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STATE

Littler on

South 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 South 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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1.1 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 their 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 South 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).

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	South Carolina Human Affairs Commission	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context.
Income Taxes	South Carolina Department of Revenue	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context.
Unemployment Insurance	South Carolina Department of Employment and Workforce	Common-law "right to control" test.[5] The principal factors indicative of the right to control according to South Carolina courts are: 1. direct evidence of the right to, or exercise of, control; 2. the method of payment; 3. the furnishing of equipment; and

[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] The term *employment* is defined in the unemployment law as "service performed . . . for wages under a contract of hire, written or oral, express or implied, including service in interstate commerce by . . . [a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." S.C. CODE ANN. § 41-27-230(1)(b).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		4. the right to fire.[6]
Wage & Hour Laws	South Carolina Department of Labor, Licensing and Regulation	South Carolina has no minimum wage or overtime requirements. Moreover, the term *employee* is not defined in South Carolina's wage payment statute.[7]
Workers' Compensation	South Carolina Workers' Compensation Commission	Common-law "right to control" test. South Carolina uses one common-law right to control test. The principal factors indicative of the right to control according to South Carolina courts are: 1. direct evidence of the right to, or exercise of, control; 2. the method of payment; 3. the furnishing of equipment; and,

[6] *Kilgore Grp. v. South Carolina Emp't Sec. Comm'n*, 437 S.E.2d 48, 49-50 (S.C. 1993) ("Under South Carolina common law, the primary consideration in determining whether an employer-employee relationship exists is whether the purported employer has the right to control the servant in the performance of his work and the manner in which it is done. . . . The test is not the actual control exercised, but whether there exists the right and authority to control and direct the particular work or undertaking.") (citations omitted)). Courts also look to the parties' intent, "which is to be gathered from the whole scope of the language used;" thus, any contract language that specifies the employment relationship of the parties is not dispositive. 437 S.E.2d at 50 (citations omitted). By administrative regulation, South Carolina explains that the common-law test to determine the employment relationship under South Carolina Code section 41-27-230(1)(b) focuses on the right to control, and that the Department of Labor, Licensing and Regulation will consider the following factors in determining if an employer-employee relationship exists:

- whether the employer has the right to control or exercises control over the services performed for the job;
- whether the employer furnishes the equipment;
- whether the method of payment indicates an employment relationship, and
- whether the employer has the right to terminate the employment relationship.

S.C. CODE ANN. REGS. 47-8. These are the common-law factors. The regulation further states that the South Caroline Department of Employment and Workforce is "not bound by the rulings of other entities when making its determination about whether an employer-employee relationship" exists and the Department may consider rules, opinions, or other interpretations published by the U.S. Department of Labor, the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Wage and Hour Division, and federal and state court decisions. S.C. CODE ANN. REGS. 47-8.

[7] *See* S.C. CODE ANN. § 41-10-10. The South Carolina Supreme Court has opined that the wage payment provisions do *not* "embrace the earnings of independent contractors," in part because independent contractors are "not subject to employer control or direction, which negates any employer-employee relationship." *Adamson v. Marianne Fabrics, Inc.*, 391 S.E.2d 249, 250 (S.C. 1990) (citation omitted).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		4. the right to fire.[8]
Workplace Safety	South Carolina Department of Labor, Licensing and Regulation, Occupational Safety and Health Administration	While South 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.[9]

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

[8] *See, e.g.*, *Lewis v. Dynasty*, 770 S.E.2d 393, 395 (S.C. 2015); *Shatto v. McLeod Reg'l Med. Ctr.*, 753 S.E.2d 416, 419 (S.C. 2013) (focusing on the right to control the performance of the work, and applying the four-factor common-law test); *Pikaart v. A & A Taxi, Inc.*, 713 S.E.2d 267, 270 (S.C. 2011) (the four factors of the common-law test are evaluated "with equal force in both directions to provide an even-handed and balanced approach") (citation omitted).

[9] 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.

immigration-related laws or burden interstate commerce with requirements in addition to those imposed 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.[10] 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.[11]

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*

An employer cannot knowingly employ an unauthorized worker to perform work in South Carolina.[12] Under the Illegal Aliens and Private Employment Act, private employers doing business in South Carolina and required to have South Carolina issued licenses to operate their businesses must also enroll in and use E-Verify to verify the employment eligibility of new hires.[13] Employers must verify the work authorization of every new employee within three business days after employing a new employee. Employers must submit a new employee's name and information for verification even if the employment is terminated less than three business days after becoming employed.[14] If a new employee's work authorization is not verified by the federal work authorization program, a private employer must not employ, continue to employ, or reemploy the new employee.[15]

Individuals who are not considered "employees" under South Carolina law are not subject to the E-Verify requirements. An *employee* is defined as an individual who receives wages as defined in section 12-8-520 of the South Carolina Code; wages are statutorily defined to exclude agricultural work.[16]

An employer that in good faith verifies the employment eligibility of a new employee will be presumed to have complied with the provisions requiring E-Verify participation and the provisions barring the employment of unauthorized aliens.[17]

The South Carolina Department of Labor, Licensing and Regulation may question any employer, owner, manager, or agent and the employees of the private employer, and inspect, investigate, reproduce, or

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[10] *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).

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

[12] S.C. CODE ANN. § 41-8-30; *see also* South Carolina Dep't of Labor, Licensing and Regulation, Office of Immigrant Worker Compliance, *Notice to All South Carolina Employers: You Must Verify All New Hires Through E-Verify Effective January 1, 2012*, *available at* http://www.llr.state.sc.us/Immigration/.

[13] S.C. CODE ANN. § 41-8-20(A)-(B).

[14] S.C. CODE ANN. § 41-8-20(B), (D).

[15] S.C. CODE ANN. § 41-8-20(D).

[16] S.C. CODE ANN. § 12-8-10(3).

[17] S.C. CODE ANN. § 41-8-40.

photograph original business records relevant to determining compliance with the employment verification requirements.[18]

Tax Withholding Requirements. A withholding agent must withhold 7% state income tax for compensation paid to an individual and reported on Form 1099 if the individual failed to provide a correct taxpayer identification number or Social Security number, or provided a taxpayer identification number issued for nonresident aliens.[19]

1.2(b)(ii) *State Contractors*

All public employers and contractors must enroll in and use E-Verify to verify the employment authorization of new employees.[20] A public employer may not enter into a services contract with a contractor for the physical performance of services within South Carolina unless the contractor agrees to register and participate in the federal work authorization program to verify the employment authorization of all new employees. The contractor must also require agreements from its subcontractors, and through the subcontractors, the sub-subcontractors, to register and participate in the federal work authorization program to verify the employment authorization of all new employees.[21]

Service contracts are contracts for the physical performance of manual labor in South Carolina, where the labor costs exceed 30% of total labor costs or exceed 5% of the total contract value. Service contracts do not include public contracts with a total annual value of less than $25,000; local government contracts with a total annual value of less than $15,000; contracts predominantly for professional or consultant services; or contracts primarily for acquiring end products.[22]

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

Private Employers. Private employers that violate the requirements to verify the employment eligibility of all new workers or that employ unauthorized aliens will face suspension or revocation of their licenses to do business in South Carolina.[23]

Denial of Deductible Business Expenses. No wages or remuneration for labor services to an individual of $600 or more per year may be claimed and allowed as a deductible business expense for state income tax purposes by a taxpayer if the individual is an unauthorized worker. This applies to both employees and independent contractors. However, this provision does not apply:

- to a business domiciled in South Carolina that is exempt from compliance with federal employment verification procedures under federal law;
- to a taxpayer where the individual being paid is not directly compensated or employed by the taxpayer;
- to wages or remuneration paid for labor services to any individual whose employment authorization status was verified pursuant to the state requirements; and

[18] S.C. CODE ANN. § 41-8-130.

[19] S.C. CODE ANN. § 12-8-595.

[20] S.C. CODE ANN. § 8-14-20(A).

[21] S.C. CODE ANN. § 8-14-20(B).

[22] S.C. CODE ANN. § 8-14-10(6).

[23] S.C. CODE ANN. § 41-8-50.

- if, based on a reasonable investigation of the individual, the taxpayer did not know or should not have known that the individual was not authorized to work.[24]

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").[25] 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 **1.3(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*

South Carolina places no statutory restrictions on a private employer's use of arrest records. In addition, South Carolina has not implemented a state "ban-the-box" law covering private employers. However, Columbia, South Carolina's ban-the-box law prohibits the city as an employer and city contractors from accessing or considering records of arrests when conducting criminal background checks.[26]

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[24] S.C. CODE ANN. § 12-6-1175.

[25] 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.

[26] COLUMBIA, S.C. CODE OF ORDINANCES § 2-353.

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

South Carolina places no statutory restrictions on a private employer's use of conviction records. However, the city of Columbia, South Carolina, enacted a ban-the-box ordinance restricting criminal background checks by private employers of five or more employees.[27] Such employers cannot:

- conduct background checks on applicants unless the employer has made a good faith determination that the relevant position is of such sensitivity that a background check is warranted or if a background check is required by law;
- inquire into a job applicant's conviction history on a job application form; and
- inquire into a job applicant's conviction history until after the employer has extended the applicant a conditional job offer.[28]

An employer cannot inquire into or consider an applicant's conviction history until after the applicant has received a conditional offer. If the employer is considering the conviction history of the applicant, the employer can consider job-related convictions only. If a statute explicitly requires that certain convictions are automatic bars to employment, then those convictions must be considered as well. Otherwise, an individual cannot be disqualified from employment, solely or in part because of a prior conviction, unless it is a job-related conviction. If an applicant's conviction history contains information that may be the basis for an adverse action, the employer must:

- identify the conviction(s) that are the basis for the potential adverse action;
- provide a copy of the conviction history report, if any;
- provide examples of mitigation or rehabilitation evidence that the applicant may voluntarily provide; and
- provide the applicant with an individualized assessment.[29]

A job-related conviction cannot be the basis for an adverse action if the applicant can show evidence of mitigation or rehabilitation and present fitness to perform the duties of the position sought. The applicant has 10 business days after issuance of the adverse action notice to respond with any information rebutting the basis for the adverse action, including challenging the accuracy of the information and submitting mitigation or rehabilitation evidence. The employer is required to hold the position open until making the final employment decision based on an individualized assessment of the information submitted by the applicant and the factors recommended by the U.S. Equal Employment Opportunity Commission. If the employer makes an adverse decision after conducting the individualized assessment, the employer must inform the applicant of the final decision and that he or she may be eligible for other positions.[30]

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

South Carolina places no statutory restrictions on a private employer's use of sealed or expunged criminal records. However, with certain exceptions, South Carolina expungement law requires the destruction of

[27] COLUMBIA, S.C. CODE OF ORDINANCES § 2-352.

[28] COLUMBIA, S.C. CODE OF ORDINANCES § 2-353.

[29] COLUMBIA, S.C. CODE OF ORDINANCES § 2-353.

[30] COLUMBIA, S.C. CODE OF ORDINANCES § 2-353.

all arrest and booking records, bench warrants, mug shots, and fingerprints of individuals who are found not guilty or whose charges are dismissed or discharged.[31]

The Columbia ordinance prohibits an employer from accessing or considering sealed, dismissed, or expunged convictions in conducting a background check.[32]

Juvenile Records. In response to preemployment inquiries, applicants can deny the existence of certain expunged juvenile charges or adjudications. No person whose juvenile records have been expunged may be held liable for perjury or otherwise giving a false statement "by reason of failing to recite or acknowledge the charge or adjudication in response to an inquiry made of the person for any person."[33]

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[34] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[35] 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 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

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[31] S.C. CODE ANN. § 17-1-40.

[32] COLUMBIA, S.C. CODE OF ORDINANCES § 2-353.

[33] S.C. CODE ANN. § 63-19-2050(E).

[34] 15 U.S.C. §§ 1681 *et seq*.

[35] 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).

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]."[36]

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

South 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.

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

South 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.[37] 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.

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

[37] 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.

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*

South 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.[38] The Drug-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.[39] 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.

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[38] 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 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.

[39] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

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

South Carolina law allows employers to establish a drug prevention program.[40] Employers that establish a program must have a substance abuse policy statement and must provide notification to all employees of the drug prevention program and its policies at the time the program is established or at the time of hiring, whichever is earlier.[41] Employers must maintain the confidentiality of test results, and the release of such information is only allowed if the employee tested or the employee's designee voluntarily signs a written consent form that meets the statutory requirements, or as otherwise required by law.[42]

State Contractors & Grant Recipients. Additionally, under the Drug-Free Workplace Act, all state contractors or employers that receive state grants must certify they will maintain a drug-free workplace.[43] Covered state contracts and grants include those for goods, construction, or services for a stated or estimated valued of $50,000 or more.[44] These employers must meet the statutory requirements for a drug-free workplace, which include: publishing a statement notifying employees about the drug-free policy and specifying actions that will be taken against violators; establishing a drug-free awareness program informing employees about the dangers of abuse, the employer's policy, rehabilitation and counseling options, and penalties; providing a copy of the policy statement to employees engaged in performance of the contract and notifying employees that compliance is a required condition of employment; sanctioning or otherwise requiring rehabilitation of employees who violate the policy; and making a good faith effort to maintain a drug-free workplace by implementing the statutory requirements.[45] Covered employers must provide a written copy of the drug-free workplace policy to all employees engaged in the performance of the contract and must require employees to notify them within five days of any conviction for a workplace violation of any criminal drug statute, of which the employer must then notify the contracting or granting state agency within 10 days.[46]

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

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.

[40] S.C. CODE ANN. § 41-1-15.

[41] S.C. CODE ANN. § 41-1-15(A).

[42] S.C. CODE ANN. § 41-1-15(C).

[43] S.C. CODE ANN. §§ 44-107-10 *et seq*.

[44] S.C. CODE ANN. § 44-107-30.

[45] S.C. CODE ANN. § 44-107-30.

[46] S.C. CODE ANN. § 44-107-30.

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[47] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[48] 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 all or a portion of such contribution may be excludable from income for federal income tax purposes.[49] 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.[50]
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.[51] 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

[47] 26 U.S.C. § 36B.

[48] 42 U.S.C. § 18071.

[49] 29 U.S.C. § 218b.

[50] 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.

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

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	administrators must send separate COBRA rights notices to each address.[52]
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.[53] 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.[54] 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.[55]
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.[56] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

[52] 29 C.F.R. § 2590.606-1.

[53] 29 C.F.R. § 825.300(a).

[54] 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.

[55] 29 C.F.R. § 825.300(a).

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

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
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.[57]
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.[58]
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 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.[59]

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	No notice requirement located.
Drug-Free Workplace Program Documents	Employers may establish a drug prevention program in order to qualify for a discount on workers' compensation insurance. Employers that participate in such a program must notify all employees of the prevention program, and the employer's policies, at the time of hiring.[60]
Fair Employment Practices Documents: South Carolina	Covered employers with 15 or more employees must provide written notice of the right to be free from discrimination for medical needs arising from pregnancy, childbirth, or related medical conditions, to

[57] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[58] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[59] 29 C.F.R. § 531.59.

[60] S.C. CODE ANN. § 41-1-15; *see also* S.C. CODE ANN. § 38-73-500.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Pregnancy Accommodations Act	new employees at the commencement of employment. The notice also must be conspicuously posted at an employer's place of business in an area accessible to employees.[61]
Tax Documents	All employees must complete a withholding exemption certificate. Form SC W-4, Employee's Withholding Allowance Certificate, is provided by South Carolina Department of Revenue.[62]
Wage & Hour Documents	All employers must notify employees in writing, at the time of hiring, of the wages and hours agreed upon, the time and place of employment, and deductions for each pay period. Employers may also comply with this requirement through a conspicuous workplace posting.[63]

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.[64] 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

[61] S.C. CODE ANN. § 1-13-80(A)(4)(i), (ii). This information is covered in the "Employment Discrimination" poster available at https://schac.sc.gov/about-us/brochures-and-posters in English and Spanish.

[62] S.C. CODE ANN. § 12-8-1010. The statute still states, "A properly completed federal withholding exemption certificate is acceptable for South Carolina purposes." Form SC W-4 is available at https://dor.sc.gov/tax/withholding. The South Carolina Withholding Information guide is available at https://dor.sc.gov/forms-site/Forms/WH105.pdf.

[63] S.C. CODE ANN. §§ 41-10-10, 41-10-30.

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

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).[65]

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.

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.[66] 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.

[65] 42 U.S.C. § 653a.

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

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

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

Who Must Be Reported. South Carolina employers must report employees newly hired or rehired after 60 days or more after separation.[67]

Report Timeframe. Employers must report within 20 days from the hiring date. If the employers report magnetically or electronically, they may report twice per month, not less 12 days, nor more than 16 days apart.[68]

Information Required. Employers are required to report the employer's name, address, and federal identification number, as well as, the employee's name, address, and Social Security number.[69]

Form & Submission of Report. The report must be made on a federal Form W-4, or at the option of the employer, an equivalent form and may be transmitted by first-class mail, fax, magnetically, or electronically.[70]

Location to Send Information.

Department of Social Services: Employer New Hire Reporting Program
P.O. Box 1469
Columbia, SC 29202
(888) 454-5294
(803) 898-9100(fax)
https://newhire.sc.gov/

Multistate Employers. An employer that has employees who are employed in two or more states and that transmits reports magnetically or electronically may comply by designating one state in which the employer has employees to which the employer will transmit the report to that state. An employer that transmits reports pursuant to this subsection must notify the Secretary of the HHS in writing as to which state the employer designates for the purpose of sending reports.[71]

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 the individual's 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.

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[67] S.C. CODE ANN. § 43-5-598(A)(6).

[68] S.C. CODE ANN. § 43-5-598(C).

[69] S.C. CODE ANN. § 43-5-598(C).

[70] S.C. CODE ANN. § 43-5-598(F).

[71] S.C. CODE ANN. § 43-5-598(E).

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 of trade secret misappropriation.[72] 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*

South Carolina does not have a general statute of applicability regarding restrictive covenants. South Carolina courts treat restrictive covenants with a degree of skepticism and hostility, noting that such covenants are "generally disfavored and will be strictly construed against the employer."[73] Courts will look beyond the "disfavored" nature of restrictive covenants and enforce them if they pass a five-part, judicially-developed test. Specifically, the restrictive covenant must be:

1. necessary for the protection of the legitimate interest of the employer;
2. reasonably limited in its operation with respect to time and place;
3. not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
4. reasonable from the standpoint of sound public policy; and
5. supported by valuable consideration.[74]

The first requirement of the five-part test is whether the covenant is necessary to protect the employer's legitimate interest. South Carolina courts recognize no legitimate interest in limiting competition itself,

[72] 18 U.S.C. §§ 1832 *et seq.*

[73] *Rental Unif. Serv. of Florence, Inc. v. Dudley*, 301 S.E.2d 142, 143 (S.C. 1983).

[74] 301 S.E.2d at 143.

and restrictive covenants that limit competition without serving a legitimate interest of an employer will not be enforced.[75] South Caroline courts have recognized the following as a legitimate interest:

- protection of customers;[76]
- protection of goodwill;[77]
- protection of existing employees;[78] and
- protection of confidential information.[79]

By statute, contractual provisions limiting the disclosure of trade secrets are not void or against public policy if they lack a time or geographic limitation.[80]

Enforceability Following Employee Discharge. In South Carolina, noncompete agreement are no longer enforceable if the employer has breached the contract.[81]

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 South Carolina, the commencement of an at-will employment relationship in exchange for a restrictive covenant constitutes consideration that will support the restrictive covenant.[82] Further, an agreement to change the terms and conditions of an employee's at-will employment in exchange for a restrictive covenant constitutes consideration that will support the restrictive covenant.[83] However, an agreement to continue an at-will relationship (*i.e.*, to refrain from terminating the employee at that moment),

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[75] *See Carolina Chem. Equip. Co. v. Muckenfuss*, 471 S.E.2d 721, 723-24 (S.C. Ct. App. 1996).

[76] *Standard Register Co. v. Kerrigan*, 119 S.E.2d 533, 539 (S.C. 1961); *see also Almers v. South Carolina Nat'l Bank of Charleston*, 217 S.E.2d 135, 137 (S.C. 1975) ("The employer is entitled to protect himself from instant pirating of his old customers.").

[77] *Almers*, 217 S.E.2d at 137 ("The employer is entitled to protect himself from instant pirating of . . . the good will of his business.").

[78] *Oxman v. Sherman*, 122 S.E.2d 559, 560 (S.C. 1961).

[79] *Almers*, 217 S.E.2d at 140 (finding that restrictive covenants are permitted to "protect some legitimate business interest, be it trade secrets, trade lists, confidentiality, etc.").

[80] S.C. CODE ANN. § 39-8-30(D). *But see Fay v. Total Quality Logistics, L.L.C.*, 799 S.E.2d 318 (S.C. Ct. App. 2017) (section 39-8-30 does not extinguish requirement of time or geographic limits for confidentiality or nondisclosure agreements that operate as noncompetes).

[81] *Williams v. Riedman*, 529 S.E.2d 28 (S.C. Ct. App. 2000), *abrogated on other grounds by Hall v. UBS Fin. Servs.*, 866 S.E.2d 337 (S.C. 2021).

[82] *See Riedman Corp. v. Jarosh*, 349 S.E.2d 404, 405 (S.C. 1986) ("We now hold that a covenant not to compete may be enforced where the consideration is based solely upon at-will employment itself.").

[83] *Standard Register Co. v. Kerrigan*, 119 S.E.2d 533, 544-45 (S.C. 1961) (defendant received a change in position and duties).

without any change in the terms and conditions of the relationship, does not constitute adequate consideration for a restrictive covenant.[84]

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.

Based on a 2010 opinion by the South Carolina Supreme Court, courts should not, under any circumstances, modify or reform overly broad restrictive covenants.[85]

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

In 1997, the South Caroline legislature adopted the Uniform Trade Secrets Act. The Trade Secrets Act defines what information is a trade secret, prohibits the misappropriation of trade secrets, and provides for remedies in the event of misappropriation.[86]

Definition of a Trade Secret. Under the act, a *trade secret* is defined as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique or process, to which the following apply:
>
> 1. the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> 2. the information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.[87]

Misappropriation of a Trade Secret. Even if a trade secret and a duty not to use or disclose the trade secret exist, the trade secret must be misappropriated in order for the disclosing party to be liable. The South Carolina Act defines *misappropriation* to include improper acquisition regardless of whether or not there is disclosure, and improper disclosure regardless of proper acquisition. The law prohibits a person from misappropriating or threatening to misappropriate a trade secret by doing the following:

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[84] *Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207, 209 (S.C. 2001).

[85] *Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.*, 694 S.E.2d 15, 18 (S.C. 2010) (noncompetes cannot be rewritten by a court and must stand or fall on their own terms).

[86] S.C. CODE ANN. §§ 39-8-10 *et seq.*

[87] S.C. CODE ANN. § 39-8-20(5).

- Acquiring the trade secret of another by means which the person knows or has reason to know constitute improper means.
- Disclosing or using without express or implied consent a trade secret of another if the person did any of the following:
  - Used improper means to acquire knowledge of the trade secret.
  - At the time of disclosure or use, knew or had reason to know that he or she obtained knowledge of the trade secret through any of the following means:
    - Deriving it from or through a person who utilized improper means to acquire it.
    - Acquiring it under circumstances giving rise to a duty to maintain its secrecy or limit its use.
    - Deriving it from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.
  - Acquiring it by accident or mistake.[88]

Under the statute, *improper means* is defined to include theft, bribery, misrepresentation, breach, or inducement of breach of a duty to maintain secrecy.[89]

A person aggrieved by a misappropriation, wrongful disclosure, or wrongful use of trade secrets may bring a civil action to recover damages incurred as a result of the wrongful acts and to enjoin its appropriation, disclosure, use, or wrongful acts pertaining to the trade secrets.[90] Damages may include the actual loss based on the misappropriation or unjust enrichment.[91]

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

South Carolina has no statutory guidelines addressing employee inventions and ideas.

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.

[88] S.C. CODE ANN. § 39-8-20(2).

[89] S.C. CODE ANN. § 39-8-20(1).

[90] S.C. CODE ANN. § 39-8-30(C).

[91] S.C. CODE ANN. § 39-8-40(B).

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.[92]
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.[93]
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.[94]
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.[95]
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.[96]
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.[97]

[92] 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.

[93] 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.

[94] 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.

[95] 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.

[96] 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.

[97] 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.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
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.[98]
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.[99]
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.[100] 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.[101]
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.[102]
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

[98] 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.

[99] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[100] 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.

[101] 41 C.F.R. §§ 60-300.44, 60-741.44.

[102] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	attaching a notice to the contract, or may post the notice at the worksite.[103]
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 visible to prospective employees and all employees who are verified through the system.[104]
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.[105]
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.[106]
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.[107]
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

[103] 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.

[104] 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.

[105] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[106] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[107] 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.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[108] **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 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).[109]
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.[110]
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.[111]

[108] 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.

[109] 29 C.F.R. § 13.5.

[110] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[111] 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.

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.

Table 6. State Posting & Notice Requirements

Poster or Notice	Notes
Fair Employment Practices: Employment Discrimination	Employers with 15 or more employees must post conspicuous notice informing employees about various state workplace laws, including the prohibition against discrimination in employment.[112]
Fair Employment Practices: Pregnancy Discrimination	Covered employers with 15 or more employees must post notice of an employee's right to be free from discrimination for medical needs arising from pregnancy, childbirth, or related medical conditions. The notice must be posted conspicuously in an area accessible to employees.[113]
Human Trafficking Resources Center Hotline	Certain employers are obligated to post notice concerning the Human Trafficking Resources Center Hotline. Notice is required for: (1) establishments that have been declared a nuisance for prostitution; (2) adult businesses in which a person appears in a state of sexually explicit nudity or semi-nudity; (3) businesses that offer massage or bodywork services by unlicensed persons; (4) emergency rooms and urgent care centers; (5) hotel, motel, room, or accommodations furnished to transients; (6) all agricultural labor contractors and agricultural labor transporters; and (7) all airports, train stations, bus stations, rest areas, and truck stops. Posters must be displayed in English and Spanish, must be at least 8.5 by 11 inches, and must be posted in each public restroom as well as in a prominent location conspicuous to the public at the entrance of the establishment.[114]
Unemployment Compensation	All employers must post conspicuous notice, which can be read by all workers, informing them about various state workplace laws, including

[112] S.C. CODE ANN. § 1-13-70. This notice is available in the Labor, Licensing and Regulation (LLR) omnibus poster ("LLR Poster") at https://llr.sc.gov/AboutUs/MediaCenter/pidocs/WorkplacePosters/LLR%20Work%20Place%20Poster%20Legal%20Size.pdf. This notice is also available as a stand-alone poster, in English and in Spanish, at https://schac.sc.gov/about-us/brochures-and-posters.

[113] S.C. CODE ANN. § 1-13-80(A)(4)(i), (ii). This information is covered in the "Employment Discrimination" poster available at https://schac.sc.gov/about-us/brochures-and-posters in English and Spanish.

[114] S.C. CODE ANN. § 16-3-2100. This poster is available at https://www.scag.gov/human-trafficking/awareness-prevention-education/.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	potential unemployment compensation benefits and how to file a claim.[115]
Wages, Hours & Payroll: Labor Law Abstract	All employers must post conspicuous notice informing employees about various state workplace laws, including child labor restrictions and laws governing the payment of wages.[116]
Workers' Compensation	All must post conspicuous notice informing employees about various state workplace laws, including rights, duties, and benefits under the workers' compensation law.[117]
Workplace Safety: Buildings Prohibiting the Carrying of a Concealable Weapon	All signs must be posted at each entrance into a building where carrying of a concealable weapon is prohibited and must be: • clearly visible from outside the building; • eight inches wide by twelve inches tall in size; • contain the words "NO CONCEALABLE WEAPONS ALLOWED" in black one-inch tall uppercase type at the bottom of the sign and centered between the lateral edges of the sign; • contain a black silhouette of a handgun inside a circle seven inches in diameter with a diagonal line that runs from the lower left to the upper right at a 45-degree angle from the horizontal; • a diameter of a circle; and • placed not less than forty inches and not more than 60 inches from the bottom of the building's entrance door.[118]
Workplace Safety: Smoking Area & No Smoking Signs	Generally speaking, smoking is prohibited in public buildings, health care facilities, schools, auditoriums, and public transportation in South Carolina. In areas where smoking is permitted, employers must conspicuously post signs designating smoking and nonsmoking areas.[119]
Workplace Safety: Safety & Health Protections on the Job	All employers must post prominent notice at all worksites, informing employees about the rights and protections of the state occupational

[115] S.C. CODE ANN. § 41-35-610; S.C. CODE ANN. REGS. 47-11. This notice is available in the LLR Poster at https://llr.sc.gov/AboutUs/MediaCenter/pidocs/WorkplacePosters/LLR%20Work%20Place%20Poster%20Legal%20Size.pdf.

[116] S.C. CODE ANN. §§ 41-1-10, 41-10-30. This notice is available in the LLR Poster at https://llr.sc.gov/AboutUs/MediaCenter/pidocs/WorkplacePosters/LLR%20Work%20Place%20Poster%20Legal%20Size.pdf.

[117] S.C. CODE ANN. REGS. 67-301. This notice is available in the LLR Poster at https://llr.sc.gov/AboutUs/MediaCenter/pidocs/WorkplacePosters/LLR%20Work%20Place%20Poster%20Legal%20Size.pdf.

[118] S.C. CODE ANN § 23-31-235(B).

[119] S.C. CODE ANN. §§ 44-95-20, 44-95-30. Employers must identify their own notices to satisfy this posting requirement.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	safety and health act, including their right to a workplace free of hazards.[120]

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.[121]	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	At least 1 year from the date of the personnel action to which any records relate.

[120] S.C. CODE ANN. § 41-15-90; S.C. CODE ANN. REGS. 71-332, 71-502. This notice is available in the LLR Poster at https://llr.sc.gov/AboutUs/MediaCenter/pidocs/WorkplacePosters/LLR%20Work%20Place%20Poster%20Legal%20Size.pdf.

[121] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[122]	
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.[123]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
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.[124]	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.[125]	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).

[122] 29 C.F.R. § 1627.3(b).

[123] 29 C.F.R. § 1627.3(b).

[124] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[125] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[126]	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; • 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.[127]	At least 3 years following the date on which the polygraph examination was conducted.
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.[128]	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).[129]	3 years.

[126] 29 C.F.R. § 1602.7.

[127] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[128] 29 U.S.C. § 1027.

[129] 29 C.F.R. § 1620.32(a).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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.[130]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • 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	3 years from the last day of entry.

[130] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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).[131] 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; • 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.[132]	
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;	3 years from the last day of entry.

[131] 29 C.F.R. §§ 516.2, 516.5.

[132] 29 C.F.R. § 516.28.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[133]	
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; • 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.[134]	At least 3 years from the last effective date.
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.[135]	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,	At least 3 years.

[133] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[134] 29 C.F.R. § 516.5.

[135] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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 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	

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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 family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[136]	
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	At least 4 years after the date the tax is due or paid, whichever is later.

[136] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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).[137]	
Immigration	Employers must retain all completed Form I-9s.[138]	3 years after the date of hire or 1 year following 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.[139]	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;	4 years after the return is due or the tax is paid, whichever is later.

[137] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[138] 8 C.F.R. § 274a.2.

[139] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[140]	
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[141]	As long as it is in effect and at 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.[142]	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.

[140] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[141] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[142] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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. *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.[143]	At least 30 years.
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.	Duration of employment plus 30 years.

[143] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	"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.[144]	
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.[145]	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.[146]	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	Immediately preceding AAP year.

[144] 29 C.F.R. § 1910.1020(d).

[145] 29 C.F.R. § 1910.1020(d).

[146] 29 C.F.R. §§ 1904.33, 1904.44.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• AAP for the immediately preceding AAP year and documentation of good faith effort.[147]	
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 • 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	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." 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.

[147] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	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.[148]	
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 • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[149]	Until final disposition of the complaint, compliance review or action.
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.[150]	3 years.

[148] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[149] 41 C.F.R. §§ 60-1.12, 60-741.80.

[150] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
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 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.[151]	During the course of the covered contract as well as after the end of the contract.
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:*	At least 3 years after the work.

[151] 29 C.F.R. § 13.25.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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 • worker or employee employed in conjunction with the project.[152]	
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.[153]	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:*	At least 3 years from the last date of entry.

[152] 29 C.F.R. § 5.5.

[153] 29 C.F.R. § 4.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• 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.[154]	

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

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Income Tax	All employers must keep and maintain all books, papers, memoranda, and records sufficient to establish the amount on a return or the amount of any tax.[155]	4 years after the return was filed or due to filed, whichever is later.
Unemployment Insurance	*Each employing unit must keep and preserve records concerning its employees, including the following data, for each pay period:* • the beginning and ending dates of such period; and • the largest number of workers in employment during each calendar week of such pay period. *Records must also be kept for each individual employed during the period, including:* • name and Social Security number; • number of hours worked each week, if less than full time;	5 years.

[154] 41 C.F.R. § 50-201.501.

[155] S.C. CODE ANN. § 12-54-210; S.C. CODE ANN. REGS. 117-200.1. Records may be retained on microfilm only in certain circumstances and with the permission of the South Carolina Department of Revenue. S.C. CODE ANN. REGS. 117-200.1.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• monetary wages (including special payments) paid for employment; • reasonable cash value of remuneration paid in a medium other than cash; • date of hire, rehire, or return to work after temporary layoff; and • date of and reason for separation. *Payroll records must be maintained in such a form that would make it possible to determine:* • wages earned, by weeks; • whether any week was in fact a week of less than full-time work; and • time lost, if any, by each worker, due to their unavailability for work.[156]	
Wages, Hours & Payroll	*Every employer must keep and maintain payroll records, for each employee, including:* • name and address; • wages paid each payday; and • deductions made.[157]	3 years.
Workers' Compensation	Each employer must keep a record of all injuries, fatal or otherwise, received by employees in the course of employment, using Form 12A.[158]	2 years.
Workplace Safety	*Each employer must keep and maintain records of:* • fatalities, injuries, and illnesses that: (1) are work-related; (2) are new cases; and (3) meet one or more of the state recording criteria set forth in the pertinent regulations;[159] • OSHA 300 Log; • privacy case list (if one exists); • annual summary; and • OSHA 301 incident report.[160]	5 years following the end of the calendar year that the record covers.

[156] S.C. CODE ANN. § 41-29-150; S.C. CODE ANN. REGS. 47-14.

[157] S.C. CODE ANN. § 41-10-30.

[158] S.C. CODE ANN. § 42-19-10; S.C. CODE ANN. REGS. 67-411. Workers' compensation forms, including Form 12A, are available at https://wcc.sc.gov/forms.

[159] *See* S.C. CODE ANN. REGS. 71-307 to 71-312 (addressing the general and specific recording criteria); *see also* S.C. CODE ANN. REGS. 71-305, 71-306 (addressing determinations of work-relatedness and new cases).

[160] S.C. CODE ANN. REGS. 71-304, 71-333.

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*

South 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**, South Carolina places no statutory restrictions on a private employer's use of criminal records for current employees. 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.

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)**.

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

South Carolina employers may by law implement drug prevention programs for employees that include drug testing.[161] The intent of any such program or policy must, by statute, "be to help those who need it while sending a clear message that the illegal use of nonprescription controlled substances or the abuse of alcoholic beverages is incompatible with employment at the specified workplace."[162] The implementation of a drug testing program by an employer in South Carolina must include:

- a substance abuse policy statement that "balances the employer's respect for individuals with the need to maintain a safe, productive, and drug-free environment;" and
- notification to all employees of the drug prevention program and its policies at the time the program is established by the employer or at the time of hiring of the employee, whichever is earlier.[163]

For more information on drug and alcohol testing, see **1.3(e)(ii)**.

[161] S.C. CODE ANN. § 41-1-15(A).

[162] S.C. CODE ANN. § 41-1-15(A)(1).

[163] S.C. CODE ANN. § 41-1-15(A)(1), (2).

3.2(c) *Marijuana Laws*

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

Under federal law, it is illegal to possess or use marijuana.[164]

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

South 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 their 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.[165]

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.[166]

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

South Carolina law requires that when a covered entity becomes aware of a computer security breach involving unencrypted personally identifiable information, the entity must notify any residents of the state whose personal identifying information is reasonably likely to be used illegally or creates a material risk of harm to the resident.[167]

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[164] 21 U.S.C. §§ 811-12, 841 *et seq*.

[165] 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.

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

[167] S.C. CODE ANN. § 39-1-90(A).

Covered Entities & Information. Any person or business that conducts business in South Carolina that owns or licenses computerized data that includes personal information is covered by this statute. However, those who are subject to and comply with Title V of the Gramm-Leach-Bliley Act and financial institutions subject to and in compliance with federal law are deemed to be in compliance and exempt from this statute.[168]

Under the statute, *personal identifying information* means the first name or first initial and last name in combination with and linked to any one or more of the following data elements that relate to a South Carolina resident, when the data elements are neither encrypted nor redacted:

- Social Security number;
- driver's license number or state identification card number issued instead of a driver's license;
- financial account number, or credit card or debit card number in combination with any required security code, access code, or password that would permit access to a resident's financial account; or
- other numbers or information which may be used to access a person's financial accounts or numbers or information issued by a governmental or regulatory entity that uniquely identify an individual.[169]

The term does not include information that is publicly available.

Content & Form of Notice. Notice may be in one of the following formats:

- written notice;
- electronic notice, if it is compliant with the federal e-sign act;
- telephonic notice; 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.[170]

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 major statewide media.[171]

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[168] S.C. CODE ANN. § 39-1-90.

[169] S.C. CODE ANN. § 39-1-90(D)(3).

[170] S.C. CODE ANN. § 39-1-90(E).

[171] S.C. CODE ANN. § 39-1-90(E)(4).

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.[172]

Timing of Notice. Notice must be given in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement.[173]

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.[174] 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.[175]

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.[176]

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.[177]

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[172] S.C. CODE ANN. § 39-1-90(K).

[173] S.C. CODE ANN. § 39-1-90(A),(C).

[174] 29 U.S.C. § 218(a).

[175] 29 U.S.C. § 206.

[176] 29 U.S.C. §§ 203, 206.

[177] 29 U.S.C. § 3(m)(2)(B).

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.[178] 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*

South Carolina has no minimum wage provisions. Employers covered by the FLSA should consult the federal provisions.

3.3(c) *State Guidelines on Overtime Obligations*

South Carolina has no overtime provisions. Therefore, the payment of overtime in South Carolina is regulated by the FLSA, which establishes a 40-hour overtime standard for covered employees.

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.[179] 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.

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.[180]

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.[181] 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

[178] 29 U.S.C. § 207.

[179] 29 C.F.R. § 785.19.

[180] 29 C.F.R. § 785.18.

[181] 29 U.S.C. § 218d.

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.[182] 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.[183] Exemptions apply for smaller employers and air carriers.[184]

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.[185] Lactation is considered a related medical condition.[186] 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.[187] 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 South Carolina.

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

There are no generally applicable meal or rest period requirements for minors in South Carolina.

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

Under South Carolina law, an individual has the right to breast feed in any location where the individual and their child are authorized to be.[188] Specific to the employment context, the South Carolina Pregnancy Accommodations Act makes it an unlawful employment practice for an employer of 15 or more employees to fail or refuse to make reasonable accommodations for medical needs arising from pregnancy, childbirth, or related medical conditions of an applicant or an employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer's business operations.[189] *Related medical conditions* includes lactation.[190]

The Act's definition of *reasonable accommodations* includes providing more frequent or longer break periods and providing a private place, other than a bathroom stall for the purpose of expressing milk.

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[182] 29 U.S.C. § 218d(b)(2).

[183] 29 U.S.C. § 218d(a).

[184] 29 U.S.C. § 218d(c), (d).

[185] 42 U.S.C. § 2000gg–1.

[186] 29 C.F.R. § 1636.3.

[187] 29 C.F.R. § 1636.3.

[188] S.C. CODE ANN. § 63-5-40.

[189] S.C. CODE ANN. § 1-13-80(A)(4).

[190] S.C. CODE ANN. § 1-13-30(e).

However, an employer is not required to compensate an employee for more frequent or longer break periods, unless the employee uses a break period which would otherwise be compensated.[191]

In addition, employers of all sizes must provide an employee with reasonable unpaid break time, or must permit an employee to use paid break time or meal time each day to express breast milk. The break time must, if possible, run concurrently with any break time already provided to the employee. An employer is not required to provide break time if doing so would create an undue hardship on the employer's operations. The employee must make reasonable efforts to minimize disruption to the employer's operations. The employer must also make reasonable efforts to provide a room or other location, other than a toilet stall, in close proximity to the work area, where an employee may express milk in privacy. However, an employer is not required to build a room for the primary purpose of expressing breast milk.[192]

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.[193] 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."[194]

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.

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

South Carolina law does not define what work activities are considered to be compensable activities. Further, subject to a few exceptions, South Carolina places no limitation on the number of hours most employees can be required to work.

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[191] S.C. CODE ANN. § 1-13-30(T).

[192] S.C. CODE ANN. § 41-1-130.

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

[194] *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").

3.6 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.[195] 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.[196] 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*

South Carolina's child labor statutes generally prohibit employers from engaging "in any oppressive child labor practices."[197]

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

General Restrictions. South Carolina restricts the employment of persons under the age of 18 by age and by the type of job (see Table 9).

Table 9. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Ages 16 & 17	*Minors aged 16 and 17 cannot work in any occupation declared to be particularly hazardous or detrimental to the health or well-being of minors by the state labor department. Such occupations include the following:* • occupations in or about establishments manufacturing or storing explosives or articles containing explosive components; • manufacturing, mixing, transporting, or handling of explosive compounds in the manufacture of small-arms ammunition and all other occupations requiring performance of duties in explosives areas where compounds are manufactured or mixed; • priming of cartridges and other occupations involving labor in workrooms where rim-fir cartridges are primed; • plate-loading of cartridges and operation of automatic loading machines; • loading, inspecting, packing, shipping, and storing of blast caps; • logging and occupations in the operation of saw, lath, shingle, or cooperage-stock mills;

[195] 29 C.F.R. §§ 570.36, 570.50.

[196] 29 C.F.R. § 570.6.

[197] S.C. CODE ANN. § 41-13-20.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• operation of power-driven machinery; • meat slaughtering, packing, rendering, processing; • all boning occupations; • all occupations that involve the pushing or dropping of any suspended carcass, half carcass, or quarter carcass and all occupations involving hand-lifting or hand-carrying any carcass or half-carcass of beef, pork, or horse, or any quarter carcass of beef or horse; • operating a freight elevator, crane, derrick, hoist (over one ton capacity), or high-lift truck; • occupations involving exposure to radioactive substances or ionizing radiation; • operation, set-up, adjustment, repair, oiling, or cleaning of rolling, pressing, pulling, bending, hammering, and shearing machines; • manufacture of clay construction and silica refractory products; • wrecking, demolition, ship-breaking; • roofing; • excavating, backfilling trenches; • working within tunnels prior to completion of all driving and shoring operations; • working within shafts prior to completion of all sinking and shoring operations; • certain mining operations; and • motor vehicle driver and outside helper, with some exceptions.[198]
Ages 14 & 15	*The following jobs are prohibited for minors aged 14 and 15:* • manufacturing, mining, and processing occupations; • occupations which involve the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines; • the operation of motor vehicles or service as helpers on such vehicles; • public messenger service; • occupations in connection with transportation of persons or property by rail, highway, air, water, pipeline, or other means; • warehousing and storage; • communications and public utilities; • construction; • work performed in or about boiler or engine rooms; • work in connection with maintenance or repair of the establishment, machines, or equipment; • outside window washing that involves working from window sills, and all work requiring the use of ladders, scaffolds, or their substitutes;

[198] S.C. CODE ANN. REGS. 71-3104, 71-3107.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• occupations which involve operating, setting up, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers and cutters, and bakery-type mixers; • work in freezers and meat coolers and all work in the preparation of meats for sale; • loading and unloading goods to and from trucks, railroad cars, or conveyors; • certain agricultural occupations; and • subject to some exceptions, cooking and baking.[199] *Permitted occupations for minors age 14 and 15 employed by retail, food service, and gasoline service establishments include:* • office and clerical work, including the operation of office machines; • cashiering, selling, modeling, art work, work in advertising departments, window trimming, and comparative shopping; • price marking and tagging by hand or by machine, assembling orders, packing, and shelving; • bagging and carrying out customers' orders; • errand and delivery work by foot, bicycle, and public transportation; • clean-up work, including the use of vacuum cleaners and floor waxers, and grounds maintenance (does *not* include the use of power-driven mowers, or cutters); • kitchen work and other work involved in preparing and serving food and beverages, including operating machines and devices used to perform such work, such as but not limited to: dish-washers, toasters, dumb-waiters, popcorn poppers, milk shake blenders, coffee grinders, automatic coffee machines, devices used to maintain the temperature of prepared food (such as warmers, steam tables, and heat lamps), and microwave ovens that are used only to warm prepared food and do not have the capacity to warm above 140 degrees Fahrenheit; • cleaning kitchen equipment (not otherwise prohibited), removing oil or grease filters, pouring oil or grease through filters, and moving receptacles containing hot grease or hot oil, but only when the equipment, surfaces, containers, and liquids do not exceed a temperature of 100 degrees Fahrenheit; • work in connection with cars and trucks, if confined to: dispensing gasoline and oil; courtesy service; car cleaning, washing, and polishing (but does *not* include the use of pits, racks, or lifting apparatus, or the inflation of tires mounted on rims equipped with removable retaining rings); and • cleaning vegetables and fruits, and wrapping, sealing, labeling, weighing, pricing, and stocking goods when performed in areas physically separate

[199] S.C. CODE ANN. REGS. 71-3106, 71-3108.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	from areas where meat is prepared for sale, including freezers and meat coolers.[200]
Under Age 14	South Carolina prohibits the employment of minors under the age of 14.[201]

Restrictions on Selling or Serving Alcohol. In South Carolina, individuals under age 21 cannot work in a retail, wholesale, or manufacturing liquor business or business establishment.[202] In a business where sale of alcoholic beverages by the drink occurs, an individual must be at least 18 to serve or deliver a drink. Bartenders must be at least age 21.[203]

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

Minors aged 14 and 15 may work during normal school sessions up to 18 hours per week. Work hours must fall within the hours of 7:00 A.M. and 7:00 P.M. Minors who attend school should anticipate a work schedule of, for example, 3:30 P.M. to 6:30 P.M.[204] During nonschool sessions, minors aged 14 and 15 may work up to eight hours per day, 40 hours per week. Work schedules for nonschool sessions must fall between the hours of 7:00 A.M. and 9:00 P.M.[205]

Minors 16 and older are exempt from the hour and scheduling restrictions. Such minors "may work as many daily and weekly hours as the job responsibilities require or the employer requests," except that such minors may not engage in any occupation deemed "hazardous" under the FLSA or state law unless an exemption applies.[206]

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

While employment of any minor under age 14 is generally prohibited, the following exceptions exist:

- minors under age 14 may work in any aspect of show business, such as acting or performing in a theatrical, television, radio, or film production;
- minors ages 12 and 13 may work during nonschool sessions in nonhazardous farm jobs with written parental consent;
- minors ages 12 and 13 may engage in farm labor at any agricultural establishment at which the minor's parents are employed (with certain exceptions for hazardous occupations as set forth in Table 9);

[200] S.C. CODE ANN. REGS. 71-3106.

[201] S.C. CODE ANN. § 41-13-20. Employment of a minor under age 14 would be deemed *oppressive child labor* in violation of the statute.

[202] S.C. CODE ANN. § 61-6-4140.

[203] S.C. CODE ANN. § 61-6-2200.

[204] S.C. CODE ANN. REGS. 71-3106.

[205] S.C. CODE ANN. REGS. 71-3106.

[206] S.C. CODE ANN. REGS. 71-3107.

- at any age, minors may work in any business or establishment that is 100% owned and operated by the minor's parents; and
- at any age, minors may deliver newspapers to consumers.[207]

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

There are no employment certificate or work permit requirements in South Carolina. However, the Department of Labor requires that employers must obtain proof of a minor employee's age.[208]

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

The South Carolina Department of Labor is charged generally with enforcement of the state's child labor statute, including inspection, enforcement, and prosecution of employers.[209] An employer that violates a child labor regulation in South Carolina must be given a written warning of the violation for a first offense or may be fined not more than $1,000.[210] For second or subsequent offenses, an employer may be fined not more than $5,000 for each offense.[211]

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).[212]

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.[213]

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[207] S.C. CODE ANN. REGS. 71-3105.

[208] South Carolina Dep't of Labor, Licensing & Regulation, *Frequently Asked Questions*, *available at* https://llr.sc.gov/wage/faq.aspx.

[209] S.C. CODE ANN. §§ 41-13-50 to 41-13-60.

[210] S.C. CODE ANN. § 41-13-25.

[211] S.C. CODE ANN. § 41-13-25.

[212] 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").

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

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.[214]

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.[215] 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.[216]

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 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.[217] 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.[218]

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[214] 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.

[215] 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/.

[216] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[217] 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.

[218] 12 C.F.R. § 1005.18.

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.[219]

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.[220]

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.

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.[221] 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.[222] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work

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[219] *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.

[220] 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.

[221] *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).

[222] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

uniforms,[223] tools and equipment,[224] and business transportation and travel.[225] 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.[226]

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;[227]
- 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);[228]
- 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);[229]
- 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;[230]
- 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;[231] or

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[223] 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.

[224] 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).

[225] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[226] 29 C.F.R. § 778.217.

[227] 29 C.F.R. § 531.38.

[228] 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*.

[229] 29 C.F.R. § 531.40.

[230] 29 C.F.R. § 531.40.

[231] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

- 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.[232]

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.[233]

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.[234] 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.[235]

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.[236]

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

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[232] 29 C.F.R. § 825.213.

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

[234] 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.

[235] 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.

[236] 29 C.F.R. § 531.36.

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.[237]

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.[238]

3.7(b) *State Guidelines on Wage Payment*

The payment of wages in South Carolina is governed by the state Wage Payment Act. Note that the Act applies only to entities that are not subject to federal minimum wage laws.[239]

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

Authorized Instruments. In South Carolina, wages may be paid in cash, check, or mandatory direct deposit.[240]

Direct Deposit. Mandatory direct deposit is permitted in South Carolina if certain conditions are met. An employer may deposit all wages due to an employee in a financial institution if the employee is given a statement of earnings and deductions, and the employee is entitled to at least one withdrawal, free of any service charge, for each deposit. The financial institution must do business in South Carolina and be insured by a federal agency.[241]

Payroll Debit Card. South Carolina's wage payment law does not address the use of payroll debit cards as a method of wage payment.

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

South Carolina law does not address how frequently an employer must pay its employees. Employers must pay employees at the time and place established by the employer.[242]

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

When an employer in South Carolina separates an employee from the payroll for any reason, the employer must pay all wages due to the employee within 48 hours of the time of separation or the next regular payday. The wages due a separated employee must in any event be paid within 30 days.[243]

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

South Carolina employers must notify each employee in writing at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the deductions that will be made from the wages, including payments to insurance programs. The employer has the option of giving written

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[237] 29 C.F.R. § 531.37.

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

[239] *Bennett v. Lambroukos*, 401 S.E.2d 428 (S.C. Ct. App. 1991).

[240] S.C. CODE ANN. § 41-10-40(A).

[241] S.C. CODE ANN. § 41-10-40(B).

[242] S.C. CODE ANN. § 41-10-40(D).

[243] S.C. CODE ANN. § 41-10-50.

notification by posting the terms conspicuously at or near the place of work.[244] In addition, every employer must furnish each employee with an itemized statement showing their gross pay and the deductions made from their wages for each pay period.[245]

3.7(b)(v) *Wage Transparency Under State Law*

South 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*

An employer must provide advance written notice of a change to its designated paydays, or a decrease in an employee's rate of pay, at least seven calendar days before they become effective.[246]

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

In South Carolina, there is no general obligation to indemnify an employee for business expenses.

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

Permissible Deductions. An employer can deduct membership dues if an employee provides written authorization. The authorization can be irrevocable for up to one year, or until a collective bargaining agreement ends, whichever occurs sooner. After one year, an employee has the absolute right to revoke the written authorization.[247]

Prohibited Deductions. An employer cannot withhold or divert any portion of an employee's wages unless the employer is required or permitted to do so by state or federal law or the employer has given written notification to the employee of the amount and terms of the deductions.[248]

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

Orders of Support. In South Carolina, an employer that is served with an income withholding order for child support against an employee's wages must begin withholding no later than the pay period that occurs immediately following the pay period in which the order was received. The employer must pay over the amounts withheld within seven working days from the date of withholding.[249] The employer is permitted to deduct up to 50% of the employee's disposable income for child support, and may also deduct an administrative fee of up to $3 in addition to the amount withheld for support.[250] An employer may not discharge, refuse to hire, or otherwise penalize any employee because of the duty to withhold income pursuant to an order of support.[251]

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[244] S.C. CODE ANN. § 41-10-30(A).

[245] S.C. CODE ANN. § 41-10-30(C).

[246] S.C. CODE ANN. § 41-10-30(A).

[247] S.C. CODE ANN. § 41-7-40.

[248] S.C. CODE ANN. § 41-10-40(A).

[249] S.C. CODE ANN. § 63-17-1460.

[250] S.C. CODE ANN. § 63-17-1460.

[251] S.C. CODE ANN. § 63-17-1460.

Debt Collection. With respect to a debt arising from a consumer credit sale, a consumer lease, a consumer loan or a consumer rental-purchase agreement, regardless of where made, a creditor may not attach unpaid earnings of the debtor by garnishment or like proceedings.[252]

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

An employer that violates the South Carolina Wage Payment Act may be assessed a civil penalty of not more than $100 for each violation. Each failure to pay in accordance with the statute is a separate violation.[253] Under the Wage Payment Act, any civil action for the recovery of wages must be commenced within three years after the wages become due.[254] South Carolina employers may also be required to pay treble damages plus costs and reasonable attorneys' fees to employees for unlawfully withheld wages under the Wage Payment Act.[255]

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).[256] 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.[257] 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 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.[258]

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

There is no requirement under South Carolina law that an employer must offer employees other benefit compensation such as vacation pay or personal time off. If 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. 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.

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[252] S.C. CODE ANN. § 37-5-104.

[253] S.C. CODE ANN. § 41-10-80.

[254] S.C. CODE ANN. § 41-10-80.

[255] S.C. CODE ANN. § 41-10-80.

[256] 29 U.S.C. § 1002.

[257] 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.

[258] 490 U.S. 107, 119 (1989).

The South Carolina Wage Payment Act's definition of *wages* includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract."[259] At the time of hiring, employers must notify employees, in writing, of the wages agreed upon, and thus, any vacation policy under which an employee may receive vacation pay or other paid time off.[260]

There is no statutory or regulatory provision prohibiting an employer from implementing caps on accrual or a "use-it-or-lose-it" policy. Further, an employer's vacation policy may require forfeiture of accrued vacation upon termination as long as the policy clearly so provides.[261]

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*

In South Carolina, employees cannot be required to work on Sunday if they are conscientiously opposed to Sunday work. Exceptions exist for certain manufacturing establishments.[262]

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.[263] 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).[264] However, under COBRA, only an employee and the employee's spouse

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[259] S.C. CODE ANN. § 41-10-10(2).

[260] S.C. CODE ANN. § 41-10-30.

[261] *South Carolina Dep't of Labor, Licensing & Regulation v. Advanced Automation*, 2003 SC ALJ LEXIS 472 (S.C. Dep't of Lab., Licensing & Regulation, July 23, 2003).

[262] S.C. CODE ANN. §§ 53-1-40, 53-1-50.

[263] 29 U.S.C. § 1144.

[264] 29 U.S.C. § 1161.

and dependent children are considered "qualified beneficiaries."[265] 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*

South Carolina does not recognize either domestic partnerships or civil unions. Accordingly, state law does not address the issue of whether an employee's domestic partner or civil union 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;[266]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[267]
- to take medical leave when the employee is unable to work because of a serious health condition;[268]
- 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.[269] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[270] For information on the FMLA, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

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[265] 29 U.S.C. § 1167(3).

[266] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[267] 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).

[268] 29 C.F.R. §§ 825.112, 825.113.

[269] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[270] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

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

South 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.[271] 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*

South 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.[272] 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 women 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 she is pregnant, as long as she is able to perform her 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.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for her own serious health condition, such as severe morning sickness.[273] FMLA

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[271] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[272] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[273] 29 C.F.R. § 825.202.

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.[274] 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*

Employers with 15 or more employees must treat individuals affected by pregnancy, childbirth, or related medical conditions the same for all employment purposes as other employees with temporary disabilities. Accordingly, policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits, reinstatement, and payment under any health or temporary disability insurance or sick leave plan must be applied to disability due to pregnancy, miscarriage, abortion, childbirth, and recovery on the same terms and conditions as they are applied to other temporary disabilities.[275]

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 the employee's 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*

South 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.

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[274] 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.

[275] S.C. CODE ANN. §§ 1-13-30(e), (l), 1-13-80(a); S.C. CODE ANN. REGS. 65-30.

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

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

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*

An employer may grant a paid leave of absence to an employee who seeks to undergo a medical procedure to donate bone marrow. Covered employers are those that employ 20 or more employees at one or more sites within the state. Eligible employees are those who work an average or 20 or more hours a week. The combined length of paid leaves of absence may not exceed 40 hours without the employer's agreement.

The employer may require verification by a physician of the need and purpose of each paid leave. If there is a medical determination that the employee does not qualify as a donor, the paid leave of absence granted before the determination is not forfeited. An employer may not retaliate against an employee for requesting or leaving under a paid leave of absence.[276]

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*

While there is no state law requiring employers to provide their employees with time off from work to vote in an election, it is unlawful to discharge an employee from employment because an employee exercises political rights and privileges guaranteed by the federal and state laws and constitutions.[277]

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*

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

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.[278] Employers are under no federal statutory obligation to pay employees while serving on a jury.

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[276] S.C. CODE ANN. § 44-43-80.

[277] S.C. CODE ANN. § 16-17-560.

[278] 28 U.S.C. § 1875.

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.[279] 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. South Carolina provides statutory protection against the dismissal or demotion of employees in the public or private sector for compliance with a jury summons.[280] By law, any employer that dismisses or demotes an employee because the employee "complies with a valid subpoena to testify in a court proceeding or administrative proceeding or to serve on a jury of any court is subject to a civil action in the circuit court for damages caused by the dismissal or demotion."[281] The employer is not required to compensate an employee for time spent on jury service.

Leave to Comply with a Subpoena. South Carolina provides statutory protection against the dismissal or demotion of employees in the public or private sector for compliance with a subpoena.[282]

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 time off from work to lawfully respond to a subpoena.[283] An employee is eligible for time off if the employee is the victim of the crime at issue in the proceedings or the spouse, parent, child, or the lawful representative of a victim who is deceased, a minor, incompetent, or physically or psychologically incapacitated.[284] An employer may not reduce the wages or benefits of a victim who lawfully responds to a subpoena.[285] An employee is not eligible for time off if the employee is the subject of an investigation for, is charged with, or who has been convicted of or pled guilty or *nolo contendere* to

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[279] *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).

[280] S.C. CODE ANN. § 41-1-70; *see also Connelly v. Wometco Enters.*, 442 S.E.2d 204 (S.C. Ct. App. 1994) (affirming denial of directed verdict for claimant who presented evidence of "good" performance and who was terminated immediately after returning from jury service).

[281] S.C. CODE ANN. § 41-1-70.

[282] S.C. CODE ANN. § 41-1-70.

[283] S.C. CODE ANN. § 16-3-1550.

[284] S.C. CODE ANN. § 16-3-1510.

[285] S.C. CODE ANN. § 16-3-1550.

the offense in question. An employee is not eligible for time off if the employee acting on behalf of the suspect, juvenile offender, or defendant, unless the employee's actions are required by law. An employee is not eligible for time off if the employee was imprisoned or engaged in an illegal act at the time of the offense at issue in the proceedings.[286]

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.[287]

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").

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.[288] 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

[286] S.C. CODE ANN. §§ 16-3-1510, 16-3-1550.

[287] 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)).

[288] 29 C.F.R. § 825.126(a).

country.[289] 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. While there is no specific state law regarding military service leave, such a leave is implied through state law regarding employment reinstatement. An employee who leaves work to serve in the state or federal National Guard must be reinstated to the employee's previous position or to a position of like seniority, status, and salary, provided the employee:

- receives an honorable discharge;
- applies in writing to the employer within five days of discharge from duty or from hospitalization continued after release from active duty; and
- is still qualified for their previous position.[290]

If the employee is no longer qualified for the previous position, the employer must offer an alternative position for which the employee is qualified and will give the employee appropriate seniority, status, and salary. However, an employer is not required to reinstate an employee if, under the circumstances, it would be unreasonable to do so.[291]

Other-Military Related Protections: Spousal Unemployment. An individual is eligible for benefits if the individual left work voluntarily to relocate because of the transfer of a spouse who has been reassigned from one military assignment to another, provided that the separation from employment occurs within 15 days of the scheduled relocation date.[292] Benefits, under this circumstance, will not be charged to the employer's account.[293]

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.

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[289] 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).

[290] S.C. CODE ANN. §§ 25-1-2310, 25-1-2320.

[291] S.C. CODE ANN. §§ 25-1-2310, 25-1-2320.

[292] S.C. CODE ANN. § 41-35-126.

[293] S.C. CODE ANN. § 41-35-130(j).

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

Volunteer Emergency Responder Leave. While not a specific requirement to offer leave, an employer may not terminate an employee who responds to a declared state of emergency in their capacity as a volunteer firefighter or volunteer emergency medical services personnel.[294]

Employment Protection During Quarantine. While not a specific requirement for leave, an employer may not terminate or otherwise discriminate against an employee who misses work while complying with a quarantine order. An employer may require an employee to use annual or sick leave to comply with such an order.[295]

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.[296] Employers are also required to comply with all applicable occupational safety and health standards.[297] 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.[298] 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*

South 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.[299] Thus, South 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. The South Carolina Occupational Safety and Health Administration oversees the South Carolina Occupational Safety and Health Act (SC-OSH Act). South Carolina has largely adopted the standards of the Fed-OSH Act, with a few exceptions. Like the Fed-OSH, the SC-OSH Act

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[294] S.C. CODE ANN. § 6-11-1460.

[295] S.C. CODE ANN. § 44-4-530.

[296] 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.

[297] 29 U.S.C. § 654(a)(2).

[298] 29 U.S.C. § 667(c)(2).

[299] 29 U.S.C. § 667.

imposes various obligations on covered employers. The SC-OSH Act contains additional provisions regarding construction standards and spray finishing using flammable and combustible materials, among others.[300]

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*

South Carolina law makes it unlawful to use a wireless electronic communication device to compose, send, or read a text-based communication while operating a motor vehicle on the public streets and highways of the state. A *text-based communication* is a communication using text-based information, including, but not limited to, a text message, an SMS message, an instant message, or an electronic mail message. This prohibition applies to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the restriction.

The prohibition against texting while driving does not include the use of a hands-free wireless electronic communication device. A *hands-free wireless electronic communication device* is an electronic device, including, but not limited to, a telephone, a personal digital assistant, a text-messaging device, or a computer, which allows a person to wirelessly communicate with another person without holding the device in either hand by utilizing an internal feature or function of the device, an attachment, or an additional device. Such a device may require the use of either hand to activate or deactivate an internal feature or function of the device.[301]

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 South Carolina, an employer may prohibit concealable, whether concealed or openly carried, weapons on company property, in the workplace, or while using any machinery, vehicle, or equipment owned or operated by the business, whether an individual is licensed to carry a concealable weapon or not.[302]

Signage Requirements. The posting of a sign stating "No Concealable Weapons Allowed" constitutes notice that the employer, owner, or person in legal possession of the premises requests that concealable, whether concealed or openly carried, weapons not be brought on the premises or into the workplace, whether an individual is licensed to carry a concealable weapon or not. To prohibit carrying these weapons

[300] See S.C. CODE ANN. §§ 41-15-80 *et seq.*

[301] S.C. CODE ANN. § 56-5-3890.

[302] S.C. CODE ANN. § 23-31-220.

on a property, there must be a sign expressing the prohibition in both written language and universal sign language. The signs must be:

- posted at each entrance into a building where a person legally entitled to carry a firearm is prohibited from carrying a concealable weapon;
- visible from outside the building;
- eight inches wide by 12 inches tall;
- contain the words "NO CONCEALABLE WEAPONS ALLOWED" in black one-inch tall uppercase type at the bottom of the sign and centered between the lateral edges of the sign;
- contain a black silhouette of a handgun inside a circle seven inches in diameter with a diagonal line that runs from the lower left to the upper right at a forty-five degree angle from the horizontal;
- a diameter of a circle; and
- placed not less than 40 inches and not more than 60 inches from the bottom of the building's door.
- if the premises do not have doors, the signs must be:
  - thirty-six inches wide by 48 inches tall;
  - contain the words "NO CONCEALABLE WEAPONS ALLOWED" in black three-inch tall uppercase type at the bottom of the sign and centered between the lateral edges of the sign;
  - contain a black silhouette of a handgun inside a circle 34 inches in diameter with a diagonal line that is two inches wide and runs from the lower left to the upper right at a 45 degree angle from the horizontal, and must be a diameter of a circle whose circumference is two inches wide;
  - placed no less than 40 inches and no more than 96 inches above the ground; and
  - posted in sufficient quantities to be clearly visible from any point of entry onto the premises.

Additionally, employers or business owners may post a sign regarding the prohibition or allowance of concealable weapons, whether concealed or openly carried, that is unique to their business.[303]

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.

[303] S.C. CODE ANN. § 23-31-235.

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

South Carolina's smoking prohibition does not extend to all workplaces; however, smoking is prohibited in government buildings and other public places.[304]

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*

South 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*

South Carolina law does not address employer workplace violence protection orders.

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");[305] (2) the Americans with Disabilities Act (ADA);[306] (3) the Age Discrimination in Employment Act (ADEA);[307] (4) the Equal Pay Act;[308] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[309] (6) the Civil Rights Acts of 1866 and 1871;[310] 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;

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[304] S.C. CODE ANN. § 44-95-20.

[305] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[306] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[307] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[308] 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.

[309] 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)).

[310] 42 U.S.C. §§ 1981, 1983.

- 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);[311]
- 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.[312] 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.[313]

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

South Carolina's Human Affairs Law prohibits employment discrimination against an individual because of:

- race;
- religion;
- color;
- sex (including pregnancy, childbirth, and related medical conditions);
- age;
- national origin; and
- disability.[314]

The South Carolina Human Affairs Law applies to private employers that employ 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and the law applies to the state and its agencies, departments, and political subdivisions.[315] South Carolina's

[311] 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.

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

[313] 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.

[314] S.C. CODE ANN. §§ 1-13-30, 1-13-80.

[315] S.C. CODE ANN. § 1-13-30.

Human Affairs Law also applies to employment agencies, labor organizations, and joint labor-management committees.[316]

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

The South Carolina Human Affairs Commission (SHAC or "Commission") enforces the South Carolina Human Affairs Law. SHAC and the EEOC have entered into a work-sharing agreement, which designates each other as agents for the purpose of receiving and drafting charges. Under this work-sharing agreement, filing with one agency constitutes filing with the other. SHAC further waives its right to exclusive jurisdiction to process charges initially. The statute provides that written complaints of employment discrimination must be filed with SHAC within 180 days after the discriminatory act.[317]

SHAC will investigate the charge of discrimination against a private employer, attempt to conciliate the dispute, and make a written recommendation that either the complaint be dismissed or the Commission bring an action in a court of equity against an employer.[318] If the charge is dismissed or the Commission has not resolved the complaint within 180 days, the complainant may bring a civil action.[319] The civil action must be brought within one year from the date of the alleged violation, or within 120 days from the date the complainant's charge is dismissed, whichever occurs earlier.[320] However, this time period may be extended with the written consent of the respondent employer.[321]

Remedies available in an action brought under the South Carolina Human Affairs Law include the court enjoining the employer from engaging in an unlawful employment practice.[322] Further, the court may order appropriate affirmative action, including reinstatement or hiring, back pay, or any other equitable relief the court deems appropriate.[323] Liability for back pay under the South Carolina Human Affairs Law will not accrue beyond two years prior to the filing of the complaint with the Commission, and any back pay awarded will be reduced by any unemployment compensation, interim earnings received, and the complainant's failure to mitigate.[324]

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

Political Opinions or Activities Discrimination. An employer cannot terminate an employee for expressing political opinions or exercising political rights and privileges guaranteed by the laws and constitutions of the United States and South Carolina.[325]

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316 S.C. CODE ANN. §§ 1-13-30(f), (g), 1-13-80.

317 S.C. CODE ANN. § 1-13-90(a). An employee must file a written complaint with SHAC or the EEOC within 180 days after the alleged discriminatory act to preserve a claim under the South Carolina Human Affairs Law. However, an employee has 300 days from the date of the discriminatory act to file a charge of discrimination with either the EEOC or SHAC to preserve federal employment discrimination claims.

318 S.C. CODE ANN. § 1-13-90(d)(1)-(4).

319 S.C. CODE ANN. § 1-13-90(d)(6).

320 S.C. CODE ANN. § 1-13-90(d)(6).

321 S.C. CODE ANN. § 1-13-90(d)(6).

322 S.C. CODE ANN. § 1-13-90(d)(9).

323 S.C. CODE ANN. § 1-13-90(d)(9).

324 S.C. CODE ANN. § 1-13-90(d)(9).

325 S.C. CODE ANN. § 16-17-560.

Tobacco Products. In South Carolina, the use of tobacco products outside the workplace "must not be the basis of personnel action."[326]

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."[327] 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.[328]

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

The South Carolina Human Affairs Law makes it an unlawful employment practice for covered employers to discriminate against an individual with respect to the individual's compensation on the basis of a protected classification.[329] It is not an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a *bona fide* seniority or merit system or a system that measures earnings by quantity or quality of production or to employees who work in different locations, if the differences are not the result of an intention to discriminate on the basis of a protected classification.

As noted in **3.11(a)(iii)**, an employee alleging a violation of the Human Affairs Law must first exhaust administrative remedies by filing a complaint with the SHAC within 180 days of the alleged violation. The employee may then file a civil action within one year from the date of the alleged violation or within 120 days from the date the administrative complaint is dismissed.

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

[326] S.C. CODE ANN. § 41-1-85.

[327] 29 U.S.C. § 206(d)(1).

[328] 42 U.S.C. § 2000e-5.

[329] S.C. CODE ANN. § 1-13-80.

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.[330]

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
- temporary suspension of an employee's essential job function(s).[331]

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.[332] 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

[330] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[331] 29 C.F.R. § 1636.3.

[332] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

an effective reasonable accommodation.[333] 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."[334]

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.[335]

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;
- 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.[336]

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.

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[333] 29 C.F.R. § 1636.3.

[334] 29 C.F.R. § 1636.4.

[335] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[336] 29 C.F.R. § 1636.3.

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*

In addition to pregnancy disability leave, discussed in 3.9(c)(ii), the South Carolina Human Affairs Law, as amended by the South Carolina Pregnancy Accommodations Act, provides that it is an unlawful employment practice for an employer with 15 more employees to:

- fail or refuse to make reasonable accommodations for medical needs arising from pregnancy, childbirth, or related medical conditions of an applicant or an employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer's business operations;
- deny employment opportunities to a job applicant or employee, if the denial is based on the employer's need to make reasonable accommodations to the known limitations for medical needs arising from pregnancy, childbirth, or related medical conditions of an applicant for employment or an employee;
- require an applicant or an employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that the applicant or employee chooses not to accept, if the applicant or employee does not have a known limitation related to pregnancy, or if the accommodation is unnecessary for the applicant or employee to perform the essential duties of her job;
- require an employee to take leave under any leave law or policy of the employer if another reasonable accommodation can be provided to the known limitations for medical needs arising from pregnancy, childbirth, or related medical conditions; or
- take adverse action against an employee in the terms, conditions, or privileges of employment for requesting or using a reasonable accommodation to the known limitations for medical needs arising from pregnancy, childbirth, or related medical conditions.[337]

Reasonable accommodation may include:

- making existing facilities used by employees readily accessible to and usable by individuals with disabilities and individuals with medical needs arising from pregnancy, childbirth, or related medical conditions, except that an employer is not required to construct a permanent, dedicated space for expressing milk; however, nothing in this section exempts an employer from providing other reasonable accommodations; and
- providing more frequent or longer break periods; providing more frequent bathroom breaks; providing a private place, other than a bathroom stall for the purpose of expressing milk; modifying food or drink policy; providing seating or allowing the employee to sit more frequently if the job requires the employee to stand; providing assistance with manual labor and limits on lifting; temporarily transferring the employee to a less strenuous or hazardous vacant position, if qualified; providing job restructuring or light duty, if available; acquiring or

[337] S.C. CODE ANN. § 1-13-80(A)(4).

modifying equipment or devices necessary for performing essential job functions; modifying work schedules.[338]

The employer is not required to take any of the following actions, unless the employer does or would do so for other employees or classes of employees that need a reasonable accommodation:

- hire new employees that the employer would not have otherwise hired;
- discharge an employee, transfer another employee with more seniority, or promote another employee who is not qualified to perform the new job;
- create a new position, including a light duty position for the employee, unless a light duty position would be provided for another equivalent employee; or
- compensate an employee for more frequent or longer break periods, unless the employee uses a break period which would otherwise be compensated.[339]

Covered employers must provide written notice of the right to be free from discrimination for medical needs arising from pregnancy, childbirth, or related medical conditions, to new employees at the commencement of employment. The notice must also be conspicuously posted at an employer's place of business in an area accessible to employees.[340]

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.[341] Multiple decisions of the U.S. Supreme Court[342] 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.[343] 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.

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[338] S.C. CODE ANN. § 1-13-30(T).

[339] S.C. CODE ANN. § 1-13-30(T).

[340] S.C. CODE ANN. § 1-13-80(A)(4)(i), (ii).

[341] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[342] *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).

[343] 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.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

There are no antiharassment training and education requirements mandated for private employers in South Carolina.

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*

South Carolina law does not have a general whistleblower law providing protections for private-sector whistleblowers, although there are whistleblower protections for public employees. State law, however, protects all employees that engage in certain activities related to health and safety. Employers are prohibited from discriminating against or discharging an employee that has filed a complaint or instituted a proceeding under the South Carolina occupational safety and health laws.[344] An employee who believes they were discharged or discriminated against because of filing a complaint, instituting or causing to be instituted a proceeding, or testifying or about to testify in a proceeding related to the occupational safety and health statutes, rules, or regulations may file a complaint with state labor officials within 30 days of the violation.[345]

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)[346] and the Railway Labor Act (RLA)[347] 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

[344] S.C. CODE ANN. § 41-15-510.

[345] S.C. CODE ANN. § 41-15-520.

[346] 29 U.S.C. §§ 151 to 169.

[347] 45 U.S.C. §§ 151 *et seq*.

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* 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*

The public policy of South Carolina acknowledges by statute "that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization."[348] By statute, any agreement between an employer and labor organization whereby persons not members of such labor organizations are denied the right to work for the employer or whereby such membership is made a condition of employment, or of continuance of employment, violates South Carolina's public policy and is deemed unlawful and an illegal combination or conspiracy.[349]

South Carolina's right-to-work statutes specifically make it unlawful for an employer to require an employee, as a condition of employment, or of continuance of employment:

- to be, become, or remain a member or affiliate of a labor organization or agency;
- to abstain or refrain from membership in a labor organization; or
- to pay any fees, dues, assessments, or other charges or sums of money to a person or organization.[350]

Likewise, South Carolina law prohibits a person or a labor organization from directly or indirectly participating in an agreement, arrangement, or practice that has the effect of requiring, as a condition of employment, that an employee be, become, or remain a member of a labor organization or pay to a labor organization any dues, fees, or any other charges.[351] The state's public policy also prohibits any union or labor organization from acquiring an employment monopoly in any enterprise.[352]

Prohibited Activities. In South Carolina, the following forms of interference with an employee's right-to-work are declared unlawful:

- by force, intimidation, violence or threats, or violent or insulting language, directed against the person, their family, or property:
  - to interfere, or attempt to interfere, with such person in the exercise of their right to work, to pursue any lawful vocation or business activity, to enter or leave any place of employment, or to receive, ship, or deliver materials, goods, or services not prohibited by law; or

[348] S.C. CODE ANN. § 41-7-10.

[349] S.C. CODE ANN. § 41-7-20.

[350] S.C. CODE ANN. § 41-7-30.

[351] S.C. CODE ANN. § 41-7-30(B).

[352] S.C. CODE ANN. § 41-7-20.

- to compel or attempt to compel any person to join, support, or refrain from joining or supporting any labor organization; or

- to engage in picketing by force or violence or in such number or manner as to interfere, or constitute a threat to interfere, with:
  - free ingress to, and egress from, any place of employment; or
  - free use of roads, streets, highways, sidewalks, railways, or other public ways of travel, transportation, or conveyance.[353]

South Carolina's labor laws do not prohibit "peaceful picketing" provided for under the NLRA and the U.S. Constitution.[354]

3.12(c) *State Statute Regarding Employer Handbooks*

Employers in South Carolina may take advantage of a statutory mechanism to avoid liability for breach of contract based on representations in handbooks, personnel manuals, and other documents published to employees.[355] The statute prevents the creation of "an express or implied contract of employment" with an employee if the handbook, manual or other document is "conspicuously disclaimed" by an employer. The statute provides:

> It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.[356]

In short, the handbook law permits an employer to avoid creating an employment contract through its handbook if the employer puts a *conspicuous* disclaimer (defined generally as one that is underlined and in capital letters, and acknowledged in writing by an employee) on the first page of the document.

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

[353] S.C. CODE ANN. § 41-7-70.

[354] S.C. CODE ANN. § 41-7-70.

[355] S.C. CODE ANN. § 41-1-110.

[356] S.C. CODE ANN. § 41-1-110.

workforce they constitute).[357] 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.[358] 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*

South 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*

Employers in South Carolina engaging in a mass separation of 10 or more workers employed in a single establishment at around the same time and for the same reason must give notice to the South Carolina Department of Employment and Workforce. The notice must be on Form UCB-113, and must be filed with the office near the worker's place of employment, or the office nearest the worker's residence. The form must be filed not later than 10 calendar days, not including Sundays and holidays, after the separation.[359]

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.[360] 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.

[357] 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.

[358] 20 C.F.R. §§ 639.4, 639.6.

[359] S.C. CODE ANN. REGS. 47-19.

[360] 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.

Table 10. Federal Documents to Provide at End of Employment	
Category	**Notes**
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.[361]

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.	A notification of the privilege to continue coverage after termination must be included in each certificate of coverage. In addition, the employer must clearly and meaningfully advise an employee upon termination of the right to continue insurance and the amount of premium required, including the employee's responsibility to pay the premium each month before the date that the policy month begins.[362]
Separation Notice	A liable employer (an employer that contributes to the state unemployment benefits program under the State Unemployment Tax Act) other than the last separating employer may be sent a Request to Employer for Separation Information which must be completed and returned in accordance with Section 41-31-160.[363]
Unemployment Notice	**Generally.** South Carolina does not require that employees be provided notice about unemployment benefits when employment ends. Nonetheless, the employer generally must post notice in readily accessible places, informing employees about unemployment insurance and how to file a claim for benefits. Accordingly, it is recommended that an employer provide a copy of that unemployment notice when employment ends.[364] **Multistate Workers.** Whenever an individual covered by an election is separated from employment, an employer must again notify the

[361] 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.

[362] S.C. CODE ANN. § 38-71-770. For more information and a sample notice, see https://www.doi.sc.gov/DocumentCenter/View/11352/State-Continuation-of-Health-Insurance-Coverage.

[363] S.C. CODE ANN. REGS. 47-19.

[364] S.C. CODE ANN. § 41-35-610; S.C. CODE ANN. REGS. 47-11. This notice is available in the LLR Poster at https://llr.sc.gov/AboutUs/MediaCenter/pidocs/WorkplacePosters/LLR%20Work%20Place%20Poster%20Legal%20Size.pdf.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
	employee as to the jurisdiction under whose employment security law services have been covered. If, at the time of termination, the individual is not located in the elected jurisdiction, an employer must notify them as to the procedure for filing interstate benefit claims.[365] In addition to the above notice requirement, employers must comply with the covered jurisdiction's general notice requirement, if applicable.

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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*

South Carolina grants limited immunity to employers from liability for disclosure of an employee's personnel information.[366] Unless otherwise provided by law, an employer in South Carolina is immune from civil liability for:

- The disclosure of an employee's or former employee's "dates of employment, pay level, and wage history to a prospective employer."[367]
- The disclosure by an employer in writing in response to "a written request concerning a current employee or former employee from a prospective employer of that employee" of said employee's:
  - written employee evaluations;
  - official personnel notices that formally record the reasons for separation;
  - whether the employee was voluntarily or involuntarily released from service and the reason for the separation; and
  - information about job performance.[368]

[365] S.C. CODE ANN. REGS. 47-33.

[366] S.C. CODE ANN. § 41-1-65.

[367] S.C. CODE ANN. § 41-1-65(B).

[368] S.C. CODE ANN. § 41-1-65(C). The statute defines the term *evaluation* as "a written employee evaluation which was conducted by the employer and signed by the employee, including any written employee response to the evaluation, before the employee's separation from the employer and of which the employee, upon written request, shall be given a copy." The statute defines *job performance* as including, but not being limited to, "attendance, attitude, awards, demotions, duties, effort, evaluations, knowledge, skills, promotions, and disciplinary actions."

The statutory protections do not apply where an employer "knowingly or recklessly releases or discloses false information."[369]

[369] S.C. CODE ANN. § 41-1-65(D).