

2024 POCKET GUIDE

North Carolina Employment Law

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The following sections summarize key North Carolina employment statutes and principles of employment law. The summaries are not intended to be a comprehensive analysis of the laws or their judicial interpretations. When no reference to a statute is provided, federal law or common law may apply. Federal law in particular covers a wide range of employment law contexts, including areas like discrimination, workplace safety, leave policies, and collective bargaining agreements. Our attorneys are well-versed in these areas and available to assist with any federal issues.

Joshua L. Rogers, *Editor*

→ **Classification of Employees Versus Independent Contractors**

In North Carolina, independent contractor status is determined under common law, which provides several factors that “are considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee.” *State ex rel. N. Carolina Dep’t of Com., Div. of Emp. Sec. v. Aces Up Expo Sols., LLC*, 853 S.E.2d 769, 775 (N.C. App. 2020). The factors include an inquiry into whether the employee is engaged in an independent occupation, works at a fixed price, has control over the method used when performing the work, can use any assistants the employee thinks may be proper, has full control over such assistants, and in control of his own time.

→ Criminal Background Checks

North Carolina does not have a general law governing background checks, but most employers are prohibited from requiring an applicant to disclose information about any arrest, criminal charge, or criminal conviction that has been expunged. If an employer does ask for such information, the employee does not have to provide it. N.C.G.S. § 15A-153(c). This does not apply to state or local law enforcement agencies authorized by N.C.G.S. § 15A-151 to obtain confidential information for employment purposes.

→ Drug Testing

Employers who use drug testing must comply with statutory and regulatory requirements. Although employers must pay for the costs of drug testing, employees must pay reasonable expenses if they want to be retested after getting a positive test. Employers who violate the drug testing statute are subject to civil penalties.

N.C.G.S. § 95-230 to 95-235; 13 N.C. Admin. Code 20.0100-0602.

→ Employment-at-Will State

North Carolina is an at-will-employment state, which means an employer may terminate the employee for “any reason, no reason at all, or for an irrational or arbitrary reason.” *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, 746 S.E.2d 13, 17 (N.C. App. 2013). There are three exceptions: (1) the employee has a contract for a definite term; (2) the termination violates a state or federal anti-discrimination law; and/or (3) the termination violates state public policy. *Gillis v. Montgomery Cty. Sheriff’s Dep’t*, 663 S.E.2d 447, 449-50 (N.C. App. 2008). Although there is no list of actions that violate public policy, violations include firing someone for refusing to break the law or for engaging in legally protected activity. *Ridenhour v. Int’l Bus. Machines Corp.*, 512 S.E.2d 774, 778 (1999).

→ Employment of Minors

The legality of hiring someone under age 18 to work is a highly fact-specific consideration that depends heavily on the specific age of the employee, the type of work, and the number of hours to be worked.

N.C.G.S. § 95-25.5.

→ Equal Employment Practices Act

Under North Carolina's Equal Employment Practices Act, it is state public policy to "protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgment on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees." N.C.G.S. § 143-422.1 *et seq.* North Carolina has generally adopted federal standards for evaluating discrimination claims. *N. Carolina Dep't of Correction v. Gibson*, 301 S.E.2d 78, 82 (N.C. 1983).

→ Final Payments to Separated Employees

Whenever an employee quits or is terminated from employment, the employee is entitled to receive all wages on or before the next regular payday. In the case of alternative compensation (like bonuses and commissions), the employee must be paid on the first regular payday after the amount becomes calculable. Wages cannot be forfeited if the employer has not previously given notice of a policy or practice justifying forfeiture. If there is a dispute over the amount of wages, the employer must pay the part of any wages that are not in dispute.

N.C.G.S. §§ 95-25.7, 95-25.7A.

→ Genetic Information and Medical Status Issues

Employers cannot discriminate against an applicant or employee based on the following: a person having sickle cell or hemoglobin C trait, a person requesting genetic testing or counseling services, or based on genetic information obtained about the person or a member of the person's family.

N.C.G.S. §§ 95-28.1, 95-28.1A.

Employers are prohibited from requiring employees to take a test for the AIDS virus to qualify for "continued employment." Employers are permitted, however, to require a preemployment test for the AIDS virus; and they can refuse to hire someone solely based on a confirmed positive test for the AIDS virus. Employers can also require employees to test for the AIDS virus annually and reassign or terminate an employee whose infection "would pose a significant risk to the health of the employee, coworkers, or the public, or if the employee is unable to perform the normally assigned duties of the job."

N.C.G.S. § 130A-148.

→ Hazardous Chemicals Right to Know Act

Employers cannot discriminate against an employee who has assisted authorities with an inspection regarding hazardous chemicals, testified (or is about to testify) in a proceeding about hazardous chemicals, or asked the employer for information about the chemicals used at the employer's facility.

N.C.G.S. § 95-196.

→ Health Coverage Continuation

Mini-COBRA Law

Employers who offer group health insurance coverage must, with some exceptions, continue coverage of hospital, surgical, or major medical insurance for 18 months following an employee's ineligibility. Continuation is available only to employees and their dependents who have been continuously insured under the employer's group policy for the preceding three months. Employers must provide notice of the availability of coverage in each individual certification of coverage, on the employees' insurance cards, orally, or in writing as part of the exit process. The employee then has 60 days to elect coverage and begin paying the premium.

N.C.G.S. §§ 58-53-5 et seq.

→ Immigration Verification

Private employers with 25 or more employees must verify a person's work authorization using E-Verify and keep the verification record for one year after the employee leaves the employer.

N.C.G.S. §§ 64-25, 64-26.

→ Leave

Domestic Violence. Employers cannot take adverse action against an employee who takes reasonable time off to obtain relief under the state's domestic violence statutes. "Reasonable time off" is not defined by the statute. Unless there is an emergency, the employee must follow the employer's normal leave policy, and the employer may require documentation supporting the absence.

N.C.G.S. § 50B-5.5.

Jury Duty. Employers cannot discharge or demote employees because they have been called for jury duty or are serving as a grand or petit juror.

N.C.G.S. § 9-32(a)-(b).

Juvenile Court Leave. An employer cannot take adverse action against a parent-employee who complies with a juvenile court order requiring the parent to appear in court, a parenting class, an evaluation, or treatment.

N.C.G.S. § 7B-2700, et seq.

School Leave. Employers must provide four hours of job-protected, unpaid leave per year to parents or guardians to be involved in their child's school, and they cannot discriminate against employees for taking advantage of the leave. There are three conditions: (1) the employer and employee must mutually agree upon the time of the absence from work; (2) the employer can require the employee to make a leave request at least 48 hours beforehand; and (3) the employer can require the employee to provide written verification from the child's school that the parent was involved in a school activity at the time the parent took the leave.

N.C.G.S. § 95-28.3.

Vacation and Sick Leave. If an employer chooses to give employees paid vacation or sick leave, employees cannot forfeit their leave due to a company policy change without getting notice from the employer at least one pay period prior to any changes. Regulations prohibit reducing or eliminating certain vacation benefits, and they also include specific requirements for what must be addressed in vacation policies.

N.C.G.S. §§ 95-25.12 – 95-25.13; 13 N.C. Admin. Code § 12.0306.

→ **Medical Testing**

Employers with 25 or more employees cannot condition employment on applicants paying for medical examinations or records.

N.C.G.S. § 14-357.1.

→ **Military Service Preference and Discrimination**

Private employers may provide a preference for veterans as well as spouses of honorably discharged veterans with service-connected permanent and total disability.

N.C.G.S. § 95-28.4.

Employers cannot discriminate against employees who serve, apply to serve, or have an obligation to serve in a state National Guard. The employee need only prove that the employer's action was a motivating factor in the employer's decision, after which the employer must prove it would have taken the same action regardless of the employee's protected military activities. Employers are not required to pay a person's salary during their active service.

N.C.G.S. § 127A-202.1.

In December 2023, the North Carolina legislature added similar nondiscrimination protections for employees who serve in the North Carolina Wing – Civil Air Patrol.

N.C.G.S. § 143B-1033.

→ **Minimum Wage, Overtime, and Tips**

The state minimum wage is the same as the federal minimum wage: \$7.25 per hour. An employee who works more than 40 hours must be paid 1.5 times their regular rate of pay. N.C.G.S. § 95-25.4. A host of employees are exempt from the minimum wage and overtime pay requirements.

N.C.G.S. § 95-25.

With respect to tipped employees, they may be paid \$2.13 per hour under the federal Fair Labor Standards Act if the employee's tips bring the total hourly wage up to the state minimum wage. Employers can only allow a tip pooling arrangement among employees if employees are paid at least 85% of the tips they earned before the money went into the tip pool.

N.C.G.S. § 95-25.3.

→ **Negligent Hiring, Supervision, Retention, and Training**

An employer can be liable for harm to third parties caused by its employees if the employer was negligent in hiring, retaining, supervising, or training the employee. *Keith v. Health-Pro Home Care Servs., Inc.*, 873 S.E.2d 567, 574 (N.C. 2022); *Prior v. Pruett*, 550 S.E.2d 166, 172 (N.C. App. 2001). To avoid liability, an employer should reasonably investigate the background of an employee before hiring, including making inquiries into and verifying any information that is pertinent to the job. Likewise, after employment, an employer should investigate complaints about an employee that have been brought, or actions observed, that could cause harm to another.

→ **Persons with Disabilities Protection Act**

Under the Persons with Disabilities Protection Act, government employers and employers with 15 or more full-time employees are generally barred from discriminating against qualified employees or applicants with a disability. There are also protections for employees who are “regarded as” having a disability.

The employee with a disability must be able to satisfactorily perform the duties of the job, with or without reasonable accommodation. Employers do not have to make accommodations that would impose an undue hardship, which the statute defines as a “significant difficulty or expense” that is determined based on factors like the employer’s financial resources.

N.C.G.S. § 168A-3 et seq.

→ Reference Checks

It is a crime to discharge an employee and then “prevent or attempt to prevent . . . such employee from obtaining employment.” N.C.G.S. § 14-355. But employers are immune from liability for disclosing information about a current or former employee’s job performance to the employee’s prospective employer at the request of the prospective employer or the employee. That means an employer can discuss the employee’s suitability for re-employment; the reason for the employee’s separation; and the employee’s skills, abilities, and traits as related to future employment. Employers lose this immunity if the information they disclose is false or the employer knew or reasonably should have known that the information was false.

N.C.G.S. § 1-539.12.

→ Right to Work and Collective Bargaining

North Carolina is a right-to-work state, and it is a violation of public policy for an employer to require employees to join or refrain from joining a labor union.

N.C.G.S. §§ 95-78 et seq.

→ Salary History

State agencies are barred from requesting salary history from applicants or relying on salary history information in determining an applicant’s pay. Exec. Order No. 93 (Apr. 2, 2019).

→ Substance Use Laws

Employers cannot discriminate against employees for lawfully using lawful products (like cigarettes) off-premises during nonworking hours unless it is adversely affecting job performance or other employees’ safety. Employers can impose restrictions based on bona fide occupational requirements that are reasonably related to the employment activities and restrictions related to “the fundamental objectives of the organization.” Employers can also take action when an employee

fails to comply with the employer’s substance abuse prevention program or fails to comply with the recommendations of substance abuse prevention counselors hired by the employer.

N.C.G.S. § 95-28.2.

→ **Unemployment Compensation**

To be eligible to receive unemployment benefits under North Carolina’s Employment Security Law, an employee must have been employed to work an indefinite duration or been employed for at least 30 days and lost their job through no fault of their own. Employees who are unemployed due to misconduct are disqualified for benefits. An employee will also be disqualified from these benefits if the person fails to do a number of things during unemployment, including: (1) applying for suitable work when directed by the state to do so; (2) accepting suitable work when it is offered; (3) returning to the employee’s customary self-employment when directed by the state to do so; and (4) refusing to return to work when the employer asks the employee to come back within four weeks after being laid off (unless the employee has a good reason that is attributable to the employer).

N.C.G.S. § 96 et seq.

→ **Whistleblower Protections**

Under the Whistleblower Act, state employees are protected from retaliation for reporting violations of law; fraud; misappropriations of state resources; substantial and specific danger to public health and safety; and gross mismanagement, gross waste of money, or abuse of authority. Supervisors are only allowed to engage in what might otherwise be retaliatory acts if they know or have reason to know that the employee’s whistleblower report is false. N.C.G.S. § 126–84. A state employee who sues under the statute must demonstrate a causal connection between the act of whistleblowing and the alleged retaliation. *Newberne v. Dep’t of Crime Control & Pub. Safety*, 618 S.E.2d 201, 205–06 (N.C. 2005).

Under the Retaliatory Employment Discrimination Act, employers cannot retaliate against an employee who files a claim or complaint, initiates an inquiry or investigation, testifies, or provides information regarding various laws, including the Workers' Compensation Act, the Wage and Hour Act, the Occupational Safety and Health Act of North Carolina, and other laws. An employer will not be held liable where it would have taken the same unfavorable action regardless of whether the employee engaged in protected activity.

N.C.G.S. §§ 95-240 et seq.

→ **Workers' Compensation Act**

Most employers must provide compensation to employees for personal injuries caused by an accident that happens in the course of employment. N.C.G.S. §§ 97-2(3), (4), (6); 97-9. Not every injury sustained while working is covered. The injury must be the result of some “unusual or unforeseen circumstances interrupting [the employee’s] work routine.” *Gray v. RDU Airport Auth.*, 203 N.C. App. 521, 529, 692 S.E.2d 170, 176 (N.C. App. 2010). The statutory definition of “injury” specifically excludes “a disease in any form, except where it results naturally and unavoidably from the accident.”

N.C.G.S. § 97-2(6).

Once an injury is reported, the employer must promptly investigate it, admit or deny the employee’s right to compensation as early as possible, and file a report with the North Carolina Industrial Commission within five days of learning about the injury.

N.C.G.S. § 97-18(j).

This guide is provided for informational purposes and includes both legal requirements and generally recommended best practices. It is not intended to be legal advice. An attorney should be consulted when developing policies and procedures for your organization.

Sands Anderson PC

Employment Practice

Sands Anderson PC attorneys have extensive experience in the fields of employment counseling and litigation. Our clients include corporations, partnerships, sole proprietors, executives, and tax-exempt organizations from a variety of industries, as well as local governments and agencies. Our attorneys provide common sense strategies and solutions for challenging human resource issues and, when necessary, can be aggressive in litigation while being conscious of your bottom line.

We are prompt in meeting our clients' needs, whether we are engaged in the review and crafting of employment policies and contracts, advising on the administration of personnel policies, including employee benefits issues, or providing legal representation in state and federal courts and administrative agencies such as the North Carolina Civil Rights Division, North Carolina Department of Labor, Equal Employment Opportunity Commission, the United States Department of Labor, National Labor Relations Board, and Office of Federal Contract Compliance Programs.

We serve as experienced counsel to insurers and insureds, providing defense under employment practices liability (EPL) policies. Our attorneys conduct supervisor and staff trainings on a variety of workplace issues and best practices and are frequently invited to speak at meetings of professional associations.

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