



The Small
Business
Owner's

EMPLOYMENT LAW BLUEPRINT



WARD AND SMITH, P.A.
ATTORNEYS AT LAW



Under the Radar?

A Guide to Labor and Employment Law For the Small (but Mighty) Employer

We tend to think of labor and employment law beginning at the 15-employee threshold of Title VII. However, regulation of the employment relationship begins with the very first employee. This guide provides a synopsis of the labor and employment laws, federal and state, statutory, as well as common law considerations, that apply to the private sector employer who has ten or fewer employees. At the end, we recap what this business owner has to look forward to as the roll of employees grows.

Important considerations to keep in mind are:

... Yes, North Carolina is an at-will state, meaning that, absent an agreement to the contrary, employment for an indefinite term may be terminated at the will of either the employer or the employee. Nevertheless, the general rule is subject to a common law Public Policy Exception, as well as statutory exceptions, that prohibit discrimination on the basis of specified characteristics, traits, and conditions.

... Every employer, large or small, has a duty to the general public to select and retain competent employees. Liability may be imposed on the employer for injury done to a customer by an incompetent or unfit employee. Every employer must take adequate steps in its recruitment procedures to insulate itself from this kind of liability.

... Although illegal harassment is typically thought of as a Title VII issue (again, when there are 15 or more employees), such behavior may give rise to a common law claim of intentional infliction of emotional distress.

... Written employment agreements are required if the employer desires to hold an employee to a noncompetition covenant. Furthermore, an employment agreement may provide the best means for the employer to protect trade secrets and other proprietary information under a nondisclosure agreement (NDA).



Although no law requires employers to have an employee handbook, it provides a good way to communicate workplace rules and information to employees about payroll practices, forfeiture of vacation pay, and other requirements of wage and hour law.

Regular evaluation of employee performance is the tried and true mean of correcting shortfalls in employee conduct. If done properly, it also can provide the evidence needed to successfully defend against claims of wrongful termination.

Social media permeates our modern society, and the permutations in which it can affect the employer-employee relationship are abundant. For example, an employee discussing the terms and conditions of employment with other employees on Facebook®, even in a seemingly derogatory or critical manner, may be protected by the National Labor Relations Act's concerted activity provisions. Wage and hour laws may be affected when a non-exempt employee performs "off the clock" work intended to promote an

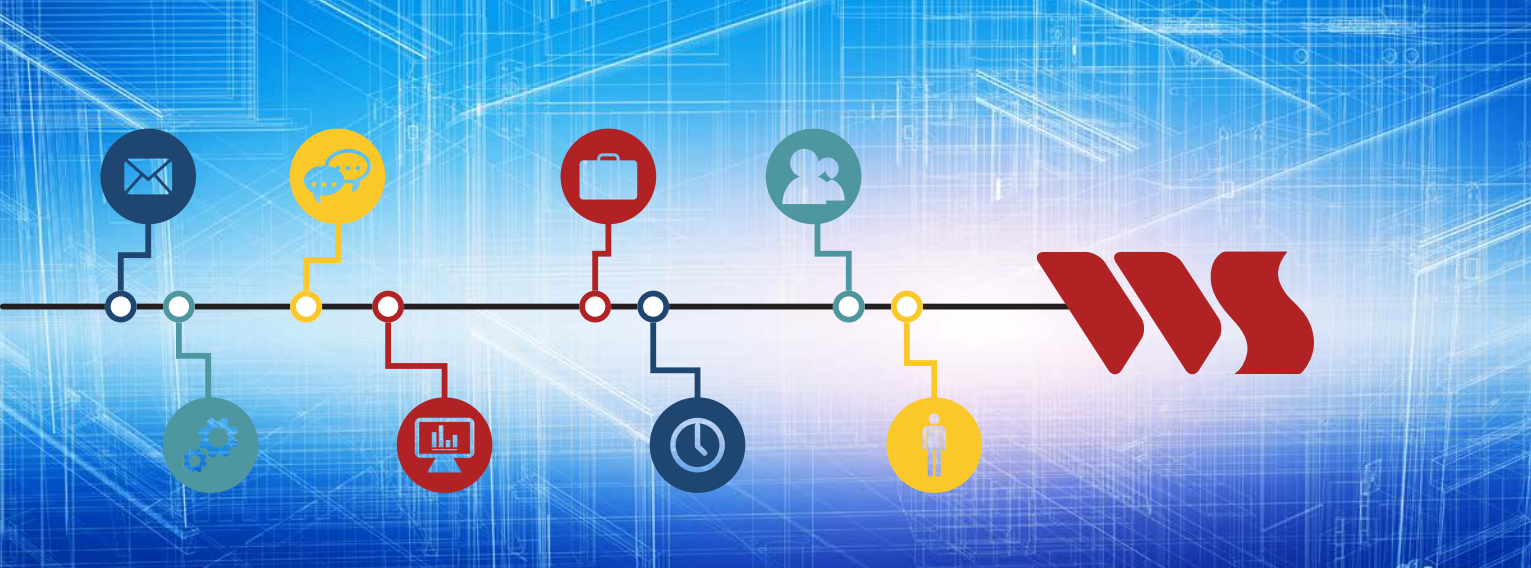
employer's interests. In short, an employer should carefully consider its obligations under the various employment laws before taking action against an employee for social media activity.

Use of information technology systems, such as computers, email, and smartphones, is critical in today's business environment. Such systems make it easier for businesses to assist their customers and clients. These technologies, however, also provide employees a potential outlet to disclose or acquire trade secrets and other confidential company information (whether inadvertently or purposefully), engage in unprofessional conduct towards other employees or customers, waste company time, and breach copyright and licensing restrictions. It is important for companies of all sizes to know the legal methods available to minimize these various risks.

Section 1981 of the Civil Rights Act of 1866	Prohibits discrimination on the basis of race or color. Race discrimination is never “under the radar.”
Consumer Credit Protection Act of 1968 (CCPA)	Protects employees from being discharged by their employers because their wages have been garnished for any one debt. It also limits the amount of employees’ earnings which may be garnished in any one week.
Employee Polygraph Protection Act (1988)	Strict regulation of the use of lie detector tests in the workplace.
Employee Retirement Income Security Act (ERISA) (1974)	(If company offers benefits.) Ensures that employees get pension and other benefits promised by their employers. It also requires tax-favored pension plans to provide benefits in a way that doesn’t favor the highest paid employees.
Equal Pay Act of 1963 (EPA)	Prohibits discrimination in pay on the basis of sex. Requires equal pay for equal work. Employers covered under the FLSA are covered by the EPA, but practically speaking, an employer would need to have two or more employees to demonstrate a pay disparity between genders.
Fair Credit Reporting Act (FCRA) (1970)	Allows credit reporting agencies to provide background financial and personal information on prospective and current employees to employers. FCRA regulates an employer’s ability to collect and use certain types of information in employment decisions.
Fair Labor Standards Act (FLSA or Wage and Hour Law) (1938)	Sets minimum hourly wages, training wages, overtime hours and rates (generally one and a half times the regular pay for work in excess of 40 hours per week for non-exempt employees), and regulates the employment of children under 18.
Federal Insurance Contributions Act (FICA) (1935)	Requires that taxes be collected from both employers and employees to fund the Social Security program.
Health Insurance Portability and Accountability Act of 1996 (HIPAA)	Creates national standards to protect individuals’ health records and give them control over that information. Sets limits on the use and release of health records and establishes safeguards to protect the privacy of health information.
Immigration Reform and Control Act of 1986 (IRCA)	Prohibits employers from hiring undocumented workers and requires employers to verify each employee’s identity and legal entitlement to work in the U.S.
Occupational Safety and Health Act (OSHA) (1970)	Establishes uniform national standards for workplace safety and health practices throughout the country. There are rules for hazard assessments, employee safety and health, hazard communication, recordkeeping, OSHA inspections, employee rights, penalties, and most frequent OSHA violations.
Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)	Prohibits discrimination against employees who have to be absent from civilian employment to serve in uniformed services.



N.C. Gen. Stat. § 9-32	Prohibits employers from discharging or demoting any employee because the employee has been called for jury duty or is serving on a jury.
N.C. Gen. Stat. § 14-45.1	Refusal of a physician, nurse, or other health care provider to participate in an abortion on ethical or moral grounds may not serve as the basis for any disciplinary action.
N.C. Gen. Stat. § 58-53-1, et seq.; Group Health Insurance Continuation and Conversion Privileges (State COBRA)	Provides continuation of group health insurance coverage (hospital, surgical, or major medical) to employees for 18 months after termination of employment or loss of plan eligibility.
N.C. Gen. Stat. § 75-4; Iredell Digestive Clinic, P.A. v. Patrozza, 92 N.C. App. 1, 373 S.E. 2d 449 (1988)	Noncompetition covenants must be in writing, signed by the employee, based on reasonable consideration, reasonable both as to time and territory, and not against public policy.
N.C. Gen. Stat. § 95-28.1A	Prohibits employment discrimination against any person on the basis of genetic information obtained about the person or a member of the person's family. Applies to every employment relationship. Enforced under the North Carolina Retaliatory Employment Discrimination Act (REDA), just like workers' compensation discrimination.
N.C. Gen. Stat. § 95-28.3; Leave for Parental Involvement in Schools	Allows parents, guardians, or any person standing in loco parentis of a school-aged child to take up to four (4) hours of leave per year to attend or otherwise be involved in the child's school. The leave is unpaid and must occur at a mutually agreed upon time. Employers are prohibited from retaliating against an employee for taking such leave.
N.C. Gen. Stat. § 95-230, et seq.; North Carolina Controlled Substance Examination Regulation Act (CSERA)	Regulates drug testing of both applicants and employees, including the setting and conditions of where the test takes place, appropriate chain of custody, and employee's rights to retest in the event of a positive sample.
N.C. Gen. Stat. § 95-240, et seq.; Retaliatory Employment Discrimination Act (REDA)	Prohibits employment discrimination against any person who makes a workers' compensation claim or wage and hour complaint. See also N.C. Gen. Stat. § 95 28.1A above.
N.C. Gen. Stat. § 96-1, et seq.; Employment Security Law	The Division of Employment Security administers temporary unemployment insurance benefits to individuals who are unemployed through no fault of their own and who are able, available, and actively seeking work.
N.C. Gen. Stat. § 110-90.1	Requires that a criminal history record check be conducted on all persons who provide childcare in a licensed childcare facility and all persons providing childcare in non-licensed childcare homes that receive state or federal funds.
N.C. Gen. Stat. § 163-41.2	No employer may discharge or demote an employee because the employee has been appointed to serve or is serving as a precinct official.
N.C. Gen. Stat. § 163-274(a)(6)	Makes it a crime to terminate or threaten to terminate employment of any legally qualified voter on account of a vote cast, vote that may be cast, or vote not cast.



Ward and Smith, P.A. Labor and Employment Experience and Capabilities

Since the sweeping labor and employment laws of the mid-1960s, employers have faced an ever-increasing number of laws and regulatory agencies governing their businesses and employee relations. Numerous federal and state laws have been added to the Equal Pay Act (1963), Title VII of the Civil Rights Act (1964), and the Age Discrimination in Employment Act (1967) including, but not limited to: the Family and Medical Leave Act, the Employee Retirement Income Security Act, the Occupational Safety and Health Act, the Americans with Disabilities Act, and the North Carolina Wage and Hour Act.

The Labor and Employment Practice Group attorneys of Ward and Smith understand the burden these laws place on employers. We work with clients to develop, implement, and defend policies and practices related to all aspects of the employment relationship to lessen the impact of these burdens to the greatest extent possible. We are a trusted advisor and a fierce advocate for our clients.

We serve clients from all areas of business and regularly assist mid-size and small employers. We are able to handle all aspects of the legal process for small companies, including crafting employee benefits programs and assisting with workplace safety and health investigations.

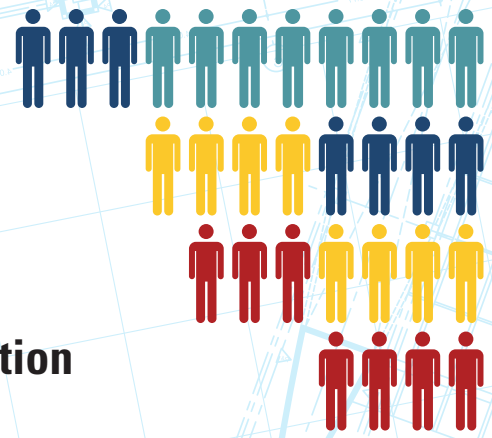
We strive to know and understand the frequent changes in the law — before clients call for help. We take a proactive, twofold approach to help clients avoid personnel and employment law disputes resulting from unfair employment practices. Several of our attorneys focus on business and human relations practices such as preparing personnel manuals, employment contracts, compensation agreements, documents associated with workforce reductions, and settlement agreements and releases associated with other forms of termination. Other attorneys focus on employment litigation.

Because we litigate our own cases, we better serve our clients. Our litigation experience encompasses all types of civil rights discrimination, affirmative action compliance and claims, state and federal wage and hour issues, wrongful termination charges, unemployment claims, breach of employment contracts, occupational safety and health matters, labor disputes, and workers' compensation claims.

Learn more at www.wardandsmith.com.

What's in Store?

The Rising Tide of Statutory Regulation as the Business' Census Grows



Number of Employees	Applicable Law	In Brief
2 ¹	National Labor Relations Act (NLRA)	Guarantees employees the right to engage in concerted activities for mutual aid or protection.
3	North Carolina Workers' Compensation Act N.C. Gen. Stat. § 97 1, et seq.	Provides benefits for employees who sustain certain workplace injuries and occupational disease.
3	North Carolina – Lawful Use of Lawful Products N.C. Gen. Stat. § 95 28.2	Prohibits discrimination against employees who make lawful use of lawful products on their own time (e.g., cigarette use).
4	Immigration Reform and Control Act (IRCA)	Prohibits discrimination on the basis of citizenship and national origin.
11	Occupational Safety and Health Act (OSHA)* (recordkeeping requirements) *Note that the OSHA requirements are subject to a few exceptions (certain low hazard industries in the retail, finance, insurance, real estate, and service sectors).	
15	Title VII, ADA, GINA, FCRA, Fair and Accurate Credit Transactions Act (FACTA), N.C. Equal Employment Practices Act	
20	Age Discrimination in Employment Act (ADEA) COBRA	
50	FMLA Affordable Care Act ²	
51	Mental Health Parity Act of 1996 Mental Health and Addiction Equity Act of 2008	
100	WARN Act EEO-1 Report (annual) for organizations that are not federal contractors	

¹ Assuming it takes at least two employees to engage in concerted activity

² A quick reminder: Under the Affordable Care Act, applicable large employers (ALEs), which include for-profit and not-for-profit businesses as well as government entities with 50 or more full-time equivalent (FTE) workers, are required to provide "minimum essential" health insurance coverage to 95 percent of their full-time workforce and those employees' dependent children, excluding step-children and foster children, under the age of 26.

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Employ Good Judgement.

From east to west and in between, businesses come in all sizes. The Labor and Employment Attorneys of Ward and Smith, P.A. work with clients to develop, implement, and defend policies and practices related to all aspects of the employment relationship. Whether you employ 1 or 1,000, we are your trusted advisors and fierce advocates.



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