

# Practice Management

## Five Federal Employment Regulations Urgent Care Operators Need to Know (Part 1)

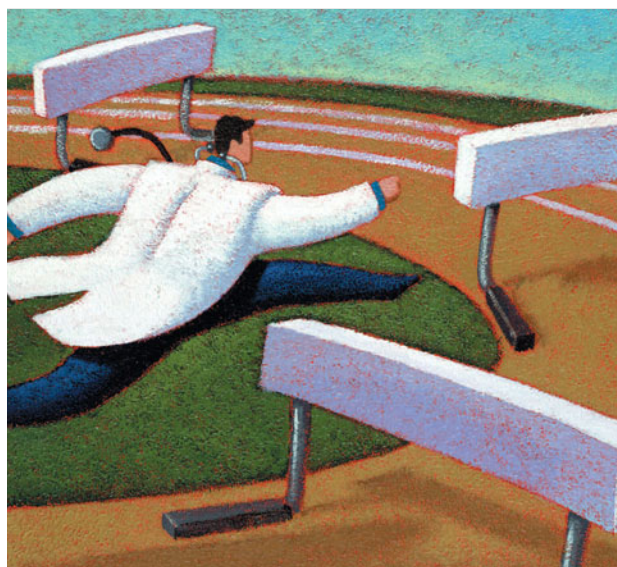
**Urgent message:** As employers and managers of people, urgent care operators are likely to encounter situations that invoke federal labor laws.

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Urgent care centers are subject to a multitude of federal employment regulations and failure to comply with any of them could result in civil litigation or criminal penalties. Laws prohibiting discrimination, regulating wages and hours, permitting leave for military service and family or personal health issues, and affecting collective bargaining are commonly misunderstood, and as a result, violated by urgent care operators. The best protections are detailed human resources policies and an operating culture of integrity and compliance. As a start, managers and supervisors should be educated on the basics. This article is the first of a two-part series that offers specific cases illustrating five of the most significant federal employment regulations. This installment covers anti-discrimination laws and the Fair Labor Standards Act; the Uniformed Services Employment and Re-employment Rights Act, the Family Medical Leave Act, and the National Labor Relations Act will be covered in the second installment.

### Anti-Discrimination Laws

A variety of statutes regulated by the U.S. Equal Employment Opportunity Commission (EEOC) prohibit discrimination and retaliation on the basis of an employee's "protected" status. All job-related decisions must be made for legitimate business reasons and not on the basis of characteristics such as:



- Race
- Skin Color
- Sex
- Ethnicity
- Religion
- Age
- Military Status

**Table 1** summarizes the major federal anti-discrimination statutes. If an urgent care operation is small—employing fewer than 15 people—most federal anti-discrimination laws will not apply. The one exception is the equal pay act, which applies to virtually all employers. The specific headcount limits are included

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Table 1 Federal Anti-Discrimination Legislation		
Federal EEO Legislation <sup>2</sup>	Minimum Number of Employees	Protected Class
Age Discrimination in Employment Act (ADEA)	Applies to companies with 20+ employees.	Individuals age 40 or over.
Americans with Disabilities Act (ADA)	15+ employees	Individual with a disability, history of disability, perceived disability, or relationship to someone with a disability. Disability is defined as “a condition that substantially limits major life activities.”
Equal Pay Act (EPA)	No specific size requirement	Women should receive pay equal to men for “substantially equal” work. Pay includes benefits, allowances, bonuses and overtime.
Genetic Information and Nondiscrimination Act (GINA)	15+ employees	Genetic information; individual and family medical history.
Title VII <sup>3</sup> (15+ employees)	15+ employees	Race, color, religion, sex, or national origin (birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group.)
Pregnancy Discrimination Act (PDA) (This Act is an amendment of Title VII)	15+ employees	Women experiencing pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

in **Table 1**,<sup>1-3</sup> but it’s important to note that many states have anti-discrimination laws that apply to smaller businesses and extend the number and scope of “protected” classes beyond what’s prescribed by federal law.

For example, nearly half the states and many major cities have laws prohibiting employment discrimination on the basis of sexual orientation. Some jurisdictions also specifically prohibit discrimination based on gender identity, while others protect such categories as marital status, political affiliation, and height and weight.<sup>1</sup> Employers are responsible for understanding the laws in their areas and developing policies that incorporate provisions from each applicable regulation

that confers the greatest protection to employees.

Employers are responsible for ensuring that hiring processes don’t adversely impact a protected group. Even large companies with extensive legal expertise are not immune from problematic processes that have a disparate effect on certain segments of the workforce. Consider a recent case against Pepsi.<sup>4</sup> The company conducted a routine background check of all applicants, but the screening did not just rule out applicants who had been convicted of a crime—it also excluded those who had been arrested but never convicted. This policy disparately affected African-Americans, although the EEOC did not accuse Pepsi of intentional discrimination. In January 2012, the company agreed to settle the claim for more than \$3 million, plus training and job offers to affected applicants.

Bona fide occupational qualifications still do exist that allow hiring discrimination in some limited circumstances. For example, it would not be considered illegal discrimination for a hospital to hire only female technicians specifically for ob/gyn functions.<sup>5</sup>

Anti-discrimination legislation doesn’t just impact hiring decisions, it also affects the treatment of current employees on the job. For example, under the Americans with Disabilities

Act (ADA) an employee is entitled to ask for an accommodation to allow him or her to perform the essential functions of the job, despite a disability. Types of accommodation might include a physically modified workstation, restricted job responsibilities, or a flexible working schedule.<sup>6</sup> While an employer can refuse accommodations that would result in an undue hardship, factors such as cost alone will not necessarily constitute sufficient grounds to refuse.<sup>7</sup>

Remember that in many cases—particularly with a medical accommodation—the obligation is not necessarily to give the employee the specific accommodation he or she requests, but to provide an accommodation

Table 2 Fair Labor Standards Act Exemption Test	
Exemption	Eligibility/Test
Administrative	Compensated more than \$455/week, work directly related to the management or general business operations of the employer, exercises discretion and independent judgment on significant issues.
Computer	Compensated more than \$455/week or \$27.63 an hour; employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field; primary duty must consist of: systems analysis techniques and procedures, design, development, testing or modification of computer systems or programs.
Executive	Compensated more than \$455/week; primary duty is managing the company, department or subdivision; must “customarily and regularly” direct the work of at least two full-time employees or their equivalent, and have the authority to hire or fire other employees, or strongly influence the decision.
Outside Sales	The employee’s primary duty must be making sales, obtaining orders or contracts for services or facilities, and the employee must be customarily and regularly engaged away from the employer’s place or places of business.
Professional	The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week; primary duty must be the performance of work requiring advanced knowledge, in a field of science or learning and acquired by prolonged intellectual instruction.

that meets the employee’s needs. If a suitable accommodation exists that better meets the employer’s operational needs, the employer may select this accommodation instead of the employee’s preferred suggestion. For example, although an employee may prefer to have a flexible working schedule, the employer might prefer to redistribute the job duties, and assign the employee to tasks that are not limited by the disability.

Disability is not the only factor requiring accommodation in the workplace. The employer must also consider requests for religious accommodation. One such case involved an urgent care facility that informed a Muslim physician during her interview that the facility had a “no hats” policy, which would prohibit her hijab (religious head-covering). The applicant questioned the policy with the organization’s human resources department, which confirmed that the interviewer was correct—religious accommodation for her hijab would not be granted. After adverse news coverage and pressure from Islamic organizations, the company issued an apology and promised to clarify the policy, stating that the applicant would be hired and accommodated.<sup>8</sup>

*A leader’s obligation is to recognize discrimination*

It’s not enough just to have a policy prohibiting discrimination. Managers must actively recognize discrimination and enforce anti-discrimination policies accordingly. This mandate was made particularly clear with a June, 2011 U.S. Supreme Court decision reversing certification of a class of approximately 1.5 million Wal-

mart female employees claiming that Walmart engaged in sex discrimination by systematically denying its female employees promotions and raises.<sup>9</sup> In *Dukes vs. Walmart*, the Supreme Court specifically noted that Walmart had a written anti-discrimination policy that it enforced, including penalizing those who violated the policy. This practice was important evidence to contradict the claim that Walmart had a general policy, practice, and culture of discriminating against women. In light of this decision, employers should be sure to update—and enforce—their employment policies, which may prove critical in avoiding and defending legislation.

**Fair Labor Standards Act (FLSA)**

The Fair Labor Standards Act, known as FLSA, regulates the federal minimum wage and overtime requirements for non-exempt employees. The act also contains provisions for the employment of minors. While the Act regulates a variety of wage-and-hour related issues, state and local codes often contain more specific and detailed information that intersects with the FLSA regulations.

*What the Fair Labor Standards Act DOES Regulate:*

- Minimum wage of \$7.25 per hour effective July 24, 2009.
- Overtime pay for non-exempt employees at a rate of not less than one and one-half times the regular rates of pay after 40 hours of work in a workweek.
- Reasonable break time and a place for an employee to express milk for her nursing child, for up to 1 year after

**Fair Labor Standards Act: What Would You Do?**

The following table describes some common scenarios that invoke FLSA's wage and hour regulations in urgent care settings. Read each scenario and determine how you might respond. The correct answer is provided.

**Q.** Jane works 1 hour of overtime without her manager's authorization. The center's policy states that overtime can only be worked with express advance authorization from the manager. Jane did not ask for permission, and the manager would not have granted it because other medical assistants were working. Can the center refuse to pay Jane for the time worked?

**A.** No. Under the FLSA, Jane is entitled to be paid for the time she worked, regardless of whether it was approved or not. If the time was in excess of 40 hours in the workweek, she is entitled to time and a half. However, the employer is entitled to discipline Jane for her violation of the policy.

**Q.** Jim has to stay 30 minutes late to deal with an urgent patient issue. Because of the economy, the urgent care center has restricted payment of overtime. Jim volunteers to make up the time by coming in 30 minutes later the next day. Is that allowed?

**A.** Yes. As long as the time is made up within the same workweek, an employee can adjust his or her hours to stay within a 40-hour workweek and not incur overtime charges. Note: In some jurisdictions, such as California, overtime is incurred for any time worked over 8 hours in a day.

**Q.** Marc, the 15-year-old son of one of the center's nurses, is saving money to buy a car. His mother suggests to the owner that Marc help cut the lawn and trim the bushes using the

owner's gas-powered lawnmower and electric clippers. Is that permissible?

**A.** No. The FLSA states that 14- and 15-year-olds cannot operate power-driven machinery other than certain office and food preparation machines<sup>14</sup>.

**Q.** Blair, a medical receptionist, takes her lunch in the back and sorts the mail while she eats. Does she get paid for this time?

**A.** Yes. Because Blair is performing work, she is entitled to be compensated for the time.

**Q.** Blair, the medical receptionist, decides to eat lunch at her desk instead, while surfing the Internet. Does she get paid?

**A.** It depends. Assuming Blair is surfing the Internet for personal reasons and is not required to perform work duties during her lunch, the FLSA would not require her to be paid. However, if Blair is sitting at her desk because someone needs to provide cover for reception, or if she answers phones or assists patients during her break, she is entitled to be compensated. Because the line can be blurry between work and breaks—for example, just because a customer didn't happen to come in, doesn't necessarily mean the employee wasn't working reception—it would be good practice to make a clear distinction between lunch and breaks by requiring Blair to eat lunch in the break room.

the child's birth. The time is not compensated, assuming the employee is completely relieved from duty and would not ordinarily receive compensation for the break. A bathroom is not a permissible location.

- Youth employment activity restrictions and minimum wage.
- Employees must be paid for training, when the training is mandatory.

As with anti-discrimination laws, state laws may be more specific or prescribe greater requirements than the federal statutes. For instance, 16 states have a higher minimum wage than required by federal law.<sup>10</sup> Nevada, for example, has a statewide minimum wage of \$8.00 per hour but employers who offer health insurance can pay the federal rate of \$7.25. And while California has a statewide minimum wage of \$8.00 per hour, the City of San Francisco sets the rate at \$10.24. Throughout California, overtime must be paid for working more than 8 hours in a single day or more than 6 days in a single week—although federal law defines overtime as greater than 40 hours in a single week.<sup>11</sup>

*What the Fair Labor Standards Act DOES NOT Regulate<sup>12</sup>:*

- Leave time (vacation, sick pay, holidays, etc.)
- Mandated meal breaks or rest periods
- Double, triple or premium pay for weekends or holidays
- Salary increases or benefits
- Dismissal requirements or immediate payment of final wages to terminated employees

Remember that although the FLSA does not regulate the above items, state laws do typically control them. For example, the California labor code requires employers to give non-exempt workers an unpaid, uninterrupted 30-minute lunch break after 5 hours of work, provided that the workday is longer than 6 hours. In addition, California employees are entitled to a paid 10-minute rest break for every 3.5 hours worked. *Whenever state and federal laws differ—the employer must follow the regulation that most benefits the employee.*

*Exempt and Non-exempt Employees*

As the name suggests, "exempt" employees are those

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Physicians, physician assistants, and nurse practitioners, whether practicing in an urgent care, primary care, hospital, or office environment, are invited to submit a review article or original research for publication in a forthcoming issue.

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who are exempted from the provisions of the FLSA. Several significant differences exist in the way employers treat exempt and non-exempt employees. Exempt employees are typically salaried and are not entitled to overtime pay. But an exempt employee must be paid for every day he/she works because partial-day deductions from an exempt employee's salary are not permitted except in specific circumstances, such as for unpaid time under the Family Medical Leave Act, to offset jury fees received by the employee or in the initial or terminal week of employment.<sup>13</sup>

The FLSA includes tests for several specific exemptions of broad classifications from the Act, as illustrated in **Table 2**.

FLSA standards are complex and go well beyond pay and scheduling and affect an urgent care center's staffing model, job descriptions, facility layout, and operating hours, among other factors. To test your knowledge of FLSA by reviewing the box on page 23 that lists wage and hour scenarios commonly encountered by urgent care operators. ■

#### References

1. Council on Size and Weight Discrimination <http://www.cswd.org/docs/legalaction.html> (Retrieved April 22, 2012).
2. U.S. Equal Employment Opportunity Commission: *Discrimination by Type* <http://www.eeoc.gov/laws/types/index.cfm> (Retrieved March 26, 2012.)
3. U.S. Equal Employment Opportunity Commission: *Federal Laws Prohibiting Job Discrimination Questions And Answers* <http://www.eeoc.gov/facts/qanda.html> (Retrieved March 26, 2012.)
4. The Workplace Class Action Blog: *EEOC Announces Its First Multi-Million Dollar Settlement Of 2012 - Based On Discrimination In The Use Of Criminal Histories In Hiring* <http://www.workplaceclassaction.com/eeoc-litigation/eeoc-announces-its-first-multi-million-dollar-settlement-of-2012---based-on-discrimination-in-the-us/> (Retrieved March 27, 2012)
5. Columbia Journal of Gender and Law: *The bona fide body: Title VII's last bastion of intentional sex discrimination* [http://goliath.ecnext.com/coms2/gj\\_0199-2707072/The-bona-fide-body-Title.html](http://goliath.ecnext.com/coms2/gj_0199-2707072/The-bona-fide-body-Title.html) (Retrieved March 26, 2012.)
6. Job Accommodation Network [www.asksjan.org](http://www.asksjan.org) (Retrieved April 22, 2012)
7. U.S. Equal Employment Opportunity Commission: *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* <http://www.eeoc.gov/policy/docs/accommodation.html#undue> (Retrieved March 27, 2012)
8. CAIR: *Texas Medical Group Apologizes for Hijab Flap, Clarifies Policy on Religious Accommodation* <http://www.ccan.org/Opinion%20Editorials/2009/November/6%2000/CAIR%20Texas%20Medical%20Group%20Apologizes%20for%20Hijab%20Flap,%20Clarifies%20Policy%20on%20Religious%20Accommodation.htm> (Retrieved April 4, 2012.)
9. U.S. Supreme Court: *Walmart Stores, Inc., v. Dukes, et al.* <http://www.supremecourt.gov/opinions/10pdf/10-277.pdf>
10. [http://en.wikipedia.org/wiki/List\\_of\\_U.S.\\_minimum\\_wages](http://en.wikipedia.org/wiki/List_of_U.S._minimum_wages) (Accessed April 16, 2012)
11. <http://www.californiaovertime.com> (Accessed April 16, 2012)
12. U.S. Department of Labor: *Handy Reference Guide to the Fair Labor Standards Act* <http://www.dol.gov/whd/regs/compliance/hrg.htm> (Retrieved March 27, 2012.)
13. U.S. Department of Labor: *FLSA Overtime Security Advisor - Compensation Requirements - Deductions* <http://www.dol.gov/elaws/esa/flsa/overtime/cr4.htm> (Retrieved March 29, 2012.)
14. U.S. Department of Labor: *Fact Sheet #52: The Employment of Youth in the Health Care Industry* <http://www.dol.gov/whd/regs/compliance/whdf52.htm> (Retrieved March 28, 2012.)