

NORTH CAROLINA EMPLOYMENT LAW SUMMARY

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I. DISCRIMINATION

A. Equal Employment Practices Act (EEPA)

N.C. Gen. Stat. § 143-422.1 *et seq.* provides that the public policy of North Carolina is to protect those holding or seeking employment from discrimination on account of race, religion, color, national origin, age, sex, or handicap. The EEPA provides no remedies or independent causes of action, but some federal courts have held that there is a cause of action for wrongful discharge based on the public policy expressed in the EEPA. State courts have not yet directly addressed this issue.

B. Other Discrimination Statutes

Examples of other statutes which prohibit discrimination include:

- Discrimination against any person based on genetic testing, N.C. Gen. Stat. § 95-28.1A;
- Discrimination against any person for lawful use of lawful products during non-working hours, N.C. Gen. Stat. § 95-28.2; and
- In the private sector, no person can be denied employment, discharged from employment, or discriminated against due to membership or lack of membership in a labor union, association, or organization, N.C. Gen. Stat. § 95-78.

C. State Retaliation Issues

The Retaliatory Employment Discrimination Act (“REDA”), N.C. Gen. Stat. § 95-241 *et seq.*, provides protection for employees who make complaints or file certain claims with state agencies. An employee who believes that he or she has been unlawfully retaliated or

discriminated against for filing a worker's compensation, wage and hour, OSHA, mine safety or sickle cell claim may file a charge with the North Carolina Department of Labor, Workplace Retaliatory Discrimination Division, within 180 days after the allegedly discriminatory act. Either the employee or the NCDOL can bring suit against an employer in a REDA action.

II. WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

North Carolina is an "employment-at-will" state. Employers are free to discharge at-will employees at any time and for any reason. However, employers do not have a right to terminate for an unlawful reason or purpose that contravenes public policy as expressed in North Carolina statutes, regulations or constitution. Examples include termination for refusing to follow an employer's instructions to violate federal trucking regulations, termination for refusing to work for less than minimum wage, and refusal to testify untruthfully in a court proceeding.

III. RECORD KEEPING

A. State/Local Requirements for Retention of Employee Records and Information

Employers must keep records of wages, hours, and other conditions and practices, 13 N.C.A.C. 12.0801, and they are to be kept for at least three years, 13 N.C.A.C. 12.0802. OSHANC records are required in accordance with Section 8(c) of the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596) and regulations made pursuant thereto (see 13 N.C.A.C. 7A.0603). N.C. Gen. Stat. § 95-143.

B. Confidentiality of Employee Records and Information

State employee personnel files are confidential, and access is limited to the reasons and persons as outlined in N.C. Gen. Stat. § 126-24. The release of records concerning controlled substance examinations is governed by 13 N.C.A.C. 20.0503.

IV. POSTING REQUIREMENTS

Wage and hour posting requirements are outlined in N.C. Gen. Stat. § 95-25.13 and 13 N.C.A.C. 12.0805. Employers must notify employees, orally or in writing at the time of hiring, of all promised wages and the date and place of payment. In addition, employers must give notice to employees in writing or through posted notice of the employer's practices and policies with regard to wage payments or changes thereto.

V. INTELLECTUAL PROPERTY

A. Non-Competition Agreements

Covenants not to compete are not favored by North Carolina courts but may be enforceable if they (i) in writing, (ii) made a part of an employment contract, (iii) based upon valuable consideration, (iv) reasonably necessary for the protection of legitimate business

interests, (v) reasonable as to time and territory, and (vi) not otherwise against public policy. *Kennedy v. Kennedy*, 160 N.C. App. 1, 584 S.E.2d 328 (2003). Generally speaking, North Carolina courts will not re-write or revise non-competes which are overly broad or unreasonable. However, the court may choose to strike an objectionable and severable portion of the covenant in lieu of striking the entire provision.

B. Non-Solicitation Agreements

Non-solicitation agreements are generally enforceable in North Carolina. However, case law construing such agreements has caused confusion and has been inconsistent regarding standards of enforcement.

C. Unfair Trade Practices

N.C. Gen. Stat. § 75-1.1 prohibits unfair and deceptive trade practices and provides treble damages and attorney's fees for acts in violation of the statute. Its use is limited in the employer/employee context, but it may be useful in situations such as against a "raiding employer." To maintain a cause of action, a plaintiff must show: (i) an unfair or deceptive act or practice or unfair method of competition, (ii) in or affecting commerce which (iii) proximately causes injury to the claimant's business.

D. Trade Secrets

The Trade Secrets Protection Act, N.C. Gen. Stat. § 66-152 *et seq.*, codifies North Carolina trade secret law. A violation of the Act may be alleged in conjunction with actions alleging violation of covenants not to compete in agreements or confidentiality agreements.

VI. WORKPLACE RULES

A. State/Local Workplace Requirements

North Carolina state courts recognize the existence of an employee's duty of loyalty, but they do not recognize its breach as an independent claim outside of a fiduciary relationship. *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001).

B. OSHA

The Occupational Safety and Health Act of North Carolina ("OSHANC") is codified at N.C. Gen. Stat. § 95-126 *et seq.* and was modeled directly after the Federal Occupational Safety and Health Act of 1970. The federal government approved the OSHANC on December 10, 1996 allowing OSHANC to operate without the simultaneous enforcement of the Federal OSHA.

Under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), the North Carolina Supreme Court held that employers may be held liable in tort for a work related injury or death to an employee, notwithstanding the exclusivity provisions of the North Carolina Worker's Compensation Act if the employer (i) intentionally engages in misconduct, (ii) knows the

misconduct is substantially certain to cause serious injury or death to an employee, and (iii) the employee is injured or killed as a result of the misconduct. The North Carolina Supreme Court also held that an owner or general contractor on a construction project may be liable for injuries sustained by an independent subcontractor's employee if the subcontractor was engaged in "inherently dangerous activity." Employers should consider the potential inter-relationship between OSHANC violations and *Woodson* claims.

VII. PRIVACY

A. State Laws on Privacy, Surveillance, and Searches

There are various statutes protecting the confidentiality of records or information. These include: (i) confidentiality of patient medical information in the possession of the Department of Health (N.C. Gen. Stat. § 130A-12), (ii) confidentiality of information and records that identify a person who has the AIDS virus or may have a disease or condition otherwise required to be reported to protect public health (N.C. Gen. Stat. § 130A-143), and (iii) documents considered as part of a medical peer review process which are privileged and confidential (see, e.g., N.C. Gen. Stat. § 131E-95; N.C. Gen. Stat. § 90-21.22).

North Carolina courts have held that the personal right of privacy is basic to the moral and philosophic fiber of our democracy. See *Flake v. Newsco*, 212 N.C. 780, 195 S.E.2d 55 (1938). North Carolina has recognized two types of privacy torts: (i) the appropriation of the employee's name or likeness for defendant's advantage, and (ii) intrusion upon an employee's seclusion or solitude.

B. State Requirements for Drug Testing

North Carolina does not require an employer to have a written drug testing policy before conducting drug testing. However, if drug testing is performed, it must comply with the Controlled Substance Examination Regulation Act, N.C. Gen. Stat. § 95-230 *et seq.* All testing must be performed by or through an "approved" laboratory. For prospective employees, samples and screening may be conducted on-site provided that positive drug tests be sent to an approved laboratory for confirmation. For current employees, samples may be collected on-site but must be sent to an approved laboratory for the screening test.

VIII. WORKER'S COMPENSATION

North Carolina's Worker's Compensation Act is codified at N.C. Gen. Stat. § 97-1 *et seq.* The Act covers injuries by accident arising out of and in the course of the employment and does not include a disease in any form, except where it results naturally and unavoidably from the accident. An employer may not deduct from an employee's wages any portion of the premium for worker's compensation insurance. N.C. Gen. Stat. § 97-21.

IX. STATE EQUIVALENTS TO ADA AND FMLA

A. ADA-Related Laws and Compliance Issues

North Carolina has enacted the Handicapped Persons Protection Act, N.C. Gen. Stat. § 168A-1 *et seq.*, for the purpose of encouraging and enabling persons with disabilities to engage in remunerative employment. In addition, discrimination on the basis of disability is contrary to public policy as stated in the EEPA discussed above. However, there is no North Carolina state equivalent to the Americans with Disabilities Act.

B. State Equivalent to the FMLA

There is no state equivalent to the FMLA.

X. EMPLOYEE HANDBOOKS / POLICIES

A. Whether or not Required and Contents

Employers are not required to maintain employee handbooks.

B. State Law Requirements for Disclaimers / Effectiveness Under State Law

The general rule in North Carolina is that employee handbooks and policies do not become a part of the employment contract unless expressly incorporated into the contract. *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985). However, it is advisable to incorporate language in the employee contract clarifying that the employee handbook is not to be construed as a contract of employment.

XI. EMPLOYMENT AT-WILL

See Paragraph II above.

XII. WAGES

A. State Equivalent FLSA Rules, Including Minimum Wage and Overtime

The Wage and Hour Act, N.C. Gen. Stat. § 95.1 *et seq.*, governs wage-related matters. The State minimum wage is tied to the minimum wage as set forth in the FLSA. N.C. Gen. Stat. § 95-25.3. The overtime wage rate is generally set to at least time and a half. N.C. Gen. Stat. § 25.4.

B. State Restrictions on Wage Deductions, Payment for Uniforms and Shortages, etc.

N.C. Gen. State § 95-25.8 applies to wage deductions. In general, if an employer wishes to withhold or divert wages then the employer must receive prior authorization from the

employee. The employer must furnish the employee with an itemized statement of deductions made from the employee's wages. N.C. Gen. Stat. § 95-25.13.

C. Payday Statutes / Time of Payment

Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. Wages based upon bonuses, commissions, or other forms of calculations may be paid as infrequently as annually if prescribed in advance. N.C. Gen. Stat. § 95-26.6. The employer must notify the employee, at the time of hiring, of the promised wages and the day and place for payment. N.C. Gen. Stat. § 95-25.13.

D. Payment of Wages: What Constitutes a Wage, What Must be Included with Final Paycheck, Permitted Offsets to the Final Paycheck

Wage is defined as compensation for labor or service, as well as the reasonable cost for furnishing employees with board, lodging, or other facilities. N.C. Gen. Stat. § 95-25.3. An employer may withhold or divert any portion of an employee's wages when the employer is required or empowered to do so by State or federal law. N.C. Gen. Stat. § 95-25.8.

E. State Law on Commissions, Restrictions on Charge-backs; When is a Commission Earned? Must Commissions be Paid After Termination of Employment?

Wages based upon bonuses, commissions, or other forms of calculations may be paid as infrequently as annually if prescribed in advance. N.C. Gen. Stat. § 95-26.6. Wages based on commissions shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. N.C. Gen. Stat. § 95-25.7.

F. Employment of Minors

No youth under 18 years of age may be employed by any employer unless the youth meets the exemptions set forth in N.C. Gen. Stat. § 95-25.5.

XIII. SAFETY

See Section VI(B) above.

XIV. LABOR ISSUES

North Carolina is a "right to work" state. In the private sector, no person can be denied employment, discharged from employment, or discriminated against due to membership or lack of membership in a labor union, association, or organization. N.C. Gen. Stat. § 95-78.

XV. DISPUTE RESOLUTION

North Carolina has a strong public policy favoring settlement of disputes by arbitration. When there is any doubt about the existence of an agreement to arbitrate, it will be resolved in favor of arbitration.

The Revised Uniform Arbitration Act (“RUA”) applies to agreements to arbitrate made on or after January 1, 2004, unless all parties to the agreement consent to application of the statute. The RUA does not apply to arbitration agreements between employers and employees or their respective representatives unless the agreement provides that it will apply. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982). N.C. Gen. Stat. § 1-569.1 *et seq.* The Federal Arbitration Act may preempt the RUA in certain circumstances.

XVI. TERMINATING EMPLOYEES

North Carolina is an “at will” employment state. See above. In general, an employer’s unilateral policies concerning benefits are contractually binding once the employee earns the benefit.

XVII. OTHER STATE-SPECIFIC PITFALLS / STATUTES

North Carolina has a “whistleblower” policy for state personnel governed by N.C. Gen. Stat. § 126-84 *et seq.* In addition, REDA provides protection for employees who make complaints or file claims with state agencies.

XVIII. PLANT CLOSING / MASS LAYOFF

In North Carolina, the “state dislocated worker unit” under WARN is the North Carolina Division of Employment and Training.

XIX. DISASTER PLANNING

Employees can be eligible for disaster unemployment assistance under N.C. Gen. Stat. § 96-13.