether these breaks are compensated is left to the employer's discretion, unless modified by a collective bargaining agreement.

## Other Forms of Employment Discrimination

Vermont extends protection of many anti-discrimination laws, including the Fair Employment Practices Act, to cover people who are gay, lesbian, bisexual, and those experiencing gender identity discrimination. The same legal rights that make it unlawful to discriminate against or to harass people on the basis of sex also apply to people who experience discrimination or harassment because of their sexual orientation or gender identity.

In addition to sex and sexual orientation, it is important to understand that the law prohibits discrimination or harassment in hiring, pay, work conditions, promotions, discipline, treatment on the job, etc., against any person because of:

- **Race** (for example, African American, Asian American, Native American);
- **Color** (any type of skin color);
- **National origin** (being from outside the U.S.);
- **Religion** (an employer has to make reasonable accommodations for an employee's religious practices or beliefs);
- **Genetic information** (information about an individual's genetic tests, including family members);
- **Gender identity** (whether you identify yourself, or are perceived as, male or female, regardless of your assigned sex at birth);
- **Ancestry** (your family background or heritage);
- **Place of birth** (where you were born, inside or outside the U.S.);
- **Age** (18 years of age or older - can be because you are young or because you are older), it is lawful for an employer to use age as an occupational qualification that is reasonably necessary for the normal operation of a particular business;
- Having a **positive HIV**-related blood test;
- **Physical or mental disability**;

Discrimination on any of these bases is unlawful and can be addressed through the same avenues as sex discrimination.

## Disability

People with physical or mental disabilities face particular challenges in the workplace that require not only equal treatment but additional safeguards. People are considered to have a disability if they have, are regarded as having, or have a history of, a physical or mental impairment that substantially limits their ability to do such things as walking, talking, seeing, hearing, speaking, learning or working.

It is against the law for a "qualified person with a disability" to be discriminated against in employment. A "qualified person with a disability" is a person with a disability who is capable of performing the essential functions of the job with or without a reasonable accommodation made for the disability.

Vermont's Fair Employment Practices Act (covering all Vermont employees) and Title I of the federal Americans with Disabilities Act (if you work for an employer with 15 or more employees) both provide safeguards against disability discrimination.

Federal law bans disability discrimination in regards to job application procedures, hiring, advancement, discharge, employee compensation, job training and other terms. **Federal law also bans discrimination against employees for being associated with a person with a disability.** For example, a company cannot refuse to hire you because you have a disabled child or have high health costs and would be eligible to be covered under the company's employee health plan.

Employers cannot ask applicants to answer medical questions, take a medical exam, or identify a disability. An employer may ask an applicant whether or how they can perform the job. After the applicant is offered the job, an employer can condition employment by requiring the applicant to answer medical questions or to pass a medical exam. An employer must require the same questions or the same exam of employees for the same job.

### **Reasonable Accommodations**

Federal and State law require employers to make reasonable accommodations at the job that would enable a person to perform the job's essential functions or tasks. **A "reasonable accommodation" is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.** For example, reasonable accommodations may include:

- provision or modification of equipment or devices;
- job restructuring;
- part-time or modified work schedules;
- reassignment to a vacant position;
- adjustment or modification of examinations, training materials, or policies;
- provision of readers and interpreters;
- provision of readily accessible and usable workplaces for people with disabilities.

**An employee must ask for the reasonable accommodation.** Examples might include provision of particular devices to assist in doing the job, modifications to office space, job restructuring or modified work schedules. An employer might refuse to grant the request if it can show that the request is not reasonable, or if it would cause an undue hardship to the employer, e.g. excessive cost or disruption. An employer cannot refuse a reasonable accommodation because it involves some cost.

The Americans with Disabilities Act also prohibits employers from asking job applicants

if they have a disability or asking specifics about a disability, unless it relates to an employee's or a prospective employee's request for a reasonable accommodation.

Employers may not withdraw an employment offer based on the information obtained in a medical examination, unless it is job-related or necessary for the conduct of the employer's business. **However, the job offer may be withdrawn if the employee's disability constitutes a "direct threat" to the health and safety of the employee and others and no reasonable accommodation is available.**

## **Retaliation and Whistleblower Protection**

**Employers are prohibited by both Vermont and federal employment discrimination laws from taking any retaliatory action against an employee who complains of discrimination or harassment to an employer or to a state or federal enforcement agency.** This protection also applies to employees who cooperate with, or provide support to, an investigation into a claim of discrimination or harassment. Retaliation is an adverse action against an employee. Examples of retaliation are:

- firing or laying off;
- failure to hire;
- blacklisting;
- demoting;
- denying overtime or promotion;
- reducing hours or pay;
- denial of benefits;
- disciplining;
- intimidation;
- harassment; or
- making threats.

Vermont law also protects hospital and nursing home employees against employer retaliation. If you work in a hospital or nursing home, your employer may not retaliate against you for reporting any activity or policy you reasonably believe violates the law, or any activity or policy you reasonably believe constitutes improper patient care. Your employer may not retaliate against you for refusing to participate in any activity you reasonably believe illegal or constitutes improper patient care.

It is also against the law in Vermont for an employer to fire or to discriminate against you for filing a workers' compensation claim. It is also unlawful for an employer to refuse to hire an applicant because the applicant filed a workers' compensation claim. See section later in this chapter on Workers' Compensation.

You must report the alleged violation to a supervisor, and give your employer a reasonable opportunity to address the problem.

## **Polygraph Protection**

Vermont employers are generally prohibited from subjecting you to a polygraph (or “lie detector”) test. Employers cannot refuse to hire, promote, or change your status of employment if you refuse a polygraph test.

Please note however, the following employers are allowed to administer polygraph tests:

- Department of Public Safety;
- Department of Motor Vehicles, for law enforcement positions;
- Police and Sherriff’s departments, for sworn officers of the law;
- Employers whose primary business is in the sale of precious metals or jewelry;
- Employers whose business includes the manufacture or sale of certain regulated drugs, for employees in direct contact with those drugs;
- Employers required to administer polygraph tests under federal law.

## **Addressing Discrimination and Retaliation**

If you believe you have suffered discrimination, harassment or retaliation in employment, you have a number of options. You may choose more than one of the following options:

- follow your employer’s internal complaint procedures;
- file a complaint with the Vermont Attorney General’s Office, Civil Rights Unit;
- file a complaint with the Vermont Human Rights Commission (only if you are an employee of a state agency);
- file a complaint with the U.S. Equal Employment Opportunity Commission (EEOC);
- file a complaint with the Office of Federal Contract Compliance (only if you believe your employer receives some federal funding);
- file a complaint with the U.S. Dept. of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (if your complaint involves national origin or citizenship discrimination);
- consult with a private attorney.

[\(See VCW’s Resource Directory – Legal section for contact information.\)](#)

At the state level, potential remedies may include: reinstatement to your job; back wages and benefits; emotional distress damages; reasonable cost of your attorney’s fees; and particular requirements that must be met by your employer.

If you bring your case in federal court, the 1991 Civil Rights Act enables employees who have suffered intentional discrimination or harassment to be awarded money damages. Federal law places a limit on the amount of money that can be awarded by a court. For example, an individual can only recover up to \$50,000 if the employer has 100 or fewer employees; up to \$100,000 if it has 101 to 200 employees; up to \$200,000 if it has 201 to 500 employees; and up to \$300,000 if it has more than 500 employees.

## Labor Trafficking

In 2011, Vermont became the 42<sup>nd</sup> state to pass human trafficking legislation. This law includes labor trafficking as well as sex trafficking. If you feel that you have been forced to stay in a job or perform a service through force, fraud or coercion, you may be a victim of labor trafficking. You do not need to be an immigrant or have moved to Vermont for the job. It does not matter if you originally consented to do the job or signed a contract.

**An employer may not withhold your identification card or passport or threaten to withhold food or medical care.**

Examples of labor trafficking may include working as a domestic servant (nanny or maid), in a sweat shop, in the meat packing industry, as a janitor, restaurant or food service worker, a migrant, a farm worker, or in the hotel or tourist industry.

Note that you may be eligible for victim's assistance services and legal help, including immigration assistance, as soon as a law enforcement officer finds there is a probable cause of labor trafficking.

For a full description of this law including the legal definition of coercion, criminal penalties for trafficking, and your rights as a victim including immigration assistance, please [see the Violence Against Women and Children chapter of \*The Legal Rights of Women in Vermont\*](#).

## Relevant Laws

### Vermont:

Absence on Military Service and Training, 21 V.S.A. §491 – 493  
Accommodations for pregnant employees, 21 V.S.A. § 495d  
Drug Testing law, 21 V.S.A. § 511, et seq.  
Earned Sick Time, 21 V.S.A. Chapter 5, subchapter 4b  
Employment Conditions, 21 V.S.A. § 304  
Fair Employment Practices Act, 21 V.S.A. §495, et seq.  
Flexible Working Arrangements, 21 V.S.A. §309  
Human Trafficking, 13 V.S.A. §2651, et seq.  
Juror and Witness Work Leave, 21 V.S.A. § 499  
Town Meeting, 21 V.S.A. §472b.  
Military Preference in Appointment to State Jobs, 20 V.S.A. §1543  
Minimum Wage and Hour Act, 21 V.S.A. §381, et seq.  
Nursing Mothers in the Workplace, 21 V.S.A. §305  
Parental and Family Leave, 21 V.S.A. §470, et seq.  
Polygraph Testing as Condition for Employment, 21 V.S.A. §494a-b  
Sexual Harassment in the Workplace, 21 V.S.A. §495d (13), 495h §1755  
Sick Leave, 16 V.S.A.

Subpoena to Testify, 13 V.S.A. §5313  
Unemployment Benefits for Victims of Domestic and Sexual Violence, 21 V.S.A. §1251, et seq.  
Unemployment Compensation Act, 21 V.S.A. §1302, et seq.  
Whistleblower Protection, 28 V.S.A. §507  
Workers' Compensation Act, 21 V.S.A. §601, et seq.  
Workers' Compensation Act (discrimination), 21 V.S.A. §710

### **Federal:**

Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C.A. §621, et seq.  
Americans With Disabilities Act of 1990 (ADA), Title I, 42 U.S.C.A. §12101, et seq.  
Civil Rights Act of 1991, Pub.L.102-166 (Amendments to Title VII)  
Equal Pay Act of 1963, 29 U.S.C.A. §206(d)(1)  
Fair Labor Standards Act, 29 U.S.C.A. §201, et seq.  
Family and Medical Leave Act of 1993, 29 U.S.C.A. §2601, et seq.  
Pregnancy Discrimination Act of 1978, 42 U.S.C.A. §2000e(k)  
Rehabilitation Act of 1973, Section 501, 29 U.S.C.A. §791  
Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §4301 – 4335.  
Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C.A. §2000e  
Lilly Ledbetter Fair Pay Act of 2009, Section 706(e), 42 U.S.C. §2000e  
Rights and Protections Under Employee Polygraph Protection Act, 2 U.S.C.A. 1314  
Prohibiting Employment Discrimination on the Basis of Genetic Information, 42 U.S.C.A. 2000ff, et seq.

Updated 7/11/17 - LT