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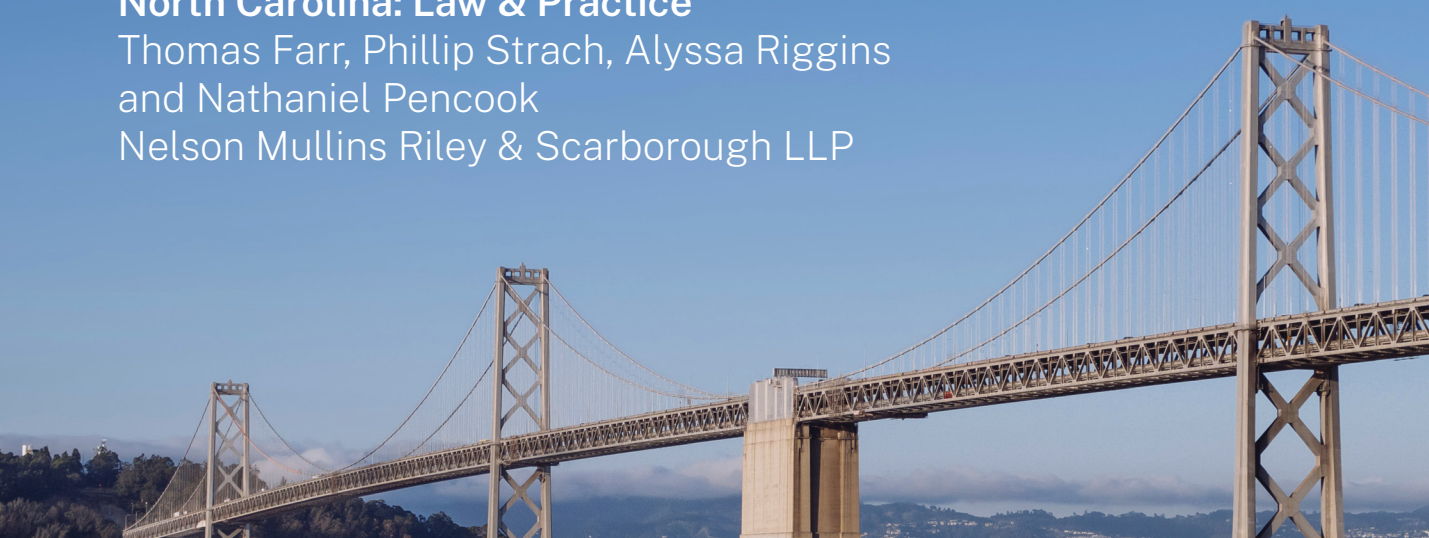
North Carolina: Law & Practice

Thomas Farr, Phillip Strach, Alyssa Riggins and Nathaniel Pencook
Nelson Mullins Riley & Scarborough LLP



NORTH CAROLINA

Law and Practice

Contributed by:
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Nelson Mullins Riley & Scarborough LLP

Contents

Nelson Mullins Riley & Scarborough LLP is based in Raleigh, North Carolina, and has more than a century of labor and employment experience representing clients in federal and state courts and ADR venues both in North Carolina and throughout the USA. The employment team's experience includes litigating federal and state antidiscrimination laws, wage and hour complaints, non-compete disputes, occupational safety concerns, and immigration and labor law issues. It also has a long and experienced track record in litigating, trying and winning employment cases.

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1. Context Matters: Current Socio-economic, Political, and Legal Climate

1.1 "Me Too" Five Years Later

The "Me Too" movement has had a lasting effect on the HR landscape. While North Carolina law does not expressly require sexual harassment training, effective sexual harassment prevention training is an important risk management tool. Best practices include annual training courses – one aimed at management-level employees, with separate training for all other employees. North Carolina HR departments should also be wary that sexual harassment investigations are not necessarily covered under the attorney-client privilege, even if in-house counsel is involved. In recent cases, the North Carolina Supreme Court has clarified that investigations into alleged violations of company policy are "ordinary business activities" that are "not necessarily" privileged (Buckley, LLP v Series 1 of Oxford Ins Co, NC, LLC, 382 NC 55, 56, 876 S.E.2d 248, 249; see Window World of Baton Rouge, LLC v Window World, Inc, 377 NC 551 857 S.E.2d 850 (2021) (per curiam)). Investigation processes and procedures are more likely to come into public view; therefore, strict adherence to internal policies can be essential to mitigate retaliation and constructive discharge claims.

On the whole, the number of Equal Employment Opportunity Commission (EEOC) charges in North Carolina has remained about the same, with a slight decline from 2019. For FY 2022, North Carolina reported a grand total of 3,506 EEOC charge filings representing about 4.8% of all charges nationwide. Of those, approximately 27.8% of all North Carolina charge filings were sex-based discrimination in 2022 – a decrease from the peak 30.4% reported in 2019. That said, constructive discharge filings have slowly increased nationwide since 2020.

1.2 Politics at Work

In today's diverse and dynamic workforce, personal political views can often intersect with the professional realm, thereby posing challenges for employers in maintaining a harmonious workplace. Today, more than ever, employers are tasked with the difficulty of navigating the complex terrain of personal political views in the workplace while remaining compliant with relevant employment laws.

The First Amendment of the United States Constitution protects citizens' rights to freedom of speech, including political expression. However, these rights primarily apply to government action rather than private employers. Public employers must distinguish an employee's speech as a private citizen on a matter of public concern from the type of speech undertaken on behalf of the employer, which can lawfully be restricted. In contrast, in North Carolina, private employers generally have the discretion to implement policies that regulate or limit political speech and expression within the workplace. Furthermore, an individual's political affiliation is not a trait protected by state or federal antidiscrimination laws applicable to private employers. Private employers can adopt policies that restrict political discussions during work hours to prevent disruptions that could negatively impact overall business operations. Such policies can help mitigate potential conflicts and ensure that the focus remains on job-related matters.

Private employers enjoy a wide latitude as to how they can lawfully restrict political speech in the workplace, but adopting a clear personnel policy to lay out those restrictions and the purpose of those restrictions is advisable. While

no one wants to feel as though they are being censored, most employees will appreciate a policy that even-handedly addresses politics at work in a way that avoids potential conflict in the workplace.

1.3 Impending Economic Issues

If employers find themselves in a situation where they need to "right size" during a recession, employers should ensure that any such decisions are made based on neutral criteria that comply with all state and federal laws. Specifically, employers should make sure Reduction in Force (RIF) selection criteria are free from bias and are not retaliatory. HR or counsel should review the manager's selections to ensure that employees who have recently raised complaints or been on leave are not selected unfairly.

Employers may also consider running an adverse impact analysis and consulting with local employment counsel to ensure that there is no disparate impact on any protected group. Employers should be particularly mindful not to create an adverse impact based on an employee's age. Age-based claims are often associated with RIFs and historical data suggests that these are brought more often during recessions.

Employers should also ensure that any releases sought in conjunction with a severance payment comply with state and federal laws, particularly with the timeframe for consideration required under the Age Discrimination in Employment Act (ADEA) and the Older Worker Benefit Protection Act (OWBPA). Lastly, for large or inter-state RIFs, employers will want to be mindful of laws mandating a certain type of notice or a specific notice period prior to termination. Under federal law, these notice provisions are governed by the Worker Adjustment and Retraining Notification Act (the "WARN Act"). Although North Carolina does not have its own WARN Act, numerous other states including California, New York, New Jersey and Illinois have WARN laws that require employers to take additional actions than the federal WARN Act.

2. Labor Relations

2.1 Aggressive Approaches by the National Labor Relations Board (NLRB)

During the past year, the NLRB has continued its current trend from pro-employer to pro-employee. Just this past February, in what NLRB General Counsel Jennifer Abruzzo described as return "to longstanding precedent", the NLRB's decision in McLaren Macomb held that employers offering severance agreements containing broad non-disparagement and confidentiality provisions may violate Section 7 of the National Labor Relations Act (NLRA). This is a particularly significant decision for employers, as it has become quite customary for employers to offer severance agreements containing such non-disparagement and confidentiality provisions.

McLaren Macomb Decision

Of note, the NLRB in McLaren Macomb held that the following language in the severance agreement's non-disclosure and confidentiality provisions interfered with employees' Section 7 rights:

- broad language prohibiting the employee from making any "statements to [the] Employer's employees or to the general public which could disparage or harm the image of [the] Employer";
- language prohibiting non-disparagement without any temporal limitation;
- applicability of the provisions to all employers "parents and affiliated entities and their

officers, directors, employees, agents, and representatives"; and
- broad language prohibiting employee from disclosing the terms of the agreement "to any third person".

In its decision, the NLRB emphasized the "chilling tendency" that such language has on employees' Section 7 rights to:

- criticize employer's policies;
- discuss severance, wages, and other terms with other employees or former employees; and
- assist or cooperate with NLRB investigations.

Subsequent Guidance from NLRB General Counsel Abruzzo

Naturally, inquiries from employers, labor organizations, and the public regarding the implications of McLaren Macomb prompted a subsequent March 22, 2023 memorandum from NLRB General Counsel Abruzzo, offering guidance on the NLRB's decision. A few key points from the memorandum are set forth here.

- Non-disparagement and confidentiality provisions are not banned. These provisions in severance agreements are still allowed, but only where they are narrowly tailored to avoid interfering with employees' Section 7 rights, including their rights "to engage with one another to improve their lot as employees".
  (a) "Confidentiality clauses that are narrowly tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful."
  (b) "[A] narrowly tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or reckless disregard for their truth or falsity, may be found lawful."
- Mere proffering of an overbroad severance agreement is unlawful. This is the case regardless of whether the severance agreement is actually signed.
- McLaren Macomb applies to supervisors under certain circumstances, despite supervisors generally not being covered by the NLRA. By way of an example, it would be unlawful for an employer to retaliate against a supervisor who refuses to proffer an overbroad severance agreement to an employee.
- Severance agreements will be reviewed retroactively. NLRB General Counsel Abruzzo recommends that employers notify their former employees that any overly broad portions in existing severance agreements no longer apply.
- Savings clauses will "not necessarily cure overly broad provisions" in a severance agreement. NLRB General Counsel Abruzzo reminds employers that they can still be responsible for "mixed or inconsistent messaging" that could impede an employee's Section 7 rights.

Recommendations for Employers

At least while there is still some uncertainty surrounding the impact of McLaren Macomb, and pending the appeal of this decision, many employers will opt for a "wait-and-see" approach to assessing prior severance agreements or drafting new ones. Nevertheless, in the meantime, employers should exercise caution – and precision – in drafting severance agreements containing non-disclosure or confidentiality provisions. Moreover, employers would be wise to review prior severance agreements and assess

for any potential violations of the NLRA based on McLaren Macomb.

Indeed, even under the strictest reading of McLaren Macomb, employers are still well within their rights to ensure against reputational harm or disclosure of confidential information through severance agreements that are narrowly tailored to:

- preclude employees from making defamatory statements about their employer; and
- preclude dissemination of proprietary or trade secret information.

Any future severance agreements, and any existing templates, should be reviewed by legal counsel with particular attention to these provisions.

Other Aggressive Stances by the NLRB

In addition to non-disclosure and non-disparagement provisions in severance agreements, the NLRB also has its focus on other provisions that NLRB General Counsel Abruzzo believes can infringe on employees' rights under Section 7, including non-compete clauses, non-solicitation clauses, non-poaching clauses, broad liability releases, and covenants not to sue. Indeed, another memorandum from NLRB General Counsel Abruzzo (dated May 30, 2023) explains that "non-compete provisions are overbroad, that is, they reasonably tend to chill employees in the exercise of Section 7 rights..."

What can be gleaned from the NLRB's stances reflected above is that the NLRB's current trend from pro-employer to pro-employee remains strong, and the NLRB undoubtedly has its sights on expanding into areas which have not historically been under the auspices of the NLRB. While it remains to be seen whether such an interpretive expansion of the NLRA can withstand judicial scrutiny, it is apparent that – at least for the time being – employers must exercise great caution in drafting any covenants or restrictions that may even tangentially appear to rub up against employees' Section 7 rights.

2.2 Increased Efforts to Organize

Unions seem to be frequently in the news recently – for example, ongoing strikes by the actors' and writers' guilds in Hollywood have the nation's favorite movies and TV shows paused indefinitely, while potential strikes by unions for railroad workers and United Parcel Service threatened supply chain disruptions. However, the percentage of wage and salary employees who are members of a union is decreasing – down to only 10.1% in 2022, which is the lowest on record (according to the Bureau of Labor Statistics). In North Carolina, that figure is even lower: only 3.9% of workers are represented by a union. North Carolina is one of 28 states that has enacted a "Right to Work" (RTW) Law. Under North Carolina's RTW Law, employees cannot be forced to join a union or pay dues as a condition of employment.

Nevertheless, North Carolina is the target of increased union-organizing activity. With recent successful organizing efforts in healthcare and ongoing efforts in retail, there appears to be increasing public support for unions. Employers should take proactive steps to avoid unionization efforts in their workforce.

Most importantly, employers should strive to have a satisfied workforce. Open communication, effective leadership – both in the direction of the business and at the supervisory level – and strong compensation and benefits make for happy employees who do not desire unionization. In addition to a satisfied workforce, employers should adopt policies governing per-

sonal conduct, social media use, distribution of literature on site, non-employees coming on site, and confidentiality. These facially neutral policies prohibit activity that would be disruptive in the workplace, including common union-organizing activity. To avoid these policies running afoul of the NLRA, they must be even-handedly enforced against all infringing activity, not just union-organizing activity. It is also best practice to have a labor-readiness plan in place so as to be prepared for future union-organizing activity. This includes identifying and training supervisors who do not have the right to unionize under the NLRA how to monitor employee morale and potential union activity, as well as having a response team prepared to lawfully address union activity once identified.

3. Nature and Import of the Employment Relationship

3.1 Defining and Understanding the Relationship

One of the most important aspects of the relationship between a business and its workers is defining the terms and conditions of that relationship. Workers can be classified either as employees or independent contractors. Under the Fair Labor Standards Act (FLSA) and North Carolina Wage and Hour Act, the following factors are analyzed to determine whether a worker is properly characterized as an independent contractor or employee:

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

Joint employment – ie, whether two or more businesses are deemed to be employers of the same employee – is another important component of the relationship. The Biden Administration recently withdrew a Trump-era rule that narrowed the test for joint employment, continuing this administration's pro-worker policies. In the Fourth Circuit, the test for determining a joint employment relationship under the FLSA includes the following:

- whether – formally or as a matter of practice – the putative joint employers jointly determine, share or allocate the power to direct, control, or supervise the worker (either by direct or indirect means);
- whether – formally or as a matter of practice – the putative joint employers jointly determine, share, or allocate the power to (directly or indirectly) hire or fire the worker or modify the terms or conditions of the worker's employment;
- the degree of permanency and duration of the relationship between the putative joint employers;
- whether – through shared management or a direct or indirect ownership interest – one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
- whether the work is performed on a premises owned or controlled by one or more of the

putative joint employers, either independently or in connection with one another; and
- whether – formally or as a matter of practice – the putative joint employers jointly determine, share or allocate responsibility for functions ordinarily carried out by an employer, including:
  (a) handling payroll;
  (b) providing workers' compensation insurance;
  (c) paying payroll taxes; and
  (d) providing the facilities, equipment, tools or materials necessary to complete the work.

North Carolina courts continued to apply this test in the face of the Trump-era rule narrowing the joint employment test and should continue to do so now that the Biden Administration repealed the Trump-era rule.

Finally, absent an employment contract to the contrary, workers in North Carolina are presumed "at-will". However, workers may be employed for a specified period of time if set forth in an employment contract, which may limit the employer's ability to terminate that employee at will.

3.2 Immigration and Foreign Workers

US federal statutes and related US federal regulations control US immigration law. These statutes preempt all state laws on the subject matter, although state law may supplement – not contradict – federal immigration law. Often states enact immigration laws that focus on employment verification, personal identification, and entitlement to public benefits that are traditionally regulated at state level. If these state statutes clash, federal law prevails as a matter of statutory and constitutional law.

From Petition to Admission

Immigrant versus nonimmigrant intent and admission documents

All non-US citizens applying for admission at the US border are presumed to have permanent resident intent to stay in the USA upon admission. If the applicant has not been granted permanent residency status in the USA, such person is obligated to prove by written evidence that the purpose of entry is temporary and they will depart the USA on or before the departure date assigned at time of admission. The purpose and period of admission is assigned at time of admission and may be further documented by the issuance and placement of a visa stamp with an expiry date in the passport of the applicant.

Admission based on nonimmigrant intent may be pursuant to a visa waiver or a nonimmigrant visa. In either case, the admission for a term of stay is conditioned upon the applicant's proof of intent to remain in the USA for the period of authorized stay. This term is electronically controlled and monitored after the applicant crosses the US border. Upon admission, the applicant is granted a term of stay – before the end of which, the applicant must depart the USA to comply with the terms of admission. Failure to depart on time becomes a violation of the terms of admission and will have repercussions for the applicant – whether in the short or long term – upon future applications filed with the US immigration agencies.

The nonimmigrant visa classification of admission sets the scope of authorized activities during the period of presence in the USA. Activities performed outside the scope of the visa classification is a violation that can have serious repercussions for the applicant and any employer participating in the violation.

Nonimmigrant visa classifications, visa issuance and visa appointments

All visas and documentation of a visa waiver are issued from outside the USA through the US Consulate in the country where the applicant is authorized to make application. Further, only a US Consulate may issue a visa; authorization depends upon a personal interview and Federal Bureau of Investigation and Interpol clearances of a background check on the applicant.

Visa appointments are difficult to get because of consulate staffing and budgeting. COVID-19 created long backlogs at many consulates. Consequently, the US Department of State is considering allowing certain visas to be obtained in the USA, as was authorized 20 years ago. Many applicants seeking a visa interview try to qualify for "emergent" or "exceptional circumstances" for an expedited appointment. The criteria for qualification for an emergent interview can vary depending on the country of origin's COVID-19 conditions, local consular staffing and other similar conditions.

Approval authority for issuance of the visitor visa (B) and the trader/investor visa (E) rests solely at the discretion of a US Consulate and depends on the reciprocal conditions documented by agreement or treaty between the USA and host country. Issuance of a visa by the US Department of State does not assure admission at the US border by the US Customs and Border Protection agency, which can verify the conditions of issuance or use.

Nonimmigrant visa classifications for business

Visa Waiver Progam (VWP)/Electronic System for Travel Authorization (ESTA):

- classification – visa waiver;
- maximum term of stay per visit – 90 days;
- term of stay per visit – 90 days;
- issuer – US Customs and Border Protection; and
- comment – online application, granted at US border and use of ESTA/VWP more than three times in one year will draw border scrutiny and possible disqualification.

B-2:

- classification – visitor/tourist;
- maximum term – ten years;
- term of stay per visit – six months;
- issuer – US Consulate; and
- comment – requires consular interview.

E-1:

- classification – treaty trader;
- maximum term – five years and renewable in five-year terms;
- term of stay per visit – two years;
- issuer – US Consulate; and
- comment – renewable for as long as criteria met.

E-2:

- classification – treaty investor;
- maximum term – five years and renewable in five-year terms;
- term of stay per visit – two years;
- issuer – US Consulate; and
- comment – renewable for as long as criteria met.

E-3:

- classification – specialty occupation workers from Australia; and
- same criteria as H-1B Australian nationals.

F-1:

- classification – student;
- maximum term – duration of status;
- term of stay per visit – duration of status;
- issuer – US Consulate; and
- comment – renewable for as long as criteria met and may be coupled with part-time work authority.

H-1B:

- classification – temporary worker (skilled or unskilled labor) needed for a short duration (seasonal need, peak-load need or one-time occurrence need);
- maximum term – generally nine months if seasonal or peak-load need or up to three years if one-time occurrence need;
- comment – must test the labor market for qualified US workers and prove the start and end dates of the temporary need and the number of workers requested, as a mere labor shortage does not necessarily qualify as a temporary need for H-2B workers.

J-1:

- classification – intern/student;
- maximum term – 12–18 months;
- term of stay per visit – based on subcategory;
- issuer – J-1 sponsoring agency; and
- comment – depends on subcategory and US sponsor.

L-1A:

- classification – multinational manager/executive;
- maximum term – seven years;
- term of stay – two years unless a new office (in which case, one year);
- issuer – United States Citizenship and Immigration Services (USCIS); and
- comment – multinational transfer between related entities.

L-1B:

- classification – multinational "specialized knowledge";
- maximum term – five years;
- term of stay per visit – two years;
- issuer – USCIS; and
- comment – multinational transfer between related entities.

O-1:

- classification – extraordinary ability;
- maximum term – three years;
- term of stay per visit – varies, one to three years;
- issuer – USCIS; and
- comment – evidence-intensive.

TN (Treaty NAFTA):

- classification – Canadian and Mexican citizens in a professional or licensed occupation as listed on Treaty Annex;
- maximum term – three years; and
- comment – Mexican nationals require consular interview but Canadians may apply at the US border.

Recent Trends and Developments

The advent of COVID-19 created significant immigration policy and operational changes affecting employers and foreign nationals.

Effective March 20, 2020, the Department of Homeland Security (DHS)/USCIS instituted relaxed Form I-9 employment verification and

re-verification policy guidance, allowing remote verification of the employee's documentation in lieu of the required in-person/physical review of the employee's work authorization documentation. Per DHS/USCIS guidance, employers could view the documentation presented by remote hires via Zoom, Skype and other online methods and record the documents presented in Section 2 of the Form I-9 with annotations that the documents were reviewed remotely.

On July 25, 2023, the DHS/USCIS published a Final Rule announcing the sunset of the remote Form I-9 verification and re-verification policy effective August 1, 2023. Employers have 30 days to complete the required follow-up in-person physical review of the employee's Form I-9 documents proving identity and the authorization to work in the USA. The Final Rule also introduced a new relaxed standard for employers registered with the DHS E-Verify program, allowing employers who registered with E-Verify on March 20, 2020 to review the documentation (or new documentation) for employees hired between March 20, 2020 and July 31, 2023 remotely again and annotate the "other information box" on the new Form I-9 that was published on August 1, 2023, in the event that the required in-person physical inspection had not already been conducted. Employers who were not enrolled in E-Verify on March 20, 2023 must perform the physical/in-person examination and recordation of the Form I-9 documents presented by August 31, 2023 for any employees hired following the registration with E-Verify after March 20, 2020. By way of an example, an employer that registered with E-Verify on June 1, 2021 would only need to complete physical/in-person examination of the Form I-9 work authorization documents for persons hired (where the relaxed COVID-19 remote Form I-9 rules were utilized) between March 20, 2020 and July 31, 2023.

COVID-19 also created barriers to entry to the USA and the availability of US consular officers at the various US embassies and consulates to conduct required visa appointment interviews. As such, the US embassies and consulates abroad were unable to issue temporary and permanent visas for entry to the USA. The inability to schedule visa appointments for many months has created a backlog for visa appointment availability at US embassies and consulates worldwide. In instances where historically temporary and permanent visa appointments were widely available (within a week to three weeks within the request for the appointment), the waiting period of an available visa appointment date has been extended to many weeks/months in most instances. While some of the consular posts are amenable to requests for expedited visa appointments, the general backlog has greatly impacted the timing of transferring critical foreign national executives, managers, professionals, specialists and laborers to the USA.

The economic impact of COVID-19 for many US employers in the hospitality, construction, landscaping, manufacturing, crabbing/seafood and other temporary/seasonal industries resulted in unforeseen workforce shortages. Losses of employees in these economic sectors during COVID-19 created a shortfall in available US employees to perform these unskilled and skilled positions. As a result, there has been an unprecedented spike in employer requests for H-2B nonagricultural season and peak-load worker visas. The US Department of Labor (DOL) received enough applications for H-2B temporary labor certification to cover 105,297 H-2B workers between the initial filing dates of Janu-

ary 2–4, 2023 (of which only 33,000 were available).

Similarly, the demand for professional work visas (H-1B) continues to increase post COVID-19. Between March 1 and March 17, 2023 (the H-1B registration submission window), USCIS received 758,994 H-1B registrations (a 61% increase from the prior year), with only 85,000 H-1B registration selections available for each government fiscal year. In the previous Government Financial Year (GFY 2023), the USCIS received 483,927 H-1B registrations.

4. Hiring and Interviewing Process

4.1 Legal and Practical Constraints

The types of questions that may be asked of prospective employees is governed by federal discrimination laws (Title VII, the ADEA, the Americans with Disabilities Act (ADA), etc) and their North Carolina counterparts.

First, any inquiry about an individual's membership of a protected class is prohibited by both federal and North Carolina antidiscrimination laws. Protected classes under federal law include race, color, national origin, religion, sex (including pregnancy, childbirth and other related medical conditions), sexual orientation and gender identity, disability, age (40 years of age or older), citizenship status and genetic information. Under state law, it is also unlawful to refuse to hire an applicant because of their use of legal tobacco products away from the workplace. North Carolina law permits an employer to require job applicants to take a pre-employment drug test, but requires that certain notices be provided to an applicant regarding their rights and that drug tests be performed by laboratories certified by the State of North Carolina.

Finally, any employer who intends to make inquiries into a job applicant's credit history must abide by the federal Fair Credit Reporting Act (FCRA), which contains requirements in relation to obtaining written consent and providing a variety of written disclosures to applicants. These disclosures include forms that must be provided to an applicant before and after taking adverse action (eg, not hiring an applicant based on information contained in a credit report).

4.2 Artificial Intelligence and the Hiring Process

AI is generally described as the use of algorithms to make decisions or solve problems. The everyday use of AI has reached new heights since the November 2022 release of ChatGPT, a popular AI chatbot. Employers are no exception to the AI trend; hiring personnel are increasingly using AI tools to screen, interview, and hire employees. Even among the seemingly bottomless possibilities of machine learning that stand poised to simplify day-to-day employment issues, employers should use caution when delegating any part of the hiring process to an algorithmic system. Although AI technology is developing rapidly, it raises concerns under longstanding federal laws such as Title VII, the ADEA, and the ADA.

The EEOC is paying increasing attention to employers' use of AI. In spring 2023, the EEOC issued a joint statement with the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (CFPB), and the US Department of Justice notifying the public that they would be using existing federal laws to target AI bias. The EEOC also issued guidance informing employers of how use of AI could implicate federal antidiscrimination law. Notably, the EEOC just settled its first ever case alleging AI bias, where an AI tool allegedly automatically rejected women over age 55 and men over age 60.

Employers who use AI in the hiring process should exercise caution, as companies can be held liable even when they did not intend to discriminate using AI tools. In a Title VII case from 2010, the court reiterated that unconscious stereotyping – also called "implicit bias" – could lead to liability in an employment context wherein a Black employee was not given a raise (Kimble v Wisconsin Dep't of Workforce Dev, 690 F Supp 2d 765 (ED Wis 2010)). In this respect, a company that only feeds its machine-learning software with resumes of its own already-hired employees might inadvertently replicate and even facilitate discriminatory trends within the organization. Companies cannot escape liability for AI-based discriminatory hiring decisions by acquiring AI tools from third-party vendors instead of developing those tools themselves.

AI tools provide inarguable advantages to employers. At its best, an AI tool can sift through countless resumes without tiring and can analyze each new potential candidate with "fresh eyes" instead of feeling fatigued or even frustrated by – for instance – the thousandth applicant in a list. However, employers should not be lulled into complacency by the relative ease of AI tools, as employers will ultimately be held to be a responsible party if such a tool makes discriminatory decisions. As EEOC Chair Charlotte Burrows said in spring 2023: "There are very important discussions happening now about the need for new legal authorities to address AI. But I want to be absolutely clear that the civil rights laws already on the books govern how these new technologies are used in the meantime."

5. Terms of the Relationship

5.1 Restrictive Covenants

Federal agencies such as the NLRB and the FTC are aggressively pushing back against non-competes. The FTC recently proposed a rule that would prohibit non-competes entirely. Many states have also passed rules banning or severely restricting employers' use of non-competes. Despite these national trends, restrictive covenants are still permissible in North Carolina. Though they are generally disfavored, courts will enforce reasonable restrictions that are tailored to a legitimate business interest.

To be enforceable, North Carolina restrictive covenants must be:

- in writing;
- part of an employment contract or in connection with the sale of a business;
- supported by valuable consideration;
- reasonable as to time and territory; and
- reasonable as to scope of activities covered by the restriction.

Valuable consideration is a key component of an enforceable non-compete under North Carolina law. Continued employment is insufficient consideration. Instead, there must be some new consideration – a promotion, a raise, a bonus, or some combination thereof – for a restrictive covenant to be valid under North Carolina law for a current employee.

Although North Carolina does not have a hard-line rule on the reasonableness of time restrictions, generally North Carolina courts approve of two-year restrictions. The duration and geographic scope of a restrictive covenant are considered together to determine if it is reasonable. Courts may approve longer restrictions if the

geographic territory is relatively small – likewise, courts may approve broader geographic territories if the duration of the restriction is relatively short. Regardless, courts rarely approve restrictions of five years or more.

Courts will look at the following six factors when determining whether a non-compete or non-solicitation agreement is reasonable as to time and territory:

- the geographic area of the restriction;
- the area where the employee was assigned to, and actually did, work;
- the area in which the company does business;
- the nature of the business; and
- the nature of the employee's duty and the employee's knowledge of the business operation.

Additionally, the scope of the activities covered by the non-compete must be tied to the work performed for the employer. Courts have refused to enforce non-competes that prevent an employee from doing any work for a competitor, regardless of whether it is the same nature of the work performed for the employer. Additionally, non-competes that preclude "direct or indirect" competition have been unenforceable owing to the scope preventing, for example, ownership of a mutual fund holding shares of a competitor.

5.2 Privacy Issues

Protection of personal data has become a focus of legislative efforts at all levels. With increased scrutiny on data privacy practices arising in European countries, many states across the USA are beginning to follow suit. Now more than ever, employers must be cognizant of previously established privacy-related laws, along with industry trends towards over inclusivity.

Industry groups such as the International Association of Privacy Professionals (IAPP) offer more in-depth guides for navigating privacy concerns across various employment sectors.

Federal Considerations for Multi-State and Multinational Employers

Common privacy issues and areas global employers should consider include:

- employee health information and records;
- records relating to and obtained via background checks;
- response standards and mechanisms for data breaches;
- possession and use of student or education-related data; and
- the use of and marketing or sale of Personally Identifiable Information (PII).

The following examples of laws and areas of work may carry increased potential implications of employee personal privacy issues:

- the Health Insurance Portability and Accountability Act and the protections of employee personal health records;
- the ADA, which regulates when, how, and for what purposes an employer may access employee health information;
- the Family and Medical Leave Act and the limits on obtaining and/or disclosing certain information relating to covered employee leave;
- the FCRA and its applications to conducting employee background checks;
- the Family Educational Rights and Privacy Act for any company operating in spaces including student data; and

- enforcement actions by various federal agencies including the FTC, the Department of Health and Human Services, the CFPB, the Federal Communications Commission, the EEOC, and others.

With ever-increasing data breaches, many global employers have also instituted internal policies and response mechanisms, with some even hiring designated privacy teams. Currently, there are no federal laws regarding standardized responses relating to data breaches. It is in this area that many employers look abroad for guidance.

A growing trend in data privacy has seen companies turning to foreign and domestic guidance in crafting privacy policies and dealing with related issues. In recent years, an increasing number of employers have begun self-certifying pursuant to the strict General Data Protection Regulation (GDPR) standards via either contractual commitments or participating in the Federal Government's Data Privacy Foundation certification (US Privacy Shield).

While there is no absolute way to guarantee universal compliance, global employers operating in the USA should strongly considering opting for stricter self-governance and applying standards that may be stricter than previously thought. The GDPR's standards – along with compliance with longstanding laws such as those discussed earlier – are quickly becoming a recommended industry norm, especially if an employer is involved in any way with the retention or handling of employee health records and data.

State Law Considerations for Employers

If the GDPR is considered the benchmark for international privacy laws, then California and the California Consumer Privacy Act (CCPA) can rightfully be seen as the domestic guidepost not only for states looking to enact their own privacy laws, but also for employers seeking to be proactive in their compliance and policies. Currently, 11 states have their own privacy laws – many of which are modeled after the CCPA. Additionally, five more states have pending legislation relating to these same issues. Included in this list are states such as Delaware and its reputation for attracting foreign and domestic companies alike. North Carolina, however, does not have such a law at this time.

Global employers operating in the USA are well-advised to stay abreast of all evolving data privacy regulations and laws. Failure to comply has and may continue to result in serious fines and penalties, in addition to loss of customer and employee trust and goodwill.

5.3 Discrimination, Harassment and Retaliation Issues

North Carolina employers have largely internalized the lessons of "Me Too" and "Black Lives Matter". Potential claims for implicit bias are a reality of which North Carolina employers are aware and many are taking steps to train their leadership to identify and address areas of exposure. In the event bias issues are identified, company personnel are trained to immediately utilize the chain of command so that the employer can proactively and lawfully deal with the issues. Conducting consistent anti-harassment and antidiscrimination training is helpful for prevention and can provide an employer with a key defense in a hostile work environment case.

These movements have made discrimination, implicit bias, and harassment much more prominent topics for all employees. While – as far as North Carolina is concerned – it may not have

changed expectations regarding terms of the employment relationship (which remains at-will), these movements have created an expectation that employees can raise such issues to the employer and expect a full and fair investigation.

The recent US Supreme Court decision in Students for Fair Admission, Inc, serves as a good reminder to employers that – while voluntary DE&I programs and training on a respectful workplace provide a lot of corporate and social benefits – affirmative action outside of a federal or state contracting requirement is unlawful and may subject employers to reverse discrimination claims.

5.4 Workplace Safety

On May 11, 2023, the federal government declared an end to the public health emergency for COVID-19. As such, COVID-19 is shifting to an endemic – meaning that, while COVID-19 might be here to stay, infections are not overwhelming healthcare systems.

However, employers should still consider implementing a system of protections that can slide into place if another outbreak occurs in their geographic region. The federal DOL issued a COVID-19 Workplace Safety Plan in July 2023 that provides helpful guidance for employers looking forward. By way of an example, the DOL continues to encourage employers to urge workers to get vaccinated and/or boosted. Furthermore, employers can implement a system that would prevent the spread of COVID-19 in the workplace – for example, wearing masks, distancing, and increased ventilation. Employers should also consider removing infected workers (or workers who have had close contact with someone with COVID-19) from the workplace.

Employers should be aware, however, that an employee may request reasonable accommodations – absent an undue hardship – if an employee is unable to comply with an employer's safety guidance or requirements owing to a disability under the ADA. Additionally, an employee may ask for reasonable accommodations – absent an undue hardship – when required to work in the workplace if the employee has a pre-existing disability that places the employee at a higher risk from COVID-19. Reasonable accommodations may include changes to the work environment such as designating one-way aisles and implementing barriers (eg, plexiglass) between employees and customers.

Moreover, the EEOC has issued guidance on whether COVID-19 or Long COVID qualify as a disability. As with any other medical condition, the ADA's three-part definition of disability – actual disability, record of disability, and regarded as an individual with a disability – applies to COVID-19 and Long COVID and therefore will be determined on a case-by-case approach. In other words, COVID-19 and Long COVID are not automatically considered as a disability, but can qualify as a disability if a person meets at least one out of the three categories in the three-part definition of disability.

6. Termination of the Relationship

6.1 Addressing Issues of Possible Termination of the Relationship

Employers should both determine and communicate the details of the employment relationship at its inception to better maintain control of the termination process. Key considerations in terminating the employment relationship include:

- the nature of the employment relationship;

- the rationale for ending the employment relationship;
- whether the employee is bound by any restrictive covenants;
- whether the employee has possession or control of company property or information (including confidential information); and
- the potential for a resulting employment dispute or litigation.

Rationale and procedure for ending the employment relationship

Although the employer may not be required to tell the employee the reason that they are ending the employment relationship, the employer must ensure that the rationale does not violate federal or state law. The employer may not terminate someone owing to their membership of a protected class or in retaliation for the exercise of certain rights, for example. In addition, North Carolina allows employees to maintain a claim for wrongful termination in violation of public policy, which can provide more expansive remedies than those available under federal law.

Possession or control of company property or information

Once the decision to end the employment relationship has been made, but prior to informing the employee of the decision, the employer needs to determine:

- what company property or information the employee may have in their possession;
- how to get the property or information from the employee; and
- how to prevent the employee from disseminating company information to third parties.

This could entail changing passwords or access to email or electronic documents shortly before the termination meeting, requiring all electronic devices to be brought to the meeting and turned over, or even asking for a forensic examination of certain electronic devices if there is already concern about improper sharing of information.

Potential for employment dispute or litigation

The employer also needs to determine the likelihood of an employment dispute and document the termination accordingly. If the employer is already on notice of the likelihood of a dispute, counsel should be consulted to review the evidence supporting a termination and to ensure that no relevant documents or communications are deleted.

Preventing Age Discrimination

Employers should be cognizant of certain protections for individuals over the age of 40 under federal and North Carolina law. The federal ADEA and the OWBPA prohibit discrimination based on age.

When an employer grants a release or is involved in a settlement with an employee over the age of 40, the ADEA and the OWBPA require the employer to give the employee 21 days to consider and accept the terms of any agreement. The ADEA and the OWBPA also require employers to allow the employee seven days to rescind the agreement after signing. When an employer undertakes a reduction in force or group layoff, the ADEA and the OWBPA require the employer to provide affected employees with certain statistical information regarding the other individuals affected by the termination.

7. Employment Disputes: Claims, Dispute Resolution Forums, and Relief

7.1 Contractual Claims

When global employers elect to conduct business in the USA, there are several areas of contractual disputes that should garner special attention. Although most largely relate to labor and employment agreements, there are other more general contractual disputes that are becoming increasingly common. Employers should be informed of the specific laws and regulations that apply to the states and jurisdictions they are operating in, as those may widely vary. In addition to restrictive covenant claims, which are discussed at length in **5.1 Restrictive Covenants**, employers and employees are free to enter enforceable contracts setting a term of employment and restrictions on the employer's right to terminate the relationship. Most employees in North Carolina do not have these types of contracts and are instead employed on an "at-will" basis, meaning the employer or the employee can end their employment relationship at any time, for any reason (other than unlawful discrimination) and without notice.

Despite the at-will element of North Carolina law, employers should always have a good, legitimate and non-discriminatory reason before they terminate the employment of any employee. Egregious violations – such as overt sexual or racial harassment, assault or battery, threats of violence, the use of illegal drugs at the workplace, and other similar serious acts of misconduct – can justify the immediate discharge of the offending employee. Terminations because of job performance should never be implemented unless the employee in question has received written notice of his job deficiencies and a reasonable opportunity to correct them.

It is also important for employers to understand and craft effective choice of law and choice of forum clauses in their contracts. Proper drafting of these clauses allows the employer to dictate the specific law to be applied to the case and the place in which it is heard, thus avoiding the unpredictability of varying state and federal laws. Often, the more specificity these clauses have, the better. By way of example, if an employer wants to capture all claims relating to an employment contract, language such as "all claims arising out of or relating to" is preferred.

7.2 Wage and Hour Claims

Currently, there is an uptick in enforcement actions and private cases on employee misclassification. Rules on worker classification have operated more in shades of grey than black and white for decades; however, in June 2022, the DOL announced their intention to clarify guidelines in order to help employers determine how to correctly classify their workers. In this notice, the DOL specifically noted that their wage and hour enforcement division had found rampant misclassification issues across industries, leading to liability for these employers under the FLSA. Given that classification impacts wages, benefits, unemployment insurance, workers' compensation insurance and many other issues under state and federal law, misclassification can be a hotbed of potential liability for employers.

Under federal law, no one factor is dispositive in determining whether a worker should be classified as an independent contractor or an employee. Rather, it is the economic reality of the worker's situation that is determinative. When assessing this, courts typically look at factors such as:

- the degree of control exercised by the alleged employer – for example, control over scheduling, policies, and type of supervision;
- the relative degree of investment between worker and alleged employer – for example, the investment needed in specialized equipment and specialized costs associated with the job (given that who is supplying tools, and the underlying materials or obligations, can also be an important factor);
- the degree to which the alleged employer controls the worker's opportunity for profit and loss – for example, the degree of control over hours, in addition to other managerial initiatives (particularly around efficiency or maximizing pay or profit);
- skill and initiative required to perform the job – for example, whether the worker has a unique skill set or has the ability to exercise significant initiative in the manner in which the work is performed;
- the permanency of the relationship – such as whether the worker is providing work exclusively for the alleged employer, the duration of the relationship, and whether the relationship is project-based; and
- whether the service rendered is an integral part of the alleged employer's business.

When analyzing these factors, some general rules stand out. By way of an example, the more integral the services provided by the worker are to the alleged employer's business, the more this factor tends to suggest an employment relationship. A unique skill set, providing own work materials or tools, and having significant input over the manner in which a job is completed leans toward an independent contractor. Hiring individuals for projects – especially those unrelated to the underlying function of a business or for short periods (perhaps only to fill in for someone on leave) – also leans toward an independent contractor status. On the other hand, controlling schedules or hours – or providing heavy supervision – can suggest employee status.

Therefore, just because a worker has been classified as an independent contractor (and is paid under a 1099 form), it does not mean that the worker in question has been classified properly. And improper classification is likely to cost employers. Costs for improperly classifying a worker as an independent contractor – when they should have been classified as an employee – can lead to fines, penalties, payment of back taxes, unpaid wages (including potentially overtime), sick or vacation time, or other work-related expenses. In 2021 alone, the DOL's wage and hour division recovered more than USD210 million in back wages and resolved more than 20,000 cases.

Employers are usually required to pay for a plaintiff's attorney's fees under actions brought under the FLSA as well. This means that if a worker improperly classified as an independent contractor prevails and is owed USD10,000 in back wages and other benefits, but incurs USD40,000 in legal fees to prevail, the company is likely to end up writing a check for at least USD50,000. With this in mind, it is a good idea for employers to review the status of their workers, including those who may be on short term contracts (especially if those contracts fulfill and integral part of a company's business).

7.3 Whistle-Blower/Retaliation Claims

The North Carolina Retaliatory Employment Discrimination Act prohibits employers from discriminating or retaliating against an individual who has filed or threatened to file a claim under the Workers' Compensation Act, the the Occupational Safety and Health Act (OSHA),

the Wage and Hour Act, and certain other North Carolina statutes. The federal False Claims Act similarly provides protection against retaliation for employees who bring qui tam actions in federal court for alleged fraudulent or false claims for payment from the federal government.

Several federal laws also provide whistle-blower protection for employees who report suspected violations of law. Among them are the OSHA, the Sarbanes-Oxley Act of 2002, the Clean Air Act, the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the SEC's whistle-blower program.

Recent case law demonstrates that North Carolina employers should be prepared to defend any actions they take regarding an employee's compensation, job duties or termination and argue against an employee's claims that these reasons were merely pretextual covers for retaliation (Webb v Daymark Recovery Servs, Inc, No 1:21CV424, 2022 WL 17820279, at *12 (MDNC Dec 20, 2022), reconsideration denied, No 1:21CV424, 2023 WL 3203164 (MDNC May 2, 2023)). Maintaining clear, accurate records before issues arise will behoove employers who find themselves the subject of a retaliation claim, especially one brought under REDA – see, for example:

- Webb v Daymark Recovery Servs, Inc, No 1:21CV424, 2022 WL 17820279l, at *12–13 (finding that the multiple performance evaluations the employer conducted established that the decision to terminate the employee was not post hoc, nor inconsistent or unsubstantiated by the employer's stated non-retaliatory reasons for termination); and
- Vines v Mountaire Farms, Inc, No 5:21-CV-00059, 2023 WL 2334413, at *4 (EDNC Mar 2, 2023) (finding that the employer substantiated two non-retaliatory motives for taking adverse actions against the employee with records of the employee's habitual absence from work and failure to inform them of his work limitations before employment).

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