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## Fifth Amendment: A Definition

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son, daughter, spouse, or parent for whom the employee must provide care on the date that the medical leave expired.

*See also* Employment Law; Vocational Rehabilitation Act; Americans with Disabilities Act (ADA)

**Resources:**

Family and Medical Leave Act of 1993. U.S. Department of Labor Web site, <http://www.dol.gov>.

Form WH-380. An optional form used to obtain medical certification from a health care provider. U.S. Department of Labor Web site, <http://www.dol.gov>.

Form WH-381. An optional form for use by an employer to respond to an employee's request for leave. U.S. Department of Labor Web site, <http://www.dol.gov>.

National Defense Authorization Act for FY 2008 (H.R. 4986).

U.S. Department of Labor, Employment Standards Administration. <http://www.dol.gov/esa/regs/statutes/whd/fmla.htm>.

*Jennifer A. Majkowski and Ann Gilley*

## FIFTH AMENDMENT

The Fifth Amendment to the U.S. Constitution states that “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”<sup>1</sup>

The Fifth Amendment is commonly thought of as the amendment that protects against self-incrimination. For example, “I plead the fifth” is a commonly heard phrase. This relates directly to the Fifth Amendment protections. However, the Fifth Amendment contains much more than the protection of self-incrimination. This amendment contains the grand jury requirement, prohibits forcing a person to be a witness against himself or herself, forbids double jeopardy, protects against the deprivation of life, liberty, or property without due process, and requires appropriate compensation be provided when private property is taken for public use.<sup>2</sup>

### Double Jeopardy

While the Fifth Amendment discusses being put in jeopardy of life and limb twice, the interpretation of the amendment is to retry a person on a previously acquitted case. *Ball v. U.S.* specifically states that an acquittal prevents any subsequent prosecution for the same offense.<sup>3</sup> Mistrials do not fall under this double jeopardy protection. In essence, there must be a decision on the case (acquittal, conviction, etc.). A mistrial is not a decision based upon the facts of the case.

### Self-incrimination

The Fifth Amendment also protects against self-incrimination or being forced to testify against oneself. To “plead the fifth” is enacting the right to not self-incriminate.

This protection is a personal right that can be exercised only by individuals and is not available to an organization or corporation. Additionally, this protection is only for self-incrimination. For example, if the answers to questions only hurt a reputation or position, the Fifth Amendment does not apply.<sup>4</sup>

### **Due Process**

Both the Fifth and Fourteenth amendments describe and protect due process. The Due Process Clause ensures that no one shall be deprived of “life liberty and/or property” without following the process as outlined in the law. There are two types of due process. Substantive due process refers to due process with regard to laws, ordinances or other regulations as they are written. These types of legal codes must be written in specificity and not in general terms. The second type of due process relates to procedural process. Procedural process is the requirements of notice and proper steps being followed.<sup>5</sup>

### **Appropriate Compensation for Property Taken for Public Use**

The Fifth Amendment guarantees that fair compensation is afforded if property is taken by the government for public use. Another term for this is “National Eminent Domain.” When the Bill of Rights was produced, the British took property without appropriate or sufficient remuneration to the property owner. In response to these actions, the Fifth Amendment attempts to limit federal government authority by ensuring that eminent domain is only exercised with fair compensation.

Additionally, the eminent domain or taking of property must be for public use and cannot be exercised if the use of the property will be for private use. Additionally, fair compensation has been defined by the courts as, “a full and perfect equivalent for the property taken.”<sup>6</sup>

### **HR Practitioner**

What does any of this have to do with HR? Most references to the Fifth Amendment refer to self-incrimination. However, there is more depth and applicability to human resources in the Fifth Amendment than simply this. Employer drug testing can also fall under this amendment. For example, termination or failure to hire based on a positive drug test result could create issues with “due process” (also discussed under the Fourteenth Amendment definition). The Fifth Amendment Due Process Clause could permit the employee to challenge the process of testing, including test reliability, and allow the employee to refute the test findings, etc.<sup>7</sup>

### **Conclusion**

The Fifth Amendment is one of the most widely known amendments due to the protection of self-incrimination. This aspect of the Fifth Amendment is very important. However, the Fifth Amendment holds many more protections, such as it includes grand jury requirements, prohibits forcing a person to be a witness against himself or herself, forbids double jeopardy, protects against the deprivation of life, liberty, or property without due process, and requires appropriate compensation be provided when private property is taken for public use.<sup>8</sup> These protections are extremely important to the citizens,

in the Fourteenth Amendment, the causation for each amendment is different. Therefore, the scope of each amendment and importance to human resource management differs.

*See also* Fourteenth Amendment; Privacy Rights

## NOTES

1. FindLaw, "Fourteenth Amendment," <http://caselaw.lp.findlaw.com/data/constitution/amendment05/> (accessed January 15, 2008).
2. Constance E. Bagley, *Managers and the Legal Environment*, 4th ed. (Mason, OH: Thomson South-Western, 2006).
3. Henry Cheeseman, *Business Law: Legal Environment, Online Commerce, Business Ethics, and International Issues*, 6th ed. (Upper Saddle River, NJ, Pearson Prentice Hall, 2006); and Bagley, *Managers and the Legal Environment*.
4. FindLaw, "Fourteenth Amendment."
5. Cheeseman, *Business Law*, 2006.
6. Findlaw, "Fourteenth Amendment."
7. "Drug Testing," in *Encyclopedia of Everyday Law*, ed. Shirelle Phelps (Gale Group, Inc., 2003), *eNotes.com*. 2006. May 8, 2008, <http://www.enotes.com/everyday-law-encyclopedia/drug-testing> (accessed August 18, 2008).
8. Bagley, *Managers and the Legal Environment*.

*Paul M. Shelton*

## FOUR-FIFTHS RULE

The four-fifths rule is a measure to determine whether adverse impact for employees is present. Generally, employment laws, regulations, and guidelines are put into place to prohibit and possibly deflect any and all acts of discrimination, perpetrated either as overt or covert, within the employment arena. Discrimination may occur when decisions are made by employers or hiring agencies concerning employment based upon race, sex, age, religion, or any other class. Fair and equitable employment selection must be made based upon job-specific knowledge, potential, or skill set talent and ability held by the prospective employee. Employment selection practices that unfairly discriminate against any specific category of employee are termed *unlawful* or *discriminatory*. Unlawful or discriminatory hiring practices cause adverse impact to a specific class or group of people.

The Civil Rights Act of 1964 disallows overt acts of discrimination and any practice that is "fair in form, but discriminatory in operation." Basically, the Civil Rights Act of 1964 makes discriminatory any employment or preemployment method and any practice not justifiable as related to the job performance or the job position. Cognitive ability testing, for example, stands out as a popular yet sometimes controversial method used to predict performance.

In 1978, four federal agencies issued the *Uniform Guidelines on Employee Selection Procedures*, which embodied guiding principles outlining the use of methods when selecting employees. The *Uniform Guidelines on Employee Selection Procedures* are legally binding and must satisfy two conditions to be considered legal and legitimate when balanced against the guidelines:

- Must be job-related and valid for the purpose used
- A business necessity must be present for use