Employment and Labor Laws

At-Will Employment and Employment Discrimination

In North Carolina, unless the employer and employee have entered into an employment contract (that is, a legally enforceable agreement of the terms and conditions of employment), employees are hired and terminated *"at-will."* In other words, the employer is free to decide which candidates to hire and to reject all others, for any reason that suits the employer. Likewise, the employee is free to decide whom they want to work for and the terms of employment.

Moreover, the employer is free to decide at any time to promote, reward, demote, or dismiss any employee already working for the employer, for any reason or for no reason at all.

That said, employers may not exercise any of these rights if *doing so violates equal employment opportunity laws.*

The U.S. Equal Employment Opportunity Commission (EEOC) was established via the Civil Rights Act of 1964 to administer and enforce civil rights laws against workplace discrimination. All states are required to comply with federal equal employment opportunity (EEO) laws. States and municipalities can expand protections to their citizens. North Carolina follows federal law for the most part. *Be aware that laws and regulations are subject to change.*

The following sections cover various anti-discrimination laws that must all be understood and followed to remain in compliance.

Title VII of the Civil Rights Act of 1964 (Amended 1991)

Title VII of the Civil Rights Act makes it unlawful for employers with 15 or more employees "to discriminate against any individual with respect to their compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information" 42 U.S.C. § 2000e-2(a)(1).

The **Pregnancy Discrimination Act** expanded Title VII of the Civil Rights Act to make it unlawful to discriminate against a woman who is pregnant.

Employers do not have to exhibit overt discrimination to risk liability. Even seemingly benign questions during the interview process can introduce the possibility of discrimination. If you are not disciplined in your interview process, "red flag" questions can unintentionally slip out.

Many companies carefully draft and review interview questions for specific jobs to ensure applicants are judged on their merits and to avoid questions that suggest selection bias. Even subtle inquiries can raise the question of prejudice, such as:

- What religion are you? What church do you go to? (Suggests discrimination based on religion.)
- Do you plan to start a family? (Suggests discrimination based on the prospect of pregnancy.)
- What country do you come from? (Suggests discrimination based on national origin.)
- Are you married? (Could suggest discrimination based on sexual orientation, gender identity, or prospect of pregnancy.)

The safest course of action is to avoid interview questions other than those required for determining if the candidate can comply with the performance requirements and hours of the job.

If you are concerned that your hiring decision might be discriminatory, it pays to confer with an employment attorney who can look at your situation and the legal issues. An employment attorney can determine whether you might be protected under "**undue hardship**" exceptions, based on the laws of all applicable jurisdictions. For example, the Civil Rights Act of 1964 contains an undue hardship provision that recognizes it might be burdensome to a business to comply with an employee's religious requirements that prohibit working on Sundays if that is a crucial day for business.

Be sure to check your local ordinances. For example, Wake County, the City of Charlotte, and the City of Winston-Salem have all enacted discrimination ordinances to protect certain classifications. The ordinances prohibit discrimination in employment on the basis of a protected class. They amended the definition of a protected class to include gender identity, gender expression, sexual orientation, and natural hairstyle.

The Equal Pay Act – Expanding on Title VII of the Civil Rights Act, the Equal Pay Act prohibits paying wages based on the employee's sex.

Sexual Harassment – Sexual harassment is a form of discrimination that violates Title VII of the Civil Rights Act. Sexual harassment can be defined as unwelcome sexual advances, requests for favors, or other verbal or physical conduct of a sexual nature amounting to either a condition of employment or offensive job interference. Generally, there are two distinct types of sexual harassment: "**quid pro quo**" sexual harassment and "**hostile work environment**" sexual harassment.

The more easily recognizable form of sexual harassment is quid pro quo sexual harassment, which occurs when a beneficial condition of employment, such as a bonus or promotion, is premised upon an employee's submission to sexual advances. Typically, this type of claim arises when an employee rejects a sexual advance and claims a connection between that rejection and a subsequent, adverse job action. For example, a denial of a raise or promotion, a termination, or a "constructive discharge" where an employee claims that the retaliation made job conditions intolerable.

Hostile work environment sexual harassment is more pervasive and, from a legal standpoint, more difficult to define. According to case law and the EEOC's interpretive regulations, a hostile work environment is one that is so pervasive with offensive conduct that it significantly alters the terms and conditions of an employee's employment.

These type of sexual harassment claims generally involve behavior that is uninvited or unwelcome and sexual in nature. For example, conduct sufficient to rise to the level of "hostile work environment" sexual harassment can be:

- Physical: touching such as hugs, kisses, body rubbing, and intentionally brushing up against another person
- Verbal: sexually suggestive words or jokes; sexual innuendos; compliments or comments about body parts; references such as gorgeous, honey, doll, babe, or other "pet names";

whistles, cat calls, and suggestive sounds; telling lies or spreading rumors about an employee's sex life; or repeated requests for dates
- Nonverbal/visual: sexual gestures; unwanted attention in the form of flowers, love letters, or compliments; stares, leers, winks, or suggestive looks; or pornographic material such as nude pictures, calendars, cartoons, diagrams, or objects

A single incident, such as the touching or grabbing of private parts, may be enough to demonstrate a hostile work environment if it is severe. Otherwise, courts generally require a pattern of inappropriate behavior before the conduct is considered sufficient to rise to the level of a hostile work environment.

The establishment, dissemination, and enforcement of a no-harassment policy are the first key steps to limiting liability.

To be effective, a no-harassment policy should be in writing and distributed to every employee (optimally with a signed acknowledgement by each). This typically is done by way of either an employee handbook or is presented to the employee at the time of hire with a signed acknowledgement form placed in the employee's personnel file.

Additionally, the policy should be posted in plain view, like in an employee break room or other location where it can be easily seen by employees.

Furthermore, the policy should be sure to prohibit all types of harassment and should not be confined to only sexual harassment. It should provide a clear definition of harassment and concrete examples of prohibited conduct.

Train managers to adhere to a zero-tolerance policy regarding sexual harassment. Even the best sexual harassment policy will not necessarily prevent sexual harassment from occurring. For this reason, it is critical that staff, particularly managers/supervisors, be given sexual harassment training both at their time of hire and, if need be, in periodic intervals thereafter. This is crucial as operators can be held liable—in some cases strictly liable—for their managers' conduct.

For more information:
U.S. Equal Employment Opportunity Commission
Title VII of the Civil Rights Act of 1964
https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964

The Americans with Disabilities Act of 1990, Title I (ADA)

The Americans with Disabilities Act (ADA) prohibits employers from discriminating based on disability. The ADA defines "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year..." (42 U.S.C. § 12111(5)(A)).

The ADA defines "qualified individual with a disability" as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Several aspects of the ADA you should be aware of:

"**Essential functions**" of the job. A person with a disability might not be able to perform all aspects of the job as well as a person without a disability; however, you must determine whether these are "essential functions" of the position.

For example, a bookkeeper might be expected to retrieve file boxes from storage as part of the job, but this is not an essential function of bookkeeping. A person confined to a wheelchair due to a physical disability could fulfill the role of bookkeeper if otherwise qualified.

"**Disability**" includes a wide range of physical, mental, and emotional conditions. Not all individuals with a disability have readily recognized impairments, such as paralysis or blindness.

"Reasonable accommodation" is often required by an employer to assist an employee with a disability in performing the job. For example, while prep cooks tend to work on their feet, it might be considered reasonable accommodation to set up a workstation that allows someone with a circulatory disorder to be seated for a large percentage of the shift.

"Undue hardship" takes into account the burden placed on the employer in accommodating an individual with a disability. Among the factors considered in determining whether an undue hardship exists are the cost of the accommodation, the impact on the business's resources, and the size and type of business.

A detailed job description outlining all essential functions and requirements of the job is an important first step to avoiding complicated or uncomfortable hiring decisions. If the applicant must be able to lift 50 pounds, be available on weekends, or possess a valid driver's license, then clearly state that in the job description.

Questions you should avoid in job interviews include:

- Do you have a disability that will prevent you from doing this job?
- Will your disability interfere with your ability to do this job?
- How many days were you sick last year?
- Do you have (name of disease or disorder)?

For more information:
ADA.gov
Information and Technical Assistance on the Americans with Disabilities Act
https://www.ada.gov/ada_title_I.htm

The Americans with Disabilities Act of 1990, Title I (ADA)

Under North Carolina law and the federal Americans with Disabilities Act (ADA), people with disabilities may bring their service animals to all "public accommodations," such as restaurants, museums, hotels, and stores. These laws also require those who operate transportation services to allow service animals.

Public accommodations in North Carolina must comply with both state and federal law, and their patrons are entitled to rely on whichever law provides the most protections.

For more information, view NCDHHS' Guide to Service Animals for Businesses.

Discrimination Based on Private Health Information

The 1992 Retaliatory Employment Discrimination Act

North Carolina legislation makes it illegal for an employer to discriminate based on traits for sickle cell, hemoglobin C, or other genetic information.

Title II of the Genetic Information Non-discrimination Act of 2008

Covers private employers with at least 15 employees (and labor unions, employment agencies; educational institutions; local, state, and federal governments). It prohibits discrimination based on genetic information; for example, refusing to hire any candidates because you are concerned their medical conditions would drive up the cost of employee health insurance.

The Age Discrimination in Employment Act (ADEA) of 1967

The ADEA prohibits employment discrimination against persons 40 years of age or older. Among other provisions, the ADAE makes it unlawful "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age" (29 U.S.C § 623 (a)(1)).

A business might be prone to claims under the ADEA if hiring managers have an automatic bias for young employees. Questions to avoid in job interviews include:

- When did you graduate from high school?
- How old are you?

The ADEA contains a *bona fide occupational qualification* exemption, and requires that the age discrimination must be "reasonably necessary to the normal operation of the particular business" (29 U.S.C § 623 (f)(1)).

Bona fide occupational qualifications allow for an employer to discriminate against employees and potential employees "on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" (42 U.S.C § 2000 (e)(2)). This exemption from employment discrimination liability does not allow the employer to discriminate based on race.

For more information:
The Age Discrimination in Employment Act of 1967
https://www.eeoc.gov/statutes/age-discrimination-employment-act-1967

The Family Medical Leave Act (FMLA)

The FMLA allows eligible employees to take off up to 12 work weeks in any 12-month period for the birth or adoption of a child, to care for an immediate family member with a serious health condition, or to take medical leave for the employee's own serious health condition.

To be eligible, the employee must have worked for a total of 12 months of employment (which does not need to be consecutive); must have worked at least 1,250 hours in the previous 12-month period; and must have worked in the United States or in any territory or possession of the United States at a work location that has 50 or more employees within a 75-mile radius.

Employees are permitted to take FMLA leave on an intermittent basis, allowing them to work on a reduced schedule, in certain circumstances. Employees who take FMLA leave also have the right to return to the same or equivalent position, pay, and benefits at the conclusion of their leave.

It is important to note that many small businesses are exempt from the FMLA, as it applies to businesses with 50 or more employees located within a 75-mile radius. Nevertheless, several independent operations, particularly emerging chains, are subject to its provisions.

For more information:
U.S. Department of Labor
Family and Medical Leave (FMLA)
https://www.dol.gov/general/topic/benefits-leave/fmla

Immigration Law

Under the Immigration Reform and Control Act of 1986, employers may hire only persons who can legally work in the United States, that is, citizens and nationals of the United States and non-citizens authorized to work in the United States. The employer must verify the identity and employment eligibility of anyone to be hired, which includes completing the Employment Eligibility Verification Form (I-9). Employers must keep each I-9 on file for at least three years or one year after employment ends, whichever is longer.

If you find a prospective employee who is not authorized to work in the United States but who you would like to hire, you should contact an immigration attorney to assist with the process of obtaining authorization.

Negligent Hiring and Retention

Negligent hiring and retention laws are founded on the concept that an employer is liable for the harm to a third party (usually a member of the public) that results from an employee's negligent act. The employer has a duty to exercise reasonable care in the selection and retention of employees.

If your employees are brought in contact with members of the public in the course of your business, you could be subject to lawsuits by plaintiffs claiming careless hiring and retention practices were a cause of their injuries.

A key question in determining whether an employer has been negligent in hiring is defining "reasonable care." The definition varies slightly in each jurisdiction, but in most cases involving negligence, the courts look at the situation from the standpoint of a "prudent" employer.

"Reasonable care" often hinges on the circumstances and common sense. For example, hiring a catering truck driver without requiring proof of a valid driver's license would certainly be lack of "reasonable care." Employee drug testing and background checks such as contacting the employee's references and checking criminal records are some of the ways negligent hiring and retention claims can be avoided.

Protection of Younger Workers

These laws seek to protect workers by restricting the type of work they can do, the number of hours they can work, and the types of businesses where they can work. As with many laws that protect workers, North Carolina generally follows federal law; however, the state laws are embodied in N.C. Gen. Stat. § 95-25.5.

Youths Under 18 Years of Age

No youth under 18 years of age may be employed by any employer in any occupation without a youth employment certificate unless specifically exempted. The State Commissioner of Labor prescribes regulations for youths and employers concerning the issuance, maintenance, and revocation of certificates. Certificates will be issued by the Commissioner, both directly and electronically.

Information on this certificate is available at:

https://www.labor.nc.gov/workplace-rights/youth-employment-rules/youth-employment-certificate

During the regular school term, no youth under 18 years of age who is enrolled in school in grade 12 or lower may be employed between 11 p.m. and 5 a.m. when there is school for the youth the next day. This restriction does not apply to youths 16 and 17 years of age if the employer receives written approval from the youth's parent or guardian and from the youth's principal or the principal's designee.

No youth under 18 years of age may be employed by an employer in any occupation which the United States Department of Labor finds and by order declares to be hazardous and without exemption under the Fair Labor Standards Act, or in any occupation which the Commissioner of Labor after public hearing finds and declares to be detrimental to the health and well-being of youths.

Youths Between 14 and 15 Years of Age

No youth 14 or 15 years of age may be employed by an employer in any occupation except those determined by the United States Department of Labor to be permitted occupations under the Child Labor Provisions of the Fair Labor Standards Act. These youths may be employed by employers:

1. No more than three hours on a day when school is in session for the youth
2. No more than eight hours on a day when school is not in session for the youth
3. Only between 7 a.m. and 7 p.m., except to 9 p.m. during the summer (when school is not in session)
4. No more than 40 hours in any one week when school is not in session for the youth
5. No more than 18 hours in any one week when school is in session for the youth
6. Only outside school hours. Notwithstanding the above, enrollees in high school apprenticeships or in work experience and career exploration programs as defined under the Fair Labor Standards Act may work up to 23 hours in any one week when school is in session, any portion of which may be during school hours.

No youth 14 or 15 years of age may be employed for more than five consecutive hours without an interval of at least 30 minutes for rest. No period of less than 30 minutes is considered an interruption of a continuous period of work.

Youths 13 Years of Age or Younger

No youth 13 years of age or younger may be employed by an employer.

Note: The Commissioner may waive any provision of the Youth Employment Section and authorize the issuance of an employment certificate for any youth between the ages of 13 and 18 when:

1. The Commissioner receives a letter from a social worker, court, probation officer, county department of social services, a letter from the North Carolina Alcohol Beverage Control Commission, or school official stating those factors which create a hardship situation and how the best interest of the youth is served by allowing a waiver; and
2. The Commissioner determines that the health or safety of the youth would not be adversely affected; and
3. The parent, guardian, or other person standing in loco parentis consents in writing to the proposed employment.

For more information:
North Carolina General Statutes §95-25.5
Youth Employment
https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_95/gs_95-25.5.html

Breastfeeding Laws

Mothers in North Carolina have the right to breastfeed in public (NC Gen. Stat. §14-190.9 (1993)), which includes inside a restaurant. In North Carolina, breastfeeding mothers are exempt from indecent exposure laws.

North Carolina does not have any state legislation to protect and support breastfeeding mothers in the workplace. Mothers in North Carolina are protected by the Fair Labor Standards Act (FLSA) if they are a non-exempt (hourly) employee. Under this federal mandate, breastfeeding mothers are entitled to reasonable break time and a private space (other than a bathroom) to pump at work for one year

following their child's birth. North Carolina also offers a free resource toolkit to help breastfeeding mothers return to work.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994

The USERRA covers all members of the uniformed services (including non-career National Guard and Reserve members and active-duty personnel). It ensures that members of the uniformed services are entitled to return to their civilian employment after their service.

Unionization and Right to Work

North Carolina is among a minority of states that does not require an employee to join a union or pay the union fees as a condition of employment where the employer and a union have entered into a collective bargaining agreement.

Wage and Hour

Minimum Wage – An employer must pay its employees at least the minimum wage for all hours worked, and time and one-half overtime pay based on an employee's regular rate of pay for all hours worked more than 40 in a work week unless the employee is *exempt* (see below). The minimum wage in North Carolina follows the current federal minimum wage of $7.25 an hour. According to the North Carolina Wage and Hour Act (WHA), an employer is not required to pay its employees more in wages than is required by the minimum wage and overtime pay provisions. Likewise, an employer is not required by law to give mandatory wage benefits such as vacation pay, sick leave, jury duty pay, and holiday pay to its employees regardless of how many hours a week they work.

North Carolina follows the federal Fair Labor Standards Act (FLSA), which allows employers to pay a lower hourly minimum wage if that wage plus the tips adds up to at least the full minimum wage for each hour worked. If not, the employer must make up the difference to reach the minimum wage. In North Carolina, employers can pay tipped employees an hourly wage of $2.13 as long as the employee's tips bring the total hourly wage up to the state minimum wage.

Overtime Laws – Exempt employees are not eligible for overtime pay for hours worked over 40 in a work week because of their rate of pay and type of work that they do. Non-exempt employees must be paid time and a half for any hours over 40 worked in a work week.

Executive, administrative, professional, and outside sales employees (as defined in Department of Labor regulations) who are paid on a salary basis are exempt from both the minimum wage and overtime provisions of the FLSA.

To be considered "*exempt*," employees must generally satisfy the following criteria:

1. Employees must earn a weekly salary that meets the minimum requirements, currently not less than $684 per week.
2. With very limited exceptions, the employer must pay employees their full salary in any week they perform work, regardless of the quality or quantity of the work.
3. In addition, the employee's primary job duties must meet one of the following categories of exemptions:

a. **Executive employee exemption** – All the following must apply:
    - The employee's primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise.
    - The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent.
    - The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.
b. **Administrative employee exemption** -- All the following must apply:
    - The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than the minimum requirements, currently $684 per week.
    - The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.
    - The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.
c. **Learned professional employee exemption** – (*Note: This exemption does not typically apply in the hospitality industry; however, it would apply to employees whose jobs were accounting or in-house legal counsel. You should contact your attorney if you have questions whether an employee, such as a bookkeeper, falls under this category.*) All the following must apply:
    - The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than the minimum requirements, currently $684 per week.
    - The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character, and which requires the consistent exercise of discretion and judgment.
    - The advanced knowledge must be in a field of science or learning, and the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
d. **Creative professional employee exemption** – (*Note: This exemption does not typically apply in the hospitality industry; however, it would apply to employees whose jobs are graphic art or web design, for example. You should contact your attorney if you have questions whether an employee, such as a social media marketing specialist, falls under this category.*) All the following must apply:
    - The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than the minimum requirements, currently $684 per week.
    - The employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

There is also an exemption for "highly compensated" employees who customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee. These employees must receive a total annual compensation of at least $107,432 to qualify for this exemption.

Workers' Compensation

Workers' Compensation laws are *state* laws that provide injured workers medical treatment for their injuries as well as wage replacement when they are disabled. The workers' compensation system is a form of no-fault insurance provided by the employer for the employee.

The employee gives up certain rights to sue in exchange for protection from injuries incurred on the job. Unless the injury was caused by the intentional misconduct of the employer, an employee cannot sue their employer for the injury under traditional negligence claims (such as arising from automobile accidents or "slip-and-fall" cases).

With very narrow exceptions that **do not apply to the hospitality industry**, all employers with three or more employees are required to have workers compensation insurance under North Carolina law.

When an employee is injured on the job, even when it might be considered a minor injury, you should give the employee Form 18 to complete. As an employer, you must complete Form 19: *Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission*. The employer is required to file Form 19 within five days of learning of the injury. Typically, your workers' compensation insurer will then file the completed forms electronically with the North Carolina Industrial Commission, the state agency that handles workers' compensation claims. A copy of the Form 19 also must be provided to the injured worker.

For more information:
North Carolina Industrial Commission Workers' Compensation Forms
http://www.ic.nc.gov/forms.html

North Carolina Workers' Compensation Act (Chapter 97 of the North Carolina General Statutes)
Chapter_97.pdf (ncleg.gov)

Tipping

General Provisions

North Carolina tipping is governed by sections of the North Carolina Wage and Hour Act (N.C. Gen. Stat. **§** 95-25) and administrative law (13 NCAC 12) that specifically addresses tips. These laws are generally referenced throughout this section but are explained in plain language. You may find the specific language at the following links:

North Carolina Wage and Hour Act:
https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_95/Article_2A.pdf

North Carolina Administrative Code – Tips and Tip Credits:
http://reports.oah.state.nc.us/ncac/title%2013%20-%20labor/chapter%2012%20-%20wage%20and%20hour/13%20ncac%2012%20.0303.pdf

North Carolina follows federal law, including the Fair Labor Standards Act (FLSA), which defines tipped employees as individuals engaged in occupations in which they customarily and regularly receive more than $30 a month in tips.

Tipped Employees Under the Fair Labor Standards Act (FLSA):
https://www.dol.gov/agencies/whd/fact-sheets/15-flsa-tipped-employees

Tip Credit

According to North Carolina administrative law, "tips are not wages" (13 NCAC 12.0303). This means as an employer, you are not allowed to require employees to receive their entire compensation from tips in lieu of wages.

Tips may be counted *toward* wages, however, to the extent as the employer is permitted to take a "tip credit" of at least $2.13 an hour in direct wages and applied as long as each employee receives enough in tips to make up the difference between the wages paid and the current minimum wage ($7.25). An employer can take advantage of a "tip credit" by paying tipped employees a cash wage of $2.13 plus an additional amount in tips that brings the total wage to the federal minimum wage. For an employer to use the "tip credit" to help meet the minimum wage requirement for employees, the employee must be informed of this fact and the employee must also be permitted to keep tips, unless the employee is part of a tip pool with other employees who regularly receive tips. For a tip pool to be valid, the employer must make sure that only employees who regularly receive tips participate.

North Carolina follows the federal minimum wage and tip credit. Be aware these amounts can change depending on changes to federal law. No state is permitted to pay a minimum wage or tip credit below the federal minimum guidelines.

The US Department of Labor (DOL)'s new Dual Jobs and final 80/20 tip credit rules are effective December 28, 2021, and change tip regulations under the Fair Labor Standards Act (FLSA). Employers are required to closely monitor tipped employees' work in three categories:

- Time spent on tasks that produce tips – this is work that provides service to customers for which tipped employees receive tips.
- Time spent on tasks directly supporting tip-producing work – this is work performed in preparation of or to otherwise assist tip-producing customer service work. It may be paid at a tip credit rate, but only if the work is not performed for a substantial amount of time, which is defined as either (1) more than 30 continuous minutes, or (2) more than 20% of the hours in a workweek for which the employer has taken a tip credit.
- Time spent on tasks that are not part of the tipped occupation – any time spent in this category must be compensated at full minimum wage.

View the provided examples of how DOL believes hospitality work should be categorized:
https://www.littler.com/publication-press/publication/dol-publishes-final-rule-resurrect-8020-rule-tipped-employees

Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to $1,000 for each such violation.

Learn more about what's next and how to adopt a compliance strategy: https://www.restaurantowner.com/public/New-Year-New-Compliance-Challenges-Upcoming-Changes-to-the-Dual-Jobs-and-8020-Rules-and-Their-Effect-on-the-Tip-Credit.cfm

Notice to Employees – A key requirement for taking the tip credit is notice to employees. Employers must notify employees in advance of the amount of cash wages they will be paid and the amount that wages will be increased using the tip credit. Employers must also notify employees in advance that employees are entitled to retain all tips.

Employers need not provide this information in writing. Of course, putting it in writing and obtaining an employee's written acknowledgement of receipt would help prove that the information was provided.

The National Restaurant Association provides information on tip credit employee notice requirements and has developed two sample notices, which can be obtained from the association's website. Version A is for those who do not require tip pooling, while Version B is for those who do. You may obtain these sample notices here:

www.restaurant.org/Downloads/PDFs/advocacy/tipcredit_notice_samples.pdf

Service Charges

The federal Fair Labor Standards Act (FLSA) regulations describe the "general characteristics" of a tip as:

> … a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity (29 CFR § 531.52 – General restrictions on an employer's use of its employees' tips).

As expressed by North Carolina statute, "a tip shall not include a service charge which the employer requires the customer to pay, no matter what the charge is labeled" (12 NCAC 12.0303). Some restaurants choose to eliminate tips entirely and include a service charge or "auto gratuity" on the customers' bills. Service charges are also used for banquets and, in some cases, large parties, in lieu of tipping. In short, service charges are treated as sales, not tips.

Tips are discretionary (optional or extra) payments determined by a customer that employees receive from customers. Tips include:

- Cash tips received directly from customers
- Tips left through electronic settlement or payment (including a credit card, debit card, gift card, or any other electronic payment method)
- The value of any noncash tips, such as tickets or other items of value
- Tip amounts received from other employees paid out through tip pools or tip splitting, or other formal or informal tip sharing arrangements

Four factors are used to determine whether a payment qualifies as a tip. All four factors must apply:

- The payment must be given freely by the customer
- The amount must be solely determined by the customer
- The payment should not be the subject of negotiations or dictated by employer policy
- Generally, the customer must have the right to determine who receives the payment

If any one of these does not apply, the payment is likely a service charge and is treated like any other sales revenue. Employers who distribute service charges to employees should treat them the same as regular wages for tax withholding and filing requirements. Employers should confer with an accountant for details.

Tip Pooling

Tips belong to the employee whom the customer left them for. Employees and employers may not make an agreement that the employee will relinquish tips to the employer.

However, if there is a tip pooling arrangement the employee may be required to relinquish tips received for distribution in accordance with the tip pooling arrangement.

"Tip pooling" is an arrangement in which all or a part of the tips of the contributing employees are combined into a common pool and then divided among the participating employees according to a pre-determined formula. A tip pooling arrangement is valid when:

1. The contributing employees are notified of the arrangement before the pay period in which it will be used
2. The share of each contributing employee is at least 85% of the employee's tips before the employee contributes to the tip pool (see “tips accruing” below)
3. Only employees who customarily and regularly receive tips receive a share from the pool (servers, bartenders, service bartenders, counter personnel, and bussers)

The requirement that the employer pay "tips accruing” to the employee is satisfied if the employee in a tip pooling arrangement receives 85% of their actual tips before pooling or their share received from the pool, whichever is greater. The tipped employees must retain at least 85% of the tips they receive, which means the employer must maintain accurate and complete records of the tips received and the amount of tips earned under the tip pooling arrangement.

In many cases, employers either facilitate or require tip-sharing arrangements. There are several reasons why an employer may favor a mandatory or facilitated tip pool, including:

- A belief that a tip pool creates friendlier and better service as employees work together, thus enhancing repeat business from customers
- Distributing tips to more employees will help management take full advantage of the tip credit for more employees, thus reducing labor costs
- Redistributing tips to lower-tier employees results in less employee turnover, and management may be able to promote from within (for example, bus staff to wait staff)
- As one court has suggested, management might put in place tip pooling simply to flex managerial muscle

Besides the legal concerns, which will be addressed later, there are reasons why an employer may decide not to put in place or accommodate a tip pool, including:

- To encourage competition among wait staff, perhaps leading to increased productivity and table turns
- Not wanting to spend management resources administering the system
- Tip pooling has not been used previously and many long-term employees feel that individual tips belong to them

While tip pools are legally limited to servers, bartenders, service bartenders, counter personnel, and bus persons, there is case law expanding this list to the maître d'/host positions as well. Cooks and dishwashers are listed in the regulations as not being "tipped" employees. While this list is certainly not exhaustive of all the positions in a restaurant (e.g., dish polisher, sommelier, expediter), basically a "tipped" position is limited to those with significant guest interaction, that is, front-of-the-house positions. Managers and supervisors may not participate in a tip pool.

This is an area of the law that is evolving. If you are unclear whether an employee can be included in a tip pool, you should confer with legal counsel to assess the position according to current rulings.

Tips on Credit or Debit Cards

Most consumer transactions today are electronic. According to North Carolina administrative code, if a customer pays by credit, charge, or debit card and includes a tip for an employee, the tip accrues to the employee at the time of the charge. The employer must pay the employee the charged tip no later than the end of the pay period in which the customer signs the charge. In addition, employers may retain from the tips an amount up to or equal to a percentage of the fee charged by the card issuing company attributable to the tips.

Tip Reporting

While the IRS requires tipped employees to provide this report once a month, as the employer, you will need a report for every payroll period, otherwise you cannot correctly report the employees' total wages, nor can you withhold the proper taxes (and pay your share of FICA tax). You can use the IRS created Form 4070A "Employee's Daily Record of Tips" or use another form that includes:

- Employee's name, address, and social security number
- Employer's name
- Period covered and date reported
- Total amount of tips received by the employee
- Employee's signature

You need to withhold income and FICA tax from each paycheck and report each employee's tips to the IRS. If you use a payroll service to process your payroll, you will need to report the total tips reported for the payroll period as submitted to you by that employee, along with the tipped employee's hours and hourly rate. This information will also be included on the Employer's Quarterly Payroll Tax Return (Form 941) that you or your payroll service will file. At the end of the year, you will also need to account for each employee's total wages (including tips) on their W-2.

In certain cases, you may need to "allocate" additional wages for an employee if the employee has failed to report "sufficient" tip income.

As a practical matter you cannot force your employees to report all their tip income. While you are legally responsible for distributing Form 4070A (or an acceptable alternative), the business is only liable for its share of the FICA taxes on unreported tips (and only if the IRS is successful at substantiating unreported tip income). You should take a proactive role to get employees to accurately report their tips.

You are required to file IRS Form 8027 at the end of each year. It summarizes the business' total sales, charged sales, charged tips, and total reported tips. If tipping is customary in your restaurant, food and beverages are served, and more than 10 employees are normally employed, then you must submit the "Employer's Annual Information Return of Tip Income and Allocated Tips" on an annual basis.

Authorization for Withholding Wages

An employer may withhold or divert a portion of an employee's wages without the employee's authorization only when the employer is required or empowered to do so by North Carolina or federal law. In all other circumstances, a valid authorization by an employee is required for an employer to make a deduction from an employee's wages. Examples include contributions to savings plans, uniform rentals, and charitable contributions.

To be valid, an authorization by an employee must:

- Be written
- Be signed by the employee on or before the payday for the pay period for which the deduction is being made
- Show the date of signing by the employee
- State the reason for the deduction
- Only if it is a specific authorization, state the specific dollar amount or percentage of wages to be deducted from each paycheck and the number of paychecks or length of time for which the deduction is authorized

In addition, prior to the deduction taking place, the employer must:

- Provide advance written notice of the actual amount to be deducted
- Provide advance written notice of the employee's right to withdraw authorization
- Provide the employee with a reasonable opportunity to withdraw the authorization in writing

A specific authorization may be for one or more paychecks and should state the dollar amount or percentage of wages which the employee agrees may be deducted from each paycheck. Employers must give employees a reasonable opportunity to withdraw specific authorizations if such deductions are for the employees' convenience (for example, savings plans, credit union installments, savings bonds, union or club dues, uniform rental or cleaning not required by the employer, parking, and charitable contributions.)

Occupational Safety and Health

All owners and operators should familiarize themselves with the Occupational Safety and Health Act of 1970 (OSH Act). The OSH Act was enacted to ensure that US workplaces are safe and free of harmful working conditions. At its core, the OSH Act requires employers to provide their employees with a workplace free from recognized hazards that cause or are likely to cause death or serious physical harm, and to comply with occupational safety and health standards issued under the OSH Act.

Importantly, the OSH Act also established the Occupational Safety and Health Administration (OSHA) to provide an effective enforcement program. OSHA sets mandatory occupational safety and health standards and conducts workplace inspections to ensure that employers comply with the standards and provide a safe and healthful workplace. It is the responsibility of all business owners/operators to become familiar with standards applicable to their establishments, to eliminate hazardous conditions to the extent possible, and to comply with the standards.

Even in areas where OSHA has not addressed a specific hazard, employers are responsible for complying with the OSH Act's "general duty" clause, which states that each employer "shall furnish … a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (29 USC § 654 (5))

North Carolina and other states with OSHA-approved job safety and health programs must set standards that are at least as effective as the equivalent federal standard.

For more information:
North Carolina General Statutes
Article 16. Occupational Safety and Health Act of North Carolina
https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_95/Article_16.html

Employers' Responsibilities Under the OSH Act – As employers covered by the OSH Act, owners/operators must provide their employees with jobs and a place of employment free from recognized hazards that cause, or are likely to cause, death or serious physical harm. They must comply with the OSHA statutory requirements, standards, and regulations that require them to do the following:

- Provide well-maintained tools and equipment, including appropriate personal protective equipment when necessary
- Provide medical examinations in certain circumstances
- Provide training required by OSHA standards
- Report to OSHA within eight hours accidents that result in fatalities
- Report to OSHA within eight hours accidents that result in the hospitalization of three or more employees
- Prominently post the OSHA poster informing employees of their rights and responsibilities
- Provide employees access to their medical and exposure records
- Do not discriminate against employees who exercise their rights under the OSH Act
- Post OSHA citations and abatement verification notices at or near the work site
- Eliminate hazards cited in the violation within the prescribed period

- Respond to survey requests for data from the Bureau of Labor Statistics, OSHA, or a designee of either agency

Hazard Communication in the Workplace – Additionally, operators need to pay particular attention to OSHA's "Hazard Communication Standard." This rule requires employers who have any potentially hazardous chemical in the workplace, like cleaning solvents and pesticides, to transmit information about these chemicals to employees through labels on containers, "safety data sheets" (manufacturer-provided data sheets), and training programs.

Employees have a right to know about the chemical hazards they may face in the workplace. Consequently, under the applicable federal standards, OSHA requires that employers:

1. Ensure that all containers of hazardous materials are properly labeled, which includes identifying their contents, hazard warnings, and name and address of chemical manufacturer, importer, or other responsible party
2. Train all employees in the handling of hazardous materials, identifying hazards, and protecting themselves from exposure
3. Maintain a Safety Data Sheet (SDS) for each hazardous substance, readily available to employees, with the following information:
    - Proper identification of the chemical or the ingredients of a mixture
    - Physical and chemical characteristics
    - Physical hazards, including signs and symptoms of exposure and medical conditions associated with exposure to the chemical
    - Reactivity data
    - Primary route(s) of exposure (e.g., skin contact, inhalation)
    - The OSHA permissible exposure limit
    - Precautions for safe handling and use
    - First aid and control measures
    - Date the SDS was prepared or revised
4. Develop a written hazard communication program, readily available on request of employees, their representatives, OSHA, and National Institute for Occupational Safety and Health:
    - List of hazardous chemicals known to be present in the workplace
    - Methods used to inform employees of the hazards associated with the chemicals
    - Methods used to inform independent contractors of the hazardous chemicals their employees may be exposed to while working on the employer's premises

OSHA's Bloodborne Pathogens Standard – In 1991, OSHA released its Bloodborne Pathogens Standard (BPS) to eliminate or minimize employee contact with potentially infectious materials such as blood or other body fluids. Although the regulation principally applies to health care workers, in 1993, OSHA advised the National Restaurant Association that foodservice establishments with designated employees responsible for rendering first aid or medical assistance as part of their job duties are also covered. If a business has chosen to designate an employee as responsible for rendering first aid, under BPS the employer must provide the following:

- **Exposure plan.** Employers must provide documented operating procedures to eliminate or minimize employees' exposure to other's blood or other potentially infectious materials. The plan should include employee awareness, training, appropriate personal protection equipment,

procedures for cleanup and disposal of contaminated material, and incident reporting. Review the plan annually and update as necessary.

- **Hepatitis B vaccination.** Within 24 hours after an employee is exposed to potentially infectious materials, the employer must counsel the employee and offer to provide a free post-exposure vaccination against Hepatitis B. Although this is only required for designated first-aiders, you may wish to consider offering it to any exposed employee. The vaccination need not be offered before exposure because first aid is considered a "collateral duty" for foodservice employees.
- **Medical evaluation.** If employees have contact with blood or other potentially infectious materials, the employer must arrange for a confidential medical evaluation.
- **Recordkeeping.** The employer must maintain a record of each occupational exposure.
- **Training.** Designated first-aiders must receive training and information on first-aid techniques and certification; how to avoid or minimize exposure; handling and removal of gloves, clothing, bandages, and laundry; hand washing; and cleanup procedures.

OSHA's Emergency Temporary Standard – on November 5, 2021, OSHA published the Emergency Temporary Standard (ETS) for COVID-19 vaccinations for employers with 100 or more employees company-wide. The 100+ employee threshold includes temporary, seasonal workers, minors, and part-time employees. The ETS is temporary and will be in effect for 6 months. After that, OSHA will determine if the ETS should become permanent, rescinded, and/or modified to some degree.

OSHA is not currently implementing or enforcing the ETS due to a court order and pending litigation. If it does to into effect, employers must (1) require that all employees get vaccinated and show proof of vaccination status (unless the employee qualifies for a medical or religious exemption) or (2) provide a weekly testing option for those employees who do not wish to be vaccinated and require those employees to be masked in the workplace.

While the ETS is in legal limbo currently, businesses should be prepared if the ETS does go into effect. To learn more: https://mcusercontent.com/ba4f5470d7e01dcb7ddd3c555/files/089cbdb1-f5a9-cdfd-2ff5-f9e12419e832/NationalRestaurantAssociation_FactSheet_ETS_Oct21_2.pdf?mc_cid=cbd7ea441e&mc_eid=19c8e36327

Unemployment Insurance

As an employer, you pay an Unemployment Insurance (UI) tax on your payroll. This UI tax pays for the benefits that are paid to qualified, unemployed workers. Unemployment tax is not deducted from employee wages.

NC Department of Commerce's Division of Employment Security transfers unemployment tax payments made by employers to the federal Unemployment Insurance Trust Fund in Washington, DC. Each year, a prorated share of the interest earned on this trust fund is added back to the account of each North Carolina employer having a credit experience rating balance.

For more information:
North Carolina Division of Employment Security Unemployment Insurance Website
DES: Employers (nc.gov)

Worker Adjustment and Retraining Notification Act (WARN) of 1988

The Worker Adjustment and Retraining Notification Act (WARN) covers employers with at least 100 employees, not including employees who have worked less than six months in the last 12 months and not including employees who work less than 20 hours per week. Employers must provide 60 days' advance notice of covered closing and covered mass layoffs of 50 or more people (excluding part-time workers).

Employee Drug Testing

Employers in North Carolina may require applicants to take a drug test as a condition of employment at the expense of the employer. Applicants have the right to retest a confirmed positive sample at their own expense, at the same lab that confirmed the sample or at another approved lab of their choosing.

North Carolina "finds that individuals should be protected from unreliable and inadequate examinations and screening for controlled substances" (NCGS § 95-230). North Carolina also finds that employers who test employees for controlled substances "shall use reliable and minimally invasive examinations and screenings" (NCGS § 95-230).

If a prospective or current employee has a positive result, they "shall be confirmed by a second examination of the sample utilizing gas chromatography with mass spectrometry or an equivalent scientifically accepted method" (NCGS § 95-230).

To preserve individual dignity and privacy, examiners and their agents must keep information confidential relating to an examinee's controlled-substance examinations, unless otherwise authorized by law or code (13 NCAC 20.0501).

Potential Liability Pitfalls

Several potential liability pitfalls on drug testing include:

- Only requiring drug tests for certain classes of current or prospective employees, based on their *race, color, religion, sex, and national origin (Title VII of the Civil Rights Act)*
- Firing or refusing employment based on a positive result due to prescribed medications for a disability (Americans with Disabilities Act)
- Firing or refusing employment based on a drug screen not confirmed by an approved laboratory
- Violating the dignity and privacy of the employee by sharing results with third parties (if the results are falsely positive, sharing this information could be the basis for a civil suit for defamation)

Practical Points on Drug Testing

Because employees are hired and terminated "at-will" in North Carolina, an employer may terminate an employee for any reason that is *not discriminatory* under state or federal employment law.

If an employee appears to be unable to perform the job due to impairment (other than due to a disability requiring reasonable accommodations under the ADA), then you would be expected to take them off duty; for example, if the employee was engaged in illegal activity, such as selling drugs on

premises, and this action was verified. That said, as with every negative employment action, the employer should document the incident and file the report with the manager's signature and the signatures of witnesses, if appropriate (such as an act of violence).

If an employee smells of alcohol or marijuana on duty, the safest course of action is to privately confront the employee to voice your concern. Acting on suspicion or unverified information, even if the suspicion seems clearly supported, is risky. Implying the employee is intoxicated in front of other staff members and customers could expose your business to a defamation action. It also can breed mistrust of management, and few people like seeing their peers embarrassed or humiliated.

Important Employee Documentation

Employee Handbook (Source: Restaurant Startup & Growth)

Communicating personnel policies, work rules, expectations, benefit plans, and overall organizational philosophy to employees is vitally important to any business. Well-drafted, easy-to-understand work rules are imperative to getting your employees up to speed with your business' culture. In fact, good communication and documentation often increases employee retention, as it fosters trust and builds employee confidence in the organization.

A sound employee handbook can prove beneficial in several ways, including improving employee morale, avoiding litigation, and increasing consistent application of workplace policies and discipline. From an employee perspective, the employee handbook provides guidance, sets expectations, and provides information regarding policies and procedures that apply to the workplace. The employee handbook can also prove a valuable resource for employees with respect to employee benefit plans and can free up managers' time from answering questions regarding such programs.

As for employers, the greatest benefit that an employee handbook can provide is the legal protections from properly drafted and disseminated policies and procedures.

Clearly establishing a set of behavioral expectations demonstrates that an employer is not contributing to the employee's bad behavior. Setting clear performance and behavioral expectations can also help the employer consistently spot and address violations. Relying on loosely defined standards that are not properly documented can lead to violations that become subjective and open to interpretation. The result of such ambiguity is often inconsistent treatment, which can lead to litigation.

Employers often adopt exhaustive written personnel policies that govern relationships with current employees because a written policy can be an effective tool for defending lawsuits. Putting policies and procedures in written form also provides practical benefits. From the manager's perspective, a properly written and regularly updated employee handbook can serve as a tool for communicating performance expectations, establishing applicable work rules, setting disciplinary policies, and telling employees about the benefit plans that the employer offers.

An employee handbook can also provide support to your managers. When faced with a personnel issue, an employee handbook can provide guidance and certainty to the decision-making process.

To be effective, an effective employee handbook must be tailored to your policies, your business, your goals, and your workforce. It is an investment that can pay dividends in increased productivity, improved employee morale, and minimized litigation.

One Size Does Not Fit All. While employee handbooks can be written by software programs or by consulting services, know that there is no single template that is right for every business.

To ensure that policies are correct and remain current, employers should discuss current issues that lead to new statutes with an attorney or human resource professional who specializes in employment policies or employment law for the hospitality industry

For more guidance on what should be included in your employee handbook, review Appendix A below.

Employment Applications (Source: Restaurant Startup & Growth)

It is important for every job applicant to complete a proper employment application. Employment applications can provide a good defense for a wrongful discharge claim. A common example is the employee who lies on their application and then raises a wrongful discharge claim against the employer. Evidence of the employee's misrepresentation on their job application can diminish or undermine the claim and protect your interests.

Also, an employment application allows you to obtain written consent to perform lawful background checks. For example, before an employer can get a consumer credit report for employment purposes, it must notify the applicant in writing and get written authorization. This allows the employee to withdraw the application if there is information the employee would rather not see disclosed. School records cannot be disclosed without the consent of the student.

The application can be a double-edged sword if it is not carefully constructed. Employment applications have been the focal point of discrimination lawsuits against employers. The EEOC cautions employers to avoid questions that tend to have a "disproportionate effect" in screening out minorities or females. All questions in an application should only seek information necessary to judge if the individual is competent to perform the job.

Small Business Exemption

It is important to understand that both federal and state laws apply to restaurants, bars, and lodging establishments. For smaller businesses, which are defined differently under federal employment laws (e.g., generally employers with less than $500,000 in gross annual sales under wage and hour laws; or employers with fewer than 15 employees under nondiscrimination laws, etc.), generally only state laws apply. This is called the small business exemption. However, any person who works on or otherwise handles goods that are moving in interstate commerce is individually subject to the minimum wage and overtime protection of the FLSA. For example, a waitress or cashier who handles a credit card transaction would likely be subject to the Act.

In most cases, when two laws apply, the one most beneficial to the employee is the one to follow. Therefore, except for certain areas (e.g., pension benefits), in most cases, even if an establishment falls under federal guidelines, the state law should be followed when it benefits the employee more.