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South Carolina Employment Law Guide

19th Edition
January 2022

This South Carolina Employment Law Guide was prepared as a reference guide was for South Carolina employers. This guide provides an overview of the employment laws affecting South Carolina employers and is intended to help employers comply with the numerous laws affecting the workplace and to prevent costly and unnecessary litigation.

This publication is designed to provide accurate and authoritative information in regards to the subject matter covered. It is not intended nor designed to render legal advice to its readers. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Use of This Guide

All sections of the guide are in the same format.

A.

BACKGROUND - Section A is always background for the law or laws covered.

B.

HOW THE LAW WORKS - Section B outlines the provisions of each law and coverage.

C.

ACTION REQUIRED BY EMPLOYERS - If there are posters, forms, reports, affirmative action, etc, they are outlined in Section C.

D.

TIPS - Section D is editorial comment, suggestions for compliance and ideas to avoid problems.

Acknowledgements

The South Carolina Employment Law Guide was written and edited by the law firm of Ogletree, Deakins, Nash, Smoak and Stewart, P.C. Ogletree Deakins represents management in every area of labor and employment law. The firm has more than 800 attorneys focusing on labor and employment law in 53 offices across 31 states and across the globe. From Los Angeles to Miami, Ogletree Deakins represents employers of all sizes, from small and medium size companies to Fortune 50 corporations.

Ogletree Deakins' primary areas of practice include:

Labor and Employment Law
Litigation
Immigration
Class Action Defense
Workplace Safety and Health
Employee Benefits
Governmental Affairs
Workplace Diversity
Client Training

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1. South Carolina Department of Labor, Licensing and Regulation

A. BACKGROUND

The South Carolina legislature restructured a significant portion of state government in 1993. Effective February 1, 1994, Act 181 created the South Carolina Department of Labor, Licensing and Regulation. It merged the Department of Labor, State Fire Marshall's Office, and 38 professional and occupational licensing boards to form the new agency. The legislation empowered the Governor to appoint a Director of the Department, with the advice and consent of the Senate.

LLR administers more than forty Boards, Commissions and Councils at LLR,, and its activities include the following:

1. DIVISION OF PROFESSIONAL AND OCCUPATIONAL LICENSING ("POL")

The POL services professional and occupational regulatory boards that establish minimum standards of competence and conduct for licensees in South Carolina. The licensing boards evaluate the qualifications of license applicants, grant licenses to qualified applicants, and establish ethical and technical competence standards for licensees. POL oversees the Office of Licensure and Compliance, the Office of Board Services, and the Office of Investigations and Enforcement.

2. OFFICE OF IMMIGRANT COMPLIANCE ("OIC")

OIC enforces the South Carolina Illegal Immigration Reform Act ("SCIIRA"), which prohibits employers in South Carolina from employing unauthorized aliens and establishes additional steps that employers must take to verify the work status of newly hired employees. Persons providing immigration assistance services must be registered with LLR.

OIC conducts random audits of South Carolina businesses to inspect employer compliance with SCIIRA's verification requirements and other laws regarding private employment of unauthorized aliens. In addition, OIWC investigates complaints against employers alleging the employment of unauthorized aliens on payroll. OIWC may assess penalties for violations of SCIIRA, including monetary penalties and suspension or revocation of the employer's imputed license to employ individuals in South Carolina. OIWC may also notify federal, state, and local law enforcement agencies responsible for enforcing immigration laws.

3. DIVISION OF LABOR

The Division of Labor administers and enforces most of South Carolina's labor laws. Occupational safety, payment of wages, child labor, migrant labor, mediation of disputes between unions and businesses, and conciliation of disputes between workers and management in non-union settings all fall under this Division. Elevators and amusement rides are also regulated to assure the public's safety.

4. WAGES AND CHILD LABOR

This office is responsible for enforcing the state payment of wages and child labor laws, and falls under the Office of Investigations and Enforcement. The Office of Wages and Child Labor investigates and issues citations in connection with wage and child labor complaints.

5. LABOR MEDIATION

By state law, the director of LLR is responsible for assisting in the settlement of labor disputes. Mediators monitor contract negotiations, investigate industrial disputes, strikes, and lockouts, and try to help the two sides reach agreement. When requested by both parties, mediators will act as arbitrators or appoint other arbitrators. The office also administers the South Carolina Right-To-Work Law that provides that the rights of workers shall not be abridged based on their affiliation or non-affiliation with a labor union.

6. OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA")

In South Carolina, OSHA is a state administered program. Safety and health compliance officers conduct inspections to ensure compliance with safety and health standards and may issue citations and assess penalties in cases of noncompliance. The Office's Standards Section assists employers with interpreting OSHA standards and proper recordkeeping procedures. The section also is responsible for collecting occupational injury and illness statistics.

7. OSHA VOLUNTARY PROGRAMS

The Office of OSHA Voluntary Programs ("OVP") offers courtesy inspections, technical assistance, and training programs to employers seeking voluntary compliance with the state Occupational Safety and Health Act. OVP also conducts business outreach and recognition programs such as Palmetto Star, Safety and Health Achievement Recognition Program, Alliances, and Partnerships. Services are free to private and public sector employers upon request.

Larger employers in particular may find the Division of Labor's training programs useful. They not only assist employers in complying with South Carolina's OSHA requirements, but also demonstrate an employer's good faith attempt to do so in the event of a workplace accident, inspection, and/or citation. Among the subjects of OSHA training programs are the following:

Bloodborne Pathogens, Confined Space General Industry, Confined Space Construction Industry, Control of Hazardous Energy Sources- Lockout/ Tagout, Cranes & Rigging, Electrical Safety Work Practices (General Industry), Emergency Action Plans/Means of Egress (Exits), Excavation & Trenching, Fall Protection (General Industry or Construction), Hazard Communication (HAZCOM/GHS), Hazard Recognition for Maintenance Personnel or Construction, Hearing Conservation, Heat Stress, Industrial Truck Safety Requirements, Lab Safety, Ladder Safety (General Industry),. Office Safety, OSHA Inspection Process, OSHA Injury & Illness Record Keeping, Personal Protective Equipment, Power and Portable Hand Tools (General Industry),

Respiratory Protection, Scaffolding, Silica – Construction, Storage of Flammable Liquids, Violence in the Workplace, Walking and Working Surfaces.

8. ELEVATORS & AMUSEMENT RIDES

This office administers the S.C. Elevator Code, the S.C. Amusement Rides Safety Code, and the S.C. Bungee Safety Law. To ensure compliance, inspectors conduct inspections of new and existing elevator facilities, amusement rides, and bungee jumping facilities.

9. OFFICE OF INVESTIGATIONS AND ENFORCEMENT

The Office of Investigations and Enforcement (OIE) is responsible for investigating complaints involving a possible violation of a professional or occupational practice act. OIE also investigates Labor complaints for wage disputes and child labor. Certain professional or occupational licensing boards also require routine or follow up inspections by statute or regulation. OIE, through its inspection unit, also conducts those inspections. Occasionally, if violations are detected, and not otherwise appropriately resolved, a complaint will be opened and the alleged violations investigated. In those instances, the cases are handled as would any other OIE investigation.

10. SC STATE FIRE

This office includes the State Fire Marshal, SC Fire Academy, Emergency Response and Fire SC Safety.

11. COMMUNICATIONS

This office educates the public about LLR's programs, activities, and services. The office also responds to Freedom of Information Act requests and prepares the Division's annual reports. In addition to all of these functions, the Division's Compliance Section provides the South Carolina Tax Commission with a list of industrial properties that are exempt from ad valorem taxes because they qualify as air or noise pollution control facilities.

12. CUSTOMER CARE

The Customer Care Center ("CCC") was created in 2008 and serves as a central contact point of public inquiries. The CCC responds to queries concerning licensing requirements, status of applications, continuing education requirements, and other licensing issues.

B. ENFORCEMENT POWERS

To enforce the statutes that come under the jurisdiction of the Division of Labor, the LLR Director has the power to conduct inspections, subpoena witnesses and documents, examine witnesses, question employees and members of management, compel answers to interrogatories, issue citations, and propose and assess penalties.

Enforcement actions against employers are governed by the South Carolina Administrative Procedures Act. Thus, employers who are assessed penalties or ordered to take action by the Division of Labor are entitled to the protections set

forth in the South Carolina Administrative Procedures Act, including the right to a contested case hearing before a South Carolina Administrative Law Judge and to appeal adverse determinations to the South Carolina Court of Common Pleas.

C. ACTIONS REQUIRED BY EMPLOYERS

On July 1, 2009, all private employers in South Carolina will be "imputed" with a state employment license that permits private employers to employ a person in the state. These new licenses will remain in effect as long as the employer complies with the provisions of the Act by:

1. registering and participating in the federal work authorization program to verify the employment authorization of all new employees; or

2. employing only workers who possess or are eligible to possess a valid South Carolina driver's license or identification card or who possess a valid driver's license or identification card from another state where the license requirements are at least as strict as those in South Carolina. The South Carolina Department of Motor Vehicles will publish on its website a list of states where the license requirements are at least as strict as those in South Carolina.

All employers who fail to comply with the above verification requirements may incur civil fines of between $100 and $1,000 for each employee whose work status is not verified.. If an employer is found to knowingly employ illegal immigrants, the employer's imputed employment license could be suspended ranging from 10 days to 5 years. An employer's license could be revoked permanently in the most egregious cases.

The Division of Labor requires most employers to post certain notices in conspicuous places. Employers should post printed notices related to occupational health and safety, child labor laws, payment of wage laws, immigrant worker laws, and the Right-To-Work Law.

South Carolina labor laws require notice of a plant closing in certain circumstances. An employer who requires its employees to give advance notice of resignation must give its employees a corresponding notice of any shutdown or cessation of work. The notice must be posted in each room of the employer's building two weeks in advance or the same length of time in advance of the shutdown as is required of employees before they quit work. The notice must contain the date the shutdown will begin and the approximate length of time the shutdown is to continue. Any employer who fails to provide this required notice may be fined up to $5,000 and may be liable to its employees for any damages they suffer resulting from the failure to give notice.

D. TIPS FOR EMPLOYERS

LLR will provide employers with information concerning the coverage and administration of laws within its jurisdiction. However, since the Department is also responsible for enforcement of these laws, it is usually in an employer's best interest to seek the advice of SDA and/or qualified labor counsel before contacting the Division of Labor for anything other than routine information.

For further general information, a copy of a pamphlet issued by the Department containing the laws that it administers may be ordered from:

South Carolina Department of Labor, Licensing and Regulation Post Office
ContactLLR@llr.sc.gov

110 Centerview Dr.

Columbia, SC 29210

Tel: (803) 896-4300

Office Hours: 08:30 a.m.- 5:00 p.m.

World Wide Web home page address: www.llr.sc.gov.

2. Garnishment of Wages in South Carolina

A. BACKGROUND

A garnishment is a court order directing a garnishee (someone in possession of property belonging to a debtor) to hold the debtor's property pending resolution of a dispute between the debtor and a creditor. Employers may be placed in the role of a garnishee if a court orders the employer to withhold wages due an employee for payment of some debt owed by the employee.

A wage assignment differs from a wage garnishment in that an assignment is a voluntary agreement by the employee (debtor) to transfer or allow payment of his wages or a portion thereof to a creditor.

Various federal and state laws restrict the extent to which wages can be garnished or assigned. In South Carolina, wage garnishments have, for the most part, been eliminated by law. However, wages can still be garnished for federal and state taxes, by order of a bankruptcy court, or for child or spousal support. South Carolina law also makes acceptance of employee wage assignments by employers voluntary in most cases.

Employers must comply with the garnishment orders issued by courts of other states in certain circumstances. Failure to comply with garnishment orders can lead to complete and immediate liability for the underlying debt. Employers should consult legal counsel upon receiving any garnishment order.

B. HOW THE LAW WORKS

Garnishments

The wage garnishment process starts when a creditor sues a debtor for debts owed. The court, if it deems appropriate, will issue a set of papers to the employer. These papers include an order of attachment, a summons and a notice of levy.

The summons directs the employer to report to the court whether the employer owes unpaid wages to the employee involved. Normally, the employer will admit that he owes specified, unpaid wages to the employee, but there are procedures for denying any such debt. The attachment order will normally direct an officer of the court to seize the property or wages in the hands of the garnishee (employer). The notice of levy notifies the employer that a lien has been created on the earnings of the employee and prohibits transfer of the earnings to the employee pending resolution of the dispute.

If the employer acknowledges owing the unpaid wages, the court will enter a judgment for the amount of wages owed to the employee or for the full amount of the debt, whichever is less.

The employee's garnished wages, subject to certain federal and state limitations, must then be paid by the employer to the court for disbursement to the employee's creditors.

Limitations on Wage Garnishments

1. South Carolina Law

South Carolina law prohibits garnishments for debts "arising from a consumer credit sale, a consumer lease, a consumer loan, or a consumer rental-purchase agreement regardless of where made,." S.C. Code Ann. § 37-5-104. The law allows garnishment of wages for payment of taxes, garnishments pursuant to the order of a federal bankruptcy court under Chapter 13 of the Bankruptcy Act, or child or spousal support orders.

2. Garnishment for Child or Spousal Support

Under South Carolina law, all child or spousal support orders must contain a provision stating that the employee's wages will be subject to withholding if the employee is in arrears in child or spousal support payments or upon the request of the employee. In the event withholding is necessary, the Family Court must send the employer a Notice to Withhold, which must state the employer's rights and obligations and the specific amount to be withheld. The amount withheld cannot exceed 50 percent of the employee's disposable (after tax) income. Upon receipt of the Notice to Withhold, the employer is required to:

- Pay the Clerk of Court the amount specified in the Notice;
- Continue withholding until further notice;
- Notify the court if the employee is terminated for any reason and supply the employee's last known address, and new employer's address, if known; and
- Notify the court if health insurance is available to the employee for the benefit of the children for whom the income is being withheld.

Employers who fail to comply with the Notice to Withhold become liable for the amount they should have withheld. In addition, employers cannot discharge, refuse to hire, or take disciplinary action against an employee solely because of the withholding. An employer guilty of such conduct may be forced to reinstate the employee, pay damages suffered by the employee, and pay a fine.

An employer may charge an employee up to $3.00 for each paycheck in which a withholding is required.

3. Federal Restrictions: Consumer Credit Protection Act

Federal law generally limits garnishments on earnings to the smaller of:

- Twenty-five percent of the debtor's disposable weekly earnings; or
- The amount by which the employee's earnings exceed thirty times the applicable federal minimum wage.

The Federal wage garnishment law specifies that its limitations on the amount of earnings that may be garnished do not apply to certain bankruptcy court orders or to debts due for federal or state taxes.

If a state wage garnishment law differs from Title III, the law resulting in the

lower amount of earnings being garnished must be observed.

4. Federally Financed Student Loans

As the agency responsible for administering the programs that provide federal loan financing for higher education, the U. S. Department of Education pursues the collection of unpaid student loans. The Higher Education Act, 20 U.S.C. § 1095a, authorizes the Department of Education, as well as student loan guaranty agencies, to collect defaulted federally-financed student loans by means of an administrative order to the employer without the need for a court order. This order requires the employer to withhold and pay over to the Department of Education or the guarantor up to 15% of the debtor's disposable pay. This federal law supersedes any state law governing wage garnishment.

5. Assignments

South Carolina law requires that any assignment of wages by an employee must be revocable. However, an employer does not have to honor any assignment of future wages if it does not desire to do so.

C. ACTION REQUIRED BY EMPLOYERS

Upon receiving a valid garnishment order, employers must comply with the order or risk liability to the employee's creditor for the amount of the garnished wages.

D. TIPS FOR EMPLOYERS

Court Orders Required

All valid and enforceable wage garnishments should be supported by court orders. These orders normally take into consideration the limitations on wage garnishments discussed above. If garnishment is sought without a valid court order, consult your attorney as soon as possible.

An exception to this is the federal law, the Higher Education Act, 20 U.S.C. § 1095a, allowing garnishments for non-payment of federally financed student loans. The statute allows the guaranty agency to issue a withholding order directly to an employer without a separate court order.

Discharge or Discipline for Wage Garnishments Restricted

The Consumer Credit Protection Act prohibits an employer from discharging an employee for garnishment of wages arising out of a single indebtedness. The courts have held that employers may also violate Title VII of the Civil Rights Act by discharging certain employees for incurring wage garnishments because discharges for garnishments can have a disparate impact on certain protected classes of employees.

South Carolina laws allowing garnishments for child or spousal support also prohibit discharging an employee solely because of garnishments.

3. Occupational Safety and Health Act of South Carolina

A. BACKGROUND

In 1970, Congress passed the Occupational Safety and Health Act to promote safety and health in the workplace. The Act is generally administered by the Occupational Safety and Health Administration, a federal agency within the U.S. Department of Labor. However, the Act provides that states with approved plans may administer the law in place of the federal government. In 1972, federal OSHA authorities approved an OSHA plan for South Carolina. [S.C. Code Ann. § 41-15-80 et. seq.] As a result, the Occupational Safety and Health Division of the South Carolina Department of Labor, Licensing, and Regulation has exclusive authority for enforcing OSHA standards and regulations in most industries in the state.

B. HOW THE LAW WORKS

Coverage

Virtually all private and public employers in the state are covered by the South Carolina Occupational Safety and Health Act ("SCOSHA") and those excluded from the state level such as maritime employees or USPS are covered under the Federal OSHA. The Act defines employer as any "individual, partnership, joint venture, cooperative association or corporation licensed to do business in the state, and the State of South Carolina and any political subdivision thereof." Some classes of employees are exempted from coverage, including employees of the federal government and certain railroad, maritime, and mining employees.

Both Federal and South Carolina Occupational Safety and Health Act exclude the enforcement of the field sanitation standard (29 CFR 1928.110) and the temporary labor camps standard (29 CFR 1910.142) with respect to any agricultural establishment where workers are engaged in "agricultural employment" within the meaning of the Migrant and Seasonal Agricultural Worker Protection Act, 29 USC. 1802(3) – regardless of the number of workers – including workers engaged in hand packing of produce into containers, whether done on the ground, on a moving machine, or in a temporary packing shed. South Carolina retains enforcement responsibility over agricultural temporary labor camps for workers engaged in egg, poultry, or red meat production, or the post-harvest processing of agricultural or horticultural commodities.

Occupational Safety and Health Standards

In general, the Act requires that employers and employees: (1) comply with all applicable occupational safety and health standards, rules, and regulations, and (2) comply with the "general duty clause."

1. **Industry Standards**
   There are thousands of specific safety and health requirements contained in dozens of standards that apply to various industries. Employers should obtain a copy of the General Industry Standards and review them to ensure compliance with applicable standards. The standards are readily available at www.OSHA. gov. Some areas which deserve special emphasis in manufacturing facilities include hazard communication, wiring and electrical equipment, fire protection equipment, material handling equipment, machine guarding, storage of flammable liquids, accumulation of hazardous fumes, use of personal protective equipment, toilet and washroom facilities, and general housekeeping.

2. **General Duty**
   In addition to specific industry standards, SCOSHA contains a "general duty clause." The general duty clause is a catch-all provision which requires employers to furnish to its employees a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and shall comply with occupational safety and health rules and regulations. A violation of the general duty clause will be found if a situation exists that is not covered by a particular standard but is generally recognized as hazardous in a particular industry or the employer has knowledge of a situation that presents a potential hazard of death or serious injury to employees.

3. **Citations and Penalties**
   If a compliance officer discovers a suspected violation of a specific standard or the general duty clause during an inspection, a citation will normally be issued. Citations listing any violations found during an inspection will be mailed to the employer and must be posted in a conspicuous place at or near the site of the violation for three (3) working days or until the violation is corrected, whichever is later, to warn employees of the danger that may exist. Citations are classified as follows:

   a. **De minimis**
      A violation of a standard exists but has no direct or immediate relationship to safety and health. Under these circumstances, SCOSHA reasons that there is a remote chance of minor injury. Fines are not assessed for de minimis violations.

   b. **Other than Serious**
      A violation exists with a direct or immediate relationship to safety or health but does not raise a substantial probability that death or serious physical harm would result. Fines up to $7,000 per violation are possible, but no less than $1,000.

   d. **Serious**

      A violation exists that raises a substantial probability of causing death or serious physical harm, if an accident were to occur and the employer knew or

should have known (with the exercise of reasonable diligence) of the violation. Fines up to $7,000 per violation are possible, but no less than $1,000.

e. Repeat Violation

A repeat violation occurs when a final order has been issued previously for a substantially similar violation. A "substantially similar violation" refers to the facts underlying the issuance of the citation and specifically refers to the hazards involved. A fine of up to $70,000 per violation is possible.

f. Willful Violation

Willful violations occur when the employer has knowledge of the hazard and the regulations that are violated and still shows an intentional disregard or plain indifference to the requirements. No malicious intent is necessary. The most common way for the government to prove this type of violation is to introduce evidence of prior violations of the same standard by the employer. A fine of not less than $5,000 and not greater than $70,000 will be assessed for each violation.

g. Criminal

If a willful violation causes the death of an employee, the employer shall be guilty of a misdemeanor, and upon conviction, punished by a fine of not more than

$10,000 or imprisonment for not more than six months, or both. These penalties may be doubled for second time offenders.

h. Notice of Failure to Abate

A notice of failure to abate is issued when an employer fails to take the abatement measures within the time allowed in a previous uncontested citation or final order. Fines of up to $7,000 per day can be assessed for failure to abate.

4. Enforcement

a. Inspections

Compliance officers or industrial hygienists from the South Carolina Office of Occupational Safety and Health conduct SCOSHA inspections. There are several types of inspections including: (1) general administrative inspections designed to check pre-selected employers for compliance on a periodic basis, (2) inspections prompted by an employee complaint, and (3) inspections prompted by an occupational fatality or hospitalization of three or more employees. In addition, SCOSHA sometimes attempts unscheduled inspections when they are already in a locale and have time available.

Inspections usually begin when a compliance officer or hygienist arrives at a facility (usually unannounced), presents his or her credentials, and requests entry to conduct an inspection. During the inspection, the inspector usually speaks with management and employees, reviews documents, and conducts a "walk- around" of the site in general inspections and of the accident site

in the event of an incident involving a death or injuries. Employers and employees have the right to participate in the walk-around, as does a union representative if the employees are organized, but the inspector may limit the total number of people participating if necessary.

Employers have a constitutional right to demand that the inspector obtain a search warrant before allowing an inspection. If such a demand is made, the inspector must go to a judge and show that the inspection is being conducted in accordance with an established inspection plan. Warrants can also be obtained based on employee complaints or a report of a fatality or accident that resulted in the hospitalization of three or more employees. Whether an employer should require a warrant is an important question that should be considered in advance of an inspection. Additional information on the question of whether to require a search warrant is presented in the Tips for Employers section of this chapter.

b. Contesting Citations

If a citation is issued as a result of an inspection, the employer can: (1) accept the findings, correct the violation, and pay a monetary penalty (if required), or (2) disagree with any part of the findings, including the violation itself, the amount of time given to correct the violation, or the proposed penalty. An employer may request an informal conference with the South Carolina OSHA Office within 5 days of receipt of the citation, or may seek a formal hearing by filing a written hearing request with the South Carolina Administrative Law Court within 30 calendar days after receiving notice of a citation. If the citation is contested, a hearing will be scheduled before an Administrative Law Court Judge. In these hearings, the State has the burden of proving that the employer knowingly exposed its employees to hazardous conditions. The State must also show what actions the employer should have taken to abate the hazard and the feasibility of such abatement measures.

After the hearing, the Court will render a decision on the citation. The Court's decision may then be appealed through the state courts.

Nondiscrimination Provisions

1. Discrimination for Exercising Rights Under the Act

South Carolina and Federal law specifically prohibit discrimination against, or discharge of an employee who has filed a complaint, instituted any proceeding or inspection under SCOSHA, testified or is about to testify in any such proceeding or has exercised on his or her own behalf, or on behalf of others, any right affected by the SCOSHA. Any employee who believes he has been the subject of such discrimination may file a complaint with the Director of the South Carolina Department of Labor, Licensing and Regulation or the nearest federal OSHA office. The Director must investigate the charge and institute proceedings in the Court of Common Pleas if the investigation reveals evidence of discrimination. The Court is authorized to enjoin the discrimination and give appropriate relief including reinstatement with back pay.

2. Refusal to Perform Dangerous Work

SCOSHA [as well as the National Labor Relations Act] places a number of restrictions on an employer's right to discipline employees who refuse to perform certain jobs or tasks for safety or health-related reasons. Under SCOSHA, an employee may refuse to do a task or job if he maintains a good faith belief that performing the task or job would result in death or serious bodily injury. An employee who refuses to perform assigned tasks for this reason is protected from discrimination and discharge provided that the employee's fear was "reasonable."

3. Walk-Around Pay

SCOSHA regulations require that an employer pay an employee for time spent accompanying an OSHA compliance officer during a workplace inspection. An employer's failure to pay an employee for time during which he or she is engaged in walk-around inspections is considered discrimination.

C. ACTION REQUIRED BY EMPLOYERS

In addition to complying with specific industry standards and the general duty clause, employers should also be aware of the following requirements:

Log and Summary (OSHA Form 300)

Covered employers are required to maintain a log and summary of all recordable occupational injuries and illnesses at each establishment. In general, employers are required to keep records of fatalities, injuries, and illnesses that are work- related, constitute a new case, and result in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness.

Recordable injuries and accidents must be entered on the log as soon as practicable but no later than seven calendar days after knowledge that a recordable injury or illness has occurred.

Individual Injury and Illness Reports (OSHA Form 301)

In addition to the log, covered employers must also prepare an individual report for each recordable occupational injury or illness on OSHA Form 301. This form must also be completed within seven calendar days from the time the employer has knowledge of the injury or illness. State Workers' Compensation Form 12-A may be used as a substitute for OSHA Form 301 if it contains similar information.

Posting of Annual Summary

Covered employers must also prepare and post by February 1 of each year a summary of all recordable occupational injuries and illnesses for the preceding calendar year on OSHA Form 300A. A company official who must sign and date the summary must certify the summary. The summary must remain posted at each establishment until April 30.

Exemptions for Small Employers and Certain Industries

Employers with 10 employees or less are exempt from the above recordkeeping requirements. Employers in industries proven to be the least hazardous are also exempt from the above requirements. These industries include certain retail trades, finance, insurance, real estate and insurance establishments. [See Federal OSHA Regulations, Standards 29 C.F.R. § 1904.2.]

Fatality and Hospitalization Reports

Any accident or job-related incident that results in a death or hospitalization of three or more employees must be reported to the Office of Occupational Safety and Health in Columbia, South Carolina within eight hours. The report may be made by telephone and must include the nature of the accident, number of fatalities or number hospitalized and extent of injuries. In most cases, an onsite investigation will be conducted as a result of the report.

Other Requirements

There are dozens of other requirements contained in individual standards and regulations that may apply to a specific employer. Examples include exposure records for toxic substances and air contaminants, inspection records for fire extinguishers and inventories of flammable and combustible materials. The General Industry Standards should be examined to determine if any of these requirements are applicable. SCOSHA standards also require that all employee medical records be kept for the duration of employment plus 30 years. Records of employee exposure to toxic substances must be kept for 30 years from date made or received by the employer. Other OSHA forms, such as OSHA Forms 300 and 301 must be kept for five years following the year to which they relate.

Access to Records

Upon request, OSHA Forms 300, 301, and the annual summary must be made available to certain federal and state officials for inspection and copying. In addition, OSHA Form 300 and the annual summary must be made available upon request to any employee, former employee or their representative at reasonable times and places for inspection and copying. Access to employee medical records of exposure to toxic substances is also required under certain circumstances.

Hazard Communication Standard

Federal OSHA issued the Hazard Communication Standard, or HCS, in November 1983 (29 C.F.R. § 1910.1200). It requires evaluation of hazards in the workplace and communication of those findings to employees. The South Carolina Department of Labor has adopted the federal standard. The federal Hazard Communication Standard may be reviewed on the OSHA Website at: www.osha.gov.

The HCS imposes four basic requirements upon employers:

1. Safety Data Sheets ("SDS")

Employers must make SDS accessible to employees for each hazardous chemical in their workplace. Chemical purchasers are entitled to rely upon SDS provided by the manufacturer, distributor or importer absent clear errors or omissions. Chemical manufacturers have the obligation to conduct hazard determinations and transmit them to distributors and purchasers. Section 1910.1200(g) of the HCS lists categories of information that must be present. Certain trade secret information may be withheld from the SDS, but medical personnel, including nurses, have access to these secrets under specified conditions.

As of 2021, Safety Data Sheets have a new format consisting of 16 required sections:

1. Identification of the substance/mixture and of the company/undertaking
2. Hazards identification
3. Composition/information on ingredients
4. First aid measures
5. Fire-fighting measures
6. Accidental release measures
7. Handling and storage
8. Exposure controls/personal protection
9. Physical and chemical properties
10. Stability and reactivity
11. Toxicological information
12. Ecological information
13. Disposal considerations
14. Transport information
15. Regulatory information
16. Other Information

https://www.osha.gov/sites/default/files/publications/OSHA3514.pdf

2. Labels

Each container of hazardous chemicals must be labeled. A container can be a small vial, can, reaction vessel, or even a railroad car. Pipes are not considered containers. Manufacturers, importers and distributors must label the chemical with its identity, name, address, and telephone number of the chemical manufacturer, importer, or other responsible party, product identifier, signal word, hazard statement, pictogram, and precautionary statement. Labels can be tags, tickets, signs, etc. Certain chemicals are exempt from the labeling requirement. (29 C.F.R. § 1910.1200(b)(4)).

Medical records of exposure to toxic substances is also required under certain circumstances.

OSHA Poster

All South Carolina employers must display the official OSHA poster in an area in which employees congregate. The new consolidated poster contains the required information.

1. Training

Employers must train employees in detection of hazardous chemicals, prevention of injury, the location of hazardous chemicals, the requirements of the HCS and availability of the communication program itself. Generic programs and audiovisuals may be used if supplemented to meet the specific needs of a facility.

2. Written Hazard Communication Program

Employers are required to develop a written program describing how they have met the labeling, SDS and employee training provisions. Programs may be developed for each distinct work area or the entire facility. The program(s) should include evidence of compliance with the HCS and be made available to employees, their designated representatives and to OSHA inspectors.

Chemical manufacturers have two additional burdens. They must conduct hazard determinations on the chemicals they manufacture and develop an SDS for those found to be hazardous. The SDS for each must be transmitted to distributors and purchasers of the chemicals, as well as made available to foreseeably exposed employees.

The most basic step toward compliance with the HCS is identification of hazardous chemicals. A chemical is deemed hazardous if it poses a physical or health hazard. Certain categories are deemed hazardous (e.g., irritants, carcinogens, toxins, corrosives, compressed gasses, flammables, etc.), as well as chemicals found to produce acute or chronic health effects in at least one scientific study (see also § 1910.1200(c) and Appendices A and B of the Standard). Hazardous wastes, tobacco, wood, certain employee consumables and articles are exempt from coverage.

D. TIPS FOR EMPLOYERS

OSHA Inspection Policy

All employers should have a comprehensive written OSHA inspection policy in order to be prepared when the SCOSHA inspector arrives. SCOSHA inspectors are normally courteous and businesslike, but keep in mind that they are charged by law to cite employers for each and every violation noted during the inspection. As an agent of the company, everything that is said by management can, and probably will, be used against the company. OSHA would win fewer cases if company officials who attempt to "explain away" violations or argue with an inspector about some part of the inspection did not assist them.

An OSHA inspection policy should designate specific management personnel to greet and accompany the inspector during the inspection. Contacts with other members of management should be limited to the extent possible. In addition, the OSHA inspection policy should:

- **Require the designated company official to record all necessary information concerning the inspector, the areas inspected and any tests**

or photographs taken.

- **Instruct the designated official to be courteous and to avoid arguing or admitting the existence of any violation.**
- **Instruct the designated official to use a route to the area to be investigated that minimizes contact with other plant operations.**
- **Instruct the designated plant official to inform the inspector of any trade secrets the inspector is exposed to and request confidentiality.**

In sum, the company representative should: (1) be courteous, (2) get the facts, (3) limit the scope of the investigation when possible, and (4) avoid making harmful admissions. These steps will help reduce the possibility of receiving an OSHA citation.

Free Training and Consultation

The South Carolina OSHA Office offers free regional and onsite training designed to help employers address occupational safety and health issues. For more information, contact the South Carolina OSHA Office of Voluntary Programs, P.O. Box 11329, Columbia, SC 29211, phone (803) 896-7788 or fax (803) 896-7750. The Office also offers free and confidential consultation to employers, including courtesy inspections, technical assistance, and management analysis. The employer must agree to correct all hazards identified during the consultation and verify those corrections have been made, but any violations or hazards identified during the consultation will not be cited or assessed a penalty. Employers interested in a consultation should send a written request to the S.C. OSHA Office of Voluntary Programs, P.O. Box 11329, Columbia, SC 29211, phone (803) 896-7744 or fax (803) 896-7750.

Search Warrants

As noted above, an employer may lawfully deny access to an SCOSHA inspector who does not have a search warrant. This right may be exercised merely by telling the inspector that the company will not consent to a warrantless inspection. In most cases, however, it is not difficult for an inspector to obtain a warrant and requiring a search warrant may subject an employer to closer scrutiny after the warrant is issued. On the other hand, there may be occasions where there are valid reasons for refusing to consent to a warrantless inspection. Whether to require a search warrant is a business and legal decision that should be discussed with labor counsel before the inspector's arrival. This discussion can lead to a general policy regarding search warrants. Exceptions to this general policy can then be made on a case-by-case basis.

Contesting Citations

The decision of whether to contest a citation should not be taken lightly. An uncontested citation is, in effect, an admission of a violation that could later lead to "repeat," "willful," or even "criminal" violations. In deciding whether

or not to contest a citation, an employer should consider the nature and seriousness of the citation, the proposed penalty, its record of prior citations and the abatement posture of any citations that have not been completely abated.

Audit Standards

Review and audit all standards that may apply to your operations such as forklift training, reporting of power press accidents, requirements relating to hazardous substances, etc.

Hazard Communication

Compliance with the Hazard Communication Standard ("HCS") should be approached methodically. A good beginning is development of a facility-wide chemical inventory containing all chemicals. Using this list, those chemicals considered hazardous can be identified for inclusion in the HCS program. As new chemicals enter the workplace, they should be added to the list and classified. There are many exceptions, cross-references, definitions, and requirements in the HCS. Be sure to seek qualified assistance.

4. Public Employers in South Carolina

A. BACKGROUND

Federal and state employment laws that cover private employers may not apply to public employers in South Carolina. Additionally, certain employment laws apply to public employers but not to private employers. The applicability of federal and state employment laws to public employers is discussed below.

B. HOW THE LAW WORKS

Exclusion From National Labor Relations Act

The National Labor Relations Act does not cover employees employed by any state or political subdivision of a state. In determining whether an entity is exempt from the NLRA as a "political subdivision," the NLRB considers such factors as whether the entity: (1) has authority to exercise the power of eminent domain, (2) is created directly by the state, or administered by state-appointed or elected officials, (3) is administered by individuals who are responsible to public officials or to the general electorate, (4) was created by governmental act, (5) is being financed with government funds, and (6) maintains a tax status comparable to the state or other political subdivisions.

Examples of "political subdivisions" that have been exempted from NLRB jurisdiction include counties, cities, school boards, school districts, public hospitals, component universities comprising a state's university system, city- operated gas and electric utilities, and certain urban development agencies and community service organizations. Additionally, certain government contractors have been found to be outside the jurisdiction of the NLRB because of their contractual relationship with a state or political subdivision of a state.

Right to Join a Union and Bargain Collectively

Public sector employees in South Carolina have a constitutionally protected right to join a union. However, the State of South Carolina Attorney General has stated that the state or its subdivisions have neither the obligation nor the right to enter into collective bargaining agreements with public employees. Thus, while public sector employees in South Carolina are free to join labor unions, the state cannot enter into a collective bargaining agreement with a union.

Dues Deductions

State law provides that any employee of the State may request deductions from his or her compensation for the payment of membership dues for the South Carolina State Employees' Association, the South Carolina Troopers' Association and the South Carolina Law Enforcement Officers' Association. However, no deduction is permitted if the association at any time engages in collective bargaining or encourages their members to strike. Dues may not be deducted for a national or multi-state association or group.

Employment Discrimination

1. Federal Law

Generally, all federal job discrimination statutes that apply to private-sector employees also apply to public employees (see Chapter 12/Equal Employment Opportunity Law). Additionally, Section 1983 of the 1871 Civil Rights Act has been interpreted to apply to state and local government employers. Section 1983 makes liable "every person" who, under color of statute, ordinance, regulation, custom, or usage, subjects or causes to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges and immunities secured by the Constitution and laws. The law prohibits discrimination in employment because of race, but like Section 1981 of the 1866 Civil Rights Act does not apply to discrimination because of sex, religion, age or disability.

2. South Carolina Law

All state departments and local political subdivisions are required by statute to provide equal opportunity in employment without regard to race, religion, color, , national origin, sex, age, or physical disability to all persons otherwise qualified, except where specific age, sex, or physical requirements constitute bona fide occupational qualifications. Another statute bans discrimination in the state's hiring policies with regard to any applicant for employment based upon any physical handicap or impairment, unless the defect to some degree prevents the applicant from performing the required duties. A similar statute also requires that handicapped persons be employed in the state services, the service of the political subdivisions of the state, in the public schools, and in all other public and private employment, on the same terms and conditions as the able-bodied, unless it is demonstrated that the particular disability impairs the performance of the work involved.

The South Carolina Human Affairs Commission is recognized by the EEOC as a deferral agency for all charges of discrimination filed by employees of the state and its political subdivisions. As such, the department has the authority to

process charges of discrimination filed with it. Those filed with the EEOC are deferred to SCHAC for investigation. Employees of state departments, the university system and county government are covered.

Veterans

Honorably discharged members of the United States Armed Forces who are given employment preference by the United States Government shall be given preference for appointment and employment in every public department and upon all public works as long as such preference may be practicable; age, loss of limb or other physical impairment which does not in fact incapacitate shall not be deemed to disqualify them, provided they possess the capacity of skill and knowledge necessary to discharge the duties of the position involved.

State employees called to active duty in the armed forces for at least 90 days, but not more than 5 years, are entitled by statute to an unpaid leave of absence. Upon

returning from active duty, the employee is entitled to resume his position without loss of seniority or register rating.

State employees who are members of the National Guard or the reserves are entitled to paid leave for up to 15 working days per year in order to attend training or other required duties. Employees are entitled to an additional 30 days leave if called for an emergency.

Wage and Hour Law

The U.S. Supreme Court has ruled that the Fair Labor Standards Act covers state and local governments. Federal minimum wage and overtime requirements therefore apply (see Chapter 3/Fair Labor Standards Act). Special provisions may apply to hospital, fire protection and law enforcement employees. Public employers must also comply with the provisions of the South Carolina Wage Payment Statute (see Chapter 8 on South Carolina Wage and Hour Law).

Federal and State Safety Law

The definition of "employer" in the Occupational Safety and Health Act of 1970 specifically excludes state and local governments from its coverage. However, South Carolina's occupational safety and health plan includes public sector employers and employees, with the exception of those employed in maritime, railroads, mining and federal operation (see Chapter 3 on Occupational Safety and Health Act of South Carolina). Unlike private employers, civil or criminal penalties may not be imposed against any state agency or political subdivision for violations of the state job safety and health plan.

Workers' Compensation

Most public sector employees are covered by the South Carolina Workers' Compensation Act (see Chapter 9 on South Carolina's Workers' Compensation Law).

Employment Security Law

Most public sector employees are covered by the South Carolina Employment Security Law (see Chapter 7 on South Carolina Employment Security Law).

State Employee Grievance Procedure

A grievance procedure established by the State Employment Grievance Procedure Act applies to employees of any governmental unit of the State of South Carolina. Local government employees are not covered under the state grievance procedure. However, the County and Municipal Employees Grievance Procedure Act encourages, but does not require, local government entities to establish grievance procedures. If a city or county government adopts a grievance procedure, it must comply with the requirements of the Act. The Act's provisions relating to city or county employees are discussed in the next section.

Each state agency must develop and provide to each covered employee a written internal grievance procedure. The internal plans must require that any grievance be filed within 14 calendar days of the effective date of the challenged action. The agency must issue a final written decision on the grievance within 45 days of the filing by the employee. The employee is to consider an agency's failure to respond within 45 days

as an adverse decision.

An employee wanting to appeal the decision of the agency grievance committee must file a request to appeal to the State Employee Grievance Committee within

10 days of receipt of the decision or within 55 days of filing the grievance, whichever occurs first. The request to appeal is filed with the state personnel director.

After determining that the employee has complied with the agency grievance procedure, the state personnel director must attempt to mediate the grievance. The state personnel director must review the record and meet with both the grievant and an agency representative to investigate the grievance. If an agreement cannot be reached, the state personnel director must prepare tentative findings and a recommendation as to resolution of the appeal. Each party must file a written response within 10 days either accepting or rejecting the recommendation.

Absent agreement, a panel of the State Employee Grievance Committee will hear the appeal. The Committee must issue its decision on the appeal within 20 days of the hearing.

Any appeal from the Committee's final decision is to the Court of Common Pleas pursuant to the Administrative Procedures Act.

Local Government Grievance Procedures

If a local government body elects to implement a grievance procedure, the procedure must contain at least the following:

- A grievance committee consisting of three to nine members;
- When an employee cannot satisfactorily resolve a dispute concerning a dismissal, suspension, involuntary transfer, demotion, or promotion, etc., he may file a written request with the local governing body for a hearing before the committee;
- The hearing must be scheduled within 10 days of receipt of the employee's request;
- Within 20 days of the hearing the committee must report its decision to the governing body;
- If the governing body approves the decision, it becomes final and is transmitted to the employee and the agency involved. If the governing body disagrees with the decision, it makes its own decision with no additional hearing. This decision is then transmitted to the employer and agency involved; and
- The finality of the decision by the county or municipal grievance committee or the governing body does not preclude judicial review of that decision, where the decision at issue is the decision to terminate an employee. The language of the statue that the decision of the body vested with discharge authority shall be "final" refers to the exhaustion of the complaining employee's administrative remedies.

Right to Know Act/Hazard Communication Standard/Title III

South Carolina state and local governments are covered by the Hazardous Chemicals Right to Know Act, as well as the OSHA Hazard Communication Standard (see ***Chapter on Occupational Safety and Health Act of South Carolina***). Title III of the

Superfund Amendments may also apply to state agencies.

Handicapped Protection Act

The state government and its political subdivisions are covered by the South Carolina Handicapped Bill of Rights (see ***Chapter 6 on State Disability Laws***). In fact, public employers are required to file annual affirmative action plans setting forth a plan to promote the hiring of handicapped employees.

Retaliation for Reporting Corruption, Criminal Activity or Waste

No adverse employment action may be taken against any state or local government employee for exposing governmental criminal activity, corruption, waste, fraud, gross negligence or mismanagement. However, an employee may be disciplined for making this type report without probable cause to believe the report is accurate.

Medical and Personal Leave

The Family and Medical Leave Act of 1993 applies to public employers with 50 or more employees. Generally, employees with at least 1,250 hours of service with the employer during the previous 12 months are entitled to 12 weeks of unpaid leave for the birth or placement of a child; because of a serious health condition of a spouse, child or parent; or because of an employee's own serious health condition.

Aside from leave provided by the FMLA, state employees are entitled to use up to 6 weeks of accrued paid sick leave to care for a newly adopted child after placement. Moreover, state employees are entitled to use up to 10 days annually of accrued paid sick leave to care for ill members of his/her immediate family. Public employers are entitled, but are not required, to count this leave against the 12-week entitlement under the FMLA.

C. ACTION REQUIRED BY EMPLOYERS

Posters

Covered public employers are required to display state and federal posters in the same manner as covered private employers. A list of required posters can be found in Chapter 17/***Recordkeeping & Posters*** and the Chapter on ***South Carolina Recordkeeping & Posters***.

State and Local Government Report, EEO-4

Report Form EEO-4 must be filed annually with the EEOC by all state and local government jurisdictions with 100 or more employees. State and local governments with 15 or more employees must maintain records of the information required on the form and may be required to submit an EEO-4 report as part of an annual sample of jurisdictions with 15-99 employees.

Although union activities of public-sector employees are not covered by the NLRA, certain union activities by public employees are protected under the U.S. Constitution. Specifically, the First Amendment protects the right of an individual to speak freely, to advocate ideas, and to associate with other persons to further their personal beliefs. Additionally, the Equal Protection Clause of the Fourteenth Amendment protects public employees from being denied a benefit for reasons that infringe on the employee's constitutionally protected interests-- particularly the employee's freedom of speech.

While the Constitution does not impose any obligation on a public sector employer to bargain with a labor organization, the public employer is prohibited from infringing upon these Constitutional guarantees or imposing sanctions for the expression of particular views it may oppose. For example, a public employer may not prohibit an employee from speaking openly about unionization because that would constitute an infringement of the employee's First Amendment right of free speech. Similarly, while a public employer has no obligation to provide the use of its facilities (e.g., bulletin boards, meeting places) for use by the employee organizations, once it does so, or allows the public to use the facilities, it may not be able to single out a particular employee organization and deny it the use of such facilities because of that group's interest in organizing employees.

5. Recordkeeping and Posting Requirements

A. BACKGROUND

A number of state laws contain recordkeeping and posting requirements. South Carolina employers should keep abreast of these requirements in order to avoid penalties for noncompliance.

B. HOW THE LAW WORKS

Recordkeeping

SC EMPLOYMENT SECURITY LAW Applies to employers with at least 1 employee in each of 20 different calendar weeks in either the current or preceding year.	
For each pay period: • the beginning and ending dates and • the largest number of workers employed during each calendar week of that pay period.	5 years. S.C. Code Reg. 47-14.
For each individual employee: • his/her name and social security number, • number of hours worked each week (if less than full-time), • monetary wages paid (including special payments), • reasonable cash value of remuneration paid in other than cash, • the date he/she was hired, rehired, or returned to work after temporary layoff, and the date or reason he/she was separated from employment.	
Regarding eligibility for partial benefits for each employee: • the wages earned by weeks, • whether any week was less than full-time, and • time lost due to the employees unavailability for work. S.C. Code Reg. 47-14.	

SOUTH CAROLINA WORKERS' COMPENSATION LAW Applies to employers with 4 or more regularly employed employees.	
A record of all work-related injuries, fatal or otherwise, reported by employees in the course of employment, on Form 12A supplied by the Commission. S.C. Code Reg. 67-411.A.	2 years. S.C. Code Reg. 67-411.B.

Posting

Various state and federal laws require employers to post legal notices in the workplace. A summary of South Carolina posting requirements is set forth in the chart below. Employers are encouraged to review on a periodic basis the information concerning posting requirements on the South Carolina Department of Labor, Licensing & Regulation website to ensure ongoing compliance with federal and state law, as existing posters are revised periodically and new posting requirements added.

South Carolina Law

In addition to federal law posting requirements outlined in Chapter 17, all employers in South Carolina are required to post the following employment notices:

1. Labor Law Abstract (Payment of Wages and Child Labor)
2. Employment Discrimination
3. Safety and Health Protection on the Job
4. Unemployment Insurance
5. Workers' Compensation
    - These notices are available as an all-in-one poster on the SC DLLR website.
6. SC Human Affairs Commission Law
    - Available on the SCHAC website - https://schac.sc.gov/.

C. ACTION REQUIRED BY EMPLOYERS

Employers are required by state and federal law to retain certain records for prescribed minimum periods of time and to post certain notices advising employees of their rights under various laws, as set forth in the tables above.

D. TIPS FOR EMPLOYERS

To ensure ongoing compliance with posting requirements and avoid penalties, employers should periodically review the websites of the S.C. Department of Labor, Licensing & Regulation, SC Human Affairs Commission and the U.S. Department of Labor, as existing posters are revised and new posters added periodically. Employers should post all required notices in conspicuous locations on their premises where they are readily accessible to employees.

In the world of remote work, employees are still required to have access to the information included on employment posters. It is a best practice to send copies of all the applicable required posters with new hire paperwork and post on a company intranet, if applicable.

The US DOL issued Field Assistance Bulletin 2020-7 to provide guidance on acceptable electronic distribution of employment posters.

The guidance states electronic versions of employment posters are acceptable if:

- **Employees regularly receive communication electronically and,**
- **Employees always have readily available access to the posters.**

Furthermore, the following federal posters must be accessible to applicants. They should be featured on the careers section of your website, if applicable.

- **FMLA**
- **EEO**
- **Employee Polygraph Protection Act**
- **E-Verify Participation / E-Verify Right to Work**

State and federal recordkeeping requirements are complex and varied. Employers, in consultation with legal counsel, should implement and maintain comprehensive record retention policies.

6. State Disability Laws

A. BACKGROUND

Both federal and South Carolina law prohibit discrimination against individuals with disabilities. South Carolina prohibits discrimination against the disabled under the South Carolina Human Affairs Law. Additionally, two federal laws specifically protect disabled individuals: the Americans with Disabilities Act of 1990 ("ADA"), including the ADA Amendments Act of 2008 ("ADAAA"), discussed in Chapter 19, and the Rehabilitation Act of 1973. The Rehabilitation Act of 1973 requires certain federal government contractors and subcontractors to take "affirmative action" to prohibit discrimination. The Rehabilitation Act is discussed in Chapter 13/Affirmative Action Requirements.

B. HOW THE LAW WORKS

South Carolina Human Affairs Law

a. Coverage

South Carolina's Human Affairs Law applies to all employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person. Employment agencies, labor organizations and all departments, agencies, and political subdivisions of state government are also covered.

Exceptions – The Law does not apply to Indian tribes or bona fide private membership clubs other than labor organizations.

In 2018, the South Carolina Human Affairs Law was amended to include new language and accommodations for pregnant employees working in the state.

The updates again mirror federal discrimination rules, however, there is a requirement for employers to provide written notice to all employees of the "right to be free from discrimination for medical needs arising from pregnancy, childbirth, or related medical conditions." It is recommended South Carolina employers include "on the basis of pregnancy, childbirth, or related medical conditions, including, but not limited to, lactation" in their Equal Employment Opportunity policies.

b. What is Prohibited

With respect to employment, the Human Affairs Law makes it unlawful for an employer:

1. To fail or refuse to hire, bar, discharge from employment or otherwise discriminate against an individual with respect to the individual's compensation or terms, conditions, or privileges of employment because of the individual's disability;

2. To limit, segregate, or classify employees or applicants for employment in a way which would deprive or tend to deprive an individual of employment

opportunities, or otherwise adversely affect the individual's status as an employee because of the individual's disability;

3. To exclude or otherwise deny equal jobs or benefits to a qualified individual because of a known disability of an individual with whom the qualified individual is known to have a relationship or association;

4. To fail to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose undue hardship on the operations of the [employer]; or to deny employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if the denial is based on the need of the [employer] to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

5. To use qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test, or other selection criteria, as used by the [employer], is shown to be job related for the position in question and is consistent with business necessity;

6. To fail to select and administer tests concerning employment in the most effective manner to ensure that, when the test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the [individual] that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of the [individual], except where the skills are the factors that the test purports to measure;

7. To discriminate against an individual . . . because the individual has opposed a practice made an unlawful employment practice by this [law] or because the individual has made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under this [law]; or

8. [To require] a medical examination or make inquiries of a job applicant as to whether the applicant is an individual with a disability or as to the nature or severity of the disability.

S.C. Code Ann. §§ 1-13-80, 1-13-85.

c. Exceptions

Under the law, it is not a discriminatory employment action for an employer to:

- Observe the terms of a bona fide seniority system or a bona fide employee benefit plan which is not a subterfuge to evade the purpose of this law except that no employee benefit plan may excuse the failure to hire an individual;
- Inquire whether a person has the ability to perform job-related functions;
- Require an employee to undergo a medical examination, provided that: (1) a conditional offer of employment has been made, (2) the examination is required of all employees or applicants for the job in question, and (3) the

information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations and first aid. Safety personnel may be informed when appropriate, if the disability might require emergency treatment;

- Conduct voluntary medical examinations, including voluntary medical histories that are part of an employee health program available to employees at the worksite. Information obtained under the voluntary medical examination or history of an employee must be collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.
- Fail to hire, transfer, promote, or to discharge a disabled person who has a communicable disease which would disqualify a non-disabled person from similar employment.

d. Enforcement

The South Carolina Human Affairs Commission ("SHAC") is the enforcement agency and is responsible for processing and investigating complaints of discrimination based on disability. The procedures used by SHAC to process claims of disability discrimination are the same as those used in Title VII cases.

Statute of Limitations: The charge must be made to SHAC within 180 days after the alleged discriminatory practice occurred. If the charge is dismissed by SHAC, SHAC has not filed an action under the law, or SHAC has not entered into a conciliation agreement within 180 days from the filing of the charge, the individual may bring an action in equity against the employer in circuit court.

Damages: Upon finding that an employer has violated the law, the court may grant an order requiring that such unlawful discriminatory practice be discontinued and requiring such other action, including, but not limited to, hiring, reinstatement or upgrading employees, with or without back pay, to the persons aggrieved by such practice as, in the judgment of the court, will effectuate the purposes of the law. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with SHAC. Unemployment compensation, interim earnings, or amount earnable with reasonable diligence, by the person discriminated against, shall operate to reduce the back pay otherwise allowable. No order of the court shall require the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay if such individual was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of his disability or in retaliation for exercising any right granted by the Human Affairs Law.

Election of Remedies: To avoid duplicative litigation under federal and state law, claims under the South Carolina Human Affairs Law can be maintained only when the disabled person has not brought an action alleging essentially the same facts and seeking relief for the same complaint in a separate action in federal court.

C. ACTION REQUIRED BY EMPLOYERS

Is Accommodation Possible?

While it is normally the employee's responsibility to inform the employer that an accommodation is needed, there is no one specific method that is required to notify an employer of a need for an accommodation, and even if the individual does not provide notice or request an accommodation, the employer may still be required to provide a reasonable accommodation if knowledge of the disability is imparted to the employer. Once an employer is on notice of an individual's need for an accommodation, the employer must engage in a timely good faith interactive process with the individual to determine whether a reasonable accommodation, up to an undue hardship, is possible.

When engaging the employee in the interactive process, it is not necessary that the employer accede to the will and fancy of the disabled individual. Employers are only required to implement reasonable and effective accommodations and are entitled to choose among any reasonable and effective accommodations. However, the employer should consider the preference of the individual and should implement the individual's preference, where costs and other considerations are comparable. The requested accommodation must be necessary, reasonable and effective.

An employee is, of course, free to refuse an offered accommodation. However, if an employee does so in the instance where he cannot perform the essential functions of the job without the accommodation, the employee will not be considered "qualified" under the law.

Discrimination

If a disabled individual cannot be reasonably accommodated, it is essential for the employer to document the steps taken in reaching this determination. If the disabled individual subsequently brings a suit, this documentation will provide the foundation of the employer's defense.

D. TIPS FOR EMPLOYERS

Pre-Employment Inquiries and Job Descriptions

It is unlawful for an employer to require an applicant to identify himself as disabled. This means that questions like "have you ever had a back injury" are unlawful if asked on an application form or in a pre-employment interview. It is not unlawful, however, for an employer to ask an employee whether he can perform the essential duties of a particular job. Defining essential job functions is an area over which the employer can exert the most control under the ADA at least in establishing which individuals are not "qualified" and therefore not protected by the ADA. Employers should take full advantage of their ability to define the job and its essential requirements.

Well-written job descriptions that list the job functions, both marginal and essential, are critical for an employer to avoid ADA liability. A good

job description will identify the purpose of the job and all of the activities, physical and cognitive, associated with the job.

Differences in Federal and State Law

Regulations implementing Sections 503 and 504 of the Rehabilitation Act and the ADA contain different and sometimes more onerous requirements than state law.

Compliance with state law does not necessarily constitute compliance with federal law. Likewise, an employer can be in compliance with federal law, but not state law. Employers need to be familiar with both federal and state laws to ensure compliance with both.

7. South Carolina Employment Security Law

A. BACKGROUND

Unemployment insurance in South Carolina is governed by a dual system of federal and state laws. These laws provide temporary income protection for individuals who lose their jobs through no fault of their own.

The Federal Unemployment Tax Act, a part of the Internal Revenue Code and Social Security Act, controls the federal unemployment system. Under this law, unemployment taxes are collected by the states and deposited in the federal treasury where they are subsequently requisitioned by the states to pay claims for benefits to the unemployed in accordance with state law.

The South Carolina Employment Security Law establishes procedures for distributing unemployment funds within the state. The purpose of this law is twofold: (1) to help the unemployed find work through job service programs, and (2) to provide unemployment benefits for a limited time while unemployed individuals seek work.

In March of 2010, the South Carolina Legislature passed legislation mandating that the South Carolina Employment Security Commission, the agency formerly responsible for administering the Employment Security Law, be reorganized and renamed the Department of Employment and Workforce ("DEW"). The legislation created the DEW to be headed by an executive director who is to be appointed by the governor as a cabinet member with legislative input. The legislation also set up a Workforce Department Appellate Panel to replace the previous system of three "Employment Security Commissioners" who were solely elected by the General Assembly.

B. HOW THE LAW WORKS

Coverage

Unemployment insurance coverage in South Carolina includes all work for which wages are paid by:

- An employer who employs one or more workers in any 20 weeks during a calendar year or whose payroll is $1,500 or more during a calendar quarter;
- An agricultural employer who employs 10 or more workers in any 20 weeks during the current or preceding calendar year, or who pays $20,000 or more in wages in any calendar quarter;
- An employer who pays $1,000 or more for domestic service during any calendar quarter;
- State and local governments; and
- Nonprofit elementary and secondary schools.

Eligibility Requirements

To be eligible for unemployment insurance benefits, an individual must:

- Be unemployed;
- Lost job through no fault of your own
- Be physically able to work;
- Be actively looking for work;
- Report all wages earned during any week for which benefits are claimed;
- Report all job offers made during any week for which benefits are claimed; and
- Have earned wages equal to a specified amount during a "base period" as provided by law.

Disqualifications

Eligible individuals may still be disqualified from receiving benefits if the individual:

- Left his/her last job voluntarily without good cause attributable to the employer, including voluntary retirement;
- Refuses to apply for or accept suitable work;
- Is unemployed because of a labor dispute involving his employer;
- Being discharged for cause, other than misconduct.
- Was discharged for gross misconduct connected with work including:
  1. Willful or reckless employee damage to employer property in excess of $50;
  2. Employee theft valued at more than $50;
  3. Employee consumption of alcohol or being under the influence of alcohol on employer property in violation of a written company policy restricting or prohibiting consumption of alcohol;
  4. Failure to comply with applicable state or federal drug and alcohol testing and use regulations;
  5. Criminal assault or battery of another employee or customer;
  6. employee committing criminal abuse of patient or child in his professional care;
  7. Employee insubordination, which is defined as willful failure to comply with a lawful, reasonable order of a supervisor directly related to the employee's employment as described in an applicable written job description; and
  8. Willful neglect of duty directly related to the employee's employment as described in an applicable written job description.

Amount of Benefits and Duration

a. General

The amount and duration of a claimant's benefit is determined by the wages

earned while employed and the amount of time worked during a "base period" of employment.

b. Base Period

In South Carolina, the "base period" upon which benefits are based is defined as the first four of the last five completed calendar quarters immediately preceding the first day in which an unemployment claim is filed.

c. Weekly Benefit Amount

An individual's weekly benefit amount is 50 percent of the amount determined by dividing the wages earned during the highest quarter of the base period by 13. However, payments are subject to a maximum benefit equal to two-thirds of the state average weekly wage as computed by the Commission.

d. Duration of Benefits

The duration of benefit payment varies, with a maximum payment period of 20 weeks.

e. Extended Benefits

When the insured unemployment rate becomes unusually high for a period of several months, extended benefits may be paid to eligible individuals.

Employer Contributions and Experience Rating

Employers in South Carolina pay the costs of unemployment insurance through contributions to an unemployment trust fund. Taxes collected from particular employers may be credited to any account. Tax rates for covered employers in South Carolina vary from a minimum of 1.3 percent to a maximum of 5.4 percent.

The DEW uses an "experience rating" to determine the rate of contribution for each employer. The experience rating is determined based on the employer's frequency of use of the unemployment system. As of January 1, 2011, an employer's experience rating is determined based on that employer's "benefit ratio." The benefit ratio is calculated by dividing the average of all benefits charged to an employer during the forty calendar quarters immediately preceding the calculation date by the employer's average taxable payroll during the same period. In 2014, this calculation was modified and the benefit ratio will be determined by dividing the average of all benefits charged to an employer during the twelve calendar quarters immediately preceding the calculation date by the employer's average taxable payroll during the same period.

Filing Procedures, Hearings and Appeals

Claims for unemployment insurance benefits may be filed or contested as follows:

a. Filing of Claim and Decision of Claims Adjudicator

The claimant initiates a claim for benefits by filing with the DEW office. A copy of the claim is then submitted to the claimant's last employer who has ten calendar days to complete and return the form. If contested issues are raised by the claimant of the last employer, a copy of a Fact Finding Report is prepared by a Claims

Interviewer and this report, together with a copy of the initial claim, is sent to a Claims Adjudicator for a determination of eligibility based either on written evidence from the parties or, where necessary, through an informal hearing. The Claims Adjudicator's determination is then reported to the claimant and the employer.

b. Appeal of the Claims Adjudicator's Decision

Either party may appeal the Claims Adjudicator's decision. Appeals require the party to file a notice of appeal within 10 calendar days from the date of the decision . If an appeal is filed, a hearing will be held before an Appeals Panel or duly appointed referee. Evidence concerning the claimant's separation and other related matters will be taken under oath and a record of the evidence is made. This is the claimant's and the employer's only opportunity to present additional evidence and all appeals will be decided solely on the basis of evidence produced at this hearing. Both the employer and the claimant have a right to be represented by an attorney at such hearing.

And if you disagree with the decision after the initial appeal, you can file a subsequent appeal to the Appellate Panel. This must occur within 10 calendar days of the mailing date listed on the Appeal Tribunal decision.

c. Appeal to the South Carolina Courts

Judicial review of the decision of an Appeals Tribunal can be sought in the Administrative Law Court in Columbia. The decision of the Administrative Law Court can, in turn, be appealed to the appropriate appellate court.

C. ACTION REQUIRED BY EMPLOYERS

Contesting Non-Chargeable Claims

If an employee voluntarily quits work or is discharged for misconduct connected with work, an employer's account will not be charged if certain steps are taken.

Where an employee is separated under non-charging conditions, an employer should:

- Respond to the DEW within 10 calendar days of receiving the notification. If the department does not receive a response, DEW assumes the individual is unemployed through no fault of their own. An employer that fails to respond to a separation request may also experience increased benefit charges and higher unemployment insurance taxes.If the decision of the Claims Adjudicator or Appeals Referee does not disqualify the claimant who has quit or was discharged for cause, an employer should consider appealing the decision to the next highest authority. Instructions for filing appeals are generally included in decisions rendered at each level of the adjudication process. If a decision at a particular level does not disqualify a claimant, the employer's request for non-charging will not be allowed absent a reversal on appeal.

Other Forms That Must Be Filed

a. Tax Forms

Unemployment Insurance (UI) tax forms can be found here - https://www.dew.sc.gov/employers/employer-resources - you may need these when reporting to DEW. Many of these tasks can now be done online through the UI tax portal, SUITS. Some forms can be submitted electronically by going to State Information Data Exchange System (SIDES) E-Response or the Employer's Self-Service Portal.

b. Form UCB-113, Mass Separation —Total Unemployment Report

In the event an employer separates 25 or more employees for an expected duration of seven days or more, the employer must submit a "Mass Separation-Total Unemployment Report" for each employee affected with the local office of the State Unemployment Service within eight days (not including Sundays and holidays) following the separation. S.C. Code of of Regulations 47-19(B) says:

1. The term "mass separation" means a separation (permanently, or for an indefinite period), of ten or more workers employed in a single establishment at or about the same time and for the same reason; provided however, that the term "mass separation" shall not apply to separations for regular vacation periods as defined in the Act and approved by the Department.

2. In cases of mass separations the employer, shall, for each individual affected, file with the office nearest the worker's place of employment, or with such office nearest employee's residence. Form UCB-113, setting forth such information as is required thereby; such form shall be filed not later than ten (10) calendar days, exclusive of Sundays and holidays, after such separation.

c. Employer Vacation Shutdown

If your business experiences regularly occurring vacation periods, you may be able to avoid paying for UI benefits during that time.

An individual is ineligible for benefits in the following situations:

1. No individual may be considered unemployed in any week that DEW finds that his unemployment is due to a vacation week.

2. No individual is eligible to receive benefits or waiting week credit for any week during which he is unemployed due to a vacation shutdown when:

   - A written contract between employer and employees specifically provides a vacation period without pay, not to exceed two weeks per calendar year.
   - The individual was notified at the time of employment of the employer's vacation policy providing for a vacation layoff without pay, not to exceed two weeks per calendar year.
   - The individual was employed at the beginning and the end of the vacation period.

To have a vacation policy approved, submit a letter to the address below.

S.C. Department of Employment and Workforce
Benefit Department Director
P. O. Box 1477
Columbia, SC 29202

Your letter must outline your policy in regard to the vacation dates and how you notify employees. Submit any modifications to a previously approved vacation policy at least 30 days prior to the scheduled vacation period.

d. Employer Filed Claims

Employers who have a temporary shutdown, are experiencing a slow or smaller workload than normal, or have temporary/seasonal work can request permission to file claims on their workers' behalf. These are called Employer Filed Claims.

You are allowed to file up to six weeks for your affected employees. Your employees are exempt from work search requirements during those six weeks.

You are required to report any earnings the employee may have received from you or any other employer during the particular week filed. You also must submit an electronic file to our department each week you wish to file by using the Employer Self-Service Portal. The claim must be submitted after the week of layoff is over but within 14 days of the claim week ending date.

e. Recordkeeping and Required Postings

Each employer must preserve the employee records listed below for five years.

For each pay period:

- Beginning and ending dates.
- Largest number of workers employed each calendar week of the period.

For each individual employed during the period:

- Name and Social Security number.
- Total hours worked each week, if less than full time.
- Wages paid (special payments included).
- Reasonable cash value paid in any medium other than cash.
- Date hired, rehired or returned to work after temporary layoff and the date and reasons a job was lost.

Additionally, an unemployment notice must be displayed by all covered employers. The South Carolina Department of Labor, Licensing and Regulation has combined this notice with other required workplace posters. The poster can be downloaded and printed from the LLR website at https://llr.sc.gov/wage/pdf/2018laws.pdf.

Unemployment Claims Involving Other Legal Claims

If a claimant for unemployment benefits has or is expected to file charges with the Equal Employment Opportunity Commission ("EEOC"), National Labor Relations Board ("NLRB"), or any other federal or state agency involving his employment or separation from employment, the advice of labor counsel should be sought before responding to the unemployment claim. This is important for a number of reasons. First, an employee who intends to sue as a result of separation is likely to have retained an attorney to advise him. Additionally, written statements and testimony provided by the employer to the DEW are generally admissible in proceedings before other federal and state agencies. In many situations, unions or attorneys representing claimants will use unemployment proceedings in an attempt to obtain evidence that will assist them in proving charges of discrimination. For these reasons, labor counsel should be consulted at the earliest possible stage of the unemployment proceedings if further charges are expected to be filed with other federal or state agencies.

Employers should also carefully review the statement of charges to employer's experience rating account issued quarterly to employers to determine if the company has been properly charged. If the review reveals improper benefit charges or charges which meet the criteria for non-charging, employers should write the Claims Department of the DEW giving the claimant's name, Social Security number, and the explanation of how the charges are improper or non- chargeable.

The DEW has published an extensive amount of information helpful to employers on its website http://dew.sc.gov.

8. South Carolina Wage and Hour Laws

A. BACKGROUND

South Carolina's Payment of Wages Act is broad in its coverage, applying to employers both public and private. For this reason, special attention is paid to this Act. Additionally, South Carolina's Sunday Closing laws "Blue Laws" regarding the State's general bar to working on Sunday, is a complicated, inconsistent patchwork of statutes. As such, the following seeks to highlight both the basics of the Blue Laws and the many and varied exceptions and exemptions to the Sunday work prohibition.

B. HOW THE LAW WORKS

Payment of Wages Act

a. Coverage

The Payment of Wages Act has broad coverage which includes executives, outside salespersons, and anyone who is an employee. It also addresses all forms of compensation, except pension type benefits, including executive bonus plans and other compensation plans for highly paid employees and salespersons. Independent contractors are not covered.

"Employer" is defined to include all persons and entities, both public and private, and any agent or officer of these entities. All employers in the state are covered except employers of domestic labor in private homes and employers employing fewer than five employees at all times during the preceding 12 months. Employers are required to provide written notification of (1) wages and hours agreed upon, (2) time and place of payment, (3) deductions from wages, and (4) seven-day, written notification of changes. Employers must comply with the specific recordkeeping requirements of the Act and give employees itemized statements of deductions from wages.

b. Limitations of Actions

A civil action for the recovery of wages must be filed within three years. The Act does not apply retroactively.

c. Definition of Wages

Wages are defined as: "all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount . . ." Vacation, holiday, and sick leave payments "which are due to an employee under any employer policy or employment contract" are included in the definition of wages. Funds placed in pension or profit sharing plans are excluded. Severance payments are also excluded.

Notices to Employees

a. New Employees

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 which will be made from wages, including payments to insurance programs." The employer has the option of giving this "written notification by posting the terms conspicuously at or near the place of work." Any changes, other than wage increases, must be in writing and notice of changes must be given seven days before they become effective.

The law requires written notification of those benefits "which are due to an employee under any employer policy or employment contract." "[A]ny employer policy" likely includes informal practices or policies. Thus, employers with informal policies could be violating the Act if they fail to give new hires written notice of a policy or practice, even though it may be a flexible or informal policy or practice.

The law further requires employees to be notified in writing of the "normal hours . . . agreed upon." The Terms of Employment Notice published by the S.C. Department of Labor Licensing and Regulation ("LLR") has a blank space on which to list the "normal hours of work." The form suggests listing the number or range of hours per week, day, or other time period. The recommended practice is to describe the normal office or shift hours and days to be worked. In situations where the hours of work are uncertain and flexible, an employer may give notice of the routine hours and include language about the uncertain and flexible schedules which are necessarily a part of the job.

b. Current Employees

Seven days' advance written notice must be given to employees prior to any change in (1) wages, (2) normal hours of work, (3) time and place of payment, or (4) deductions from wages. Changes in deductions specifically include insurance programs. Wage increases do not require notice. If overtime or extra hours are routine, they would be "normal hours" and require written notice.

Recordkeeping Requirements

Employers must keep records for three years of employees' names, addresses, and deductions made each payday. Employees must receive a statement showing gross pay and any deductions for each pay period.

Payment to Separated Employees

Employers must pay separated employees within 48 hours of the time of separation or by the next regular payday, which may not exceed 30 days. However, the reference to 48 hours is a meaningless remnant from the former statute. The next regular payday is the time when payment is due and this must not exceed 30 days.

The employer must pay all wages that are "due." It is reasonable to assume that the court would hold wages that are not payable until they are due pursuant to the policies and practices of the employer.

Disputes over small amounts of wages can put an employer at risk for substantially more than the contested amount. If the employer loses, the cost could include the employee's attorneys' fees, attorneys' fees of the employer, legal costs, and up to three times the disputed wages.

Deductions from Wages

Employers must notify each employee in writing, at the time of hiring, of the deductions which will be made from wages, including payments to insurance programs. An employer is prohibited from withholding or diverting 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 notice, as required in subsection (A) of S.C. Code Annotated § 41-10-30. Thus, taxes and other sums required by state or federal law may be withheld without prior written notice to the employee. State law mandating the withholding of wages for child support is not in conflict with this provision.

It is necessary for employers to give advance written notice for any new deduction that will be taken from employees' wages. Pursuant to South Carolina's Payment of Wages Act, a change in deductions from an employee's wages would require seven days' advance written notice.

Direct Deposit of Wages

If wages are paid by direct deposit to a financial institution under a plan adopted by the employer, the employee is entitled to at least one withdrawal, free of any service charge, for each deposit. The financial institution must be doing business in South Carolina and be insured by an agency of the federal government. Employees must be furnished a statement of earnings and withholdings. Employers may mandate direct deposit in South Carolina, as long as the requirements set forth above are met.

Administrative Enforcement

a. Authority

The South Carolina Department of Labor Licensing and Regulation is responsible for enforcing the Act. The Office of Labor Services-Wages within LLR handles these duties. LLR is authorized to investigate, mediate, and conciliate complaints. It may promulgate regulations, give written warnings, and assess civil penalties of not more than $100.00 for each violation. LLR may file suit to enforce collection of penalties. LLR inspectors and agents may enter the premises of the employer at reasonable times to question the employer, its agents, and employees. They may inspect and copy records.

b. Regulations

No regulations have been promulgated by LLR regarding payment of wages. However, the Commissioner issued Interpretive Bulletin IV, which made it clear that the Department would not penalize an employer for making a deduction from wages for items over which the employer had no control, such as deductions required by law.

c. Civil Penalties

The Director is required to assess civil penalties for violations of the provision relating to notice of terms and conditions of employment and the provision relating to withholding and timely payment of wages. The first violation of the notice provision requires a written warning. For subsequent violations of this section or any violations of the timely payment provision, the Director is required to assess a civil penalty of not more than $100 for each violation.

d. Criminal Penalties

Criminal sanctions have been removed from the Act.

Employee Causes of Action

a. Unpaid Wages

Employees are authorized to file suit for unpaid wages. Employees may recover treble the amount of unpaid wages, plus costs and attorneys' fees, in the event the employer fails to pay wages as required by the Act. This remedy applies to failure to pay wages due separated employees in a timely fashion and failure to follow the requirements of subsections (A) through (D) of Section 41-10-40. These provisions relate to unauthorized deductions, failure to pay at the time and place designated, and failure to comply with the direct deposit requirements.

b. Treble Damages

Treble damages are discretionary, not mandatory. An employee is entitled to treble damages and attorneys' fees where an employer's policy for payment of commissions earned was based on its unilateral, arbitrary decision of when to issue payment, and no good faith dispute existed.

c. Statutory Wages

Can the Act be used as a separate cause of action for treble damages where an employer has failed to pay minimum wages or overtime pay required by the Fair Labor Standards Act? There have been no appellate court decisions directly on this point; however, attorneys frequently include both claims in wage and hour cases.

d. No Prospective Relief

The South Carolina Supreme Court ruled in Mathis v. Brown & Brown of SC, Inc., 389 S,C, 299, 698 S.E.2d 773 (2010), that the South Carolina Payment of Wages Act does not apply to future wages, but only to wages that have already been rendered. Thus, damages for prospective wages (i.e., wages to be earned in the future) are not recoverable under the Act. Depending on the particular circumstances, a current or former employee may have a breach of contract claim for prospective wages, but they will not have a claim under the South Carolina Payment of Wages Act.

e. Personal Liability

Courts have held that the Act imposes individual liability on agents or officers of a corporation who knowingly permit their corporation to violate the Act. In a 2006 case, the court held that, as an officer and agent of the employer, an individual who had knowledge of the failure to pay the employee, and as the person directly

responsible for the non-payment, the individual was personally liable under that statute. See Temple v. Tec-Fab, Inc., 370 S.C. 383, 635 S.E.2d 541 (Ct. App. 2006) aff'd in part, rev'd in part, 381 S.C. 597, 675 S.E.2d 414 (2009).

f. Attorneys' Fees

Reasonable attorneys' fees may be awarded to a claimant in the event the case is decided in the employee's favor. Emphasizing the discretionary nature of an award of attorneys' fees, in 2003, a court held that the existence of a bona fide dispute with respect to the wages precluded an award of attorneys' fees.

g. Retaliatory Discharge in Violation of Public Policy

The Act does not contain a remedy for wrongful discharge in retaliation for an employee's asserting his/her rights under the statute. The South Carolina Supreme Court has held that a cause of action for wrongful discharge in violation of the public policy of the state may be available where no statutory remedy for wrongful termination exists. Following along these lines, at least one court has found that when an employer terminated employees in retaliation for invoking their rights under the Act, a violation of the public policy of the State occurred. The Court of Appeals affirmed the verdict in Evans v. Taylor Made Sandwich Co., 337 S.C. 95, 522 S.E.2d 350 (Ct. App. 1999), overruled on other grounds by Barron v. Labor Finders of S.C., 393 S.C. 609, 713 S.E.2d 634 (2011).

Payment of Post-Termination Claims to Sales Representatives

a. Coverage

The Act covers both employees and independent contractors. It contains no threshold number of employees or sales representatives that are required in order to invoke coverage.

b. Limitations of Actions

The Act does not specify a statute of limitations, but it appears that the three-year limitation found in S.C. Code Ann. §15-3-530 would apply.

Definitions

a. Commissions

"Commissions" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of orders or sales or as a specified amount of each order or sale. Ordinary salaries and hourly wages are not commissions.

b. Person

"Person" means an individual, corporation, partnership, association, estate or trust.

c. Principal

"Principal" means a person who: (a) manufactures, produces, imports, or distributes a tangible product for wholesale; (b) contracts with a sales representative to solicit orders for the product; and (c) compensates the sales

representative, in whole or in part, by commission. The Act will not apply if the principal is solely in a retail business. The Act will not cover sales representatives who work for principals who sell services or other "intangible" goods.

d. Sales Representative

"Sales Representative" means a person who: (a) contracts with a principal to solicit wholesale orders; (b) is compensated, in whole or in part, by commission;

(c) does not place orders or purchase for his own account or for resale; and (d) does not sell or take orders for the sale of products to the ultimate consumer.

Payments Upon Termination of Contract

"When a contract between a sales representative and a principal is terminated for any reason, the principal shall pay the sales representative all commissions that have or will accrue under the contract to the sales representative according to the terms of the contract." Section 39-65-20. Unlike the Payment of Wages Act, the Sales Representatives Act does not specify a deadline for payment of the amounts owed. The entitlement to payments and the timing of same hinge on the existence of a contract expressing definite terms for the payment of commissions.

Administrative Enforcement

The Act is not enforced by an administrative agency.

Private Causes of Action

A principal who fails to comply with the provisions of Section 39-65-20 is liable to the sales representative in a civil action for: (1) all amounts due the sales representative plus punitive damages in an amount not to exceed three times the amount of commissions due the sales representative, and (2) attorneys' fees actually and reasonably incurred by the sales representative in the action and court costs. A sales representative, if successful, may be awarded the unpaid commissions and an additional sum equal to three times the amount that was due. The award of attorneys' fees under the Act is mandatory.

Frivolous Actions

Where the court determines that an action brought by a sales representative against a principal under this chapter is frivolous, the sales representative is liable to the principal for attorneys' fees actually and reasonably incurred by the principal in defending the action and court costs.

Nonresident Principal

A principal who is not a resident of this State who contracts with a sales representative to solicit orders in this State is deemed to be doing business in this State for purposes of the exercise of personal jurisdiction over nonresidents.

Effect on Other Rights

Nothing in the Act invalidates or restricts any other right or remedy available to a sales representative or precludes a sales representative from seeking to recover in one action on all claims against a principal.

Prohibition Against Claims Under Payment of Wages Act

Sales representatives must elect whether to proceed under the Sales Representatives Act or under the Payment of Wages Act. They cannot recover under both Acts.

South Carolina Blue Laws

a. Scope

Blue Laws regulate sales, commerce, sporting events, businesses, and "worldly work." The frequent amendments to the law have resulted in a patchwork of restrictions and exemptions which are inconsistent and confusing. The Blue Laws are found in Chapter 1, Title 53 of the Code of Laws of South Carolina 1976, as amended.

b. Sunday Work Prohibited

The general prohibition against Sunday work appears in S.C. Code Ann. § 53-1-

40. On the first day of the week, commonly called Sunday, it shall be unlawful for any person to engage in worldly work, labor, business of his ordinary calling or the selling or offering to sell, publicly or privately or by telephone, at retail or at wholesale to the consumer any goods, wares or merchandise or to employ others to engage in work, labor, business or selling or offering to sell any goods, wares or merchandise, excepting work of necessity or charity.

c. Exceptions to Sunday Work Prohibitions

After 1:30 p.m. on Sunday.

The Blue Laws do not apply after 1:30 p.m. on Sunday. However, this broad exception is qualified by the following language: "Any employee of any business which operates on Sunday under the provisions of this section has the option of refusing to work in accordance with Section 53-1-100. Any employer who dismisses or demotes an employee because he is a conscientious objector to Sunday work is subject to a civil penalty of treble the damages found by the court or the jury plus court costs and the employee's attorneys' fee. The court may order the employer to rehire or reinstate the employee in the same position he was in prior to dismissal or demotion without forfeiture of compensation, rank or grade."

"No proprietor of a retail establishment who is opposed to working on Sunday may be forced by his lessor or franchisor to open his establishment on Sunday nor may there be discrimination against persons whose regular day of worship is Saturday." S.C. Code § 53-1-5.

d. Work of Necessity or Charity

The statute making it unlawful to work on Sunday contains an exception for work of necessity or charity.

e. Saturday Sabbath in Charleston County

An exception to the Sunday work prohibition is made for any person in Charleston County who conscientiously believes, because of his/her religion, that Saturday ought to be observed as the Sabbath and who actually refrains from secular

business or labor on Saturday.

f. General Exceptions

Under the exemptions in S.C. Code § 53-1-50, Sunday work prohibitions do not apply to work involving:

- The sale of food needs, ice, or soft drinks.
- The sale of tobacco and related products.
- The operation of radio or television stations or to the printing, publication and distribution of newspapers or weekly magazines, or to the sale of newspapers, books and magazines.
- The operation of public utilities or sales usual or incidental thereto.
- The transportation by air, land, or water of persons or property, or to the sale or delivery of heating, cooling, refrigerating, or motor fuels, oils or gases or the purchase or installation of repair parts or accessories for immediate use in cases of emergency in connection with motor vehicles, boats, bicycles, aircrafts, or heating, cooling, or refrigerating systems, or to the cleaning of motor vehicles.
- The providing of medical services and supplies, or to the sale of drugs, medicine, hygienic supplies, surgical supplies, and all other services and supplies related thereto.
- The operation of public lodging or eating places, including food caterers.
- Janitorial, custodial, and like services.
- Funeral homes and cemeteries.
- The sale of novelties, souvenirs, paper products, educational supplies, cameras, film, flash bulbs and cubes, batteries, baby supplies, hosiery and undergarments, flowers, plants, seeds, and shrubs.
- The sale of art and craft objects at arts or craft exhibitions held pursuant to § 53-1-10 provided that each art or craft object shown or sold has been designed by and is the original work of artisans present at the exhibition.
- Exhibition of noncommercial real property and mobile homes.
- The providing of any service, product, or other thing by means of a mechanical device not requiring the labor of any person.
- The sale or rental of swimming, fishing, and boating equipment.
- Any farming operations necessary for the preservation of agricultural commodities.
- Light bulbs or fluorescent tubes.

g. Machine Shops, Rubber and Plastic Injection Molding

While no person may be discriminated against for refusing to work on Sunday because of conscientious or physical objections, the operation of machine shops, rubber molding and plastic injection molding facilities are exempt from the law.

h. Textiles

While no person may be discriminated against for refusing to work on Sunday because of conscientious or physical objections, the manufacture and finishing of textile products are exempt from the law.

i. Continuous Manufacturing Operations

Manufacturing processes requiring continuous and uninterrupted operation or, which for economical operation, must engage in a continuous process are exempted. Included in the exemption are support services and personnel such as repair, maintenance, research and development, and other employees. Persons opposed to Sunday work are not protected under the continuous process exemption.

j. Bakery Products

Bakery employees are completely exempted.

k. Accommodation Tax

Any county with more than $900,000 in revenue from the accommodations tax is exempt from Blue Laws.

l. Suspension by County Government and Referendum

County Council may suspend the application of Chapter 1, Title 53, and hold a referendum on whether to exempt the County from the Blue Laws.

m. Time Off to Attend Church

The Blue Laws statute provides that any employee in a retail store where there are more than three employees shall, upon request of the employee, be granted time off to attend service, allowing one hour for preparing to go and traveling to church and one hour after service for returning therefrom.

n. Saturday Work

The language "nor may there be discrimination against persons whose regular day of worship is Saturday" appears in the statutes providing exemptions for businesses opening after 1:30 p.m. on Sunday, counties with substantial accommodation tax revenue, and in counties where the County Council suspends the Blue Laws and holds a referendum.

o. Conscientious or Physical Objection

Persons who object to working on Sunday for conscientious or physical reasons are protected in several sections which exempt businesses from the Blue Laws. This protection appears in the (1) machine shop, rubber molding and plastic injection molding exemption, (2) textile exemption, and (3) the child labor exemption.

There are no South Carolina cases dealing with the proof required to establish conscientious objector status under the Blue Laws. Presumably, physical objections would require nothing more than the employee wants the day off to rest.

p. Proprietors and Franchises

No proprietor of a retail establishment who is opposed to working on Sunday may be forced by his lessor or franchisor to open his establishment on Sunday. This relates to: (1) opening after 1:30 p.m. on Sunday, (2) the accommodations tax exemption, and (3) County Council action/public referendum exemption.

q. Child Labor

No person may employ, require or permit the employment of children on Sunday in any mercantile establishment or manufacturing establishment. Cafeterias and restaurants are excluded from the broad definition of mercantile establishments, defined as any place where goods or wares are offered or exposed for sale. The term "manufacturing establishment" is defined as "any plant or place of business engaged in manufacturing." "Children" includes anyone under the age of 18.

Relief Under South Carolina Blue Laws

a. Criminal Penalties

There are criminal fines for violations of the general prohibition against Sunday work. Penalties are not less than $50 or more than $250 for the first offense. Subsequent offenses will result in a fine of between $100 and $500 for each offense. The child labor statute also provides for penalties.

Civil Remedies

a. Damages

Employers who dismiss or demote any employee because the employee is a conscientious objector to Sunday work are subject to a civil penalty of treble the damages found by the court or the jury plus court costs and the employee's attorneys' fees. The court may also order the employee be reinstated to his former position.

b. Civil Penalty

The 1985 and 1995 amendments provide for a civil penalty of treble the damages found by the court or jury. While there is no mention of who is to receive the civil penalty (the plaintiff or State), it likely is reasonable to assume the full amount goes to the Plaintiff, until a court rules otherwise. The courts have yet to decide whether the awarding of treble damages is mandatory or discretionary.

c. Equitable Remedies

The court is authorized to order the employer to rehire or reinstate the employee in the same position he held prior to dismissal or demotion without forfeiture of compensation, rank or grade.

d. Attorneys' Fees

The sections which permit treble civil penalties also provide for employee's attorneys' fees in the event the employee prevails. It is assumed that the awarding of such fees is discretionary.

Do not forget to give written notice to employees at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the deductions to be made from wages. "Wages" may include vacation, holiday and sick leave payments, depending on the employer's policies.

Do not forget the requirement that the employer must give a seven-day written notice for any reduction in pay, sick leave, holiday, vacation, or change in the normal hours of work.

On the issue of Sunday or Saturday work, the Blue Laws provide more protection for the employee than the Civil Rights Act of 1965. Title VII calls for reasonable rather than absolute accommodations. Employees falling within the protection of the South Carolina Blue Laws have substantial rights and remedies.

9. South Carolina's Workers' Compensation Law

A. BACKGROUND

The purpose of South Carolina's Workers' Compensation Act [S.C. Code Ann. § 42-1-10, et seq.] is to provide compensation to employees for lost wages caused by occupational injuries and diseases arising out of and in the course of employment.

The South Carolina Workers' Compensation Act is an employee's exclusive remedy for work-related injuries or occupational diseases. This means an employee cannot sue his employer or a co-worker for damages resulting from occupational injuries and an employer cannot avoid a workers' compensation claim by showing that the employee's negligence caused the injury or disease. However, an employee is not eligible for workers' compensation benefits if the injury resulted from intoxication, use of controlled substances not prescribed by a doctor, or willful intention to injure himself or another.

The South Carolina Workers' Compensation Commission enforces the South Carolina Workers' Compensation Act. The Commission consists of seven commissioners who are appointed by the Governor for terms of six years.

B. HOW THE LAW WORKS

Coverage

All employers in the State with four or more employees are subject to the Act. Coverage is voluntary for railroads, railroad employees, railway express companies or railway express company employees, casual employees who don't work regular hours and only when it's needed., federal employees in the state, agricultural employees, People selling agricultural products. and employers who regularly employ less than four employees or who have a total annual payroll of less than $3,000, regardless of number of employees. State and local governments, and all political subdivisions thereof, must provide coverage for their employees. Employers can obtain workers' compensation insurance through an insurance carrier or be self-insured upon meeting certain requirements established by the Commission.

Claims must be filed within two years of the date of the injury or, in the case of an occupational disease, within two years after the employee has been diagnosed and notified of the diagnosis.

Compensable Injuries and Diseases

a. Injuries in General

An "injury" is compensable under the South Carolina Workers' Compensation Act if:

- The injury was caused by accident;
- The injury arose out of employment; and
- The injury was sustained in the course of employment.

The requirement that an injury must be caused by accident is an important feature of the South Carolina Workers' Compensation Act. The courts have defined the term "accident" to mean a separate, unlooked for and untoward event which is not expected or designed by the injured employee. In 2002, the South Carolina Supreme Court recognized "repetitive trauma" injuries as "injuries by accident" under the Act. Such injuries are disease-like in their gradual onset and result typically from the cumulative effect of repeated events or activities. The burden of proving that an injury was caused by accident arising out of and in the course of employment rests with the employee.

b. Occupational Diseases

An "occupational disease" is defined as: A disease arising out of and in the course of employment which is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged. A disease shall be deemed an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation or employment as a direct result of continuous exposure to the normal working conditions thereof.

The following diseases are exempt from the definition of occupational disease: Diseases that (1) do not arise from exposure to the hazards peculiar to the particular employment, (2) arise from climatic conditions, (3) result from exposure to fellow employees, (4) are ordinary diseases of life to which the general public is equally exposed, (5) are cardiac, pulmonary or circulatory diseases not resulting from conditions peculiar to the employment, or (6) are chronic skeletal diseases.

The law expressly provides that "disablement or death of an employee resulting from an occupational disease shall be treated as an injury by accident."

Benefits

Three types of benefits are available to employees who suffer occupational injuries or diseases: (1) compensatory benefits, (2) medical benefits, and (3) death benefits.

a. Compensatory Benefits

Compensatory benefits are designed to compensate an employee for lost wages caused by a work-related injury or disease. The following rules apply to compensatory benefits:

b. Waiting Period

No compensatory benefits are required to be paid by the employer for the first 7 days of disability resulting from an injury, except medical treatment, but, if the injury results in disability of more than 14 days, compensation shall be allowed from the initial date of disability.

c. Amount of Benefits for Total and Partial Disability

Total disability benefits are paid during a period of total disability and while the employee is earning no wages. The employee is entitled to receive weekly benefits of two-thirds his average weekly earnings subject to a specified minimum and maximum payment. The maximum benefit period is 500 weeks.

If an employee returns to work on a part-time basis during his period of recovery and the wages he earns are reduced by the injury, he can collect temporary partial benefits. An employee is then entitled to benefits in an amount equal to two-thirds of the difference in the wages he was earning prior to the injury and the wages he earns after the injury. The maximum benefit period for temporary partial benefits is 340 weeks.

d. Benefits for Scheduled Injuries

If an injury results in amputation or permanent loss of a specified part of the body, compensation for permanent disability is payable at the end of the healing period. This benefit is due even though there may be no showing of loss of earning capacity. Once an employee has reached maximum medical improvement, the doctor may indicate that the employee has a permanent functional impairment as a result of the injury. The Commissioner will then translate the doctor's impairment rating into a disability rating. The Act lists the maximum number of weeks of compensation payable for an injury to a specific member or part of the body.

e. Medical Benefits

In addition to compensation for lost earning capacity, the Act also provides for the payment of medical benefits. The employer is required to provide medical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services and other treatment reasonably required to affect a cure or give relief. Normally, the employer selects a physician or medical facility to provide treatment for the injured employee. The employee's refusal to accept treatment bars the employee from receiving further compensation benefits until such refusal ceases. However, in an emergency, or if an employer refuses to provide the above benefits, the employee can obtain the necessary treatment from a physician or hospital of his own choice and must be reimbursed by the employer. Additionally, if an employee is dissatisfied with the treatment being rendered by the physician furnished by the employer, he can seek permission from the Commission to change physicians. In cases involving permanent total disability, medical expenses must be paid for the life of the employee.

f. Death Benefits

When a compensable injury or occupational disease causes the death of an employee, death benefits are payable to the dependents for a period not to exceed 500 weeks from the date of the injury and funeral expenses may also be included. If an employee has been receiving benefits prior to his death, the compensation to his dependents begins from the date of the last payment to the deceased but shall not continue more than 500 weeks from the date of injury. A hearing is required in all death cases to determine dependents.

Hearings, Awards, and Appeals

a. Application and Hearing

If the employer and the employee disagree as to whether compensation is due or the amount that is due, either party may apply to the Workers' Compensation

Commission requesting a hearing on the issues in dispute. Workers' Compensation Commission Form 50 or 21 are used to make such a request. Self-insured employers and insurance carriers must respond to a claimant's request for a hearing on Form 51 within 30 days of the receipt of the request. Upon application, a hearing will be scheduled before a Commissioner in the county where the injury occurred.

b. Determination and Award

After a hearing, the Commissioner will issue a determination including findings of fact, rulings of law and, if appropriate, an award.

c. Review of an Award

Within 14 days after the notice of award, a party may apply to the full Commission for a review of the award. The Commission may reconsider the evidence and receive further evidence. A decision or award of the full Commission may be appealed for errors of law to the Court of Appealsof the county in which the alleged incident happened if notice of the appeal is provided within 30 days of the date of the award. Subsequent appeals to the South Carolina Court of Appeals and Supreme Court are also available.

d. Termination of Benefits

Payments may be stopped once they begin without a hearing if within 150 days one or more of the following circumstances arise:

- If the employee returns to work or agrees he is able to return to work;
- If a good faith investigation reveals grounds for denial of the claim;
- If the employee has been released by the treating physician without restriction and the employer offers comparable employment [the same or limited duty]; or
- The employee refuses medical treatment.

An employee whose disability payments are terminated must request a hearing to have the payments restarted. A hearing must be held within 60 days. Once the 150 day period expires, an employer must request permission from the Commission to stop paying TTD.

If the employee returns to work after the expiration of the 150 day period, the employer can stop paying temporary total benefits if the employee signs a Form 17 (Conditional Waiver of Hearing). After the employee has returned to work for 15 calendar days, the employer should have the employee sign a Form 17 authorizing the employer to stop temporary total benefits. This does not prevent the employee from claiming disfigurement and/or permanent disability at a later date. This form merely authorizes the employer to stop paying temporary total benefits.

If the employee is working but refuses to sign the Form 17, or if the employee refuses to return to work and the employer believes him capable of returning, the employer can file an Application to Stop Payment of Compensation (Form 21). This will trigger a hearing before the Commission on the issue of whether the employee is capable of returning to work.

Discharge or Demotion for Filing a Claim is Prohibited

An employer may not discharge or demote an employee for filing a workers' compensation claim or testifying in a workers' compensation proceeding.

C. ACTION REQUIRED BY EMPLOYERS

First Report of Injury

When an injury requires less $500.00 in medical treatment and does not cause more than one lost workday or permanency, the employer may pay for the medical treatment directly. The employer is not required to make a written report to the employer's representative or to the Commission. If the employer denies the claim or does not elect to pay for the medical treatment, the employer shall send a copy of the Form 12A to the employer's representative immediately after the occurrence and knowledge of the injury. When an injury requires five hundred dollars or more in medical treatments or when it is determined more than one workday will be missed as a result of the injury or there is likely to be permanency, the employer shall send a copy of the Form 12A to the employer's representative immediately.

"Medical Only" Cases

On the Commission's Form 12M, the employer's representative shall annually report all injuries requiring less than $2,500.00 in medical treatments and not resulting in compensable lost time or permanency.

Posting "Workers' Compensation Notice"

All employers covered by the South Carolina Workers' Compensation Act must post in a conspicuous place a notice informing employees of the coverage of the Act.

D. TIPS FOR EMPLOYERS

Unions continue to emphasize employee safety and health concerns during union organizing campaigns. Unions are using issues such as tendonitis, byssinosis, asbestosis and other injuries in an attempt to rally employee support and paint the employer as uncaring and unconcerned about safety and health issues. Of course, the vast majority of South Carolina employers are vitally concerned and interested about the safety and health of their employees. Yet employees may not be aware of this concern unless the employer on a regular basis communicates it. Employee meetings, safety committees, etc., can be used for this purpose.

You should police claims carefully, and keep in touch with injured employees, physicians, and insurance carriers to facilitate an early return to work, as well as continuing good employee relations.

Such attention may reduce appeals and other legal action on the part of

legitimately injured employees and reveal malingering on the part of others.

Remember, your company has the right to select the physicians to treat and examine the injured or ill employee. Your company should have some established relationship with local physicians who understand the nature of work your employees perform.

10. Miscellaneous South Carolina Employment Laws

A. BACKGROUND

In addition to the South Carolina employment laws discussed in other chapters, there are also a number of miscellaneous employment-related laws in South Carolina of which employers should be aware. They include both statutory and common law (i.e., law derived primarily from court decisions).

B. HOW THESE LAWS WORKS

Employment-At-Will and the Employee Handbook Exception

The South Carolina Supreme Court created an exception to the employment-at-will doctrine in Small v. Springs Industries, Inc., 292 S.C. 481, 357 S.E.2d 452 (1987). Specifically, the Court held that the provisions of an employee handbook or oral assurances can form the basis of an implied employment contract and thereby limit the employer's right to discharge the employee-at-will. In Small, the employee claimed the company did not follow the progressive discipline procedure outlined in its handbook when it discharged her. Accordingly, the Court found the handbook could form the basis of a contract even though it was unilaterally issued by the company and could be changed.

The Court in Small, however, did state that an employer could avoid such unwanted consequences by inserting a prominent disclaimer in the employee handbook. Such a disclaimer should, at a minimum, make it unreasonable for the employee to rely on the handbook if the employer does not intend to be bound by it and notifies the employee it is not a contract of employment.

Numerous cases after Small addressed the form of disclaimers, their effectiveness in not making a handbook a contract of employment, and how mandatory language affects a handbook. See Fleming v. Borden, Inc., 316 S.C. 452, 450 S.E.2d 589 (1994); King v. PYA/Monarch, Inc., 317 S.C. 385, 453 S.E.2d 885 (1995); Prescott v. Farmers Telephone Co-Op, Inc., 335 S.C. 330, 516 S.E.2d 923 (1999); Williams v. Riedman, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000); Connor v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002); Horton v. Darby Elec. Co., 360 S.C. 58, 599 S.E.2d 456 (2004); Hessenthaler v. Tri-County Sister Help, Inc., 365 S.C. 101, 616 S.E.2d 694 (2005); Grant v. Mount Vernon Mills, Inc., 370 S.C. 138, 634 S.E.2d 15 (Ct. App. 2006).

In an attempt to limit the court's ability to continue to legislate at-will employment, the South Carolina legislature enacted a safe harbor for disclaiming certain documents. See S.C. Code Ann. § 41-1-110. The statute reaffirms that the mere issuance of an employee handbook does not automatically create a contract of employment. The statute states that handbooks, personnel manuals, policies, procedures, and other documents issued by an employer after June 30, 2004, will not create an express or implied contract of employment if they are "conspicuously

disclaimed." To fall within the protections of the statute, a disclaimer in a handbook or personnel manual will be considered conspicuous if it is in underlined capital letters on the first page of the document and signed by the employee. For all other documents, 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. See S.C. Code Ann. § 41-1-110.

An employer is generally free to modify a handbook or policy once issued. The South Carolina Supreme Court in Fleming stressed, however, that changes are not binding on the employee unless he or she has received actual notice of the changes.

Right-to-Work Law

a. Background

The National Labor Relations Act ("NLRA") gives an employee the legal right to refuse to join a union except where the employer has a valid collective bargaining agreement that requires union membership or payment of union dues within a specified time after the employee is hired. The NLRA, however, also permits states to enact "right-to-work" laws that prohibit such requirements in collective bargaining agreements.

In South Carolina, the right to work on a job without regard to union membership or non-membership has been declared a public policy of the State. S.C. Code Ann. § 41-7-10 provides:

"It is hereby declared to be the public policy of this State that the right of persons to work shall not be denied or abridged on account of membership or non-membership in a labor union or labor organization."

b. How the Law Works

South Carolina's Right-To-Work Law makes it unlawful:

- To require any employee to become or remain a member of any labor organization as a condition of employment or continued employment;
- To require any employee to abstain or refrain from membership in any labor organization as a condition of employment or continued employment;
- To require any employee to pay any dues, fees, or other charges of any kind to any labor organization as a condition of employment or continued employment.

The law not only prohibits compulsory unionization, it also prohibits discrimination against individuals who are or want to be union members.

South Carolina's right-to-work law effectively prohibits:

- Closed Shop Agreements: Under this type of agreement, the hiring of any individual who is not a union member is prohibited. A closed shop agreement also requires employees to maintain union membership as a condition of continued employment.
- Union Shop Agreements: Under this type of an agreement, an individual need

not be a member of the union in order to be hired. Nevertheless, once hired, the individual must become and remain a union member as a condition of continued employment.

- Membership Maintenance Agreements: Agreements of this nature do not require an individual to join the union as a condition of employment or continued employment. Nevertheless, once an individual joins the union, he must remain a member during the term of the collective bargaining agreement as a condition of continued employment.
- Agency Shop Agreements: Individuals do not have to be members of the union to be hired or retained in employment under this type of an agreement. However, they must pay the equivalent of union dues and other union fees as a condition of employment.

Drug Testing

South Carolina allows employers to establish a drug prevention program in the workplace. S.C. Code Ann. § 41-1-15 (Supp. 2004). The law provides for random drug testing, confidentiality of test results, and release of test-related information only with the employee's written consent. It also provides for reduced workers' compensation insurance premiums for employers who establish a drug testing policy in accordance with the statute. S.C. Code Ann. §38-73-500(B) (Law Co- op. 2002).

A drug prevention program under this law must include: (1) a substance abuse policy statement that balances the employer's need to maintain a safe, drug-free environment with the employer's respect for its employees; and (2) notice to all employees of the drug prevention program and procedures at the time of hiring, or at the time the program is established, whichever is earlier.

The intent of the substance abuse policy "shall be to help those who need it while sending a clear message that the illegal use of non-prescription controlled substances or the abuse of alcoholic beverages is incompatible with employment at the specified workplace." S.C. Code Ann. § 41-1-15(A)(1).

Employers who contract with the State of South Carolina should be aware of the provisions of the Drug-Free Workplace Act. All employers should be aware of

S.C. Code Ann. § 41-1-15, which also provides for a drug prevention program in the private sector workplace.

Employee Access to Personnel Records

Generally, private employees have no right to see their personnel records or files. Although there are exceptions (e.g., access to certain OSHA medical records), the exceptions are limited. From a practical standpoint, however, it may promote good employee relations to allow employees to review their own personnel records so long as certain precautions are observed. See Tips for Employers in this Chapter.

Discrimination Against Union Members

Under South Carolina law, it is a misdemeanor to discharge or discriminate in the payment of wages against any person because of his/her membership in a labor organization. Upon conviction, an employer is subject to a fine of not less than

$10 nor more than $50 or imprisonment for not less than 10 or more than 30 days. S.C. Code Ann. § 41-1-20 (Law. Co-op. 1986).

Conciliation of Industrial Disputes

The Director of Labor, Licensing and Regulation investigates industrial disputes, strikes and lockouts in order to ascertain their causes and to induce both sides of the dispute to arrive at an agreement. The Director of Labor, Licensing and Regulation's powers in conducting such an investigation are broad. Any person who hinders the Director and his/her agents from performing their duties is guilty of a misdemeanor and upon conviction is subject to fines for every offense of not less than $25 nor more than $100 or a sentence of not more than 30 days on the county chain gang. S.C. Code Ann. § 41-17-10 to 70 (Supp. 2004).

Employee Wage Liens

Employees of factories, mines, mills, distilleries, and other manufacturing establishments have liens upon the output of the factory, mine, mill, distillery or other manufacturing establishment employing them to the extent of wages and salaries due and owed to them by their employer. S.C. Code Ann. § 29-11-10 (Law. Co-op. 1991). Liens can also protect ship workers, S.C. Code Ann. § 29-9- 10 (Law. Co-op. 1991), and employees of contractors and subcontractors. S.C. Code Ann. § 29-7-10 (Law. Co-op. 1991 & Supp. 2004).

Employees' Political Opinions and Activities

Employers may not discharge employees based upon their political opinions or activities. Employers convicted of this misdemeanor are subject to a fine of not more than $1,000 or imprisonment for not more than two years, or both. S.C. Code Ann. § 16-17-560 (Law. Co-op. 2003 & Supp. 2004).

Sunday Work

Under South Carolina law, most businesses may not open on Sunday until after 1:30 p.m. S.C. Code Ann. § 53-1-5 et seq. (Law Co-op. 1992 & Supp. 2004). There are several exceptions, including an exception for manufacturing establishments that require continuous or uninterrupted operation for economic or practical reasons. S.C. Code Ann. § 53-1-130. Other exceptions apply to machine shops, textile operations, and other retail establishments and facilities.

Employers in counties that collect sufficient tax revenues are exempt from restrictions on operating hours. S.C. Code Ann. § 53-1-150(B). Other than those operating under the continuous operation exception, employers may not discriminate against employees who refuse to work on Sundays because of conscientious or physical objections. S.C. Code Ann. §§ 53-1-100, 110 & 150.

Use of Tobacco Products

Employers are forbidden from making personnel decisions such as hiring, demotion, promotion, or termination, on the basis of an employee's use of tobacco products outside the workplace. S.C. Code Ann. § 41-1-85 (Supp. 2004).

Intentional Infliction of Emotional Distress

Individuals who claim to have suffered emotional or mental anguish as a result of another's actions often sue for damages. South Carolina has extended this tort of intentional infliction of emotional distress or "outrage" to the employment context. See Todd v. South Carolina Farm Bureau Mutual Ins. Co., 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984).

To state a claim for outrage, an employee must allege the following: (1) conduct by the employer that is so extreme and outrageous as to exceed all possible bounds of decency; (2) the employer acted recklessly or with intent to inflict emotional distress; and (3) the employer's actions caused the employee to suffer severe emotional distress. Wright v. Sparrow, 298 S.C. 469, 472, 381 S.E.2d 503, 506 (Ct. App. 1989). In addition, the court of appeals has held that an employee cannot recover for intentional infliction of emotional distress unless he or she can show a particular susceptibility to emotional distress, if major outrage is shown. Shipman v. Glenn, 314 S.C. 327, 329, 443 S.E.2d 921, 923 (Ct. App. 1994).

Workers' compensation law may provide a defense to a claim of outrage. The South Carolina Supreme Court has held that mental injuries caused by purely mental or emotional stimuli (i.e., the type of injury usually alleged in a claim for outrage) may only be redressed, if at all, through workers' compensation in certain situations. Powell v. Vulcan Materials, 299 S.C. 325, 384 S.E.2d 725 (1989). The only exception to this rule is when the emotional distress is inflicted by an employee who holds such a significant position within the company that he is considered the alter ego of the employer. Dickert v. Metropolitan Life Insurance Co., 311 S.C. 218, 428 S.E.2d 700 (1993).

Work Authorization – E-Verify

All South Carolina employers are required to participate in E-Verify. E-Verify is a federal, web-based system used by employers to check their new hires' eligibility for employment, as well as the validity of their Social Security numbers. For more information on the federal E-Verify program, refer to Chapter 20 in the NC section of this guide or visit https://www.e-verify.gov.

Concealed Weapons

South Carolina conceal and open carry laws still allow employers to prohibit concealed weapons on their property and in company owned vehicles and parking lots. However, there are SC specific signage requirements detailed below. Employers are encouraged to have sound weapons and safety policies in accordance with all applicable laws and regulations.

S.C. Code Ann. § 23-31-235 provides as follows:

(A) Notwithstanding any other provision of this article, any requirement of or allowance for the posting of signs prohibiting the carrying of a concealable weapon, whether concealed or openly carried, upon any premises shall only be satisfied by a sign expressing the prohibition in both written language interdict and universal sign language.

(B) All signs must be posted at each entrance into a building where a concealable weapon permit holder is prohibited from carrying a concealable weapon, whether concealed or openly carried, and must be:

(1) clearly visible from outside the building;

(2) eight inches wide by twelve inches tall in size;

(3) 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;

(4) 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'

(5) a diameter of a circle; and

(6) placed not less than forty inches and not more than sixty inches from the bottom of the building's entrance door.

New Hire Reporting Program

The Child Support Services Division (CSSD) of the South Carolina Department of Social Services, in compliance with section 43-5-598 of the South Carolina Code of Laws and 42 USC Sec. 653a, has developed the Employer New Hire Reporting Program. Through this program all employers must report all newly hired and rehired employees. This information will be used to ensure that non-custodial parents live up to their financial responsibilities to their children. By working together, the CSSD and employers can reduce the burden on our nation's taxpayers and provide a better life for our nation's children.

Decreasing the tax burden needed to fund government programs benefits all state residents. When children are receiving public assistance, State and Federal Laws allow the CSSD to collect the child support owed to the children and use these monies to reimburse the State for the public assistance payments. Most important of all, timely child support payments to families who are not receiving public assistance can prevent dependence on welfare programs in the future.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Federal Welfare Reform) requires employers to report the following data elements for each newly hired or rehired employee within 20 days:

- Employer Name
- Employer Address
- Employer Federal Identification Number
- Employer Phone Number (optional)
- Employee Name
- Employee Address
- Employee Social Security Number

- Employee Date of Birth
- Employee Date of Remuneration (first day of work)

New Hire information submitted by employers will only be used for purposes prescribed by law, including:

- Establish and enforce child support orders
- Detect Unemployment Benefits overpayments and fraud
- Detect Workers' Compensation overpayments and fraud
- Detect overpayments and fraud in other government programs, such as Welfare and Food Stamps

The penalty for an employer failing to report newly hired or rehired employees is:

- $25 for the second offense and $25 for each offense thereafter; or
- $500 for each and every offense, if the failure to report is the result of a conspiracy between the employer and the employee not to supply the required information or to supply false or incomplete information.

D. TIPS FOR EMPLOYERS

Access to Personnel Files

Private employees have no absolute legal right, absent a court order, to view their own personnel records but will likely become suspicious if denied such access. It is usually a sound employee relations policy to remove irrelevant items from personnel files and allow employees to view their own records if they so request. This practice will strengthen an effective open door policy and promote good employee relations. As a general rule, employees should not be allowed to remove their files from company property. Terminated employees should not be provided access to their files.