



**DESK REFERENCE  
FOR THE CAROLINAS**

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# EMPLOYMENT AND LABOR LAW DESK REFERENCE FOR THE CAROLINAS

## DISCRIMINATION

### Race, Color, Sex, National Origin, Religion

Under Title VII of the Civil Rights Act of 1964, employers with 15 or more employees are prohibited from refusing to hire, discharging, or otherwise discriminating against any individual because of race, color, sex, national origin, or religion. Title VII also prohibits discriminatory harassment that is severe and pervasive and that creates a hostile work environment. Finally, Title VII prohibits retaliation against employees who report or oppose unlawful discrimination. Before an aggrieved employee can pursue litigation under Title VII, she must file a Charge of Discrimination with the EEOC within 180 days (or, in South Carolina, file with the S.C. Human Affairs Commission within 300 days) of the alleged discrimination.



### Race

42 U.S.C. § 1981 prohibits all employers, regardless of size, from discriminating against any individual on the basis of race. Section 1981 also provides a remedy for racial harassment and retaliation. Claims under § 1981 do not have to be presented to the EEOC prior to filing suit. The statute of limitations for claims under § 1981 is four years. There are no statutory caps on damages under § 1981.

### Sexual Harassment

Sexual harassment is unwelcome conduct, including sexual comments, jokes, or gestures; requests for sexual favors; inappropriate touching; or sexual advances. When such conduct is made a term or condition of employment, or forms the basis for an employment decision, it is actionable by an employee. In some cases, an employer that disseminates and enforces a policy against sexual harassment, and takes appropriate and prompt remedial action when made aware of a claim, may be able to avoid liability. Claims under Title VII must be filed with the EEOC prior to filing suit.

## **Pregnancy**

The Pregnancy Discrimination Act (PDA) provides that discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII. The PDA applies



to employers with 15 or more employees. Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations. In the event of a pregnancy-related absence, employers must hold open a job for the same length of time jobs are held open for employees on sick or disability

leave. Any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions.

## **Age**

Under the Age Discrimination in Employment Act (ADEA), employers with 20 or more employees are prohibited from refusing to hire, discharging, or otherwise discriminating against any individual because he or she is over 40 years of age. The ADEA also prohibits age-based harassment that is severe and pervasive and creates a hostile work environment. Finally, the ADEA prohibits retaliation against employees who report or oppose age discrimination. An employer may, however, base hiring decisions on age or may discharge an older employee in the rare situation where age is a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business. Claims under the ADEA must be filed with the EEOC before filing suit.

## **Age - Releases**

The Older Workers Benefits Protection Act (OWBPA) sets out specific requirements that employers must follow to obtain a valid release of ADEA claims. Strict compliance with the OWBPA is required in all severance agreements or settlement agreements where rights under the ADEA are being released.

## **Americans with Disabilities Act**

Title I of the Americans with Disabilities Act (ADA) makes it unlawful for an employer with 15 or more employees to discriminate against a qualified

individual with a disability. A qualified individual with a disability is one who, with or without reasonable accommodation, can perform the essential functions of the employment position that he holds or desires. An employer must reasonably accommodate a disabled employee's functional limitations unless doing so would impose an undue hardship on the employer. The ADA also regulates the manner and method by which an employer may question employees, including by administering employee physicals and other medical examinations. ADA claimants must file with the EEOC before filing suit.



### **State Law**

The law in North and South Carolina prohibits discrimination in employment on the basis of race, color, national origin, sex, religion, age, or disability. North Carolina law also prohibits discrimination based on sickle cell trait or genetic information. Furthermore, the laws in both states prohibit employers from retaliating against any employee for making a claim under, or exercising any rights guaranteed by, the payment of wages or workers' compensation statutes.

### **Affirmative Action**

If a business has a federal contract, subcontract, or federally assisted construction contract that exceeds \$10,000, or a combination of federal contracts exceeding \$10,000 in a 12-month period, the business is required to engage in affirmative action. Federal contractors with 50 or more employees and \$50,000 or more in government contracts or subcontracts must develop a written affirmative action plan for each business establishment.

## **OTHER INDIVIDUAL RIGHTS**

### **At-Will Employment**

Generally, employees are employed "at will," and an employer may terminate an employee at any time for any reason or for no reason at all. Both North Carolina and South Carolina recognize a "public policy exception" to the employment at-will doctrine; this exception prohibits the discharge of an employee at will for a reason that violates public policy.

## Employee Handbooks

A South Carolina statute offers some protection for employers against a finding that a handbook, or other writing, creates a contract altering the at-will relationship if the writing includes a “conspicuous” disclaimer. The disclaimer must appear on the first page of the document in underlined, capital letters, and, for handbooks and personnel manuals, employees must sign the disclaimer. In North Carolina, a handbook will not typically alter the employment at-will relationship.



## Credit and other Background Checks

The Fair Credit Reporting Act (FCRA) most often applies in the employment context when an employer is conducting a background check on a job applicant and the background check includes a request for a consumer report. A consumer report is any written, oral, or other communication of any information by a consumer reporting agency that bears on, among other things, an individual’s character, general reputation, personal characteristics, or mode of living, and that is used or expected to be used as a factor in making an employment decision. The employer must provide a clear and conspicuous disclosure in writing to the applicant that a consumer report may be obtained for employment purposes before the report is actually procured; the employer must also obtain a written authorization from the applicant to request a report. If employment is denied to an applicant based on the consumer report, the employer must give various notices to the applicant prior to the adverse action. Penalties for FCRA violations are severe.

## Drug and Alcohol Testing

Private employers in the Carolinas have the discretion to design and implement drug- and alcohol-testing policies. Generally speaking, testing may occur pre-employment or during employment—and on a random, for cause, or post-accident basis—after obtaining written consent. Employers must carefully follow chain-of-custody protocols when obtaining a testing specimen and only use certified laboratories to confirm test results. North Carolina heavily regulates drug testing and requires various notices to employees both before and after testing. Employers involved with transportation must also be mindful of testing-related rules issued by the U.S. Department of Transportation.

## Family and Medical Leave

The Family and Medical Leave Act (FMLA) provides up to 12 weeks of unpaid leave in a 12-month period to eligible employees for certain family and/or medical needs. The FMLA applies to employers with 50 or more employees. In order to be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months and must have worked 1,250 hours in the preceding 12-month period. An employee may take leave under the FMLA for, among other things, his own serious health condition; the birth or adoption of a child; or the serious health condition of a spouse, child, or parent. Generally, employees on FMLA leave are entitled to continued health insurance coverage during the FMLA leave period, as well as reinstatement to the same or an equivalent position at the end of the leave period.

## Health Insurance Continuation Coverage

Group health plans of employers with 20 or more employees are required to provide health care continuation coverage to employees and their qualified beneficiaries under COBRA when, absent COBRA, such coverage would end. If an eligible employee experiences a "qualifying event" that results in a loss of coverage, continuation coverage must be offered for 18 months to the employee and his or her dependents. In some cases, the period of continuation coverage may be extended to up to 36 months. "Qualifying events" include reduction in the employee's hours of employment; termination of the employee for any reason other than gross misconduct; or loss of coverage due to divorce or legal separation of the employee. COBRA also contains several notice requirements. North and South Carolina state law requires employers to provide continuation coverage where COBRA does not apply.



## Health Insurance Portability Requirements

The Health Insurance Portability and Accountability Act (HIPAA) allows for portability of health care coverage; limits pre-existing condition exclusions for plan participants moving from one plan to another; and provides for the availability of health care coverage for small employers. Also, state law in North and South Carolina allows participants in group health plans to convert their group coverage to individual coverage.

## Military Service Leave

Under the Uniform Services Employment and Reemployment Rights Act (USERRA), men and women serving in the uniformed services have various employment and reemployment rights. USERRA applies to all employers regardless of size and protects all employees serving in the military, regardless of whether military service is voluntary or involuntary. The employee must be treated as if he or she had been employed continuously during the military service, and health insurance, pension, and other benefits must be maintained during the leave. Under most circumstances, the employer must reinstate the employee at the conclusion of the military service. For a period of time after returning from military service, an employee may only be terminated "for cause." Discrimination and retaliation on the basis of military service are prohibited. North Carolina has a similar statutory scheme for employees serving in the N.C. National Guard.

## Personnel Files

Personnel files may include, among other documents, benefit elections and information about marital status, dependents, age, and the like where needed for insurance, benefits, or tax purposes. All medical information – including any information gathered in connection with medical examinations, FMLA leave requests, or drug testing – must be maintained in separate medical files and treated confidentially. Employees do not have any guaranteed right to review their personnel files.



## Polygraph Tests

The Employee Polygraph Protection Act (EPPA) broadly prohibits the use of polygraph and lie detectors in the workplace. Although there are a few exceptions, these exceptions are liability traps for the unwary. The EPPA specifically prohibits any employer from directly or indirectly requiring, requesting, suggesting, or causing an employee or prospective employee to take a lie detector test. Furthermore, an employer may not discharge or take any adverse action against a current employee, or refuse to hire an applicant, for refusal to take a lie detector test. The U.S. Secretary of Labor may impose civil penalties for violations of the EPPA, and individuals may bring a private civil action.

## **Smokers**

Both North and South Carolina protect the rights of smokers in the workplace. In South Carolina, the use of tobacco products outside the workplace may not be the basis of any personnel action. The S.C. statute applies to all employers regardless of size. In North Carolina, all employers with three or more regularly employed individuals are prohibited from discriminating against any employee because he or she engages in the use of lawful products (like tobacco or alcohol) off the employer's premises, during non-working hours, and where such usage has no adverse effect on job performance.

## **Unemployment Benefits**

Both North and South Carolina provide for unemployment benefits for qualified employees who are separated from employment. To be eligible, the former employee must meet certain wage requirements, must be unemployed or partially unemployed, and must show that he was separated from employment through no fault of his own. Decisions granting and denying unemployment benefits are appealable by the affected party.

## **WAGE AND HOUR LAW**

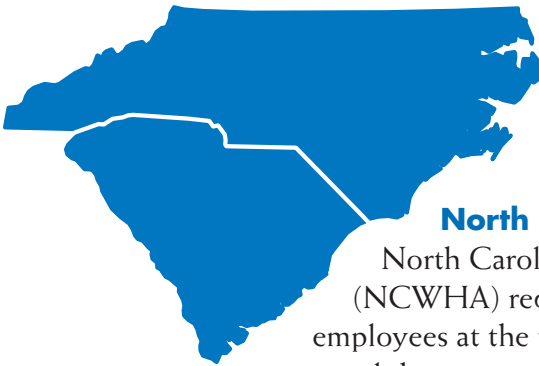
### **Federal**

The Fair Labor Standards Act (FLSA) establishes standards for minimum wages, record-keeping, and child labor. In addition, employers must pay non-exempt employees overtime pay for hours worked in excess of 40 in a seven-day workweek. However, employees in certain positions that meet specific tests are exempt from coverage under the law. FLSA exemptions are available for white-collar employees, such as executives, administrators, professionals, and computer technicians. Other exemptions apply to employees in specified industries, including transportation, agriculture, and seasonal recreation. The FLSA does not limit the number of hours an employee may be required to work in a day or a week, nor does it require breaks or meal periods during the day.

## South Carolina

The S.C. Payment of Wages Act (SCPWA) requires employers to notify employees in writing at the time of hire of the hours and wages agreed upon, the time and place of payment, and any deductions that will be made from paychecks. Any change in these terms, other than raises, must be communicated to employees at least seven days before the change becomes effective. Employers may not deduct "any portion of an employee's wages unless the employer is required or permitted to do so by . . . law or the employer has given" prior written notice it will make the deduction. When an employee is terminated for any reason, the SCPWA requires that "all wages due" are paid to the employee "within 48 hours of the time of separation or the next regular payday which may not exceed 30 days." If the employer and employee disagree on the wages due, the employer must give written notice of its position and pay the amount it concedes to be due "without condition." If an employer violates the

SCPWA, an aggrieved employee may be entitled to recover double damages and, subject to a court's determination, costs and attorney's fees.



## North Carolina

North Carolina's Wage & Hour Act (NCWHA) requires employers to notify employees at the time of hire of the wages agreed upon and the time and place of payment. Any change in these terms, other than raises, must be communicated to employees at least 24 hours before the change becomes effective. Employers may not deduct any amount from an employee's wages unless the employer is required or permitted to do so by law or the employee has executed a written authorization form giving the employer permission to make the deduction. When an employee is terminated for any reason, the NCWHA requires that all wages due be paid by the next regular payday. If any employee will forfeit any "wages" (such as vacation pay, sick pay, or bonuses) upon termination, the employee must be informed of the forfeiture policy in writing prior to the pay period in which the forfeiture becomes effective. If an employer violates the NCWHA, an aggrieved employee can recover double damages, plus costs and attorney's fees.

## OTHER LAWS

### ERISA

The Employee Retirement Income Security Act (ERISA) governs employee claims related to employer-sponsored retirement benefit plans and welfare benefit plans. ERISA establishes requirements for plan sponsors, plan administrators, plan fiduciaries, and third-party claims administrators. These requirements include proper management of plan assets, strict rules for claims processing, establishment of written plan documents, providing plan documents to plan participants and beneficiaries, and filing annual reports. ERISA pre-empts state law when the state law relates to a benefit plan. Common ERISA-based claims include claims for benefits under a benefit plan, claims for breach of fiduciary duty, and claims related to the plan administrator's failure to provide documents.

### Immigration – I-9 Compliance

All employers, regardless of size, are required to verify the identity and eligibility of each new hire to work in the United States using Form I-9, and to maintain such records on all employees. To verify a new hire's identity and eligibility to work, employers must request that she present one or more documents listed on the Form I-9. Typically, these documents consist of a state-issued photo ID and either a Social Security card or an INS document indicating eligibility to work. Hiring of "unauthorized" aliens is prohibited, as is discrimination against employees or applicants on the basis of national origin or citizenship. Violations are punishable by substantial fines, or, in some cases, imprisonment.

### Immigration – Visas

U.S. immigration law provides three basic status types: U.S. citizens, Permanent Resident aliens (holders of "Green Cards"), and holders of various types of temporary visas. Temporary visas are designated as "A" through "V." Some temporary visas allow the holder to work in the United States; others do not. The most common temporary working visa used by businesses and universities is the H-1B visa. The H-1B has three fundamental requirements. The employee must hold a professional-level university degree, or the equivalent thereof; be offered a professional-level position; and be offered a salary that at least equals the "prevailing wage." No more than 85,000 H-1B visas are issued per year, and there are long waiting periods.

## **Labor Relations**

The National Labor Relations Act (NLRA) governs the legal relationships between employees, employers, and labor unions. It grants employees several basic rights, known as "Section 7 rights," such as the right to support or to oppose labor unions in the workplace. Violating an employee's Section 7 rights can trigger unfair labor practice charges against an employer or union. The NLRA also provides for secret ballot elections by which employees can vote for or against unionization. An agency of the federal government, the National Labor Relations Board, enforces the NLRA and supervises the election process.

## **Medical Information Privacy**

In addition to covering the portability of health care coverage between employers, HIPAA sets forth specific privacy rights regarding individuals' medical records and other individually identifiable health information that is held or disclosed by a HIPAA-covered entity, such as a health plan or health care provider. In addition, HIPAA regulates how such information may be stored and transmitted and provides for significant fines for violations of HIPAA's confidentiality requirements.

## **Occupational Safety and Health**

The Occupational Safety and Health Act requires all employers to provide their employees with a safe and healthy worksite free of hazards that may cause injuries and illnesses to workers. North and South Carolina have adopted the federal Occupational Safety and Health Administration (OSHA) standards almost verbatim, with exceptions in the areas of construction and general industry standards. Civil penalties for violations may be as high as \$70,000 if the employer has knowledge of the hazard and shows an intentional disregard or indifference to the requirements of the law, or if a repeat violation occurs. OSHA also imposes record-keeping and recording requirements.

## **Plant Closings – Federal Law**

The Worker Adjustment and Retraining Notification (WARN) Act requires employers to give 60 days' notice prior to a "plant closing" or "mass layoff" to affected employees, the state employment security commission, and certain local government officials. The Act defines a plant closing as the permanent or temporary "shutdown" of a "single site of employment" or one or more "facilities or operating units" within a "single site of employment," if the shutdown results in an "employment loss" for 50 or more employees (as all those terms are defined by the Act). A mass layoff means a layoff that does not involve a plant closing and results in an employment loss at a single site of employment for: (1) 50 or more employees if they constitute 33 percent or more of active employees, or (2) 500 employees regardless of whether they constitute 33 percent of the workforce.

WARN Act notices must contain information required by the Act. The WARN Act provides exceptions for closing temporary facilities, "faltering companies," "unforeseeable business circumstances," natural disasters, and sales of businesses, among others.

Violations can lead to civil penalties, including back pay and lost benefits for up to 60 days and attorney's fees. If the required notice is not provided to the appropriate government officials, the employer can be fined up to \$500 per day for each day of violation for up to 60 days.

## **Plant Closings - State Law**

North Carolina does not have a state plant closing law.

Under South Carolina's plant closing law, if an employer requires employees to give notice before quitting, then the employer must post a warning of any plans to shut down the workplace. The notice must be posted at least two weeks before the closing or the same length of time as the advance notice required of employees who quit. The state law provides exceptions for closings caused by unforeseen accidents to plant machinery or acts of God or "the public enemy." An employer that fails to post the notice can be fined up to \$5,000 and is liable to each employee for damages.

## **Sarbanes-Oxley Whistleblower Protection**

The Sarbanes-Oxley Act (SOX) contains two major provisions to protect whistleblowers. Section 806 of SOX gives a civil cause of action to any employee of a publicly traded company (or, in some cases, of a non-publicly traded subsidiary of a public company) who was retaliated against for providing information or making a complaint regarding activity he reasonably believed violated federal antifraud or securities laws or regulations. Successful Section 806 claimants are entitled to immediate reinstatement and back pay, front pay, costs, and reasonable attorney's fees. Section 1107 of SOX generally makes it a crime for any employer—including privately owned companies—to retaliate against employees who provide a law enforcement officer truthful information relating to the commission of a federal offense. Violations of Section 1107 are punishable by fines of up to \$500,000 and imprisonment for up to 10 years.

**This Desk Reference is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situations. We encourage you to consult an attorney about specific questions.**



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