

## ALABAMA

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### I. AT-WILL EMPLOYMENT

#### A. Statute

At-will employment in Alabama is not statutory; rather, it is a creature of common law.

#### B. Case Law

Alabama's at-will employment doctrine provides that "[e]mployment may be terminated for 'a good reason, a wrong reason, or no reason'. Our Supreme Court has declined to create 'public policy' exceptions to this general rule." *Cunningham v. Dabbs* 703 So. 2d 979, 981 (Ala. Civ. App. 1997) (quoting *Howard v. Wolff Broadcasting Corp.*, 611 So. 2d 307 (Ala. 1992) (in which the employee, a female, was fired admittedly because of her gender)). With regard to dismissals based on the filing of worker's compensation claims, however, the legislature has carved out an exception to this general rule, *infra. Culbreth v. Woodham Plumbing Co., Inc.*, 599 So.2d 1120 (Ala.1992).

It is a heavy burden to overcome the presumption of at-will employment. A party much show " '(1) that there was a clear and unequivocal offer of lifetime employment or employment of definite duration, *Bates v. Jim Walter Resources, Inc.*, 418 So.2d 903 (Ala.1982); (2) that the hiring agent had authority to bind the principal to a permanent employment contract, *Alabama Mills, Inc. v. Smith*, 237 Ala. 296, 186 So. 699 (1939); and (3) that the employee provided substantial consideration for the contract separate from the services to be rendered, *United Security Life Ins. Co. v. Gregory*, 281 Ala. 264, 201 So.2d 853 (1967).' " *Ex parte Moulton et al.*, 116 So. 3d 1119, 1136-37(Ala. 2013) (citations and internal quotation marks omitted).

Simply because employment is at-will, however, does not protect an employer from the "consequences of its fraud." *Farmers Ins. Exchange v. Morris*, ---So. 3d---(Ala. 2016), 2016 WL661671, \*9 (Ala. Feb. 12, 2016). Specifically:

When an employee leaves one job for another based on a misrepresentation by the new employer regarding the new job that is not true at the time it is made, the new employer cannot hide behind the fact that Alabama law enforces or reads into the new employment contract an “at-will” clause to avoid the consequences of its fraud. Therefore, the fact that the agent agreement was terminable at will by either party would not, as a matter of law, prevent [plaintiff] from reasonably relying on the representations made to him.

## II. EXCEPTIONS TO AT-WILL EMPLOYMENT

### A. Implied Contracts

#### 1. Employee Handbooks/Personnel Materials

Where a formal employment contract does not exist, the Alabama Supreme Court continues to reaffirm its holding in *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987), that a contract for continued employment may be *implied* from a personnel policy manual:

Under the *Hoffman-La Roche* analysis, provisions of an employee handbook can become a unilateral contract, thereby altering the at-will status of an employment relationship. The question whether an employee handbook creates a unilateral contract between an employee and his employer can be determined by applying the following analysis to the facts in the case: “First, the language contained in the handbook must be examined to see if it is specific enough to constitute an offer. Second, the offer must have been communicated to the employee by issuance of the handbook, or otherwise. Third, the employee must have accepted the offer by [continuing his] employment after he has become generally aware of the offer. [The employee’s] actual performance supplies the necessary consideration.

*Birmingham Parking Auth. v. Wiggins*, 797 So. 2d 446, 448 (Ala. 2001) (citations omitted); *accord Mack v. Arnold*, 929 So. 2d 480, 484 (Ala. 2005). *Hoffman-La Roche* established the above-mentioned three-prong test (i.e., specificity, issuance to employee, and acceptance by employee) to determine whether a policy contained in an employee handbook is sufficient to create a contract.

Importantly, the *Hoffman-La Roche* approach only applies when the employee is free to leave the employment if he/she wishes. *Davis v. University of Montevallo*, 638 So. 2d 754 (Ala. 1994). An implied contractual relationship may provide the employee with a property interest sufficient to require his/her employer to provide a hearing upon termination of the employment relationship. *Harper v. Winston County*, 892 So. 2d 346 (Ala. 2004); *Hardric v. City of Stevenson*, 843 So. 2d 206 (Ala. 2002).

#### 2. Provisions Regarding Fair Treatment

There is no relevant statutory or case law in Alabama on provisions regarding fair treatment.

### 3. Disclaimers

In *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987), the Alabama Supreme Court recognized that if certain conditions are met, a policy contained in an employee handbook can create an employment contract. An employer, however, is free to state in the handbook or in a separate acknowledgement form that it does not intend the policies set forth in the handbook to constitute an offer for a unilateral contract of employment. *Stinson v. Am. Sterilizer, Co.*, 570 So. 2d 618 (Ala.1990); *accord Massey v. Krispy Kreme Doughnut Corp.*, 917 So. 2d 833 (Ala. Civ. App., 2005). “[A]n employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer. If the employer reserves in the employee handbook the right to change policies unilaterally, its reservation operates as a disclaimer to negate any inference that the handbook constitutes an enforceable contract.” *Mack v. Arnold*, 929 So. 2d 480, 484 (Ala. 2005) (citation and quotation marks omitted).

For example, in *Abney v. Baptist Medical Centers*, 597 So. 2d 682, 682 (Ala.1992), the Alabama Supreme Court held that the following acknowledgment form signed by the employee upon receipt of an employee handbook adequately disclaimed the employee handbook as constituting an employment contract:

I have received a copy of the Employee Information Folder and I am aware that the policies in this booklet are not intended to be all-inclusive and are subject to change. The policies in this booklet are not an expressed or implied contract of employment.

I understand that my employment is terminable at will by me or by the employer.

Alternatively, in *Ex parte Amoco Fabrics and Fibers Co.*, 729 So. 2d 336, 339-40 (Ala. 1998), the Alabama Supreme Court held that an employer’s “Layoff-Reduction in Work Force” policy, contained only in the employer’s policy-and-procedure manual but not in the employee handbook, offered a promise that the employer would follow a seniority system in determining layoffs as a condition of employment. The court found that the supervisor communicated this “offer” to plaintiff employees during the course of their employment despite the fact that the “lay-off reduction in force” policy was not in the employee handbook. The court further held that the employees accepted this offer by continued employment, thereby removing the employees from “at will” status and creating a unilateral employment contract. The court invalidated a disclaimer in the policy and procedure manual, holding that no part of the manual created a binding contract because it was included in the manual after the plaintiffs began working. Therefore, the plaintiffs could not have assented to the disclaimer.

### 4. Implied Covenants of Good Faith and Fair Dealing

Employment contracts contain an implied duty to act in good faith and to deal fairly. *Am.*

*Cast Iron Pipe Co. v. Williams*, 591 So. 2d 854 (Ala. 1991). Although the obligation to act in “good faith” arises as part of an employment contract, the breach of this implied duty does not give rise to a bad faith tort action. *Am. Cast Iron Pipe Co.*, 591 So. 2d at 857.

## B. Public Policy Exceptions

### 1. General

To date, the Alabama Supreme Court remains content to leave any changes to the “at will” doctrine to the state legislature. *Wright v. Dothan Chrysler Plymouth Dodge*, 658 So. 2d 428 (Ala. 1995). Until the State Legislature acts on the issue, if it ever does, Alabama courts likely will uphold the “at will” doctrine, even where the employer acts maliciously in terminating the employee.

For example, in *Cunningham v. Dabbs*, 703 So. 2d 979, 981 (Ala. Civ. App. 1997), the court upheld the “at will” doctrine where the employer terminated a female employee because she planned to marry, holding that “Dabbs’s conduct, as reprehensible as it might have been, cannot support a claim for wrongful discharge in an ‘at-will’ employment situation.”

Likewise, in *Howard v. Wolff Broadcasting Corp.*, 611 So. 2d 307, 308 (Ala. 1992), the Alabama Supreme Court upheld the “at will” doctrine where an employer fired Plaintiff solely because she was female. The principal question before the court was whether the court should carve out an exception to the employee-at-will doctrine and hold that Plaintiff stated causes of action for breach of an implied contract of employment and fraud. The facts of the case were not significantly disputed. Plaintiff presented evidence that a sign was posted in the lobby of the defendant employer’s radio station which stated that Defendant would not discriminate against “females, blacks or any others.” About a year after her hire, Defendant fired Plaintiff because his wife “did not want any females on the air.” There was no written contract of employment, so Plaintiff sued Defendant on grounds of fraud and breach of implied contract and sued Defendant employer’s wife for intentional interference with contractual relations. Plaintiff and the wife entered a *pro tanto* settlement agreement on the claim of intentional interference with business relations and the case proceeded to summary judgment on the breach of contract and fraud claims. The Alabama Supreme Court affirmed the trial court’s entry of summary judgment on the breach of contract claim because the facts of the case did not fit within any of the three implied contract exceptions to the employment at will doctrine under *Hoffman-La Roche v. Campbell*, 512 So. 2d 725 (Ala. 1987). The summary judgment as to the fraud claim also was affirmed as Plaintiff failed to establish all of the elements of promissory fraud or that the anti-discrimination sign in the lobby illustrated that the defendant employer had a present intent to deceive Plaintiff at the time of her hire. The court devoted an entire section of its opinion to its refusal to carve out a public policy exception to the employment at will doctrine based on principles of non-discrimination. The court stated as follows:

The Court had consistently refused to create a cause of action on “public policy” grounds for three reasons: (1) to do so would abrogate the inherent right of contract between employer and employee; (2) to do so would be to overrule well-

established employment law; and, (3) “contrary to public policy” is too vague or nebulous a standard to justify the creation of a new tort.

*Id.* at 312 (citations omitted). The court also took notice of the fact that Plaintiff had no federal cause of action because the defendant employer did not have the requisite number of employees (*i.e.*, 15) to qualify as an “employer” under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1992):

In refusing to adopt a “public policy” exception, we should not be understood as condoning a person’s discharge because of gender. We merely hold that it is the province of the legislature to create such an exception, if it should determine that employees such as Howard, who cannot come within the provisions of the Equal Employment Act, should be given the right to sue for damages.

*Id.* at 313 n.1; *see also Salter v. Alfa Ins. Co.*, 561 So. 2d 1050, 1054 (Ala. 1990) (declining to create a public policy exception to the “at will” doctrine where the employer terminated the employee because of petty jealousy).

## 2. Exercising a Legal Right

Except as otherwise discussed *infra*, there is no public policy exception to the “at will” doctrine where an employee is terminated because he/she exercised a legal right.

## 3. Refusing to Violate the Law

The Alabama Supreme Court has declined to create a public policy exception to the “at will” doctrine where an employee is terminated because he/she refuses to commit an illegal act. *Wright v. Dothan Chrysler Plymouth Dodge, Inc.*, 658 So. 2d 428 (Ala. 1995). Note, however, that the result may be different when there is an employment contract. *Eager Beaver Buick, Inc. v. Burt*, 503 So. 2d 819 (Ala. 1987) *overruled in part by Elmore County Com’n v. Ragona*, 540 So. 2d 720, 725 (Ala. 1989).

Likewise, no exception exists when an at-will employee is allegedly terminated for complying with state and federal law. *Gosa v. Wal-Mart Stores E., LP*, No. CV 16-0055-CG-B, 2017 WL 457198, \*16 (S.D. Ala. Feb. 2, 2017).

## 4. Exposing Illegal Activity (Whistleblowers)

### a. Public Employees

There is whistleblower protection for public employees pursuant to ALA. CODE § 36-25-24 (1975).

### b. Workers’ Compensation Protection

Alabama Code § 25-5-11.1 prohibits an employer from discharging an employee in retaliation “solely because” he/she complained of a violation of the employer’s safety regulations or because he/she filed a claim for workers’ compensation benefits. *Webb Wheel Prods., Inc. v. Hanvey*, 922 So. 2d 865 (Ala. 2005); *McClain v. Birmingham Coca-Cola Bottling Co.*, 578 So. 2d 1299 (Ala. 1991); *Caraway v. Franklin Ferguson Mfg. Co.*, 507 So. 2d 925 (Ala. 1987); *Massey v. Krispy Kreme Doughnut Corp.*, 917 So. 2d 833 (Ala. Civ. App. 2005).

Section 25-5-11.1 became effective in February 1985, and case filings under § 25-5-11.1 are increasing and can be dangerous for employers. However, § 25-5-11.1 carves out only a *limited* exception to Alabama’s “at will” doctrine to protect employees who exercise their rights under Alabama’s workers’ compensation laws. *Tyson Foods, Inc. v. McCollum*, 881 So. 2d 976 (Ala. 2003); *accord Scott Bridge Co. v. Wright*, 883 So. 2d 1221 (Ala. 2003). Recognizing that § 25-5-11.1 provides only a limited exception to Alabama’s employment at-will rule, the Alabama Supreme Court has reiterated that § 25-5-11.1 should not be applied “in a manner that revises the at-will doctrine beyond the extent necessary to accommodate the obvious legislative purpose.” *Tyson Foods, Inc.*, 881 So. 2d. at 982.

The Alabama Supreme Court has articulated the following test for determining when an employee may recover for retaliatory discharge:

In order for an employee to establish a prima facie case of retaliatory discharge the employee must show: 1) an employment relationship, 2) an on-the-job injury, 3) knowledge on the part of the employer of the on-the-job injury, and 4) subsequent termination of employment based solely upon the employee's on-the-job injury and the filing of a workers' compensation claim.

*Alabama Power Co. v. Aldridge*, 854 So. 2d 554, 563 (Ala. 2002).

In *Aldridge*, the court clarified that, in order for a plaintiff to recover under Section 25-5-11.1, a plaintiff must put forth substantial evidence that a claim for workers’ compensation was the *sole* reason for the termination of plaintiff’s employment. The court held that “if there is uncontradicted evidence of an independently sufficient basis for the discharge then the defendant is entitled to a judgment as a matter of law.” *Id.* at 568. The court further explained that “[a]n employer's stated basis for a discharge is sufficient as a matter of law when the underlying facts surrounding the stated basis for the discharge are undisputed and there is no substantial evidence indicating (a) that the stated basis has been applied in a discriminatory manner to employees who have filed workers' compensation claims, (b) that the stated basis conflicts with express company policy on grounds for discharge, or (c) that the employer has disavowed the stated reason or has otherwise acknowledged its pretextual status.” *Id.*; *accord Blue Circle Cement, Inc. v. Phillips*, 989 So. 2d 1025, 1039 (Ala. 2007) (holding that trial court erred in denying employer’s motion for judgment as a matter of law where plaintiff failed to contradict one of employer’s stated reasons for the discharge).

In *Hatch v. NTW Inc.*, 35 So. 3d 623, 629 (Ala. Civ. App. 2009), the employee claimed that he was discharged around the same time as his treating physician put him on maximum

medical improvement, and that the proximity of the two events was circumstantial evidence that his discharge was motivated solely by his filing a workers' compensation claim. The employee, though, had been receiving workers' compensation benefits for months and had been on leave from his job as a result of his injury. The Alabama Court of Civil Appeals rejected the "proximity" argument, finding the timing to be a coincidence. The employee also failed to demonstrate a "negative attitude toward his injured condition" by anyone affiliated with his employment. Even with "slight differences in the expression of the reason" for discharge, the underlying reason—the expiration of the employee's leave of absence—was the same and not pretext, and the employee could not show that the sole reason for his discharge was the filing of a workers' compensation claim.

In *Ex parte Wood*, 69 So. 3d 166 (Ala. 2011), however, the Alabama Supreme Court reinstated a verdict for an employee after the Alabama Court of Civil Appeals found that the employer's stated reasons for termination were legitimate where an employee admitted making profane remarks to the human resources manager. The employee had claimed that he was terminated because he left work early due to pain from an on-the-job injury. The Alabama Supreme Court reasoned, though, that evidence of pretext existed as a result of inconsistent explanations given to the employee for termination and that it was reasonable for the trier of fact to conclude that the employer relied on the foul-language as an alternate basis for the termination decision "after the fact to bolster its [allegedly] pretextual termination." *Id.* at 172.

The Alabama Supreme Court also recently clarified that Section 25-5-11.1 does not prohibit termination in anticipation of an employee filing a workers' compensation claim; rather, the statute requires either the filing of workers' compensation "claim" or the commencement of a civil action for workers' compensation benefits before the employee's termination in order for an employer to be held liable for retaliatory discharge. *Falls v. JVC America, Inc.*, 7 So. 3d 986, 990-91 (Ala. 2008).

"[A] retaliatory-discharge claim brought pursuant to § 25-5-11.1 arises out of a worker's compensation factual setting, the claim is nevertheless a tort action and is governed by the general rules of tort law." *SSC Selma Operating Co. LLC v. Fikes*, ---So. 3d---(Ala. 2017), 2017 WL2209884, \*3 (Ala. May 19, 2017) (citation omitted). Employee dispute resolution programs that cover tort actions thus include retaliatory discharge claims related to workers' compensation claims. *Id.*

### **III. CONSTRUCTIVE DISCHARGE**

An employee who voluntarily leaves employment under adverse working conditions may sue an employer for constructive discharge. Employees in such cases typically contend that they have been subjected to severe harassment or retaliation in the workplace. "[T]o establish a claim of constructive discharge, an employee must present substantial evidence that his or her employer deliberately [made] [the] employee's working conditions *so intolerable that the employee [was] forced into an involuntary resignation.*" *Ex parte Breitsprecher*, 772 So. 2d 1125, 1129 (Ala. 2000) (emphasis added) (citations and quotation marks omitted); *accord Jim Walter Res., Inc. v. Riles*, 920 So. 2d 1093 (Ala. Civ. App. 2004).

#### IV. WRITTEN AGREEMENTS

##### A. Standard “For Cause” Termination

Employers are free to provide that an employee may be terminated only “for cause,” as long as the employer clearly outlines what “cause” means or entails.

##### B. Status of Arbitration Clauses

###### 1. General

Unless otherwise preempted by federal law, both Alabama Code § 8-1-41(3) (1975) and Alabama public policy bar the specific enforcement of a pre-dispute arbitration agreement. *Accord Orkin Exterminating Co. v. Larkin*, 857 So. 2d 97 (Ala. 2003). The Federal Arbitration Act (“FAA”) preempts Alabama's statutory law and renders enforceable any pre-dispute arbitration agreement involving interstate commerce; such involvement must have a substantial effect on interstate commerce for the FAA to apply. *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004); *Jim Walter Homes, Inc. v. Saxton*, 880 So. 2d 428 (Ala. 2003).

In *Robert Frank McAlpine Architecture, Inc. v. Heilpern*, 712 So. 2d 738, 749 (Ala. 1998), the Alabama Supreme Court followed the majority of federal circuits in rejecting an employee's argument that Section 1 of the FAA exempts all employment contracts from the operation of federal arbitration law. The Supreme Court of Alabama instead held that Section 1 of the FAA only applies to the employment contracts of those workers directly engaged in the movement of goods in interstate commerce. *Id.*

One year later in *Gold Kist, Inc. v. Baker*, 730 So. 2d 614 (Ala. 1999), the court held that Section 1 of the FAA did not exempt a dock worker whose only connection with interstate commerce was loading pallets onto a truck. The court stated it was “keeping in mind the United States Supreme Court's mandate that all doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, and that the [Section] 1 exemption is a narrow one.” *Id.* at 616.

In short, these rulings hold that the FAA is not applicable unless the employment contract substantially affects interstate commerce; otherwise, Alabama statutory law, which generally opposes the enforcement of arbitration clauses, governs arbitration clauses. *Ex parte McNaughton*, 728 So. 2d 592, 594 n.3 (Ala. 1998) (“Thus, [the Supreme Court of Alabama] has limited the [Section] 1 exemption to seamen, railroad workers, and other workers actually involved in the interstate transportation of goods.”). That being said, despite the Alabama statutory law prohibiting specific enforcement of arbitration agreements, Alabama courts routinely enforce arbitration agreements because of the broad preemption of the FAA.

###### 2. Arbitration Clauses in Employee Handbooks

In *Ex parte McNaughton*, 728 So. 2d 592, 595 (Ala. 1998), the employee handbook contained the following provision: “I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, do not establish a contract.” *Id.* The acknowledgment form stated, “I agree to submit all employment related disputes based on a legal claim to arbitration under [the employer’s] policy.” *Id.* The Alabama Supreme Court found that “McNaughton’s signed acknowledgment form indicated that the parties agreed to be bound by one provision of the employee handbook--the arbitration policy--but not by other provisions of the handbook.” *Id.* The court simultaneously upheld the arbitration agreement and the “at-will” doctrine. *Id.* at 596; *see also Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 665 (Ala. 2004) (“The burden of proving unconscionability of an arbitration agreement rests with the party challenging the agreement.”); *Service Corp. Int’l v. Fulmer*, 883 So. 2d 621, 633 (Ala. 2003) (“[A]greements to arbitrate are not in themselves unconscionable.”); *Gayfer Montgomery Fair Co. v. Austin*, 870 So. 2d 683 (Ala. 2003) (holding that employee was bound to arbitrate her claims against her employer since she had signed an acknowledgement form regarding the arbitration requirement, her employment concerned interstate commerce, and the arbitration agreement was not unconscionable); *Baptist Health Sys. v. Mack*, 860 So. 2d 1265 (Ala. 2003) (finding that the employee was bound by the arbitration provision).

Alternatively, in *Ex parte Beasley*, 712 So. 2d 338, 340 (Ala. 1998), the employee handbook stated that “no written statement or agreement in this handbook concerning employment is binding.” The Alabama Supreme Court held that the arbitration provision was unenforceable due to the conflicting language: “the plain meaning of the phrase ‘no written statement’ would include the statement in the standard employee handbook that the employee ‘will use binding, independent arbitration as a final step in the complaint process.’” *Id.* The court, however, noted that if the acknowledgement form itself had included an arbitration clause, the employee would have been required to arbitrate because the employment contract substantially affected interstate commerce. *Cf. Ex parte Ephraim*, 806 So. 2d 352 (Ala. 2001) (holding irrelevant the fact that the signed acknowledgment form contained an arbitration clause because the employer failed to present evidence that the employment contract substantially affected interstate commerce).

## V. ORAL AGREEMENTS

### A. Promissory Estoppel

Alabama courts have held that “although equitable estoppel might transform an otherwise non-binding agreement into a legally binding contract, the principle of promissory or equitable estoppel cannot be utilized to create primary contractual liability where none would otherwise exist.” *Bates v. Jim Walter Res., Inc.*, 418 So. 2d 903, 905 (Ala. 1982); *Aldridge v. DaimlerChrysler Corp.*, 809 So. 2d 785, 794 (Ala. 2001) (“When one seeks to impose liability under the doctrine of promissory estoppel, we look to the facts to determine whether that doctrine can be used to create liability, once we have determined that no binding contract existed . . . [T]he doctrine of promissory estoppel cannot be used to create liability against a party under circumstances that would not sustain a contract if one had been made, the trial court properly

entered the summary judgment as to the promissory estoppel claim . . .”).

B. Fraud

To establish a promissory fraud claim regarding an oral agreement, an employee must demonstrate: “a misrepresentation in the form of a promise” made by the employer, “that the misrepresentation concerned a material existing fact,” “that the employee [] relied on the misrepresentation,” “that the reliance proximately caused the injury or damage alleged,” and “that when [the employer] made the promise, it intended not to perform the act promised, but intended to deceive the employee [].” *Aldridge v. DaimlerChrysler Corp.*, 809 So. 2d 785, 794 (Ala. 2001).

C. Statute of Frauds

Section 8-9-2(1) (1975) of the Alabama Code provides:

In the following cases, every agreement is void unless such agreement or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party to be charged therewith or some other person by him thereunto lawfully authorized in writing:

Every agreement which, by its terms, is not to be performed within one year from the making thereof;

To bring a contract within the operation of ALA. CODE § 8-9-2(1), there must be an express and/or specific agreement or indication that the contract cannot be performed within a year. *Ala. Agric. & Mech. Univ. v. Jones*, 895 So. 2d 867 (Ala. 2004). A contract is not brought within Alabama Code § 8-9-2(1) by the mere fact that full performance of the contract within a year is highly improbable, nor by the fact that the parties may not have expected that the contract would be performed within one year. *Bay City Constr. Co. v. Hays*, 624 So. 2d 1031 (Ala. 1993).

Thus, pursuant to ALA. CODE § 8-9-2(1), to be enforceable, an employment contract for a stated period of time in excess of one year must be in writing. However, when the parties agree that either party may terminate the contract at any time prior to the stated contract completion date, the employment contract need not be reduced to writing to be enforceable, as termination of the contract could occur within one year. *Abbott v. Hurst*, 643 So. 2d 589 (Ala. 1994). In addition, a party seeking to avoid the effect of a contract may not invoke the protection of § 8-9-2(1) to the extent the contract has been executed, *i.e.*, fully performed by the other party. *Ala. Agric. & Mech. Univ.*, 895 So. 2d at 867. However, if the contract has been only partially executed, § 8-9-2(1) may be invoked as a defense to the remaining executory components of the contract. *Ex parte Ramsay*, 829 So. 2d 146, 155 (Ala. 2002) (“The partial performance of a contract, void under the statute of frauds, does not take it from under the influence of the statute, so as to permit a recovery under the contract for any part of the contract remaining executory.”).

Also important in the Statute of Frauds context is § 8-9-2(5), which requires contracts for

the sale of real property be in writing. In *Hess v. Market Investments Company, L.L.C.*, 917 So. 2d 140 (Ala. 2005), the Alabama Supreme Court found that an oral contract between a real estate investment consultant and a real estate investment corporation did not fall within the Statute of Frauds, concluding that the contract actually was an employment contract (which could be performed within a year) rather than a contract for the sale of real property. The contract provided that the consultant would be given a 20 percent interest in investment property the consultant located for the corporation to purchase, after the corporation purchased it. The equity he was given in the property amounted to compensation rather than a sale of property.

## VI. DEFAMATION

### A. General Rule

The rule of defamation in Alabama is set forth as follows:

To establish a prima facie case of defamation, the plaintiff must show that the defendant was at least negligent, in publishing a false and defamatory statement to another concerning the plaintiff, which is either actionable without having to prove special harm (actionable per se) or actionable upon allegations and proof of special harm (actionable per quod).

...

The foundation of an action for libel or slander is a malicious injury to reputation, and any false and malicious imputation of crime or moral delinquency by one published of and concerning another, which subjects the person to disgrace, ridicule, odium, or contempt in the estimation of his friends and acquaintances, or the public, with resulting damage to his reputation, is actionable either per se or per quod. . . .

*Butler v. Town of Argo*, 871 So. 2d 1, 16 (Ala. 2003) (internal citations and quotation marks omitted).

#### 1. Libel

As set forth in *Butler v. Town of Argo*, 871 So. 2d 1, 16 (Ala. 2003), the distinction between libel and slander is as follows:

There is a distinction between actions of libel predicated on written or printed malicious aspersions of character, and actions of slander resting on oral defamation. . . . This distinction, however, is merely in respect to the question as to whether the imputed language or words are actionable per se.

...

In cases of libel, if the language used exposes the plaintiff to public ridicule or contempt, though it does not embody an accusation of crime, the law presumes damage to the reputation, and pronounces it actionable per se. While to constitute slander actionable per se, there must be an imputation of an indictable offense involving infamy or moral turpitude. . . .

. . .

This distinction, however, does not deny the right to maintain an action for slander founded on oral malicious defamation subjecting the plaintiff to disgrace, ridicule, odium, or contempt, though it falls short of imputing the commission of such crime or misdemeanor. In such case the law pronounces the words actionable per quod only, and the plaintiff must allege and prove special damages as an element of the cause of action.

*Id.* at 16-17 (internal citations and quotation marks omitted).

## 2. Slander

*See* discussion under “Libel” above.

### B. References

Defamation issues between employers and employees typically arise as a result of communications between former and prospective employers. However, references which fall within the conditional privilege parameters of *Gore v. Health-Tex, Inc.*, 567 So. 2d 1307 (Ala. 1990) – as set forth in the immediately following section -- will not subject an employer to liability for defamation.

### C. Privileges

*Gore v. Health-Tex*, 567 So. 2d 1307 (Ala. 1990), sets out the general rule in Alabama regarding references and conditional privilege.

[A]ny publication made between a previous employer and a prospective employer is protected by a conditional privilege. . . .

. . .

Where a party makes a communication, and such communication is prompted by duty owed either to the public or to a third party, or the communication is one in which the party has an interest, and it is made to another having a corresponding interest, the communication is privileged, if made in good faith and without actual malice. . . . The duty under which the party is privileged to make the communication need not be one having the force of legal obligation, but it is

sufficient if it is social or moral in its nature and defendant in good faith believes he is acting in pursuance thereof, although in fact he is mistaken.

*Id.* at 1308 (citation and internal quotation marks omitted); accord *Butler v. Town of Argo*, 871 So. 2d 1 (Ala. 2003). Thus, in order to defeat the conditional privilege, a plaintiff must show bad faith or “malice” on the employer’s behalf. *Butler*, 871 So. 2d at 1. Bad faith or “[a]ctual malice may be shown by evidence of previous ill will, hostility, threats, rivalry, other actions, former libels or slanders, and the like, emanating from the defendant, or by the violence of the defendant’s language, the mode and extent of publication, and the like.” *Id.* at 27 (quotation omitted).

#### D. Other Defenses

##### 1. Truth

“Truth is an absolute defense to defamation. . . .” *Wal-Mart Stores, Inc. v. Smitherman*, 872 So. 2d 833, 840 (Ala. 2003).

##### 2. No Publication

Where there is no publication, there cannot be a cause of action for defamation. *Butler v. Town of Argo*, 871 So. 2d 1 (Ala. 2003). The *Burney/McDaniel* rule, established in *Burney v. Southern Railway Co.*, 165 So. 2d 726, 730-31 (Ala. 1964), and *McDaniel v. Crescent Motors, Inc.*, 31 So. 2d 343, 344 (Ala. 1947), provides that there is no “publication” where the employer’s agents make allegedly defamatory statements about an employee to other employer agents in the course of transacting the employer’s business.

For example, in *Burney*, the Alabama Supreme Court held that a manager who dictated a letter to his secretary which contained supposedly defamatory statements about an employee did not publish the statements because those statements were only given to a co-employee in the course of conducting the manager’s business. *Burney*, 165 So. 2d 726, 730-31. Similarly, in *McDaniel*, an employer was not liable for defamation where allegedly defamatory statements were made by three of the employer’s managers to a union representative for plaintiff because the managers were conducting the employer’s business and the union representative was plaintiff’s agent, such that there was no publication to a third party. *McDaniel*, 31 So. 2d 343; see also *Brackin v. Trimmier Law Firm*, 897 So. 2d 207 (Ala. 2004) (finding that there was no “publication” where the employer’s employees made statements to an auditor during an investigation regarding the possibility of improper loan procedures because the statements were made within the line and scope of the employees’ employment and the auditor was acting as an agent of the employer); *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085 (Ala. 1988) (“As long as a communication to a non-managerial employee falls within the proper scope of that employee’s knowledge or duties, the *McDaniel/Burney* rule applies to non-managerial employees as well as to managerial employees. A corporation can act only through its servants, agents, or employees . . . and when officers and employees of a corporation act within the scope of their employment and within the line of their duties, they are not third persons vis-à-vis the

corporation.” *Id.* at 1093) (quotation marks, citation and emphasis omitted).

### 3. Self-Publication

In *Gore v. Health-Tex, Inc.*, 567 So. 2d 1307 (Ala. 1990), the Alabama Supreme Court was “not prepared to hold that a plaintiff’s own repetition of allegedly defamatory statements can supply the element of publication in a slander action.” *Id.* at 1308-09 (holding that former employer was not guilty of slander even though former employee was required to self-publicize the allegedly defamatory reason for her termination).

### 4. Invited Libel

There is no relevant statutory or case law in Alabama on invited libel.

### 5. Opinion

“One cannot recover in a defamation action because of another's expression of an opinion based upon disclosed, non-defamatory facts, no matter how derogatory the expression may be. This is so because the recipient of the information is free to accept or reject the opinion, based on his or her independent evaluation of the disclosed, nondefamatory facts.” *Sanders v. Smitherman*, 776 So. 2d 68, 74 (Ala. 2000) (entering summary judgment on the plaintiff’s defamation claim in favor of the defendants where the plaintiff alleged the defendants committed defamation by stating their opinion that the plaintiff violated state ethics laws).

### E. Job References and Blacklisting Statutes

ALA. CODE § 25-8-57(b) addresses the issue of “blacklisting” employees who report child labor law violations:

No employer, agent of an employer, or any other person shall discharge or otherwise discipline, threaten, harass, blacklist, or in any other manner discriminate against an applicant, employee, former employee, or any other person because that individual disclosed any information not prohibited from disclosure by statute, refused to obey an illegal order, or in any other manner not prohibited by statute challenged or revealed any violation of this chapter.

Furthermore, it is a crime to maintain a “blacklist” under Alabama law. ALA. CODE § 13A-11-123 states:

Any person, firm, corporation or association of persons who maintains what is commonly called a blacklist or notifies any other person, firm, corporation or association that any person has been blacklisted by such person, firm, corporation or association or who uses any other similar means to prevent any person from receiving employment from whomsoever he desires to be employed by shall be guilty of a misdemeanor.

F. Non-Disparagement Clauses

Though relevant case law is limited, non-disparagement clauses in employment agreements appear to be enforceable generally. *See Jones v. Hamilton*, 53 So. 3d 134 (Ala. Civ. App. 2010) (finding former employee breached confidentiality agreement by assisting in the removal of confidential documents but finding insufficient evidence that former employee made disparaging remarks in violation of the confidentiality agreement).

**VII. EMOTIONAL DISTRESS CLAIMS**

A. Intentional Infliction of Emotional Distress

“In Alabama, the torts of intentional infliction of emotional distress and outrage are synonymous.” *Ferrari v. DR Horton Inc.-Birmingham*, Case No. 2:14-cv-01941, 2017WL467472, \*10 (N.D. Ala. Feb. 3, 2017) (citation omitted). Alabama courts are reluctant to recognize claims for intentional infliction of emotional distress in the employment context (and otherwise). Only in limited instances has the Alabama Supreme Court allowed recovery for intentional infliction of emotional distress under a theory of “outrage.” In short, a plaintiff must prove the employer’s conduct 1) was intentional or reckless; 2) extreme and outrageous; and 3) caused emotional distress so severe that no reasonable person could be expected to endure it. *Am. Rd. Serv. v. Inmon*, 394 So. 2d 361 (Ala. 1980); *accord Wal-Mart Stores, Inc. v. Smitherman*, 872 So. 2d 833 (Ala. 2003); *McDole v. Alfa Mut. Ins. Co.*, 875 So. 2d 279 (Ala. 2003); *Habich v. Crown Cent. Petroleum Corp.*, 642 So. 2d 699 (Ala. 1994).

In *American Road Service v. Inmon*, 394 So. 2d 361 (Ala. 1980), the Alabama Supreme Court first recognized a claim for outrage in an employment lawsuit. Plaintiff filed suit against his employer for extreme and outrageous conduct causing severe emotional distress because his employer allegedly accused him of dishonesty and improper dealings and eventually terminated him. The issue before the court was whether Alabama allowed recovery for “the intentional or reckless tort of outrageous conduct causing severe emotional distress.” *Id.* at 362. The court answered in the affirmative, but in so doing, set out a restrictive test for recovering under an outrage theory:

[O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily injury resulting from the distress. The emotional distress thereunder must be so severe that no reasonable person could be expected to endure it. Any recovery must be reasonable and justified under the circumstances, liability ensuing only when the conduct is extreme. . . . By extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society.

*Id.* at 365 (citation omitted). Pursuant to this standard and while recognizing that *Inmon*’s

“termination was disorganized and a humiliating experience for him,” the Alabama Supreme Court determined that his termination did not meet this standard. *Id.* The court noted that “liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” *Id.* at 368 (quotation omitted).

Recent cases demonstrate the parameters of outrageous conduct in the employment context:

In *Soti v. Lowe’s Home Centers, Inc.*, 906 So. 2d 916 (Ala. 2005), the Alabama Supreme Court affirmed the trial court’s entry of summary judgment in favor of the employer on the employee’s outrage theory. The employee, a workers’ compensation claimant, claimed that the employer’s conduct was outrageous in refusing to refer the employee to a general surgeon for the treatment of his hernia. The court found that there was no evidence that the employer was refusing the referral in order to pressure a settlement of the employee’s workers’ compensation claim and highlighted the fact that the referral was sought two years after the employee stopped working for the employer and the employer did not understand how the hernia was related to the employee’s workers’ compensation back injury, for which the employer had provided treatment.

In *Bullin v. Corr. Med. Services, Inc.*, 908 So. 2d 269 (Ala. Civ. App. 2004), employees of a correctional center brought an outrage claim (and other tort claims) against the correctional center for its alleged failure to protect the employees from the correctional center inmates. The Alabama Court of Civil Appeals concluded that the employees’ claims were not barred by the exclusivity provisions of the Workers’ Compensation Act because the employees’ injuries were psychological in nature and not caused by a physical injury such that they were not seeking recovery for purposes of a workers’ compensation “injury.” Consequently, the court reversed the trial court’s entry of summary judgment in favor of the correctional center.

In *Grantham v. Vanderzyl*, 802 So. 2d 1077 (Ala. 2001), Keith Vanderzyl, a surgeon, became angry with his assisting nurse, Tammy Grantham, and allegedly threw a surgical drape at her, causing a patient’s blood and surgical refuse to get on Grantham’s face. Grantham sued Vanderzyl on the basis of outrage, among other things, claiming fear of contracting a communicable disease such as AIDS. The Alabama Supreme Court held that “the mere fear of contracting a disease, without actual exposure to it cannot be sufficient to cause the level of emotional distress necessary for [the tort of outrage].” *Id.* at 1081.

The case of *Ex parte Crawford*, 693 So. 2d 458 (Ala. 1997), held that the delay of workers’ compensation payments alone is insufficient to support a claim for outrageous conduct. “[T]he stringent test of outrageous conduct” requires something more. *Id.* at 461.

In *Turner v. Hayes*, 719 So. 2d 1184 (Ala. Civ. App. 1997), *rev’d in part by Ex parte Atmore Cmty. Hospital*, 719 So. 2d 1190 (Ala. 1998), Diane Turner, a female employee, alleged that a male co-worker, Michael Hayes, harassed her by fondling his genitals in front of her and repeatedly making sexual advances and comments toward her. Turner also alleged that when she complained about Hayes’ actions, the intensity of his harassment increased, culminating in his throwing computer labels at her. Nonetheless, the Alabama Supreme Court held that Hayes’

conduct was not outrageous. *But see Barlow v. Piggly Wiggly Ala. Distributing Co. Inc.*, Case No. 2:14-CV-971, 2015WL5770625,\*6 (N.D. Ala. Oct. 2, 2015) (finding jury question on outrage claim that alleged “unambiguous, inappropriate touchings” of employee).

The plaintiff employee in *Morris v. Merritt Oil Co.*, 686 So. 2d 1139 (Ala. 1996), claimed that, after being arrested on suspicion of using an illegal gambling device in her place of employment, she suffered severe emotional distress. Plaintiff claimed and evidence supported that she did not know of the device's capacity for use in gambling. However, in light of evidence that the employer's placement of the machine was entrepreneurial in nature and not intended to harm an employee, the Alabama Supreme Court held that defendants did not inflict emotional distress upon plaintiff. *Id.* at 1146. The court also found that an employer's duty to provide a safe workplace under Alabama Code § 25-1-1 (1975) does not include “ensur[ing] that nothing in the workplace disturbs the emotional well-being of the employees.” *Id.* at 1144. In reaching its conclusion, the court noted that plaintiff failed to satisfy the three criteria under *Inmon*, 394 So. 2d 361.

The Alabama Supreme Court held that an employee who was raped by a third party while working at a convenience store could not establish the tort of outrage against her employer. *Habich v. Crown Central Petroleum Corp.*, 642 So. 2d 699 (Ala. 1994); *see also Patrick v. Union State Bank*, 681 So. 2d 1364, 1367 (Ala. 1996) (“[A]bsent a special relationship or special circumstances, a person has no duty to protect another from criminal acts of a third person.”). The *Habich* court held that plaintiff presented no evidence that her employer's failure to protect her from the criminal acts of a third party “even approached the degree of severity required to support an emotional distress claim.” 642 So. 2d at 701. The court reiterated the rule that “extreme” means “conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.” *Id.*

The Alabama Supreme Court denied recovery to plaintiff in *McAfee v. Shredders, Inc.*, 650 So. 2d 871 (Ala. 1994), when he claimed that he suffered severe emotional distress as the result of his employer's refusal to provide him with rehabilitation benefits after suffering from a physical injury. Because the employer had an arguable reason for not providing the benefits in question, (plaintiff's low scores in vocational testing), the evidence was “insufficient to meet the *Inmon* standards.” *Id.* at 873.

Conversely, in *Cont'l Cas. Ins. Co. v. McDonald*, 567 So. 2d 1208 (Ala. 1990), plaintiff showed that, in addition to delaying workers' compensation payments that were owed to him, the employer “knew that the plaintiff, an injured worker, was enduring severe pain and knew that he was especially susceptible to emotional distress.” *Id.* at 1211. On these facts, the Alabama Supreme Court found that a jury could reasonably find that defendant's conduct was intentional and sufficient to support a claim for outrageous conduct.

In *Carraway Methodist Health Sys. v. Wise*, 986 So. 2d 387, 402 (Ala. 2007), held that while being discharged from his employment was a personal crisis for former general counsel who had devoted his entire career to a company that decided it no longer needed his services, his

discharge did not meet the *Inmon* criteria. Furthermore, the court “decline[d] to expand the operation of the tort of outrage to encompass the breach of this employment contract.” *Id.*

#### B. Negligent Infliction of Emotional Distress

The Alabama Supreme Court has not recognized a claim for negligent infliction of emotional distress in the employment context. *See, e.g., Allen v. Walker*, 569 So. 2d 350, 352 (Ala. 1990).

### VIII. PRIVACY RIGHTS

#### A. Generally

Alabama has long recognized the tort of invasion of privacy. *Smith v. Doss*, 37 So. 2d 118 (Ala. 1948). Invasion of privacy consists of four limited and distinct wrongs: “1) the intrusion upon the plaintiff’s physical solitude or seclusion; 2) publicity which violates the ordinary decencies; 3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; and 4) the appropriation of some element of the plaintiff’s personality for a commercial use.” *I.C.U. Investigations, Inc. v. Jones*, 780 So. 2d 685, 688-92 (Ala. 2000), *quoting Johnson v. Corporate Special Serv., Inc.*, 602 So. 2d 385, 387 (Ala. 1992) (holding that plaintiff who previously filed for workers’ compensation benefits had no actionable invasion of privacy claim because workers’ compensation claimant should reasonably expect to be investigated and the investigators merely watched and tape-recorded plaintiff when he was in public view).

The majority of employment-related invasion of privacy claims allege the intrusion upon the plaintiff’s physical solicitude or seclusion (although *Ex parte Birmingham News, Inc.*, 778 So. 2d 814 (Ala. 2000), addressed the public dissemination of private information violating ordinary decency). In *Phillips v. Smalley Maintenance Services, Inc.*, 435 So. 2d 705 (Ala. 1983), the Alabama Supreme Court adopted the RESTATEMENT (SECOND) OF TORTS (1977) definition of the wrongful intrusion branch of the invasion of privacy tort as found in § 652(B).

Two representative invasion of privacy cases in the employment context are summarized below:

In *Portera v. Winn Dixie, Inc.*, 996 F.Supp. 1418 (M.D. Ala. 1998), plaintiff claimed that her supervisor hugged her, made comments to her that she found offensive, and touched her inappropriately. The court held that the combination of incidents did not rise to a level constituting invasion of privacy. The court stated that “evidence of an invasion of privacy must be a course of conduct which rises to a level that has been previously held to constitute an invasion of privacy.” *Id.* at 1435. Specifically, the court cited *Busby v. Truswal Systems Corp.*, 551 So. 2d 322 (Ala. 1989) (asserting invasion of privacy claim based on seventeen listed instances of lewd comments, gestures, and touching), and *Phillips*, 435 So. 2d 705 (Ala. 1983) (addressing an invasion of privacy issue after an employer questioned a female employee about her sexual experiences and made coercive sexual advances toward her behind “locked doors” several times a week), as the benchmark for behavior constituting an invasion of privacy.

*Ex parte Birmingham News, Inc.*, 778 So. 2d 814 (Ala. 2000), provides guidance for determining when an intrusion of privacy encompassing the giving of publicity to private information rises to the level of intrusion. The plaintiff employee asserted an invasion of privacy claim against her employer for giving publicity to private information. Plaintiff reported to her supervisor that a co-employee hugged and kissed her without invitation. Plaintiff's supervisor responded, "I don't want to get too close because I don't want a sexual harassment suit against me." *Id.* at 815. Plaintiff's mother claimed that she overheard the supervisor tell another woman something similar with regard to plaintiff's report. The Alabama Supreme Court held that there was no evidence that the employer gave publicity to plaintiff's private life because the supervisor's "alleged communication about the incident was to only one person, or at most, to a small group of people." *Id.* at 819. The court adopted the requirements for a prima facie case of giving publicity to private information set forth in § 652(D) of RESTATEMENT (SECOND) OF TORTS:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that:

1. would be highly offensive to a reasonable person, and
2. is not of legitimate concern to the public.

*Ex parte Birmingham News, Inc.*, 778 So. 2d. at 818, quoting RESTATEMENT (SECOND) OF TORTS § 652(D) (1977).

Alabama law does provide for the publication of fair and impartial reports of certain criminal and civil proceedings, unless the publication was with actual malice, unless the publisher has refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable explanation or contradiction by the plaintiff, or unless the publisher has refused to publish a subsequent determination of such criminal or civil proceeding. ALA. CODE § 13A-11-161.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Alabama Code § 31-13-25 established E-Verify through the Alabama Department of Homeland Security for any business or employer with 25 or fewer employees to verify an employee's employment eligibility. Before receiving any contract, grant, or incentive by the state, or any state-funded entity, a business or employer must provide proof to the state, political subdivision thereof, or state-funded entity that the business or employer is enrolled in, and is participating in, the E-Verify program. *Id.* A business entity or employer that is enrolled in the E-Verify program and that verifies the employment eligibility of an employee in good faith, and acts in conformity with all applicable federal statutes and regulations, is immune from liability

under Alabama law for any action by an employee for wrongful discharge or retaliation based on a notification from the E-Verify program that the employee is an unauthorized alien. *Id.*

## 2. Background Checks

Alabama requires criminal background checks on employees or volunteers at child care facilities, adult care facilities, and child-placement agencies licensed by the Alabama Department of Human Resources. ALA. CODE § 38-13-3. Additionally, criminal background checks are performed on employees of the Department of Human Resources for anyone in a position which requires unsupervised access to children, the elderly, or individuals with disabilities as one of the essential functions of the job; those under contract with the Department are likewise subject to criminal background checks. *Id.* Criminal background checks received by the Department are confidential, except for certain permitted releases, and are not available for public inspection. ALA. CODE § 38-13-8.

### C. Other Specific Issues

#### 1. Workplace Searches

The Alabama Code does not provide any specific protections against invasion of privacy in the workplace. However, the following Alabama Code provisions provide privacy protections within and outside of the workplace:

- (a) ALA. CODE § 13A-11-31 protects individuals from the intentional use of any device to eavesdrop.
- (b) ALA. CODE § 13A-11-32 makes it a crime to engage in surveillance when trespassing on private property.
- (c) ALA. CODE § 13A-11-33 states that “[a] person commits the crime of installing an eavesdropping device if he intentionally installs or places a device in a private place with knowledge it is to be used for eavesdropping and without permission of the owner and any lessee or tenant or guest for hire of the private place.”
- (d) One is guilty of criminal possession of an eavesdropping device pursuant to ALA. CODE § 13A-11-34 if he develops or otherwise transports a device often used for eavesdropping with the intention to use that device to eavesdrop or with knowledge that another person intends to do the same.
- (e) In accordance with ALA. CODE § 13A-11-35, one who knowingly or recklessly uses or divulges illegally obtained information (*i.e.*, information gathered through criminal eavesdropping or surveillance efforts) is guilty of divulging illegally-obtained information.

## 2. Electronic Monitoring

*See* discussion under “Workplace Searches” above.

## 3. Social Media

No case law or statutes were found involving the issue of social media and privacy related to employers or employees.

## 4. Taping of Employees

*See* discussion under “Workplace Searches” above.

## 5. Release of Personal Information on Employees

Statutory law in Alabama requires that certain types of employee information—for certain types of employees—remain confidential. For example, results of substance abuse testing programs in the workplace are confidential communications under Alabama law, except that such results and information may be used or produced in civil or administrative proceedings, but not in criminal proceedings. ALA. CODE § 25-5-339. Reports and information from an employer or employee to each other, to the Alabama Director of Industrial Relations, or to any board under the state’s workers’ compensation ombudsman program are confidential (except to the extent necessary for the presentation of the contest of a claim), privileged, and not open to public inspection. ALA. CODE § 25-5-294. State departments, licensing and regulatory boards, agencies, and commissions are prohibited from revealing identifying information (except a person’s name) of state employees on documents available for public inspection absent express consent. ALA. CODE § 41-13-7. Also, as noted above, criminal background check results required by the Alabama Department of Human Resources are confidential, except for certain permitted releases, and are not available for public inspection. ALA. CODE § 25-5-294.

## 6. Medical Information

Under Alabama Code Section 25-5-77(b), physicians (including medical doctors, surgeons, and chiropractors) of an injured employee, “shall, upon written request of the injured employee or his or her employer and without consent of or notice to the employee or employer not making the request, furnish the injured employee or his or her employer a written statement of his or her professional opinion as to the extent of the injury and disability.”

# **IX. WORKPLACE SAFETY**

## A. Negligent Hiring

In Alabama, a claim of negligent hiring is often made along with a claim for negligent

supervision and/or retention. The Alabama Supreme Court in *Ledbetter v. United American Insurance Co.*, 624 So. 2d 1371 (Ala.1993), held that in order for an employer to be liable for negligent supervision, the plaintiff "must show or demonstrate that [the employer] had notice or knowledge (actual or presumed) of [the employee]'s alleged incompetency for [the employer] to be held responsible; demonstrating liability on [the employer]'s part requires affirmative proof that [the employee]'s alleged incompetence was actually *known to* [the employer] or was discoverable by [the employer] if it had exercised care and proper diligence." *Id.* at 1373 (citation and quotation marks omitted); *see also Beard v. Mobile Press Register, Inc.*, 908 So. 2d 932 (Ala. Civ. App. 2004) (noting that claim of negligent hiring or supervision against the employer where employee was killed by a co-employee is barred by Alabama's Workers' Compensation Act's exclusivity provisions).

In *Stevenson v. Precision Standard, Inc.*, 762 So. 2d 820 (Ala. 1999), the Alabama Supreme Court held that a jury verdict against an employer based on negligent training and supervision of supervisor who allegedly sexually harassed a fellow employee could not stand where the jury also exonerated the supervisor. In essence, the employer could not be held liable for conduct that, according to the jury, did not occur. Thus, "implicit in the tort of negligent hiring, retention, training, and supervision is the concept that, as a consequence of the employee's incompetence, the employee committed some sort of act, wrongdoing, or tort that *caused* the plaintiff's injury." *Jones Express, Inc. v. Jackson*, 86 So. 3d 298 (Ala. 2010) (holding jury's finding that truck driver was not negligent was inconsistent with finding that company negligently hired truck driver) (citation omitted).

#### B. Negligent Supervision/Retention

*See* discussion under Negligent Hiring above.

#### C. Interplay with Worker's Comp. Bar

Under Alabama law, if an employee is injured on the job by another employee, the workers' compensation act is typically the exclusive remedy against the employer. In *Beard v. Mobile Register*, 908 So. 2d 932 (Ala. 2004), an employee was fatally shot by a coworker. Workers' compensation law was the exclusive remedy against the employer, as the death resulted from an "accident" as defined in the act—"an unexpected or unforeseen event, happening suddenly and violently, with or without human fault." *Id.* at 936. Alleging intentional or willful conduct could not surmount the act's exclusivity provisions. *Id.* Even the "employer's actual or imputed knowledge of [an employee's] violent propensities is immaterial to whether [injury or death] resulted from an 'accident' under the Act so as to render the Act's remedies exclusive as to the employer. What *is* material is whether *the decedent* [or injured party] intended or expected to be injured [by a shot from [the coworker's] pistol]." *Id.* at 937. Without such evidence, or without evidence that the employer intended an employee to be injured, neither an employee nor his or her successor-in-interest can seek a remedy outside the workers' compensation act. *Id.*

If, however, an injury at work occurs because of the acts of a third party for personal reasons not related to the employee's employment, the injury is outside of workers' compensation. As the Alabama Supreme Court stated in *Ex parte N.J.J.*, 9 So. 3d 455, 457 (Ala. 2008):

The Alabama Workers' Compensation Act, § 25-5-1 et seq., Ala.Code 1975, is intended to make workers' compensation the exclusive remedy for most job-related injuries. The Act excludes from its provisions an injury caused by the act of a third party who intends to injure the employee because of reasons personal to the employee and not directed against him or her as an employee or because of his or her employment or where the attack had no relationship to the employment. § 25-5-1(9), Ala.Code 1975; see also *Jacobs v. Bowden Elec. Co.*, 601 So.2d 1021 (Ala.Civ.App.1992). In other words, an employee's injury caused by the willful act of a third person arises out [of] the employment and is compensable under the Workers' Compensation Act only if the willful act was directed against the employee because of his or her employment, and this requirement is met if there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.

Additionally, under Alabama Code § 25-5-11, when a workers' compensation compensable injury or death is caused under circumstances also creating liability for damages from another party other than the employer, such as a co-worker, a claim may be brought against the other party while a workers' compensation claim is pursued against the employer. "Willful" conduct, which includes tampering with safety devices with knowledge that injury or death would likely or probably result, intoxication which leads to the wrongful and proximate cause of injury or death to another employee, and the violation of a specific written safety rule after written notice to the violating employee by another employee, all may give rise to a cause of action by the employee. *Id.*

#### D. Firearms in the Workplace

Employers in Alabama may typically restrict or prohibit employees from carrying firearms while on the employer's property or while engaged in the duties of the person's employment. ALA. CODE § 13A-11-90(a). Under recent legislation, however, employees in Alabama are permitted to transport and store lawfully possessed firearms or ammunition in the employees' privately owned vehicles while parked or operated in a public or private parking lot, subject to certain criteria. ALA. CODE § 13A-11-90(b). Specifically, the employee must have either a valid concealed weapon permit or has a legal firearm used for hunting, other than a pistol. ALA. CODE § 13A-11-90(b). If the weapon is a hunting firearm, additional criteria must be met under the statute:

- The employee has a valid Alabama hunting license;
- The weapon is unloaded;
- It is during hunting season in Alabama;
- The employee has not been convicted of a violent crime (as defined in

- pertinent statutes);
- “The employee does not meet any of the factors set forth in Section 13A-11-75(a)(1)a.1-8” [regarding involuntary treatment, etc., for mental illness]; and
  - The employee has no documented incidents of workplace threats or acts of physical injury.

The firearm must be kept from ordinary observation within the vehicle and in a locked area unless the employee is with the vehicle. ALA. CODE § 13A-11-90(b)(3).

An employer may, if he or she believes an employee presents a risk of harm to himself or herself or to others, ask if an employee has a firearm in his or her vehicle, and, if so, make “any inquiry necessary to establish that the employee is in compliance with subsection (b)[above].” ALA. CODE § 13A-11-90(c). If the employee is not in compliance, the employer may take adverse action, but may not otherwise take adverse action simply because of a compliant firearm in the vehicle. ALA. CODE § 13A-11-90(c) and (f). Employees can recover for any adverse employment action against them if they have complied with the statute’s requirements. ALA. CODE § 13A-11-90(g). Employers may also, based upon information and belief that there is credible evidence of a prohibited or stolen firearm, or a threat by an employee to harm himself or herself or others, report the complaint or threat to law enforcement. ALA. CODE § 13A-11-90(e). The transportation, carrying, storing, or possession of the firearm and ammunition must still comply with federal law. ALA. CODE § 13A-11-90(j).

The presence of a firearm or ammunition on the employer’s property does not by itself constitute a failure to provide a safe workplace, and

an employer and the owner and/or lawful possessor of the property on which the employer is situated shall be absolutely immune from any claim, cause of action or lawsuit that may be brought by any person seeking any form of damages that are alleged to arise, directly or indirectly, as a result of any firearm brought onto the property of the employer, owner, or lawful possessor by an employee, including a firearm that is transported in an employee’s privately owned motor vehicle.

ALA. CODE § 13A-11-91(a) and (b). Additionally, public or private employers have no duty to patrol, inspect, or secure parking lots or employees’ privately owned vehicles, or to investigate, confirm, or determine an employee’s compliance with the law. ALA. CODE § 13A-11-91(c).

Employers are, of course, still liable for their own affirmative wrongful acts, and the statute does not expand or limit the rights of an employer or employee under workers’ compensation law. ALA. CODE § 13A-11-91(d) and (f).

#### E. Use of Mobile Devices

No case law or statutes were found involving the use of mobile devices in the course of employment.

## **X. TORT LIABILITIES**

### **A. Respondeat Superior Liability**

#### **1. Indirect Liability**

An employer can be held indirectly liable for the acts of its employees where the employees' acts are done in the line and scope of employment or in furtherance of the employer's interest. *Ex parte Henry*, 770 So. 2d 76 (Ala. 2000). In determining if an employee's actions fall within the line and scope of his employment, the Alabama Supreme Court states as follows:

[I]f an employee is engaged to perform a certain service, *whatever he does to that end or in furtherance of the employment*, is deemed to be an act within the line and scope of the employment. . . . The conduct of the employee . . . *must not* be impelled by motives that are wholly personal, or *to gratify his own feelings* or resentment, but should be in protection of the business of his employment.

*Doe v. Swift*, 570 So. 2d 1209, 1211 (Ala. 1990) (emphasis in original). Most cases alleging intrusive invasion of privacy will fall outside of the "line and scope" definition.

#### **2. Direct Liability**

Conversely, direct liability of an employer is not predicated on any "line and scope" analysis. Instead, direct liability exists where the employer "(1) had actual knowledge of the tortious conduct of the offending employee and that the tortious conduct was directed at and visited upon the complaining employee, (2) that based upon this knowledge, the employer knew or should have known that the conduct constituted sexual harassment and/or a continuing tort and (3) that the employer failed to take 'adequate' steps to remedy the situation." *Stevenson v. Precision Standard, Inc.*, 762 So. 2d 820, 824 (Ala. 1999) (citation omitted).

### **B. Tortious Interference with Business/Contractual Relations**

To demonstrate a tortious interference claim, "the plaintiff must first demonstrate the *existence of a contract or a business relationship* between the plaintiff and a third party." *Beachcroft Props., L.L.P. v. City of Alabaster*, 901 So. 2d 703, 707 (Ala. 2004) (emphasis in original; citation omitted); *accord Waddell & Reed, Inc. v. United Investors Life Ins. Co.*, 875 So. 2d 1143, 1153 (Ala. 2003). To state a claim for intentional-interference-with-contractual-or-business-relations, the plaintiff must show that the defendant was a "stranger" to the subject contract. *Walter Energy, Inc. v. Audley Capital Advisors LLP*, 176 So. 3d 821, 828 (Ala. 2015). While "a defendant need not be a signatory to the subject contract or one of the primary actors in the business relationship to effectively be a party to it," a defendant is considered "a party in interest to a relationship if the defendant has any beneficial or economic interest in, or control

over, that relationship.” *Id.* quoting (*Waddell & Reed*, 875 So. 2d at 1154). Additionally, the plaintiff must show the defendant's knowledge of the contract or business relation, intentional interference by the defendant with the contract or business relation, the absence of justification for the defendant's interference, and damage to the plaintiff as a result of the interference. *Tom's Foods, Inc. v. Carn*, 896 So. 2d 443, 453 (Ala. 2004) (citation omitted).

## **XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS**

### **A. General Rule**

Alabama disfavors contracts restraining trade and employment. Alabama Code § 8-1-190 declares non-competition covenants void except for the following statutory exceptions allowing contracts that preserve a protectable interest:

- (1) A contract between two or more persons or businesses or a person and a business limiting their ability to hire or employ the agent, servant, or employees of a party to the contract where the agent, servant, or employee holds a position uniquely essential to the management, organization, or service of the business.
- (2) An agreement between two or more persons or businesses or a person and a business to limit commercial dealings to each other.
- (3) One who sells the good will of a business may agree with the buyer to refrain from carrying on or engaging in a similar business and from soliciting customers of such business within a specified geographic area so long as the buyer, or any entity deriving title to the good will from that business, carries on a like business therein, subject to reasonable time and place restraints. Restraints of one year or less are presumed to be reasonable.
- (4) An agent, servant, or employee of a commercial entity may agree with such entity to refrain from carrying on or engaging in a similar business within a specified geographic area so long as the commercial entity carries on a like business therein, subject to reasonable restraints of time and place. Restraints of two years or less are presumed to be reasonable.
- (5) An agent, servant, or employee of a commercial entity may agree with such entity to refrain from soliciting current customers, so long as the commercial entity carries on a like business, subject to reasonable time restraints. Restraints of 18 months or for as long as post-separation consideration is paid for such agreement, whichever is greater, are presumed to be reasonable.
- (6) Upon or in anticipation of a dissolution of a commercial entity, partners, owners, or members, or any combination thereof, may agree that none of

them will carry on a similar commercial activity in the geographic area where the commercial activity has been transacted.

ALA. CODE § 8-1-190(b). The Alabama Supreme Court “has stated on numerous occasions that a ‘professional’ cannot fall within these statutory exceptions.” *Friddle v. Raymond*, 575 So. 2d 1038, 1040 (Ala. 1991) (citations omitted).

B. Blue Penciling

In *Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston*, 678 So. 2d 765 (Ala. 1996), the Alabama Supreme Court held that a promise not to compete does not render the entire contract void. Instead, the contract provision is only void to the extent prohibited by § 8-1-190 of the Alabama Code.

C. Confidentiality Agreements

Confidentiality agreements, even if they include non-trade secret information to be kept confidential, are enforceable generally. *Jones v. Hamilton*, 53 So. 3d 134, (Ala. Civ. App. 2010) (finding former employee breached confidentiality agreement by assisting in the removal of confidential documents but finding insufficient evidence that former employee made disparaging remarks in violation of the confidentiality agreement); *see also* discussion under “Trade Secrets Statute” below.

D. Trade Secrets Statute

The Alabama Trade Secrets Act is found at ALA. CODE §§ 8-27-1 *et seq.* The statute draws heavily from the Restatement and the Uniform Trade Secrets Act. *IMED Corp. v. Sys. Eng’g Ass’n Corp.*, 602 So. 2d 344 (Ala. 1992). However, the Alabama Supreme Court has held that the statute differs from the Restatement §§ 757 and 758B, which only require knowledge at the point where information is received, as opposed to the Alabama statute which extends the knowledge requirement to the time the information is passed along by the accused party. *Id.* at 348-49.

A “trade secret” is defined as information that:

- a. Is used or intended for use in a trade or business;
- b. Is included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique, or process;
- c. Is not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret;
- d. Cannot be readily ascertained or derived from publicly available information;
- e. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and
- f. Has significant economic value.

ALA. CODE § 8-27-2(1).

A person who discloses or uses a trade secret of another, without a privilege to do so, is liable for misappropriation if:

- (1) the person discovered the trade secret by improper means;
- (2) the person's disclosure or use constitutes a breach of confidence reposed in that person by the other;
- (3) the person learned the trade secret from a third person, and knew or should have known that (i) the information was a trade secret and (ii) that the trade secret had been appropriated under circumstances which violate the provisions of (1) or (2) above; or
- (4) the person learned the information and knew or should have known that it was a trade secret and that its disclosure was made to that person by mistake.

ALA. CODE § 8-27-3.

The Alabama Trade Secrets Act provides various remedies. First, the courts have broad discretion in choosing appropriate equitable relief including, but not limited to, injunctive relief. ALA. CODE § 8-27-4(1) (a). Secondly, § 8-27-4(1)(b) allows for an accounting of profits. Third, actual damages are recoverable. ALA. CODE § 8-27-4(1)(c). Fourth, § 8-27-4(2) calls for attorneys' fees to be awarded to a prevailing party where a misappropriation claim or motion to terminate an injunction is made or resisted in bad faith, or where willful and malicious misappropriation exists. Fifth, exemplary damages may be awarded in cases of willful and malicious misappropriation, but are limited to an amount equal to the actual award but not less than \$10,000. ALA. CODE § 8-27-4(3). The Act also provides for criminal penalties for the misappropriation of trade secrets and for intentionally remunerating or recruiting a third person for actual or threatened misappropriation of a trade secret. ALA. CODE § 8-27-4(b).

The procedures in Rules 65 and 65.1 of the Alabama Rules of Civil Procedure apply to a wrongful injunction obtained under the Alabama Trade Secrets Act. *Ex parte Waterjet Sys., Inc.*, 758 So. 2d 505 (Ala. 1999).

The Alabama Trade Secrets Act is subject to a two-year statute of limitations which begins to run when the misappropriation is discovered or should have been discovered through reasonable diligence. Ala. Code § 8-27-5.

#### E. Fiduciary Duty and Other Considerations

Alabama courts have recognized a fiduciary duty for employees. "A duty to act in good faith flows from an agent to his principal." *Systrends, Inc. v Group 8760, LLC*, 959 So. 2d 1052, 1078 (Ala. 2006) (finding no error in trial court's denial of motion for a judgment as a matter of

law based on an argument that, as an employee, no fiduciary duty was owed). As the Alabama Supreme Court held in *Allied Supply Co., Inc. v. Brown*, 585 So. 2d 33, 37 (Ala. 1991):

It is an agent's duty to act, in all circumstances, with due regard for the interests of his principal, and to act with the utmost good faith and loyalty. *Williams v. Williams*, 497 So.2d 481 (Ala.1986). Implicit in this duty is an obligation not to subvert the principal's business by luring away customers or employees of the principal, or to otherwise act in any manner adverse to the principal's interest. See *Naviera Despina, Inc. v. Cooper Shipping Co.*, 676 F. Supp. 1134 (S.D.Ala.1987).

## **XII. DRUG TESTING LAWS**

### **A. Public Employers**

With respect to public employers, Alabama follows the “reasonable suspicion” standard for determining whether employee drug testing is permissible. *State Pers. Bd. v. State Dep't of Mental Health and Mental Retardation*, 694 So. 2d 1367, 1374-75 (Ala. Civ. App. 1996). The employer must have more than a “mere ‘hunch,’” but “certainty is not required.” *Id.* at 1375. Reasonable suspicion can be based wholly or partly on hearsay. *Id.*

In *State Personnel. Bd.*, the Alabama Supreme Court determined that “reasonable suspicion” existed where the defendant presented evidence that the plaintiff-employee had a prior drug offense arrest, recently had been released from a drug rehabilitation center, had been suspected by the employer of drug dealings on several previous occasions, and had been identified by eyewitnesses as a drug dealer. 694 So. 2d at 1374-75.

Employees may be terminated based on a positive drug test. However, there is no absolute rule regarding when an employee will be terminated because of a positive drug test. The Alabama Supreme Court considers the evidence on a case-by-case basis to determine the sufficiency of the grounds for discharge. Some opinions suggest that the court will opt for less harsh punishment whenever possible.

For example, in *Jefferson County Bd. of Educ. v. Moore*, 706 So. 2d 1147 (Ala. 1997), the school board terminated two of its employees, a truck driver and a painter, for violating the school board's drug and alcohol policy. After an employee review panel reinstated the employees, the school board appealed the reinstatement. The Alabama Supreme Court upheld the employee review panel’s decision, holding that the employees should not have been terminated, but instead, should have been reinstated after successfully completing a drug rehabilitation program. The court relied on “substantial evidence” that the employees had excellent employment records on which the panel could have relied to determine that termination was inappropriate. *Id.* at 1150. Additionally, in *Wood v. State Pers. Bd.*, 705 So. 2d 413 (Ala. Civ. App. 1997), the Alabama Court of Civil Appeals reversed an employer's termination of an employee who had tested positively for drugs. An employee of the Department of Corrections was fired after testing positive for marijuana during a random drug screen. The employee contended that he unintentionally ingested the drugs. Based on this defense, the court reversed the trial court and

remanded the case to the Personnel Board that previously terminated plaintiff with instructions to determine the weight and credibility of the employee's defense.

Alternatively, however, in *Logan v. Pers. Bd. of Jefferson County*, 657 So. 2d 1125 (Ala. Civ. App. 1995), the Alabama Court of Civil Appeals affirmed a personnel board's decision to discharge a county employee who tested positive for illegal drugs. The employee contended that the test results were invalid because the courier who transported the employee's urine sample was not identified and a medical review officer did not review the findings. The court found the employee's arguments to be without merit and affirmed the termination. *See also Wood v. State Pers. Bd.*, 705 So. 2d 413, 418 (Ala. Civ. App. 1997) (noting "[i]n a civil case involving employee drug testing, 'twenty-four hour vigilance of the evidence is not required.'" (quoting *George v. Dep't of Fire*, 637 So. 2d 1097, 1107 (La. App. 1994))).

## B. Private Employers

Alabama's Drug-Free Workplace Program Act appears in ALA. CODE §§ 25-5-330 *et seq.* The Act applies to all employers who are subject to the Alabama Workers' Compensation Law, except for individual self-insurers and members of group self-insurance funds. ALA. CODE § 25-5-331(7). Employers who implement drug-free workplace programs in accordance with the Act qualify for a five-percent premium discount under the employers' workers' compensation insurance policies. ALA. CODE § 25-3-332. However, Alabama law does not *require* employers to implement drug-free workplace programs. ALA. CODE § 25-5-334(c).

To obtain the five-percent workers' compensation insurance premium discount, a drug-free workplace program must contain all of the following elements:

- (1) a written policy statement that the work environment is drug free as provided in ALA. CODE § 25-5-334;
- (2) substance abuse testing as provided in ALA. CODE § 25-5-335;
- (3) resources of employee assistance providers maintained in accordance with ALA. CODE § 25-5-336;
- (4) employee education on drugs and alcohol as provided in Ala. Code § 25-5-337(a); and
- (5) supervisor training on substance abuse in accordance with Ala. Code § 25-5-337(b).

ALA. CODE § 25-5-333(a). Additionally, the drug-free workplace program must comply with the confidentiality standards set forth in ALA. CODE § 25-5-339.

Before testing, employers must give all employees and job applicants a one-time notice of testing and a written policy statement which contains all of the following:

- (1) A general statement of the employer's substance abuse policy that identifies: (a) the types of testing the employer may require; and (b) the actions the employer may take against an employee or job applicant on the basis of a positive confirmed

test result.

- (2) A statement advising employees or job applicants of the existence of the Alabama Drug-Free Workplace Program Act.
- (3) A general statement regarding confidentiality.
- (4) The consequences of refusing to submit to a drug test.
- (5) A statement informing employees of either an employee assistance program or a resource file of other assistance programs, when applicable.
- (6) A statement informing employees or applicants of the right to contest or explain a positive confirmed test result within five working days after written notification of the positive test result.
- (7) A statement informing employees of the provisions of the federal Drug-Free Workplace Act, if applicable.

ALA. CODE § 25-5-334 (a)(1)-(7).

Additionally, an employer which did not have a substance abuse program in effect on July 1, 1996, shall ensure that at least 60 days elapse between a general one-time notice to all employees that a substance abuse testing program is being implemented and the beginning of the actual testing. ALA. CODE § 25-5-334(b). Employers with substance abuse testing programs in effect prior to July 1, 1996, are not required to provide the 60-day notice period. *Id.*

Employers must also post a notice of the substance abuse testing on vacancy announcements for those positions for which testing is required and in an appropriate and conspicuous location on the employer's premises. ALA. CODE § 25-5-334(c).

To qualify for the workers' compensation premium discount, employers are required to conduct the following types of tests:

- An employer shall require job applicants to submit to a substance abuse test after extending an offer of employment. Limited testing of job applicants by an employer may qualify if the testing is conducted on the basis of reasonable classifications of job positions.
- An employer shall require an employee to submit to reasonable suspicion testing.
- An employer shall require an employee to submit to a substance abuse test if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination that is part of the employer's established policy or that is scheduled routinely for all members of an employment classification or group.

- Employers shall require a follow-up test for employees that have previously tested positive and have since entered an employee assistance or rehabilitation program. Employees that voluntarily entered the program, however, are not required to take a follow-up test. Follow-up testing must be performed at least once a year for a two-year period after completion of the program, with no advance notice to the employee.
- If the employee has caused or contributed to an on-the-job injury which resulted in a loss of work time, the employer shall require the employee to submit to a substance abuse testing.

ALA. CODE § 25-5-335.

In addition to these required forms of testing, Section 25-5-335(b) provides: “Nothing in this article shall prohibit a private employer from conducting random testing or other lawful testing of employees.” ALA. CODE § 25-5-335(b).

Additionally, the Alabama Workers’ Compensation Act provides that “no compensation shall be allowed for an injury or death caused by . . . an accident due to the injured employee being intoxicated from the use of alcohol or being impaired by illegal drugs.” Ala. Code § 25-5-51. However, the courts generally place the burden on the employer to establish that the employee was drug-induced at the time of his/her work-related injury and that this drug-inducement proximately caused the injury for which recovery is sought. *Ross v. Ellard Constr. Co.*, 686 So. 2d 1190 (Ala. Civ. App. 1996). Proposed legislation would change this burden, requiring the employee to show that the injury was not a result of the impairment.

In *Collins Signs, Inc. v. Smith*, 833 So. 2d 636 (Ala. Civ. App. 2001), an employer appealed a judgment for temporary total disability benefits entered in favor of its employee based on the trial court’s finding that the marijuana in the employee’s system was a contributing but not the proximate cause of his injuries. Rather, the trial court found that the sign which fell onto the employee and the employee’s improper handling of that sign were the proximate cause of the injury. On appeal, the Alabama Court of Civil Appeals examined and explained the trial court’s misapplication of Alabama’s law of proximate causation and noted that:

Indeed, it is clear from reviewing the record and the final judgment that had Smith *not* been impaired by illegal-drug use, he probably would not have been injured. Given the evidence that Smith disobeyed shop policy regarding moving large signs at the same time his drug test revealed he had a level over 30 times the threshold amount of marijuana required for a positive reading, it seems reasonably certain that the accident was proximately caused by Smith's impairment.

*Id.* at 640 (emphasis in original). Based on this conclusion, the court reversed and remanded the case.

Alternatively, in *Flowers Specialty Foods v. Glenn*, 718 So. 2d 1137 (Ala. Civ. App. 1998), the plaintiff-employee sought workers' compensation benefits when he injured his fingers by catching them in a chain sprocket. Although the plaintiff tested positive for marijuana subsequent the accident, the Alabama Court of Civil Appeals affirmed the trial court's compensation award because the employer failed to demonstrate that the plaintiff's drug impairment proximately caused the accident leading to the injury. The plaintiff's supervisor testified that the plaintiff seemed fine, and other evidence showed that the plaintiff was performing his job properly and was not acting "erratically or lethargically" at the time of the accident. *Id.* at 1138.

### **XIII. STATE ANTI-DISCRIMINATION STATUTE(S)**

#### **A. Employers/Employees Covered**

Alabama has enacted the Age Discrimination in Employment Act of 1997 ("AlaADEA"). The AlaADEA is codified in the Alabama Code §§ 25-1-20 *et. seq.* (1975). The AlaADEA applies to any person employing 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. ALA. CODE § 25-1-20(2). It also applies to labor unions, employment agencies, and associations. ALA. CODE § 25-1-20(3) and (4). Employees covered under the AlaADEA include workers 40 years of age and over. ALA. CODE § 25-1-21. However, the AlaADEA does not define "employee" beyond prescribing an age beyond which a worker may sue.

Because the Alabama Act is modeled on the federal ADEA and because the federal ADEA has been the subject of substantial litigation, Alabama courts have some guidance in interpreting the law. However, areas of the Act that are not in line with the federal ADEA, such as the lack of an administrative filing requirement and the lack of criteria for damage awards, may be problematic for the courts.

#### **B. Types of Conduct Prohibited**

The AlaADEA provides that employers must not discriminate in hiring, job retention, and training practices, including the following:

- (i) to fail or to refuse to hire or discharge an individual, or to otherwise discriminate against an individual covered under the Act, with regard to compensation, terms, or privileges of employment. ALA. CODE § 25-1-22(1); and
- (ii) to limit, segregate, or classify employees or applicants for employment on the basis of age that in any way deprives the individual of employment opportunities. ALA. CODE § 25-1-22(2).
- (iii) Employers under the AlaADEA are prohibited from discriminating against employees covered by the AlaADEA who seek to obtain a license or certificate or to take an exam in preparation for employment. ALA. CODE § 25-1-26.

- (iv) The AlaADEA also prohibits employers from printing, publishing, or advertising material related to employment that indicates a preference, limitation, or specification regarding age. ALA. CODE § 25-1-27.
- (v) Finally, the AlaADEA makes it an unlawful practice for an employer to discriminate against an individual who has made a claim on the basis of the AlaADEA or who has been involved in any proceeding related to the Act. ALA. CODE § 25-1-28.

### C. Administrative Requirements

There is no administrative filing requirement for AlaADEA claims. In accordance with the Alabama Supreme Court's opinion in *Byrd v. Dillard's, Inc.*, 892 So. 2d 342, 346 (Ala. 2004), a plaintiff's AlaADEA claim will be timely if it is filed either (1) within 180 days of the date of the alleged discrimination or (2) within 90 days of the date the plaintiff is issued a right-to-sue letter, if he/she files a federal administrative claim.

### D. Remedies Available

Under the AlaADEA, a claimant may proceed with a federal action or "bring a civil action in the circuit court of the county in which the person was or is employed for such legal or equitable relief as will effectuate the purposes of this article." ALA. CODE § 25-1-29. Section 25-1-29 further provides that:

- (a) Federal actions supersede state actions;
- (b) Plaintiffs are entitled to only one recovery of damages;
- (c) Plaintiffs are entitled to a jury trial; and,
- (d) Any damages assessed in one court will offset any entitlement to damages in any other state or federal court.

Additionally, the AlaADEA is modeled after the federal age discrimination statute, adopting all remedies, defenses, and statutes of limitations provided thereunder.

### E. Additional Statutes

In addition to the AlaADEA, Alabama has several other statutes designed to prevent discrimination in the workplace. Minimal case law exists interpreting these statutes, and they are identified below.

ALA. CODE § 21-7-8 (1975) addresses the rights of disabled persons to be employed by the state, political arms of the state, public schools, and any other employer dependent on public

funding. The Alabama courts have not determined whether § 21-7-8 creates a private cause of action. *Ethridge v. State of Ala.*, 847 F.Supp. 903, 907-08 (M.D. Ala. 1993); *see also Gore v. GTE S., Inc.*, 917 F.Supp. 1564, 1574 (M.D. Ala. 1996) (ruling without deciding whether § 21-7-8 afforded the plaintiff a private cause of action); *Mobile Fire Fighters Ass'n. v. Pers. Bd. of Mobile Co.*, 720 So. 2d 932, 939 (Ala. 1998) (“Assuming without deciding that [§] 21-7-8 affords . . . a private cause of action. . . .”); *Averyt v. Doyle*, 456 So. 2d 1096, 1098-99 (Ala. Civ. App. 1984) (holding that a city employee could not maintain action in circuit court while action was simultaneously and properly before administrative board alleging that his dismissal violated § 21-7-8 and implying without deciding that a private cause of action exists under that statute).

In Alabama, a plaintiff bringing an action under the American with Disabilities Act (“ADA”), 42 U.S.C.A. §§ 12101, *et seq.*, in an Alabama federal district court cannot simultaneously or subsequently maintain a separate action under § 21-7-8 in an Alabama state court. *Mobile Fire Fighters Ass'n v. Pers. Bd. of Mobile Co.*, 720 So. 2d 932 (Ala. Civ. App. 1998). Thus, while the case law implies that a plaintiff alleging discrimination has a private cause of action under § 21-7-8, the ruling in *Mobile Fire Fighters Association* suggests that, if the plaintiff wishes to make a claim under the ADA and § 21-7-8, he/she must bring that claim in federal district court. If he/she chooses to bring his/her claim under the state statute only, he/she is limited to recovery under § 21-7-8 only.

Another anti-discrimination statute in Alabama deals with the rights of persons seeking employment with the legislative branch of the state government. The statute provides that discrimination on the basis of sex, race, creed, or color when hiring Legislative employees is prohibited. ALA. CODE § 29-4-3 (1975).

Additionally, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act makes it a discriminatory practice for a business entity or employer to fail to hire a job applicant who is a United States citizen or an alien who is authorized to work in the United States as defined in 8 U.S.C.A. § 1324a(h)(3) or discharge an employee working in Alabama who is a United States citizen or an alien who is authorized to work in the United States as defined in 8 U.S.C. § 1324a(h)(3) while retaining or hiring an employee who the business entity or employer knows, or reasonably should have known, is an unauthorized alien. ALA. CODE § 31-13-17(a). The legislation has been controversial, and the Eleventh Circuit has found parts of it to be preempted by federal law and has enjoined those provisions. *See U.S. v. Alabama*, 691 F.3d 1269, 1290 (11th Cir. 2012).

In determining whether an employee is “an unauthorized alien,” the court may only consider the federal government’s determination, pursuant to 8 U.S.C. § 1373(c). ALA. CODE § 31-13-17(e). Under the legislation, a violation of the Beason-Hammon Act may be the basis of a civil action in Alabama state courts, and the prevailing party may be entitled to compensatory relief, court costs, and attorneys’ fees (limited to the amount the losing party paid his or her own attorneys); civil or criminal sanctions may not be assessed against the employer. ALA. CODE § 31-13-17(b) & (c). The provision allowing compensatory damages, mandatory attorneys’ fees, and court costs, however, has been held to be an imposed “sanction” that is expressly preempted by federal law. *U.S. v. Alabama*, 691 F.3d 1269, 1290 (11th Cir. 2012).

Any business entity or employer, though, that terminates an employee to comply with ALA. CODE § 31-13-15, which prohibits the knowing employment of an unauthorized alien, shall not be liable for any claims made against the business entity or employer by the terminated employee, provided that such termination is made without regard to the race, ethnicity, or national origin of the employee and that such termination is consistent with the anti-discrimination laws of this state and of the United States. ALA. CODE § 31-13-15(i).

Provisions that criminalized knowing application for work, solicitation of work, or performance of work by an unauthorized alien were also held to be preempted by federal law, as was a provision which prohibited employers from deducting as a business expense on their state taxes any compensation paid to unauthorized aliens. *U.S. v. Alabama*, 691 F.3d 1269 (11th Cir. 2012).

Also important is Alabama Code § 25-1-10 which sets out the definition of “minority” for the purposes of enacting affirmative action programs:

whenever any employer in this state sponsors or initiates a program of affirmative action designed to cure or eradicate the effects of discrimination in employment, and the intent of the program is to affect the recruitment, selection, appointment, promotion, or other personnel procedures or functions . . . , the term “minority” shall include . . . any specifically identified ethnic group or other classification . . . [and American Indians or Alaskan Natives who are citizens of the United States].

The Alabama courts have not interpreted or ruled on this provision.

#### **XIV. STATE LEAVE LAWS**

##### **A. Jury/Witness Duty**

Under Alabama law, employees, upon presenting a jury summons to their employer the next employment day after receiving it, shall be excused for jury duty. ALA. CODE § 12-16-8. Employees may not be required or requested to use vacation time, unpaid leave, or sick leave for jury duty, and full-time employees must be paid their usual compensation. *Id.* Section 12-16-8.1(b) of the Alabama Code expressly allows for a civil action for damages to be instituted by an employee who has been discharged as a result of serving on a state or federal jury. In *Norfolk S. Ry. v. Johnson*, 740 So. 2d 392 (Ala. 1999), the Alabama Supreme Court stated:

[W]e hold that to “serve” on a jury, within the meaning of that word as it is used in [Alabama Code §] 12-16-8.1, is to perform all the legal duties and responsibilities associated with a juror's participating in the jury process. Those duties would include reporting for jury service; answering voir dire questions truthfully; listening to, observing, and weighing the evidence presented at trial; observing the demeanor of the witnesses; participating in deliberations; and

ultimately rendering a verdict.

\* \* \* \*

This statute, however, in no way encompasses or protects illegal or inappropriate conduct. We cannot say that the Legislature, in enacting [Alabama Code §] 12-16-8.1, intended to protect conduct such as providing false information under oath during voir dire, receiving bribes as a juror, or assaulting another juror.

*Id.* at 397.

Additionally, note that ALA. CODE § 12-16-8.1 does not protect an employee who is summoned to testify before a grand jury. *Givens v. Heilig-Meyers Co.*, 738 So. 2d 1282, 1283 (Ala. Civ. App. 1999).

B. Voting

Alabama requires that employees be allowed up to one hour of leave to vote unless the employee's working hours commence at least two hours after the polls open or end at least one hour prior to the polls closing. Ala. Code § 17-1-5.

There is no relevant statutory or case law in Alabama.

C. Family/Medical Leave

There is no additional relevant statutory or case law in Alabama, except for public employees. Ala. Code §§ 36-26-1 *et seq.* (1975).

D. Pregnancy/Maternity/Paternity Leave

There is no additional relevant statutory or case law in Alabama, except for public employees, who may receive additional maternity leave through leave donation programs. Ala. Code §§ 36-26-1 *et seq.* (1975).

E. Day of Rest Statutes

There is no additional relevant statutory or case law in Alabama.

F. Military Leave

Alabama provides certain employment protections for Alabama's military.

Section 31-12-2 provides that "[w]hensoever any active member of the Alabama National Guard, in time of war, armed conflict, or emergency proclaimed by the Governor or by the President of the United States, shall be called or ordered to state active duty for a period of 30

consecutive days or more or federally funded duty for other than training, the provisions of the SSCRA and the Uniformed Services Employment and Reemployment Rights Act shall apply.”

Section 31-12-5 provides protection for state employees called to active duty:

In addition to any other benefits provided in this chapter, any state employee or any employee of a public educational entity in this state who is called into active service in any of the Armed Forces of the United States during the war on terrorism which commenced in September 2001, shall receive from his or her employer department or agency compensation in an amount which is equal to the difference between the lower active duty military pay and the higher public salary which he or she would have continued to receive if not called to active service. The amount of compensation required to be paid to an employee called into active service under this section shall be paid for the duration of the active military service, the length of which shall be determined by the Adjutant General of the Alabama National Guard, from the date of activation and shall be paid from funds appropriated to the employer. The provisions of this section shall be construed to provide for such payments retroactive to September 11, 2001, if applicable.

Section 31-12-6 provides protection for local government employees called to active duty.

The governing body of any local governmental entity in this state may provide for any public employee of the entity who is called into active service in the armed forces of the United States during the war on terrorism which commenced in September 2001, to receive from his or her employer compensation in an amount which is equal to the difference between the lower active duty military pay and the higher public employment salary which he or she would have received if not called to active service. The amount of compensation which may be paid under this section to a local public employee called into active service may be paid for a period as determined by the local governing body under rules and regulations for processing claims for and payments of the compensation promulgated and implemented by the local governing body.

There are also provisions for health insurance for public employees while on leave and protections regarding retirement. ALA. CODE § 31-12-7.

#### **G. Sick Leave**

Alabama does not require private employers to provide employees with sick leave or to pay an employee for sick leave accrued under an employer’s voluntary sick leave policy upon termination. An employer must comply with the terms of its own policies or employment handbooks and/or contracts with regard to whether accrued sick leave is owed when employment terminates. The accrual of sick leave and payment of accrued sick leave for public sector employees under the state merit system is governed by Ala. Code § 36-26-36.

#### **H. Domestic Violence**

Alabama does not require an employer to provide leave to victims of domestic violence.

#### **I. Other Leave Laws**

Alabama has no other laws addressing leave.

### **XV. STATE WAGE AND HOUR LAWS**

The Fair Labor Standards Act, 29 U.S.C.A. §§ 201 *et seq.* (2005), governs wage and hour law in Alabama.

#### **A. Current Minimum Wage in State**

Alabama has no state minimum wage law; the current minimum wage is \$7.25, the amount under the Fair Labor Standards Act.

#### **B. Deductions from Pay**

The Fair Labor Standards Act, 29 U.S.C.A. §§ 201 *et seq.* (2005), governs wage and hour law in Alabama.

#### **C. Overtime Rules**

The Fair Labor Standards Act, 29 U.S.C.A. §§ 201 *et seq.* (2005), governs wage and hour law in Alabama.

#### **D. Time for payment upon termination**

Alabama has no statute that applies to private sector employers. The single Alabama statute addressing payment of wages upon termination applies only to public service corporations involved in transportation that employ 50 or more persons. *See* Ala. Code § 37-8-270. This section provides that wages must be paid within 15 days.

#### **E. Breaks and Meal Periods**

Alabama does not require rest or meal periods, except for minors. The scheduling of rest or meal periods related to non-minor employees is left to the discretion of the employer, and compensation for any such periods is governed by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Minors who are 14 or 15 years of age are not permitted to work more than 5 continuous hours without a meal or rest period lasting at least 30 minutes. Ala. Code § 25-8-38.

### **XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES**

#### **A. Smoking in Workplace**

Employers having an enclosed place of employment may adopt a written smoking policy which shall contain an employee's right to make his working area nonsmoking, with signs provided by the employer indicating the same. ALA. CODE § 22-15A-5. Employers have the right to designate any place of employment as a nonsmoking area, though a common area can be designated as a smoking area if the majority of workers who work in the area—along with the employer—agree to such a designation. *Id.* Employers have a duty to communicate the smoking policy to employees to all employees within three weeks of its adoption, as well as to provide a written copy of the policy to existing or prospective employees upon request. *Id.*

#### B. Health Benefit Mandates for Employers

Section 36-29-1, *et seq.*, of the Alabama Code governs state employees' health insurance plan.

#### C. Immigration Laws

Alabama's state legislature has enacted sweeping legislation regarding immigration which contains significant employment-related provisions. The statute, called the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, discussed above, can be found at Alabama Code § 31-13-1 *et seq.* The legislation is not without controversy, and parts of the Act have been held by the Eleventh Circuit to be preempted by federal law. *See U.S. v. Alabama*, 691 F.3d 1269, 1290 (11th Cir. 2012)

The Beason-Hammon Act makes it illegal for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state as of September 1, 2011. ALA. CODE § 31-13-11(a). This provision has been held to be preempted by federal law. *U.S. v. Alabama*, 691 F.3d 1269 (11th Cir. 2012).

Section 31-13-15 also makes it a crime to hire an unauthorized alien as of April 12, 2012. Specifically, Section 15, which applies to *all* public and private employers,

- Prohibits employers from knowingly hiring, employing, or continuing to employ unauthorized aliens. ALA. CODE § 31-13-15(a)

“Knowingly employ, hire for employment, or continue to employ an unauthorized alien means the actions described in 8. U.S.C. § 1324a.” ALA. CODE § 31-13-15(a)

- Provides penalties and an enforcement scheme, including (1) termination of the unauthorized alien, (2) a three-year probationary period throughout the state (which requires filing quarterly reports with the local district attorney for each new employee who is hired in the state), (3) filing a sworn affidavit with the local district attorney within three days of the order stating that the employer has

terminated the employment of every unauthorized alien and will not knowingly or intentionally employ an unauthorized alien in the state, and (4) suspension of the business license and permits of the employer for a period not to exceed 10 business days specific to the business location where the unauthorized alien performed work *for the first violation*. ALA. CODE § 31-13-15(c)

For a second violation, the court shall direct that all business licenses and permits be *permanently revoked* specific to the business location where the unauthorized alien performed work. ALA. CODE § 31-13-15(e).

A subsequent violation results in suspension of the employer's business licenses and permits *forever throughout the state*. ALA. CODE § 31-13-15(f).

- Requires all employers in Alabama to use E-Verify. ALA. CODE § 31-13-15(b)
- Does not apply to the relationship between a party and the employees of an independent contractor performing work for the party or to casual domestic labor performed within a household. ALA. CODE § 31-13-15(l)

Notably, the time for incurring second and subsequent violations is not limited, and second and subsequent violations may occur at different jobsites or work locations. Use of E-Verify, though, in effect creates a “safe harbor” defense for employers, and an employer can establish an “affirmative defense” to a claim that the employer knowingly hired or employed an unauthorized alien if it can establish that it has complied in good faith with the requirements of 8 U.S.C.A. § 1324a(b), i.e., complied with its federally imposed Form I-9 obligations. ALA. CODE § 31-13-15(b).

Furthermore, Alabama Code § 31-13-16(a) declares that wages, compensation, and other remuneration paid to an unauthorized alien shall not be allowed as a deductible business expense for any state income or business tax purpose as of September 1, 2011. Any employer who knowingly fails to comply with this section of the Act shall be liable for a penalty equal to 10 times the business expense deductions claimed in violation of § 31-13-16(a). ALA. CODE § 31-13-16(b). Section 16 has been held to be preempted by federal law, as it is an impermissible “sanction.” *U.S. v. Alabama*, 691 F.3d 1269, 1288 (11th Cir. 2012).

#### D. Right to Work Laws

Employers may not require employees to become or remain members of any labor union or labor organization as a condition of employment or continuation of employment, or require an employee to pay any dues, fees, or other such charges. ALA. CODE § 25-7-32; ALA. CODE § 25-7-34. Conversely, an employer may not require an employee to abstain from or refrain from being a member in a labor union or organization. ALA. CODE § 25-7-33. It is against public policy and an illegal combination and conspiracy for an employer and any labor union or labor organization to agree to require membership in the union or organization as a basis for employment or continuation of employment, and to deny anyone the right to work based on not being a member

of such an organization or union. ALA. CODE § 25-7-31. People denied employment or continuation of employment under these laws may seek damages in court. ALA. CODE § 25-7-35.

D. Lawful Off-Duty Conduct (including lawful marijuana use)

In 2016, Alabama enacted a statute which authorizes the limited use of nonpsychoactive cannabidiol for specified debilitating conditions that produce seizures. ALA. CODE § 13A-12-214.3. That statute expressly states that it “is not intended as a generalized authorization of medical marijuana.” *Id.*

E. **Lawful Off-duty Conduct (including lawful marijuana use)**

Alabama has no laws addressing whether an employer may restrict an employee’s lawful off duty conduct. Recreational use of marijuana, however, is illegal in Alabama. Alabama has passed legislation permitting the use of non-psychoactive cannabidiol to treat certain medical conditions that cause seizures. Ala. Code § 13A-12-214.3.

F. **Gender/Transgender Expression**

The information in the 2017 compendium remains accurate.

G. Other Key State Statutes