

Hiring, Firing, and Other Pitfalls of Day-To-Day Operations.

Presented by:

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Hiring Considerations

- At Will v. Contract Employee v. Independent Contractor
- Protection of legitimate business interest including trade secrets, data and confidential information.
- Employee policies in place
- Maintain employee file (payment records)
- Compliance with employment statutory requirements, i.e. workers comp. and background checks.



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Employment Agreement or Independent Contractor Agreement

- Restrictive Covenants
 - Non-Compete
 - Non-Solicitation
- Protection of Confidential Information
 - How defined?
 - Liquidated damages
- Dispute Resolution
- Choice of Law and Venue



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Restrictive Covenants

To be enforceable, restrictive covenants must be:

1. In writing;
2. Part of a contract concerning employment or sale of business;
3. Based on valuable consideration;
4. Reasonably necessary to protect a recognized business interest of the company;
5. Reasonable as to time, territory and scope of activities; and
6. Not against public policy



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BUSINESS INFORMATION

- Courts generally require an employer to show that the information sought to be protected by restrictive covenants constitutes trade secrets and/or confidential information worthy of protection.
- Note: Duty of confidentiality also arises out of common law even absent a confidentiality agreement, but it is best not to rely only on the common law.



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Reasonableness of Restriction

- a. Reasonable as to time
 - b. Reasonable as to territory
 - c. Reasonable as to scope of activities precluded
- North Carolina Courts evaluate time and territorial restrictions in tandem to determine whether they produce a reasonable restriction



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RISKS TO “NEW” EMPLOYER

- Potential tortious interference with contract claim
- Possible Unfair Trade Practice claim
- Punitive damages/Attorneys’ Fees
- Tip to New Employers: ask for employee representation that he/she is not bound by restrictive covenants, and for indemnification as to same.



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Duty to Protect data

- All data-regardless of where stored, i.e. employee personal devices.
- Employee Policy
 - Signed and Acknowledged by Employee
 - To protect and dispose of protected data



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NORTH CAROLINA IDENTITY THEFT PROTECTION ACT (N.G.G.S. § 75-60 et seq.)

- Effective December 1, 2005
- Generally, obligates **all businesses** to protect client's social security numbers and other client personal information
- Credit reporting agencies to place security freezes in certain circumstances
- obligates businesses to destroy records with personal information
- protect customers' information from security breaches and
- notify individuals in the event of a breach
- H.B. 904, most recent version submitted 4/16/19: If passed, NCITPA to include more confidential information (i.e. medical information) and stricter requirements regarding breach determination and notification



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PROTECTED PERSONAL INFORMATION

1. Includes a person's first name and/or first initial and last name in combination with any of the following:
 - a. Social security number or employer tax payer identification number
 - b. Driver's license, state identification card or passport number
 - c. Checking account number
 - d. Savings account number
 - e. Credit card and debit card number
 - f. PIN numbers
 - g. Electronic identification numbers, email or address entered in account numbers or internet identification names
 - h. Digital signatures
 - i. Any other numbers or information that can be used to access a person's financial resources
 - j. Biometric data
 - k. Fingerprints
 - l. Passwords
 - m. Parent's legal surname prior to marriage
2. If your business maintains any of this information, **it must take reasonable steps to safeguard this information** and if this information is compromised and it is determined a breach of this information has occurred, then notification requirements are triggered.



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Enforcement of NC Workers Compensation Act

- Enforced by the NC Industrial Commission
- Requires employers who have three or more employees, including corporate officers, to have workers' compensation insurance
- Remedy for a first time violation.



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ASSESSMENTS FOR FAILURE TO MAINTAIN WORKERS COMPENSATION INSURANCE COVERAGE

- NC Workers' Compensation Act requires persons or entities **employing 3 or more persons** to maintain workers' compensation insurance or qualify as self-insurers.
- Some exceptions, listed Industrial Commission ("IC") website (<http://www.ic.nc.gov/wcinsrqmt.html>), like casual employees, not in usual course and scope of business; domestic workers employed directly by household; farm laborers if fewer than full time non-seasonal.



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Employee Fair Classification Act ("EFCA")

Effective December 31, 2017, Employee classification refers to whether persons are treated as employees or independent contractors

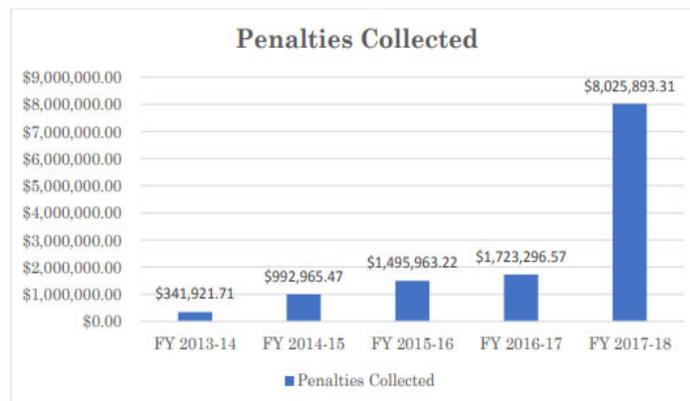
Unlike with independent contractors, employers pay employees overtime, pay into funds for unemployment and Social Security benefits, withhold taxes on employee compensation, and provide workers compensation insurance coverage

The Departments of Labor (State and Federal), Division of Employment Security, Departments of Revenue (State and Federal), and Industrial Commission all administer laws that apply to employees, but not independent contractors.



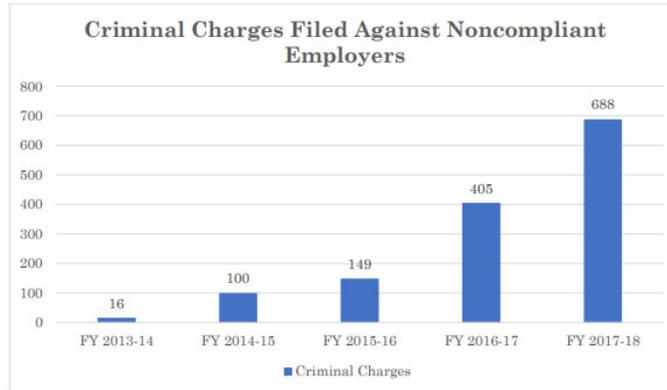
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Enforcement of NC Workers Compensation Act



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Enforcement of NC Workers Compensation Act



EEOC Guidance on Use of Arrest and Conviction Records

Source of Potential Liability

- Title VII, Civil Rights Act of 1964 as amended
 - Includes prohibition of discrimination in employment based on **race, national origin**
- Statistically, minorities (often African American, Hispanic) proportionately over-represented in criminal records checks



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Arrest

- Does not establish that criminal conduct has occurred
- An exclusion based on an arrest, in itself, is not job related and consistent with business necessity
- BUT – depending on circumstances, employer MAY make decision based on **conduct underlying arrest**



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Conviction

- Usually serves as sufficient evidence that a person engaged in particular conduct
- BUT - there MAY be reasons for an employer not to rely on the conviction record alone when making an employment decision
- Any decision must be **job related and consistent with business necessity**



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Disparate Treatment

- Employer treats criminal history information differently for different applicants or employees, based on their race or national origin
- No liability if treat all applicants the same



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Disparate Impact

- Neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII
- Statistically higher criminal convictions for minorities
- Therefore, neutral policy may violate the law if not **JOB RELATED** and consistent with **BUSINESS NECESSITY**
- May be liable even if treat all applicants the same.



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Analysis – Must Make Individualized Assessment of

- Nature, seriousness of crime
- The time elapsed since crime committed
- Nature of Job



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Possible factors

- Facts/circumstances
- Number of offenses
- Relative age at time of offense/application
- Work history since offense
- Rehabilitation, education, training since offense
- References



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Best Practices

- Limit inquiry on conviction until late in hiring process
- Notify applicant that screened out because of conviction and allow applicant to demonstrate that should not be excluded because of conviction
- Use EEOC website as reference and consult counsel



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Notice to Employee

- When employers hire a background reporting company in the business of compiling background information and history, certain rules apply:
- **The employer must tell the prospective employee they could use the information to decide about hiring, promoting, or firing.** Employer must give this information in writing and in a standalone document. Employer must also get written permission before asking the company to run a background check.
- **An employer must take certain steps before they decide not to hire, keep, or promote an applicant because of something in the report.** Employer must give a copy of the report and a “Summary of Rights” that tells you how to contact the background reporting company.



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Firing Considerations

- Per Employment Agreement (proper notice, documentation, dispute resolution)
- Severance Agreement (certain notice of waiver of claims)
- All wages paid per NC Wage and Hour Act
 - Potential personal liability
- Return and/or disposal of proprietary and confidential information
- Retaliation Claims



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Severance Agreement Considerations

- Restrictive Covenants
- NDA and use of proprietary and confidential information
 - Proper return/disposal of protected data
- Non-Disparagement
- Release of Claims
 - Specific statutory requirements, i.e. age related claims, revocation period.



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Duty to dispose of personal information

- Any business that conducts business in North Carolina and maintains personal information of a resident of North Carolina must take reasonable measures to protect against unauthorized access to or use of the information in connection with or after its disposal.



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Avoiding Whistleblower & Retaliation Claims

- Both Federal and State
- N.C.G.S. § 95-241 prevents discrimination or taking retaliatory action because the employee either does or threatens to:
 - ✓ file a claim under certain statutes
 - ✓ initiate complaint for themselves/someone else
 - ✓ exercise rights under other statutes
 - ✓ comply with juvenile delinquent statutes
 - ✓ exercise rights under domestic violence statutes



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Protected Complaints

- Workers' Compensation Act
- Wage and Hour Act
- North Carolina's OSHA
- Mine Safety and Health Act
- Sickle Cell or Hemoglobin C Discrimination (N.C.G.S. § 95-28.1)
- National Guard Re-employment Statute
- Genetic Information or Testing Discrimination (N.C.G.S. § 95-28.1A)



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Proving REDA Act Claim

- Must show:
 - a. protected activity
 - b. adverse employment action
 - c. protected activity substantial factor in adverse action
 - d. action would not have occurred in absence of knowledge of claim
- Courts require close temporal connection



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NC Definition

- Discharge
- Suspension
- Demotion
- Retaliatory relocation
- Other action taken in the terms, conditions, privileges, and benefits of employment



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Federal Statutory Prohibitions

- Title VII
- Title IX
- False Claims Act
- FLSA
- Equal Pay Act
- FMLA
- Sarbanes-Oxley
- USERRA
- 42 U.S.C. § 1981
- ADA
- ADEA
- ARRA
- ERISA



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Considerations

- Discrimination need not have occurred
- Employee need not be of the protected class
- Employee must have objectively reasonable belief of violation



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Protected activity

- Participation
 - actual testimony
 - preparation for testimony
 - support
 - providing documents
- Opposition must relate to employment
 - complaints, protests
 - removing offensive materials
 - assisting someone else in filing a complaint
 - refusing to follow instructions
- Third party retaliation recognized



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Adverse Acts

- Acts against others
- Collective acts
- Constructive discharge
- Harassment
- Adverse HR response to complaint
- Sabotage
- Sales
- Withdrawal of severance or settlement



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Actions that May Be Adverse

- Discipline
- Exclusion
- Failure to investigate
- Failure to provide tools
- Investigation of employee
- Involuntary medical exam
- Litigation
- Negative references
- Performance reviews
- Promotions
- Release of personal info
- Reports to law enforcement
- Rescinded termination
- Suspension/leave
- Threats
- Denial of training
- Transfers
- Work hours
- Work location
- Workload



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Onboarding Vendors

- How to quit: pay attention on to get out of the contract;
- Indemnification: look out for “gross negligence” limits
- Limitation of liability: SaaS contracts often cap liability at amount of spent but may be mission critical
- Read the scope of work!



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QUESTIONS

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