

Labor and Employment Laws in the State of North Carolina



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This booklet is intended to provide an overview of the most important parts of North Carolina state 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

This booklet addresses North Carolina law regulating labor and employment from the perspective of employers. Besides the many federal laws that govern employment relationships, the State imposes both affirmative duties and negative prohibitions upon your behavior as an employer. This booklet should introduce you to most of North Carolina's most important laws governing your interaction with your employees.

The scope of this booklet is limited to State law. For more information on federal statutes and regulations, please consult the appropriate FISHER & PHILLIPS LLP material.

Please keep in mind that this booklet is not legal advice. No booklet can serve as a substitute for adequate legal counsel. You should consult an attorney for guidance on applying the law to any specific situation.

II. EMPLOYMENT AT WILL (COMMON LAW PRINCIPLE)

In North Carolina, the general rule is that every employment relationship is terminable at the will of either party. This means either the employer or the employee may terminate the employment relationship for a good reason, a bad reason, or no reason at all. Exceptions to this default rule are when the employment action taken violates a specific statute, public policy, or a contractual agreement to work for a definite period of time.

Some of the statutes that provide exceptions to the employment-at-will principle are discussed later in this booklet. Also referenced are statutes that declare the official public policy of North Carolina. Whenever those statutes fail to provide a specific remedy for an aggrieved party, that party retains an action for wrongful discharge.

If there is an employment contract for a definite period of time, an employer must have "cause" to discharge the employee before the expiration of the term specified in the contract. Cause is not defined by statute, but it has been found in various court cases to include such things as excessive absenteeism or tardiness, insubordination, lack of productivity, and violation of company policy.

Employers would be wise not to rely too heavily on this doctrine when making employment decisions. Important as it is, increasing regulation in the area of employment law is quickly transforming employment at will into the exception rather than the rule. Moreover, if you must justify your decision to a jury, you may discover the jurors have little sympathy for employment at will rights if your actions were not otherwise deemed fair.

III. EMPLOYMENT OF MINORS (N.C. GEN. STAT. § 95-25.5)

A. Employment Of Minors Under 14

The general rule is that no minor under the age of 14 shall be employed.

B. Employment Of Minors Under 16

Minors aged 14 or 15 may be employed, subject to the following conditions:

1. Maximum Hours

No more than 3 hours a day and 18 hours a week when school is in session. No more than 8 hours a day and 40 hours a week when school is not in session.

2. Permissible Hours

Only outside school hours and between 7 a.m. and 7 p.m., except to 9 p.m. when school is not in session.

3. Permitted Occupations

The Fair Labor Standards Act only permits minors under 16 to be employed in certain occupations. A separate booklet on the Fair Labor Standards Act is available from Fisher & Phillips and contains a comprehensive list.

4. Breaks

No youth under 16 years of age shall be employed for more than five consecutive hours without an interval of at least 30 minutes for rest. No period of less than 30 minutes shall be deemed to interrupt a continuous period of work.

5. Alcohol

No person who holds an Alcohol Beverage Control (ABC) permit for the on-premises sale or consumption of alcoholic beverages may employ a youth under 16 on the premises for any purpose unless the minor obtains written permission of his parent or guardian and he is employed to work on the outside grounds of the premises for a purpose that does not involve the preparation, serving, dispensing, or sale of alcoholic beverages.

C. Employment Of All Minors Under 18

1. Youth Employment Certificate

No minor under 18 years of age may work without a youth employment certificate unless specifically exempted.

2. Permissible Hours

During the regular school term, no minor under 18 who is enrolled in grade 12 or lower may work between 11 p.m. and 5 a.m. when there is school for the youth the next day. This restriction does not apply if the employee is 16 or 17 and you receive written approval from his parents or legal guardian and from his principal or the principal's designee.

3. Permitted Occupations

No minor may be employed to work in any occupation declared hazardous by the United States Department of Labor and without exemption under the Fair Labor Standards Act, or in any occupation which the Commissioner of Labor after public hearing shall find and declare to be detrimental to the health and well-being of youths. For a list of prohibited occupations under the FLSA, please consult the relevant FISHER & PHILLIPS LLP materials. The North Carolina Commissioner of Labor has prohibited the employment of minors in the following occupations: (N.C. Admin. Code tit. 13, r. 12.0406)

- welding, brazing, or torch cutting;
- any processes where quartz or any form of silicon dioxide or an asbestos silicate is present in powdered form;
- any work involving exposure to lead or any of its compounds in any form;
- at any work involving exposure to benzene or any benzene compound which is volatile and which can penetrate the skin;
- occupations in canneries, seafood, or poultry processing;
- any work which involves the risk of falling a distance of 10 feet or more;
- any work as an electrician or an electrician's helper;
- any work in confined spaces;
- occupations in which the use of a respirator is required.

4. Driving

Any youth who holds a North Carolina driver's license valid for the type of driving involved may be assigned as part of his employment to drive an automobile or truck not exceeding 6,000 pounds gross vehicle weight within a 25-mile radius of the principal place of employment, provided that the youth has completed a State-approved driver-education course, and provided that the assignment does not involve the towing of vehicles. "Gross vehicle weight" includes the truck chassis with lubricants, water and full tank or tanks of fuel, plus the weight of the cab or driver's compartment, body and special chassis and body equipment, and payload.

5. Alcohol

No person who holds an ABC permit for the on-premises sale of alcoholic beverages may employ a minor to prepare, serve, dispense, or sell alcoholic beverages.

6. Records

You must maintain the youth employment certificate where it is readily accessible to any person authorized to inspect or investigate youth employment. You must maintain the certificate for the duration of the minor's employment and for 2 years after termination.

D. Exceptions

1. Paper Delivery

Minors 12 and 13 may be employed outside school hours in the distribution of newspapers to the consumer but not more than 3 hours per day. No youth employment certificate is required for any minor engaged in newspaper distribution.

2. Residents Of Homes For Dependent Children

The certificate requirement is waived for youths who reside in homes for dependent children. Such minors may perform domestic activities, e.g. personal care, maintenance of living quarters, work around the residence or its farm, and other activities normally performed by children when living at home under direct parental control.

3. Performing Arts

Youths employed as models, or as actors or performers in motion pictures or theatrical productions, or in radio or television productions are exempt from all provisions relating to youth employment except the certificate requirement. Youths employed by an outdoor drama directly in production-related positions such as stagehands, lighting, costumes, properties, and special effects are exempt from all provisions relating to youth employment except the certificate requirement. This exemption does not apply to positions such as office workers, ticket takers, ushers, and parking lot attendants.

4. Family Employment

Minors employed by their parents are exempt from all the provisions relating to youth employment except for the certificate requirement, the prohibition against hazardous and detrimental occupations, and the regulations relating to alcohol.

5. Higher Education

Youths who are enrolled at an institution of higher education may be employed by the institution provided the employment is not hazardous.

6. Persons And Establishments Subject To Regulation Of Child Labor Under The FLSA

Persons and establishments required to comply with or subject to regulation of child labor under the Fair Labor Standards Act are exempt from all provisions of this section except the certificate requirement, the restriction against employment between 11 p.m. and 5 a.m. during

the regular school term, the prohibition against hazardous occupations, and the regulations related to alcohol.

E. Civil Penalties (N.C. Gen. Stat. § 95-25.23)

Any employer who violates the provisions relative to the employment of minors will be subject to a penalty not to exceed \$250 for each violation.

IV. WAGES

A. Minimum Wage And Overtime (N.C. Gen. Stat. § 95-23.3; § 95-25.4)

The wage and hour provisions in North Carolina generally mirror those established by the federal government through the Fair Labor Standards Act. For more information, please consult the Fisher & Phillips LLP materials on the FLSA.

The North Carolina minimum wage rate is at the time of publication \$6.15 per hour for non-exempt employees which is above the current federal minimum wage of \$5.85 per hour. The North Carolina minimum wage is scheduled to increase to \$6.55 per hour on July 24, 2008, and to \$7.25 per hour on July 24, 2009.

B. Wage Payment (N.C. Gen. Stat. § 95-25.6)

You must pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. Wages based upon bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if prescribed in advance.

C. Payment To Separated Employees (N.C. Gen. Stat. § 95-25.7)

You must pay employees whose employment is discontinued for any reason all wages on or before the next regular payday either through the regular channels or by mail if requested by the employee. Wages based on bonuses, commissions, or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified of your policy or practice which results in forfeiture.

D. Wages In Dispute (N.C. Gen. Stat. § 95-25.7A)

If the amount of wages is in dispute, you should pay your employee the wages, or that part of the wages, which you concede to be due without condition. A partial payment does not constitute a release of the balance of the employee's claim. Any release of the claim you require as a condition of partial payment is void.

E. Withholding Of Wages (N.C. Gen. Stat. § 95-25.8, et. seq.)

You may withhold or divert any portion of an employee's wage under certain circumstances:

1. When you are required or empowered to do so by State or federal law.
2. When the amount or rate of the proposed deduction is known and agreed upon in advance, the employer must have written authorization from the employee which i) is signed on or before the payday(s) for the pay period(s) from which the deduction is to be made; ii) indicates the reason for the deduction; and iii) states the actual dollar amount or percentage of wages which shall be deducted from one or more paychecks. Provided, that if the deduction is for the convenience of the employee, the employee shall be given a reasonable opportunity to withdraw the authorization.
3. When the amount of the proposed deduction is not known and agreed upon in advance, the employer must have written authorization from the employee which is signed on or before the payday(s) for the pay period(s) from which the deduction is to be made; and indicates the reason for the deduction. Prior to any deductions being made under this section, the employee must i) receive advance written notice of the actual amount to be deducted; ii) receive written notice of his or her right to withdraw the authorization; and iii) be given a reasonable opportunity to withdraw the authorization in writing.
4. The withholding or diversion of wages owed for the employer's benefit must comply with the following requirements:
 - in non-overtime workweeks, an employer may reduce wages to the minimum wage level;
 - in overtime workweeks, employers may reduce wages to the minimum wage level for non-overtime hours; and
 - no reductions may be made to overtime wages owed.
5. You may also withhold or divert a portion of an employee's wages for cash shortages, inventory shortages, or loss or damage to property after giving the employee written notice of the amount to be deducted seven days prior to the payday on which the deduction is to be made. When a separation occurs the seven-day notice is not required.
6. An overpayment of wages to an employee as a result of a miscalculation or other bona fide error, advances of wages to an employee or to a third party at the employee's request, and the principal amount of loans made by an employer to an employee are considered prepayment of wages and may be withheld or deducted from an employee's wages. Deductions for interest and other charges related to loans by an employer to an employee requires written authorization.
7. If criminal process has been issued against an employee, an employee has been indicted, or an employee has been arrested for a charge incident to a cash shortage, inventory

shortage, or damage to an employer's property, an employer may withhold or divert a portion of the employee's wages in order to recoup the amount of the loss without written authorization. If the employee is not found guilty, then the amount deducted must be reimbursed to the employee.

8. Nothing in this Article shall preclude an employer from bringing a civil action in the General Court of Justice to collect any amounts due the employer from the employee.

F. Vacation Pay (N.C. Gen. Stat. § 95-25.12)

You are not required to provide vacation for your employees. However, if you do, you must give all vacation time off or payment in lieu of time off in accordance with your policy or practice. You must notify your employees of any policy or practice which requires or results in the loss or forfeiture of vacation time or pay. Employees not so notified are not subject to such loss or forfeiture.

G. Notification, Posting, And Records (N.C. Gen. Stat. § 95-25.13)

The following rules are also relevant to wages:

1. You must notify your employees, orally or in writing, at the time of hiring, of the promised wages and the day and place for payment.

2. You must make available to our employees, in writing or through a posted notice maintained in a place accessible to your employees, your practices and policies with regard to promised wages and any changes in promised wages prior to the time of such changes except that wages may be retroactively increased without prior notice.

3. You must furnish your employees with an itemized statement of deductions.

V. GENERAL EMPLOYER OBLIGATIONS

A. Unemployment Compensation (N.C. Gen. Stat. § 96-1, *et. seq.*)

The North Carolina Employment Security Law provides for unemployment compensation. Certain taxes must be withheld from employee wages and remitted to the appropriate government agency. These include state and federal income taxes and FICA (Social Security). The State of North Carolina requires that every new employer complete and file with the North Carolina Department of Revenue an application for a North Carolina withholding identification number.

In addition, the federal government requires that every employer who pays wages to one or more employees file an application for an employer identification number with the Internal Revenue Service. You may hear these numbers often referred to as Tax ID Number or Taxpayer

ID Number. You are required to provide unemployment insurance coverage for your employees if your business:

- has one or more employees for twenty or more weeks in a calendar year; or
- you pay at least \$1,500 in wages during a calendar quarter.

You may also be liable for unemployment insurance tax if you acquire all or part of a business already subject to the Unemployment Insurance Act. Your contributions to the Unemployment Insurance Fund are paid to and administered by the North Carolina Employment Security Commission. To determine the extent of your obligation, contact your local Job Service Center or the Employment Security Commission.

B. Labor Statistics (N.C. Gen. Stat. § 95-8)

The Department of Labor furnishes you with blank labor statistic reports. Each employer owes a duty to complete and return them to the Commissioner of Labor. Refusal to do so, subsequent to an order to show cause, constitutes contempt of court.

C. Postings Of Laws (N.C. Gen. Stat. § 95-9)

If you have more than four employees, you must post in a conspicuous place the provisions of the law relevant to employment and the regulation of hours and working conditions. You may obtain these for free from the Department of Labor website. The URL is <http://www.dol.state.nc.us/pubs.htm#Posters>.

D. Family And Medical Leave

North Carolina has no legislative requirement that you grant your employees family or medical leave.

E. Leave For Parent Involvement In Schools (N.C. Gen. Stat. § 95-28.3)

You must grant four hours of leave per year to any employee who is a parent, guardian, or person standing *in loco parentis* of a school-aged child so that the employee may attend or otherwise be involved at that child's school. You are not required to pay your employee for this leave. The leave is subject to the following conditions:

- the leave shall be at a mutually agreed upon time between you and the employee;
- you may require your employee to provide a written request at least 48 hours before the time desired for the leave;
- you may require your employee to furnish written verification from the child's school

that the employee attended or was otherwise involved at that school during the time of the leave.

You cannot discharge, demote, or otherwise take an adverse employment action against an employee who requests or takes leave pursuant to this provision.

F. Wage Garnishment (N.C. Gen. Stat. § 95-73)

Creditors are prohibited from sending out of the State any action, suit, or proceeding for the garnishment of wages when both the creditor and the debtor are under the jurisdiction of North Carolina courts. This is relevant to you because it is illegal for persons residing in the State to counsel, aid, or abet any violation of this provision. If you violate these provisions, you are answerable in damages to the debtor for the full amount of the debt thus garnished. In addition, you would be guilty of a Class 3 misdemeanor and can be fined.

G. Polygraphs

North Carolina has no law regulating or prohibiting the use of polygraph tests, voice stress analyzers, or other tests of veracity.

H. Non-Competition Agreements (N.C. Gen. Stat. § 75-4; *United Laboratories, Inc. v. Kuyendall*)

The requirements for a valid non-competition agreement are that:

- it is written;
- it is part of an employment contract;
- reasonable consideration was given in exchange for the agreement not to compete;
- the agreement is reasonable as to time and territory; and
- the agreement is not against public policy.

I. Medical Examinations (N.C. Gen. Stat. § 14-357.1)

If you have more than 24 employees, you may not require any applicant to pay the cost of a medical examination or the cost of furnishing any records you require as a condition of the initial act of hiring.

J. Liability For Disclosure Of Certain Employee Information (i.e., Job Reference requests) (N.C. Gen. Stat. § 1-539.12)

You are immune from civil liability when disclosing information about a current or former employee's job history or job performance to a prospective employer unless the information you furnish is false and you know or reasonably should have known that the information is false.

K. Identity Theft Protection Act (N.C.Gen. Stat. § 75.60 *et seq.*)

North Carolina's Identity Theft Protection Act seeks to protect an individual's financial information and resources. The Act places certain obligations and restrictions on an employer's use of "personal information." "Personal information" is defined broadly under the Act and includes a person's name in combination with identifying information such as social security numbers, driver's license numbers, bank account and credit card numbers, e-mail addresses, PIN codes, or any other information that could be utilized to access an individual's financial resources.

In addition to limiting the use and disclosure of personal information, the Act imposes a duty on employers to report any security breaches where personal information may have been compromised. The Act also requires you to dispose of personal information in a reasonable manner and implement formal written policies and procedures for disposal.

VI. WORKPLACE SAFETY

A. Occupational Safety And Health (N.C. Gen. Stat. § 95-126, *et. seq.*)

The state of North Carolina has a federally approved program to administer the Occupational Safety and Health Act (OSHA) in North Carolina. The program is administered by the N.C. Department of Labor's Division of Occupational Safety and Health (OSH). OSHA imposes a general duty to provide your employees with workplaces free of recognized hazards likely to cause death or serious injury. You must comply with the occupational safety and health regulations adopted by the North Carolina Department of Labor. All the standards promulgated under the federal OSHA have been adopted by the State Department of Labor. For further explanation, please consult the FISHER & PHILLIPS LLP material on OSHA. The following rules and procedures are unique to the state of North Carolina:

1. Inspections

The OSH Division conducts workplace inspections for several reasons. They can be triggered by complaints, accidents, or random selection. When an OSH inspector arrives at your workplace to conduct an inspection, you have a right to see confirming identification. You can call the OSH Division to check the inspector's identity. You may refuse to allow the inspector to enter your workplace without an administrative inspection warrant. If the inspector obtains a warrant or you allow the inspection, you have the right and responsibility to accompany him on his inspection. The law also requires you to assist him in the performance of his inspection by

supplying or by making available information, any necessary personnel, and any necessary inspection aides.

2. Citations

Following an inspection, you may be cited for one or more violations of OSHA standards. This citation may include a monetary penalty. It will always give you a set amount of time to correct the violation in order to avoid further action. If an OSH inspection results in any citations, you must promptly and prominently display the citation at or near the place where the violation occurred. It must remain posted for three days or until the violation has been corrected or abated, whichever is longer.

3. Contesting Citations

Once you have been cited, you may request an informal conference with OSH officials to discuss the amount of the penalty, abatement, or other issue related to the citation. This request must be made within 15 working days after you receive the citation. You may choose to formally contest the citation by filing a "Notice to Contest." Your appeal will be heard by the Safety and Health Review Board of North Carolina. This is an independent body that hears and decides on appeals entered by employers and employees concerning citations, abatement periods, and penalties.

4. Records

If you have 11 or more employees, you are required to maintain updated occupational injury and illness records of your employees.

5. Accident Reporting

Any on-the-job accident or illness requiring three or more employees to be hospitalized or that causes a fatality must be reported to the OSH Division **within eight hours** after it occurs. You can be fined up to \$7,000 for failing to notify the division director of such an accident. To report an accident call the OSH Division at **1-800-NC-LABOR** or **(919) 807-2796**.

6. Employee Rights And Responsibilities

Employees must comply with OSHA standards that relate to their own actions and conduct. An employee has a basic right to make a complaint regarding workplace conditions he feels are unsafe, unhealthy, or in violation of OSHA standards. When an OSH inspector is in an employee's workplace, he has a right to point out unsafe or unhealthy conditions, and to freely answer any questions asked by the inspector. When making a complaint, the employee may request that his or her name be kept confidential.

7. Variances

a. Temporary Variances

You may submit a written application to the Commissioner of Labor requesting a temporary variance from an OSHA standard. The temporary variance may be for a period of no

longer than required to achieve compliance or one year, whichever is shorter, and may be renewed only once. To obtain an order granting a temporary variance, you must establish that you are unable to comply with a standard by the effective date because of the unavailability of professional or technical personnel or materials and equipment required or necessary construction or alteration of facilities or technology, that all available steps have been taken to safeguard your employees, and that you have an effective program for coming into compliance with the standard as quickly as practicable.

b. Permanent Variances

You may apply to the Commissioner for a rule or order for a permanent variance from an OSHA standard. To do so, you must first notify each of your affected employees, submit to an OSH inspection, and show by a preponderance of the evidence that your business will be as safe under alternative procedures.

c. Experimental Variances

The Commissioner of Labor is also authorized to grant a variance from any standard or portion thereof to permit you to participate in an approved experiment to demonstrate or validate new and improved techniques to safeguard the health and safety of your workers.

8. Fines And Penalties

You can be fined up to \$7,000 for each violation. An additional maximum \$7,000 penalty can be assessed for each day an employer fails to correct or abate a violation after the allotted time to do so has expired. If you are found to have willfully violated an OSHA standard, you can be fined up to \$70,000. This level of penalty can also be assessed against you for a repeated violation. You may also be subject to criminal penalties if you are found guilty of willfully violating any standard that has resulted in an employee's death. If convicted of such a violation, you will be fined \$10,000 and imprisoned for six months. A repeated conviction of such a case doubles these penalties.

9. Exemptions

The provisions of OSHA apply to all employers except:

- the Federal Government;
- employers regulated by the Atomic Energy Act of 1954;
- employers regulated by the Federal Coal Mine Health and Safety Act of 1969 or the Federal Metal and Nonmetallic Mine Safety Act;
- railroad operators subject to Subtitle V of Title 49 of the United States Code;
- maritime operators; and
- employers within that class and type of employment which does not permit federal funding, on a matching basis, to the State in return for State enforcement of all

occupational and safety health issues

B. Toxic And Hazardous Substances (N.C. Gen. Stat. § 95-191, et. seq.)

The Hazardous Chemicals Right to Know Act is a uniform system for the disclosure of information regarding the use and storage of hazardous chemicals. Its provisions impose several obligations upon North Carolina employers. They include:

1. Hazardous Substance List

If you manufacture, process, use, store, or produce hazardous chemicals, you must compile and maintain a Hazardous Substance List which shall contain the following information for each hazardous chemical stored in the facility in quantities of 55 gallons or 500 pounds, whichever is greater:

- a. The chemical name or the common name used on the MSDS or container label;
- b. The maximum amount of the chemical stored at the facility at any time during the year, using the following ranges:
 - Class A, quantities of less than 55 gallons or 500 pounds;
 - Class B, quantities of between 55 gallons and 550 gallons, and quantities of between 500 pounds and 5,000 pounds;
 - Class C, quantities of between 550 gallons and 5,500 gallons, and quantities of between 5,000 pounds and 50,000 pounds; and
 - Class D, which shall include quantities of greater than 5,500 gallons or 50,000 pounds
- c. The area in the facility in which the hazardous chemical is normally stored and to what extent the chemical may be stored at altered temperature or pressure.

The Hazardous Substance List must be updated quarterly, if necessary, but not less often than annually. If a chemical is deleted from, or added to, the Hazardous Substances List, or if the quantity changes sufficiently to cause the chemical to be in a different Class, you must update the List to reflect those changes as soon as practicable, but in any event within 30 days of such change.

2. Material Safety Data Sheets

If you manufacture or distribute chemicals you must provide material safety data sheets (MSDS's) to purchasers for each hazardous chemical purchased. If you purchase hazardous

chemicals, you must maintain the most current MSDS received from the manufacturer or distributor.

3. Labeling

You must not remove or deface existing labels on incoming containers of hazardous chemicals. In addition, all containers of hazardous substances must be clearly designated as hazardous.

4. Emergency Information

If you store any hazardous chemical in an amount of at least 55 gallons or 500 pounds, whichever is greater, you must provide the Fire Chief of the Fire Department having jurisdiction over the facility, in writing, the names and telephone numbers of knowledgeable representatives you employ who can be contacted for further information in case of an emergency and a copy of your updated Hazardous Substances List.

You must furnish the following information pursuant to a written request from the Fire Chief:

- a copy of the MSDS for any chemical on the Hazardous Substances List; and
- an emergency response plan that includes evacuation procedures, a list of emergency equipment available at the facility, and copies of other emergency response plans.

5. Community Right-To-Know

Any person in North Carolina may request in writing from you a list of chemicals used or stored at your facility. You must furnish to the person making the request a list containing, at a minimum, all chemicals included on the Hazardous Substances List, the Class of each chemical, and an MSDS for each chemical for which an MSDS is available and is requested. You may not charge a fee in excess of the cost of reproducing the materials. You must furnish the materials within 10 working days of receiving the written request for information.

6. Exemptions

The provisions related to toxic and hazardous chemicals do not apply to chemicals in or on the following:

- a. Hazardous substances while being transported in interstate commerce into or through this State;
- b. Products intended for personal consumption by your employees;
- c. Retail food establishments and all other retail trade establishments, exclusive of processing and repair areas;
- d. Any food, food additive, color additive, drug or cosmetic;

- e. A laboratory under the direct supervision or guidance of a technically qualified individual provided that:
 - labels on containers of incoming chemicals shall not be removed or defaced;
 - MSDS's shall be maintained and made accessible to employees and students;
 - the lab is not used primarily to produce hazardous chemicals in bulk for commercial purposes;
 - the lab complies with the provisions relating to the Fire Chief.
- f. Any farming operation which employs 10 or fewer full-time employees, except that if any hazardous chemical in an amount in excess of 55 gallons or 500 pounds, whichever is greater, is normally stored at the farming operation, you must comply with the provisions relating to the Fire Chief;
- g. Any distilled spirits, tobacco, and untreated wood products; or
- h. Medicines used directly in patient care in health care facilities and health care facility laboratories.

7. Employee Rights

You cannot discharge, or cause to be discharged, or otherwise discipline or in any manner discriminate against an employee at the facility because the employee has assisted the Commissioner of Labor or his representative or the Fire Chief or his representative who may make or is making an inspection, or has testified or is about to testify in any proceeding relating to toxic or hazardous chemicals, or has used or requested information pursuant to the right-to-know provisions of the law.

C. Controlled Substance Examinations (N.C. Gen. Stat. § 95-230, *et. seq.*)

North Carolina law imposes no duty to conduct controlled substance examinations. If you choose to test your employees for controlled substances, however, you have two choices. You may perform screenings on-site, provided that positive results are sent to an approved laboratory for confirmation. Alternatively, you may have an approved laboratory perform both screenings and confirmations. If you screen on-site, you must abide by the following procedural requirements:

1. Sample Collection

You must provide reasonable and sanitary conditions that respect the individual dignity of your employees. Your efforts must be reasonably calculated to prevent the substitution of samples and interference with the collection, examination, or screening of samples.

2. Confirmation

Confirming laboratories must employ gas chromatography with mass spectrometry or an equivalent scientifically accepted method.

3. Retention

The laboratory must retain the sample for 90 days from the time the results are delivered to the examiner.

4. Chain Of Custody

You must implement chain of custody procedures including effective recordkeeping, handling, labeling, and identification of samples.

If one of your employees is confirmed to have used controlled substances, he retains the right to retest the sample at the same or another approved laboratory. If he makes this request, however, he is responsible for all associated reasonable expenses.

Violation of the controlled substance examination regulations will result in a penalty of up to \$250 per affected employee with a cap of \$1000. Such a violation will not, however, provide the basis for a wrongful discharge claim on behalf of a terminated employee. *Garner v. Rentenbach Constructors, Inc.*, 515 S.E.2d 438 (N.C. 1999).

D. Workers' Compensation Act (N.C. Gen. Stat. § 97-1, et. seq.)

1. Scope

The North Carolina Workers' Compensation Act ("The Act") addresses injuries by accident arising out of and in the course of employment. The Act does not cover diseases in any form, except when they result naturally and unavoidably from an accident. With respect to back injuries, however, where injury to the back arises out of and in the course of employment and is the direct result of a specific traumatic incident of the work assigned, the disabling physical injury to the back arising out of and causally related to such an incident will be considered an "injury by accident." Disablement or death resulting from an occupational disease shall be treated as the happening of an injury by accident and the procedure and practice and compensation and other benefits provided by the Act shall apply in all such cases.

2. Applicability

The Act is relevant if you are a public or quasi-public employer or a private employer with three or more employees or if your business involves the use or presence of radiation

regardless of the number of your employees. The only exception to this general rule is if your business provides agricultural or domestic services. If your business is agricultural services, you are exempt from the Act unless you employ 10 or more full-time non-seasonal workers. You are also exempt from the Act if you are an individual sawmill and logging operator with less than 10 employees, if you saw and log less than 60 days in any six consecutive months and your principal business is unrelated to sawmilling or logging. No contract or agreement shall in any manner operate to relieve you of any obligation created by the Act.

3. Requirements

a. Recordkeeping

You are required to keep a record of all injuries, fatal or otherwise, received by your employees in the course of their employment on blanks approved by the North Carolina Industrial Commission (The Commission). Within 5 days after the occurrence and knowledge of an injury, you must make a report in writing and deliver it to the Commission. Upon termination of the disability of the injured employee, or if the disability extends beyond a period of 60 days, you must make a supplemental report to the Commission.

b. Insurance

You must insure and keep insured your liability under the Act or obtain a license from the Commissioner of Insurance as a self-insurer. All policies insuring the payment of compensation under the Act must contain a clause to the effect that, as between you and the insurer, the notice to or acknowledgment of the occurrence of the injury on your part shall be deemed notice or knowledge on the part of the insurer, that the insurer shall in all things be bound by and subject to the awards, judgments, or decrees rendered against you, and that your insolvency or bankruptcy shall not relieve the insurer from payment of compensation for disability or death sustained by an employee during the life of such policy or contract. The policy must also contain the agreement of the insurer to promptly pay the person entitled to same all benefits conferred by the Act, and all installments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by your default after the injury or by any default in giving notice required by such policy or otherwise.

c. Postings

You must post in a conspicuous place a notice stating that your employment is subject to the Act and stating whether your business has insurance or qualifies as a self-insured employer.

d. Proof Of Insurance

You must file evidence of your Workers' Compensation insurance or license as a self-insurer with the Commission.

e. Compensation

You must secure the payment of compensation to your employees. Compensation includes payments for lost wages and medical expenses. When you admit the employee's right to compensation, the first installment of compensation becomes due on the fourteenth day after you

have written or actual notice of the injury. Compensation thereafter must be paid in installments weekly.

If you deny the employee's right to compensation, you must notify the Commission, on or before the fourteenth day after you have notice of the injury. That notification must include your name, the employee's name, the date of alleged injury, the insurer, and a detailed statement of the grounds upon which the right to compensation is denied.

If you are uncertain on reasonable grounds whether the claim is compensable or whether you are liable, you may initiate compensation without prejudice and without admitting liability. To do so, you must accompany the first payment with a form prescribed by and filed with the Commission. You may terminate payment of compensation when the terms of the award have been fully satisfied. You may terminate payment of compensation for total disability when the employee has returned to work for you or a different employer, or when you contest the claim within the time allowed.

f. Notice

If you deny the employee's right to compensation, you must advise the employee of his right to request a hearing. You must notify the Commission and the employee of the termination of compensation for total disability and the availability of trial return to work and additional compensation due the employee for any partial disability.

g. Settlements

Agreements between you and your employee must be submitted to the Commission for approval.

4. Effects On Other Remedies

If you and the employee are subject to and have complied with the provisions of the Act, then the rights and remedies granted to him, his dependents, next of kin, or personal representative will exclude all other rights and remedies, except those against third parties.

5. Forfeiture

Employees forfeit their rights to compensation if the injury is proximately caused by:

- their intoxication, provided the intoxicant was not supplied by you or your agent in a supervisory capacity to the employee; or
- their being under the influence of any controlled substance, where such controlled substance was not by prescription by a practitioner; or
- their willful intention to injure or kill himself or another.

6. Deductions And Credits

Payments you make to the injured employee during the period of his disability, or to his dependents, which by the terms of the Act were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. In addition, if an injured employee has received unemployment benefits under the Employment Security Law for any week with respect to which he is entitled to workers' compensation benefits for temporary total or permanent and total disability, the employment benefits paid for such weeks may be deducted from the award to be paid as compensation.

7. Penalties

If you refuse or neglect to secure compensation for an injured employee, you will be fined one dollar for each employee you have, but not less than fifty dollars a day nor more than one hundred dollars per day of such refusal or neglect. Additionally, if your refusal is willful, you are guilty of a Class H felony. If caused by neglect, you are guilty of a Class 1 misdemeanor. Finally, you will be liable in a civil action which may include ancillary remedies including the attachment and/or receivership of your property.

E. Workplace Violence Prevention Act (N.C. Gen. Stat. § § 95-260 *et. seq.*)

An employer may file an action for a civil no-contact order on behalf of an employee who has suffered "unlawful conduct" from any individual that can reasonably be construed to be carried out, or to have been carried out, at the employee's workplace. "Unlawful conduct" is defined by the Act as:

- 1.** Attempting to cause bodily injury or intentionally causing bodily injury;
- 2.** Willfully, and on more than one occasion, following, being in the presence of, or otherwise harassing, as defined in N.C. Gen Stat. 14-277.3, without legal purpose and with the intent to place the employee in reasonable fear for the employee's safety;
- 3.** Willfully threatening, orally, in writing, or by any other means, to physically injure the employee in a manner and under circumstances that would cause a reasonable person to believe that the threat is likely to be carried out and that actually causes the employee to believe that the threat will be carried out.

You must consult and advise those employees you seek to protect prior to initiating a civil action. You may discipline employees for failure to cooperate with your attempt to obtain a no-contact order.

A civil no-contact order can provide a wide array of injunctive relief, including enjoining the offending individual from contacting or visiting the employee on the employer's premises or interfering with the employer's operations. A violation of a civil no-contact order can result in a fine and imprisonment.

VII. EMPLOYMENT DISCRIMINATION

A. Equal Employment Practices Act (N.C. Gen. Stat. § 143-422.1, *et. seq.*)

North Carolina has no statute analogous to the federal government's Title VII. The Equal Employment Practices Act (EEPA), while declaring that employment discrimination on account of race, color, religion, national origin, age, or sex is against public policy, provides no remedy to victims of employment discrimination. The Act does endow the Human Relations Commission in the Department of Administration with the authority to receive charges of discrimination. The powers of the Commission, however, are limited to investigation and conciliation. Although the Act does not provide a remedy per se, the declaration of public policy is significant to a wrongful discharge cause of action. The EEPA applies to you if you have 15 or more employees.

B. Persons With Disabilities Protection Act (N.C. Gen. Stat. § 168A1, *et. seq.*)

1. Applicability

The Persons With Disabilities Protection Act (PWDPA) regulates all employers with 15 or more employees.

2. Substantive Provisions

The PWDPA mirrors the Americans with Disabilities Act. It prohibits you from taking adverse employment action against a qualified person with a disability on the basis of that disability. The Act establishes a civil remedy limited to declaratory or injunctive relief. You may, however, be liable for back pay. For further discussion please consult the Fisher & Phillips LLP materials on the ADA.

3. Exceptions

You are not liable under the PWDPA if you:

a. Make an employment decision on the basis of State and federal laws or regulations imposing physical, health, mental, or psychological job requirements.

b. Fail to hire, transfer or promote, or to discharge a person with a disability who has a history of drug abuse or who is unlawfully using drugs if your business is an establishment that handles controlled substances.

c. Fail to hire, transfer, or promote, or to discharge a person with a disability because the person has a communicable disease which would disqualify a person without a disability from similar employment.

d. Fail to make reasonable accommodations where the person with a disability has not requested a reasonable accommodation by apprising you of his disabling condition, submitted necessary medical documentation, made suggestions for possible accommodation, and

cooperated in any ensuing evaluation aimed at determining possible or feasible accommodation.

e. Inquire whether a person has the ability to perform the duties of the job in question.

f. Require or request a person to undergo a medical examination, which may include a medical history, for the purpose of determining the person's ability or capacity to safely and satisfactorily perform his duties, provided that an offer of employment has been made on the condition that the person meets the physical and mental requirements of the job with or without reasonable accommodation and that the examination is required of all persons conditionally offered employment for the same position regardless of disabling condition.

g. Obtain medical information or require a medical examination where such information is for the purpose of establishing an employee health record.

h. Administer pre-employment tests, provided that the tests measure only job-related abilities, are required of all applicants for the same position, and accurately measure the applicant's aptitude and not his disability.

4. Affirmative Defenses

The following is a non-exclusive list of affirmative defenses:

a. The failure of the qualified person with a disability to comply with or meet the employer's work rules and policies or performance standards, provided that such person is not held to rules or standards different from other employees without a disability similarly employed.

b. The excessive, willful, or habitual tardiness or absence of a qualified person with a disability, provided that the standard you use is the same as that applied to other similarly-situated employees without a disability.

c. A bona fide seniority or merit system, or a system which measures earnings by quantity or quality of work.

5. Retaliation

You are prohibited from taking adverse employment action against any person because such person has testified, assisted, or participated in any manner in proceedings governed by the PWDPA.

C. Sickle Cell Trait Or Hemoglobin C Trait (N.C. Gen. Stat. § 95-28.1)

You cannot deny or refuse employment to any person or discharge any person on account of the fact such person possesses sickle cell trait or hemoglobin C trait.

D. Genetic Testing (N.C. Gen. Stat. § 95-28.1A)

You are prohibited from denying or refusing employment to any person or discharging any person on account of the person's having requested genetic testing or counseling services, or on the basis of genetic information obtained concerning the person or a member of the person's family.

E. Smoking (N.C. Gen. Stat. § 95-28.2)

You cannot fail or refuse to hire a prospective employee, or discharge or otherwise discriminate against any employee because he engages in or has engaged in the lawful use of lawful products if the activity occurs off the premises during nonworking hours and does not adversely affect his job performance. You are allowed to:

1. Restrict the lawful use of lawful products by employees during nonworking hours if the restriction relates to a bona fide occupational requirement and is reasonably related to your business.
2. Restrict the lawful use of lawful products by employees during nonworking hours if the restriction relates to the fundamental objectives of the organization.
3. Take adverse employment action against an employee for his failure to comply with the requirements of your substance abuse prevention program or the recommendations of a substance abuse prevention counselor you employ or retain.

You are not prohibited from having insurance policies that differentiate between employees for the type or price of coverage based on the use or nonuse of lawful products if each of the following is met:

- differential rates assessed reflect actuarially justified differences;
- you provide written notice to your employees setting forth the different rates; and
- you contribute an equal amount to the insurance carrier on behalf of each employee.

If you violate these provisions, you can be held liable in a civil action for any wages or benefits the employee forfeits as a result of your violation. In addition, the court can order reinstatement of the affected employee or direct you to offer employment to the prospective employee, depending on the nature of the case.

F. Military Personnel (N.C. Gen. Stat. § 127B-10, *et. seq.*)

You cannot discriminate against anyone in the military because of their membership therein. In addition, you cannot take adverse employment action against any person because of the performance of any emergency military duty. If you violate these provisions you are guilty of a Class 2 misdemeanor.

G. National Guard (N.C. Gen. Stat. § 127A-201, et. seq.)

1. Reemployment

Upon release from State duty, an employee may make a written application to you for reemployment within 5 days of their release from duty. If he is still qualified, you must restore him to his previous position or to a position of like seniority, status, and salary, unless your circumstances now make the restoration unreasonable. If he is no longer qualified, you must place him in another position, for which he is qualified, unless that placement is unreasonable due to your circumstances.

2. Discrimination

You cannot discriminate against anyone on the basis of their membership in the North Carolina National Guard, their application for membership, performance of service, application for service, or obligation.

3. Civilian Leave

Your employees have a right to take leave without pay if they are a member of the National Guard and called into service of the State. You cannot force your employees to use or exhaust their vacation or other accrued leaves.

4. Remedy

If you violate the above provisions, you may be held liable for any loss of wages or benefits and subject to declaratory or injunctive relief.

H. HIV And AIDS (N.C. Gen. Stat. § 130A-148(i))

You cannot require a test for HIV infection to determine the suitability of continued employment of any of your employees. Furthermore, you cannot discriminate against any person having AIDS or HIV on account of that infection in determining suitability for continued employment. You can, however, require an HIV test of job applicants in preemployment medical examinations. Additionally, you may deny employment to a job applicant based solely on a confirmed positive test, include a test for HIV performed in the course of an annual medical examination you require, and take appropriate employment action, including reassignment or termination if the continuation by the employee would pose a significant risk to his health, or the health of his coworkers or the public, or if the employee is unable to perform the normally assigned duties of the job.

I. Discrimination On The Basis Of Wage Garnishments (N.C. Gen. Stat. §§ 110-136.8(e), 131E-50)

You may not discriminate against an employee because his wages are subject to withholdings for child support or for payment of services at a public hospital.

J. Jurors (N.C. Gen. Stat. § 9-32)

You cannot discharge or demote any employee because the employee has been called for jury duty, or is serving as a grand juror or petit juror.

K. Unprotected Classes

North Carolina has no laws proscribing adverse employment action on the basis of:

- sexual orientation;
- ancestry;
- citizenship or alienage;
- marital status; or
- prior arrests or convictions.

L. Retaliatory Employment Discrimination (N.C. Gen. Stat. § 95-240, et. seq.)

You cannot discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:

1. File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:

- Workers' Compensation;
- OSHA;
- Wage and Hour Act;
- Mine Safety and Health Act;
- Discrimination based on the sickle cell trait or the hemoglobin C trait;
- National Guard Reemployment Rights; or
- Discrimination based on genetic testing or genetic information.

2. Cause any of these activities to be initiated on an employee's behalf.

3. Exercise any right on behalf of the employee or any other employee afforded by the Wage and Hour Act or OSHA or by the Mine Safety and Health Act.

4. Comply with the provisions pertaining to juvenile delinquency, e.g.

attending the hearings of a juvenile under the jurisdiction of the juvenile court or parental responsibility classes under court order.

If you take retaliatory employment action you can be held liable for lost wages, benefits, and other economic losses, as well as the reasonable costs and expenses of bringing the action, including attorney's fees. You are also potentially subject to an injunction, forcing you to reinstate the employee.

VIII. LABOR ORGANIZATIONS

North Carolina has adopted several provisions addressing your relationship, if any, with organized labor:

A. Right-To-Work (N.C. Gen. Stat. § 95-78)

North Carolina is a right-to-work state. You may not deny or abridge the right of persons to work on account of membership or non-membership in any labor union or labor organization or association.

B. Membership In Labor Organization Or Payment Of Association Dues As Condition Of Employment Prohibited (N.C. Gen. Stat. § 95-79)

Agreements whereby membership in a labor union or organization is made a condition of employment or continuation of employment are prohibited. In addition, you cannot require any person to pay any dues to any labor union or organization.

C. Yellow-Dog Contracts Illegal (N.C. Gen. Stat. § 95-81)

You cannot require anyone to abstain or refrain from membership in any union or labor organization as a condition of employment or continuation of employment.

D. Collective Bargaining Agreements Between Units Of Government And Labor Unions Are Illegal (N.C. Gen. Stat. § 95-98)

All agreements or contracts between the State or any of its political subdivisions and any labor union is against the public policy of the State, illegal, unlawful, void, and of no effect.

E. Strikes By Public Employees Prohibited (N.C. Gen. Stat. § 95-98.1)

Strikes by public employees are illegal. Any violation of this Article is a Class 1 misdemeanor.

F. Hot-Cargo Agreements Prohibited (N.C. Gen. Stat. § 95-102)

It is unlawful for you to pay, to or for the benefit of, a labor organization, any charge by reason of the placing upon, delivery to, or movement by rail, or by a railroad car, of a motor vehicle, trailer, or container which is also capable of being moved or propelled upon the highways. Any person in violation is guilty of a Class 3 misdemeanor.

G. Voluntary Arbitration Of Labor Disputes (N.C. Gen. Stat. § 95-36.1, et. seq.)

An arbitration service has been established under the N.C. Department of Labor. The service includes a list of qualified arbitrators available to resolve labor disputes. The costs of such arbitration are paid in accordance with an agreement between the parties. In the absence of an accord, the award in the proceeding shall normally include arbitration costs. The Commissioner of Labor may provide for the arbitration costs when such action serves the public interest.

H. Conciliation Service And Mediation Of Labor Disputes (N.C. Gen. Stat. § 95-32, et. seq.)

The Department of Labor has also established a conciliation service. Upon his own motion in an existent or imminent labor dispute, the Commissioner of Labor may, and, upon the direction of the Governor, must order a conciliator to take such steps as seem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between you and your employees which have precipitated in or threaten to culminate in such labor dispute. Any information you reveal under the auspices of such conciliation is confidential and not subject to subpoena in any civil suit.

For more information, contact any attorney in the Charlotte office of Fisher & Phillips LLP at 704.334.4565 or visit our website at www.laborlawyers.com.