

Labor and Employment Laws in the State of South Carolina



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This booklet is intended to provide an overview of the most important parts of South Carolina employment laws. It is not intended to be legal advice for any specific situation or set of facts. Whenever you are dealing with any employment related situation it is always a good idea to seek the advice of competent legal counsel.

I. INTRODUCTION

In the past few decades, the number and scope of laws regulating the employment arena has grown tremendously. While some areas of labor and employment law are governed exclusively by federal law, other areas are covered by supplemental (or overlapping) state laws, and a handful are exclusively of a state or even local concern. In general, federal law serves to establish the threshold of what an employer absolutely must do and to what employees are entitled in various situations. State law may still govern if it establishes either a higher, stricter standard for employers than federal law or applies to a class of employers not covered under federal law. This means that where both state and federal laws apply, state regulations must offer either the same or greater protections to employees than federal law.

This booklet provides a basic overview of the employment laws in effect in South Carolina and is divided into five main themes, or sections, as follows: 1) the employment relationship; 2) wages and hours; 3) employment discrimination; 4) workplace safety; and 5) immigration. Citations to South Carolina Code of Laws are provided when available.

Bear in mind that this booklet is not meant to be an exhaustive treatment of South Carolina employment law in any particular area. Rather, it is intended to provide a basic reference guide to help employers quickly and successfully address common employment issues in accordance with South Carolina law. Always remember, that where state and federal laws differ, the higher, stricter standard must be followed. Additional information about federal employment issues may be found in the various other booklets published by Fisher & Phillips LLP. These booklets summarize and explain the federal laws that govern employers.

II. THE EMPLOYMENT RELATIONSHIP

A. Employment Contracts

Once a contract is formed, an employer is bound. Most employment contracts are fairly informal, consisting of an oral hiring and perhaps incorporating certain terms derived from an employee handbook, manual, or other document. If the employment is for more than one year, the law requires that the contract be in writing for it to be enforceable. Apart from that, formal or written contracts usually are used only for professional employees, managers, and other highly skilled or compensated workers, and in situations involving unusual job duties.

This type of formal employment contract can be a complicated document and if it is poorly drafted it can have dire consequences. Employers should consult with a lawyer rather than trying to write their own contracts.

Unfortunately, sometimes the courts have found that an employer agreed to a contract when, in fact, the employer had not yet made a firm decision to hire the person in question. Accordingly, an employer who provides an applicant with written information relating to the job description, salary, and fringe benefits also should include in bold-faced and underlined type, **THIS IS NOT AN OFFER OF EMPLOYMENT** to avoid this problem. When an employer decides to hire the person, a formal offer of employment can be drafted and sent to the applicant.

B. Employment At Will

1. Generally

In South Carolina, if an employee is employed for an indefinite period of time, the employment relationship is considered to be “employment at will.” This means that both the employer and the employee can end the employment relationship at any time, for any reason, or for no reason at all, as long as the reason is not against the law.

2. Limits To The At-Will Status

There are legal limits to “at-will” status. An employee may not be discharged for any legally prohibited reason, such as age, sex, race, or disability (see section on Employment Discrimination). Neither may an employee be discharged in retaliation for exercising a legal right, nor for performing a legal duty. Furthermore, a collective bargaining agreement or other form of employment contract may impose additional limits on the permissible grounds and processes for dismissal.

In South Carolina an “at-will” employee can sue an employer for wrongful discharge if the employee can prove that the discharge violated “public policy.” This means that if the reason for an employee’s termination is itself a violation of law, the public policy exception to the employment at-will rule will be applied. For example, regardless of the at-will relationship, it is contrary to public policy to terminate an employee for failing to contribute to a political action fund or to discharge an employee in order to avoid paying commissions. Furthermore, under state law it is a “crime against public policy” to fire any person because of that person’s political beliefs. S.C. Code Ann. § 16-17-560.

3. Implied Contract Of Employment – The Employer Handbook S.C. Code Ann. § 41-1-110

South Carolina recognizes the doctrine of employment at-will, which means that employment is generally terminable by either party at any time, for any reason or no reason at all. However, in the 1987 *Small v. Springs Industries* decision by the South Carolina Supreme Court, the court recognized that handbooks and personnel policies issued by an employer may limit the general rule of employment at-will in South Carolina. An employer may issue written policies without impacting at-will employment if the employer inserted a *conspicuous* disclaimer in the handbook stating that employees are at-will. This was chipped away by later decisions, such as *Connor v. City of Forest Acres*, in which courts held that a disclaimer may not be effective if there are other provisions in the employee handbook or other company policies which appear to be promissory in nature and are, therefore, inconsistent with at-will employment.

In 2004, to allow employers to provide employee handbooks which do not create contracts, the South Carolina General Assembly passed what is widely referred to as the “Employment At-Will” statute. The law sets forth procedures that an employer should follow when promulgating handbooks, policy manuals or individual policies and documents to avoid destroying at-will employment. Essentially, in order to issue an employment handbook, manual, etc., with a valid at-will disclaimer, the document must have on its first page a “conspicuous” disclaimer, referring to language stating the employment relationship is at-will. The language must be underlined and

in all capital letters and the employee's signature must appear below the disclaimer. The statute provides protection for all employer issued documents containing a conspicuous disclaimer *issued after June 30, 2004*. It is still important that an employer be cautious when writing and issuing employment handbooks because the content can still have serious legal consequences.

Employers can take advantage of the statute by reissuing a handbook with a disclaimer that complies with the at-will statute. If changes are made to any of the policies, the employer must put all employees on actual notice of the changes. This can be done by issuing a new handbook or manual, with a summary of the changes, and requiring employees to sign a statement acknowledging that they have received the new handbook and that they understand the changes. The employer is then free to implement the changes.

C. Labor Organizations/Labor Relations

1. Generally; S.C. Code Ann. § 41-1-20

Labor relations in South Carolina are primarily regulated by the National Labor Relations Act (NLRA). Although South Carolina has various provisions regulating picketing, union security, and similar labor related procedures (see below, Right-To-Work Protections For Employees), South Carolina does not have generally applicable labor relation laws. In South Carolina, workers have the right to organize and the right to designate representatives of their own choosing to negotiate the terms and conditions of employment. No employer may discharge or discriminate in the payment of wages against any person because of his or her membership in a labor organization. To do so is a misdemeanor, punishable by a fine of between \$10 and \$50 or imprisonment for between 10 and 30 days.

2. The National Labor Relations Act

The field of labor relations is primarily governed by the NLRA, which is enforced by the National Labor Relations Board (NLRB). The NLRA allows groups of employees to elect a labor organization to negotiate their wages and working conditions. While employers may express their opposition to unionization, they may not discriminate against employees because of their union activity or past membership. If a union wins an NLRB election, the employer must negotiate in good faith with the union. If the parties negotiate a collective bargaining agreement, the agreement is a fully enforceable contract. More information about the NLRA is available in separate Fisher & Phillips booklets.

3. Right-To-Work Protections For Employees; S.C. Code Ann. §§41-7-10, *et seq.*

Since South Carolina is a "right-to-work" state, employees in South Carolina cannot be required to join or pay dues to a union. S.C. Code Ann. § 41-7-30. In particular, an employer may not require an employee to become a member of a union, abstain from membership in a union, or pay dues to a union as a condition of employment or continuance of employment. S.C. Code. Ann. § 41-7-30.

An employer may deduct union dues from an employee's wages only if the employer has received a written assignment from the employee which must not be irrevocable for a period of

more than one year or until the termination date of any applicable collective agreement or assignment, whichever occurs sooner. S.C. Code Ann. § 41-7-40. An employer may not negotiate any collective bargaining agreement that contradicts these “right-to-work” provisions. S.C. Code Ann. § 41-7-50.

Any party who violates these provisions is guilty of a criminal misdemeanor and shall be punished by imprisonment between 10-30 days or fined between \$10.00 and \$1,000.00 and the aggrieved individual may seek equitable relief and damages. S.C. Code Ann. §§ 41-7-80; 41-7-90

4. Interference With The Employee’s Right To Work; S.C. Code Ann. § 41-7-70

The South Carolina Code also governs union interference with the right to work. The primary economic weapon for unions is the right to strike and picket an employer’s workplace. While South Carolina cannot legislate to enjoin peaceful strikes or picketing, South Carolina law does offer significant protection from unlawful acts by unions. No person or organization may use force, intimidation, violence or threats of violence in order to:

- interfere, or attempt to interfere, with a person’s right to work or engage in any lawful vocation, or to enter or leave any workplace, or to receive, ship, or deliver materials, goods, or services not prohibited by law; or
- compel or attempt to compel anyone to join, support, or refrain from joining or supporting any labor organization; or
- engage in picketing by force or violence or in such a way that would obstruct or interfere, or constitute a threat to obstruct or interfere, with:
 - free ingress to, and egress from, any place of employment; or
 - free use of roads, streets, highways, sidewalks, railways, or other public roads.

5. Right to Secret Ballot Election; S.C. Const. Article II, § 2

In November of 2010, South Carolina voters approved the South Carolina Secret Union Voting Amendment which amended the Constitution of South Carolina to guarantee the right of an individual to vote by secret ballot for a designation, selection, or authorization for employee representation by a labor organization.

D. Background Screening

1. Criminal Background Checks And Inquiries; S.C. Code Ann. Regs. 73-23(E)

Employers may consider prior criminal convictions in making employment decisions. An employer may obtain an applicant’s or employee’s criminal history record information, unless it is sealed. S.C. Code Ann. Regs. 73-23(E). The criminal history record will contain all unsealed conviction data, non-conviction data, non-disposition data, and similar dispositions which show a

final disposition of an arrest. An applicant's criminal record can be obtained from the South Carolina Law Enforcement Division. A criminal record check costs \$25.00 and an employer must supply the applicant's name, race, sex, date of birth, and, if available, Social Security number.

Several statutes require background checks for particular jobs. For example, South Carolina school districts are required to have the State Police perform criminal background checks on all applicants for jobs involving direct, daily contact with students. S.C. Code Ann. §59-25-115. Likewise, operators and employees of private security and investigation agencies are required to submit a set of fingerprints and undergo a criminal history check. S.C. Code Ann. §§ 40-18-20, 40-18-80.

2. Drug And Alcohol Testing; S.C. Code Ann. §44-107-10, *et seq.*

Federal law requires employers in most transportation industries to conduct both pre- and post-employment decision testing for drug and alcohol abuse among employees performing a safety-sensitive function. Drug and alcohol testing is legal, but not required for other employers.

Employers who directly enter into contracts with or receive grants from the state are covered by South Carolina's Drug-Free Workplace law. The Drug-Free Workplace Act imposes certain duties on government contractors, but it does not require drug testing. The South Carolina Drug-Free Workplace law requires grantees and contractors with state agency grants or contracts of \$50,000 or more to certify that they will provide and maintain a drug-free workplace.

This law does not require drug testing, but does require covered employers to: 1) publish a statement announcing the drug-free workplace policy; 2) establish a drug free awareness program to inform employees of potential penalties, available counseling, and dangers of drug use in the workplace; 3) post and distribute the notice/statement to all employees involved in contract or grant work with the state/federal government; 4) notify the employee in the required statement that, as a condition of employment on the contract or grant the employee will: a) abide by the terms of the statement; and b) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after the conviction; 5) notify the contracting or granting agency of any criminal drug convictions of employees; 6) impose penalties or require employees to complete a rehabilitation program in response to any such convictions; 7) make a good faith effort to continue to maintain a drug free workplace. S.C. Code Ann. §44-107-30.

Although the Americans with Disabilities Act treats prior drug or alcohol addiction as a disability, it expressly allows testing of applicants for current drug abuse and does not require employers to accommodate current drug or alcohol abuse. If pre-employment drug tests are used, they should be used on all applicants. This will forestall a later claim that minorities were singled out for testing.

3. Effect Of Drug Testing on Unemployment Benefits; S.C. Code Ann. § 41-35-120

The South Carolina Department of Employment and Workforce has certain requirements that must be met for an employee to be denied unemployment based on a termination related to substance abuse testing. Specifically, South Carolina requires that an employer provide notice of

a positive test result to an employee within 24 hours of receipt. Also, an employer must keep test result records for up to one year.

Under South Carolina law, an employee will be disqualified from receiving unemployment benefits when the employee tests positive for drug use and is terminated. However, in order to be disqualified, an employer's testing procedures must meet the provisions in the statute in order to prevail at a subsequent South Carolina Department of Employment and Workforce hearing. The employer will need to offer proof of compliance to prevail at the hearing. The statutory requirements on drug testing require that a company affirm that:

- the sample was collected and labeled by a licensed healthcare professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel;
- the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists, or the State Law Enforcement Division; and
- any initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or more accurate scientifically accepted method approved by the National Institute on Drug Abuse.

4. Confidentiality Of Drug Testing Results; S.C. Code Ann. §41-1-15

Employers who implement drug testing programs are required by law to keep all information regarding such programs, including drug test results, confidential.

5. Pre-Employment Medical Exams

Under the Americans with Disabilities Act, an employer cannot require applicants to take a medical examination before extending an offer of employment. An employer may condition the offer on the completion of a medical examination before beginning work, however, the examination must be required of everyone who is offered employment in this job category. Employers wishing to use pre-employment medical or psychiatric examinations must: 1) apply them uniformly to all applicants regardless of disability; 2) perform them after all other forms of evaluation are concluded (keep in mind the federal Americans with Disabilities Act (ADA) requires that medical exams not be given until after a job offer is made); 3) make the results available to the applicant upon request; and 4) be prepared to make reasonable accommodations where appropriate.

When an applicant can perform all the essential functions of the job safely and efficiently with or without *reasonable accommodation* an employer may not refuse to hire based on the applicant's disability. Employers must remember that *failing* a medical examination does not automatically disqualify a person from employment. If the medical condition that caused this person to *fail* the examination is a disability, but the employer can reasonably accommodate that disability, then the employer cannot revoke the offer of employment.

Furthermore, physical examinations may not be used to disqualify applicants based on physical conditions which merely pose a risk of future injury. Employers should communicate to the doctor performing the examination the precise nature and demands of the position so that he or she may examine the applicant in light of the specific job requirements.

E. Health Insurance

1. Coverage And Mandated Benefits; S.C. Code Ann. §38-71-670, et seq.

Once an employer chooses to offer health insurance to employees there are a number of state and federal laws impacting the offered medical benefits, the administration of the plan, and the continued availability of health insurance. Employers who provide fully insured plans in South Carolina are required to offer certain mandated benefits, including but not limited to the following:

- mammograms;
- prostate cancer examinations; and
- Pap smears.

S.C. Code Ann. § 38-71-145. Additionally, group health insurers are required to provide a mother and newborn with hospitalization benefits for at least 48 hours after delivery, not counting the day of delivery, or at least 96 hours following a cesarean section, not counting the day of delivery. S.C. Code Ann. § 38-71-135.

The law requires a health insurance plan to provide coverage for the treatment of a mental health condition, including, but not limited to, bipolar disorder, major depressive disorder, obsessive compulsive disorder, paranoid disorder, schizophrenia, anxiety, and post-traumatic stress disorder. S.C. Code Ann. § 38-71-290. Further, an insurance plan may not establish a rate, term or condition on the treatment of a mental health condition that places a greater financial burden on the insured than for treatment of a physical health disorder. *Id.* Any deductible or out-of-pocket expenses required by an insurance plan must be comprehensive for coverage of both physical and mental health conditions. *Id.*

A health insurance plan which provides family benefits must cover newborns from the time of birth, including treatment for any congenital defects, injury or sickness. S.C. Code Ann. § 38-71-140. Similarly, family benefits must cover adopted children from the time of birth if the adoption decree was filed at least 31 days before the birth of the child. *Id.*

A health insurance plan is not permitted to stop coverage of dependent children if the child is incapable of employment due to disability and is dependent on the insured. S.C. Code Ann. §§ 38-71-350; 38-71-780.

Other state insurance requirements are applicable only to certain conditions. For example, if the insurance provided to employees provides coverage for mastectomy surgery, it must also cover surgery to reconstruct the breast and prosthetic devices.

2. Continuation Of Coverage

Employers electing to offer group health insurance plans are also regulated by state and federal laws that impose certain obligations on them to provide for the continuation of such health insurance. In South Carolina, employers are covered not only by the federal health care continuation law (COBRA), but by state laws governing insurance benefits for employees' spouses and terminated employees.

a. The Federal COBRA Law

The COBRA law applies to employers with 20 or more employees and requires "qualified beneficiaries" who would ordinarily lose coverage under the employer's group health plan due to certain "qualifying events" be given the chance to purchase continued coverage under the employer's plan for 18 to 36 months at a rate up to 102% of the applicable group rate. COBRA applies to any employer group health care plan that provides medical, dental, vision, or prescription drug benefits, but does not apply to disability or life insurance plans.

b. Renewal Or Continuance Of Coverage At Option Of Insurer; S.C. Code Ann. §38-71-770

South Carolina, like most states, has an insurance law that requires continued coverage in instances where COBRA does not apply. In South Carolina, if an insured health plan is involved, continuation coverage must be offered to employees and dependents that lose coverage for any reason except nonpayment of premiums. However, the individual must have been covered by the plan for a period of at least six months in order to be eligible for state law continuation coverage. Coverage must be provided for the fractional month remaining after termination and for the next six policy months. The participant is responsible for paying the full cost of coverage (100% of the applicable premium). However, the employer may not require the participant to pay 102% of the applicable premium, as is the case with COBRA.

F. Employment Of Minors; S.C. Code Ann. §41-13-5, *et seq.*; S.C. Code Ann. Regs. 71-3105, 71-3107

The Federal Fair Labor Standards Act (FLSA) provides comprehensive regulation of the employment of minors. Locally, the South Carolina Department of Labor, Licensing and Regulation has the authority to enact regulations affecting child labor. S.C. Code Ann. §41-13-50. The current South Carolina regulations are substantially the same as the federal law. Anyone under the age of 18 is considered a minor.

1. Minors 16 And 17 Years of Age; S.C. Code Ann. Regs. 71-3107

In South Carolina, minors 16 and 17 years of age can be hired in any job that has not been designated as hazardous, with no limit on the number of hours. S.C. Code Ann. Regs. 71-3104; 71-3107. A list of hazardous jobs can be found on the Department of Labor, Licensing, and Regulation's website or at S.C. Code Ann. Regs. 71-3107.

2. Minors 14 And 15 Years Of Age; S.C. Code Ann. 71-3106

South Carolina Regulation 71-3106 states which jobs are permissible and impermissible for minors 14 and 15 years of age. Several restrictions apply. For example, such minors may not:

- work for more than three hours a day when school is in session;
- work for more than eight hours a day when school is not in session;
- work for more than 18 hours a week when school is in session;
- work for more than 40 hours a week when school is not in session; and
- their work cannot begin before 7 a.m. or end after 7 p.m., except during summer break when their work may end no later than 9 p.m.

3. Minors Under 14 Years Of Age

Generally, minors under age 14 may not be employed. However, minors of any age may be employed:

- working on a farm (with some restrictions);
- delivering newspapers;
- performing in radio, television, movies, or theatrical productions; or
- working for their parents in solely owned businesses (except in manufacturing or hazardous jobs).

4. Enforcement And Penalties; S.C. Code Ann. Regs. 71-3111

The federal child labor laws are enforced by the U.S. Department of Labor. The department may assess a penalty for each employee found to be the subject of a violation. Employers should insist upon documentation of the age of anyone who might be a minor.

The state child labor laws are enforced by the South Carolina Department of Labor, Licensing, and Regulation. As determined by the Department of Labor, Licensing, and Regulation, an employer who violates a state child labor law must be given a written warning for a first offense or be fined not more than \$1,000 dollars. For a second offense, an employer may be fined not more than \$5,000. South Carolina also has separate penalties listed in South Carolina Regulation 71-3111.

G. Employee Surveillance In The Workplace

1. Searches

Private sector employers are subject to few restrictions on their right to search articles and lockers on the employer's premises. In fact, the primary motivation for employers to exercise

restraint is one of maintaining good employee relations, rather than legally imposed restrictions. Whatever your practice, it is a good idea to be clear and forthright in communicating any surveillance or search practices at the time of hire and to post appropriate notices outlining the policy to not only discourage undesirable behavior but to maintain good employee relations.

2. Surveillance

As with searches, private-sector employers are limited in their surveillance of employees while on the employer's premises first and foremost by concerns over employee relations. A general guide to what is appropriate is to inform employees at the outset when and how they are being monitored and limit such surveillance to only that which is reasonable. A camera directed at a factory floor is obviously different from a camera in a locker room or a changing area.

H. Job References; S.C. Code Ann. §41-1-65

The references that one employer gives another employer concerning a former employee may give rise to a common law action for defamation. A potential claim of defamation may stem from an employer's providing another with the reasons given for a termination, a negative evaluation of the employee's work habits, skills, attitude, or general desirability as an employee. Although employment references are generally privileged under the common law, employers have decided to give out no information other than that a particular employee was a former employee, the job title, the dates of employment, and sometimes salary information.

In 1996 the South Carolina General Assembly enacted the Job Reference Immunity Statute. Under this statute, if a reference to a prospective employer is given orally, the employer giving the reference may only disclose the former employee's dates of employment, pay level and wage history. If, however, a reference request by a prospective employer is made in writing and is responded to in writing, then the former employer may disclose the following information, to which the employee must also have access:

- written employee evaluations;
- official personnel notices that formally record the reasons for separation;
- whether the employee was terminated voluntarily or involuntarily and the reason for the termination; and
- information about job performance.

Regardless of whether a job reference is given in writing or orally, the immunity provided by the statute is lost if the employer knowingly or recklessly releases false information that defames the former employee.

III. WAGES AND HOURS

A. Wage Payment Provisions

1. Paying Employees; S.C. Code Ann. §41-10-10, et seq.

a. Employers Covered; S.C. Code Ann. §41-10-20

South Carolina's wage payment provisions apply to all employers, except those who employ domestic labor in private homes and those who have had fewer than five employees at all times during the previous 12 months.

b. Frequency And Method Of Payment; S.C. Code Ann. §41-10-30; 41-10-40

In South Carolina, all employers must notify each new employee in writing at the time of hiring (individually or by posted notice) of the normal hours and wages agreed upon, the time and place of payment, the deductions which will be made from the wages (including insurance payments), and the other benefits due to an employee under any employer policy or employment contract (including vacation, holiday and sick leave policies). Also, employers must notify all employees in writing of any changes in these matters at least seven days in advance. For each pay period, employers must provide each employee an itemized statement showing his or her gross pay and the deductions made from his or her wages. All wages must be paid either by cash, negotiable warrant, direct deposit or check dated upon payday. When an employee's wages are direct deposited, the employer must furnish the employee a statement of earnings and withholdings.

Employers who pay employees bonuses or other incentive payments must notify employees of the time when such payments will be made. The Court of Appeals of South Carolina has recently determined that an employer violated the wage payment act where it did not have a set time for payment of bonuses but instead relied on "target dates."

An employer is not permitted to withhold or divert any portion of an employee's wages unless required or permitted to do so by federal or state law or the employer has provided the employee with written notification of the amount and terms of the deductions.

c. Penalties; S.C. Code Ann. §41-10-80

Each failure to pay is a separate offense. In addition to the civil penalty, the employee may recover three times the unpaid wages plus costs and attorneys' fees in a civil action. This Act is enforced by the Office of Labor Services, and the South Carolina Department of Labor, Licensing and Regulation. Violations of the wage payment law subject the employer to a civil penalty of up to \$100 for each violation.

2. Minimum Wage And Overtime Pay

South Carolina does not have any state legislation governing minimum wage or overtime pay. South Carolina follows the standards set by the Fair Labor Standards Act (FLSA) for both minimum wage and overtime.

a. Minimum Wage; S.C. Code Ann. §6-1-130

The FLSA requires that employees be paid not less than the minimum wage for all hours worked. The federal minimum wage increased on July 24, 2009, to \$7.25. South Carolina has enacted a law prohibiting its political subdivisions from establishing, mandating or otherwise requiring a minimum wage that exceeds the federal minimum wage rate. S.C. Code Ann. §6-1-130.

b. Overtime

For all hours worked over 40 in a workweek, the employee must be paid at a rate not less than one and one-half times the regular rate at which the employee is paid. The regular rate is not just the stated hourly rate (or other forms of compensation, such as salary, reduced to an hourly basis). Rather, it includes all forms of remuneration paid to or on behalf of an employee, except the following:

- gifts that are not dependent on hours worked, production or efficiency;
- discretionary bonuses;
- payments made pursuant to a bona fide profit sharing plan;
- payments made pursuant to a bona fide plan providing for retirement, insurance, or similar fringe benefits; or
- pay for unworked time such as vacation pay, holiday pay, sick pay, or jury duty pay; and certain forms of premium pay.

3. Payment On Termination; S.C. Code Ann. §§41-10-10; 41-10-50; 41-10-60

For purposes of wage payment and payment on termination, “wages” includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract. Funds placed in pension or profit sharing plans are not considered to be wages. Upon discharge, employers must pay their employees within 48 hours of the discharge, or by next regular payday, which may not exceed 30 days. South Carolina does not have any specific provisions governing payment options in regards to employees who quit, go on strike or pass away. In the case of a wage dispute, the employer must notify the employee in writing of the amount conceded to be due. That amount must be paid as required and acceptance by the employee does not constitute a release as to the balance of the employee’s claim.

4. Payment Of Commissions; S.C. Code Ann. §39-65-10, et seq.

South Carolina law also requires principals to pay sales representatives, upon termination, all commissions that have accrued or will accrue under the contract, regardless of whether the sales representatives are employees. Employers who fail to do so can be liable for treble damages, as well as attorneys' fees.

5. Unclaimed Wages

a. Generally; S.C. Code Ann. §§27-18-20; 27-18-30; 27-18-160; 27-18-180

In South Carolina, unclaimed wages, including unrepresented payroll checks, are presumed abandoned one year after becoming payable. Unclaimed wages are checks mailed but returned as undeliverable or not presented for payment. Other unclaimed property, such as payments distributable from a trust established to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment, or similar benefits, are presumed abandoned after they have remained unclaimed for five years. Employers holding unclaimed wages or other property must file a verified report before November 1 of each year reflecting status as of the preceding June 30. Employers are required to send a written notice to payees owed more than \$50 as part of the due diligence requirement no more than 120 days before filing a verified report. Wages of less than \$50 may be reported to the State Treasurer in the aggregate.

b. Penalties; S.C. Code Ann. §§27-18-350; 27-18-310

The state may require an employer who has not filed a report to file a verified report stating whether or not it is holding unclaimed wages. The state may also examine an employer's records to determine whether it is in possession of unreported unclaimed wages.

An employer that fails to remit unclaimed wages on time is subject to payment of statutory interest, effective from the date the wages should have been remitted. Failure to remit wages is punishable by a civil penalty equal to 25 percent of the value of wages. Furthermore, failure to make a timely report is punishable by a civil penalty of \$100 for each day not reported, up to \$5,000. An employer who willfully refuses, after written demand by the state, to remit unclaimed wages is guilty of a misdemeanor and is subject to a fine of up to \$10,000, up to one year imprisonment, or both.

6. Wage Deductions

a. Garnishment; S.C. Code Ann. §41-10-40

South Carolina does not have a general provision regarding the garnishment of earnings for personal services; hence, the remedy is unavailable to most judgment creditors in this state. Furthermore, an employer is not permitted to withhold from a resident employee's wages due to garnishment proceedings brought in any court outside the state unless the creditor first obtains a judgment against the employee in a court in South Carolina.

b. Garnishment For Child And Spousal Support; S.C. Code Ann. §20-7-1315; 20-7-1321; 15 U.S.C. §1673(b)

Despite South Carolina's general prohibition on garnishment, South Carolina law provides for income withholding for child or spousal support orders. When a South Carolina Circuit Court issues an order for child or spousal support, a separate order for withholding from the employee's income takes effect immediately. Every employer, public and private, must thereafter withhold from every paycheck the prescribed amount until either the employer receives a written formal release or the employee is no longer being paid by the employer. Employers must begin withholding income on the next regularly scheduled pay period following service of an order.

The only exceptions are when both parties enter into a written agreement that provides for an alternative arrangement that is approved by the court and insures payment of support or one of the parties to the order demonstrates and a court finds there is good cause not to require immediate income withholding. As with any wage deduction, you should notify the employee of the deduction prior to the first withholding and provide the employee with a copy of the order.

Note that under the Federal Consumer Protection Act, the maximum deductions allowable for child support, spousal support (alimony) and any employer withholding fee may not exceed 60% of the employee's disposable earnings (gross income less federal, state and local taxes), or 50% of disposable earnings if the employee is supporting a second family. An additional 5% of disposable earnings may be withheld if the employee falls 12 or more weeks behind in payments.

Income subject to withholding broadly includes any form of payment to an individual, not specifically exempted by the statute, regardless of source, including but not limited to wages, salary, commissions, bonuses, compensation as an independent contractor, workers' compensation, disability, annuity and retirement benefits, payments made pursuant to a retirement program, interest, and any other payments made by a person or an agency or department of the federal, state, or local government.

Remember, too, that employers in South Carolina are required to honor child and spousal support withholding orders from other states regardless of whether the employer operates or has any legal presence in the other state.

c. Assignment; S.C. Code Ann. §§37-2-410, 37-3-403

Generally, a seller or lessor is not permitted to take an assignment of earnings for payment or security for payment of a debt. However, in South Carolina, an employee can authorize deductions from his earnings, however, this authorization is completely revocable and the consent has to be in writing.

d. Priority; S.C. Code Ann. §20-7-1315(F)

Withholding for support has priority over any other process under state law against the same wages. If there is more than one support order, the employer must comply with all orders, until the federal limits are reached, in which case the employer must so inform the court in writing.

B. Work Hours

1. Hours Actually Worked; S.C. Code Ann. §§53-1-40, 53-1-50

The term “hours worked” refers to the total time an employee is required to work, be at the employer’s place of work, or be at some other designated place of work. This includes, for example, employees attending mandatory offsite and/or after hours job training classes. In addition, an employer must pay for all actual time worked, including time when the employee was not required to work, such as when an employer merely permits employees to come to work early or stay late.

An employer may establish certain policies to limit the time an employee is allowed to work by prohibiting employees from starting or continuing to work before or after a certain time, or by prohibiting overtime work without prior approval of a supervisor. Violations of such a policy should be dealt with as disciplinary matters, however, and not by refusing to pay for time actually worked.

The law in South Carolina does not impose a limit on the number of hours an employee may be required to work either in a day or a workweek. South Carolina’s only limit on mandatory overtime requires that employees not be made to work on Sundays. § § 53-1-40, 53-1-50.

The time an employee spends “on call” is generally not considered work time. However, when overly restrictive limitations are placed on employees “on call” it may necessitate counting this time as hours worked. Examples of such limitations include requiring a reporting time of less than 20 minutes or restricting an employee to one location (even the employee’s home).

Time spent attending training programs is generally considered time worked. In order for it not to be counted as time worked all four of the following conditions must be met: 1) attendance is voluntary; 2) training occurs outside normal working hours; 3) the training is not directly related to the employee’s current job; and 4) the employee does not do any productive work during this time.

Any time spent working while traveling is also included in hours worked. Time spent traveling between places of work is considered time worked, though normal commuting time between work and home is not. In instances where an employee is asked to travel either to another city or to another location in the same city and return home the same day, all travel time, less the employee’s normal commute, is considered hours worked. Where an overnight stay in another city is involved, travel during normal working hours, no matter the day of the week, is counted as hours worked, while travel occurring after normal working hours is not.

2. Recordkeeping Requirements; 26 CFR § 516, et seq.; 29 CFR § 785.48(b)

Employers are required to keep records to demonstrate compliance with the law in paying all non-exempt employees for time worked. The following information must be kept for all employees (exempt and nonexempt): name and identification number; home address, including zip code; date of birth (if under 19); sex; occupation; time and day when employee’s workweek begins; and other information concerning the payment of wages.

In addition, the following information must be kept for non-exempt employees only: the regular rate of pay and an explanation of any payments not included; number of hours worked each workday and workweek; total regular pay; total overtime pay; and an itemized list of additions and deductions for each pay period.

While the format of such records is generally left up to the employer, all records must be kept for a period of two or three years, depending on the type of record either at the place of employment or at a centralized record storing facility. The records should be easily accessible to employees or state officials and if stored centrally offsite should be available to the place of employment within 72 hours upon notification.

Note that because the state places the burden on the employer to properly maintain accurate records demonstrating compliance, if the employer's records show inconsistencies with regard to time worked and wages paid, the state may either question their accuracy or presume the employer to have not paid the proper amounts. Furthermore, if the employer fails to provide proper records, the records of the employee will be considered accurate. Finally, note that employers may use rounding in their records of time worked provided three requirements are met: 1) the rounding increments do not exceed 15 minutes; 2) the practice or policy is posted and understood by employees; and 3) the effect is that employees are fully and accurately paid for the time actually worked.

3. Meal And Break Periods

There is no requirement under South Carolina law for an employer to provide employees with breaks or a lunch period. Allowing employees to eat at their work stations can lead to having this count as compensable time if the meal period is subject to frequent or significant (more than two or three minutes) interruptions. Break periods also are not required by federal or state law, but if they are provided and are for 20 minutes or less, they are compensable times.

4. Military Leave; S.C. Code Ann. §8-7-90

South Carolina statutorily requires 15 work days per year for military leaves of absence. However, military leave is primarily governed by federal law. The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to all employers. The federal law prohibits employment discrimination due to an individual's military service. Employers must grant all employees time off work for military duty and, upon discharge, an employer must return the employee to his or her prior position or one of "like seniority, status and pay."

In addition, once an employee returns from military service he or she is protected from discharge without cause for a specified period of time if they served in excess of 30 days. Specifically, service between 30 and 180 days requires a period of 6 months protection from discharge without cause. Service of more than 180 days garners protection from discharge without cause for one year.

Note that employers are entitled to advance notice of an employee's absence for military duty, unless the circumstances are such that advance notice would be unreasonable. More information about USERRA is available on the federal Department of Labor's website at www.dol.gov/dol/compliance/comp-userra.htm.

5. Bone Marrow Donation Leave; S.C. Code Ann. § 44-43-80

Employers which employ 20 or more employees may grant paid leaves of absence to employees who seek to donate bone marrow. The length of paid leaves may not exceed 40 hours, unless the employer agrees to a longer period of leave. Employers are permitted to require verification by a physician of the purpose and length of each leave requested to donate bone marrow. An employer may not retaliate against an employee for requesting or obtaining a leave of absence to donate bone marrow.

6. Jury Duty Or Court Attendance Leave; S.C. Code Ann. § 41-1-70

A South Carolina employer may not discharge or demote an employee because the employee complies with a subpoena to testify in court or at an administrative proceeding or to serve on a jury of any court. Dismissal of an employee in violation of the statute may subject an employer to damages limited to no more than one-year's salary or 52 weeks of wages in the amount the employee was receiving at the time of receipt of the subpoena. Damages for demotion in violation of the statute are limited to the difference for one year of salary.

7. Family And Medical Leave

South Carolina does not have a state family and medical leave law for private sector employees. Therefore, family and medical leave is governed by the federal Family and Medical Leave Act (FMLA). An employer is subject to the FMLA if it has 50 or more employees within a 75 mile radius for at least 20 workweeks in the current or preceding calendar year. Eligible employees are entitled to up to 12 weeks of unpaid leave during any 12-month period for one or more of the following:

- birth of a son or daughter and to care for such son or daughter;
- placement of a son or daughter with employee for adoption or foster care;
- to care for a spouse, son, daughter, or parent with a serious health condition; or
- because of a serious health condition that renders an employee unable to perform the functions of his or her position.

Furthermore, recent amendments to the FMLA now provide for two forms of military leave entitlements. First, the Military Caregiver Leave provision entitles eligible employees who are family members of covered servicemembers to take up to 26 workweeks of leave in a single 12-month period to care for a covered servicemember with a serious illness or injury incurred in the line of duty, while on active duty. This 26 workweek entitlement is a special provision that extends FMLA job-protected leave beyond the normal 12 weeks of FMLA leave.

Second, an employee may also be entitled to Qualifying Exigency Leave. This new military leave helps families of members of the armed forces manage their affairs while the member is on active duty in support of a contingency operation. This provision makes the normal 12 workweeks of FMLA job-protected leave available to eligible employees with a covered military member serving in the armed forces to use for "any qualifying exigency" arising out of the fact that a

covered military member is on active duty or called to active duty status in support of a contingency operation.

More information about the FMLA can be found in other Fisher & Phillips, LLP publications.

IV. EMPLOYMENT DISCRIMINATION

A. Race, Color, Religion, Gender, And National Origin

1. Federal Law, 42 U.S.C. 2000(e); Section 1981

Title VII of the federal Civil Rights Act of 1964, which covers employers with 15 or more employees, prohibits discrimination on the basis of race, color, religion, gender and national origin as well as retaliation against employees who oppose unlawful discrimination or participate in Title VII proceedings. Title VII allows plaintiffs to sue for back wages, reinstatement or front pay, and attorneys' fees. Plaintiffs may also recover compensatory and punitive damages, the combined amount of which may range up to \$300,000 (depending on the size of the employer).

Further, Section 1981 gives the equal right to contract, preventing discrimination based on race. It covers employees as well as persons who enter any type of contract, such as independent contractors. Because it applies to all persons, employers with less than 15 employees are subject to Section 1981.

2. South Carolina Law; S.C. Code Ann. §1-13-10, *et seq.*

The South Carolina Human Affairs Commission prohibits discrimination based on the same protected categories. The South Carolina statutes mirror the federal discrimination statutes.

3. Process

Prior to filing a lawsuit under Title VII, generally an employee in South Carolina must either file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days or with the South Carolina Human Affairs Commission within 300 days of the alleged discriminatory event and allow investigation of the charge.

A person filing a lawsuit under Section 1981 does not need to go through the EEOC process.

4. Exceptions

Even within classes protected by Title VII there are some defenses to discrimination due to the specific requirements or qualifications of a particular job. Bona fide occupational qualifications (BFOQs) are one example. A BFOQ may exist such as when a job requires a driver's license or where a female attendant is needed for a women's locker room. Note, however, that height and weight restrictions normally do not qualify as a BFOQ and race never does. Because BFOQs represent instances where the law permits otherwise impermissible discrimination, the law construes BFOQs narrowly and requires proof that such restrictions are in fact job-related and necessary.

B. Disability

The general rule is that employers should not consider an individual's disability in making employment decisions when the disability itself would not prevent the person from performing the essential functions of the job. Furthermore, an employer may have a duty to provide a reasonable accommodation if that would allow the individual to satisfactorily perform all the essential functions of the job. The Americans with Disabilities Act (ADA) protects applicants and employees with disabilities from discrimination in regards to their employment. The ADA covers employers with 15 or more employees.

Under the ADA, covered employers cannot discriminate against employees or applicants with a qualified disability (or regarded as having a disability) who, with or without reasonable accommodation, can perform the essential functions of the job at issue. Covered employers must also make reasonable accommodation to employees, including modification of facilities and equipment and job restructuring. More information about the ADA is available in a separate Fisher and Phillips booklet.

C. Age Discrimination

South Carolina employers with 20 or more employees are subject to the federal Age Discrimination in Employment Act (ADEA). Under the ADEA, it is unlawful to discriminate against or discharge an applicant or employee who is 40 years or older or retaliate against an individual for opposing employment practices that discriminate based on age or for participating in any way in an investigation, proceeding, or litigation under the ADEA. Furthermore, the South Carolina Human Affairs law prohibits discrimination on the basis of age.

D. Other Discrimination

Employers should also note that they cannot discriminate because of pregnancy or allow harassment on the basis of race, sex, national origin, religion, age, pregnancy or disability.

E. Smokers' Rights Protections; S.C. Code Ann. §41-1-85

In South Carolina, the use of tobacco products outside the workplace cannot be the basis of personnel action, including employment, termination, demotion, or promotion of an employee.

V. IMMIGRATION

A. Generally; S.C. Code Ann. §41-8-10, *et seq.*

In 2008, South Carolina became one of the few states that require public and private employers to take affirmative steps to verify the legal status of new employees. The South Carolina Illegal Immigration Reform Act created a new implied South Carolina employment license for all private employers in South Carolina. The imputed employment license remains in effect as long as the business abides by the hiring requirements set forth in the Act. If an employer's employment license is suspended or revoked, the employer may not employ a person to do work during that period. The legislation provides for both civil and criminal penalties for employers who violate its provisions.

For employers that have service contracts with a department, an agency or other instrumentality of the State of South Carolina, compliance with the new Act began on January 1, 2009. For private employers who have 100 or more employees, compliance with the new requirements began on October 1, 2009. For private employers who employ less than 100 employees, the time for compliance began on July 1, 2010.

The new verification procedures for private employers require completion and maintenance of the federal employment eligibility verification form, otherwise known as the I-9 Form, *and* registration and participation in the E-Verify federal work authorization program. An employer complies with the Act if it fills out and maintains a I-9 Form on the employee and verifies the employee's work status through the federal E-Verify program.

The South Carolina Illegal Immigration Reform Act does not require employers to use any specified forms of identification to fill out the I-9 Form. Therefore, completion of the I-9 Form should follow established federal procedures.

B. Penalties For Violation Of The Act

The Act expressly states that a private employer shall not "knowingly or intentionally" employ an unauthorized alien. The legislation establishes a system of penalties for employers who violate either the verification of employment provisions or the prohibition on hiring an unauthorized alien. For violations of the procedures for hiring and verifying the authorization of an employee, a private employer can be assessed a civil penalty of not less than \$100.00 and not more than \$1000.00 for each violation. However, in the instance of a first violation, the employer can avoid assessment of a penalty if within 72 hours of notification of a violation the employer complies with the verification provisions. For any subsequent violation, the employer will be assessed a civil penalty.

If an employer knowingly or intentionally hires an unauthorized alien, the penalties involve either suspension or revocation of the employer's imputed license, thereby preventing the employer from hiring new employees within the state of South Carolina. Additionally, in order to obtain reinstatement of the employer's license, the employer must terminate the unauthorized alien, and pay a reinstatement fee of not more than \$1000.00. Subsequent violations of this portion of the Act can result in revocation of the employer's license for a period of five years.

C. Other Provisions Affecting Employers

The Act creates a cause of action for wrongful termination against an employer who discharges an employee authorized to work in the United States if the discharge is for the purpose of replacing that employee with a person who the employer knows or should reasonably know is an unauthorized alien. An aggrieved employee can recover his or her former position, lost wages, and other actual damages, including attorneys' fees. The employee has a year to bring a lawsuit for violation of the Act. Again, the legislation creates a "safe harbor" for those employers who verify work authorization through the E-Verify program. Employers who use the E-Verify program have an absolute defense against any cause of action alleging wrongful termination arising under the Act.

Other provisions of the Act allow the State to develop a random auditing program to inspect private employers for compliance with the provisions of the Act. State agents will be authorized to enter the employer's premises and question any employer, owner, agent, or employee and to inspect, investigate, reproduce or photograph business records relevant to determining compliance with the provisions of the Act. This right of inspection is broader than that accorded to federal immigration agents.

Finally, to those employers who may not be deterred by civil penalties or short periods of suspended licenses, the Act provides that the State will maintain a list of all private employers who have been assessed a civil penalty or who have had their license revoked and that the list will be published on a State maintained website.

VI. WORKPLACE SAFETY

A. General Provisions; S.C. Code Ann. §41-15-10, *et seq.*

Employers are required to furnish a reasonably safe workplace and do everything reasonably necessary to protect the life, health, safety and welfare of employees. Employers must warn employees about latent defects in machinery or the work environment. However, employees assume the ordinary risks of employment and must exercise ordinary skill and diligence to protect themselves.

The federal Occupational Safety and Health Act of 1970 (OSHA) establishes employer and employee rights and duties with respect to occupational safety and health. OSHA and its regulations require employers to furnish a workplace free from recognized hazards that cause or are likely to cause serious harm. South Carolina was one of the first states to develop an approved state plan. For the most part, the state plan adopts the federal standards without change. But since some minor differences do exist, employers should consult the state regulations as well. The South Carolina's Department of Labor, Licensing and Regulation is the state agency charged with the enforcement of the state OSHA program.

B. Safety And Health Complaints; S.C. Code Ann. §§41-15-510; 41-15-520

The state has adopted the federal OSHA regulations that prohibit an employer from discriminating against an employee for reporting a work-related fatality, injury, or illness; filing a safety or health complaint; requesting access to the injury and illness records; testifying in a proceeding; or otherwise exercising any rights afforded by the OSHA Act.

Within 30 days after such violation occurs, the employee must file a complaint with the Director of the Department of Labor, Licensing, and Regulation or his designee. If the subsequent investigation substantiates the allegations, an action will be brought in the appropriate court of common pleas. The court may order all appropriate relief including rehiring or reinstatement of the employee to the former position with back pay.

C. Smoking In The Workplace; S.C. Code Ann. §§44-95-10; 44-95-20; 44-95-50

Smoking or possessing lighted smoking material in any form is restricted to lawfully designated areas in the following public indoor areas:

- public schools, including preschools, where routine or regular kindergarten, elementary, or secondary educational classes are held, including libraries. Exceptions: Private offices and teachers' lounges that are not adjacent to classrooms or libraries. These exceptions do not apply, however, if the offices and lounges are included specifically in a no-smoking directive by the local school board. School district boards of trustees retain the right to prohibit on-campus smoking;
- indoor facilities providing children's services, to the extent that smoking is prohibited by federal law;
- licensed child day care facilities;
- health care facilities. Exceptions: Designated smoking areas in employee break areas. A health care facility is not precluded or prohibited by law from being entirely smoke-free;
- government buildings other than health care facilities as provided for under the law. Exceptions: Enclosed private offices and designated sections of employee break areas. Smoking policies for the state capitol and legislative office buildings must be determined by the office of government having control over the buildings or respective areas of the buildings;
- elevators;
- public transportation vehicles. Exceptions: taxicabs; and
- arenas and auditoriums of public theatres or public performing arts centers. Exceptions: Designated smoking areas in foyers, lobbies, or other common areas. Smoking is permitted as part of a legitimate theatrical performance.

VII. CONCLUSION

Employers in South Carolina are subject to numerous state and federal laws regulating nearly every area of labor and employee relations. This booklet provides a basic summary of South Carolina employment law under which employers must operate their business or workplace. Our hope is that by providing this summary we will give employers a useful reference to help them quickly answer some of the common, everyday employment questions that can and do arise. We have tried to write this booklet from the perspective of the employer so that the law is presented in way that makes it easy for employers to understand what South Carolina law requires of them as well as what it allows them to do in various situations.

First and foremost this booklet should be used to guide the actions of employers by helping them better understand South Carolina employment law so they may develop policies and procedures which allow them to successfully avoid a lawsuit. Second, this booklet is also intended to help employers make more legally informed decisions so that when lawsuits do arise they will be in a stronger legal position from which to defend. Finally, the scope of this booklet deals only with South Carolina employment law, even though aspects of federal law were briefly discussed,

and an employer must consider any employment issue in light of both applicable state and federal law.

For further information, contact any attorney in the Columbia office of Fisher & Phillips LLP at 803.255.0000 or visit our website at www.laborlawyers.com.