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STATE

Littler on

North Carolina Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in North Carolina employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

DISCLAIMER

This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

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1. PRE-HIRE

1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs his/her services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see **LITTLER ON CLASSIFYING WORKERS**.

1.1(b) *State Guidelines on Classifying Workers*

In North Carolina, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

The North Carolina Industrial Commission (NCIC), Employee Classification Section has entered into a partnership with the U.S. Department of Labor (DOL), Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts in order to reduce instances of misclassification of employees as independent contractors.[5]

The Employee Fair Classification Act. North Carolina's Employee Fair Classification Act (Act) provides for the creation of the Employee Classification Section within the Industrial Commission to investigate reports of employee misclassification and coordinate and assist all relevant state agencies in recovering any back taxes, wages, benefits, penalties, or other monies owed as a result of an employer engaging in employee misclassification.[6]

The Act defines important terms that apply to it:

- *Employ* is defined by reference to section 95-25.2(3) of the North Carolina General Statutes. For purposes of the Act, an entity or individual is not deemed to be an employer of an individual hired or otherwise engaged by or though the entity or individual's independent contractor;
- *Employee* means any individual defined as an employee by section 95-25.2(4), 96-1(b)(10, 97-2(2), or 105-163.1(4) of the North Carolina General Statutes. Employee does not mean an individual who is an independent contractor.

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[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] More information about the DOL Misclassification Initiative is available at https://www.dol.gov/whd/workers/misclassification/#stateDetails. The Memorandum of Understanding with the NCIC is available at https://www.dol.gov/whd/workers/MOU/nc.pdf.

[6] N.C. GEN. STAT. §§ 143-787, 143-788.

- *Employer* means any individual or entity that employs one or more employees as defined by section 97-2(3) of the North Carolina General Statutes; and
- *Employee misclassification* means avoiding tax liabilities and other obligations imposed by Chapter 95, 96, 97, 105, or 143 of the North Carolina General Statutes by misclassifying an employee as an independent contractor.[7]

The Employee Classification Section will also create a publicly available notice that includes the definition of employee misclassification. The new law requires that the Wage and Hour Act poster that must be displayed in every covered establishment include notice regarding employee treatment and the reporting of suspected misclassification to the Employee Classification Section.[8]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	North Carolina Human Relations Commission	At least one federal court has applied a "right to control" test to determine employer status under the North Carolina Equal Employment Practices Act. The court considered the following nonexhaustive factors in applying this test: "(1) the source and nature of compensation, (2) the provision of tools necessary for the job, (3) control over the time at which work is performed, (4) control over the manner in which work is performed, (5) the right to terminate, and (6) the assignment of duties."[9]
Income Taxes	North Carolina Department of Revenue	Internal Revenue Service (IRS) 20-factor test.[10]

[7] N.C. GEN. STAT. § 143-786.

[8] N.C. GEN. STAT. § 95-25.15(c). This notice will be available in the Labor Poster. It is available at https://www.labor.nc.gov/osh/publications/nc-labor-laws.

[9] *Murry v. Jacobs Tech., Inc.*, 2012 WL 1145938, at *7 (M.D.N.C. Apr. 5, 2012) (citation omitted).

[10] States agencies and courts will look to IRS standards for determining whether an individual is an employee or an independent contractor for state income tax purposes. *See, e.g.*, *Assured Care, Inc. v. North Carolina Dep't of Revenue*, 2011 N.C. Tax LEXIS 6 (N.C. Dep't of Rev. Dec. 8, 2011). Moreover, the North Carolina Administrative Code defines the *employee-employer relationship* for withholding purposes as follows:

> Everyone who performs services subject to the will and control of an employer, both as to what shall be done and how it shall be done, is an employee. An employer-employee relationship exists when the person for whom the services are performed has the right to control and direct the individual performing

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Unemployment Insurance	Division of Employment Security, North Carolina Department of Commerce	North Carolina's Employment Security Law excludes independent contractor from the definition of employment. *Independent contractor* is defined as "[a]n individual who contracts to do work for a person and is not subject to that person's control or direction with respect to the manner in which the details of the work are to be performed or what the individual must do as the work progresses."[11] North Carolina courts have applied a "right to control" test considering the following factors in determining employment status: 1. whether the individual is engaged in an independent calling or business; 2. whether the individual uses special skills, knowledge, or training to perform the work; 3. whether the individual is doing a specified piece of work at a fixed price or lump sum, or on a quantitative basis; 4. whether the individual is subject to discharge if he adopts one method of performing the work versus another; 5. whether the individual is in the regular employ by the other contracting party; 6. whether the individual is free to use assistants to perform the work;

the services . . . . If an individual is subject to the control and direction of another only as to the results of his work and not as to the methods of accomplishing the results, he is an independent contractor and not an employee.

17 N.C. ADMIN. CODE 6C.0108.

[11] N.C. GEN. STAT. § 96-1(b)(12), (19).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		7. whether the individual has full control over assistants; and 8. whether the individual controls the hours when the individual works.[12]
Wage & Hour Laws	North Carolina Department of Labor, Wage & Hour Bureau	Fair Labor Standards Act (FLSA) "economic realities" test.[13]
Workers' Compensation	North Carolina Industrial Commission	Common-law "right to control" test, considering the same factors as in the unemployment insurance context.[14]

[12] *State ex rel. Emp't Sec. Comm'n v. Huckabee*, 461 S.E.2d 787, 789 (N.C. Ct. App. 1995) (citing *Hayes v. Elon College*, 29 S.E.2d 137, 139-40 (N.C. 1944)). "In determining whether someone is an independent contractor or an employee, the decisive test is the retention by the employer of the right to control and direct the manner in which the details of the work are to be executed and what the laborers shall do as the work progresses." *Emp't Sec. Comm'n*, 461 S.E.2d at 789 (quotation omitted); *see also State ex rel. Emp't Sec. Comm'n v. Paris*, 400 S.E.2d 76, 78 (N.C. Ct. App. 1991); *State ex. rel. Emp't Sec. Comm'n v. Faulk*, 363 S.E.2d 225, 227 (N.C. Ct. App. 1988); *Reco Transp., Inc. v. Employment Sec. Comm'n of N.C.*, 344 S.E.2d 294, 296 (N.C. Ct. App. 1986). These cases were decided under the old unemployment law, before North Carolina overhauled its unemployment provisions in 2013; however, to date, the North Carolina courts have not analyzed the issue of employment status under the new law.

[13] Generally, North Carolina relies on the FLSA and related judicial and administrative interpretations and rulings as a guide for interpreting and enforcing its wage and hour provisions. 13 N.C. ADMIN. CODE 12.0103. "However, where there are intentional differences in the language of the North Carolina statutes, or where the laws of this State or the authority granted to the Commissioner of Labor of North Carolina require a different interpretation, the federal decisions will not be binding on the Department." 13 N.C. ADMIN. CODE 12.0103; *see also* North Carolina Dep't of Labor, *Employment Relationship under the Fair Labor Standards Act (FLSA) and under the North Carolina Wage and Hour Act (WHA)*, *available at* https://www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/independent-contractor-vs (describing the characteristics and requirements of the FLSA economic realities test as also used under the North Carolina Wage and Hour Act). In *Horack v. Southern Real Estate Co. of Charlotte, Inc.*, the North Carolina Court of Appeals observed that, in examining whether an individual is an employee under the Wage and Hour Act, North Carolina courts have looked at factors such "(1) the degree of control the alleged employer exerted over the person; and (2) the permanency of the relationship between the person and the alleged employer." 563 S.E.2d 47, 51 (N.C. Ct. App. 2002) (citations omitted). Noting that North Carolina's laws were modeled on the FLSA, in *Laborers International Union of North America v. Case Farms, Inc.*, the North Carolina Court of Appeals pointed to several other factors used by federal courts to examine employee status, which are also useful under the North Carolina Wage and Hour Act: "(1) whether the alleged employee performs services for the employer; (2) the degree of control exerted by the alleged employer over the individual or entity; and (3) the alleged employee's opportunity for profit or loss derived from its relationship with the employer." 488 S.E.2d 632, 634 (N.C. Ct. App. 1997) (quotation omitted).

[14] *Capps v. Southeastern Cable*, 715 S.E.2d 227, 231 (N.C. Ct. App. 2011) (citing *Hayes*, 29 S.E.2d at 139-40 (N.C. 1944)); *see also Staton v. Josey Lumber Co., Inc.*, 772 S.E.2d 876 (table case) (N.C. Ct. App. 2015); *Hughart v. Dasco Transp., Inc.*, 606 S.E.2d 379, 385 (N.C. Ct. App. 2005); *Grouse v. DRB Baseball Mgmt.*, 465 S.E.2d 568, 571 (N.C. Ct. App. 1996). Moreover, in *Capps* the court observed:

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Workplace Safety	North Carolina Department of Labor, Occupational Safety and Health Division	While North Carolina has an approved state plan under the federal Occupational Safety and Health Act, there are no relevant statutory definitions or case law identifying a test for independent contractor status in this context.

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[15]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed

> No particular one of these factors is controlling in itself, and all the factors are not required. Rather, each factor must be considered along with all other circumstances to determine whether the claimant possessed the degree of independence necessary for classification as an independent contractor.

715 S.E.2d at 230 (quotation omitted). The Court also added that the common-law factors set forth in *Hayes v. Elon College*, while important, are not exclusive, and North Carolina courts may consider other factors depending on the circumstances of the case. *Capps*, 715 S.E.2d at 230.

[15] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[16] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[17]

For more information on these topics, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

1.2(b)(i) *Private Employers*

North Carolina law requires all private employers that transact business in North Carolina and employ 25 or more employees in North Carolina to verify the employment eligibility of each new hire using E-Verify.[18] Covered employers must retain the records of the verification of work authorization for each employee while the employee is employed and for one year thereafter.[19]

Notably, the E-Verify requirement does not apply to any individual whose term of employment is less than nine months in a calendar year.[20]

1.2(b)(ii) *State Contractors*

Employers that contract with the state or any of its political subdivisions, agencies, boards, or governing bodies must register with and use E-Verify to verify the employment eligibility of new hires.[21] The same is required of subcontractors.[22] As well, each county and municipality in North Carolina must register and participate in E-Verify to verify the work authorization of new employees hired to work in the United States.[23]

1.2(b)(iii) *State Enforcement, Remedies & Penalties*

Private Employers. For a first violation, the employer will be ordered to file a signed sworn affidavit with the North Carolina Commissioner of Labor within three business days of the order. The affidavit must state with specificity that the employer has, after consultation with the employee, requested a verification of work authorization through E-Verify. If an employer fails to timely file an affidavit, the Commissioner of Labor will order the employer to pay a significant civil penalty.[24] For second and subsequent violations,

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[16] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[17] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

[18] N.C. GEN. STAT. §§ 64-25(4), 64-26(a).

[19] N.C. GEN. STAT. § 64-26(b).

[20] N.C. GEN. STAT. § 64-25(3).

[21] N.C. GEN. STAT. § 143-133.3.

[22] N.C. GEN. STAT. § 143-133.3.

[23] N.C. GEN. STAT. §§ 153A-99.1(a), 160A-169.1(a).

[24] N.C. GEN. STAT. § 64-31.

the Commissioner of Labor will order all of the measures for a first violation, plus additional civil penalties.[25]

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[26] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.
2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.2(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

North Carolina places no statutory restrictions on a private employer's use of arrest records. In addition, North Carolina has not implemented a state "ban-the-box" law covering private employers.

1.3(a)(iii) *State Guidelines on Employer's Use of Conviction Records*

North Carolina places no statutory restrictions on a private employer's use of conviction records.

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[25] N.C. GEN. STAT. §§ 64-32, 64-33.

[26] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

1.3(a)(iv) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

A North Carolina employer is prohibited from requiring an applicant to disclose any information about an expunged arrest record, criminal charge, or criminal conviction in any application, interview, or in any other way.[27] Additionally, an employer cannot knowingly and willingly inquire about any arrest, charge, or conviction that it knows has been expunged.[28] This law specifies, however, that employers are *not* prohibited from asking applicants about criminal charges or convictions that have not been expunged and are public record.[29]

If an applicant is asked about an arrest or criminal charge that did not result in a conviction, the applicant is not required to include a reference to or information concerning any arrest, charge, or conviction that has been expunged.[30] Moreover, no person will be held guilty of perjury or for giving a false statement by reason of that person's failure to recite or acknowledge an expunged criminal history record in response to any inquiry.[31]

1.3(a)(v) *State Enforcement, Remedies and Penalties*

The North Carolina Department of Labor enforces the prohibitions on preemployment inquiries about expunged criminal records. Employers that violate the provisions can be fined, but the law does not create a private cause of action for aggrieved individuals.[32]

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[33] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[34] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting

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[27] N.C. GEN. STAT. § 15A-153(c).

[28] N.C. GEN. STAT. § 15A-153(c).

[29] N.C. GEN. STAT. § 15A-153(a).

[30] N.C. GEN. STAT. § 15A-153(c).

[31] N.C. GEN. STAT. §§ 7B-3201 (juvenile records), 15A-145(b) (certain first offender records), 15A-146(a) (records that have been dismissed or there is a finding of not guilty), 15A-153 (expunged arrest, apprehension, charge, indictment, information, trial, or conviction), 15A-147(a)-(b) (charges resulting from theft or mistake of the person's identity), and 15A-149 (records relating to charges for which a pardon of innocence has been granted).

[32] N.C. GEN. STAT. § 15A-153(f).

[33] 15 U.S.C. §§ 1681 *et seq*.

[34] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[35]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

North Carolina does not have a mini-FCRA law, and there are no additional state provisions specifically restricting a private employer's use of credit information and history.

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

[35] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

North Carolina law contains no express provisions regulating employer access to applicants' or employees' social media accounts.

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[36] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see LITTLER ON EMPLOYMENT TESTING.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

North Carolina law contains no express provisions regulating polygraph examinations for applicants or employees.

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[37] The Drug-

[36] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

[37] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and

Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[38] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

North Carolina law does not prohibit drug testing by employers, nor does it create a duty to implement drug testing.[39] Employers that voluntarily choose to test employees for the use of controlled substances must follow procedural requirements and guidelines for testing.[40] All testing must be performed in accordance with the Controlled Substance Examination Regulation Act ("Substance Regulation Act").[41]

Procedural Requirements. Employers have the option of either: (1) performing the screening test on-site for prospective employees, as long as the samples that demonstrate a positive drug test are sent to an approved laboratory for confirmation; or (2) having an approved laboratory perform both the screening and confirmation tests.[42] An approved laboratory must confirm any sample that produces a positive result by a using gas chromatography with mass spectrometry or an equivalent accepted method, unless the examinee signs a written waiver at the time or after they receive the preliminary test result. A portion of every sample that produces a confirmed positive result must be preserved by the laboratory that conducts the confirmatory examination for at least 90 days from the time the results are mailed to the employer examiner. The examiner must have procedures in place regarding the chain of custody for sample collection and examination to guarantee proper record keeping, handling, labeling, and identification of examination samples. In addition, the employer is required to pay the expenses related to all controlled substance examinations except examinee-requested retests.[43]

Notification Requirements. North Carolina requires that when a sample is taken, the employer-examiner must provide the examinee with a written notice of his/her rights and responsibilities under the Substance Regulation Act.[44] In addition, within 30 days from the time that the results are mailed or delivered to the examiner, it must give notice, in writing: (1) of any positive result of a controlled substance examination; and (2) of the examinee's rights and responsibilities regarding retesting.[45]

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the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[38] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[39] N.C. GEN. STAT. § 95-233.

[40] N.C. GEN. STAT. §§ 95-232, 95-233.

[41] N.C. GEN. STAT. § 95-232.

[42] N.C. GEN. STAT. § 95-232.

[43] N.C. GEN. STAT. § 95-232.

[44] 13 N.C. ADMIN. CODE 20.0401.

[45] 13 N.C. ADMIN. CODE 20.0402(1)-(2).

Confidentiality. Employer-examiners and their agents are required to keep confidential all information regarding examinees' controlled substance examinations. This includes controlled substance examination results as well as information provided by examinees about their medical histories and lawful prescription drug use. A limited number of exceptions to this general rule apply. For example, employers may release this information to the examinees or any person upon written authorization signed by the examinee or laboratories performing retests. Additionally, employers may release this information for other employment-related reasons, including performance evaluations, discipline, and references, or to a government agency or court engaged in a claim or proceeding involving the examinee and the examiner.[46]

Employers that fail to follow the statutory procedures and regulatory requirements of the Substance Regulation Act can face civil penalties.[47]

For more information on drug and alcohol testing of current employees, see **3.2(b)**.

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[48] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[49] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that

[46] 13 N.C. ADMIN. CODE 20.0501-20.0503.

[47] N.C. GEN. STAT. § 95-234.

[48] 26 U.S.C. § 36B.

[49] 42 U.S.C. § 18071.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	all or a portion of such contribution may be excludable from income for federal income tax purposes.[50] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[51]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[52] Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[53]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[54] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[55]

[50] 29 U.S.C. § 218b.

[51] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[52] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[53] 29 C.F.R. § 2590.606-1.

[54] 29 C.F.R. § 825.300(a).

[55] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[56]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[57] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[58]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[59]
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip

[56] 29 C.F.R. § 825.300(a).

[57] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[58] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[59] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[60]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: Vacation	Employers must notify employees of any vacation pay policies and practices at the time of hire, either verbally or in writing.[61] North Carolina vacation policies and practices must address specific topics, as discussed in more detail in **3.8(a)(ii)**.[62] Moreover, if an employer does not notify its employees of any policy or practice that requires or results in the loss of vacation time or pay, then employees are not subject to forfeiture.[63]
Fair Employment Practices Documents	No notice requirement located.
Tax Documents	All employees must furnish signed tax withholding exemption certificates, both the federal Form W-4 and a North Carolina Exemption Certificate.[64]
Wage & Hour Documents: Bonuses, Commissions, etc.	Employers must notify employees of all policies and practices concerning pay and all forms of wage calculation, including bonuses and commissions.[65]
Wage & Hour Documents: Tipped Employees	An employer may not claim a tip credit toward the minimum wage for any employee unless it has notified the employee in advance that the credit will be taken.[66] For more information on the tip credit, see **3.3(b)(ii)**.

[60] 29 C.F.R. § 531.59.

[61] 13 N.C. ADMIN. CODE 12.0306(a); *see also* N.C. GEN. STAT. §§ 95-25.12, 95-25.13.

[62] 13 N.C. ADMIN. CODE 12.0306(b).

[63] *See* N.C. GEN. STAT. §§ 95-25.12, 95-25.13.

[64] N.C. GEN. STAT. § 105-163.5; *see also* North Carolina Dep't of Revenue, *Withholding Tax Frequently Asked Questions*, *available at* http://www.dornc.com/taxes/wh_tax/faq.html. State withholding forms are available at https://www.ncdor.gov/taxes-forms/withholding-tax.

[65] 13 N.C. ADMIN. CODE 12.0307.

[66] N.C. GEN. STAT. § 95-25.3; 13 N.C. ADMIN. CODE 12.0303.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Wage & Hour Documents: Wages and Paydays	At the time of hire, all employers must inform employees in writing of their: (1) promised wages; and (2) the day and location for wage payment. *Wages*, for this purpose, is broadly defined to include all forms of compensation, on any basis (*i.e.*, time, task, piece), as well as "other amounts promised," such as vacation, holiday, or severance pay under an employer's policy or practice. An employee's signature on written notice constitutes presumptive evidence that the employer complied with this requirement.[67]

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[68] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[69]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

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[67] N.C. GEN. STAT. §§ 95-25.2, 95-25.13; 13 N.C. ADMIN. CODE 12.0310.

[68] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

[69] 42 U.S.C. § 653a.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[70] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of North Carolina's new hire reporting law.

Who Must Be Reported. Employers must report individuals for whom a federal Form W-4 is required to be completed at the time of hiring, including employees who are newly hired, rehired, or returned to work after being laid off, furloughed, separated, granted a leave without pay, or terminated.[71]

[70] HHS offers the form online at http://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[71] N.C. GEN. STAT. § 110-129.2(j)(5).

Report Timeframe. Employers must report no later than 20 days from hiring date. If the reports are submitted electronically or magnetically, employers must report twice per month, not less than 12 nor more than 16 days apart.[72]

Information Required. Employers must report the employee's name, address, Social Security number, and date of remuneration as well as the employer's name, address, and state and federal identification numbers.[73]

Form & Submission of Report. Reports shall be made on the Form W-4 or, at the option of the employer, an equivalent form, and may be transmitted magnetically, electronically, or by first-class mail.[74]

Location to Send Information.

North Carolina State Directory of New Hires
PO Box 427
Norwell, MA 02061
(888) 514-4568
(866) 257-7005 (fax)
https://ncnewhires.ncdhhs.gov/

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after his/her employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims

[72] N.C. GEN. STAT. § 110-129.2(b).

[73] N.C. GEN. STAT. § 110-129.2(c).

[74] N.C. GEN. STAT. § 110-129.2(c).

of trade secret misappropriation.[75] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

In North Carolina, covenants not to compete between employees and employers are "not viewed favorably in modern law."[76] North Carolina courts carefully scrutinize contracts that prevent an employee from competing with his/her former employer.[77] When evaluating the enforceability of a noncompete, "a court examines the reasonableness of its time and geographic restrictions, balancing the substantial right of the employee to work with that of the employer to protect its legitimate business interests."[78] Under North Carolina law, valid covenants not to compete must be:

1. in writing;
2. made a part of the employment contract;
3. based on valuable consideration;
4. reasonable as to time and territory; and
5. designed to protect a legitimate business interest of the employer.[79]

North Carolina public policy interests also come into play with noncompetes. A restrictive covenant violating North Carolina's public policy will not be enforced.[80]

In North Carolina, noncompetition agreements must be reasonable as to both time and territory. The general test for determining the reasonableness of a noncompetition agreement is as follows:

The restrictions . . . must be no wider in scope than necessary to protect the business of the employer. A major consideration in determining the reasonableness of restrictions as to time and territory relates to the type of position occupied by the employee, and the skills and/or knowledge obtained by the employee while under employment. . . . Thus, a time limitation contained in the covenant not to compete should remain valid and enforceable if its duration can be justified on the ground that it is reasonably necessary to prevent a loss of customers to the employee or a subsequent employer. Furthermore, in determining the reasonableness of the territorial restrictions, when the primary concern is the employee's knowledge

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[75] 18 U.S.C. §§ 1832 *et seq.*

[76] *Hartman v. W.H. Odell & Assocs.*, 450 S.E.2d 912, 916 (N.C. Ct. App. 1994), *review denied*, 454 S.E.2d 251 (N.C. 1995).

[77] *Washburn v. Yadkin Valley Bank & Trust Co.*, 660 S.E.2d 577, 583 (N.C. Ct. App. 2008); *Chemimetals Processing, Inc. v. McEneny*, 476 S.E.2d 374 (N.C. Ct. App. 1996).

[78] *Okuma Am. Corp. v. Bowers*, 638 S.E.2d 617 (N.C. Ct. App. 2007).

[79] N.C. GEN. STAT. § 75-4; *see also Farr Assocs., Inc. v. Baskin*, 530 S.E.2d 878, 881 (N.C. Ct. App. 2000).

[80] *United Labs., Inc. v. Kuykendall*, 370 S.E.2d 375, 380 (N.C. 1988).

of customers, the territory should only be limited to areas in which the employee made contacts during the period of his employment.[81]

The time and territory restrictions are considered together, meaning that even if either provision is reasonable standing alone, it must also be reasonable when considered in conjunction with the other. This translates into larger geographic restrictions being reasonable when paired with a shorter time period and longer time periods being reasonable when joined with a smaller geographic area.[82]

As with covenants not to compete, agreements prohibiting solicitation of customers by a former employee are enforceable if they are reasonable as to both time and territory.[83] Even without a territorial component, however, a customer-based restriction may be enforceable and can be a valid substitute for a geographic restriction in the context of a nonsolicitation clause.[84]

Enforceability Following Employee Discharge. In North Carolina, it is unclear whether noncompete agreements are enforceable following discharge. "North Carolina courts have not explicitly considered the voluntary or involuntary nature of an employment termination in determining the enforceability of a restrictive covenant."[85]

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding. Providing *consideration* means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

In North Carolina, if an employee signs a noncompetition agreement at the beginning of the employment relationship, the promise of new employment provides sufficient consideration for the agreement.[86] This is true even if the covenant was agreed upon orally at the inception of employment, but was not reduced to writing until a later date.[87]

If, however, the employee signs the noncompetition agreement after the inception of the employment relationship, new consideration is required.[88] The promise of continued employment is insufficient. Instead, the employer must provide the employee with a salary increase or some other new tangible

[81] *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 257 S.E.2d 109, 114-15 (N.C. Ct. App. 1979).

[82] *Farr Assocs.*, 530 S.E.2d at 881.

[83] *Whittaker General Medical Corp. v. Daniel*, 379 S.E.2d 824, 826 (N.C. 1989).

[84] *Market America, Inc. v. Christmas-Orth*, 520 S.E.2d 570, 578 (N.C. Ct. App. 1999).

[85] *Amerigas Propane, L.P. v. Coffey*, 2015 WL 6093207 at *10 n.7 (N.C. Super. Ct. Oct. 15, 2015).

[86] *Farr Assocs.*, 530 S.E.2d at 881; *Milner Airco, Inc. v. Morris*, 433 S.E.2d 811 (N.C. Ct. App. 1993).

[87] *Young v. Mastrom, Inc.*, 392 S.E.2d 446, 448 (N.C. Ct. App. 1990).

[88] *Whittaker General Medical Corp.*, 379 S.E.2d at 826.

benefit in order to create a valid restrictive covenant.[89] Courts normally deem promotions and compensation changes to be sufficient consideration.[90]

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

North Carolina follows the blue-pencil approach to covenant modification.[91] This approach means that North Carolina courts will not rewrite an overly broad provision, but they can chose not to enforce a distinctly separable portion of the covenant in order to render the remainder reasonable. The courts may not, however, otherwise revise or rewrite an overbroad contract.[92]

2.3(b)(iv) *State Trade Secret Law*

North Carolina has adopted a version of the Uniform Trade Secrets Act, the North Carolina Trade Secrets Protection Act. This Act protects trade secrets under written agreement, as well as, in the absence of written agreement.[93]

Definition of a Trade Secret. Under the North Carolina Trade Secrets Act, a *trade secret* means

> [B]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> > (a) derives independent or actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and

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[89] *Young*, 392 S.E.2d at 448.

[90] *Whittaker Gen. Med. Corp. v. Daniel*, 379 S.E.2d 824 (N.C. 1989); *see also Calhoun v. WHA Med. Clinic P.L.L.C.*, 632 S.E.2d 563 (N.C. Ct. App. 2006) (asset purchase followed by the execution of new employment contracts provided sufficient consideration for restrictive covenants protecting the acquiring company).

[91] While, strictly speaking, North Carolina follows the blue-pencil rule, as a practical matter, the North Carolina courts may lean toward the all-or-nothing rule. *See Beverage Sys. of the Carolinas, L.L.C. v. Associated Beverage Repair, L.L.C.*, 784 S.E.3d 457, 461-62 (N.C. 2016) (blue penciling could not save the agreement because striking the unreasonable territorial limits would leave no territory left within which to enforce the noncompete); *VisionAIR, Inc. v. James*, 606 S.E.2d 359, 362 (N.C. Ct. App. 2004) ("If a noncompete covenant 'is too broad to be a reasonable protection to the employer's business it will not be enforced. The courts will not rewrite a contract if it is too broad but will simply not enforce it.'") (quoting *Whittaker Gen. Med. Corp.*, 379 S.E.2d at 828 (N.C. 1989)).

[92] *VisionAIR, Inc.*, 606 S.E.2d at 362; *Jones v. Summers*, 450 S.E.2d 920 (N.C. Ct. App. 1994).

[93] N.C. GEN. STAT. §§ 66-152 *et seq.*

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[94]

This definition covers economically valuable information that is not generally known to competitors. For example, customer pricing lists, cost information, confidential customer lists, and pricing and bidding formulas may constitute trade secrets.[95] Similarly, special knowledge of customer needs and preferences is a trade secret.[96]

Factors used in determining whether information constitutes a trade secret include:

1. the extent to which the information is known outside the business;
2. the extent to which the information is known to employees and others involved in the business;
3. the extent of measures taken to guard the information's secrecy;
4. the value of the information to the business and its competitors;
5. the amount of money or effort expended in the information's development; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.[97]

As noted above, protected trade secret status is available only when the information is not readily accessible to a reasonably diligent competitor.[98] Similarly, information generally known in the industry will not constitute a trade secret.[99] Further, under the North Carolina Trade Secrets Act, trade secret owners have an affirmative duty to take reasonable measures to maintain the information's secrecy.[100]

Misappropriation of a Trade Secret. The owner of a trade secret may bring a civil action for the misappropriation of that trade secret.[101] A misappropriation claim may be brought regardless of whether or not there is a written agreement in place prohibiting disclosure of confidential information. Under the statute, *misappropriation* is defined as the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret."[102] An action for misappropriation of a trade secret must be brought within three years after the misappropriation complained of "is or reasonably should have been discovered."[103]

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94 N.C. GEN. STAT. § 66-152(3).

95 *Philips Elecs. N. Am. Corp. v. Hope*, 631 F. Supp. 2d 705, 721 (M.D.N.C. 2009).

96 631 F. Supp. 2d at 721.

97 *State ex rel. Utilities Comm'n v. MCI Telecomms. Corp.*, 514 S.E.2d 276 (N.C. Ct. App. 1999).

98 N.C. GEN. STAT. § 66-152(3).

99 *Reichhold Chems., Inc. v. Goel*, 555 S.E.2d 281 (N.C. Ct. App. 2001).

100 *Glaxo, Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280, 1300 (E.D.N.C. 1996), *aff'd,* 110 F.3d 1562 (Fed. Cir. 1997).

101 N.C. GEN. STAT. § 66-153.

102 N.C. GEN. STAT. § 66-152(1).

103 N.C. GEN. STAT. § 66-157.

Under the North Carolina Trade Secrets Protection Act, the misappropriation of a trade secret or the threat of misappropriation must be established by substantial evidence demonstrating that the person alleged to have misappropriated the trade secret:

1. knew or should have known of the trade secret; and
2. had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

A court may enjoin actual or threatened misappropriation of a trade secret.[104] The North Carolina Trade Secret Protection Act provides for recovery of the actual damages caused by an employee's misappropriation of a trade secret, measured by the economic loss or unjust enrichment caused by the misappropriation, whichever is greater.[105]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

In North Carolina, any provision in an employment agreement that assigns the employee's rights to an invention to the employer does not apply to an invention that the employee developed entirely on his/her own time without using the employer's equipment, supplies, or trade secret information. Employers do have rights to employee inventions that relate to the employer's business or result from work performed by the employee for the employer.[106]

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[107]

[104] N.C. GEN. STAT. § 66-154(a).

[105] N.C. GEN. STAT. § 66-154(b).

[106] N.C. GEN. STAT. § 66-57.1.

[107] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[108]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[109]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[110]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[111]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[112]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[113]

[108] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[109] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[110] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

[111] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[112] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[113] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[114]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[115] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[116]
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[117]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[118]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is

[114] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[115] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[116] 41 C.F.R. §§ 60-300.44, 60-741.44.

[117] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[118] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	visible to prospective employees and all employees who are verified through the system.[119]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[120]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[121]
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[122]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[123] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing

[119] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[120] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[121] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[122] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[123] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[124]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[125]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[126]

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

[124] 29 C.F.R. § 13.5.

[125] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[126] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Child Labor	Employers must post conspicuous notice, in every room where five or more employees are working, summarizing the restrictions on the employment of minors.[127]
Fair Employment Practices	Employers must post conspicuous notice, in every room where five or more employees are working, informing employees of the prohibitions against discrimination and retaliation in employment.[128]
Unemployment Compensation (Recommended)	The North Carolina Division of Employment Security, Unemployment Insurance Division highly recommends that employers post notice (Form NCESC 524), where employees will see it, informing them about the unemployment insurance program and how to request benefits.[129]
Wages, Hours & Payroll	Employers must post conspicuous notice, in every room where five or more employees are working, summarizing the law governing wages, overtime, wage payment, wage complaints, and right-to-work.[130]
Worker's Compensation	All employers that have secured workers' compensation coverage or are self-insured must post conspicuous notice (NCIC Form 17), informing employees what to do if they have a work-related injury or illness and identifying the insurance carrier.[131]
Workplace Safety	Employers must post conspicuous notice, in every room where five or more employees are working, describing the state occupational safety and health law and summarizing the rights and responsibilities of employers and employees.[132]

[127] N.C. GEN. STAT. § 95-9. This notice is available in the omnibus North Carolina Department of Labor "Wage and Hour Notice to Employees" and "OSH Notice to Employees" combined poster (Labor Poster). It is available in English at https://www.labor.nc.gov/osh-wh-english-posters-9-22pdf/open and in Spanish at https://www.labor.nc.gov/osh-wh-spanish-posters-9-22pdf/open.

[128] N.C. GEN. STAT. § 95-9. This notice is available in the Labor Poster. It is available in English at https://www.labor.nc.gov/osh-wh-english-posters-9-22pdf/open and in Spanish at https://www.labor.nc.gov/osh-wh-spanish-posters-9-22pdf/open.

[129] This poster is available in English at https://www.des.nc.gov/documents/downloads/ncdes524-rev-1-21/download.

[130] N.C. GEN. STAT. §§ 95-9, 95-25.13, 95-25.15. This notice is available in the Labor Poster. It is available in English at https://www.labor.nc.gov/osh-wh-english-posters-9-22pdf/openand in Spanish at https://www.labor.nc.gov/osh-wh-spanish-posters-9-22pdf/open.

[131] N.C. GEN. STAT. § 97-93. This poster is available in English at http://www.ic.nc.gov/forms/form17.pdf and in Spanish at http://www.ic.nc.gov/forms/forma17.pdf.

[132] N.C. GEN. STAT. §§ 95-9, 95-143. This notice is available in the Labor Poster. It is available in English at https://www.labor.nc.gov/osh-wh-english-posters-9-22pdf/openand in Spanish at https://www.labor.nc.gov/osh-wh-spanish-posters-9-22pdf/open.

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements

Records	Notes	Retention Requirement
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[133]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[134]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[135]	For the full period the plan or system is in effect, and for at least 1 year after its termination.

[133] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[134] 29 C.F.R. § 1627.3(b).

[135] 29 C.F.R. § 1627.3(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[136]	At least 1 year from the date the records were made, or from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[137]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[138]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner;	At least 3 years following the date on which the polygraph examination was conducted.

[136] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[137] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[138] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[139]	
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[140]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[141]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[142]	At least 2 years.
Fair Labor Standards Act	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:*	3 years from the last day of entry.

[139] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[140] 29 U.S.C. § 1027.

[141] 29 C.F.R. § 1620.32(a).

[142] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
(FLSA): Payroll Records	• full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[143] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips;	

[143] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[144]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[145]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms;	At least 3 years from the last effective date.

[144] 29 C.F.R. § 516.28.

[145] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[146]	
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[147]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the	At least 3 years.

[146] 29 C.F.R. § 516.5.

[147] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing	

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[148]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[149]	At least 4 years after the date the tax is due or paid, whichever is later.
Immigration	Employers must retain all completed Form I-9s.[150]	3 years after the date of hire or 1 year following

[148] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

[149] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[150] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
		the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[151]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[152]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[153]	As long as it is in effect and at

[151] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[152] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[153] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
		least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[154]	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used.	At least 30 years.

[154] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	Exceptions to this requirement include: • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[155]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[156]	Duration of employment plus 30 years.

[155] 29 C.F.R. § 1910.1020(d).

[156] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Workplace Safety: Analyses Using Medical and Exposure Records	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[157]	At least 30 years.
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[158]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[159]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later."

[157] 29 C.F.R. § 1910.1020(d).

[158] 29 C.F.R. §§ 1904.33, 1904.44.

[159] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[160]	If the contractor has fewer than 150 employees or does not have a contract of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and	Until final disposition of the complaint, compliance review or action.

[160] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[161]	
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[162]	3 years.
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be	During the course of the covered contract as well as after the end of the contract.

[161] 41 C.F.R. §§ 60-1.12, 60-741.80.

[162] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[163]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and	At least 3 years after the work.

[163] 29 C.F.R. § 13.25.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• worker or employee employed in conjunction with the project.[164]	
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[165]	At least 3 years from the completion of the work records containing the information.
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[166]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements.

[164] 29 C.F.R. § 5.5.

[165] 29 C.F.R. § 4.6.

[166] 41 C.F.R. § 50-201.501.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Employment Verification	As discussed in **1.2(b)**, many North Carolina employers are required to use E-Verify. Such employers are required to retain the records of verification of work authorization.[167]	During each employee's employment and 1 year after.
Unemployment Compensation	*Each employer must keep true and accurate records employment and payroll records. Records must include, for each employer:* • name and address, including all names and addresses of each division, branch, or establishment operated, owned, or maintained in North Carolina;[168] • records that establish and reflect ownership, and any changes thereto; • address of headquarters where employer is located; • mailing address; • address where records are available for inspection; • address(es) of owner(s); and • for corporations or unincorporated organizations, the addresses of directors, officers, or other individuals who may be served with legal process, subpoenas, or citations in North Carolina.[169] *For each individual performing services for the employer, records must include:* • name, address, and Social Security number; • dates that the individual performed services; • actual number of hours worked each day; • total number of hours worked each week; • daily attendance record, including times that the individual did not work (for reasons other than lack of work); • state(s) in which the worker's services were performed (including base of operations as well as worker's state of residence); • amount of wages paid, for each separate payroll period if paid weekly (or by calendar weeks, if not paid weekly),	At least 5 years after the calendar year in which wages are paid.

[167] N.C. GEN. STAT. § 64-26.

[168] 4 N.C. ADMIN. CODE 24D.0501(a)(1)-(2).

[169] 4 N.C. ADMIN. CODE 24D.0501(b)-(c).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	noting the date of such payment as well as remuneration paid other than wages; • amounts paid as allowances or reimbursements for travel or other expenses, including the dates of such payments and the amounts of expenditures incurred and documented by the worker; • if the individual worked less than full time, the hours and dates worked; • reasons for separation; • any contract between the parties; • if the employer considers the worker to be an independent contractor for unemployment purposes, all records and evidence supporting that classification; and • federal and state tax returns for the periods when the worker was employed.[170]	
Wages, Hours & Payroll: General	*For each employee in each workweek, unless specifically exempted, the employer must maintain records with the following information:* • name in full; • home address, including zip code and home phone number; • date of birth (if under 20); • occupation or job title; • time of day and day of week that the workweek begins; • regular rate of pay; • hours worked each workday; • total hours worked each workday and total hours worked each workweek; • total straight time earnings and total overtime earnings each workweek; • total additions to or deductions from wages; • total gross wages paid each pay period; and • date of each payment.[171] *Employers must maintain additional employment records, including records related to:* • tip credits; • costs of meals, lodging, or other facilities;	3 years.

[170] N.C. GEN. STAT. § 96-4(i); 4 N.C. ADMIN. CODE 24D.0501(a)(3).

[171] N.C. GEN. STAT. § 95-25.15; 13 N.C. ADMIN. CODE 12.0801(a), 12.0802.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• start and end time for youth under 18; • youth employment certificates; • wage deductions; • vacation and sick leave policies; • policies and procedures regarding promised wages; and • records required to compute wages, including all forms of wages determined on any basis (time, task, piece, etc.), any board, lodging, or other facilities furnished, and other amounts promised by the employer (such as sick, vacation, or severance pay, bonuses, or commissions).[172] *Additionally, an employer must keep the following records for each employee for whom a tip credit is claimed:* • Complete and accurate records of the amount of tips received for each workweek as such tips are certified by the employee monthly or for each pay period. The employee certification is the employee's signature or initials on the employer's records. Certification must occur either monthly or for each pay period. An employee's acceptance of wages from the employer does not constitute certification by the employee of tips received; • The amount claimed by the employer as tip credit for each employee for each workweek; • For each employee participating in a tip pool, for each workweek, the amount of contributions to the tip pool; and • For each employee participating in a tip pool, for each workweek, the amount received from the tip pool. *If the employee refuses to certify or to certify accurately and completely the amount of tips received, a tip credit may be claimed if the employer:* • Meets the general tip credit requirements; and • Can demonstrate with written documentation for each workweek for which a credit is claimed: • That the tipped employee certifies having received tips in the amount for which the credit is taken, or	

[172] 13 N.C. ADMIN. CODE 12.0801(a), 12.0802; *see, e.g.*, N.C. GEN. STAT. § 95-25.2(16) (defining *wages*).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• That a similarly situated tipped employee received tips in the amount for which the credit is taken, or • By other method which reliably establishes that the tipped employee regularly receives tips in the amount for which the credit is taken.[173]	
Wages, Hours & Payroll: Unclaimed Wages	Employers with unclaimed wages must retain records related thereto.[174]	5 years.
Workers' Compensation	All employers must keep records of all injuries, fatal or otherwise, received by employees in the course of employment.[175]	None specified.
Workplace Safety: General	Employers must comply with the safety and health reporting and record-keeping requirements of federal law, which were adopted by North Carolina.[176]	See Fed-OSH Act requirements.
Workplace Safety: Hazardous Communication	*All employers that manufacture, process, use, store, or produce hazardous chemicals must compile and maintain a Hazardous Substance List, which must include the following information for each hazardous chemical stored in the facility in quantities of 55 gallons or 500 pounds, whichever is greater:* • chemical name or common name; • maximum amount of chemical stored at facility at any time during a year, depending on quantities set forth in the statute; and • area in the facility where the chemical is normally stored and if it may be stored at altered temperature or pressure.[177]	1 year.

[173] 13 N.C. ADMIN. CODE 12.0303, 12.0802.

[174] N.C. GEN. STAT. § 116B-73.

[175] N.C. GEN. STAT. § 97-92.

[176] N.C. GEN. STAT. § 95-143; *see* North Carolina Dep't of Labor, *Injury and Illness Recordkeeping: Which Standards Apply?*, *available at* https://www.labor.nc.gov/safety-and-health/occupational-safety-and-health/occupational-safety-and-health-topic-pages/recording-and-reporting#regulations ("OSH automatically adopts all recordkeeping standards for application in North Carolina when published in the Federal Register in accordance with 13 NCAC 07A.0301(a).").

[177] N.C. GEN. STAT. §§ 95-143, 95-191.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	The list should be updated quarterly if needed, but no less often than annually; if major changes occur, however (addition or deletion of chemical, or a change in quantity that adjust the classification), such revisions must be made to the list within 30 days.[178]	
Workplace Safety: Material Safety Data Sheets	All employers (manufacturing and nonmanufacturing) that have purchased hazardous chemicals must maintain the most current material safety data sheet.[179]	None specified.

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

North Carolina law does not address access to personnel files for private-sector employees.

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see 1.3.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

As noted in 1.3, North Carolina places no statutory restrictions on a private employer's use of criminal records for current employees, other than a prohibition on inquiring about expunged criminal records. Moreover, there are no statutory restrictions on an employer's access to employee credit history or social media, or on an employer's use of polygraph examinations on current employees.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see 1.3(e)(i).

[178] N.C. GEN. STAT. § 95-191(b).

[179] N.C. GEN. STAT. §§ 95-143, 95-192(a).

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

North Carolina employers are not prohibited from conducting, but nor are they required to conduct, drug testing on their employees.[180] Employers are permitted, however, to terminate, discipline or take adverse employment actions against an employee:

1. where that employee has failed to comply with requirements of the employer's substance abuse prevention program; or
2. upon the recommendation of a substance abuse prevention counselor employed or retained by the employer.[181]

In an effort to protect employees from unreliable and inadequate controlled substance examinations and screenings, drug testing must be conducted pursuant to the Controlled Substance Examination Regulation Act. This law provides procedural requirements and guidelines for the administration of such examinations when conducted.[182] For more information on this law, see **1.3(e)(ii)**.

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[183]

3.2(c)(ii) *State Guidelines on Marijuana*

North Carolina has no private-employer-related provisions regarding marijuana use.

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in his/her gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[184]

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[180] N.C. GEN. STAT. § 95-233.

[181] N.C. GEN. STAT. § 95-28.2(c)(3).

[182] N.C. GEN. STAT. §§ 95-232, 95-233.

[183] 21 U.S.C. §§ 811-12, 841 *et seq*.

[184] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[185]

3.2(d)(ii) *State Data Security Breach Guidelines*

North Carolina law requires that when a business that owns or licenses the personal information of North Carolina residents or any business that conducts business in North Carolina discovers a security breach involving personally identifiable information, they must notify the affected class.[186]

Covered Entities & Information. Under the statute, covered entities include any business that owns or licenses personal information of residents of North Carolina or any business that conducts business in North Carolina that owns or licenses personal information in any form, whether computerized, paper, or otherwise.[187]

North Carolina has a comprehensive definition of *personal information*. Under the statute, *personal information* means a person's first name or first initial and last name in combination with:

- Social Security or employer taxpayer identification numbers;
- driver's license, state identification card, or passport numbers;
- checking account numbers;
- savings account numbers;
- credit card numbers;
- debit card numbers;
- Personal Identification (PIN) Code;
- electronic identification numbers, electronic mail names or addresses, internet account numbers, or internet identification names;
- digital signatures;
- any other numbers or information that can be used to access a person's financial resources;
- biometric data;
- fingerprints;
- passwords; and

[185] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[186] N.C. GEN. STAT. § 75-65.

[187] N.C. GEN. STAT. § 75-65(a).

- parent's legal surname prior to marriage.[188]

Personal information does not include any information publicly available.[189]

Content & Form of Notice. Notice must be clear and conspicuous and must include all of the following:

- a description of the incident in general terms;
- a description of the type of personal information that was subject to the unauthorized access and acquisition;
- a description of the general acts of the business to protect the personal information from further unauthorized access;
- a telephone number for the business that the person may call for further information and assistance, if one exists;
- advice that directs the person to remain vigilant by reviewing account statements and monitoring free credit reports;
- the toll-free numbers and addresses for the major consumer reporting agencies; and
- the toll-free numbers, addresses, and website addresses for the Federal Trade Commission and the North Carolina Attorney General's Office, along with a statement that the individual can obtain information from these sources about preventing identity theft.[190]

The notice may be in one of the following formats:

- written notice;
- electronic notice, for those who have a valid email address and have agreed to receive communications electronically if it is compliant with the federal e-sign act; or
- substitute notice if the covered entity demonstrates that:
  - the cost of providing notice would exceed $250,000;
  - the affected class of persons to be notified exceeds 500,000; or
  - the information holder does not have sufficient contact information.[191]

Substitute notice must consist of all of the following:

- email notice when the information holder has an email address for the subject persons;
- conspicuous posting of the notice on the website of the covered entity if the information holder maintains a website; and
- notification by statewide media.[192]

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[188] N.C. GEN. STAT. §§ 75-61, 14-113.20.

[189] N.C. GEN. STAT. § 75-61.

[190] N.C. GEN. STAT. § 75-65(d).

[191] N.C. GEN. STAT. § 75-65(e).

[192] N.C. GEN. STAT. § 75-65(e)(4).

Timing of Notice. Notice must be given without unreasonable delay. Notice may be delayed for the legitimate needs of law enforcement, to determine sufficient contact information, to determine the scope of the breach, or to restore the reasonable integrity, security, and confidentiality of the date system.[193]

Additional Requirements. If more than 1,000 individuals will be notified of a security breach, then the information holder must also notify all nationwide consumer reporting agencies of the timing, distribution, and content of the notices.[194]

In addition, if a covered entity provides notice, it must also notify without unreasonable delay the Consumer Protection Division of the Attorney General's Office of the nature of the breach, the number of consumers affected by the breach, steps taken to investigate the breach, steps taken to prevent a similar breach in the future, and information regarding the timing, distribution, and content of the notice.[195]

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[196] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[197]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[198]

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193 N.C. GEN. STAT. § 75-65(a).

194 N.C. GEN. STAT. § 75-65(f).

195 N.C. GEN. STAT. § 75-65(e)(1).

196 29 U.S.C. § 218(a).

197 29 U.S.C. § 206.

198 29 U.S.C. §§ 203, 206.

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[199]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[200] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.3(b) *State Guidelines on Minimum Wage Obligations*

3.3(b)(i) *State Minimum Wage*

Pursuant to the North Carolina Wage and Hour Act, the minimum wage in North Carolina is currently $7.25 per hour for most nonexempt employees.[201] State law requires payment of at least the federal minimum wage. However, state minimum wage provisions do *not* apply to persons employed by an enterprise covered under the federal FLSA, although certain exceptions apply.[202] Employers covered by the FLSA should refer to the federal provisions.

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. In North Carolina, an employer may pay its tipped employees in accordance with the FLSA's treatment, as long as:

- the employer maintain accurate records of the tips received by each employee;
- each employee certifies tips and receives enough in tips to equal the minimum wage rate; the employee retains all tips; and
- employees are notified in advance of the method of payment.[203]

If an employee earns tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, a tipped employee must receive a minimum cash wage of $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, the employer must make up the difference between the wage actually made, and the minimum wage, which is currently $7.25 per hour.[204] An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee. Employees and employers may not agree that the employees will surrender tips to the employer.[205]

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

Generally, all nonfarm, nongovernmental employers with an annual dollar volume of under $500,000 must comply with the North Carolina minimum wage requirements. However, North Carolina's minimum wage provisions do not apply to:

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[199] 29 U.S.C. § 3(m)(2)(B).

[200] 29 U.S.C. § 207.

[201] N.C. GEN. STAT. § 95-25.3(a).

[202] N.C. GEN. STAT. § 95-25.14.

[203] N.C. GEN. STAT. § 95-25.3(f).

[204] N.C. GEN. STAT. § 95-25.3(f).

[205] 13 N.C. ADMIN. CODE 12.0303(c).

- any person who is employed in a *bona fide* executive, administrative, professional (including teachers and academic administrative personnel in elementary and secondary schools) or outside sales capacity, as defined under the FLSA;
- individuals employed in agriculture, as defined under the FLSA;
- individuals employed as domestic service workers, including babysitters and companions, as defined under the FLSA;
- individuals working as a page in the North Carolina General Assembly or in the governor's office;
- a *bona fide* volunteer in a medical, educational, religious, or nonprofit organization where an employer-employee relationship does not exist;
- any person confined in and working for any penal, correctional, or mental institution of the state or local government;
- any person working as a model, or as an actor or performer in motion pictures or theatrical, radio, or television productions, as defined under the FLSA;
- individuals employed by an outdoor drama in a production role, including lighting, costumes, properties, and special effects (but not including office workers, ticket takers, ushers, and parking lot attendants);
- any person employed by a boys' or girls' summer camp or by a seasonal religious or nonprofit educational conference center;
- any person employed in the catching, processing, or first sale of seafood, as defined under the FLSA;
- any person who is the spouse, child, parent, or otherwise qualified as a dependent of the employer under the income tax laws of North Carolina; and
- any computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, as defined in the FLSA.[206]

Certain categories of workers may receive subminimum wage in North Carolina. Full-time students, learners, apprentices and messengers, as defined by the FLSA, must be paid 90% of the statutory minimum wage.[207]

3.3(c) *State Guidelines on Overtime Obligations*

Like the FLSA, the North Carolina Wage and Hour Act (NCWHA) requires that every employer pay each employee who works more than 40 hours in any workweek at least time and one half of the regular rate of pay for all hours worked over 40 hours.[208] There is no requirement under the NCWHA that employees be paid overtime or premium pay for hours worked in excess of eight (or any amount) each day, nor is there any requirement that employees be paid overtime for hours worked on Saturday or Sunday or on any holiday. The state overtime provisions do not apply to an employer covered under the FLSA.

[206] N.C. GEN. STAT. § 95-25.14.

[207] N.C. GEN. STAT. § 95-25.3(b).

[208] N.C. GEN. STAT. § 95-25.4.

3.3(d) *State Guidelines on Overtime Exemptions*

Under the NCWHA, the exemptions that apply to minimum wage, as described in **3.3(b)(iii)**, also apply to overtime pay. In addition, North Carolina's overtime requirements do not apply to:

- drivers, drivers' helpers, loaders and mechanics, as defined by the FLSA;
- taxicab drivers;
- seamen, employees of railroads, and employees of air carriers, as defined in the FLSA;
- salespersons, mechanics, and partsmen employed by automotive, truck, and farm implement dealers, as defined under the FLSA;
- salespersons employed by trailer, boat, and aircraft dealers, as defined by the FLSA;
- live-in child care workers or other live-in employees in homes for dependent children;
- radio and television announcers, news editors, and chief engineers, as defined under the FLSA; and
- any employee of a seasonal amusement or recreational establishment.[209]

North Carolina follows the FLSA for purposes of the executive, administrative, professional, computer employees, and outside sales exemptions.[210] However, state law contains no express exemption for commissioned sales employees. Nonetheless, any employee considered exempt under a provision of the FLSA for which there is no state equivalent is *not* exempt from state overtime provisions unless the FLSA exemption provides a method of computing overtime which is an alternative to the method required in 29 U.S.C. section 207(a). State labor department regulations expressly state that "[e]xamples of such F.L.S.A. exemptions include . . . Commissioned inside salespersons in retail as specified in 29 U.S.C. 207(i)."[211] Moreover, judicial and administrative interpretations of and rulings under the FLSA are used as a guide when interpreting overtime provisions, and control for enforcement purposes.[212]

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[213] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

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[209] N.C. GEN. STAT. § 95-25.14(c).

[210] N.C. GEN. STAT. § 95-25.14; 13 N.C. ADMIN. CODE 12.0102.

[211] 13 N.C. ADMIN. CODE 12.0501(c).

[212] N.C. GEN. STAT. § 95-25.14; 13 N.C. ADMIN. CODE 12.0501, 12.0102.

[213] 29 C.F.R. § 785.19.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[214]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[215] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[216] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[217] Exemptions apply for smaller employers and air carriers.[218]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[219] Lactation is considered a related medical condition.[220] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[221] For more information on these topics, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

There are no generally applicable meal or rest period requirements for adults in North Carolina, although special rules apply to pharmacists.[222]

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[214] 29 C.F.R. § 785.18.

[215] 29 U.S.C. § 218d.

[216] 29 U.S.C. § 218d(b)(2).

[217] 29 U.S.C. § 218d(a).

[218] 29 U.S.C. § 218d(c), (d).

[219] 42 U.S.C. § 2000gg–1.

[220] 29 C.F.R. § 1636.3.

[221] 29 C.F.R. § 1636.3.

[222] 21 N.C. ADMIN. CODE 46.2512.

3.4(b)(ii) *State Meal & Rest Periods for Minors*

Employees under the age of 16 are permitted to work no more than five consecutive hours without a break of at least 30 minutes.[223] Periods of less than 30 minutes do not interrupt a continuous period of work.[224] There are no additional meal or rest period requirements for minors aside from this 30-minute break period.

3.4(b)(iii) *State Enforcement, Remedies & Penalties*

Violations of the meal and rest break provision for minors are punishable by a civil penalty of up to $500 for the first violation and $1,000 for subsequent violations. Penalties are subject to a two-year statute of limitations.[225]

3.4(b)(iv) *Lactation Accommodation Under State Law*

Under North Carolina law, an individual has the right to breast feed in public.[226] Although the law does not specifically mention employers, it can be construed to include places of employment.

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[227] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[228]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

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[223] N.C. GEN. STAT. § 95-25.5(e).

[224] N.C. GEN. STAT. § 95-25.5(e).

[225] N.C. GEN. STAT. § 95-25.23.

[226] N.C. GEN. STAT. § 14-190.9.

[227] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

[228] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

North Carolina law does not include an express definition of hours worked. There are a number of issues considered when determining whether activities constitute work. This publication looks more closely at pay requirements for reporting time, on-call time, and travel time. North Carolina law addresses all three.

Reporting Time. There is no reporting time pay requirement in North Carolina. Employers are not required to pay a minimum number of hours to their hourly or nonexempt salary employees, including if they are called back in. An employer is obligated only to pay such employees for actual hours worked. However, if an employer has made a promise to pay its employees a certain minimum amount of time if an hourly employee or nonexempt salary employee is called in, then the employee must be paid according to the agreement.[229]

On-call Time. Under North Carolina law, time spent on call is compensable when employees are required to remain on the employer's premises or so close to the workplace that they cannot effectively use the time for their own personal purposes. Employees who are not required to remain on the employer's premises but are merely required to leave word at their home or with company officials where they may be reached are not working while on call and need not be compensated.[230]

Travel Time. Travel from the employer's office to a worksite and travel from the worksite back to the employer's office is worktime for the *driver* of a company vehicle. However, travel from the employer's office to a worksite and travel from the worksite back to the employer's office is not work-time for a *rider* in a company vehicle if all the following conditions are met:

- riding to and from the worksite and office in the company vehicle is optional and not mandatory;
- for the trip to the first or only worksite, the rider does not help load the company vehicle at the office; and
- for the trip from the last or only worksite back to the office, the rider does not help unload the company vehicle once back at the office.[231]

Travel time between worksites is worktime for both drivers and riders regardless of whether the employee uses a company or personal vehicle. However, even if travel time is worktime, an employer may elect to pay an employee a lower hourly rate for this worktime, which may be set as low as the minimum wage.[232]

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[229] North Carolina Dep't of Labor, *Maximum/Minimum Hours Worked*, *available at* https://www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/maximumminimum-hours-worked.

[230] *Spencer v. Hyde Cnty.*, 959 F. Supp. 721 (E.D.N.C. 1997); *Whitehead v. Sparrow Enterprise, Inc.*, 605 S.E.2d 234, 237 (N.C. Ct. App. 2004), *review denied*, 618 S.E.2d 240 (N.C. 2005).

[231] *Whitehead v. Sparrow Enterprise, Inc.*, 605 S.E.2d 234, 237 (N.C. Ct. App. 2004); North Carolina Dep't of Labor, *Driving and Riding Time and Hours Worked*, *available at* https://www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/riding-and-drivingmeeting#:~:text=Driving%20and%20Riding%20Time%20and%20Hours%20Worked&text=The%20time%20an%20employee%20spends,is%20normally%20not%20work%2Dtime.

[232] North Carolina Dep't of Labor, *Driving and Riding Time and Hours Worked*, *available at* https://www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/riding-and-

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[233] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[234] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

North Carolina's child labor laws generally do not apply to FLSA-covered employers. However, such employers are still required to comply with the state child labor provisions regarding the following:

- the youth employment certificate;
- the hours in which youths under 18 who are enrolled in school may be employed during the school year;
- the prohibition of employment in hazardous occupations; and
- the restrictions on youth employment for employers holding Alcohol Beverage Control ("ABC") permits.[235]

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. Like federal law, North Carolina restricts the employment of persons under the age of 18 by age and by the type of job. No one under 18 years of age may work in any occupation that the U.S. Department of Labor has found and declared to be hazardous and without exemption under the FLSA, or in any occupation that the North Carolina Commissioner of Labor has found and declared to be detrimental to the health and well-being of minors.[236] Table 9 summarizes the state restrictions on type of employment by age.

drivingmeeting#:~:text=Driving%20and%20Riding%20Time%20and%20Hours%20Worked&text=The%20time%20an%20employee%20spends,is%20normally%20not%20work%2Dtime.

[233] 29 C.F.R. §§ 570.36, 570.50.

[234] 29 C.F.R. § 570.6.

[235] N.C. GEN. STAT. § 95-25.5(k).

[236] N.C. GEN. STAT. § 95-25.5(b).

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
Under Age 18	*The following occupations have been deemed to be detrimental to the health and well-being of minors and are prohibited:* • welding, brazing, and torch cutting;[237] • any processes where quartz or any other 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; • any work involving exposure to benzene or any benzene compound that is volatile or that can penetrate the skin; • occupations in canneries, seafood, and poultry processing establishments that involve the use, setting up, adjusting, repairing, or cleaning of cutting or slicing machines, or freezing or packing activities; • any work that involves the risk of falling a distance of 10 feet or more, including the use of ladders and scaffolds; • any work as an electrician or electrician's helper; • any work in confined spaces;[238] or • occupations in which the use of a respirator is required by title 29 of the Code of Federal Regulations, sections 1910.146 and 1926.21.[239] Exceptions apply for certain internship programs.[240] Minors who hold a North Carolina driver's license valid for the type of driving involved may be assigned as part of their employment to drive a vehicle not exceeding 6,000 pounds gross weight within a 25-mile radius of the principal place of employment, provided that they have completed a state-approved driver education course and the assignment does not involve towing vehicles.[241]
Ages 14 & 15	Minors age 14 and 15 can work only in occupations permitted by federal child labor laws.[242]
Under Age 14	Minors under age 14 cannot be employed, subject to limited exceptions.[243]

Restrictions on Selling or Serving Alcohol. In North Carolina, employers that hold an ABC permit for the on-premises sale or consumption of alcohol cannot employ minors under age 18 and minors cannot

[237] 13 N.C. ADMIN. CODE 12.0406; *see also* 29 C.F.R. §§ 1910.251 to 1910.255, 1926.350-54.

[238] 13 N.C. ADMIN. CODE 12.0406; *see also* 29 C.F.R. §§ 1910.146 and 1926.21.

[239] 13 N.C. ADMIN. CODE 12.0406(a).

[240] N.C. GEN. STAT. § 95-25.5(k1).

[241] N.C. GEN. STAT. § 95-25.5(l).

[242] N.C. GEN. STAT. § 95-25.5(k).

[243] N.C. GEN. STAT. § 95-25.5(d).

prepare, serve, dispense, or sell alcohol.[244] Further, such employers cannot employ minors under age 16 on the premises for any purpose, unless the minor is at least age 14 and both of the following conditions are met:

- the minor's parent or guardian provides written consent; and
- the minor is employed to work on the outside grounds of the premises for a purpose that does not involve preparing, serving, dispensing, or selling alcohol. Except for the sale of alcohol at the point of sale for only off premises consumption.[245]

3.6(b)(ii) *State Limits on Hours of Work for Minors*

On school days, minors enrolled in grade 12 or below cannot work between 11:00 P.M. and 5:00 A.M., unless the minor's parents and principal agree to an exception.[246] Minors aged 14 and 15 cannot work:

- during school hours;
- more than three hours on a school day;
- more than 18 hours per week when school is in session, except that minors enrolled in high school apprenticeship, work experience or career exploration programs can work up to 23 hours when school is in session, including during school hours;
- between 7:00 P.M. and 7:00 A.M., except that minors can work until 9:00 P.M. from June 1 to Labor Day;
- more than eight hours on a nonschool day; or
- more than 40 hours per week when school is not in session.[247]

3.6(b)(iii) *State Child Labor Exceptions*

As discussed above, North Carolina's child labor laws do not apply to employers covered by the FLSA.[248] In addition, minors employed as models, or as actors or performers in motion pictures or theatrical productions, or in radio or television productions, are exempt from the child labor laws except for the youth employment certificate requirements.[249] Minors employed by an outdoor drama directly in production-related positions such as stagehands, lighting, costumes, properties, and special effects are also exempt, but minors employed in positions such as office workers, ticket takers, ushers and parking lot attendants have no exemption and are subject to all state child labor provisions.[250]

Further, minors under 18 employed by a parent, guardian, or other person standing *in loco parentis* are exempt from all provisions of this section, except for all of the following:

- the youth employment certificate requirements;

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[244] N.C. GEN. STAT. § 95-25.5(j).

[245] N.C. GEN. STAT. § 95-25.5(j).

[246] N.C. GEN. STAT. § 95-25.5(a1).

[247] N.C. GEN. STAT. § 95-25.5(c).

[248] N.C. GEN. STAT. § 95-25.5(k).

[249] N.C. GEN. STAT. § 95-25.5(g).

[250] N.C. GEN. STAT. § 95-25.5(h).

- the prohibition from hazardous or detrimental occupations; and
- the alcohol service and sale prohibitions, if the minors only work at the establishment when another employee at least 21 years of age is in charge of and present at the licensed premises.[251]

Finally, North Carolina's child labor provisions generally do not apply where:

- the employee is employed in agriculture, as defined under the FLSA;
- the employee is a domestic, including babysitters and companions, as defined under the FLSA.
- the employee is a page in the North Carolina General Assembly or in the state governor's office;
- the person is a *bona fide* volunteer in a medical, educational, religious, or nonprofit organization where an employer-employee relationship does not exist; or
- the employee is confined in and working for any penal, correctional, or mental institution of the state or local government.[252]

3.6(b)(iv) *State Work Permit or Waiver Requirements*

North Carolina law requires minors under age 18 to have a youth employment certificate unless specifically exempted, and certificates will not be issued if employment will violate the FLSA's child labor laws.[253] Unless the individual is an emancipated minor, the certificate must be signed by the employer, minor, and his/her parent, guardian, custodian, or other legal representative. An employer must obtain a copy of the certificate on or before the first day of employment.[254] A certificate is valid only at the employer specified on the certificate.[255] It must be maintained on record, readily accessible to any person authorized to inspect or investigate youth employment. Moreover, the certificate must be kept during the minor's employment and for two years after employment terminates.[256]

3.6(b)(v) *State Enforcement, Remedies & Penalties*

Employers that violate North Carolina's child labor laws are subject to a civil penalty not to exceed $500 for the first violation or $1,000 for subsequent violations.[257] The size of the business charged and the gravity of the violation are factors in the Commissioner's penalty amount decision. Assessments of youth employment penalties are subject to a two-year statute of limitations commencing at the time of the occurrence of the violation.[258]

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[251] N.C. GEN. STAT. § 95-25.5(i).

[252] N.C. GEN. STAT. § 95-25.14(a).

[253] N.C. GEN. STAT. § 95-25.5(a).

[254] 13 N.C. ADMIN. CODE 12.0403.

[255] 13 N.C. ADMIN. CODE 12.0402.

[256] 13 N.C. ADMIN. CODE 12.0401.

[257] N.C. GEN. STAT. § 95-25.23(a).

[258] N.C. GEN. STAT. § 95-25.23(d).

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[259]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[260]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[261]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[262] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[263]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that

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[259] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

[260] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

[261] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[262] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

[263] 12 C.F.R. § 1005.2(b)(3)(i)(A).

must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[264] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[265]

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[266]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[267]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

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[264] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[265] 12 C.F.R. § 1005.18.

[266] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

[267] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[268] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[269] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[270] tools and equipment,[271] and business transportation and travel.[272] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[273]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[274]

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[268] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

[269] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[270] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[271] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[272] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[273] 29 C.F.R. § 778.217.

[274] 29 C.F.R. § 531.38.

- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[275]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[276]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[277]
- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[278] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[279]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[280]

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[275] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[276] 29 C.F.R. § 531.40.

[277] 29 C.F.R. § 531.40.

[278] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[279] 29 C.F.R. § 825.213.

[280] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[281] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[282]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[283]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[284]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[285]

3.7(b) *State Guidelines on Wage Payment*

Employers must notify employees, in writing, at least one pay period before a change in "promised wages" occurs. However, wages can be retroactively increased without notice.[286]

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[281] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[282] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[283] 29 C.F.R. § 531.36.

[284] 29 C.F.R. § 531.37.

[285] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[286] N.C. GEN. STAT. § 95-25.13.

3.7(b)(i) *Form of Payment Under State Law*

Authorized Instruments. In North Carolina, wages may be paid in any legal form of payment, including cash, money order, negotiable checks, and direct deposit.[287]

Direct Deposit. Mandatory direct deposit is permitted in North Carolina. Although wage payment statutes do not specify how wages can be paid, accompanying regulations provide that an employer may select any legal form of payment, including direct deposit into either an institution whose deposits are insured by the U.S. Government or one selected by an employee, so long as payment is made in full on the designated payday, subject to authorized deductions and legal withholdings.[288]

According to the North Carolina Department of Labor, an employer can make direct deposit a condition of employment without violating the state Wage and Hour Act. If direct deposit is the only option offered, employees must be able to choose their own financial institution. If direct deposit is mandatory, employees cannot incur additional costs as a result of participation (*e.g.*, bank fees), if those costs would reduce an employee's pay to less than the minimum wage. However, if direct deposit is completely optional and an employee elects to be paid by direct deposit, then the cost to the employee can bring the employee's pay below the minimum wage.[289]

Payroll Debit Card. The Department of Labor also permits payroll debit cards as an acceptable form of payment if both of the following conditions are met:

- the employee is able to withdraw all monies due on payday; and
- one-time use of the card on payday is at no cost to the employee.[290]

If an employer mandates wage payment via payroll debit card, and all other requirements are met, subsequent withdrawals can be subject to "bank-imposed" fees and do not require any authorization from the employee since this is a contractual issue between the bank and the employee. If the card is optional and employees are permitted to elect other methods of receiving wages and the fees are disclosed to the employees, a bank may impose a monthly fee and a withdrawal fee for each withdrawal after the initial no-cost withdrawal.[291]

3.7(b)(ii) *Frequency of Payment Under State Law*

Employers must pay every employee all wages and tips accruing to the employee on regular paydays, but North Carolina employers have some discretion as to how often and when employees are to be paid.[292]

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[287] 13 N.C. ADMIN. CODE 12.0309; North Carolina Dep't of Labor, *Debit-Payroll Card Payment and Direct Deposit: Direct Deposit Enforcement Position*, *available at* https://www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/debit-payroll-card-payment.

[288] *See* N.C. GEN. STAT. §§ 95-25.6, 95-25.7; 13 N.C. ADMIN. CODE 12.0309.

[289] North Carolina Dep't of Labor, *Debit-Payroll Card Payment and Direct Deposit: Direct Deposit Enforcement Position*, *available at* https://www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/debit-payroll-card-payment.

[290] North Carolina Dep't of Labor, *Debit-Payroll Card Payment and Direct Deposit: Debit/Payroll Card Payment*, *available at* https://www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/debit-payroll-card-payment.

[291] North Carolina Dep't of Labor, *Debit/Payroll Card Payment*.

[292] N.C. GEN. STAT. § 95-25.6.

Pay periods may be daily, weekly, biweekly, semi-monthly, or monthly. Wages based on bonuses, commissions, or other forms of calculation may be paid as infrequently as once a year if prescribed in advance.[293]

3.7(b)(iii) *Final Payment Under State Law*

Employees whose employment is discontinued for any reason must be paid all wages due on or before the next regular payday.[294] Wages based on bonuses, commissions, or other forms of calculation must be paid on the first regular payday after the amount becomes calculable.[295] Such wages may not be forfeited unless the employee has been notified in writing or through a posted notice of the employer's policy or practice that results in forfeiture. The notice must be provided at the time of hire or at least one pay period before any changes in the promised wages takes place.[296]

If requested by an employee, the final paycheck must be mailed. An employer may not withhold a final paycheck because the employee refuses to pick it up.[297]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

North Carolina employers must provide each employee with an itemized statement of the amount and purpose of deductions made from the employee's wages for each pay period such deductions are made.[298] The employer may provide the itemized statement:

- in writing;
- by electronic mail (only if capable of being printed out as a paper copy by the employee); or
- by any other means that supplies the required information in a form the employees can retain in written form.[299]

3.7(b)(v) *Wage Transparency*

North Carolina law does not address whether an employer may prohibit employees from disclosing their wages or from discussing and inquiring about the wages of other employees.

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

North Carolina law has no general notice requirements with regard to the change of payday. However, it is recommended that employees receive advance written notice before a change occurs.

For changes in rate of pay, employers must notify employees in writing at least one pay period before a change in promised wages occurs. However, wages can be retroactively increased without notice.[300] Notably, wages computed under a bonus plan, commission plan, vacation plan, or other forms of calculation policy or practice that does not establish specific earning criteria cannot be reduced or

[293] N.C. GEN. STAT. § 95-25.6; 13 N.C. ADMIN. CODE 12.0307.

[294] N.C. GEN. STAT. § 95-25.7.

[295] N.C. GEN. STAT. § 95-25.7.

[296] N.C. GEN. STAT. § 95-25.13.

[297] 13 N.C. ADMIN. CODE 12.0308.

[298] N.C. GEN. STAT. § 95-25.13.

[299] 13 N.C. ADMIN. CODE 12.0304, 12.0807.

[300] N.C. GEN. STAT. § 95-25.13.

eliminated due to a policy or practice change. If a policy or practice is changed to establish specific earning criteria, the employee is entitled to the bonus, commission, or other forms of wages earned under the original policy through the effective date of the change, and is entitled to the items earned under the new policy from the effective date forward, if the earning criteria are met under both policies.[301]

3.7(b)(vii) *Paying for Expenses Under State Law*

In North Carolina, there is no general obligation to indemnify an employee for business expenses. However, specific requirements exist concerning whether an employee may be required to pay for travel expenses, transportation expenses, uniforms, tools, and equipment. In general, items that primarily benefit the employer cannot be computed as wages and the cost cannot be passed on to the employee.[302]

Travel Expenses. For purposes of the wage payment provisions, the definition of *wage* includes "other amounts promised when the employer has a policy or a practice of making such payments." *Other amounts promised* are those an employer has promised or has a policy or practice of paying, and include travel expenses.[303]

Transportation Expenses. Transportation charges incident or necessary to employment are considered to primarily benefit an employer and cannot be computed as wages.[304]

Uniforms. Where an employer requires an employee to wear a unique or customized uniform, such uniforms are considered to primarily benefit an employer and cannot be computed as wages.[305] Deductions for the cost of uniform rental or cleaning, if not required by the employer, are permissible as taken for the "convenience of the employee."[306]

Tools & Equipment. Tools and equipment required by an employer are considered to primarily benefit an employer and cannot be computed as wages.[307] Moreover, an employer cannot obtain an employee's authorization to deduct for personal protective equipment that an employee does not wear off the jobsite for use off the job, which an employer is required to provide.[308]

3.7(b)(viii) *Wage Deductions Under State Law*

Permissible Deductions. North Carolina permits employers to withhold or divert any portion of an employee's wages only when:

- the employer is required or empowered to do so by state or federal law; or
- the employee has submitted a written and signed authorization for the deduction on or before the payday for the pay period from which the deduction is to be made.[309]

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[301] 13 N.C. ADMIN. CODE 12.0307.

[302] 13 N.C. ADMIN. CODE 12.0301.

[303] N.C. GEN. STAT. § 95-25.2; 13 N.C. ADMIN. CODE 12.0310.

[304] 13 N.C. ADMIN. CODE 12.0301.

[305] 13 N.C. ADMIN. CODE 12.0301.

[306] 13 N.C. ADMIN. CODE 12.0305.

[307] 13 N.C. ADMIN. CODE 12.0301.

[308] 13 N.C. ADMIN. CODE 12.0305.

[309] N.C. GEN. STAT. § 95-25.8(a).

In the latter case, two types of authorizations are permitted:

- 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 that:
  - is signed on or before the payday(s) for the pay period(s) from which the deduction is to be made;
  - indicates the reason for the deduction; and
  - states the actual dollar amount or percentage of wages that must be deducted from one or more paychecks (provided, however, that if the deduction is for the employee's convenience, the employee must be given a reasonable opportunity to withdraw the authorization);[310] or
- when the amount of the proposed deduction is not known and agreed upon in advance, the employer must have written authorization from the employee that 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, as long as the employee receives advance written notice of the actual amount to be deducted, receives written notice of his/her right to withdraw the authorization, and is given a reasonable opportunity to withdraw the authorization in writing.[311]

When withholding is done for the employer's benefit, and no overtime is worked in the workweek at issue, an employer may not reduce wages below the minimum wage level by way of deductions. Further, in overtime workweeks, employers may reduce wages to the minimum wage level only for non-overtime hours. Employers are prohibited from making reductions to overtime wages owed.[312]

Additionally, the following deductions are permitted:

- overpayments 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
- principal amount of loans made to an employee. However, deductions for interest and other charges related to loans require an employee's written authorization and must comply with the general authorization requirements.[313]

Further, in contrast with some other states, a North Carolina employer may withhold a portion of an employee's wages for cash shortages, inventory shortages, or loss or damage to an employer's 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.[314] The seven-day notice requirement does not apply where there has

[310] N.C. GEN. STAT. § 95-25.8(a).

[311] N.C. GEN. STAT. § 95-25.8(a).

[312] N.C. GEN. STAT. § 95-25.8(b).

[313] N.C. GEN. STAT. § 95-25.8(d).

[314] N.C. GEN. STAT. § 95-25.8(c).

been a separation of employment.[315] If an employee is charged, indicted, or arrested in connection with a shortage or damage, an employer may withhold a portion of an employee's wages in order to recoup the amount of the shortage or damage to the employer's property, without the written authorization subject to the restrictions regarding the minimum wage and overtime wages.[316] If the employee is found not guilty of the charged offense, the employer must reimburse the employee for the deduction.[317]

Prohibited Deductions. The wage deduction provisions do not include any specific deductions that are prohibited. Thus, so long as a deduction meets the requirements set forth above, it is permissible under the statute. Authorizations for deductions that are not permitted by law are invalid (*e.g.*, an agreement that the employee pays the employer's portion of workers' compensation insurance).

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

Orders of Support. North Carolina caps the amount of wages that can be garnished from a working parent's earnings. Pursuant to North Carolina law, courts may enter a garnishment order not to exceed 40% of the responsible parent's monthly disposable earnings.[318] *Disposable earnings* are defined as "that part of the compensation paid or payable to the responsible parent for personal services, whether denominated as wages, salary, commission, bonus, or otherwise (including periodic payments pursuant to a pension, retirement, or other deferred compensation program)" remaining after other withholdings required by law.[319]

Employers may increase the garnished amount by an additional $1 processing fee to retain for each payment under the garnishment order.[320] Employers are not permitted to institute a higher garnishment than set in the underlying child support order.[321] Further, employers may not discharge employees because their wages are subject to a child support garnishment.[322]

Debt Collection. North Carolina courts are not permitted to issue an order requiring an employer to withhold wages for debts such as loans, credit cards, and other personal debts. However, creditors in other states may be able to get an order of garnishment under their own states' laws requiring a North Carolina employer to withhold from an employee's wages. Thus, if a court from another state issues a valid order under that state's law requiring a North Carolina employer to withhold from an employee's wages for payment of a debt, the employer is not in violation of the North Carolina Wage and Hour Act by obeying that order.[323]

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315 N.C. GEN. STAT. § 95-25.8(c).

316 N.C. GEN. STAT. § 95-25.8(e).

317 N.C. GEN. STAT. § 95-25.8(e).

318 N.C. GEN. STAT. § 110-136(a).

319 N.C. GEN. STAT. § 110-136(a).

320 N.C. GEN. STAT. § 110-136(c).

321 *Sampson Cnty. Child Support Enforcement Agency ex rel. Bolton v. Bolton*, 377 S.E.2d 88, 91 (N.C. Ct. App. 1989).

322 N.C. GEN. STAT. § 110-136.8(e).

323 North Carolina Dep't of Labor, *Garnishments in North Carolina*, *available at* https://www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/garnishments-north-carolina.

3.7(b)(x) *State Enforcement, Remedies & Penalties*

Employees have a private right of action to redress violations of the North Carolina minimum wage, overtime, or wage payment provisions.[324] An employer that violates those provisions will be held liable to the affected employees in the amount of their unpaid wages, their unpaid overtime compensation, or any other unpaid amounts, plus interest at the legal statutory rate.[325] In addition, courts will award liquidated damages in an amount equal to the amount of unpaid wages.[326] If, however, the employer shows that the act or omission that resulted in the nonpayment of wages was in good faith and the employer had reasonable grounds for believing it was not in violation of the law, courts have discretion to refuse to award liquidated damages or may award any amount of liquidated damages less than the amount of unpaid wages.[327] The statute of limitations for a civil action to recover unpaid wages is two years.[328]

An employee may also elect to file a wage claim with the Commissioner of Labor, who has the authority to investigate and resolve such claims.[329] An employee is not required to exhaust administrative remedies by pursuing this course of action.[330]

Civil penalties may be assessed against an employer that violates the child labor provisions, as discussed in **3.6(b)(v)**, or for violations of the wage and hour record-keeping requirements.[331]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[332] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[333] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater

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[324] N.C. GEN. STAT. § 95-25.22.

[325] N.C. GEN. STAT. § 95-25.22.

[326] N.C. GEN. STAT. § 95-25.22.

[327] N.C. GEN. STAT. § 95-25.22.

[328] N.C. GEN. STAT. § 95-25.22.

[329] N.C. GEN. STAT. § 95-25.22; 13 N.C. ADMIN. CODE 12.0604.

[330] North Carolina Dep't of Labor, *How to File a Wage Complaint*, *available at* https://www.labor.nc.gov/workplace-rights/employee-rights-regarding-time-worked-and-wages-earned/how-file-wage-complaint.

[331] N.C. GEN. STAT. § 95-25.23A.

[332] 29 U.S.C. § 1002.

[333] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[334]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

There is no requirement under North Carolina law that an employer must offer employees other benefit compensation such as vacation pay, holiday pay, personal time off, bonuses, severance pay, or pensions. In other words, paid vacation is a benefit that may or may not be provided at the discretion of the employer.[335] However, once an employer does establish a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively. Therefore, it is important to draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice.

Employers are required to notify their employees of vacation pay policies and practices:

- orally or in writing at the time of hiring;
- by making a copy of the policies and practices available to them in writing or through a posted notice maintained in a place accessible to the employees; and
- before the effective date of any changes, in writing or through a posted notice maintained in a place accessible to the employees.[336]

If an employer does not notify its employees of any policy or practice that requires or results in the loss of vacation time or pay, then employees are not subject to forfeiture.[337] North Carolina vacation policies and practices must address:

- how and when vacation is earned so that the employees know the amount of vacation to which they are entitled;
- whether vacation time may be carried forward from one year to another, and if so, in what amount;
- when vacation must be taken;
- when and if vacation pay may be paid in lieu of time off; and
- under what conditions and in what amount vacation pay will be paid upon discontinuation of employment.[338]

[334] 490 U.S. 107, 119 (1989).

[335] N.C. GEN. STAT. § 95-25.12.

[336] 13 N.C. ADMIN. CODE 12.0306(a).

[337] N.C. GEN. STAT. § 95-25.12.

[338] 13 N.C. ADMIN. CODE 12.0306(b).

Ambiguous vacation policies are construed against the employer and in favor of the employees.[339] Vacation granted under a policy that does not establish an earning period cannot be reduced or eliminated as a result of a policy change.[340]

State law does not expressly address common vacation policy provisions such as caps on accrual and "use-it-or-lose-it" provisions. However, under the principles set forth above, such provisions would likely be permissible so long as they are included in an employer's policy in writing and the employer has complied with the employee notification requirements.[341]

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

North Carolina does not require employers to provide employees with a day of rest each week, or compensate employees at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[342] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[343] However, under COBRA, only an employee and the employee's spouse

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339 13 N.C. ADMIN. CODE 12.0306(c).

340 13 N.C. ADMIN. CODE 12.0306(d).

341 *See*, *e.g.*, *Hamilton v. Memorex Telex Corp.*, 454 S.E.2d 278 (N.C. Ct. App. 1995).

342 29 U.S.C. § 1144.

343 29 U.S.C. § 1161.

and dependent children are considered "qualified beneficiaries."[344] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

Couples may register as domestic partners in the cities of Chapel Hill, Charlotte, Durham, Asheville, Carrboro, and Greensboro, and in some counties, although for the latter, at least one partner must be a county employee. However, state law does not address the issue of whether an employee's domestic partner would be considered an eligible dependent for purposes of employee benefits.

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[345]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[346]
- to take medical leave when the employee is unable to work because of a serious health condition;[347]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[348] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the

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[344] 29 U.S.C. § 1167(3).

[345] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[346] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[347] 29 C.F.R. §§ 825.112, 825.113.

[348] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

last 12 months at a location where 50 or more employees work within 75 miles of each other.[349] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

North Carolina law does not address family and medical leave for private-sector employees.

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[350] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

3.9(b)(ii) *State Guidelines on Paid Sick Leave*

North Carolina law does not address paid sick leave for private-sector employees.

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[351] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individuals with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

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[349] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[350] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[351] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for their own serious health condition, such as severe morning sickness.[352] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[353] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**. To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

North Carolina law does not address pregnancy leave for private-sector employees.

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of his/her leave entitlement under the FMLA. For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

North Carolina law does not address adoptive parents leave for private-sector employees.

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(e)(ii) *State Guidelines on School Activities Leave*

North Carolina employers must grant four hours of unpaid leave annually to any employee who is a parent, guardian, or person standing in *loco parentis* of a school-aged child for the employee to attend or be

[352] 29 C.F.R. § 825.202.

[353] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

involved at his/her child's school.[354] The conditions that apply to leave for parental involvement in schools are as follows:

- the leave must be at a mutually agreed upon time (between the employer and employee);
- the employer may require a written request for the leave to be submitted at least 48 hours before the time desired for the leave; and
- the employer may require the employee to furnish written verification from the child's school that the employee was involved at the school during the time requested for leave.[355]

Employers may not discharge, demote, or take any adverse employment action against employees who request or take leave to attend their children's school functions.[356] Where an employer takes an adverse employment action against an employee who has requested or taken such leave, the employee may bring a civil action against the employer and obtain either: (1) wages or benefits lost as a result of the violation; or (2) an order of reinstatement of position, seniority, wages, or benefits.[357]

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

North Carolina law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(g)(ii) *State Voting Time Guidelines*

North Carolina law does not address time off to vote for private-sector employees.

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

North Carolina law does not address leave for private-sector employees to participate in political activities.

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[354] N.C. GEN. STAT. § 95-28.3(a).

[355] N.C. GEN. STAT. § 95-28.3(a)(1)-(3).

[356] N.C. GEN. STAT. § 95-28.3(b).

[357] N.C. GEN. STAT. § 95-28.3(c).

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[358] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[359] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. An employer is not required to provide paid leave for an employee's participation in judicial proceedings, including leave for jury duty, unless the employer has specifically promised to do so. An employer may not, however, discharge or demote any employee because that employee has been called for jury duty, or is serving as a grand juror or petit juror.[360] Further, an employer that discharges or demotes an employee because of that employee's jury duty obligation is liable in a civil action for the reasonable damages suffered by the employee because of the discharge or demotion.[361]

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

An eligible employee may take reasonable time off from work to obtain relief under North Carolina's domestic violence laws or civil no-contact laws, including but not limited to, instituting a civil action, obtaining a protective order, or obtaining emergency assistance.[362] An employee is eligible for time off if

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[358] 28 U.S.C. § 1875.

[359] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

[360] N.C. GEN. STAT. § 9-32(a).

[361] N.C. GEN. STAT. § 9-32(b).

[362] N.C. GEN. STAT. §§ 50B-5.5, 95-270.

the employee is obtaining or attempting to obtain relief under North Carolina's domestic violence or civil no-contact laws.[363]

The employee must follow the employer's usual time-off policy or procedure, including advance notice to the employer (when required by the employer's usual procedures), unless an emergency prevents the employee from doing so.[364] An employer may require documentation of any emergency that prevented the employee from complying in advance with the employer's usual time-off policy or procedure, or any other information available to the employee which supports the employee's reason for being absent from work.[365]

There is no requirement that the employee be compensated for absences taken pursuant to this statute.

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see **LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES**.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[366]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

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[363] N.C. GEN. STAT. §§ 50B-5.5, 95-270.

[364] N.C. GEN. STAT. § 95-270.

[365] N.C. GEN. STAT. § 95-270.

[366] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[367] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.[368] Notably, leave is only available for covered relatives of military members called to active *federal* service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.
2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

Military Service Leave. Employees who are members of the National Guard called into service of the state by the governor have the right to take leave without pay from their employment.[369] Such employees may not be required to exhaust vacation or other accrued leave for a period of active service. Choice of leave is solely at the discretion of the employee.[370]

Any National Guard member who, at the direction of the governor, enters state duty is entitled to reemployment within five days after release from duty. If the employee's state duty lasted 30 days or less, the employee must make a written application for reemployment no later than the first regularly scheduled work period which begins eight hours after the employee has safely traveled from the place of state service to his/her residence. If the state duty lasted more than 30 days, the employee must make such a written application for reemployment within 14 days of the employee's release from state duty.

The employee is entitled to reinstatement in his/her previous position or a position of like seniority, status, and salary, unless the employer's circumstances make reinstatement unreasonable. If the employee is no longer qualified for the previous employment, the employee must be placed in another position for which the employee is qualified and that will give the employee appropriate seniority, status, and salary, unless the employer's circumstances now make the placement unreasonable.[371]

If an employee is hospitalized, or convalescing from an injury incurred in or aggravated during state duty, the employee must make the written application for reemployment within the period of recovery, which is the period necessary for the employee to recover, up to two years. This two-year period may be extended by the Commissioner of Labor upon written application.[372]

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[367] 29 C.F.R. § 825.126(a).

[368] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

[369] N.C. GEN. STAT. § 127A-111.

[370] N.C. GEN. STAT. § 127A-111.

[371] N.C. GEN. STAT. §§ 127A-201 *et seq.*

[372] N.C. GEN. STAT. § 127A-202.

An employer may not discriminate against or discharge an individual because of their membership in the state or federal military forces, or discharge an employee because the employee must perform emergency military duty.[373] Likewise, an employer may not discriminate or retaliate against an employee or an applicant for employment on the basis of his/her membership or application for membership in the North Carolina National Guard or the National Guard of another state.[374]

Civil Air Patrol Leave. Employees who are members of the North Carolina Wing-Civil Air Patrol have the right to take leave from their employment to perform duties if the absence is authorized, and an employer may not discriminate against, discharge, demote, or otherwise take adverse action against an employee based on their membership in the Civil Air Patrol or for any authorized absence.[375] An absence is authorized if all of the following requirements are met:

- the absence is necessary to perform duties incident to a State-approved mission or a United States Air Force authorized mission;
- the absence is for no more than seven consecutive scheduled working days for that employee; and
- the total absences in a calendar year do not exceed more than 14 scheduled working days for that employee.[376]

An employer is entitled to require the employee to furnish a copy of the employee's mission order.[377] An employer is not required to pay salary or wages to a member of the Civil Air Patrol during the employee's authorized absence, except when the employee chooses to use any paid leave that may be available to the employee through their employment.[378]

Other Military-Related Protections: Spousal Unemployment. An individual is not ineligible for benefits upon leaving work to accompany a spouse due to a spouse's military location reassignment. Such benefits paid are not charged to the employer's account.[379]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(l)(ii) *State Guidelines on Other Leaves*

Volunteer Emergency Responder Leave. An employee who is called to respond to a state of emergency in their capacity as a volunteer firefighter, member of a rescue squad, or member of an emergency medical services agency may take a leave of absence from work. The leave may be unpaid; however, the employer may not force the employee to exhaust available vacation or sick leave. An employer may have

[373] N.C. GEN. STAT. §§ 127B-10 *et seq*.

[374] N.C. GEN. STAT. § 127A-202.1.

[375] N.C. GEN. STAT. § 143B-1033(a).

[376] N.C. GEN. STAT. § 143B-1033(b).

[377] N.C. GEN. STAT. § 143B-1033(c).

[378] N.C. GEN. STAT. § 143B-1033(d).

[379] N.C. GEN. STAT. § 96-14.8(1).

an employee certified as essential to the employer's own on-going emergency or disaster relief activities. If an employee is so certified, leave will not be allowed.[380]

Leave to Attend Juvenile Court Proceedings. An employee who is the parent, guardian, or custodian of a juvenile under the jurisdiction of the juvenile court is required to attend the hearings of which they receive notice.[381] No employer may discharge, demote, or deny a promotion or other benefit of employment to any employee because that employee takes leave to attend required juvenile court hearings.[382]

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[383] Employers are also required to comply with all applicable occupational safety and health standards.[384] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see LITTLER ON WORKPLACE SAFETY.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[385] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

North Carolina, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[386] Thus, North Carolina is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards. Under the Occupational Safety and Health Act of North Carolina (OSHANC),[387] the North Carolina State Legislature has specifically adopted the federal standards and

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380 N.C. GEN. STAT. § 166A-19.76.

381 N.C. GEN. STAT. § 7B-2700.

382 N.C. GEN. STAT. § 7B-2705.

383 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

384 29 U.S.C. § 654(a)(2).

385 29 U.S.C. § 667(c)(2).

386 29 U.S.C. § 667.

387 N.C. GEN. STAT. §§ 95-126 *et seq*.

regulations.[388] The North Carolina Department of Labor is responsible for OSHANC compliance within the state. The State has also set up the North Carolina Occupational Safety and Health Review Commission to settle disputes between employers and the North Carolina Department of Labor. The North Carolina system essentially mirrors the federal system.

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

A North Carolina statute makes it illegal, with some exceptions, to drive a vehicle while using a mobile telephone to write or read any electronic mail or text message.[389] An exception is provided for the use of voice-operated technology.[390] Further, the use of a mobile telephone or electronic device by the driver of a commercial vehicle is completely prohibited unless operated hands-free.[391]

These prohibitions apply to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, these requirements.

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

In North Carolina, employers may prohibit firearms on company property by posting a conspicuous notice or statement that carrying concealed handguns is prohibited.[392]

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

North Carolina law bans smoking in enclosed areas of restaurants and bars.[393] The statute authorizes local governments to impose more restrictions, but they cannot apply to private residences or vehicles; tobacco

[388] N.C. GEN. STAT. § 95-131.

[389] N.C. GEN. STAT. § 20-137.4A.

[390] N.C. GEN. STAT. § 20-137.4A.

[391] N.C. GEN. STAT. § 20-137.4A(a1).

[392] N.C. GEN. STAT. § 14-415.11(c)(8).

[393] N.C. GEN. STAT. § 130a-497.

processors, manufacturers, or farmers; private clubs, including cigar clubs; designated smoking rooms in hotels; or actors using tobacco products on live production sets.[394]

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

North Carolina law does not address suitable seating requirements for employees.

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

Under the North Carolina Workplace Violence Prevention Act, 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.[395] *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 section 14-277.3 of the North Carolina General Statutes, without legal purpose and with the intent to place the employee in reasonable fear for the employee's safety; or
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.[396]

An employer must consult and advise those employees it seeks to protect prior to initiating a civil action.[397] An employer may also discipline employees for failure to cooperate with the employer's attempt to obtain a no-contact order.[398]

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394 N.C. GEN. STAT. § 130A-498.

395 N.C. GEN. STAT. §§ 95-260 *et seq.*

396 N.C. GEN. STAT. § 95-260(3).

397 N.C. GEN. STAT. § 95-261.

398 N.C. GEN. STAT. § 95-261.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[399] (2) the Americans with Disabilities Act (ADA);[400] (3) the Age Discrimination in Employment Act (ADEA);[401] (4) the Equal Pay Act;[402] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[403] (6) the Civil Rights Acts of 1866 and 1871;[404] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[405]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[406] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[407]

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[399] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[400] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[401] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[402] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

[403] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[404] 42 U.S.C. §§ 1981, 1983.

[405] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

[406] The EEOC's website is available at http://www.eeoc.gov/.

[407] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

3.11(a)(ii) *State FEP Protections*

North Carolina's Equal Employment Practices Act (EEPA) states that it is the public policy of North Carolina to protect the right to seek, obtain, and hold employment without discrimination on the basis of:

- race;
- religion;
- color;
- national origin;
- age;
- sex; or
- handicap.[408]

The EEPA applies to employers of 15 or more employees.[409]

While the EEPA may appear on its face to be analogous to Title VII, it is not, as it provides employees with no private right of action.[410] In fact, there is no state statute in North Carolina analogous to Title VII that provides employees with the ability to sue their employers over alleged discrimination.

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

Although the EEPA authorizes the state's Human Relations Commission (HRC) to receive charges of discrimination and attempt to investigate and conciliate the charges, filing a charge with the HRC is not a jurisdictional prerequisite for seeking relief under Title VII or any other federal antidiscrimination statute, and the HRC has no power to adjudicate claims or afford the charging party any relief.[411] Rather, the HRC must "use its good offices to affect an amicable resolution of the charges of discrimination."[412]

As one method around the restrictions in the EEPA, plaintiffs have increasingly brought wrongful discharge in violation of public policy tort claims against employers, alleging that the employer has violated the public policy of North Carolina as stated in the EEPA.[413]

3.11(a)(iv) *Additional Discrimination Protections*

Disabilities. The North Carolina Persons with Disabilities Protection Act (PDPA) is analogous to the federal ADA.[414] The PDPA prohibits employers of 15 or more full-time employees from discriminating against any otherwise qualified employee based on his/her disability.[415] The PDPA also requires an employer to make

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[408] N.C. GEN. STAT. § 143-422.2.

[409] N.C. GEN. STAT. § 143-422.2(a).

[410] *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 247 (4th Cir. 2000).

[411] N.C. GEN. STAT. § 143-422.3; *see also Spagnuolo v. Whirlpool Corp.*, 467 F. Supp. 364 (W.D.N.C. 1979), *vacated in part on other grounds*, 641 F.2d 1109 (4th Cir. 1981).

[412] N.C. GEN. STAT. § 143-422.3.

[413] *See, e.g.*, *McNeil v. Scotland Cnty.*, 213 F. Supp. 2d 559, 570 (M.D.N.C. 2002).

[414] *See* 2011 N.C. Sess. Laws 94; *Johnson v Board of Trs. of Durham Technical Cmty. Coll.*, 577 S.E.2d 670, 674 (N.C. Ct. App. 2003).

[415] N.C. GEN. STAT. § 168A-5.

a reasonable accommodation for any known physical or mental impairment, *unless* the accommodation would require:

- hiring one or more employees to enable the worker with a disability to be employed;
- reassignment of the worker's job duties where the reassignment would not involve replacement duties for the worker with a disability;
- reassignment of the worker's job duties where the reassignment would increase the skill, effort, or responsibility required by another employee;
- modification of a *bona fide* seniority policy or practice;
- providing accommodations of a personal nature, including eye glasses, hearing aids, etc.; or
- any accommodation that would be an *undue hardship* to the employer.[416]

A plaintiff has 180 days from the date of the discriminatory practice to file a civil action based on the PDPA in state court.[417] There is no statutory requirement that the employee first file a charge with the HRC or any other agency prior to asserting a claim under the PDPA.[418] Remedies under the statute include reinstatement, back pay, front pay, and reasonable attorneys' fees.[419]

From a practical standpoint, employers do not see many claims asserted under the PDPA because filing a federal ADA charge of discrimination with the EEOC precludes an individual from seeking a remedy under the PDPA.[420] Therefore, because plaintiffs are reluctant to forego their rights under the ADA and proceed solely under the state statute, these state law claims are rare.

HIV. An employer may not require an employee to take an HIV/AIDS test "to determine suitability for continued employment."[421] Further, an employer may not discriminate against an employee that is HIV-positive. Employees aggrieved by alleged violations of this statute have a private right of action against the employer and may file suit within 180 days of the alleged discrimination.[422] In addition to recovering actual damages, a successful plaintiff may recover his/her costs and attorneys' fees in an action under this statute.

Lawful Use of Products. In North Carolina, employers are prohibited from discharging or otherwise discriminating against individuals or refusing to hire them because they engage in or have engaged in the lawful use of lawful products, as long as the activity occurs off the employer's premises during nonworking hours and does not adversely affect job performance or the safety of other employees.[423] Exemptions allow employers to restrict use of lawful products based on *bona fide* occupational requirements and

[416] N.C. GEN. STAT. § 168A-3(10).

[417] N.C. GEN. STAT. §§ 168A-11, 168A-12.

[418] N.C. GEN. STAT. §§ 168A-1 *et seq*.

[419] N.C. GEN. STAT. §§ 168A-1 *et seq*.

[420] N.C. GEN. STAT. § 168A-11(c).

[421] N.C. GEN. STAT. § 130A-148(i).

[422] N.C. GEN. STAT. § 130A-148(i).

[423] N.C. GEN. STAT. § 95-28.2.

fundamental objectives of the organization.[424] Employers also may offer different insurance rates based on actuarially justified reasons.[425]

Military Service. An employer may not deny initial employment, reemployment, retention of employment, promotion, or any benefit of employment to persons who are members of, or have applied for membership in, the North Carolina National Guard on the basis of the membership or application.[426]

Sickle Cell Trait & Genetic Testing. An employer may not discharge or refuse to hire a person because the person possesses the sickle cell or hemoglobin C trait.[427] Employees alleging violations of this statute may file a complaint with the North Carolina Commissioner of Labor and, if the commissioner cannot resolve the issue, the employee may initiate a civil action.[428]

In addition, employers are prohibited from denying or refusing employment to any person, or discharging any person, because the person has requested genetic testing or because of the genetic information obtained concerning the person or a person's family member.[429] As with sickle cell trait discrimination, persons who have alleged an injury may file a written complaint with the North Carolina Commissioner of Labor and, if the complaint is not resolved, may file a civil action.[430]

3.11(a)(v) *Local FEP Protections*

In addition to federal and state laws, employers with operations in the following jurisdictions are subject to local fair employment practices ordinances:

- **Chapel Hill.** Protected classifications include: race; ethnicity; creed; color; sex; sexual orientation; gender identity; gender expression; national origin; national ancestry; marital status; familial status; pregnancy; veteran status; religion, religious belief or non-belief; age; and disability.[431] Covered employers include any person employing one or more persons within the Town of Chapel Hill and any person acting in the interest of an employer, directly or indirectly.[432]
- **Charlotte.** Protected classifications include: race; color; gender; religion; national origin; ethnicity; age; familial status; sex; sexual orientation; gender identity or expression; veteran status; pregnancy; natural hairstyle; and disability.[433]
- **Durham.** Protected classifications include: race; color; religion; national origin; sex; disability; familial status; military status; sexual orientation; gender identity; and protective hairstyle.[434]

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[424] N.C. GEN. STAT. § 95-28.2(c).

[425] N.C. GEN. STAT. § 95-28.2(d).

[426] N.C. GEN. STAT. § 127A-202.

[427] N.C. GEN. STAT. § 95-28.1.

[428] N.C. GEN. STAT. § 95-28.1.

[429] N.C. GEN. STAT. § 95-28.1A.

[430] N.C. GEN. STAT. § 95-28.1A.

[431] CHAPEL HILL, N.C., CODE OF ORDS. § 9-10.

[432] CHAPEL HILL, N.C., CODE OF ORDS. § 9-10.

[433] CHARLOTTE, N.C. CITY CODE §§ 12-57, 12-83.

[434] DURHAM, N.C., ORDS. §§ 34-2 – 34-91.

Covered employers include any person employing one or more persons within the City of Durham and any person acting in the interest of an employer, directly or indirectly, including an employment agency.[435]

- **Durham County.** Protected classifications include: race (including hairstyle, hair type, or hair texture historically associated with national origin); ethnicity; creed; color; sex; sexual orientation; gender identity or expression; national origin or ancestry; marital or familial status; pregnancy; military status; religious belief or non-belief; age; and disability.[436] Covered employers include any person employing one or more persons in Durham County and any person acting in the interest of any employer, directly or indirectly, including the employment agency. Employer does not include the Federal Government, the State of North Carolina, any of their agencies or departments, or any other governmental entity. Employer includes any person contracting with Durham County.[437] Complaints alleging violations of this ordinance should be filed with the General Manager for Health and Well Being for All, or such other person designated to administer this ordinance, within 180 days of the alleged discriminatory act on the complaint form provided by the County.[438]
- **Greensboro.** Protected classifications include: race, including hair texture and hairstyles that are commonly associated with race or national origin; religion; sex, including sexual orientation, gender identity, and gender expression; and national origin.[439]
- **Mecklenburg County.** Protected classifications include: race; color; gender; religion; national origin; creed; ethnicity; age; familial status; marital status; sex, including sexual orientation, gender identity, and gender expression; veteran status; pregnancy; natural hairstyle; and disability.[440] The law applies to employers that employ 15 or more employees in Mecklenburg County.[441] An individual alleging a violation of the ordinance must submit a complaint to the conciliation division of the Community Relations Committee.[442]
- **Orange County.** Protected classifications include: age; color; disability; familial status; national origin; sex; race; religion; veteran status; and hairstyle and hair texture.[443] Covered employers include a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.[444]
- **Wake County.** Protected classifications include: race; natural hair or hairstyles; ethnicity; creed; color; sex; pregnancy; marital or familial status; sexual orientation; gender identity or expression; national origin or ancestry; National Guard or veteran status; religious belief or

[435] DURHAM, N.C., ORDS. §§ 34-2 – 34-91.

[436] DURHAM CTY, N.C., CODE OF ORDS. § 15-5.

[437] DURHAM CNTY, N.C., CODE OF ORDS. § 15-5.

[438] DURHAM CNTY, N.C., CODE OF ORDS. § 15-85.

[439] GREENSBORO, N.C., CODE OF ORDS. § 12-96.

[440] MECKLENBURG CNTY., N.C. CODE OF ORDS. FAIR HOUSING OPPORTUNITIES ORD.

[441] MECKLENBURG CNTY., N.C. CODE OF ORDS. FAIR HOUSING OPPORTUNITIES ORD.

[442] MECKLENBURG CNTY., N.C. CODE OF ORDS. FAIR HOUSING OPPORTUNITIES ORD.

[443] ORANGE CNTY., N.C., CIVIL RIGHTS ORD. § 4.1.

[444] ORANGE CNTY., N.C., CIVIL RIGHTS ORD. art. III.

non-belief; age; and disability.[445] Covered employers include any employer with one or more employees within Wake County.[446] An individual alleging a violation of the ordinance must file a complaint with the County Manager's Office within 90 days of the discriminatory act on the complaint form provided by the County.[447]

- **Winston-Salem.** Protected classifications include: race; color; religion; national origin; ethnicity; creed; sex; sexual orientation; gender identity or expression; protected hairstyle; pregnancy; disability; age; veteran status; marital status; familial status; and political affiliation.[448] Covered employers include employers in the city limits of Winston-Salem employing one or more employees.[449] Any person claiming to be aggrieved by a discriminatory practice may file a written complaint with Winston-Salem Human Relations Department within 60 days after the alleged violation occurred, setting forth the facts upon which the complaint is based, and setting forth facts sufficient to enable the Human Relations Department to identify the person against whom the complaint is filed.[450]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[451] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[452]

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[445] WAKE CNTY., N.C., CODE OF ORDS., tit. III, Ch. 34.

[446] WAKE CNTY., N.C., CODE OF ORDS., tit. III, Ch. 34.

[447] WAKE CNTY., N.C., CODE OF ORDS., tit. III, Ch. 34.

[448] WINSTON-SALEM, N.C., ORD. § 38-120.

[449] WINSTON-SALEM, N.C., ORD. § 38-120.

[450] WINSTON-SALEM, N.C., ORD. § 38-120.

[451] 29 U.S.C. § 206(d)(1).

[452] 42 U.S.C. § 2000e-5.

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

North Carolina does not have a separate equal pay law prohibiting employers from discriminating in compensation on the basis of sex.

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[453]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or

[453] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

- temporary suspension of an employee's essential job function(s).[454]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[455] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[456] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[457]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[458]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;

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[454] 29 C.F.R. § 1636.3.

[455] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[456] 29 C.F.R. § 1636.3.

[457] 29 C.F.R. § 1636.4.

[458] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[459]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

North Carolina law does not address pregnancy accommodations for private-sector employees.

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[460] Multiple decisions of the U.S. Supreme Court[461] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[462] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see **LITTLER ON HARASSMENT IN THE WORKPLACE** and **LITTLER ON EMPLOYEE TRAINING**.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

There are no antiharassment training and education requirements mandated for private employers in North Carolina.

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[459] 29 C.F.R. § 1636.3.

[460] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[461] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

[462] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

Statutory Retaliation. The Retaliatory Employment Discrimination Act (REDA) prohibits retaliatory action by an employer against any employee for: (1) filing a complaint; (2) initiating any inquiry, investigation, inspection, proceeding, or other action; or (3) testifying or providing information to any person, in connection with the state statutes governing the following:[463]

- Workers' Compensation[464]
- Wage and Hour[465]
- Occupational Safety and Health[466]
- Mine Safety and Health[467]
- Discrimination based on sickle cell trait or hemoglobin C trait[468]
- Use of leave to serve in the North Carolina National Guard[469]
- Discrimination against employees on the account of genetic information or an employee's having requested genetic testing or counseling[470]
- Parental obligations in connection with court orders applying to juveniles[471]

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[463] N.C. GEN. STAT. §§ 95-241 *et seq. Retaliatory action* means the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment. N.C. GEN. STAT. § 95-240.

[464] N.C. GEN. STAT. §§ 97-1 *et seq*.

[465] N.C. GEN. STAT. §§ 95-25.1 *et seq*.

[466] N.C. GEN. STAT. §§ 95-126 *et seq*.

[467] N.C. GEN. STAT. §§ 74-24.1 *et seq*.

[468] N.C. GEN. STAT. § 95-28.1.

[469] N.C. GEN. STAT. §§ 127A-201 *et seq*.

[470] N.C. GEN. STAT. § 95-28.1A.

[471] N.C. GEN. STAT. §§ 7B-2700 *et seq*.

REDA is administered on the state level by the North Carolina Department of Labor ("N.C. DOL").[472] An employee must file a charge of discrimination with the N.C. DOL Workplace Retaliatory Discrimination Division within 180 days of any alleged REDA violation.[473] Once the employee has received his/her right-to-sue letter from the N.C. DOL, the employee must file a civil suit within 90 days.[474] A plaintiff alleging a REDA violation has a right to a jury trial.[475] Available remedies under REDA include: an injunction of the unlawful practice or conduct; reinstatement to the prior position; restoration of benefits and seniority; back pay; lost benefits; compensation for economic losses; treble damages for willful violations; and costs and expenses, including attorneys' fees.[476]

Common Law. North Carolina also recognizes a common-law action for whistleblower claims based on a wrongful discharge in violation of public policy theory, including protection for reporting suspected patient abuse.[477]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[478] and the Railway Labor Act (RLA)[479] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws*

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[472] The process at the N.C. DOL is similar to that at the federal EEOC, that is, the employer will file a position statement and supporting documentation with an investigator who may then request follow-up documents or interviews. The N.C. DOL will then make a *cause* or *no cause* determination and issue a right-to-sue letter.

[473] N.C. GEN. STAT. § 95-242. However, plaintiffs who fail to file a timely charge with the N.C. DOL are not left entirely without recourse. North Carolina court cases have held that a plaintiff may proceed with an independent common law wrongful discharge in violation of public policy claim with respect to an unlawful discharge based on filing a workers' compensation claim; such a tort claim has no administrative filing prerequisites and has a three-year statute of limitations. *See, e.g.*, *Whitings v. Wolfson Casing Corp.*, 618 S.E.2d 750 (N.C. Ct. App. 2005); *Brackett v. SGL Carbon Corp.*, 580 S.E.2d 757 (N.C. Ct. App. 2003).

[474] N.C. GEN. STAT. § 95-243(b).

[475] N.C. GEN. STAT. § 95-243(d).

[476] N.C. GEN. STAT. § 95-243(c).

[477] *See, e.g.*, *Lenzer v. Flaherty*, 418 S.E.2d 276 (N.C. Ct. App. 1992).

[478] 29 U.S.C. §§ 151 to 169.

[479] 45 U.S.C. §§ 151 *et seq*.

are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

North Carolina's right-to-work law states that employees cannot be required to become or remain a member of a union as a condition of employment.[480] Further, agreements between an employer and a labor union or labor organization wherein employee membership in that union or organization is made a condition of employment or continuation of employment are against public policy and illegal.[481] In addition, an employee may not be required to refrain from membership in any union, or to pay any dues, fees, or charges of any labor organization as a condition of employment.[482] Individuals harmed by a violation of North Carolina's right-to-work law can file in state court to recover damages resulting from the violation.[483]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[484] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[485] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

North Carolina does not have a mini-WARN law requiring advance notice to employees of a plant closing.

4.1(c) *State Mass Layoff Notification Requirements*

North Carolina does not require that an employer notify the state unemployment insurance department or another department in the event of a mass layoff.

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480 N.C. GEN. STAT. § 95-79.

481 N.C. GEN. STAT. § 95-79.

482 N.C. GEN. STAT. §§ 95-80 to 95-82.

483 N.C. GEN. STAT. § 95-83.

484 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

485 20 C.F.R. §§ 639.4, 639.6.

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 10 lists the documents that must be provided when employment ends under federal law.

Table 10. Federal Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[486] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[487]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 11 lists the documents that must be provided when employment ends under state law.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: mini-COBRA, etc.	Generally, notification of the right to continuation coverage must be included in each individual certification of coverage.[488] In addition, notification may be included on insurance identification cards or may be given by the employer, orally or in writing, as a part of the exit process from the employment.[489]

[486] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[487] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

[488] N.C. GEN. STAT. § 58-53-40.

[489] N.C. GEN. STAT. § 58-53-25; *see, e.g.*, 11 N.C. ADMIN. CODE 12.1005.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
Unemployment Notice	**Generally.** North Carolina does not require that employees be provided notice about unemployment benefits when employment ends. Nonetheless, the state highly recommends that employers post notice (Form NCESC 524), informing employees about unemployment insurance and how to file a claim for benefits.[490] Accordingly, it is recommended that an employer provide a copy of that unemployment notice when employment ends. **Multistate Workers.** North Carolina does not require that employees be again notified as to the jurisdiction under whose unemployment compensation law services have been covered. It is recommended, however, that employers consider providing notice of the jurisdiction where services will be covered for unemployment purposes. Employers should also follow that state's general notice requirement, if applicable.

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

After discharging an employee from its service, a North Carolina employer may not engage in blacklisting. That is, an employer may not prevent or attempt to prevent the discharged employee from gaining employment elsewhere.[491] In fact, the employer that does so can be guilty of a Class 3 misdemeanor. Additionally, the employer that participates in blacklisting may be liable to the discharged employee.

Nevertheless, the employer retains a qualified privilege to provide a truthful written reference to any prospective employer with whom the discharged employee has applied for employment.[492] Importantly, however, this privilege applies only when the prospective employer has requested a statement from the former employer. Unsolicited negative references are not protected under North Carolina law.[493]

[490] This notice is available in English at https://www.des.nc.gov/documents/downloads/ncdes524-rev-1-21/download.

[491] N.C. GEN. STAT. § 14-355.

[492] N.C. GEN. STAT. § 14-355; *Friel v. Angell Care, Inc.*, 440 S.E.2d 111, 114-15 (N.C. Ct. App. 1994).

[493] N.C. GEN. STAT. § 14-355.