

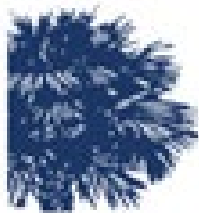


SOUTH CAROLINA
ASSOCIATION OF COUNTIES

Employment Law: What Counties Need to Know

July 30, 2024

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BETTIS LAW GROUP, LLP

South Carolina's Labor & Employment Law Firm

Topics

- Who are County employees?
- Employment at will
- Discrimination and Harassment
- Employee Handbooks
- The South Carolina Payment of Wages Act
- Grievance Procedures
- Recent Pregnancy and Lactation protections
- The Fair Labor Standards Act
- Constitutional Carry



Topics

- Remote Work
- Drug Testing
- The Family and Medical Leave Act
- Military Leave
- E-Verify
- Political Activity
- Public Records



Who are County employees?

- The real issue is who aren't County employees



- Elected and appointed officials have hiring and firing authority for employees in their departments. The officials do not have to follow County policy with respect to discipline, hiring, and firing.

Who are County employees?

- *But*

- The County sets and controls the financial terms of employment
 - Compensation
 - FMLA leave
 - Benefits
- Elected and appointed officials must comply with state and federal law
 - And federal law generally trumps state law

Who are County employees?



- Try to get the elected and appointed officials to cooperate with and coordinate with your HR department
- Advise officials that if they refuse to coordinate with the County, and their refusal results in financial liability to the County, the costs and attorneys' fees may come out of the official's budget

Avoiding the Appearance of County Employment

- Don't issue employees of elected and appointed officials all the same “new employee” documents as other employees



You may want to consider rebranding your normal “new employee” documents to reflect that they are being issued to an employee of an elected or appointed official, and not to a regular County employee

At Will Employment

- True or False:
 - South Carolina is an “at will” state
 - True. 49 states, including South Carolina, are “at will” states.

At Will Employment

- At Will Employment means, essentially, that either the employer or the employee may end the employment relationship without giving either notice or reason.
- What employees aren't at will?
 - Employees who have a contract of employment for a definite period of time
 - Employees who cannot be terminated without cause

At Will Employment

- True or False:
 - When employees are “at will” it means that they can be terminated for any reason.
 - False. An at will employee may be terminated for any reason or no reason, BUT NOT AN ILLEGAL REASON

Potentially Illegal Reasons

- Motivated by discriminatory intent based on a protected category
- Participating in a workplace investigation
- Reporting for jury duty
- Making an OSHA (Occupational Safety and Health Administration) complaint
- Refusing to perform illegal activities
- Requesting reasonable accommodation for a disability
- Taking legally protected leave (Family Medical Leave Act)
- Being a whistleblower regarding unsafe or illegal activity at the place of employment
- Filing a discrimination, wage, or harassment suit
- Complaining about wages, overtime, or the working environment

Federal Anti-Discrimination Laws

- Title VII of Civil Rights Act of 1964
 - Race
 - Sex (including sexual orientation, gender identity and pregnancy)
 - Religion
 - Color
 - National origin

Federal Anti-Discrimination Laws

- **Title VII** (cont'd.)
 - Hiring
 - Terms and conditions of employment
 - Discipline & discharge
 - Anti-retaliation
 - **Policy** – no discrimination
 - no harassment

Federal Anti-Discrimination Laws

- Age Discrimination in Employment Act (ADEA)
 - ≥ 40 years
- Americans With Disabilities Act (ADA)
 - Reasonable accommodation
 - Interactive process
- Genetic Information (GINA)
- Pregnant Workers Fairness Act (PWFA)

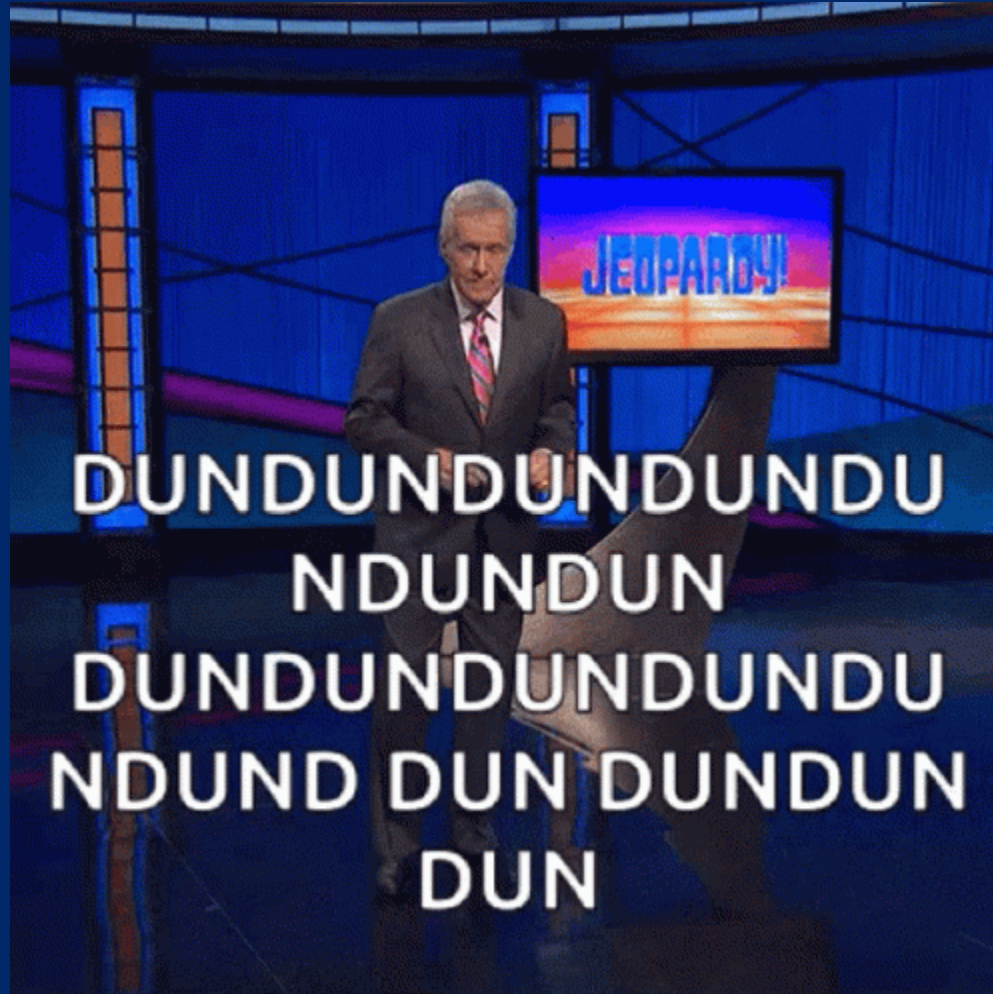
Harassment

- What is unlawful harassment?
 1. Verbal, nonverbal or physical conduct
 2. That denigrates, belittles, or puts down an individual or shows hostility, distaste, or aversion toward an individual based on his or her:

Harassment (cont.)

- race
- color
- religion
- sex (including sexual orientation, gender identity and pregnancy)
- national origin
- age (40 or older)
- disability

Let's play: Is it UNLAWFUL
harassment?!!!!



Question # 1

I'm a huge Gamecock fan. My coworker's office looks like this:



Question # 2

I'm of Pakistani origin, and every time I see my coworker he says:



Question #3

I don't celebrate Halloween for religious reasons, because I think it promotes paganism and devil-worship. Here is what I see when I walk into work all of October:



Question # 4

My boss constantly makes fun of lazy millennial “snowflakes” who get offended by everything, are addicted to their phones, and think the world owes them something. This is my friends and I:



The most common form of harassment

- What is the most common and well-known type of harassment?
 - Sexual harassment



Sexual Harassment

- Sexual harassment is a form of discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:
 - Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, career; or
 - Submission to or rejection of such conduct is used as a basis for career or employment decision; or
 - Such conduct has the purpose or effect of interfering with an individual's work performance, or creates an intimidating, hostile or offensive work environment.

Retaliation

- Harassment because of opposition to unlawful conduct is also illegal.
- Harassment because of participation in an investigation into unlawful conduct is also illegal.



Employee Handbooks



Employee Handbooks

Why do we need one?



Employee Handbooks

- What should be on the first page?
 - A disclaimer
- What one word must describe the disclaimer?
 - Conspicuous
- Why does the disclaimer need to be conspicuous?
 - Prevents the handbook from being a contract

Employee Handbooks

- **Disclaimer** (Handbooks are not contracts)
§ 41-1-110
 - Page 1 of handbook, employee manual
 - ALL CAPITAL LETTERS AND UNDERLINED
 - Signed by employee

Employee Handbooks

- Must have policies:

- Equal Employment Opportunity
- Anti-harassment
 - Must prohibit all harassment
 - Must prohibit retaliation
 - Must have a procedure for reporting, including alternate reporting based on different potential harassers
- Family and Medical Leave Act

A red, rectangular stamp with a distressed, ink-like texture. The words "MUST HAVE" are written in bold, uppercase letters, slanted slightly upwards to the right. The stamp has a double border and is set against a plain white background.

Employee Handbooks

- Policies to consider:
 - Reasonable Accommodations
 - Social Media
 - Artificial Intelligence
 - Holidays
 - County Equipment – “advance on wages”; ethics issues
 - Drug-Free Workplace policy

Is your County's employee handbook an ordinance?

- Here are just a few of the things that have happened that may have made your County's handbook out-of-date just in 2024:
 - Constitutional Carry (effective March 7, 2024)
 - The Pregnant Workers Fairness Act (effective June 27, 2023, but final regulations were issued on April 15, 2024, and went into effect on June 18, 2024)
 - New FLSA salary basis rule went into effect July 1, 2024
- If your County's employee handbook is searchable, search for the word "Myspace"
- Both law and everyday life change rapidly. Consider whether having an employee handbook that can only be modified by ordinance makes sense in our constantly evolving world

The South Carolina Payment of Wages Act



The South Carolina Payment of Wages Act

- **Payment of Wages Act** -- § 41-10-10 et seq.
 - Notice of hours, wages, deductions, and place of payment
 - Pay according to notice
 - 7 days written notice of changes

The South Carolina Payment of Wages Act

- Why is it important not to violate?
 - Damages include:
 - Treble damages
 - Costs and attorney's fees
 - Likely not covered by insurance

Grievances

- Grievance Procedure Act
 - Not required to have grievance procedure but if you do, it must comply with the Act
 - But which Act?

Grievances

- Title 8, Chapter 17, Article 3
 - Not Article 5!
- Proper subjects for a grievance hearing:
 - dismissal, suspensions, involuntary transfers, promotions and demotions
 - Not compensation, except where alleged to be inequitable

Grievances

- A sheriff's deputy has been suspended and requests a grievance hearing. What do you tell them?



Grievances

- Points to remember:
 - Have a grievance committee in place before you need one;
 - Employee is not entitled to representation during the hearing unless your policy so provides;
 - The committee only makes a recommendation

Recent Pregnancy Protections



(not so) Recent Pregnancy Protections

- The Pregnancy Discrimination Act of 1978, amended Title VII of the Civil Rights Act of 1964 to prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions.
- Effective March 23, 2010, the Patient Protection and Affordable Care Act amended the FLSA to require employers to provide a nursing mother reasonable break time to express breast milk after the birth of her child. The amendment also requires that employers provide a place for an employee to express breast milk.

Recent Pregnancy Protections

The South Carolina Pregnancy Accommodations Act

§ 1-13-10 to -110. Enacted on May 2018.

- extends discrimination protections and reasonable accommodations to “women affected by pregnancy, childbirth, or related medical conditions.”
- covered employers must provide written notice of the right to be free from discrimination for medical needs arising from pregnancy, childbirth, or related medical conditions.
- this notice must be given to all new employees at the commencement of employment and should have been given to all existing employees as of September 14, 2018.

Recent Pregnancy Protections

- **The South Carolina Lactation Support Act**
§ 41-1-130. Effective June 25, 2020.
 - provide a room or other location (other than a toilet stall) for an employee to express milk
 - does not require an employer to provide break time if doing so would create an undue hardship
 - makes it unlawful for an employer to discriminate against an employee for choosing to express breast milk in the workplace

Recent Pregnancy Protections

- The federal government has recently passed laws similar to the two South Carolina laws just discussed:
- **The Pregnant Workers Fairness Act (PWFA)**
 - effective June 27, 2023.



- **The PUMP for Nursing Mothers Act (“PUMP”) Act**
 - effective April 28, 2023.

Recent Pregnancy Protections

What are Some Accommodations for Pregnant Workers?

- Being able to sit or drink water
- Taking leave or time off to recover
- Receiving appropriately sized uniforms and safety apparel
- Receiving break time to use the bathroom, eat, and rest
- Being excused from strenuous activities

The FLSA

- The Fair Labor Standards Act, or FLSA, was signed into law on June 25, 1938.
- According to a U.S. Department of Labor (DOL) fact sheet, the FLSA protects more than 143 million American workers.



The four main provisions of the FLSA are:

- Federal minimum wages
- Overtime pay
- Employer recordkeeping
- Child labor

The FLSA

- Covered, nonexempt workers are entitled to a minimum wage of \$7.25 per hour effective July 24, 2009.
- Nonexempt workers must be paid overtime pay at a rate of not less than one and one-half times their regular rates of pay after 40 hours of work in a workweek.
- Every covered employer must keep records for each non-exempt worker that include identifying information about the employee and data about hours worked and wages earned.

EAP Exemption to the FLSA

- Employees are exempt from the Fair Labor Standards Act's minimum wage and overtime protections if they are employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Department's regulations at 29 CFR part 541.
- To fall within the EAP exemption, an employee must:
 - be paid a salary;
 - be paid at least a specified weekly salary level; and
 - primarily perform executive, administrative, or professional duties, as provided in the Department's regulations.

New Salary Basis Rule

The U.S. Department of Labor released a final rule on April 23, 2024, raising the salary threshold to qualify for the EAP exemption.

DATE	STANDARD SALARY LEVEL
Before July 1, 2024	\$684 per week (equivalent to \$35,568 per year)
July 1, 2024	\$844 per week (equivalent to \$43,888 per year)
January 1, 2025	\$1,128 per week (equivalent to \$58,656 per year)
July 1, 2027, and every 3 years thereafter	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update.

New Salary Basis Rule

- Who this does NOT apply to:
 - Teachers - the professional exemption for teachers does not have any salary basis or salary level requirement;
 - Lawyers and Physicians - exempt without regard to whether they are paid on a salary basis or receive the new minimum salary;
 - Outside Sales - salary requirements do not apply to the outside sales exemption;
 - Elected officials
 - Personal staff members of elected officials
 - Officials in a policy-making position who are selected or appointed by elected public officials
 - Advisors to those appointed officials
- excluded from the FLSA by 29 CFR § 553.11.

New Salary Basis Rule

- **What now? (or really, “What last month?”)**
 - create a list of your exempt employees who currently earn between \$35,568 and \$58,656 a year;
 - track or otherwise evaluate their actual hours worked to help you understand the potential impact of converting to non-exempt (hourly) status;
 - decide whether to raise their salary to meet the new threshold or convert them to non-exempt status;
 - provide seven days advance written notice to each employee about the specific changes to their compensation and what new responsibilities come with the changes, such as timekeeping, meal and rest breaks, and other requirements.

Constitutional Carry

South Carolina
Constitutional Carry



- Went into effect March 7, 2024.
- Allows individuals 18 years old and older to carry firearms openly or concealed without a permit.
- Firearms are still prohibited in many locations, including inside schools, churches, law enforcement facilities including detention and correctional facilities, anywhere medical procedures are performed, courthouses, public buildings, and any place clearly marked with a sign prohibiting the carrying of a firearm.

Remote Work

U.S. Worker Attitudes About Remote Work



84%

want to work remotely
at least occasionally



44%

want to work from
home all the time



64%

say freedom to live
where they want is very
or extremely important

Remote Work

Things to bear in mind if your County is still permitting remote work:

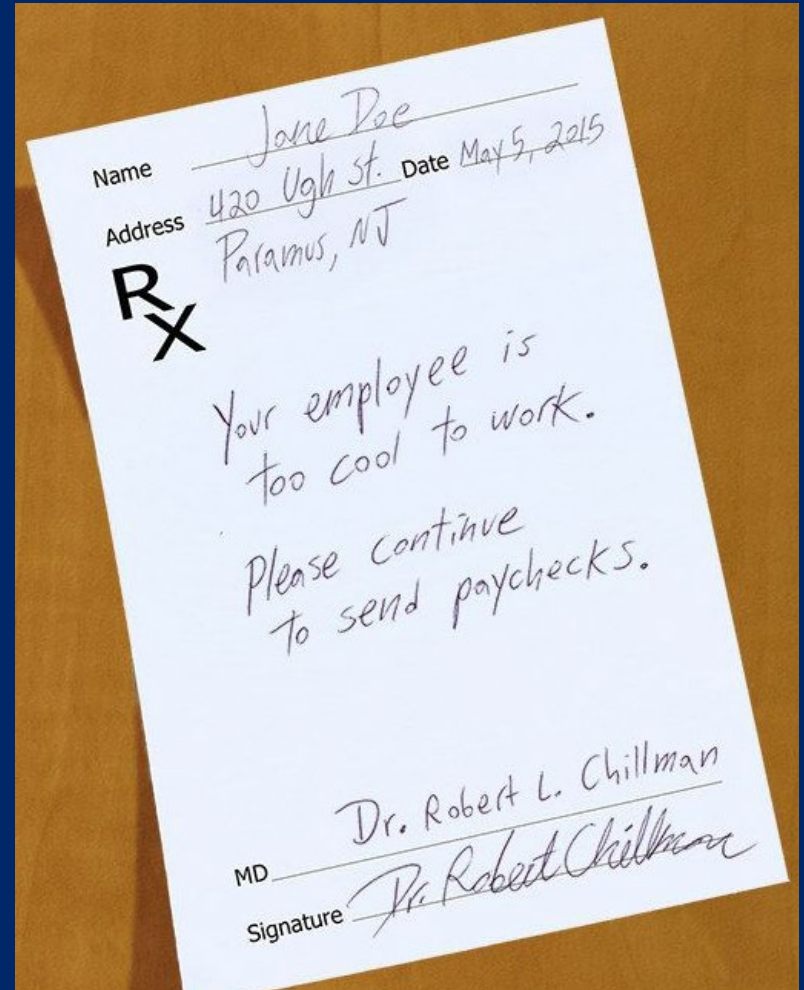
- Communication and Collaboration – avoid “out of sight, out of mind”
- Performance Management – supervisors must continue to supervise
- Set Clear Expectations – benchmarks and goals with follow-up
- Policies – have them in place and apply them evenly

Remote Work

- Employers should not automatically deny a remote work request
- In some cases, remote work may be a reasonable accommodation to disability
- Permitting an employee to work at home may be a reasonable accommodation, even if the County has no telework program

Remote Work

- However, a doctor cannot “prescribe” remote work
- An accommodation should be reached through an interactive process between the employee and employer
- An employer is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective



Remote Work

When employers fail to follow proper remote work guidelines, they could end up being taken advantage of.

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ENTERTAINMENT AND NEWS

How Overemployment Is Making People Rich – 35% Of Remote Workers Work At Least 2 Full-Time Jobs At The Same Time

Those that can v

OVEREMPLOYED



Overemployment: Why Are People Choosing to Work Two Jobs?

Workers are finding a clever way to cheat the system, by working multiple jobs at once.

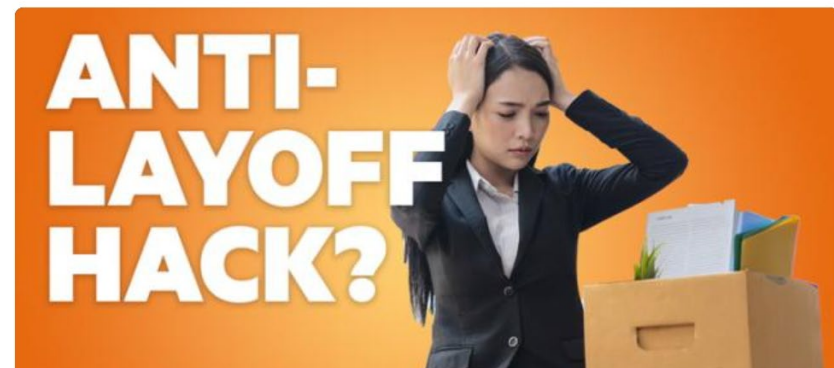


Written by
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Published on
October 7, 2022

BUSINESS INSIDER

A millennial making \$350,000 a year through overemployment says he only worked 50 hours a week



Recent

place, the Social Media App (Briefly)?
- 15 hours ago

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Drug Testing

- Your County's employee handbook should have a drug-free workplace policy
- Drivers with Commercial Driver's Licenses should have their own separate policy because DOT rules only apply to CDL drivers
- Only employees in "safety sensitive positions" may be randomly drug-tested
- All employees may be tested based on "reasonable suspicion" or post-accident
- Disciplinary consequences for positive tests should be consistent



The Family and Medical Leave Act

- **Family and Medical Leave Act (FMLA)**
 - Employee must have worked at least one year and 1250+ hours in the preceding twelve months
 - Employee receives 12 workweeks of leave in a rolling twelve-month period
 - Provisions for military purposes
 - Eligible employees may take FMLA leave for specified reasons related to certain military deployments of their family members.
 - 26 weeks of FMLA leave in a single 12-month period to care for a covered servicemember with a serious injury or illness.

The Family and Medical Leave Act

- A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid, job-protected leave in a 12-month period for one or more of the following reasons:
 - for the birth of a son or daughter, and to bond with the newborn child;
 - for the placement with the employee of a child for adoption or foster care, and to bond with that child;
 - to care for an immediate family member (spouse, child, or parent – but not a parent “in-law”) with a serious health condition;
 - to take medical leave when the employee is unable to work because of a serious health condition; or
 - for qualifying exigencies arising out of the fact that the employee’s spouse, son, daughter, or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces.
- The FMLA also allows eligible employees to take up to 26 workweeks of unpaid, job-protected leave in a “single 12-month period” to care for a covered servicemember with a serious injury or illness.

Analyzing an Employee's Request for Leave Following an on-the-job injury

- Laws that may apply:
 - **The Family and Medical Leave Act**
 - Does the employee have a serious health condition?
 - Has the employee worked for at least one year?
 - Has the employee been absent for more than twelve weeks?
 - **The Americans with Disabilities Act**
 - Could the employee's injury classify as a disability?
 - Is the employee's need for leave for a definite amount of time?
 - Is the employee's need for leave less than six months total?
 - **Worker's Compensation Retaliation**
 - Is any decision based on the filing of a worker's compensation claim or participating in a proceeding?
 - Does a statutory affirmative defense apply?

Worker's Compensation Retaliation

- **Workers' Compensation Anti-Retaliation** §41-1-80
 - Defenses to a claim of worker's compensation retaliation:
 - willful or habitual tardiness or absence from work;
 - being disorderly or intoxicated while at work;
 - destruction of any of the employer's property;
 - failure to meet established employer work standards;
 - malingering;
 - embezzlement or larceny of the employer's property;
 - violating specific written company policy for which the action is a stated remedy of the violation.

Federal Law - Military Leave

- The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal law that protects military service members and veterans from employment discrimination on the basis of their service and allows them to regain their civilian jobs following a period of uniformed service.
- USERRA applies to members of the Armed Forces, Reserves, National Guard, FEMA Reservists and other “Uniformed Services” (the National Disaster Medical System and the Commissioned Corps of the Public Health Service).
- USERRA ensures that service members:
 - Are not disadvantaged in their civilian careers because of their military service;
 - Are promptly re-employed in their civilian jobs upon return from duty;
 - Are not discriminated against by employers because of past, present, or future military service.
- USERRA applies to both public and private employers.

Federal Law - Military Leave

- Employees must provide notice to employers that they will be absent due to military service. Employees should give notice to their employers as soon as they have received it. Employees should provide a copy of their orders where possible.
- Employees must leave civilian work for the purpose of military service; nothing else.
- Employees must serve honorably for USERRA to apply; any less-than-honorable discharge from service duties may affect employers' obligations to re-employ the worker under USERRA.
- Employees may not be absent for more than five cumulative years from any one employer. This provision has some exceptions where calls for service do not count toward the five-year maximum.
- Employees must report back to work in a timely fashion, which depends on the length of service under USERRA. Generally, for service less than 31 days, the employee must return at the beginning of the next regularly scheduled work period. For service of 31 to 180 days, the employee must apply for reemployment within 14 days of release from service. And for service of 181 or more days, within 90 days of release from service.

State Law - Paid Military Leave

- Non-Temporary Employees with official military orders are eligible for paid military leave to engage in training or any other duties to which they are lawfully ordered.
- The 15 workdays of short-term military leave are based on regularly scheduled average workdays and are not required to be consecutive.
- The 15 days of short-term military leave cannot be used for travel time outside of the dates on the orders. An employee may request annual leave, compensatory time, or leave without pay for travel time to get to the assignment outside of the dates on the order.
- In accordance with S.C. Code Section 8-7-90, an employee who receives official military orders to serve during a declared emergency is entitled to 30 days of paid leave per declared emergency in addition to the 15 workdays of paid military leave granted each year.
- In accordance with S.C. Code Section 8-7-90, an employee who serves on active duty in a combat zone and who has exhausted all available leave for military purposes is entitled to receive up to 30 additional days of military leave in any one year.

E-Verify

- E-Verify is an Internet-based system that compares information entered by an employer from an employee's Form I-9 to confirm employment eligibility.
- Within three days after employing a new employee, employers must verify their eligibility to work in the United States by using the internet-based E-Verify system.
- This is in addition to – not a substitute for – completing the I-9 form.
- Employers are subject to audits by SC LLR to determine compliance.
- Non-compliance can lead to steep penalties, including probation, additional reporting requirements, and fines for each individual violation.

Political Activity

- SC Code § 16-17-560 and the First Amendment to the U.S. Constitution make it unlawful to discharge a citizen from employment because of his political opinions or the exercise of political rights.
- Employers can prohibit employees from campaigning during work time or at work sites.
- SC Code § 8-13-765 bars the use of government personnel or facilities for campaign purposes.
- Employers should be careful to avoid the appearance of an official endorsement or support of an employee/candidate.
- If an employee's pursuit of office creates a conflict of interest or causes a disruption in the workplace, the employee can be placed on leave of absence for the duration of the campaign. However, an employee cannot be terminated simply because he has chosen to run for office.

Public Records

- Public Records - all books, papers, maps, photographs, cards, tapes, recording, or other materials regardless of physical form (including emails and phone records for work cell phones and other work equipment)
- A person who unlawfully removes a public record from the office where it usually is kept or alters, defaces, mutilates, secretes, or destroys it is guilty of a misdemeanor and may be fined or imprisoned (SC Code § 30-1-30)
- The Archives and Records Management Division of the State Archives has prepared general retention and disposition schedules for counties
- The schedules list permanently valuable records, which should be properly protected for future use, and they also supply a timetable that will allow records custodians to regularly and legally dispose of records of non-permanent value
- The County-specific retention schedule can be found here:
<https://scdah.sc.gov/records-management/schedules>

Public Records

- The South Carolina Freedom of Information Act (SC Code § 30-4-10 et seq.) requires that public records and information must be made available to the public at a minimum cost or delay.
- SC Code Section 30-4-40(a) states that a “public body may but is not required to exempt” certain information from disclosure.
- For personnel files, the exception is personal information where disclosure would be an “unreasonable invasion of personal privacy.”
- The courts have narrowly construed this exception while weighing the public’s interest against personal privacy.
- Whether a County should produce personnel records in response to a FOIA request will require an individual analysis.

Public Records

- What about work emails sent on a personal computer or work-related texts sent on a personal phone, do those constitute “public records”?
- See Does Using Personal Devices Foil FOIA? from the SC Press Association for a full discussion (<https://scpress.org/does-using-personal-devices-foil-foia/>)
- The safest answer until a South Carolina court weighs in is “potentially”.
- Therefore, if those texts and emails are potentially FOIA-able, should your County consider prohibiting employees from using personal devices for work-related purposes?



Questions?

When somebody writes,
"call if you have any
questions," Do they really
mean ANY questions?
Because I'm really
wondering about
platypuses.

