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Contents

Poyner Spruill LLP has a labor and employment practice group that consists of seven partners, two associates, and one of counsel spread across three of the firm's four office locations; Charlotte, Raleigh, and Rocky Mount, North Carolina. In addition, Poyner Spruill boasts a separate employee benefits practice group that consists of three partners, and two associates, based out of the firm's Charlotte and Raleigh offices. The firm primarily focuses on two areas of employment law: defense of administrative and judicial claims by employees and proactive workplace management. The labor and employment practice group helps clients establish practical and useful employment policies, advises on the day-to-day implementation of policy and employment laws, and assists in difficult situations involving disciplinary action, termination, employee counseling, FMLA and ADA leave requests, employee violence, privacy, disability and religious accommodation, internal complaints of discrimination, retaliation, harassment, and other complex issues.

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1. Current Socio-Economic, Political and Legal Climate; Context Matters

1.1 "Gig" Economy and Other Technological Advances

The 'gig' economy raises questions of proper classification of workers as employees or independent contractors. The North Carolina Department of Labor ('NCDOL') defines an employee as someone who is dependent on the business that he or she serves. An independent contractor is typically a worker who is engaged in a business of his or her own. Factors considered by the NCDOL in determining whether a worker is an employee or an independent contractor include:

- the extent to which the services rendered are an integral part of the principal's business;
- the permanency of the relationship;
- the amount of the alleged contractor's investment in facilities and equipment;
- the nature and degree of control by the principal;
- the alleged contractor's opportunities for profit and loss;
- the amount of initiative, judgment or foresight in open-market competition with others required for the success of the claimed independent contractor; and
- the degree of independent business organization and operation.

Factors typically not considered by NCDOL include the place where work is performed, the absence of a formal employment relationship, whether an alleged independent contractor is licensed by state/local government, and time and mode of pay.

North Carolina law creates a rebuttable presumption that drivers for transportation network companies ('TNC') are independent contractors and not employees (N.C. Gen. Stat. § 20-280.8). The presumption may be rebutted by application of the common law test for determining employment status. A TNC is defined as "any person that uses an online-enabled application or platform to connect passengers with TNC drivers who provide prearranged transportation services" (N.C. Gen. Stat. § 20-280.1).

North Carolina law does not prohibit employers from asking applicants and employees for password access to social media accounts. However, the Federal Stored Communications Act makes it unlawful to obtain unauthorized access to an individual's stored electronic communications, including postings on a personal social media account. Requesting or requiring password access to a personal social media account may be viewed as 'unauthorized access'.

Employers may also realize additional unanticipated legal risk from requesting or requiring password access to an employee's or applicant's personal social media account. For example, an employer could expose itself to litigation if review of an applicant's or employee's personal account revealed otherwise unknown information about his or her age, race, ethnic origin, religion, or disability and the individual is subsequently not hired or is discharged or disciplined.

1.2 "Me Too" and Other Movements

North Carolina does not have a state law that addresses discrimination based on sexual orientation or gender identity. A change to North Carolina law on March 30, 2017, repealed a state law that had prohibited local governments from enacting ordinances prohibiting discrimination based on sexual orientation or gender identity and replaced it with a three-year moratorium on any local ordinances "regulating private employment practices or regulating public accommodations".

1.3 Decline in Union Membership

North Carolina has one of the lowest percentages of unionized workers in the country.

1.4 National Labor Relations Board

The National Labor Relations Board (NLRB) enforces the National Labor Relations Act (NLRA). New appointees to the NLRB have been proactive in overturning prior NLRB precedent, by:

- creating new standards for evaluating workplace policies;
- returning to narrower joint-employment standard governing in which employers may be jointly liable for violations of the NLRA; and
- adoption of a business-friendly micro-union test.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

It is important for employers to define and understand the relationship with workers. Some common alternative worker relationships are discussed below.

The test for determining whether an individual is an employee or independent contractor under North Carolina law is set forth in **1.1 'Gig' Economy and Other Technological Advances.** Misclassification of employees as independent contractors can subject employers to payment of an employee's workers' compensation claim, monetary penalties and criminal charges. Other consequences of misclassifying employees include employer liability for unpaid payroll taxes to the North Carolina Department of Revenue and the Internal Revenue Service and unemployment benefits.

If two entities are joint employers, they are both responsible for compliance with federal and state law. A recent Fourth Circuit Court of Appeals decision (the federal court with

jurisdiction over North Carolina, South Carolina, Virginia, West Virginia and Maryland) clarified the joint employer test under the Federal Fair Labor Standards Act: "Whether two or more persons or entities are 'not completely disassociated' with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine – formally or informally, directly or indirectly – the essential terms and conditions of the worker's employment" (Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 141 (4th Cir. 2017)).

The court also provided six factors to guide the analysis of whether a joint employment relationship exists:

- whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
- whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to – directly or indirectly – hire or fire the worker or modify the terms or conditions of the worker's employment;
- the degree of permanency and duration of the relationship between the putative joint employers;
- whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
- whether the work is performed on premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
- whether, formally or as a matter of practice, the putative joint employers jointly determine, share or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools or materials necessary to complete the work.

However, this joint employment analysis does not apply to franchisors and franchisees when analyzing state law liability. Under a recently enacted North Carolina law, franchisors will not be held liable for state law violations by their franchisees (N.C. Gen. Stat. § 95-25.24A).

2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity

No specific form is required to enter into a contract of employment with an employee in North Carolina. Many employers provide offer letters to employees setting out an overview of the basic terms of the arrangement, including the employee's job title, supervisor, exempt or non-exempt status under federal overtime laws, full-time or part-time status, benefits and any pre-conditions of employment (for example, successful completion of a background check). Although not required, offer letters communicate basic expectations while reserving the right for employers to modify the employment relationship in the future, however an offer letter does not necessarily create a contract of employment.

Employment in North Carolina is generally at-will, meaning that it can be terminated at any time by either the employee or the employer for any lawful reason. An employer and employee can enter into a contract that provides for a specific term of employment and replaces the at-will presumption.

Handbooks are not required but are recommended.

2.3 Immigration and Related Foreign Workers

Employers with 25 or more employees are required to use E-Verify to check work authorization for all new hires (N.C. Gen. Stat. § 64-26).

2.4 Collective Bargaining Relationship or Union Organizational Campaign

Union membership is low in North Carolina compared to other states. If a union or other concerted activity by employees is involved, federal laws under the National Labor Relations Act will apply. North Carolina law prohibits an employer from denying an individual the right to work based on membership or non-membership of a union (N.C. Gen. Stat. §§ 95-80, 95-81).

3. Interviewing Process

3.1 Legal and Practical Constraints

Interviews

Employers must follow federal laws that prohibit discrimination against applicants in hiring based on protected characteristics including age, race, religion, national origin, disability, pregnancy, veteran status, gender identity (including transgender status and sexual orientation according to the Equal Employment Opportunity Commission), genetic information or citizenship.

In addition, the North Carolina Equal Employment Practices Act prohibits employers who regularly employ 15 or more employees from discriminating against employees based on race, religion, color, national origin, age, sex or handicap (N.C. Gen. Stat. § 143-422.2).

Employers should not ask employees about these protected characteristics during the hiring process and must have legitimate business reasons for making employment decisions that are unrelated to these protected characteristics.

North Carolina does not have any laws prohibiting employers from asking an applicant about his or her salary history.

Pay equity, the requirement that men and women receive equal pay for equal work, is governed by the Federal Equal Pay Act.

Background Checks
There is no North Carolina law prohibiting private employers from asking employees about their criminal history during the application process. Effective December 1, 2018, employers who rely on a Certificate of Relief issued to an individual who was convicted of certain crimes are not liable for any action alleging negligence based on the hiring or employment of that individual (N.C. Gen. Stat. § 15A-173.2).

Background checks must be conducted in compliance with the Federal Fair Credit Reporting Act.

4. Terms of the Relationship

4.1 Restrictive Covenants
Covenants not to compete are generally disfavored but are enforceable in North Carolina when they are reasonable. To be enforceable, a covenant not to compete must be:

- in writing;
- part of an employment contract or sale of a business;
- based on valuable consideration (which cannot be solely continued at-will employment);
- reasonably necessary for the protection of the company's interests; and
- reasonable in time and geographic scope.

If the restrictive covenant is not entered into at the start of employment, employers must provide other valuable consideration including, for example, a raise, promotion, or bonus.

North Carolina courts may modify or 'blue-pencil' the scope, territory, or time of a non-competition agreement deemed to be unreasonably broad by striking out the unreasonable provisions. Non-competition provisions that are overbroad are not rewritten or enforced.

4.2 Privacy Issues
Agreements with employees protecting the confidentiality of business information that are limited to a company's legitimate business interests do not need to be limited by time or geographic area. Violations of these types of covenants are analyzed under normal breach of contract law.

4.3 Discrimination, Harassment and Retaliation Issues
The North Carolina Equal Employment Practices Act prohibits employers who regularly employ 15 or more employees from discriminating against employees based on race, religion, color, national origin, age, sex or handicap (N.C. Gen. Stat. § 143-422.2).

The Persons With Disabilities Protection Act (PWDPA) prohibits employers who regularly employ 15 or more employees from taking adverse employment action against a qualified person with a disability on the basis of that disability. Damages under the PWDPA include back pay and declaratory or injunctive relief (N.C. Gen. Stat. § 168A-1, et seq).

4.4 Workplace Safety
With certain limited exceptions, NCDOL adopts Federal Occupational Safety and Health Act standards almost verbatim.

The North Carolina Workers' Compensation Act requires all businesses that employ three or more employees, including those operating as corporations, sole proprietorships and limited liability companies and partnerships, obtain workers' compensation insurance or qualify as self-insured employers for the purpose of paying workers' compensation benefits to their employees. Exceptions to this requirement include:

- employees of certain railroads;
- casual employees, ie, persons whose employment is both casual and not in the course of the trade, business, profession or occupation of the employer;
- domestic servants directly employed by the household;
- farm laborers when fewer than ten full-time, non-seasonal farm laborers are regularly employed by the same employer;
- federal government employees in North Carolina; and
- "sellers of agricultural products for the producers thereof on commission or for other compensation, paid by the producers, provided the product is prepared for sale by the producer".

If a company subcontracts work to a subcontractor who does not have workers' compensation insurance, that company may be liable for the work-related injuries of the subcontractor's employees, regardless of the number of employees the company or the subcontractor employs.

4.5 Compensation and Benefits
Employers in North Carolina must follow federal laws with respect to health plans, including the Employee Retirement Income Security Act (ERISA), the Patient Protection and Affordable Care Act (ACA), and the Consolidated Omnibus Budget Reconciliation Act (COBRA). In addition, North Carolina has a 'mini-COBRA' statute applicable to insured group policies, including those of small businesses that are not subject to federal COBRA provisions.

North Carolina's mini-COBRA statute generally provides for continuation of group hospital, surgical and major medical coverages (N.C. Gen. Stat.§ 58-53-5) for up to 18 months after termination of employment or loss of eligibility (N.C. Gen. Stat. § 58-53-35).

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

In North Carolina, employment is presumed to be at-will. Employers can terminate at-will employees for any lawful reason. Severance payments upon termination are not required and may be the subject of agreement between the parties (either at the time of contracting or at the time of termination). If the employer enters into a contractual employment relationship with an employee for a term, the agreement should set out the terms for termination in detail, including what happens if a change of control occurs, what constitutes cause to terminate the employee, when and if the employee can resign with good reason and the types of payments that are due under each type of termination.

In general, employers are not required to provide notice before termination, unless otherwise required by contract or by the Federal Worker Adjustment and Retraining Notification Act.

6. Employment Disputes: Claims; Dispute Resolution Forums; Relief

6.1 Contractual Claims

In addition to any claims available to employees under federal law, North Carolina recognizes a common law claim for wrongful discharge in violation of public policy. This North Carolina claim is limited to discriminatory terminations (it does not cover harassment claims or discrimination that does not involve employment termination) and does not protect against retaliation.

6.2 Discrimination, Harassment and Retaliation Claims

North Carolina's Human Relations Commission does have the authority to receive charges of discrimination or retaliation; however, the powers of the Human Relations Commission are limited to investigation and conciliation. Discrimination claims under federal law are filed and investigated in the first instance by the Federal Equal Employment Opportunity Commission. Claims alleging discrimination based on state laws can be filed directly in state court.

North Carolina law prohibits discrimination based on lawful use of lawful products, with certain limited exceptions (N.C. Gen. Stat. § 95-28.2). Specifically, this statute prohibits employers from failing or refusing to hire a person, or discharging or otherwise discriminating against any employee with respect to any term or condition of employment, because that person or employee engages in or has engaged in the lawful use of lawful products if the activity:

- occurs off the employer's premises;
- occurs during non-working hours; and
- does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees.

6.3 Wage and Hour Claims

The wage and hour provisions in North Carolina generally mirror those established by the federal government through the Fair Labor Standards Act. Employers are not required to provide paid time off or holidays under state law. There is no requirement that employees be compensated for accrued, unused vacation time upon termination of employment, unless the employer is contractually obligated to provide such payments under a policy, practice or agreement. Absent a written provision to the contrary, accrued but unused sick time is presumed to be forfeited at termination of employment. It is strongly recommended employers include clear, written forfeiture provisions in a handbook or other employment document. In general, ambiguities will be construed against the employer.

Wage and hour claims may be filed with the N.C. Department of Labor's Wage and Hour Bureau; however, filing with the agency before initiating a claim in court is not required.

The North Carolina Wage and Hour Act (N.C. Gen. Stat. § 95-25.1, et seq.) and accompanying regulations (13 NCAC 12.0101, et seq.) are the primary sources of state wage and hour law. These laws require, among other things:

- written notice of promised wages and the date and place for payment of wages at the time of hire;
- 24 hours' advance written notice of reductions in pay during employment; and
- written policies on forfeiture of vacation, bonus and commission.

The statutes and regulations also contain youth employment rules.

Commission and bonus programs are construed against the employer when ambiguous.

The North Carolina Wage and Hour Act provides for double damages, attorney's fees and civil penalties.

Final pay must be made on the next regular payday following termination (N.C. Gen. Stat. § 95-25.7). However, wages based on bonuses, commission, or other forms of calculation may be paid on the first regular payday after the amount can be calculated.

There are also detailed rules about withholding wages and making deductions from wages (N.C. Gen. Stat. § 95-25.8). When the amount or rate of the deduction is known and

agreed on in advance, the employer must have a written authorization, which is signed on or before the payday from which the deduction will be made, indicates the reason for the deduction, and states the dollar amount or percentage of wages to be deducted. If the deduction is made for the employee's convenience, the employee must be given a reasonable opportunity to withdraw the authorization. When the amount of the proposed deduction is not known in advance, the employer must obtain a written authorization which is signed before the payday on which the deduction is to be made and indicates the reason for the deduction. Before making a deduction, the employee must be given written notice of the amount of the deduction and his or her right to withdraw the authorization and a reasonable opportunity to withdraw the authorization.

Any withholding of wages for the employer's benefit must also meet the following requirements: In weeks without overtime, wages may not be reduced below minimum wage. In weeks with overtime, deductions may be made only from wages for non-overtime hours, which may not be reduced below minimum wage. No deduction can be made from overtime. An employer may withhold from wages for cash shortages, inventory shortages, or loss or damage to the employer's property, provided the deduction limitations of the minimum wage and/or time and one-half overtime pay are met and the employee is given seven days' prior written notice of the amount of the deduction. The seven-day rule does not apply when the deduction is made from the wages of a terminated employee. If the employee is charged with a crime as the result of a cash shortage, inventory loss, or loss or damage to the employer's property, no written authorization is required, but the deduction must comply with the rules regarding deduction limitations of the minimum wage and time and one-half overtime pay. If the employee is found not guilty, any amounts withheld must be reimbursed to the employee. Loans or advances of wages are not subject to the written authorization rules.

Minimum wage is the same as required under the Fair Labor Standards Act, currently USD7.25 per hour.

An employer must pay one-and-a-half times the regular rate of pay for each hour worked over 40 hours in the working week. N.C. Gen. Stat. § 95-25.4. However, employees of seasonal amusement or recreational establishments receive overtime only after working more than 45 hours in the working week. Businesses "engaged in commerce or in the production of goods for commerce" as defined in the Fair Labor Standards Act (FLSA) are exempt from the overtime and minimum wage provisions of the state Wage and Hour Act (but will be covered by the overtime requirement of the FLSA). There are several other exemptions for specific industries (listed in N.C. Gen. Stat. § 95-25.14).

6.4 Whistle-blower/Retaliation Claims

The Retaliatory Employment Discrimination Act (REDA) limits an employer's right to terminate an employee for conduct protected by the statute. A claim under REDA can be filed with NCDOL before initiating a legal proceeding, but such filing is not required. Aggrieved employees – or NCDOL – may seek civil damages or injunctive relief when an employer discharges, suspends, demotes, relocates or takes action adverse to the employment interests of an employee when that employee files or threatens to file a claim or a complaint or takes other protected actions. Examples of protected activities include an employee exercising or threatening to exercise his or her rights under North Carolina's:

- Workers' Compensation Act;
- Wage and Hour Act;
- Occupational Safety and Health Act; or
- Mine Safety and Health Act.

Other whistleblower protections exist under various federal laws including, for example, the Sarbanes-Oxley Act, the FDA Food Safety Modernization Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act.

6.5 Dispute Resolution Forums

Rule 1.B.(1) of the 'Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions', provides that a senior resident superior court judge may, by written order, require parties, their attorneys, and a representative of any insurance carrier involved in the litigation to attend a pretrial mediated settlement conference in any civil action, with certain limited exceptions.

Federal courts in North Carolina began using mandatory mediation as its preferred ADR option shortly after the Superior Court program started in state courts. Certain classes of cases are automatically referred to mediation; otherwise the court may order alternative dispute resolution.

6.6 Class or Collective Actions

On May 21, 2018, the US Supreme Court ruled arbitration agreements between employees and employers requiring individual arbitration must be enforced. In light of this decision, employers can require employees to enter into contracts waiving their class and collective action rights in addition to their right to bring employment claims in court.

6.7 Possible Relief

In addition to the relief available for federal employment claims, employees may recover civil damages for wrongful discharge claims based on North Carolina state law, including emotional distress and punitive damages. Unlike federal law, damages under North Carolina law for wrongful discharge are not subject to a cap, but attorneys' fees cannot be recovered.

7. Extraterritorial Application of Law

The extraterritorial application of North Carolina employment law is limited. The North Carolina Court of Appeals has noted that although "a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there [i]t is axiomatic that courts have no extraterritorial jurisdiction". Sawyer v. Mkt. Am., Inc., 661 S.E.2d 750, 754 (N.C. App. 2008) (internal citations omitted). The Court concluded the North Carolina Wage and Hour Act does not provide a private cause of action for a nonresident who neither lived nor worked in North Carolina (Id. at 754).

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