



DELAWARE

QUICK AND EASY GUIDE TO LABOR & EMPLOYMENT LAW

PROVIDED BY BAKER DONELSON

Disclaimer: These materials do not constitute legal advice and should not be substituted for the advice of legal counsel.

At-Will Employment

Delaware is an at-will employment state. This means that employers may generally discharge employees for any reason, or no reason, so long as it is not a reason otherwise prohibited by law (such as discrimination or retaliation protections). There are three exceptions to the at-will doctrine according to Delaware courts: (1) breach of contract; (2) public policy; and (3) good faith and fair dealing. Under a breach of contract, an employee handbook must explicitly support a fixed-term claim of employment. Under public policy, the plaintiff must prove a violation of state or federal law, which is construed as a violation of public policy, for example, the former employee refusing to commit a criminal act. *Henze v. Alloy Surfaces Co, Inc.*, No. C.A. 91C-06-20, 1992 WL 51861 (Del. Super. Ct. Mar. 16, 1992). Delaware courts keep the public policy exception narrow. Under good faith and fair dealing, every Delaware employment contract has this implied; meaning courts look for fraud, deceit, or misrepresentation in an employer's actions to show that the employer acted in bad faith. However, if the employer's actions are from a legitimate business purpose, there may not be any bad faith, and no violation. *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 101 (Del. 1992).

Immigration Verification and Whistleblower Protection

Verification

The State of Delaware has not enacted any additional employment verification procedures on employers beyond federal I-9 compliance. There is no requirement to use E-Verify under Delaware state laws.

Whistleblower Protection

An employer cannot discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment, including reporting or threatening to report an employee's suspected or actual citizenship or immigration status, or the suspected or actual citizenship or immigration status of a family member of the employee to a federal, state, or local agency. Del. Code tit. 19 § 1703.

Drug Testing

Delaware does not have a drug and alcohol testing law that applies generally to employers. Delaware employers are thus free to administer drug testing at their discretion. However, Delaware has drug testing laws that apply to school bus drivers, nursing home employees, home health agency workers, and in other specific instances. Del. Code tit. 21, § 2708; Del. Code tit. 16, § 1145; Del. Code tit. 29, § 9020.

Jury Duty Leave

Employees serving on jury duty shall be paid a per diem rate of \$20, which shall serve as a daily allowance for reimbursement for travel, parking, and other out-of-pocket expenses. Del. Code tit. 10, § 4514. Jurors whose term of service is one day, or one trial, shall not receive reimbursement for the first day of service. *Id.* It is unlawful for an employer to deprive an employee of employment or to threaten or otherwise coerce the employee with respect thereto because the employee receives a summons, responds to a summons, serves as a juror, or attends court for prospective jury service. Del. Code tit. 10, § 4515.

Voting and Election Officer Leave

Employers cannot bribe or threaten to discharge employees in an effort to influence their right to vote in elections. Del. Code tit. 15, § 5162. Employers cannot bribe, threaten to discharge, or hinder employees appointed as election officers from performing such duties. Del. Code tit. 15 § 5161.

Employers must allow eligible employees to take leave to serve as election officers on election day if they have accrued available vacation leave and are not in a "critical need position." Del. Code tit. 15, § 4709. A "critical need position" is in the field of public safety, corrections, transportation, health care, utilities, a small business employing 20 or fewer persons or otherwise necessary persons for the business to be in service on election day. *Id.*

Parental Leave

In 2022, Delaware enacted a family and medical leave law, the Healthy Delaware Families Act (H DFA), that applies generally to private employers.

The obligation to provide paid benefits to employees begins on January 1, 2026, and employer/employee contributions begins on January 1, 2025.

Seasonal employees are exempt from the HDFA. Employers with ten to 24 employees only need to comply with the parental leave requirements, while employers with 25 or more employees must follow all paid family and medical leave requirements.

Covered employees are those who work at least 60 percent of their hours physically in Delaware. Employees must work at least 12 months with at least 1,250 hours during the last 12 months for their employer.

Employees may take paid leave to: (1) care for a new child (maximum 12 weeks per year); (2) care for a family member with a serious health condition (maximum six weeks every two years); (3) address a personal serious health condition/injury (maximum six weeks every two years); or (4) assist while loved ones are on overseas military deployment (maximum six weeks every two years). Employees may take a maximum of 12 weeks of leave per year. On leave, employees may receive up to 80 percent of their wages (up to \$900 per week).

Delaware employers with four or more employees must make reasonable accommodations for known limitations related to employees' and applicants' pregnancies, including time off to recover from childbirth, unless employers can show that these accommodations would impose an undue hardship on their business operations. Del. Code tit. 19, § 711.

Other Leave

Crime Victim Leave. Delaware employers cannot discharge or discipline employees who are crime victims or represent crime victims because they: (1) participate, at a prosecutor's request, in preparing for criminal proceedings; (2) attend criminal proceedings where their attendance is reasonably necessary to protect crime victims; or (3) attend criminal proceedings in response to a subpoena. Del. Code tit. 11, § 9409.

Emergency Response Leave. Delaware employers with ten or more employees are covered by the Volunteer Emergency Responders Job Protection Act. Del. Code tit. 19, § 1802. Employers cannot discharge or demote any employee who is a volunteer emergency responder if such an employee is absent from his or her place of employment responding to a Governor-declared or President-declared state of emergency lasting up to 14 consecutive days, or is absent from his or her place of employment due to injury from responding to an emergency. Del. Code tit. 19, § 1803. Employees covered by this leave include volunteer firefighters, volunteer EMTs, and volunteer fire police officers. Del. Code tit. 19, § 1802.

The emergency response leave provisions do not apply to employers who have substantially similar policies or rules that provide the same or substantially similar protections as are afforded in these provisions, and that provide the opportunity to appeal a decision to a court within Delaware. Del. Code tit. 19, § 1808.

Military Service Leave. If any employer fails to comply with any provisions of federal or state law relating to the employment rights of reservists or National Guard members, the employee may bring an action for damages for such noncompliance or such other relief as is appropriate in the Superior Court of Delaware. Del. Code tit. 20, § 905. Any National Guard member who is called to state active duty shall be entitled to the same rights, privileges, and protections with respect to such member's employment as such member would have had if called for military training under federal law protecting reservists and National Guard members. *Id.*

Smoking Laws

Delaware employers must prohibit smoking within indoor work areas. A "work area" is defined by statute as "an area in a place of employment where one or more employees are routinely assigned and perform services for their employer." Del. Code tit. 16, §§ 2902, 2903. Employers also must prohibit smoking in enclosed indoor areas that are open to the public, including elevators and common-use areas such as restrooms, lobbies, reception areas, and hallways. Del. Code tit. 16, § 2903. Smoking includes the use of e-cigarettes and other electronic smoking devices that create aerosol or vapor. Del. Code tit. 16, § 2902.

Employers must prominently post “Warning: Smoking Permitted” signs in their workplaces where smoking is permitted; the letters on the signs must be at least one inch high. Del. Code tit. 16, § 2905.

Pregnant Workers Fairness Act Notice

Delaware’s Pregnant Workers Fairness Act requires employers to provide notice of the right to be free from discrimination related to pregnancy, childbirth, and related conditions, including the right to reasonable accommodation to known limitations related to pregnancy, childbirth, and related conditions as follows: (1) in writing to new employees at the start of employment; and (2) orally or in writing to any employee who notifies the employer of a pregnancy within 10 days of such notification. Notice shall likewise be posted conspicuously in an area accessible to all employees. Del. Code Ann. tit. 19, § 716.

Break Time to Express Milk

Employers in the State of Delaware must not discriminate based on pregnancy, which includes lactation. Del. Code tit. 19, § 711; *see also* Del. Code tit. 19 § 710. Employers also cannot fail or refuse to make reasonable accommodations for known limitations related to employees’ and applicants’ pregnancy, including lactation, unless employers can show that these accommodations would impose undue hardship on their business operations. Del. Code tit. 19, § 711. Reasonable accommodations for pregnancy, including lactation, may include break time and appropriate facilities for expressing breast milk. Del. Code tit. 19 § 710.

Meal and Rest Breaks

Delaware employers must provide all covered employees who work at least seven and a half consecutive hours a meal break of at least 30 minutes. Del. Code tit. 19, § 707. Employers must provide the meal break after the first two hours and before the last two hours of scheduled work. *Id.*

Delaware employers must provide minors a 30-minute break every five consecutive hours. Del. Code tit. 19 § 507.

Delaware wage and hour law has no specific provisions requiring private employers to provide rest breaks.

Minimum Wage, Overtime, and Wage Recordkeeping

Effective January 1, 2024, the State of Delaware set the minimum wage at not less than \$13.25 per hour. Del. Code tit. 19, § 902. This is set to change beginning January 1, 2025, at which time Delaware’s minimum wage will increase to \$15.00 per hour. Gratuities in occupations where gratuities are customary may be considered wages in an amount equal to the tip credit percentage set by the federal government. *Id.* The minimum rate cannot be less than \$2.23 per hour. *Id.* Employers must still comply with federal wage laws and regulations. *Id.*

Private employers with more than three employees must notify each employee in writing, at the time of hiring, the rate of pay and the day, hour, and place of payment. Del. Code Ann. tit. 19, § 1108.

Delaware follows the federal provisions regarding overtime pay, which state that generally if an employee works more than 40 hours, he or she must be compensated at a rate of one and a half times the regular rate of pay at which he or she is employed. *See* 29 U.S.C. § 207.

Employers must maintain the following records for at least three years: (1) the name, address, and occupation of each employee; (2) each employee’s rate of pay and the amount paid each pay period; and (3) the hours worked each day and each workweek by every employee. Del. Code tit. 19 § 907.

Equal Pay Law

Employers in Delaware are prohibited from discriminating against an employee in the rate of pay based solely on sex for equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions. 19 Del. C. §1107A.

Employment Discrimination (DDEA)

Delaware's Discrimination in Employment Act (DDEA) prohibits employers with four or more employees from discriminating against employees based on race (including traits historically associated with race, see Crown Act below), marital status, genetic information, color, age, religion, sex (including pregnancy), sexual orientation, gender identity, national origin, volunteer emergency responder status, status as a victim of domestic violence, sexual offenses, or stalking, reproductive health decisions, and family responsibilities. Del. Code tit. 19, § 710 *et seq.*

Delaware also prohibits employers from requiring, as a condition of employment, that an employee refrain from inquiring about, discussing, or disclosing his/her wages or the wages of another employee; requiring an employee to sign a waiver or other document which purports to deny an employee the right to disclose or discuss his/her wages; and discharging, formally disciplining, or otherwise discriminating against an employee for inquiring about, discussing, or disclosing his/her wages or the wages of another employee. Del. Code tit. 19, § 711(j).

Race-Based Hair Discrimination

In April 2021, Delaware passed the Crown Act, which prohibited race-based hair discrimination. This legislation amended the definition of "race" to include traits historically associated with race, including hair texture and the protective hairstyles of braids, locks, and twists. Del. Code tit. 19 § 710. Consequently, employers may not discharge, refuse to hire, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment based on any of the hairstyles mentioned above. Del. Code tit. 19 § 711.

Employment of Persons with Disabilities

Delaware's Persons with Disabilities Employment Protections Act (PDEPA) prohibits discrimination against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.

Jamie Wolfe Employment Act. Employers who are authorized to employ an individual with a disability at a subminimum wage (pursuant to a certificate under 29. U.S.C. § 214 or pursuant to regulations under Del. Code tit. 19, § 905) may not employ or compensate disabled individuals at an hourly rate lower than the effective rate payable under Del. Code tit. 19 § 902. Del. Code tit. 19 § 752.

Delaware Worker Adjustment and Retraining Notification Act

The Delaware Worker Adjustment and Retraining Notification Act (DE WARN Act) requires employers to provide at least 60 days' written notice prior to a mass layoff, plant closing, or relocation. Employers must send such a notice to employees (and, if applicable, their representatives); the Delaware Department of Labor Division of Employment Training, WARN Act Administrator; and the Delaware Workforce Development Board for the locality of the triggering event. The DE WARN Act applies to private employers with 100 or more employees, excluding part-time employees, or 100 or more employees that work, in the aggregate, at least 2,000 hours per week. Triggering events include: a mass layoff (50 or more employees if they make up 33 percent of the employer's total workforce at the site in question, or 500 employees); a plant closing; or a relocation to a different location at least 50 miles away. Del. Code tit. 19 § 1901 *et seq.*

Final Payments

If an employee quits, resigns, is discharged, suspended, or laid off, Delaware employers must pay wages on the later of either: (1) what would have been the employee's next regular payday; or (2) three business days after the last day worked. Del. Code tit. 19, § 1103.

Unemployment Insurance

Unemployment insurance benefits provide income to individuals who have lost work through no fault of their own. The benefits are intended to partially offset the loss of wages while an unemployed worker searches for suitable work or until an employer can recall the employee to work. Nothing is deducted from the employee's wages to pay for this coverage.

Unemployment benefits are administered by the Delaware Department of Labor and additional information regarding the benefits may be accessed at labor.delaware.gov/divisions/unemployment-insurance. See *also* Del. Code tit. 19 § 3301 *et seq.*

Workers' Compensation

The Delaware Workers' Compensation Act (DWCA), Del. Code tit. 19, § 2301, *et seq.*, generally applies to all employees in Delaware. Del. Code tit. 19 § 2306. The only exceptions are domestic and casual employees earning less than \$750 in three months from one household and farm workers unless the employer carries insurance for the farm workers. Del. Code tit. 19 § 2307. Employees who suffer injuries and/or occupational diseases arising out of and in the course of their employment may be eligible to receive several types of benefits. Del. Code tit 19 § 2304. A workplace injury must be immediately reported to the employer; failing to timely report an injury may result in a denial of benefits.

The DWCA is administered by the Delaware Department of Labor. Additional information regarding the DWCA, as well as other state laws, rules, and regulations regarding workers' compensation, may be accessed at labor.delaware.gov/divisions/industrial-affairs/workers-comp. Finally, Delaware recognizes a private cause of action for discrimination and retaliation under the DWCA. Del. Code tit. 19, § 2365.

Child Labor

Minors under the age of 14 cannot be employed. Del. Code tit. 19 § 505. Minors aged 14 – 17 are prohibited from employment during certain hours and periods and from certain types of work. Del. Code tit. 19, §§ 505, 506, 507. Additional school-based learning program exceptions may apply. Del. Code tit. 19 §§ 506, 507. Employers must obtain work permits from all minor employees. Del. Code tit. 19, § 504. See Del. Code tit. 19, § 501, *et seq.*

Gun Laws

Delaware has no laws governing whether an employer can prohibit weapons in the workplace. Employers are therefore free to place restrictions on the rights of employees to possess firearms at work, including in company parking lots.

Medical and Recreational Marijuana

Delaware allows for the medical use of marijuana to treat or alleviate certain debilitating medical conditions or related symptoms. Del. Code tit. 16, § 4901a, *et seq.* Thus, an employer may not terminate or refuse to hire an employee based upon either: (1) the employee's status as a medical marijuana cardholder; or (2) a medical marijuana cardholder's positive drug test for marijuana, unless the employee used, possessed, or was impaired by marijuana on the premises of the place of employment, or during the hours of employment. Del. Code tit 16 § 4905A. Employers are not prohibited from disciplining an employee for ingesting marijuana on-site. Del. Code tit. 16 § 4907A.

Recreational marijuana is now legal for Delaware residents 21 or older up to a personal use quantity. Del. Code tit. 4 § 1304. However, the new law does not impact or restrict employers with respect to employment terms and conditions including accommodation, policies, and discipline. Del. Code tit. 4 § 1305.

Assignment of Employee Inventions

An "assignment of inventions" agreement shall not apply to an invention the employee developed entirely on his or her own time without using the employer's equipment, supplies, facility, or trade secret information, except for those inventions that relate to the employer's business or actual or demonstrably anticipated research or development or result from any work performed by the employee for the employer. Any agreement to the contrary is against public policy and, therefore, is unenforceable. Del. Code tit. 19 § 805.

Inspection of Personnel Files

Employers must, upon the request of an employee, permit the employee to inspect that employee's own personnel files used to determine that employee's own qualifications for employment, promotion, additional compensation, termination, or disciplinary action. Employers must make the records available during the employer's regular business hours in the office where these files are regularly maintained, when sufficient time is available during the course of a regular business day to inspect the files in question. The employer may require the requesting employee to inspect such records in the free time of the employee and may require the employee to file a written request for such access. Del. Code tit. 19 § 732. Employees need not be permitted to remove the file from the premises, but the employee may take notes. Finally, the employer may require the inspection of the file in the presence of a designated official and may limit inspection to once every calendar year. *Id.* at § 733.

Telephone Transmissions, Email, and Internet Usage

Employers in Delaware must provide notices to employees before they monitor or intercept a telephone conversation, email, or internet access information. Employers may provide electronic notice of such monitoring or interception policies to the employee at least once during each day the employee accesses the employer-provided email or internet service; or the employer may give a one-time notice to the employee of such monitoring or interception policies. The notice must be in an electronic record, or in another electronic form and acknowledged by the employee either in writing or electronically. 19 Del. C. §705.