

***Employment Law  
for  
North Carolina  
Nonprofits***

***A Handbook for Managers and  
Board Members of  
Nonprofit Organizations***

A cooperative project of:

The North Carolina Bar Association -  
Labor and Employment Law Section

*and the*



***N.C. Center for Nonprofits***

# EMPLOYMENT LAW FOR NORTH CAROLINA NONPROFITS

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Nonprofit Organizations

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The North Carolina Bar Association -  
Labor and Employment Law Section

*A voluntary association of attorneys working to improve their  
profession and their communities.*

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*A statewide network of nonprofits, an information center on  
effective practices, and an advocate for the nonprofit sector as a whole,  
open to all 501(c)(3) nonprofit organizations in North Carolina.*

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# EMPLOYMENT LAW FOR NORTH CAROLINA NONPROFITS

**T**his handbook describes the major requirements of state and federal employment law that apply to private, nonprofit organizations and offers suggestions for adopting personnel practices that reduce exposure to costly litigation and produce a more productive workforce.

Regardless of how charitable its mission may be and how well-intentioned its employment practices, a nonprofit organization must comply with an extensive set of laws for hiring, firing, and supervising staff. For the most part, complying with these laws requires no special legal knowledge. If you treat all employees fairly and respect their dignity, you will improve morale and satisfy most of the legal requirements necessary to avoid employment lawsuits. If you also keep good records, you will generally be able to defend successfully against any suit filed. Organizations that professionally manage their employee relations are also more effective.

Experience proves that employers do not always follow these simple maxims, however. Claims alleging violation of employment law account more than 85 percent of all claims under nonprofits' directors and officers liability insurance policies. Reading this overview of the law can help you establish or reexamine your policies from the perspective of employment law.

Understanding employment law is important not only to avoid violating it, but also to avoid being overly timid in maintaining the highest quality staff. Although some nonprofits incorrectly assume that their tax-exempt status exempts them from the employment laws, others err in the opposite direction, believing that the law is more constricting than it is.

Despite the substantial legal ramifications, nonprofit managers often make employment decisions without consulting legal counsel. Reading this handbook and referring to it at appropriate times can help you to stay within the law and to recognize when paying for legal advice is a prudent expenditure.

Further, depending on the size of your organization, you may be eligible for a free, one-hour consultation with an employment law attorney or human resources professional as a benefit of your membership in the N.C. Center *for* Nonprofits.

## **USING THIS HANDBOOK**

The handbook is divided into five sections. The first describes the key elements of lawful personnel practices and offers specific suggestions for hiring, supervising, and terminating staff. Part II summarizes the features of major federal laws governing employment. Part III describes significant North Carolina employment laws. Part IV is a handy self-audit checklist for your nonprofit organization. Finally, Part V provides basic information resources that may be helpful

when questions arise. The guidelines of the first section are supported by the details provided in the second and third sections. Reading all three is essential.

The recommendations offered in the first section of this handbook are designed to achieve three goals. The first is to keep your personnel practices within the law. The second is to reduce the likelihood that you will be sued for something that is legal but has the appearance of violating the law. The third is to enable you to defend successfully against inappropriate claims that may be filed. To achieve the latter two objectives, the handbook recommends some strategies that are advisable, but not legally required. You should also remember that you may choose to provide employees with *greater* benefits or guarantees than those required by law, but if you do, you may be sued if you fail to honor your commitments.

Because there are dozens of employment laws and thousands of court cases, this handbook cannot be comprehensive. The focus here is on the major state and federal laws. You are strongly encouraged to consult with your legal counsel, local employer associations, the North Carolina Center *for* Nonprofits, the North Carolina Bar Association, or other nonprofit assistance providers to supplement this handbook.

Not all of the laws discussed in this handbook are applicable to all nonprofit organizations. Many of the statutes provide for a minimum coverage threshold (usually expressed in terms of the number of employees of a nonprofit organization) or, as in the case of the Fair Labor Standards Act, in terms of an organization's gross revenue. Where a statute's applicability depends upon the number of employees, a notation is included in the summary. Although some of the laws discussed here may not be applicable to a particular nonprofit, it is a good idea to follow the principles of the law even if not literally required.

Similarly, most employment laws do not apply to volunteers. The more your volunteers function like employees, though, the more likely a court is to find that for purposes of the law, your volunteers are "employees." As a general rule, people are employees if they receive pay in any form. Even paying modest stipends or providing "volunteers" with food or medical benefits may put them in the category of "employees" subject to the protection of some of these laws. Employees typically may not perform the dual roles of employee and volunteer if they perform the same tasks in both roles.

# PART I:

## HIRING AND MANAGING EMPLOYEES

### THE HIRING PROCESS

**T**he hiring process ordinarily proceeds in four steps: advertising (or posting) job vacancies, receiving and reviewing résumés or employment applications, interviewing prospective employees, and making a job offer. At each step, the nonprofit must avoid unlawful discrimination against an applicant or employee.

#### **Discrimination**

The chief legal limitation on hiring – which also applies to all other facets of the employment process – is the prohibition of discrimination. Thus, advertisements and job postings must not exclude applicants based on “impermissible factors” such as age, sex, race, color, religion, national origin, pregnancy, or disability. In addition to omitting specific mention of any of these factors, you should avoid language that could be interpreted as discriminatory. Although you can use the old stand-by, “experienced person wanted,” you should avoid terms that imply one of the impermissible factors, such as “recent college graduate,” or “retired persons only.”

A useful practice in hiring is the development of a job description for the position to be filled. This description need not be extensive, but it should specify the responsibilities and duties that the employee will have, and it should also list the requirements – expressed either in terms of experience or educational level – for the job. In establishing the minimum qualifications, you should list only credentials and skills that are relevant to the tasks to be performed. If the requirements exceed what is truly necessary, a nonprofit invites a charge that the purpose of the requirements is to exclude members of a protected group. Any such exclusion could make the organization guilty of discrimination.

An employment application may be used to gather desired information on prospective employees, although no federal law requires formal applications. Federal laws also impose few rules on the format of an application if one is used or on the interview process if interviews are conducted, but the prohibition against discrimination suggests care in choosing which questions to ask. Although questions about age, race, sex, etc., are permitted, why ask them? The answers cannot be used to select among applicants, and asking creates an inference of such use.

For this reason, many employers prefer not to ask these questions. Further, the Americans with Disabilities Act limits pre-employment inquiries regarding the existence, nature, and the extent of a disability to a simple inquiry of whether the applicant can perform the essential functions of the job with or without some reasonable accommodation.

The cautious approach, therefore, is to avoid questions relating to any of the impermissible factors unless it can be clearly demonstrated that the information is relevant to the job for which the applicant is being hired. If your organization needs personal data for insurance or other legitimate purposes, the necessary questions can be asked after an applicant has been hired. In order to meet child labor law provisions, you may ask all applicants if they are at least 18 years of age.

## Screening Employees

To avoid hiring employees who pose identifiable risks to your organization and the community you serve, you must screen applicants adequately. The extent of that screening varies with the sensitivity of the position. If the employee is going to have access to large sums of money or work with young children, for example, a more thorough review is warranted.

At a minimum, the screening should include checking the applicant's references and verifying that there are no unexplained gaps in the applicant's employment history. Although an applicant is unlikely to provide the names of references who will reveal negative characteristics, failure to contact the references provided is an oversight that a jury is unlikely to forgive.

To conduct a more thorough investigation, you should ask the applicant to sign a release that empowers you to conduct a background check that includes contacting all previous employers and, if appropriate, obtaining criminal or motor vehicle records. Although you can permissibly obtain some of this information without the applicant's consent, a release reduces the likelihood of a subsequent claim. See the sample wording on the next page. You may also wish to ask the applicant directly about convictions. Asking about arrests can lead to trouble because courts have imposed liability under Title VII for basing employment decisions on arrests. In order to inquire into an applicant's or employee's credit history, or to obtain any character or credit information from a third-party vendor, a specialized release is required and certain procedures must be followed. More detailed information on this is available from the Federal Trade Commission (on its website at <http://www.ftc.gov/bcp/online/pubs/buspubs/credempl.shtm>).

In addition to the limitation on questions about arrests, employment laws also restrict certain other screening practices that were common until recently. The federal Employee Polygraph Protection Act, as well as many state laws, generally prohibit the use of lie detector tests on applicants or employees. The federal Americans with Disabilities Act limits the use of pre-employment medical examinations (see Part II).

## Hiring the New Employee

You may ask an employee to sign a formal contract, but this is not required. In the absence of a contract, state employment law will provide the terms of the employment agreement, and these terms (known as "at will" employment) are generally favorable to the employer. "At will" employment means that either the employer or the employee can end the employment relationship at any time for any reason. Employers may choose to provide greater protection to employees, but the consequences of such voluntary obligations should be clearly understood.

If you want the minimum "at-will" standards to apply, you must not promise an employee that the organization will follow some more restrictive set of rules. To make this clear, many employers have modified their employment applications to include an unequivocal statement to applicants that, despite what might be said to them (or they may think they heard) in the interview process, they are, in a legal sense, "employees at will" and can be terminated at any time. The importance of "at will" employment is lawsuit prevention – it is not an excuse to

treat employees wrongly. The following language has been used successfully by many employers to create an “at will” employment relationship. Other employers consider the language too legalistic and negative. See Part III, “Wrongful Discharge and Other Potential Suits” for alternatives and additional suggestions. This wording can be placed in employment applications (usually placed just above the employee’s signature), modified for inclusion in a personnel manual, or both:

I certify that the information contained in this application is correct to the best of my knowledge, and I authorize an investigation of my references and previous employment records. I understand that if I am hired the rules and regulations of this employer, and any personnel procedures, do not constitute a contract of employment. I understand that my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the employer or myself. I further understand that no supervisor or representative of the employer, other than [insert “the Executive Director” or other senior official] has any authority to enter into any agreement for employment for any specified period of time or to make any agreement contrary to the foregoing, and that agreement must be in writing.

To protect further the “at will” status, individuals who conduct interviews with prospective employees should be cautioned to avoid references to the duration of employment, unless an applicant is specifically being hired for a particular job that has a finite time frame. For example, applicants should not be told that, once hired, they will have a job “permanently” or as long as they perform satisfactorily. No mention should be made of a promise of progressive discipline or for dismissing employees only for gross misconduct or any other reason that could be interpreted as establishing a policy governing termination.

When hiring a new employee, you might wish to use an internal checklist of information and items that need to be communicated to the employee, including such things as the personnel manual (if one exists), office keys, insurance programs, etc. This checklist can be shared with the employee, who might be asked to sign a copy to acknowledge that he or she has received the items contained on the list. Creating this record can be useful in defending against a subsequent claim that the employee was never informed of the relevant policies. Requiring a signature also conveys the seriousness of the items you are giving to the employee.

Finally, when hiring a new employee, you must verify that the applicant is permitted to work in this country and complete form I-9 for the United States Citizenship and Immigration Service (see Part II, “Immigration Laws”).

## **MANAGING**

Prudent supervision of employee performance involves more than simply instructing employees on what their tasks should be and monitoring their progress. To avoid legal headaches, an effective manager will also keep attuned to situations in the workplace that might reflect adversely on the organization. A supervisor should solicit both positive and negative input from subordinates about problems or concerns. An open line of communication between employees and their supervisors can do much to solve problems before they become terminations or lawsuits.

## Harassment and Discrimination

At a minimum, the workplace is to be free of discrimination and harassment based on an individual's sex, race, or any of the factors that are not proper bases for employment decisions. Discrimination by supervisors during the employment relationship is as improper – and as illegal – as discrimination in hiring. The guiding principle to follow is to deal with similar situations in the same way. For example, if you consult male employees about scheduling their hours, you should also consult female employees and *vice versa*.

A fairly recent development in the law is the tightening of legal prohibitions against sexual harassment. Because the standards are changing and employers are increasingly held liable for the improper conduct of some employees toward others, extra vigilance is warranted to insure that all workers understand that such behavior is inappropriate and unlawful. As interpreted in court cases based on Title VII, the term “sexual harassment” covers a wide range of actions, including:

- Expressed or implied requests for sexual favors as a condition of job retention, promotion, or other benefit of employment;
- Unwelcome physical contact;
- Harassment or other behavior (such as the telling of sexually explicit jokes) that is unwelcome and might be construed as offensive or intimidating.

In the past, sexual harassment was often thought of in the context of a male supervisor harassing a female subordinate. Circumstances have arisen, though, in which women have harassed men, same-sex harassment has occurred, employees have harassed their peers, and vendors have harassed employees.

To reduce your organization's vulnerability to a sexual harassment claim, you should adopt a policy that prohibits such conduct and lists the activities described above as examples of improper conduct, either in the workplace or between and among employees after hours. Further, the organization should adopt a procedure for dealing with sexual harassment complaints. Employees with complaints should be encouraged to take them to their immediate supervisor, or to an alternate individual (such as the human resources manager, the executive director/CEO, or the board chair/president) if the employee is uncomfortable reporting to the supervisor for any reason. Employees should be assured that all complaints will be thoroughly and promptly investigated; that confidentiality, if at all possible, will be maintained; and that appropriate disciplinary action will be taken when warranted. Employees should also be informed, however, that false complaints will not be tolerated and may lead to disciplinary action against the accuser.

Your organization should also be especially watchful for harassment. Several court cases have held an employer liable for acts of supervisory personnel, even though the employer was not aware of those acts. By being proactive, you can reduce the likelihood of occurrence of such incidents and improve your ability to defend against a charge that the organization was insufficiently diligent in protecting staff from wrongful conduct. Periodically remind employees about prohibitions against sexual harassment and discrimination, and about the procedures to follow if they have a complaint.

## Performance Reviews

In any size organization, accurate and formal performance reviews are highly advisable. Properly reviewing your employees' performance and maintaining a record of the results can be invaluable in correcting unsatisfactory performance and in defending against allegations of wrongful dismissal. Employees' work may be reviewed on a predetermined schedule or a less formal time frame. Performance reviews generally work best when an individual's work is evaluated against established standards that have been communicated in advance to the employee. These standards might be in the form of goals (such as the number of tasks to be performed in a given period of time), or a job description that lists responsibilities.

Some larger organizations use elaborate review procedures and forms to "grade" or "rate" employees against established criteria. Although this procedure is sound personnel practice, a smaller organization should feel free to choose a less formal process that is sufficient to accomplish the objectives described above. Regardless of the level of formality, the procedure for reviewing staff should be consistent: different employees performing similar functions should be reviewed with the same criteria, and each individual employee ordinarily should be reviewed using the same standard from one review to the next.

For reviews to serve their intended purposes of giving employees a fair chance to perform up to your standards and documenting any shortcomings, supervisors must evaluate employee performance honestly, even though the truth may be uncomfortable for both the supervisor and employee being reviewed. Because most supervisors do not like to criticize subordinates, they may tell an employee that his or her performance is "good" or "satisfactory" when in fact it is unacceptable when measured by the organization's standards. The situation can be likened to a student's report card. A student who is satisfied with average grades and in fact regularly receives "C's" (or even "B's") has no incentive to improve. In addition, if the day finally comes that the professor accurately gives this same student a "D" or "F", the student may be justifiably confused and angry. To be fair to the employee and the organization, a supervisor must make employees aware of how their performance measures up against the organization's standards.

Like inflated evaluations, salary increases can send confusing, and potentially costly, signals to employees. An employee with a history of regular salary increases who is later terminated is apt to think that the termination must be the result of discrimination. If salary increases are given to marginal employees, or employees whose performance does not meet your expectations, the increase should be accompanied by a statement indicating that the raise is based on factors other than merit (*e.g.*, cost-of-living or general wage increases).

Allow time in employee reviews, whether formal or informal, for the supervisor and employee to discuss problems in the workplace, situations that could lead to problems, and employee perceptions of organizational policies. Ordinarily, supervisors should not make promises about resolving problems, but instead should indicate that all such situations will be carefully considered. The employee review also provides an opportunity to reemphasize key management policies, such as those prohibiting sexual harassment.

If an employee review results in a poor rating or a "notice" that an employee's performance must improve, communicate the required improvements in a simple and easily understood

manner. Because the level of tension may be high, so is the danger of miscommunication. Goals for the employee should be set and the employee should be advised of a time period within which the goals are to be achieved. Some employers have used the following language when performance problems are serious or longstanding: “We expect immediate, significant, and sustained improvement. Failure to do so will result in further disciplinary action up to and including termination.”

When a review is triggered by specific employee action, good or bad, do the review as quickly as possible after the incident or activity. Psychological studies have shown that the active memory for recalling an employee’s performance covers only about three weeks. Therefore, if an employee performs some act, or fails to perform some act, that calls for a special acknowledgment or warning, the supervisor should confer with the employee and make a record of the event as quickly as possible.

Record on paper the results of all employee reviews, whether formal or informal, positive or negative, at the conclusion of the review. It is not necessary that this written summation be formal or even typed. A simple handwritten memorandum or dated note will suffice. Record both good and bad points from the performance review. Many nonprofit organizations and other employers prefer to have an employee sign the supervisor’s review indicating they were shown a copy. Though this practice does minimize the potential for later disputes over what was actually said in the review, it is not essential. To encourage employee signatures when the employee does not agree with the evaluation of his or her performance, some employers use a statement such as “My signature acknowledges I have seen this review but not that I agree with its contents.” A standard policy of requiring supervisors to make notes about employee reviews promptly after conducting them is generally effective.

## **Personnel Files**

Place supervisory reviews of employee performance in the individual’s personnel file. Systematically maintaining personnel files is important because following a standard procedure increases the likelihood that employment decisions will be made in conformity with the law and that adequate documentation to support those decisions will be readily available. A personnel file – which need not be more sophisticated than a manila folder with the employee’s name on it – should contain all pertinent information about the employee and his or her performance. Copies of some items may be retained elsewhere for other purposes, such as benefits management, but an employee’s personnel file should contain each of the items listed below. Standard procedure should call for placing the items in an employee’s file as soon as possible after the event to which the record pertains. A typical personnel file contains the following:

- The employee’s job application form, if one is used, and/or a résumé;
- Any correspondence with the employee, including letters exchanged prior to employment;
- Salary history;
- Any information related to performance reviews, warnings, or counseling sessions;
- Any written communications from or to the employee pertaining to his or her job;

- At termination or resignation, information concerning the reasons for the employee's departure; and
- Any other information deemed to be important.

A personnel file with these items is a "one stop" source for almost all of the legally critical information about an employee or former employee. Maintain files on employees who have left the organization for at least five years; medical exposure information should be retained indefinitely (see Part III for discussion of Occupational Safety and Health rules). A good procedure is to purge all outdated personnel files on or about the same time each year, either at the end of an organization's fiscal year or each calendar year.

As indicated previously, it is not necessary to obtain an employee's signature on every item in the file, unless that is your organization's standard policy. Nonetheless, employees should be informed of any item placed in the file. It should not become a dumping ground of unsubstantiated or irrelevant material. Further, the employee should be given access to his or her file on request. This will give the employee an opportunity to correct erroneous information that may have found its way into the file and should do much to eliminate the secrecy and "mystery" of personnel files that can foster unnecessary suspicion among the staff. Most employers do not provide access to former employees since the file is the property of the organization.

Keep personnel files in a secure place that is not accessible to other employees except those in a management capacity with a "need to know" about employee performance. If accounting, finance, and benefits personnel need access to the file, it might be split into two portions, with restricted access to more sensitive information. Medical information should be kept separately (this is mandatory under the Americans with Disabilities Act), as should the USCIS Form I-9. It is also useful to keep all USCIS forms I-9 in a single, alphabetized file, but that is not required.

In addition to providing information that could be used in defending any litigation involving an employee's job performance or termination, you can also use personnel file data in responding to requests from other employers for reference information on past employees. If you have any doubts about the nature of information placed in a personnel file, you should consult with legal counsel.

### **Personnel Manuals: Help or Hindrance?**

Many nonprofit employers harbor negative feelings toward personnel manuals: "only bureaucracies have them," "they take too much time to prepare," and "they destroy the feeling of 'family' that we would like to create." Although a personnel manual does take time to develop and can cost an organization money for professional development or review of its contents, a personnel manual is a good idea and need not be very extensive or costly. It can serve the organization well by:

- Reducing the potential for inconsistent management decisions;
- Addressing potential problems before they arise and providing solutions in an objective

context free of the emotions that often accompany a problem raised by a particular employee;

- Communicating legally-required information such as policies for sick leave, vacation, fringe benefits, etc; and
- Establishing a policy of “employment at will” to the extent permitted by law.

Personnel manuals can be prepared by outside counsel experienced in employment law or a trained management consultant. To save costs, you can create your own handbook with this handbook as a guide. You can also purchase or borrow a “model” personnel manual and modify it for your circumstances if you are confident of your source. The N.C. Center *for* Nonprofits has samples available. Since much of a personnel manual is related to office policy – working hours, pay scales, holidays, vacation and sick leave, employer-provided benefits, performance review procedures, and disciplinary and termination procedures – you can produce a large portion of the manual internally even if you choose to rely on counsel for other portions. Information required to be communicated to employees under the Employee Retirement Income Security Act (ERISA) is usually provided by insurance carriers and can be reproduced for distribution. The requirements of ERISA and state insurance laws are beyond the scope of this handbook.

If you do create a personnel manual, it must *not* contain legally prohibited statements, and it should not contain statements that increase the organization’s vulnerability to a lawsuit. The following guidelines will reduce the likelihood that your personnel manual becomes a weapon used against you:

- Include information required to be communicated to employees;
- Include language similar to that suggested in this manual for establishing your policy of “employment at will,” avoiding references to duration of employment, unless the organization chooses to create the implication of a contractual relationship with an employee;
- Include office policies, including but not limited to hours of work, leave, attendance, severe weather, expense reimbursement, and technology usage policies;
- Include your organization’s policy against discrimination and harassment;
- Describe the procedure for employees to use if they have complaints about harassment by anyone connected with organization;
- Avoid any statements about discharging an employee only for cause, or requiring rigid adherence to a specific regimen such as progressive discipline procedures, since it may be necessary to terminate someone for budgetary reasons or other legitimate reasons unrelated to performance;
- Avoid inconsistency with bylaws, board policy decisions, and other organizational documents;
- Provide a copy to all new hires and to each employee as changes are made; and

- Obtain the employee's signature simply acknowledging receipt of the handbook on the specified date.

While many nonprofits recognize the benefits of a personnel manual, few appreciate the potential serious consequences of failing to follow the procedures and policies set forth in the manual. Courts across the country typically view an employment manual as a contract between the employer and employee (regardless of any language to the contrary in the manual itself) and are increasingly reluctant to allow employers to reap the benefits of a personnel manual while avoiding promises to employees contained in these documents. Careful monitoring of employment decisions is necessary to ensure that your organization adheres to its written policies. If a policy contained in your manual no longer meets the organization's needs, it should be changed and not ignored.

## **TERMINATING AN EMPLOYEE**

One of the most difficult tasks for a supervisor is to terminate an employee. The stress of the situation impairs memory and increases the likelihood of error. The termination process should include procedures that ensure fairness and compliance with the law.

A termination decision is not difficult if the employee has been guilty of some act of gross misconduct such as theft or insubordination. More often, however, termination is the result of the cumulative effect of many smaller events, continually poor performance, poor attendance, or even a shortage of funds to pay the employee. In these cases, the termination decision should be carefully weighed. Although an "employee at will" can be terminated for any reason not specifically prohibited by law, the termination will be more difficult to defend – and the former employee will be more likely to mount a legal challenge – if the employee has been treated badly. A brief consultation with employment law counsel before terminating an employee, especially one who has been with the organization for more than six months, can prevent a costly misstep. Prior to any termination, you should ask two questions:

1. Is the termination necessary, or is there some other disciplinary or corrective action that would be more appropriate?
2. If the employee contests the termination in court, is there enough evidence to establish that the termination was lawful?

At the point of termination, the effort expended on conducting performance reviews and maintaining adequate personnel files pays off. An employer who has kept thorough and accurate records is less likely to face a suit from the terminated employee. Though the employee may not agree with the actions, the reasons have been communicated. Such evidence can be invaluable in rebutting a claim that the decision to terminate was based on impermissible factors.

It is essential, though, that records preserved in the personnel files adhere to the highest standards of accuracy and honesty. An employee who has been repeatedly told that his or her performance is "good" or who has received periodic merit increases, even while management believes that performance is marginal, is apt to believe that termination has taken place for a discriminatory reason. The employee who has been truthfully reviewed and given warnings

about job performance is, generally speaking, less likely to sue than one who has not received open and honest communication. Similarly, the written results of periodic supervisory reviews become important evidence to support a nonprofit organization's defense that termination was not motivated by a discriminatory reason, but was rather based on objective, job-related criteria and the employee's own performance.

Termination should not be based on the unsubstantiated charge of another employee. All allegations should be thoroughly investigated, with the employee given the opportunity to present his or her side of the situation, before the decision to terminate is made. Investigating the charges will help assure the employee that he or she has been given a fair hearing and has not been the subject of discriminatory action. It will also minimize the danger that the employee will bring a defamation claim alleging injury to his or her reputation from false accusations.

## **Termination Versus Resignation**

Many employers prefer to let an employee resign when performance or attendance problems indicate termination is near. This is often viewed as a way to "save face" and provide the employee with a more acceptable explanation as to why he or she is looking for a new job. There is one major difference that usually distinguishes resignation from involuntary termination: the eligibility of an employee to receive unemployment benefits. Under the laws of North Carolina, an employee who voluntarily quits his or her job is ineligible to receive unemployment compensation benefits. A worker who has been fired may or may not be ineligible for unemployment benefits. Forced resignations, on the other hand, will be viewed as terminations by most agencies and courts (see Part III for a more complete discussion).

The decision to resign or be terminated, once made, should be consistently applied and respected. The employee should not be able to "resign" for purposes of "saving face," only to claim when applying for unemployment benefits that he or she was forced to resign. Thus, an employee who is given the option to resign should be told that the employer will contest unemployment benefits, but will also tell future employers that the employee resigned.

## **The Termination Process**

When employees are terminated, they should always be told the reasons for termination honestly and completely. (We are assuming that the stated reason is true and lawful.) A contemporaneous record of the termination interview, including any comments made by the employee, should be placed in the individual's personnel file. The person terminating the employee should be advised to avoid personal comments about the reasons for termination, such as "I didn't think it was a good idea, but my boss is making me do this" and any other comments that might be misconstrued or illegal, such as "your job requires a younger person."

There is no "right" time to terminate an employee – Monday or Friday, first thing in the day, or last. The place is more important. Termination should take place in a private room with one, or preferably two, supervisors and the employee present. Depending on the reasons for and circumstances surrounding termination, it may be advisable to ask the employee to leave work immediately upon hearing the news. Be sure to allow time for the employee to make comments or ask questions for clarification.

Severance pay may be offered but is not legally required except in certain circumstances in a few states. The federal “ERISA” law requires severance pay plans to conform to ERISA regulations. North Carolina law requires employers to pay a terminated employee what is owed for work performed prior to termination (see “Wrongful Discharge and Other Potential Suits” in Part III). Whether an employee receives payment for accrued, but unused, vacation time or sick leave is a policy determination to be made by the employer. Placing the policies for severance pay and accrued leave in a personnel manual satisfies two important needs. This ensures that employees are adequately informed of these policies from the outset, as required by state law, and it allows for such issues to be clearly defined in the event of termination, without problems caused by the emotion and personalities of the moment. Decisions are then likely to be more consistent, thus reducing the likelihood of a discriminatory treatment claim.

During the termination process, larger employers (over 20 employees) and employers with certain types of benefit plans must inform the terminated employees of their entitlements. For example, the federal “COBRA” law on continuation of health insurance requires that terminated employees be informed of their option to continue their health insurance coverage by paying the full premium. Including this and related information about accrued benefits will provide a handy source of reference at termination. There is a state insurance continuation law that may be applicable as well (see “Employee Benefits” in Part III).

Nonprofit employers can reduce the likelihood of a suit by a terminated employee by having the employee sign an agreement waiving all claims against the employer and releasing the employer from legal liability relating to the termination. To be enforceable, the employer must offer the employee some consideration to which the employee otherwise would not be entitled (*e.g.*, severance pay or payment for extended health coverage). It is helpful to expressly provide in the agreement that any such payment is not required by the employer and is being made in consideration of the waiver and release of claims. Under the Older Workers Benefits Protection Act, terminated employees 40 years of age and older must be advised of the right to consult independent legal counsel and must be given 21 days to consider any waiver and release of claims agreement and have the right to revoke such an agreement for seven days after signing it. In a group layoff situation, employees 40 years of age and older must be allowed 45 days to consider the waiver and release. It is helpful to include a provision in such an agreement specifying that the employee will not make disparaging remarks about the employer.

## **Providing References to Other Employers**

A growing number of employers are being sued for defamation by former employees who charge that they have been falsely maligned. To reduce the likelihood of such suits, you have two choices: do not give references, or do so in a clearly defensible matter. Refusal to respond to reference inquiries minimizes the risk of a lawsuit, but might hamper your own efforts to obtain references when you seek them and may open you to liability if the termination was for a particularly menacing type of misconduct, such as child abuse, and the former employee commits the same misdeed on a new job. The risk of suit is not so great that you must withhold truthful, job-related information. One strategy for ensuring fairness to your former employees and their prospective future employers is to ask inquiring employers if they provide references for their former employees.

If you do give references, establish a policy of requiring that all requests for references be

handled by a small number of designated individuals, such as the executive director or personnel director. The designated individuals should familiarize themselves with the dangers of giving out damaging information. Advise all employees to route incoming calls relating to references to the designated individual(s). The person giving the reference should know to whom the information is being given. When in doubt, take the caller's name and telephone number, then call the person back in an effort to verify the validity of the inquiry (see Part III for other cautions including a statute which restricts certain oral references).

The best defense against a charge of defamation is to give information that is accurate and verifiable. Anyone providing a reference should be truthful about an employee, provide answers to questions that are asked (not volunteering additional information), refrain from offering opinions, and limit comments to job-related information. In other words, do not repeat rumors, office gossip, or even truth about an employee's personal life.

### **Putting the Pieces Together**

A well-structured personnel system, which need not be detailed and complex, can go far in assuring that all decisions are made fairly and within the law. Following the suggestions offered above will minimize exposure to lawsuits and, if litigation does result, give your organization an excellent chance of prevailing. As with other major decisions with significant legal consequences, any questions should be resolved in advance by consulting with competent legal counsel where appropriate. See page 37 for the names and phone numbers of mediation centers which may be able to help you with employment disputes.

# PART II:

## FEDERAL EMPLOYMENT LAWS

This section will summarize some of the major federal employment laws employers must follow. These are not the only applicable laws, however, and the discussions here are not comprehensive. Although most of these laws apply only to organizations engaging in “interstate commerce,” the various definitions of that term include all but the very smallest organizations (consult your legal counsel if you are uncertain whether this applies to your organization). Where available, employee “coverage” thresholds are included in each summary to indicate the minimum number of employees required before compliance with that law is mandatory.

***Affirmative Action (coverage - varies):*** There are three major laws requiring covered employers to develop and follow affirmative action programs. Executive Order 11246 requires employers with a single federal government contract over \$50,000 and employing 50 or more employees to develop written affirmative action programs. Employers with federal contracts or grants totaling more than \$10,000 in a year must take certain affirmative employment actions and include certain clauses in advertising and contracts. The Rehabilitation Act (covering federal contracts or grants totaling more than \$2,500) requires affirmative action to hire disabled employees and prevents discrimination by recipients of federal funds or grants. Similar requirements apply to Vietnam Era Veterans. The laws are complex, so have legal counsel review your organization’s status if federal funds are received directly or indirectly (such as federal funds passed through state or local governments). Consult the federal or state agency providing the funds for additional guidance.

***Age Discrimination in Employment Act (coverage – applies if you have 20 or more employees):*** The purpose of the Age Discrimination in Employment Act (ADEA) is to protect older workers from being discriminated against in finding and keeping a job. The minimum protected age is 40. Compliance with the ADEA means that, except in certain limited situations, an employer must ignore a job applicant’s age in making determinations about hiring, promotion, and termination. Choosing a younger person for a job simply because that person is younger is illegal, under most circumstances, and could lead to a charge of discrimination.

In the hiring process, nonprofit organizations that advertise or post job openings should avoid terms like “recent college graduate,” “young,” “retired person,” or any other age specification that is not a necessary qualification for the job. The term “college graduate” is permitted, however, because that term denotes an educational requirement and not an age-based requirement. Age stereotyping and idle comments about an applicant’s or employee’s age are significant sources of age discrimination complaints. Using the phrase “state age” in a job opening notice is not in itself a violation of the law, but because it may deter older workers from applying, it invites scrutiny by government compliance officers and provides a basis for an allegation of age discrimination.

***American Competitiveness and Corporate Accountability Act (coverage – all employers):*** The American Competitiveness and Corporate Accountability Act (better known as the Sarbanes-Oxley Act of 2002) was enacted to require higher standards of accountability and corporate

governance for publicly-traded companies. One provision of the Sarbanes-Oxley Act that applies to nonprofits, however, is the requirement that employers establish a whistleblower policy. To comply with the Sarbanes-Oxley Act, nonprofits must develop a policy providing a mechanism for employees to report suspected illegal or inappropriate behavior in a confidential manner. This policy also must ensure that employers do not retaliate against whistleblowers, even if their allegations are unfounded.

***Americans With Disabilities Act (coverage –applies if you have 15 or employees):*** The Americans With Disabilities Act (ADA) prohibits discrimination against individuals with disabilities, and requires employers to take affirmative steps to provide “reasonable accommodations” for disabled workers. It also requires commercial facilities and places of public accommodation to review their facilities’ physical accessibility (regardless of number of employees). Most nonprofits will fall within one or both of the facility accessibility requirements. Landlords may remain primarily responsible for these obligations, depending upon any lease arrangements.

For purposes of the ADA, the definition of “disability” is much broader than its common understanding. The term includes anyone with a condition that threatens or impacts one or more major life functions, as well as anyone who has a past history of such a condition and anyone who is *perceived* to have such a disability. The law clearly prohibits employers from inquiring about an applicant’s disability or asking medical questions before an offer of employment is made. The offer may be contingent upon completion of a physical exam only if all applicants must have a physical exam.

The Act also requires employers to make “reasonable accommodations” for an otherwise qualified disabled worker unless those affirmative steps would pose an undue financial burden on the employer. Drafters of the statute emphasize, however, that there are many ways to make the “reasonable accommodation” that involve little or no expenditure of funds. For example, a prospective employee who is confined to a wheelchair but is otherwise the most qualified applicant for a particular job cannot be denied employment merely because the employer believes that it would be necessary to spend large sums of money to erect wheelchair ramps at all entrances to the place of employment. While that is one way of making a “reasonable accommodation,” it may be possible to make one entrance accessible or even to move the work station to an area that is already accessible. Each situation must be analyzed case-by-case.

As with other nondiscrimination statutes, the employer must carefully scrutinize the requirements of the job to be sure that all criteria are actually relevant to the job and do not act to bar people with disabilities from work they could do. Other disability discrimination laws with similar provisions may apply if the employer accepts federal grants or contracts (check the grant documents or contract). North Carolina has a disability discrimination statute establishing similar requirements for employers of 15 or more employees.

***Employee Polygraph Protection Act (coverage - all employers):*** The Employee Polygraph Protection Act prohibits pre-employment use of polygraph (lie detector) testing. Very specific procedures must be followed. The details of this law should be reviewed before a polygraph exam is considered. Essentially, this law means that you cannot use the polygraph exam in the workplace.

***Fair Labor Standards Act: (coverage depends on revenues and employee duties):*** The federal

Fair Labor Standards Act was originally adopted in 1938 and is commonly referred to as the minimum wage law. Recent laws have increased the federal minimum wage to \$5.85 per hour effective July 24, 2007; to \$6.55 per hour effective July 24, 2008; and to \$7.25 per hour effective July 24, 2009. North Carolina law provides for a minimum wage of \$6.15 per hour. This will, of course, be eclipsed by the federal minimum wage on July 24, 2008. The Fair Labor Standards Act also provides that all employees, except those that are specifically exempted, are to receive overtime pay at one-and-one-half times their regular rate of pay for all time worked in excess of forty hours in one work week. While the minimum wage portion of the statute is seldom violated (although the use of “quasi-volunteers” can raise some interesting questions), the overtime pay provisions are frequently overlooked or misconstrued and therefore cause problems.

Many managers mistakenly believe that the overtime pay provisions are applicable only to employees paid on an hourly basis. **This is not the case.** Overtime pay must be paid to workers regardless of whether they are paid by the hour or by fixed salary, unless they are specifically exempted from coverage. The most common overtime pay exemption available to nonprofits is the so-called “white collar” exemption, under which certain executive, professional, administrative, and computer employees need not receive overtime pay.

Executive employees are those employees who are paid a salary of at least \$455 per week and whose primary duty (generally, 50 percent or more of the work time) consists of management of an enterprise or a department. Exempt executive employees must regularly supervise the work of two or more full-time employees or their equivalent and must have the authority to hire and fire other employees (or their suggestions and recommendations regarding hiring and firing of other employees must be given particular weight within the organization).

Professional employees are generally defined as those employees who are paid a salary of at least \$455 per week and whose jobs have a recognized “professional” status and are based on professional knowledge attained through some course of study. A nonprofit organization’s requirement that a job candidate possess a master’s degree is usually not sufficient to have the employee categorized as a “professional” exempt from overtime. Professional employees include creative professionals and individuals who perform duties that are customarily carried out by individuals with advanced degrees.

Computer employees include employees who earn at least \$455 per week and whose primary duties include computer programming or computer system design, development, or analysis. Computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field typically qualify for this exemption.

Even if employees do not fit under the first two “white collar” exemptions, they may still qualify as administrative employees exempt from overtime. The Department of Labor has issued interpretive bulletins providing definitions of an “administrative employee,” again dependent on a minimum salary level. In general, however, an administrative employee is one whose primary duty is the performance of office or non-manual work directly related to management policies, whose primary duties include the exercise of discretion and independent judgment, and who are paid a salary of at least \$455 per week. A human resources director or an executive director of a small non-profit with few employees might be examples of persons who fit this exemption.

Also, any employee who is compensated at least \$100,000 per year and does not meet the qualifications of any of these “white collar” exemptions is exempt from the Fair Labor Standards Act if the employee regularly performs at least one of the duties of an exempt executive, administrative, or professional employee.

As noted, exempt employees must be paid on a salary basis. Exempt employees should not be treated akin to hourly employees. For example, an employer’s ability to dock an exempt employee’s wages for any reason is significantly curtailed.

In determining whether one of the “white collar” exemptions is applicable, you should be aware that the exemption is measured, not by a job’s title, but by the actual duties of the particular job. For this reason, many nonprofits prefer to develop detailed job descriptions to be used in the determination of exempt versus non-exempt status. These job descriptions can also have an extra benefit in that they can be used to measure an employee’s performance for purposes of personnel reviews, pay raises, and, if necessary, termination.

Frequently misunderstood in the analysis of overtime pay is the notion of compensatory time. Many nonprofit organizations believe that they need not pay an employee overtime if they provide the employee with time off at some future date. Private employers may not “bank” compensatory time for use in different work weeks. Employers may choose instead to give time off on a one-for-one basis in the same week extra hours are worked, thus avoiding overtime and compensatory time altogether. For example, if an employee who is normally expected to work eight hours per day works ten hours on Monday, that employee may be sent home two hours early on any other day in the same work week to avoid an overtime pay obligation. Regulations forbid averaging work weeks together.

Generally, commuting time is not compensable under the Fair Labor Standards Act. In certain circumstances, however, time spent performing duties during a commute may be compensable unless such work is considered negligible. Under the Fair Labor Standards Act, employers must pay overtime rates when non-exempt employees travel for work outside of their normal working hours.

Another provision in the Fair Labor Standards Act requires equal pay for “equal work.” This means that if two jobs in a nonprofit organization’s office require equal skill, effort and responsibility and are performed in similar working conditions, the organization must pay male and female workers in those jobs on an equal basis. Male and female secretaries with the same experience must be paid the same, but a male van driver and a female bookkeeper need not be paid the same. Factors like seniority and skill can be taken into account when determining salary levels. Because the equal pay standard, like the overtime pay exemption, is based on actual job content and not on job titles, written job descriptions prepared in consultation with a knowledgeable attorney or management consultant can assist a nonprofit organization in avoiding problems.

***Family and Medical Leave Act*** (coverage – applies if you have 50 or more employees): The Family and Medical Leave Act of 1993 (FMLA) requires covered employers to provide up to twelve unpaid work weeks of leave to qualified employees (those who worked at least 1,250 hours in the preceding 12 months) in a twelve-month period. Employees are entitled to leave if they meet certain criteria, and if the type of leave requested is recognized by the statute (e.g., birth or placement of a child, care for certain family members, or the employee’s own serious

health condition). Final regulations for the FMLA issued in early 1995 broadened the definition of “serious health conditions” and specified conditions excluded from coverage. Employers must continue group health insurance under the same conditions as before the leave and must offer reinstatement in an equivalent position. Leave may be taken on a reduced or intermittent basis under certain conditions. Employers covered by the FMLA must clearly state and fairly administer FMLA policies. There are multiple policy issues and details which the employer must address if the workplace is covered by this law. It is complex and can result in unintended liability. The Wage and Hour Division of the U.S. Department of Labor can be contacted for information regarding the Family and Medical Leave Act. (See Part V, “Information Resources.”)

***Immigration Laws (coverage - all employers):*** U.S. immigration laws require all employers, including nonprofits, to verify that new employees are authorized to work in the United States. To do this, both employer and employee must complete Form I-9, issued by the United States Citizenship and Immigration Service.

You are required to have a completed Form I-9 on file for each employee hired on or after November 6, 1986. Ask each employee to fill out the first portion of the form, which contains identifying information and a sworn statement that the person is either a U.S. citizen or an alien eligible to work in this country. As the employer, you are responsible for filling out the second portion of the form, after checking certain documents. If the employee has a U.S. passport, certificate of U.S. citizenship or naturalization, an unexpired foreign passport with an attached employment authorization form, or an alien registration card (with a photo), you can complete the I-9 Form after seeing one of those documents. If the employee cannot produce any of these documents, you can complete the form only after seeing a document that establishes the employee's identity (such as a driver's license issued by a state or other identification item that contains either a photo or information such as height, weight, hair color, etc.) *and* a document that establishes the employee's right to work (such as an original social security card, a birth certificate, or a U.S. citizen ID card, USCIS Form I-97). It is also helpful to keep a photocopy of the documents examined with the completed form I-9.

The Form I-9 must be completed and retained for *all* employees, including seasonal and part-time help, and even those individuals whom you know to be U.S. citizens. The form completion requirement is equally applicable to all levels of employees up to and including the chief executive. The form must be completed within three business days of the commencement of employment. Completing the form prior to the new employee's first day of work is advantageous, however. That way, an employee who cannot produce the necessary documents will not commence work and trigger withholding and payroll requirements if it turns out later that the individual is not eligible for employment. Completed I-9 forms should not be maintained in the personnel files if an employer wishes to maintain the confidentiality of these files during an inspection of I-9 forms by Department of Labor officials.

***Pregnancy Discrimination Act (coverage – applies if you have 15 or more employees):*** The Pregnancy Discrimination Act is actually an amendment to Title VII, adopted in 1978 to overturn several court decisions. The Act prohibits discrimination in employment based on an applicant's pregnancy, and requires that pregnancy be treated as any other illness for purposes of sick leave, vacation, and fringe benefits. This means that it is illegal to refuse to hire someone because they are pregnant, to discharge someone for that reason, or to deny them the same leave of absence considerations others receive (if any).

***Title VII of the Civil Rights Act of 1964 (coverage – applies if you have 15 or more employees):***

This landmark legislation prohibits discrimination with respect to compensation, terms, conditions, or privileges of employment because of an individual's race, color, religion, sex, or national origin. Recent cases have held that the law prohibits not only workplace discrimination but also work-related harassment based on any of the listed factors.

The guiding principle of Title VII is that individuals are to be considered on the basis of individual capacities and not on the basis of any characteristics attributed to a group. Similarly, individual characteristics used as a basis for personnel decisions must be related to the job and not merely for the purpose of "screening out" certain individuals. The underlying assumption of Congress is that the factors of race, color, sex, religion, or national origin are not appropriate criteria in making employment decisions, except in very limited situations (*e.g.*, religious organizations may be allowed to prefer employees of their own religion under certain circumstances).

Title VII prohibits more than discriminatory treatment of individuals based on impermissible factors. Title VII also forbids some "facially neutral" personnel practices that have a disparate impact. A policy that excludes a higher percentage of women than men is improper to use unless the policy is absolutely necessary to ensure that employees can do the job. For example, a policy of hiring only people who are over 5 feet, 7 inches tall has a disparate impact on women. More women are excluded than men. The policy is improper, then, unless height is clearly proven necessary for adequate job performance. A very difficult burden of proving this necessity will be placed on the employer.

***Uniformed Services Employment and Reemployment Rights Act (coverage – all employers):***

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) protects job rights and benefits for employees who are absent from work for military service. USERRA requires employers to reinstate employees returning from up to five years of military service and to reinstate these employees into health, retirement, and other benefit plans. Under USERRA, employees deployed for military service also are eligible to continue receiving employer health coverage for two years, although employees may be responsible for paying up to 102 percent of the premium if they are on military duty for more than 30 days.

# PART III: NORTH CAROLINA EMPLOYMENT LAWS

**E**very state has employment laws which expand, complement, or fill gaps left by federal law. This section summarizes the major provisions of significant North Carolina employment laws.

## **Occupational Safety And Health** (N.C.G.S. §95-126 to 95-160)

Nonprofit employers are required by the North Carolina Occupational Safety and Health (OSH) Act to provide their employees with a workplace free from recognized hazards which are likely to cause serious physical harm to employees. State OSH provisions closely parallel federal OSHA laws. The OSH Division of the State Department of Labor has responsibility for enforcing the Act and investigating complaints, and it can issue substantial fines for violations. Employers are required to display the poster “Safety and Health Protection on the Job” (also part of the combined N.C. Labor Laws poster) and maintain a log of recordable occupational injuries and illnesses (Forms 101 and 200). The OSH Division has adopted detailed rules called “standards” which employers must follow. Many standards apply to most nonprofits, including emergencies, fire prevention, hazardous chemicals, and electrical equipment. Other standards may apply only to nonprofits with specific conditions. For instance, the bloodborne pathogens standard applies if it is reasonably anticipated that employees will be exposed to blood or other infectious materials. Nonprofits can obtain free assistance from the OSH Consultative Services Division (see Part V for the phone number).

## **Recordkeeping and Posters (State and Federal)**

Several federal and state employment laws require that you place specific posters in the workplace and maintain certain records. These requirements change periodically. A summary of the primary obligations includes:

- ***The North Carolina Labor Law Poster:*** This combined poster satisfies the obligation to post separate: (1) safety and health; (2) state wage and hour law; and (3) employment discrimination. There are also separate workers’ compensation and unemployment insurance posters. The State Department of Labor will provide copies of these posters upon request.
- ***Federal Posters:*** Employers affected by federal employment laws may be required to post: (1) “Equal Employment Opportunity is the Law” describing obligations under Title VII, the ADEA, the ADA, and the Rehabilitation Act; (2) posters for programs that receive federal assistance or entities that contract with the federal government; (3) the Employee Polygraph Protection Act poster; (4) the federal minimum wage and overtime poster; (5) the Family and Medical Leave Act poster; and (6) the Uniformed Services Employment and Reemployment Rights Act poster.

- **Recordkeeping:** Affected employers should generally: (1) maintain personnel records and all application forms for at least three years (longer if an investigation is ongoing); (2) maintain basic payroll and time records for three years (five years for information related to unemployment insurance); (3) keep the OSHA 200 Log and 101 Forms for five years; (4) preserve medical records for the duration of employment plus 30 years and maintain them separately with limited access; and (5) maintain personnel files for seven years following termination (longer if space is available).

## **Unemployment Compensation**

(Chapter 96 of N.C. General Statutes)

Most employers with one or more employees are assessed a tax known as FUTA (Federal Unemployment Tax Act) by the North Carolina Employment Security Commission (ESC). An IRS §501(c)(3) nonprofit does not owe the tax unless it has at least four full-time or part-time employees during 20 different calendar weeks in one calendar year. The tax is based in large part on the particular employer's "experience rating" – or the claims which are actually paid to former or laid-off employees. The more claims that are paid on your account, the higher the tax. Nonprofit employers may choose to become a "reimbursable employer" and pay a small, set percentage of payroll until an account is established. If claims are paid, a bill is sent to replenish the account to its target level. If no claims are paid, FUTA taxes cease once the target level is reached (typically 1% of annual payroll).

Employees who are discharged through no fault of their own and cannot find work should receive up to 26 weeks of benefits for which the employer will be charged or taxed. Employees who simply resign, are discharged for substantial fault on their part (generally, problems they could have controlled but did not, especially after warnings), or misconduct (deliberate violation of rules or standards) receive no unemployment benefits or only partial benefits. Discharges for substantial fault or misconduct do not increase an employer's tax rate.

Employers faced with an unemployment compensation issue should carefully read all mail received related to the claim. Complete the requested information *immediately* and accurately. Tell the story as it occurred, attach supporting documents, and be specific. Vagueness or withholding important facts may lead to incorrect determinations by the ESC. Either party that is dissatisfied with the initial ruling may appeal within strict time guidelines. If an appeals hearing is held, take the firsthand witnesses and/or supervisor and copies of any rules violated, documentation of problems, or evidence of poor work. You have the burden of proving the claimant was at fault in the discharge. Legal or professional advice is appropriate if you are unfamiliar with the process.

## **Wage Payment Act**

The North Carolina wage and hour laws generally follow federal law in the minimum wage and overtime provisions. However, state law governs the issues of paydays, vacation, sick pay, and deductions from wages.

Employers must: (1) notify employees when hired of their promised wages, including policies on vacation, sick leave, paid holidays, commissions, and bonuses and the day and place for payment of wages; (2) maintain for employees' review a written record or posted notice of policies and practices with regard to promised wages, including commissions, bonuses,

vacation, sick leave, and holidays; and (3) give written notices of change before they occur (N.C.G.S. §95-25.13).

Separated employees are entitled to receive all wages by the next scheduled payday (N.C.G.S. §95-25.7). Wages in the form of vacation, commissions, and bonuses must be paid pursuant to the employer's policy and/or practice unless the employer has notified employees of a written policy requiring their forfeiture upon separation. Other wage deductions may be made only if required by federal or state law (such as taxes) or if written authorization has been provided by the employee (such as insurance co-payments or the cost of uniforms) (N.C.G.S. §95-28.8). Deductions for cash or inventory shortages or damage to property may be made within limits only after employee authorization and should be analyzed case-by-case (N.C.G.S. §95-25.10).

### **Workers' Compensation**

(Chapter 97 of N.C. General Statutes)

All employers with three or more employees or board officers are required to provide workers' compensation coverage. Typically, small employers meet this obligation by purchasing insurance. The insurance carrier provides administration and handles claims.

Occupational injuries or illnesses are generally compensable if they arise out of and within the scope of employment. There is no need to demonstrate the employer was at fault in creating a negligent condition. In return, benefits are limited by statute to specified amounts depending upon the severity and duration of the injury or illness, as well as the employee's pay rate. The law provides for: (1) substitute wage payments; (2) medical benefits; and (3) death benefits. Contested cases may require a hearing and testimony, usually conducted by the insurance carrier's lawyer.

Since workers' compensation provides medical benefits, you may have questions about whether a particular medical claim should be filed under the group health policy or under workers' compensation. The answer depends on whether the claim is related to work. If in doubt, contact a professional advisor or your carrier(s).

### **Youth Employment**

(N.C.G.S. § 95-25.5)

Employees under 18 years of age must obtain a youth employment certificate from the local county department of social services before starting work. Youth generally must be at least 14 years of age to be employed in non-agricultural work. Hazardous and detrimental work is not permitted for youth under 18 years of age, nor is work between 11:00 p.m. and 5:00 a.m. on a school night (except for youth 17 or 18 years of age who have written permission from a parent and school principal). Youth aged 14-15 are limited primarily to working in office, retail, and recreational jobs and have more restrictive hours of work, including no work between 7:00 p.m. and 7:00 a.m. during the school year or 9:00 p.m. and 7:00 a.m. during the summer. Bona fide volunteers to charitable and nonprofit organizations are exempt from all youth employment regulations.

### **Other Relevant State Laws**

Unless noted otherwise, all employers in North Carolina must comply with these additional

employment law provisions:

**Blacklisting** (N.C.G.S. §14-355): State law prevents employers from using written or verbal communications to prevent discharged employees from obtaining future employment. However, employers may always provide truthful, written statements about the reason for an employee's discharge when the discharged employee has applied for another job and the prospective employer has made a request for the information.

**Concealed Weapons** (N.C.G.S. §14-415-1 to 14-415-24): North Carolina law allows individuals with permits to carry concealed weapons. The statute specifically prohibits concealed weapons on certain premises, such as state or federal offices and financial institutions. The statute also prohibits concealed weapons on "any other premises" where notice that carrying a concealed handgun is prohibited by the posting of a conspicuous notice or statement "by the person in control of the premises." Accordingly, employers should notify employees in writing that weapons are prohibited on the organization's property. In addition, a notice should be posted to notify non-employees that weapons are not allowed on the premises.

**Drug Testing** (N.C.G.S. §95-230 to 95-232): State law does not require, discourage, or support drug testing of employees. However, if testing occurs, the process itself is regulated. Samples must be collected in sanitary conditions respecting individual dignity and with "chain of custody" safeguards. Only approved testing laboratories may be used. Positive samples must be retained by the lab, and confirmation tests must be run on positive samples.

**Handicapped Protection (coverage - 15 employees)** (N.C.G.S. §168A-1 to 168A-12): A state law prohibits discrimination against handicapped applicants or employees and requires much of the same accommodation considerations as the federal Americans with Disabilities Act discussed above. The federal law is generally more protective and therefore provides the minimum standards for compliance.

**Identity Theft Protection** (N.C.G.S. §75-60 to 75-65): The Identity Theft Protection Act, a 2005 North Carolina law, requires all employers, including nonprofits, to take precautions with social security numbers and other personal and confidential records maintained in their files. To the extent that organizations collect employees' social security numbers, they must not make them publicly available, must only transfer them over the Internet in a secure manner, and must not print them on mailed materials. North Carolina employers are also required to adopt and follow policies and procedures for the destruction of written and electronic materials containing confidential and personal information. For the purpose of this law, personal information includes any use of an individual's name along with other identifying information such as e-mail address, membership identification number, or credit card number. The Identity Theft Protection Act also requires employers to notify their employees in the event that personal information is compromised.

**Leave for Parent Involvement in Schools** (N.C.G.S. §95-28.3): This law requires *all* employers to grant up to four hours of *unpaid* leave per year to any employee who is a parent, guardian, or person standing *in loco parentis* of a school-aged child so that the employee can become involved in school activities. This law has been interpreted to allow four hours per calendar year, rather than school year. The term "school" is defined as any public or private grade school, preschool or child day care facility.

The statute prohibits discrimination against employees who request or take this type of leave. Employees claiming discrimination can bring a civil action against the employer seeking reinstatement of lost wages.

***Medical Examinations*** (N.C.G.S. §14-357.1): Employers with 25 or more employees may not require an applicant for employment to pay the cost of a medical examination or of providing necessary records. Disability discrimination laws discussed in Part II also limit the timing of medical examinations.

***Protection of Jurors*** (N.C.G.S. §9-32): This law makes it unlawful for an employer to discharge or demote any employee because the employee has been called for jury duty or is serving as a grand or petit juror. The statute establishes a one-year statute of limitations and provides for the recovery of reasonable damages and reinstatement.

***Retaliatory Employment Discrimination*** (N.C.G.S. §95-240 to 95-244): The “whistleblower” law protects employees against discrimination or retaliation if they exercise their rights under the Workers’ Compensation Act, the N.C. Occupational Safety and Health Act, the N.C. Wage and Hour Act, and the N.C. Mine Safety & Health Act. Employees who carry the sickle cell or hemoglobin C trait are also protected. Protected employee activities include filing formal complaints with the Industrial Commission (workers’ compensation) or the N.C. Department of Labor (OSH, Wage & Hour, Mine Safety & Health). Also protected are activities such as calling the N. C. Department of Labor with questions, asking an employer to fix an unsafe working condition, and asking a supervisor about unlawful deductions from paychecks. For example, an employee cannot be fired by a nonprofit in some health care settings for requesting that universal precautions against bloodborne diseases be taken. Nonprofit employers have a strong defense in retaliation cases if they can prove that they would have taken the same action against the employee even if the employee had not engaged in the protected activity. Complaints are investigated by the N.C. Department of Labor.

***Use of Lawful Products*** (N.C.G.S. §95-28.2): State law prohibits discrimination against applicants or employees because they lawfully use a lawful product away from work. For example, an employer may prohibit tobacco smoking at work, but may not discharge or refuse to hire a smoker because she smokes. There are defenses in the law which allow you to consider adverse effect on job performance, safety of other employees, bona fide occupational requirements, the fundamental objectives of the organization, or failure to complete a substance abuse program. Employers may provide employees in higher risk or cost categories fewer benefits if the difference is actuarially justified and the same premium is paid on behalf of each employee.

## **Wrongful Discharge and Other Potential Suits**

In general, North Carolina common law provides that an employee may be discharged for any reason that is non-discriminatory or not specifically prohibited by statute. However, the courts have over time recognized exceptions to this “at will doctrine.” These exceptions allow employees of any type or size employer to file suit claiming damages for wrongful discharge or for wrongful treatment by the employer in certain situations:

1. ***Wrongful discharge/treatment in violation of public policy***: The North Carolina courts have held that an employer has no right to terminate an employee for an unlawful reason or purpose

that contravenes public policy. For example, terminating an employee for refusing to lie at a court hearing, for refusing to work in violation of state minimum wage laws, or for refusing to drive a truck in excess of the hours allowed by the Department of Transportation and for refusing to falsify driving logs, all have been found to offend important public policies. This public policy exception may not be limited to discharge situations, but may also apply to the way the employer administers the terms and conditions of continued employment. The employee may seek compensatory and punitive damages as a result. The best defense to public policy suits is to have a good and fair reason for every discharge. Discharges motivated by non-work related concerns may provide a basis for lawsuits.

2. *Breach of contract.* Where an employee has a contract (not necessarily in writing) providing a definite term of employment, such as two years, then he may have the right to file a suit if he is discharged without cause before the end of the term. An employer may wish to offer an employment contract to a high-level executive employee; however, legal counsel should be consulted before doing so.

3. *Other promises by the employer.* If a discharged employee was induced, by an offer of permanent employment for a specific term, to give something of “additional value,” such as to move from one geographic location to another, the employee may have a claim for wrongful discharge if he or she is terminated without just cause. In addition, a discharged employee may be able to sue for fraudulent misrepresentation if he or she was fired in violation of promises that an employer made to encourage an employee to work there. The best way to prevent such a suit is to offer potential employees only those terms of employment and benefits that the employer is confident it can and will deliver.

4. *Personnel manuals.* Courts have not ruled decisively on the issue of whether a North Carolina employer will always be bound or not by the commitments it prints in an employee handbook. A discharged employee may claim that an employer promised in a personnel manual to treat him or her in a certain manner (such as providing three warnings before discharge) but breached that promise. The three best defenses to such claims are to follow all policies, to allow discretion in policies, and to publish explicit disclaimers stating that the organization’s policies are not to be relied upon as contractual statements. Many North Carolina employers ask employees to sign and date a statement acknowledging receipt of a policy manual or a list of work rules which says: “I acknowledge receipt of the employer’s policies [rules, standards of conduct, etc.]. I understand they do not form a contract of employment, they can be changed at any time, and my job can be ended by myself or the employer at any time and for any reason.” Maintaining flexibility within a particular policy is also important, such as “The employer may alter the application of these rules as specific circumstances warrant.”

### **Negligent Hiring And Retention**

An employer who knew or should have known of an employee’s dangerous or harmful characteristics may be held liable for the damages she causes. Placing an employee with a history of child abuse in charge of children is an example. If a reasonable investigation of the employee’s past would have revealed the potential problem, liability is a real possibility. Likewise, employees who demonstrate harmful proclivities (such as sexual harassment) and are retained after one occurrence expose employers to liability.

## **Sexual Harassment**

In addition to claims under federal law, a victim of sexual harassment in the workplace may bring a claim for intentional infliction of emotional distress, if he or she can demonstrate that the harassment was “extreme and outrageous” and that it caused him or her to suffer a medically diagnosable mental condition. This claim may be brought against an employer of any size, regardless of the number of employees it has. The employer may be held liable for the intentional acts of one of its employees if the employee subject to the harassment can demonstrate that the harassment was reported to a manager who failed to take any action. In this case, the employer may be found to have ratified the acts of harassment. To avoid such claims, the employer should have a clear policy prohibiting sexual harassment and one that permits the employee to bypass the alleged harasser in making a complaint. Complaints of sexual harassment should be taken seriously and investigated promptly and thoroughly. Both the alleged harasser and victim should be treated fairly, and preferably should be separated during the course of the investigation.

## **Local Ordinances And Human Relations Agencies**

Some local employment-related ordinances are enforceable in court. For instance, New Hanover County has an ordinance which parallels Title VII of the Civil Rights Act of 1964 and provides mandatory local investigation and resolution of related complaints. Most local ordinances do not have the force of law, however, and they normally establish voluntary mechanisms to investigate and resolve employee complaints. Similarly, the statewide Human Relations Commission has powers of persuasion and can refer complaints to the Equal Employment Opportunity Commission. Generally, cooperation with such an investigation is beneficial to everyone. If you have doubt as to the agency’s powers or procedures, contact a legal advisor or the agency’s representative.

## **Employee Benefits**

No state or federal law requires employers to provide employee benefits. However, employers who do provide benefits such as life insurance, health or dental insurance, retirement programs, severance pay policies, and the like are regulated by state or federal laws. Employees have the right under state and federal laws to continue or convert certain benefits plans if they are terminated. Consult your insurance brokers and plan administrators. Regardless of size, employers must be very careful in offering, changing, guaranteeing, and administering benefits programs.

# PART IV

## SELF-AUDIT CHECKLIST

A useful method of identifying improper practices or gaps in policies and procedures is a self-audit. This checklist provides a good start:

### **Hiring:**

- Is your application process accessible to persons with disabilities (*e.g.*, physical access to the facility and methods of accommodating needs in completing the application)?
- Does the employment application include discriminatory or unlawful questions, such as those seeking medical information?
- Do you have job descriptions outlining essential and additional functions and duties? If not, was it a conscious decision not to have them?
- Do interviews focus on job qualifications rather than personal characteristics? Are hiring decisions based upon the best applicant, given the specific duties in the job description?
- Are references carefully checked?
- Is the I-9 form completed on all hires?
- Are applications kept active for only a set period of time, after which interested persons have to reapply?

### **Employment Policies and Practices:**

- Are employment policies clearly defined and followed?
- If you have written policies and you have 50 or more employees, do you have a written family and medical leave policy? If, so do you properly designate covered leave as FMLA leave?
- If an employee violates policies or performs poorly, is the problem discussed and documented? Is any discipline that is imposed consistent with policy and past practice?
- Is employee performance evaluated on a regular basis?
- Is there a regular and effective means of communicating problems, opportunities, instructions, expectations, questions and results?
- Are employees discouraged from or retaliated against for raising questions or reporting

problems?

- Do you have a clearly established and enforced policy against harassment, including sexual harassment?
- If a discharge must occur, is it based upon the most accurate information that can be reasonably obtained, consistent with past practice, and not based on discriminatory considerations? Is the discharge likely to come as a surprise to the employee?
- If you have federal contracts or receive federal funds, have you addressed the additional employment law obligations?

### **Wages and Hours:**

- Are employees properly classified for wage and hour purposes?
- Are hours accurately documented?
- Are non-exempt employees ever asked, expected, or allowed to work “off the clock” to get the job done without receiving overtime?
- Is “comp time” inappropriately given in lieu of overtime pay outside the week in which it was earned?
- Do you obtain a written withholding authorization for every item withheld from an employee’s paycheck? Do you ever inappropriately withhold an employee’s paycheck or amounts from the paycheck without a written authorization?

### **Records and Documents:**

- Are all labor law posters displayed (*e.g.* Equal Employment Opportunity, Wage and Hour, Occupational Safety and Health Act, Unemployment, Family and Medical Leave Act [if applicable], Social Security)?
- Are applicable OSHA requirements met (*e.g.*, exits, fire extinguisher, labeling of potentially hazardous substances, personal protective equipment, lockout-tagout procedures for cutting off power sources during maintenance and repair)?
- Are employees trained in those safety procedures, and do you keep records of that training?
- Is appropriate employment-related documentation maintained in the proper fashion and for the right periods of time?
- Do you have a written policy regarding use of employee social security numbers and destruction of personal and confidential employee information?

**Benefits:**

- If you have three or more employees or board officers, do you have workers' compensation insurance coverage in place?
- If you offer paid vacation or other paid days off, have you accurately communicated in writing the manner in which the paid days off are earned and the circumstances under which they can be forfeited (*e.g.*, resignation without notice, termination for cause, etc.)?
- If you have a retirement plan, does the plan document comply with federal law?
- Are employee benefits properly designed, described to employees, funded and maintained? Are changes properly managed?

**General:**

- Does the organization periodically review its employment practices to ensure the continuing relevance of and compliance with those policies?
- Does the organization regularly review the adequacy of its directors and officers liability insurance policy?

# PART V:

## INFORMATION RESOURCES

**S**tate and federal agencies can provide free assistance with compliance information, required posters, and questions about the laws they administer. The most commonly contacted agencies, listed by area of expertise, include:

### **Classification of Employees**

Exempt vs. Non-exempt employees

[http://www.dol.gov/esa/regs/compliance/whd/fairpay/fs17a\\_overview.pdf](http://www.dol.gov/esa/regs/compliance/whd/fairpay/fs17a_overview.pdf)

Employees vs. Independent contractors

<http://www.irs.gov/pub/irs-pdf/p1779.pdf>

### **Disability Issues:**

Carolina Legal Assistance (the N.C. Protection and Advocacy organization)

877/235-4210

<http://www.cladisabilitylaw.org>

U.S. Equal Employment Opportunity Commission:

800/669-4000

<http://www.eeoc.gov>

Office of Federal Contract Compliance (federal government contractors):

<http://www.dol.gov/esa/ofccp/index.htm>

Raleigh

919/790-8248

Charlotte

704/344-6113

### **Discrimination on the basis of:**

Age, race, sex, religion, country of origin, disability, maternity benefits:

Equal Employment Opportunity Commission:

800/669-4000

<http://www.eeoc.gov>

N.C. Human Relations Commission:

919/789-5930

<http://www.doa.state.nc.us/hrc/>

Disability: See Disability Issues.

Union or Protected Concerted Activity:

National Labor Relations Board:

336/631-5201

<http://www.nlr.gov>

Worker Safety and Health:

Occupational Safety and Health Division, N.C. Department of Labor:

800/625-2267

<http://www.nclabor.com/osha/osh.htm>

Workers' Compensation:  
N.C. Industrial Commission: 919/807-2500  
<http://www.comp.state.nc.us>

Wage and Hour Activities: See Minimum Wage.

**Employee, Union or Other Concerted Activity:**  
National Labor Relations Board: 336/631-5201  
<http://www.nlr.gov>

**Family and Medical Leave Act:**  
U.S. Department of Labor, Wage and Hour Division: 866/487-9243  
<http://www.dol.gov/esa/whd/>  
Raleigh 919/790-2741  
Charlotte 704/749-3360

**Health Insurance:**  
U.S. Department of Employee Benefits Security Administration: 866/444-3272  
<http://www.dol.gov/ebsa/>

**Hiring Employees:**  
N.C. Employment Security Commission, Central Office: 919/707-1440  
<http://www.ncesc.com>  
(Also check phonebook under N.C. State Government for local offices.)

**Hours of Work, Minimum Wage, Overtime, Severance Pay, Vacation Pay, Youth Employment:**  
U.S. Department of Labor, Wage and Hour Division: 866/487-9243  
<http://www.dol.gov/esa/whd/>  
Raleigh 919/790-2741  
Charlotte 704/749-3360

N.C. Department of Labor, Wage and Hour Division:  
<http://www.nclabor.com/wh/wh.htm> 800/625-2267

**Immigration:**  
U.S. Citizenship and Immigration Services: 800/375-5283  
<http://www.uscis.gov>

**Injury Log, OSHA Form 200:**  
N.C. Department of Labor, Research and Policy Division: 919/715-7415

**Insurance:**  
N.C. Department of Insurance: 800/546-5664  
<http://www.ncdoi.com> 919/807-6750

**Labor Market Information** (wage scales for hourly positions): 919/733-2936  
<http://jobs.esc.state.nc.us/lmi/> 800/262-0516

**Mediation:**

Mediation Network of N.C. 919/663-5650  
<http://www.mnnc.org>

**Local Mediation Centers:**

Asheville: The Mediation Center 704/251-6089  
Brevard: The Center for Dialogue – Transylvania County 704/877-3815  
Bryson City: Mountain Mediation Services 704/488-8812  
Carrboro: Orange County Dispute Settlement Center 919/929-8800  
Carthage: Dispute Settlement Center of Moore County 910/947-6000  
Charlotte: Community Relations Committee, Dispute Settlement Center 704/336-2903  
Cherokee: Mountain Mediation Services 828/497-3933  
Concord: Cabarrus County Mediation Center 704/786-1820  
Durham: Women In Action 919/680-4575  
Fayetteville: Cumberland County Dispute Settlement Center 910/486-9465  
Franklin: Mountain Mediation Services 828/349-2553  
Gastonia: Mediation Center of the Southern Piedmont 704/868-9576  
Graham: Alamance County Dispute Settlement Center 919/227-9808  
Greensboro: Mediation Services of Guilford County 910/273-5667  
Greenville: Mediation Center of Eastern Carolina 919/758-0268  
High Point: Mediation Services of Guilford County 910/882-1810  
Hendersonville: Dispute Settlement Center of Henderson County 828/697-7055  
Kenansville: Dispute Settlement Center 910/275-0044  
Lincolnton: Mediation Center of the Southern Piedmont 704/736-8474  
Lumberton: Robeson County Dispute Settlement Center 910/738-7349  
Morganton: The Conflict Resolution Center 828/322-2566  
New Bern: Mediation Center of Eastern Carolina 919/633-2538  
Newton: Repay, Inc., Catawba Justice Center 704/464-6744  
Pittsboro: Deep River Mediation Center 919/542-4075  
Raleigh: Mediation Services of Wake County 919/508-0700  
Reidsville: Mediation Services of Rockingham County 336/342-5238  
Rocky Mount: Mediation Center of Eastern Carolina 919/985-3792  
Shelby: Mediation Center of the Southern Piedmont 704/482-1813  
Sylva: Mountain Dispute Settlement Center 828/497-3933  
Waynesville: Mountain Dispute Settlement Center 828/452-0240  
Wilmington: Community Mediation Center of Cape Fear 910/362-8000  
Wilson: Mediation Center of Eastern Carolina 252/237-7061  
Winston-Salem: Mediation Services of Forsyth County 910/724-2870

**Pensions/Retirement:**

U.S. Department of Labor, Employee Benefits Security Administration: 866/444-3272  
<http://www.dol.gov/ebsa/>

**Posters:**

N.C. Department of Labor, Education and Training Bureau, Occupational Safety and Health  
Division: 919/807-2875  
<http://www.nclabor.com/posters/posters.htm> 800/625-2267

See Discrimination or Hours of Work (above) for sources of federal posters.

**Safety and Health:**

N.C. Department of Labor, Occupational Safety & Health Division:

<http://www.nclabor.com/osha/osh.htm>

Main Office

919/807-2900

Educational Training and Technical Assistance

919/807-2875

Consultations

919/807-2905

Complaints

919/807-2796

**Severance Pay:**

U.S. Department of Labor, Employee Benefits Security Administration:

866/444-3272

<http://www.dol.gov/ebsa/>

N.C. Department of Labor, Wage and Hour Division:

Raleigh

919/733-2152

Charlotte

704/342-6966

Greensboro

910/299-3224

**Social Security:**

U.S. Social Security Administration:

800/772-1213

<http://www.ssa.gov>

**Taxes:**

U.S. Internal Revenue Service:

<http://www.irs.gov>

Individual Assistance

800/829-1040

Tax-exempt Entity and Retirement Plan Assistance

877/829-5500

N.C. Department of Revenue:

877/252-3052

<http://www.dornrc.com>

**Unemployment:**

N.C. Employment Security Commission:

[www.ncesc.com](http://www.ncesc.com)

Central Office

866/278-3822

Tax

919/707-1150

Claims

919/707-1290

(Also check phonebook under N.C. State Government for local offices.)

**Veterans Employment and Training:**

U.S. Department of Labor, Employment and Training Administration:

877/889-5627

<http://www.doleta.gov>

**Workers' Compensation:**

N.C. Industrial Commission:

919/807-2500

<http://www.comp.state.nc.us>

N.C. Occupational Safety and Health Review Commission:

919/733-3589

<http://www.oshrb.state.nc.us>