



Municipal Association
of South Carolina

The Municipality as an Employer

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Disclaimer

- This presentation in no way covers all employment issues your municipality will face. I have attempted to cover issues that our clients face most frequently.

At Will Employment

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

At Will Employment

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

At Will Employment

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

Potentially Illegal Reasons

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

Federal Anti-Discrimination Laws

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

Federal Anti-Discrimination Laws

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

Title VII of Civil Rights Act of 1964

- Title VII covers the full spectrum of employment decisions, including:
 - recruitment
 - selection
 - termination
 - promotion
 - discipline
 - other decisions concerning terms and conditions of employment.



The Age Discrimination in Employment Act

- Age discrimination involves treating an applicant or employee less favorably because of his or her age.
- The ADEA forbids age discrimination against people who are age 40 or older. It does not protect workers under the age of 40.
- The ADEA prohibits discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, benefits, and any other term or condition of employment.



The Americans With Disabilities Act

- The ADA makes it unlawful to discriminate in employment against a qualified individual with a disability.
- The ADA prohibits an employer from retaliating against an applicant or employee for asserting his rights under the ADA.
- Under the ADA, a person has a disability if he has a physical or mental impairment that substantially limits a major life activity.
- An individual with a disability must be qualified to perform the essential functions of the job with or without reasonable accommodation, to be protected by the ADA.



The Americans With Disabilities Act

- A reasonable accommodation is any change or adjustment to a job or work environment that permits an employee with a disability to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.
- Reasonable accommodations may include:
 - acquiring or modifying equipment or devices,
 - job restructuring,
 - part-time or modified work schedules,
 - reassignment to a vacant position,
 - adjusting or modifying examinations, training materials or policies,
 - providing readers and interpreters, and
 - making the workplace readily accessible to and usable by people with disabilities.



The Americans With Disabilities Act

- It is a violation of the ADA to fail to provide reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, unless to do so would impose an undue hardship on the operation of your business.
- Undue hardship means that the accommodation would require significant difficulty or expense in relation to the size and resources of the employer.



The Americans With Disabilities Act

- How does the ADA differ from the Family and Medical Leave Act?
 - The ADA only requires employers to employ 15 employees to be covered, rather than 50
 - There is no minimum length of employment required for an employee to be covered by the ADA, and in fact, it applies even before employment begins
 - The ADA does not require accommodations or leave be provided to employees who are caring for others; only for an employee's own disability
 - Leave as a reasonable accommodation is not limited to twelve weeks, and in fact, can extend to six months in some situations



The Pregnant Workers Fairness Act

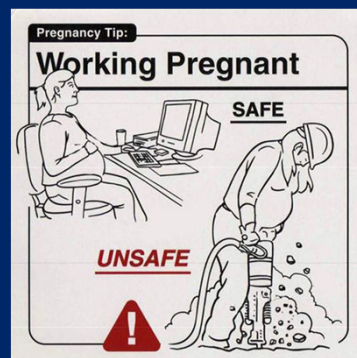
- **The Pregnant Workers Fairness Act (PWFA)**
 - effective June 27, 2023
 - the Pregnant Workers Fairness Act (PWFA) requires a covered employer to provide a “reasonable accommodation” to a qualified employee’s or applicant’s known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”
 - The PWFA applies only to accommodations. Other laws make it illegal to fire or otherwise discriminate against employees or applicants on the basis of pregnancy, childbirth, or related medical conditions.



The Pregnant Workers Fairness Act

What are Some Accommodations for Pregnant Workers?

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



Harassment

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

Harassment (cont.)

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

The most common form of harassment

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



Sexual Harassment

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

Examples of Sexual Harassment

- Verbal Sexual Harassment
 - Obscenities; vulgarities; sexual epithets
 - Off-color jokes; notes; letters
 - Sexual comments; talking about sex
- Non-Verbal Sexual Harassment
 - Lewd gestures
 - Inappropriate noises and sounds
- Physical sexual harassment
 - Touching a person inappropriately or in an unwelcome way
 - shoulder rubs; hugs; arm around shoulder

Retaliation

- Harassment or discrimination because of opposition to unlawful conduct or participation in an investigation into unlawful conduct is also prohibited by law.
- The key words here are “because of”



Employee Handbooks



Employee Handbooks

Why do we need one?



Employee Handbooks

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

Employee Handbooks

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

Employee Handbooks

- **Must have policies:**

- Equal Employment Opportunity
- Anti-harassment
 - Must prohibit all harassment
 - Must prohibit retaliation
 - Must have a procedure for reporting, including alternate reporting based on different potential harassers
- Family and Medical Leave Act (50+ employees)



Employee Handbooks

- **Policies to consider:**

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

The South Carolina Payment of Wages Act



The South Carolina Payment of Wages Act

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

The South Carolina Payment of Wages Act

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

Grievances

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

Grievances

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

Grievances

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

The FLSA

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



The four main provisions of the FLSA are:

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

The FLSA

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

EAP Exemption to the FLSA

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

Drug Testing

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



The Family and Medical Leave Act

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

The Family and Medical Leave Act

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

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

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

Worker's Compensation Retaliation

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

Political Activity

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

Public Records

- Public Records - all books, papers, maps, photographs, cards, tapes, recording, or other materials regardless of physical form (including emails and phone records for work cell phones and other work equipment)
- A person who unlawfully removes a public record from the office where it usually is kept or alters, defaces, mutilates, secretes, or destroys it is guilty of a misdemeanor and may be fined or imprisoned (SC Code § 30-1-30)



Public Records

- The Archives and Records Management Division of the State Archives has prepared general retention and disposition schedules for municipalities
- The schedules list permanently valuable records, which should be properly protected for future use, and they also supply a timetable that will allow records custodians to regularly and legally dispose of records of non-permanent value
- The Municipal-specific retention schedule can be found here:
<https://scdah.sc.gov/records-management/schedules>



Public Records

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

Public Records

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



Questions?

