

ARIZONA

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I. AT-WILL EMPLOYMENT

A. Statute

A.R.S. § 23-1501, the Employment Protection Act, codifies Arizona's long-standing adherence to the at-will employment doctrine.

1. The employment relationship is contractual in nature.

2. The employment relationship is severable at the pleasure of either the employee or the employer unless both the employee and the employer have signed a written contract to the contrary setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship. Both the employee and the employer must sign this written contract, or this written contract must be set forth in the employment handbook or manual or any similar document distributed to the employee, if that document expresses the intent that it is a contract of employment, or this written contract must be set forth in a writing signed by the party to be charged. Partial performance of employment shall not be deemed sufficient to eliminate the requirements set forth in this paragraph. Nothing in this paragraph shall be construed to affect the rights of public employees under the Constitution of Arizona and state and local laws of this state or the rights of employees and employers as defined by a collective bargaining agreement.

The Employment Protection Act defines when an employee has a claim against an employer for termination of employment. Specifically, the Act provides that an employee has a claim against an employer for termination of employment only if one or more of the following circumstances have occurred:

(a) The employer has terminated the employment relationship of an employee in breach of an employment contract, as set forth in paragraph 2 of this section, in which case the remedies for the breach are limited to the remedies for a breach of contract.

(b) The employer has terminated the employment relationship of an employee in violation of a statute of this state. If the statute provides a remedy to an employee for a violation of the statute, the remedies provided to an employee for a violation of the

statute are the exclusive remedies for the violation of the statute or the public policy set forth in or arising out of the statute, including the following:

- (i) The Civil Rights Act prescribed in Title 41, Chapter 9.
- (ii) The Occupational Safety and Health Act prescribed in Chapter 2, Article 10 of this title.
- (iii) The statutes governing the hours of employment prescribed in Chapter 2 of this title.
- (iv) The Agricultural Employment Relations Act prescribed in Chapter 8, Article 5 of this title.
- (v) The statutes governing disclosure of information by public employees prescribed in Title 38, Chapter 3, Article 9.

All definitions and restrictions contained in the statute also apply to any civil action based on a violation of the public policy arising out of the statute. If the statute does not provide a remedy to an employee for the violation of the statute, the employee shall have the right to bring a tort claim for wrongful termination in violation of the public policy set forth in the statute.

(c) The employer has terminated the employment relationship of any employee in retaliation for any of the following:

- (i) The refusal by the employee to commit an act or omission that would violate the Constitution of Arizona or the statutes of this state.
- (ii) The disclosure by the employee in a reasonable manner that the employee has information or a reasonable belief that the employer, or an employee of the employer, has violated, is violating or will violate the Constitution of Arizona or the statutes of this state to either the employer or a representative of the employer who the employee reasonably believes is in a managerial or supervisory position and has the authority to investigate the information provided by the employee and to take action to prevent further violations of the Constitution of Arizona or statutes of this state or an employee of a public body or political subdivision of this state or any agency of a public body or political subdivision.
- (iii) The exercise of rights under the workers' compensation statutes prescribed in Chapter 6 of this title.
- (iv) Service on a jury as protected by § 21-236.
- (v) The exercise of voting rights as protected by § 16-1012.

- (vi) The exercise of free choice with respect to non-membership in a labor organization as protected by § 23-1302.
- (vii) Service in the National Guard or armed forces as protected by §§ 26-167 and 26-168.
- (viii) The exercise of the right to be free from the extortion of fees or gratuities as a condition of employment as protected by § 23-202.
- (ix) The exercise of the right to be free from coercion to purchase goods or supplies from any particular person as a condition of employment as protected by § 23-203.
- (x) The exercise of a victim's right to leave work as provided in §§ 8-420 and 13-4439.

B. Case Law

Before the Employment Protection Act ("EPA") was passed in 1996, *Wagonseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 147 Ariz. 370 (1985), established that termination in violation of a public policy would constitute wrongful discharge. Public policy was to be found in the state's statutes, constitution, and its decisional law.

But before the Arizona Employment Protection Act ("EPA"), the courts were not consistent in their application of claims or remedies for wrongful termination. While some courts held that a tort claim for wrongful termination was only permitted if expressly allowed by the predicate statute, other courts allowed a version of common law tort for wrongful termination. The EPA effectively closed the loophole. Now, by its exclusive remedy provisions, the EPA expressly limits claims for wrongful termination to (1) discharge in violation of an employment contract; (2) discharge in violation of an Arizona statute; or (3) discharge in retaliation for an employee's assertion of rights protected by Arizona law.

The constitutionality of the EPA was decided by the Arizona Supreme Court in *Cronin v. Sheldon*, 991 P.2d 231, 242, 195 Ariz. 531, 542 (1999). In that case, two separate employees had been fired from two different employers after each had reported sexual harassment in the workplace. Both filed tort claims for wrongful termination in violation of public policy established by the Arizona Civil Rights Act ("ACRA"). ACRA limits the recovery of damages, precluding compensatory damages. Plaintiffs/Petitioners argued they should be permitted to pursue common law wrongful termination that does not recognize such restrictions on damages. Because the EPA precludes common law wrongful termination claims, the Petitioners argued, the EPA was unconstitutional. In the end, the Court held that the EPA did not violate the Arizona Constitution.

Clear inconsistencies notwithstanding, Arizona law established in *Wagonseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370 (1985) remains in place. By that ruling, Arizona

established the common law tort of wrongful termination claim for violation of public policy. Specifically, an employer could terminate an employee for good cause or no cause but not for bad cause. The law of *Wagonseller* was expressly preserved by the Court in *Cronin*; “neither the rationale nor the holding in *Wagonseller* is implicated by the [EPA] or today’s opinion.” *Cronin* at 536-7. See also, *Luis Vellon v. Maxim Healthcare Services*, USDC 2008 WL 11338452.

The debate continued in *Taylor v. Graham County Chamber of Commerce*, 33 P.3d 518, 358 Ariz.Adv.Rep. 20 (Ct. App. 2001). There, the Plaintiff/Appellant asserted a claim for wrongful termination based on age and gender discrimination under the ACRA, and as a breach of contract. The court found the employment materials did not create a contract that was breached. The tort claim under ACRA was dismissed because ACRA did not apply to this employer (fewer than 15 employees). Appellant argued she should be permitted to pursue a common law tort claim in this case using ACRA as a predicate statute just as the Court did in *Wagonseller*. In *Wagonseller*, Plaintiffs alleged she was terminated for refusing to participate in conduct that would have violated the Arizona indecency laws even though those laws did not allow for civil remedies. The Court seemed to continue the notion that claims under *Wagonseller*-type claims are permitted by the scope of breadth that permission remains to be decided.

Galati v. Am. W. Airlines, Inc., 69 P.3d 1011, 205 Ariz. 290 (Ct.App. 2003), is the seminal case interpreting the Employment Protection Act in a retaliation setting. Galati was an America West Airlines (hereinafter “AWA”) flight attendant that was terminated in January 1999. One year before his termination, Galati complained about being scheduled to work without FAA-mandated rest breaks and reported to the FAA that an AWA pilot had taken an action without his authority. Galati claimed his termination was in retaliation for his earlier complaints to management. He filed suit pursuant to Section 23-1501(3)(c)(ii) of the Arizona Revised Statutes, which permits a retaliation claim when an employee is discharged for reporting violations of either Arizona law or the Arizona Constitution. The Superior Court of Arizona granted a 12(b)(6) motion to dismiss the claim, holding that there is no statutory public policy exception for whistleblowing associated with federal regulations. The trial court also held that the Airline Deregulation Act preempted the Plaintiff’s state cause of action. The Arizona Court of Appeals affirmed.

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

In *Leikvold v. Valley View Cmty. Hosp.*, 688 P.2d 170, 141 Ariz. 544 (1984), employee Leikvold was employed by defendant from 1972 to 1979. There was no express employment contract. However, Leikvold was provided an Administrative and Personnel Policies Manual and was advised that strict compliance was required. The Manual included a section on “dismissal,” which provided an appeals process for termination. Leikvold was allegedly terminated for insubordination. Her request for a grievance hearing was denied. Despite the absence of an express contract of employment, the court held, “an employer’s representations in a personnel

manual can become terms of the employment contract and can limit an employer's ability to discharge his or her employees." *Id.* At 172, 141 Ariz. At 546.

Considering it a question of fact to be decided by the trier of fact about whether the employee manual constituted part of an employment contract, the court held:

Evidence relevant to this factual decision includes the language used in the personnel manual as well as the employer's court of conduct and oral representations regarding it. We do not mean to imply that all personnel manuals become part of the employment contracts. Employers are certainly free to issue no personnel manual at all or to issue a personal manual that clearly and conspicuously tells their employee that the manual is not part of the employment contract and that their jobs are terminable at the will of the employer with or without reason. Such actions, either not issuing a personnel manual or issuing one with clear language of limitation, instill no reasonable expectations of job security and do not give employees any reason to rely on representations in the manual. However, if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it. Having announced a policy, the employer may not treat it as illusory.

Id. At 174, 141 Ariz. at 548.

Summary Judgment for the hospital was reversed and the case remanded for trial on the issue of whether the employer's manual and other conduct were sufficient to become part of Leikvold's employment contract. *See also, Ford v. Revlon*, 734 P.2d 580, 153 Ariz. 38 (1987).

In *Loffa v. Intel Corp.*, 738 P.2d 1146, 1150 153 Ariz. 539, 543 (Ct. App. 1987), the court held "[t]he provisions of the employer's personnel manual may create a term of the employment agreement without any showing of particular reliance on the manual by the employee, without any specific words incorporating the manual into agreement, and notwithstanding that in other respects the employment relationship would be viewed as employment-at-will." *See also, Goodman v. Brown & Williamson Tobacco Corp.*, 891 F. Supp. 505, 510 (D. Ariz. 1993)(the court distinguished the Loffa ruling and held that the implied contract exception was "not intended to supplant the ability of the parties to enter in written contracts governing their employment... the Court will not disturb the plain meaning of the parties' written employment agreement").

In *Demasse v. ITT Corp.*, 984 P.2d 1138, 1153, 194 Ariz. 500, 515 (1999), the Supreme Court of Arizona held:

An employer cannot unilaterally modify and thus negate the effect of implied-in-fact contractual terms by subsequently publishing a handbook permitting unilateral modification or rescission. Modification of the terms of the implied-in-fact contracts are governed by traditional contract law principles, which require

assent and consideration to the offer of modification. Continued employment alone will not suffice.

The Court concluded that, while most handbook provisions merely describe policies and procedures, some can create an implied-in-fact employment contract. Once created, it cannot be unilaterally changed.

In *Almada v. Allstate Ins. Co.*, 153 F. Supp.2d 1108, 1113 (D. Ariz. 2000), the court held that the employee's at-will status was not modified by the employer's policy manual.

2. Provisions Regarding Fair Treatment

In *Gesina v. Gen. Elec. Co.*, 780 P.2d 1376, 162 Ariz. 35 (Ct. App. 1989), Gesina, an employee of G.E., agreed to a job transfer on the promise of his supervisors that he would continue to have a job "so long as his work was competent." Despite the promise, Gesina was laid off presumably for economic reasons. Gesina filed suit for wrongful termination and bad faith discharge. Though Gesina's claims were denied, the court made some significant holdings:

[w]here, as here, the employee gives up his security of union representation to work in a non-union shop only after he has been assured lifetime employment, the employee, in giving up this valuable security with the knowledge of the employer, furnishes consideration sufficient to support the promise of lifetime employment.

Where the prospective employee inquires about job security and is insured that he will be employed as long as he does the work, a fair construction is that the employer has given up his right to discharge at will and can only discharge for cause.

A bona fide decision based on sound economic reasons can constitute cause for discharge... [w]e believe that in the case of a reduction in force due to economic reasons, as between two persons of equal ability, the one who has a lifetime contract is to be preferred for retention over the one who does not.

Id. 780 P.2d at 1378, 162 Ariz. At 37 (internal citations omitted).

3. Disclaimers

As with all employment contracts, there must be an intent on both parties to limit the ability of the employer (or employee) to terminate the employment relationship. A statement contained in the personnel manual, or other documents that might ordinarily give rise to an implied-in-fact contract, that clearly and conspicuously states that the statements contained therein do not give rise to an employment contract and that their employment remains terminable at will, negate any expectation of job security. *Roberson v. Wal-Mart Stores, Inc.*, 44 P.3d 164, 202 Ariz. 286 (Ct. App. 2002).

The inclusion of disclaiming language in a personnel manual, however, may not always insulate the employer from liability. For example, contrary oral or written assurances made at hiring interview or during employment may constitute an implied contract, altering the at-will relationship.

Id. At 169, 202 Ariz. At 291.

A disclaimer should therefore specifically negate any intention on the part of the employer to have the terms of a personnel manual or other document become a part of an employment contract. The language used in the disclaimer must be clear and conspicuous. Otherwise, a question of fact is created for the trier of fact as to whether the statements were intended to express a term of the employment relationship. *Id.*

4. Implied Covenants of Good Faith and Fair Dealing

The court in *Wagonseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1031, 147 Ariz. 370, 376 (1985), recognized a third exception to at-will employment: the implied-in-law covenant of good faith and fair dealing. In the employment context, the covenant holds that the employer will act in good faith and will deal fairly with its employees. A violation of the covenant could subject the employer to contract liability. *See also, Smith v. Am. Express Travel Services*, 876 P.2d 1166, 179 Ariz. 131 (Ct. App. 1994) (recognizing *Wagonseller's* holding that recovery is limited to right to receive benefits that were part of employment agreement).

“The covenant requires that neither party do anything that will injure the right of the other to receive the benefits of their agreement.” *Wagonseller*, 710 P.2d at 1038, 147 Ariz. at 383. However, the covenant does not restrict an employer to termination only for good cause. *Id.* at 1039, 147 Ariz. at 384. Indeed, under this covenant the employer can terminate an employee for no cause. The employer is only prohibited from terminating an employee for bad cause: “reasons which contravene public policy.” *Id.* at 1041, 147 Ariz. at 386.

The Ninth Circuit Court of Appeals in *Huey v. Honeywell, Inc.*, 82 F.3d 327 (9th Cir. 1996), stated that Arizona courts have found an implied-in-law covenant of “good faith and fair dealing” in employment contracts, and have held employers liable in both contract and tort for breach of this covenant, citing *Wagonseller*.

B. Public Policy Exceptions

1. General

The Supreme Court of Arizona in *Wagonseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 147 Ariz. 370 (1985), adopted public policy exceptions to the previously blanket at-will termination rule. “We hold that an employer may fire for good cause or for no cause. He may not fire for bad cause—that which violated public policy.” *Id.*, 710 P.2d at 1033, 147 Ariz. at 378.

There are four categories of conduct that violate public policy: 1) employee refuses to participate in illegal behavior; 2) employee performs an important public obligation; 3) employee

exercises a legal right or privilege; or 4) the “whistleblower” exposes wrongdoing on part of the employer. *See Wagonseller*; *see also, Wagner v. City of Globe*, 722 P.2d 250, 150 Ariz. 82 (1986).

Common law protection against retaliatory termination has now been codified in the Arizona Employment Protection Act, A.R.S. § 23-1501. According to the Act, public policy remains a viable exception to the at-will termination rule, but only public policy as defined by the legislature.

2. Exercising a Legal Right

“Although no Arizona case has specifically held that the termination of an at-will employee in retaliation for filing a workers’ compensation claim can serve as the basis for a cause of action for wrongful discharge, our supreme court has strongly implied that this is the case. [Internal citations omitted]. Accordingly, we conclude that it can.”

Douglas v. Wilson, 774 P.2d 1356, 1359, 160 Ariz. 566, 568-69 (Ct. App. 1989).

3. Refusing to Violate the Law

An employee has a claim against an employer for termination of employment where the employer retaliates against the employee for refusing to commit an act or omission that would violate the Constitution of Arizona or the Arizona Revised Statutes. A.R.S. § 23-1501 (3)(c)(i).

Logan v. Forever Living Products Intern., Inc., 52 P.3d 760, 203 Ariz. 191 (2002)
 (“[w]here an employee is terminated by an employer for refusal to accept extortionate demands by the employer. . .the employee has a wrongful termination cause of action under the AEPA.”)

4. Exposing Illegal Activity (Whistleblowers)

An employee has a claim against an employer for termination of employment only if one or more of the following circumstances have occurred:

The employer has terminated the employment relationship of an employee in retaliation for any of the following:

The disclosure by the employee in a reasonable manner that the employee has information or a reasonable belief that the employer, or an employee of the employer, has violated, is violating or will violate the Constitution of Arizona or the statutes of this state to either the employer or a representative of the employer who the employee reasonably believes is in a managerial or supervisory position and has the authority to investigate the information provided by the employee and to take action to prevent further violations of the Constitution of Arizona or

statutes of this state or an employee of a public body or political subdivision of this state or any agency of a public body or political subdivision.

A.R.S. § 23-1501 (3)(c)(ii).

EPA does not provide an employee a cause of action for wrongful termination for whistleblowing associated with federal regulations, only Arizona Constitution and Arizona statutes. *Galati v. America West Airlines, Inc.*, 205 Ariz. 290, 69 P.3d 1011 (Ct. App. 2003)

In *Wagner v. City of Globe*, 722 P.2d 250, 150 Ariz. 82 (1986), Edward Wagner was hired as a police officer for the City of Globe and was serving a six-month probationary period when he was terminated. Shortly after his hire, Wagner learned about a man named Hicks who had been arrested for vagrancy and was given a ten-day jail term. Wagner later learned that Hicks had never been properly or timely arraigned and had been detained well beyond the ten day sentence. Wagner informed a local magistrate of Hicks' illegal arrest and detention and was advised by the Chief of Police that he did not appreciate "big city cops" coming into Globe and telling him how to run his department. Wagner was subsequently terminated. Finding that Wagner's termination was wrongful, the Supreme Court of Arizona held:

The employee who chooses to report illegal or unsafe conduct by his employer differs significantly from the employee forced to choose between his job and actual participation in illegal behavior. . . . [T]he whistleblower faces the arguably less onerous choice of either ignoring the known or suspected illegality or becoming an instrument of law enforcement. Nonetheless, whistleblowing employees have gained a measure of judicial protection.

We believe that whistleblowing activity which serves a public purpose should be protected. So long as employees' actions are not merely private or proprietary, but instead seek to further the public good, the decision to expose illegal or unsafe practices should be encouraged . . . [O]n balance actions which enhance the enforcement of our laws or expose unsafe conditions, or otherwise serve some singularly public purpose, will inure to the benefit of the public.

Id. at 256-257, 140 Ariz. at 88-89 (citations omitted).

The court emphasized that the relevant inquiry is whether some "important public policy interest embodied in the law has been furthered by the whistleblowing activity." *Wagner*, 722 P.2d at 256-57, 140 Ariz. at 88-89. Because Wagner acted to protect the life and liberty of another individual, he asserted a valid claim for wrongful termination under the public policy exception to at-will employment. *Id.*; see also Age Discrimination in Employment, 29 U.S.C. § 623(d) (1988); Americans With Disabilities Act, 42 U.S.C. § 12203 (1993); Equal Employment Opportunity Act, 42 U.S.C. § 2000e-3(a) (1998); Federal Mine Safety & Health Act, 30 U.S.C. § 815(c)(1986); and Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1988).

Wagner was decided before EPA was enacted. Nonetheless, the Arizona Court of Appeals in *Galati*, supra, in 2003 concluded that *Wagner* would have been able to pursue the same claims under EPA without relying on common law.

In *Murcott v. Best W. Int'l Inc.*, 9 P.3d 1088, 1096 (Ct. App. 2000), the Court confirmed that it is not the fact of a violation that determines if an employee is protected from whistleblowing but “whether an important public policy embodied in the law benefitted from the whistle-blowing.” In this case, it was not important how *Murcott* chose to characterize the alleged wrongful conduct (anti-trust violations) but whether *Murcott*’s complaints addressed an important public interest.

In *Tittle v. NAZCARE, Inc.* 2010 WL 1170243, the Arizona Court of Appeals found that it was not enough to garner whistleblower protections when *Tittle* simply sent emails expressing concerns about unspecified improprieties. Nor did she report them to someone in management with authority to investigate to claims.

In *Sasser v. City of Phoenix*, 1 CA-CV 07-0090, 2008 WL 4108040 (Ariz. Ct. App. Jan. 10, 2008), an employee’s wrongful termination claim was brought pursuant to A.R.S. § 23-1501(c)(ii), based on the employee’s claim that he was terminated in retaliation for disclosing the employer’s violation of state law. The court found that there was no evidence that the employee disclosed a violation of state law. Rather, he reported procedural and unprofessional conduct that allegedly occurred at the City of Phoenix Police Department. This conduct cannot sustain a claim under the Employment Protection Act.

In *Mullenaux v. Graham Cnty.*, 82 P.2d 362, 365 207 Ariz. 1, 4 (Ct. App. 2004), *Mullenaux* sued for wrongful discharge based on whistleblower retaliation, retaliation for seeking worker’s compensation, breach of contract, and defamation. The County filed a motion for summary judgment arguing that *Mullenaux* was required to exhaust his administrative remedies through the county grievance procedure before filing a lawsuit. *Id.* The trial court agreed and granted the County’s motion. The Court of Appeals affirmed and held that a classified public employee must exhaust his/her administrative remedies before filing suit in superior court. *Id.* at 368, 207 Ariz. at 7.

III. CONSTRUCTIVE DISCHARGE

The Employment Protection Act also established new rules for determining when an employee could properly claim constructive discharge. A.R.S. 23-1502 provides as follows:

- A. In any action under the statutes of this state or under the common law, constructive discharge may only be established by either of the following:
 1. Evidence of objectively difficult or unpleasant working conditions to the extent that a reasonable employee would feel compelled to resign, if the employer had been given at least 15 days’ notice by the employee that the employee intends to resign because of these conditions and the employer fails to respond to the employee’s concerns.

2. Evidence of outrageous conduct by the employer or a managing agent of the employer, including sexual assault, threats of violence directed at the employee, a continuous pattern of discriminatory harassment by the employer or by a managing agent of the employer or other similar kinds of conduct, if the conduct would cause a reasonable employee to feel compelled to resign.

B. The Act provides three preconditions the employee must follow before a constructive discharge claim will be considered, including “as a precondition to the right of an employee to bring a constructive discharge claim against an employer pursuant to subsection a, paragraph 1 of this section, the employee shall take each of the following actions before deciding whether to resign:”

1. Notify an appropriate representative of the employer, in writing, that working condition exists the employee believes is objectively so difficult or unpleasant that the employee feels compelled to resign or intends to resign.

2. Allow the employer 15 calendar days to respond in writing to the matter presented in the employee’s written communication under paragraph 1 of this subsection.

3. Read and consider the employer’s response to the employee’s written communication under paragraph 1 of this subsection.

The Act also provides that if an employee reasonably believes “that the employee cannot continue to work during the period for the employer to respond to the employee’s written communication regarding the conditions allegedly constituting constructive discharge, the employee is entitled to a paid or unpaid leave of up to 15 calendar days until the time when the employer has responded in writing to the employee’s written communication, whichever occurs first.” A.R.S. §23-1502(C).

An employer will be deemed to have waived the right to notice if the employer fails to provide written notice to its employees in conspicuous places on the employer’s premises where notices are customarily posted with similar language used in the employment handbook or through a written communication that is provided to employees. A.R.S. § 23-1502(E).

In addition to complying with § 23-1502, in the case of a public employer, the employee must also satisfy § 12-821.01 of the Arizona Revised Statutes before filing a lawsuit. That is, within 180 days of when the cause of action arises, the employee must serve a notice of claim on those persons authorized to receive service for the employer. *Barth v. Cochise Cnty. Arizona*, 138 P.3d 1186, 213 Ariz. 59 (Ct. App. 2006).

The case of *Sasser v. City of Phoenix*, 1 CA-CV 07-0090, 2008 WL 4108040 (Ariz. Ct. App. Jan. 10, 2008), held that in order to succeed on a constructive discharge claim brought under the Employment Protection Act, an employee must present evidence of ““outrageous

conduct by the employer’ or of ‘objectively difficult working conditions to the extent that a reasonable employee would feel that they were compelled to resign.’” Evidence that the employee was required to work near his supervisor who was hostile towards him, that his supervisor commented to an investigator that the employee was an “[expletive] nut” and “created mayhem” in the polygraph unit and that the employee was assigned to fill in for an absent secretary, is not enough to sustain a constructive discharge claim. These acts are “not sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent and reasonable employee to remain on the job to earn a livelihood and serve his or her employer.”

Beede v. City of Tucson, 2 CA-CV 2010-0182, 2011 WL 1630348 (Ariz. Ct. App. Apr. 26, 2011) (Court held that Beede did not allege any facts demonstrating that his work environment was so “objectively difficult or unpleasant” to the extent that a “reasonable employee would feel compelled to resign.”)

IV. WRITTEN AGREEMENTS

A. Standard “For Cause” Termination

The case of *Valles v. Arizona Bd. of Regents*, 743 P.2d 959, 154 Ariz. 450 (Ct. App. 1987), held that “[a] business decision to eliminate a position has been held sufficient basis to terminate the employee occupying that position.” *Id.* at 961, 154 Ariz. at 452. “In *Gianaculas v. Trans World Airlines, Inc.*, 761 F.2d 1391 (9th Cir. 1985), the employee was terminated when his position, among others, was eliminated during a general reduction in the employer’s work force necessitated by economic conditions. . . [There] [t]he court found that termination under those circumstances was justified.” *Id.*

In *Carlson v. Arizona State Pers. Bd.*, 153 P.3d 1055, 214 Ariz. 426 (Ct. App. 2007), the court held that a dismissed employee of the Arizona Department of Environmental Quality, who can only be dismissed for cause, has “a constitutionally protected property interest in continued employment,” and is therefore “entitled to due process before he can be terminated.” *Id.* at 1059, citing *Cleveland Bd. Of Educ. V. Loudermill*, 470 U.S. 532, 542 (1985).

These holdings are limited to facts in which an employment contract arises out of an implied-in-fact contract. These cases do not involve employment contracts that arise out of an express, bargained for exchange of services for compensation. When an express contract exists in which discharge “for cause” is limited to employee performance issues, a different result occurs.

When there is an employment contract in place that expressly permits the employer to discharge the employee only for neglect of duty or inappropriate behavior, the issue of whether the employee’s performance or conduct gave rise to sufficient justification for the employee’s discharge is one of fact. *Davis v. Tucson Arizona Boys Choir*, 669 P.2d 1005, 137 Ariz. 228, (Ct. App. 1983).

Additionally, under the Employment Protection Act, a terminated employee seeking to assert a breach of contract claim must prove that the parties entered into a written agreement that either: 1) states that the employment is one of specific duration; or 2) expressly restricts the right of either party to terminate the employment relationship. A.R.S. § 23-1501(A)(3)(a). *See, White v. AKDHC, LLC*, 664 F.Supp.2d 1054, 1062 (D. Ariz. 2009).

The Court of Appeals in *Johnson v. Hispanic Broadcasters of Tucson, Inc.*, 2 P.3d 687, 690, 196 Ariz. 597, 600 (Ct. App. 2000), held that if an employment agreement is reasonably susceptible to the interpretation that the employee was guaranteed employment for a specific duration thereby restricting an employer from terminating the employment, extrinsic evidence will be permitted to interpret its terms.

B. Status of Arbitration Clauses

Arbitration clauses contained within a contract for employment are “liberally construed with any doubt resolved in favor of arbitration.” *Payne v. Penzoil Corp.*, 672 P.2d 1322, 138 Ariz. 52 (Ct. App. 1983), *citing New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Ass’n*, 12 Ariz. App. 13, 467 P.2d 88 (1970); *see also, City of Cottonwood v. James L. Fann Contracting*, 179 Ariz. 185, 189, 877 P.2d 284, 288 (Ct. App. 1994). In *Payne*, the appellant filed a grievance against Penzoil for allegedly wrongful discharge. The Arizona Court of Appeals held that the employee’s discharge was covered by the collective bargaining agreement which provided for the exclusive remedy of arbitration and that appellant could not bring suit until he had at least exhausted his exclusive remedies under the agreement. *Id.* at 1326, 138 Ariz. at 56.

V. ORAL AGREEMENTS

A. Promissory Estoppel

Arizona courts have examined only a few cases applying promissory estoppel to oral agreements for employment. In *Mullins v. S. Pac. Transp. Co.*, 851 P.2d 839, 174 Ariz. 540 (Ct. App. 1992), the plaintiff brought suit for breach of implied contract based on statements made by his employer that his job was secure until he “reaped the benefits of the officer pension” which he understood to mean age of 65. The Court of Appeals held that this was an employment contract for a specific period of time and could not be completed within one year and was therefore invalid under the statute of frauds because it was not in writing. The court in *Mullins* rejected promissory estoppel as a means of circumventing the Statute of Frauds. *Id.* at 842, 174 Ariz. at 543.

The adoption of the Employment Protection Act in 1996 creates a presumption that the “employment relationship is severable at the pleasure of either the employee or employer unless both [parties] . . . have signed a written contract” which states otherwise. A.R.S. § 23-1502(2).

Arizona courts recognize the theory of promissory estoppel for a promise of at-will employment. *See, Walter v. Prestige Staffing, LLC*, 1 CA-CV 07-0628, 2008 WL 2406138

(Ariz. Ct. App. June 10, 2008), citing *Higginbottom v. State*, 51 P.3d 972, 977, 203 Ariz. 139, 144 (Ariz. Ct. App. 2000). In *Walter*, plaintiff left his employment and signed an at-will employment contract with an employment placement agency after being advised by the agency about a position with IBM. The day before the plaintiff was to begin working with IBM, he was told not to appear for work. The court remanded the case for further proceedings on the issue of promissory estoppel, but did recognize the theory of promissory estoppel for a promise of at-will employment.

B. Fraud

Recent years have seen a vast expansion of the use of fraudulent misrepresentation theories, both offensively and defensively. The least subtle and controversial of these cases would be those relating to false statements made by employers to induce potential employees to leave a job and come to work for that employer, or stay with the employer, foregoing other opportunities and, in many cases, relocating for a new job. While some states have four or five elements, Arizona has nine elements of fraud. To prevail on a common law claim of fraud, a plaintiff must show:

1) The defendant made representations; 2) the representations were false; 3) the representations were material; 4) the defendant knew that the statements were false or was ignorant of the truth of the matter stated; 5) the defendant intended that the plaintiff would act in reliance upon the representations in a manner reasonably contemplated; 6) the plaintiff was ignorant of the falsity of the statement; 7) the plaintiff relied on the truth of the statement; 8) the plaintiff had a right to rely on the statements; and 9) damages proximately resulted from the injury.

Nielson v. Flashberg, 419 P.2d 514, 517-18, 101 Ariz. 335, 338-39 (1966); *Echols v. Beauty Built Homes, Inc.*, 647 P.2d 629, 631, 132 Ariz. 498, 500 (1982); *Haisch v. Allstate Ins. Co.*, 5 P.3d 940, 944, 197 Ariz. 606, 610 (Ct. App. 2000); *State ex rel. Horne v. AutoZone, Inc.*, 277 Ariz. 471, 258 P.3d 289 (Ct. App. 2011).

In addition, Arizona recognizes a separate tort of fraudulent concealment, following the RESTATEMENT (SECOND) OF TORTS § 550; *Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Local, No. 395 Pension Trust Fund*, 38 P.3d 12, 34, 201 Ariz. 474, 496 (2002); see also, *Freeman v. Neal Klein Const. Corp.*, 1 CA-CV 12-0664, 2013 WL 2644461 (Ariz. Ct. App. June 11, 2013). In *Wells Fargo Bank*, the court stated:

One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.

C. Statute of Frauds

Pettit v. Arizona Board of Regents, 2008 WL 11298067 (USCD AZ), Judge Silver concluded the statute of frauds did not apply to Pettit who was a tenured professor with an implied contract with an indefinite duration.

See also, Promissory Estoppel, above.

VI. DEFAMATION

A. General Rule

A defamatory statement must be a statement “of and concerning” the plaintiff, and must be provably false. Additionally, the plaintiff must prove that the defendant acted with some degree of fault. If the plaintiff is a private individual and no privileged occasion is involved, the degree of fault is negligence. Finally, to be actionable, the statement must cause damage. In Arizona, “libel” is defined as “any malicious falsehood expressed in writing, painting, by signs or pictures, which tends to bring any person to disrepute, contempt or ridicule....” *Central Arizona Light & Power Co. v. Akers*, 46 P.2d 126, 131, 45 Ariz. 526, 535 (1935); *see also, Broking v. Phoenix Newspapers, Inc.*, 76 Ariz. 334, 337, 264 P.2d 413, 415 (1953).

There is a one year statute of limitations “for injuries done to the character or reputation of another by libel or slander.” ARIZ. REV. STAT. § 12-541(1). Although the statute provides that the year begins to run when “the cause of action accrues,” there is some ambiguity as to when that occurs. In *State v. Superior Court In and For Cnty. of Maricopa*, 921 P.2d 697, 186 Ariz. 294 (Ct. App. 1996), the court affirmed the dismissal of a defamation suit on limitations grounds. The court rejected the plaintiff’s attempts to amend a complaint after the 1-year limitations period had passed, saying each publication is a separate cause of action. *Id.* at 702, 186 Ariz. at 299.

1. Libel

Central Arizona Light & Power Co. v. Akers, 46 P.2d 126, 45 Ariz. 526 (1935), in substance, defines the offense of libel as: “any malicious falsehood (or defamation) expressed in writing. . .which tends to bring any person into disrepute, contempt or ridicule, or to blacken the memory of one who is dead;. . .or. . .which tends to impeach the honesty, integrity, virtue or reputation, or publish the natural or alleged defects of one who is alive, and thereby expose him to public hatred, contempt or ridicule.” *Id.* at 131, 45 Ariz. at 535.

2. Slander

One’s reputation is a significant, intensely personal possession that the law strives to protect. The entire common law of defamation attests to the importance we attach to an individual’s right to seek compensation for damage to his reputation. Not even the critical need

for open and robust public debate on issues of public concern is sufficient to completely shield malicious defamations. *Chamberlain v. Matthis*, 729 P.2d 905, 909, 151 Ariz. 551, 555 (1986).

B. References

A.R.S. § 23-1361. Blacklist; definition; exceptions; privileged communications; immunity.

A. “Blacklist” means any understanding or agreement whereby the names of any person or persons, list of names, descriptions or other means of identification shall be spoken, written, printed or implied for the purpose of being communicated or transmitted between two or more employers of labor, or their bosses, foremen, superintendents, managers, officers or other agents, whereby the laborer is prevented or prohibited from engaging in a useful occupation. Any understanding or agreement between employers, or their bosses, foremen, superintendents, managers, officers or other agents, whether written or verbal, comes within the meaning of this section and it makes no difference whether the employers, or their bosses, foremen, superintendents, managers, officers or other agents, act individually or for some company, corporation, syndicate, partnership or society and it makes no difference whether they are employed or acting as agents for the same or different companies, corporations, syndicates, partnerships or societies.

B. It is not unlawful for a former employer to provide to a requesting employer, or agents acting in the employer's behalf, information concerning a person's education, training, experience, qualifications and job performance to be used for the purpose of evaluating the person for employment. It is not unlawful for a school district to provide information received as a result of a fingerprint check required by § 15-512 to any other school district if requested to do so by the person who was the subject of the fingerprint check or communicate to any school district if requested to do so by the person who applied for a fingerprint clearance card whether the person has been issued or denied a fingerprint clearance card. A copy of any written communication regarding employment must be sent by the employer providing the information to the former employee's last known address.

C. An employer who in good faith provides information requested by a prospective employer about the reason for termination of a former employee or about the job performance, professional conduct or evaluation of a current or former employee is immune from civil liability for the disclosure or the consequences of providing the information. There is a presumption of good faith if either:

1. The employer employs less than one hundred employees and provides only the information authorized by this subsection.

2. The employer employs at least one hundred employees and has a regular practice in this state of providing information requested by a prospective employer about the reason for termination of a former employee or about the job performance, professional conduct or evaluation of a current or former employee.

D. The presumption of good faith under subsection C of this section is rebuttable by showing that the employer disclosed the information with actual malice or with intent to mislead. This subsection and subsection C of this section do not alter any privileges that exist under common law. For the purposes of this subsection, “actual malice” means knowledge that the information was false or was provided with reckless disregard of its truth or falsity.

E. Communications concerning employees or prospective employees that are made by an employer or prospective employer, or by a labor organization, to a government body or agency and that are required by law or that are furnished pursuant to written rules or policies of the government body or agency are privileged.

F. An employer, including this state and its agencies, a labor organization or an individual is not civilly liable for privileged communications made pursuant to subsection E of this section.

G. In response to a request by another bank, savings and loan association, credit union, escrow agent, commercial mortgage banker, mortgage banker or mortgage broker it is not unlawful for a bank, a savings and loan association, a credit union, an escrow agent, a commercial mortgage banker, a mortgage banker or a mortgage broker to provide a written employment reference that advises of the applicant's involvement in any theft, embezzlement, misappropriation or other defalcation that has been reported to federal authorities pursuant to federal banking guidelines or reported to the department of financial institutions. In order for the immunity provided in subsection H of this section to apply, a copy of the written employment reference must be sent by the institution providing the reference to the last known address of the applicant in question.

H. No bank, savings and loan association, credit union, escrow agent, commercial mortgage banker, mortgage banker or mortgage broker shall be civilly liable for providing an employment reference unless the information provided is false and the bank, savings and loan association, credit union, escrow agent, commercial mortgage banker, mortgage banker or mortgage broker providing the false information does so with knowledge and malice.

I. A court shall award court costs, attorney fees and other related expenses to any party that prevails in any civil proceeding in which a violation of this section is alleged.

C. Privileges/Immunities

Although there are absolute privileges to defamation recognized in Arizona, they do not, for the most part, apply in the employment setting. For example, absolute privileges exist for those participating in judicial proceedings and legislative meetings, complaints at state bar, and statements filed with the commission on judicial qualifications. On the other hand, communications concerning an employee may be afforded qualified privileges.

The absolute judicial privilege applies in matters where a party to private litigation is absolutely privileged to publish defamatory matter concerning another in communications

preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding. The recipient of the disclosed information must have had a close or direct relationship to the proceeding for the privilege to apply. *Hall v. Smith*, 152 P.3d 1192, 214 Ariz. 309 (Ct. App. 2007); *see also, Goddard v. Fields*, 150 P.3d 262, 214 Ariz. 175 (Ct. App. 2007).

There is a qualified privilege for a former employer to make communication to a potential employer, or an agent acting on the former employer's behalf, "concerning a person's education, training, experience, qualifications, and job performance." As previously stated above in section B, this privilege exists if the information is "to be used for the purpose of evaluating the person for prospective employment." A.R.S. § 23-1361(B).

Pinal County v. Cooper, 238 Ariz. 346,360 P.3d 142 (Ct.App. 2015). A sheriff's office employee sued a county manager for defamation, negligence and intentional infliction of emotional distress. The county manager filed a motion for summary judgment on the theory of qualified immunity as an executive government official. Motion denied and appealed. Qualified immunity is an absolute defense when actions are taken by an executive governmental official in his official capacity and executed with violating established law or acting with reckless disregard for whether the actions deprive another person of their rights. *Chamberlain v. Mathis*, 151 Ariz. 551, 729 P.2d 905 (1986). If objective evidence establishes the public official had information upon which to reasonably believe the statement in question was true and the publication was appropriate to the official's duties, immunity will apply. The question of immunity is for the court to decide though a jury can evaluate the underlying facts. In this case, the official had met his burden of presenting objective evidence and the trial court was reversed; immunity applied in favor of the county manager.

D. Other Defenses

1. Truth

In a civil action for libel, the truth of the contents of the allegedly libelous statement is a complete defense. Moreover, when proving the statement's truth, the defendant need not prove the literal truth of every detail, but must only prove that the statements are substantially true. The defense of substantial truth recognizes that "slight inaccuracies of expression are immaterial" if the allegedly defamatory statement is "true in substance." RESTATEMENT (SECOND) OF TORTS § 581(A). Although not an employment case, *Read v. Phoenix Newspapers, Inc.*, 819 P.2d 939, 941, 169 Ariz. 353, 355 (1991) represents that the general defense of truth applies to claims for defamation.

2. No Publication

Defamation is the publication to a third party, of a false, defamatory statement of and concerning the plaintiff that is not privileged. *See, Yetman v. English*, 811 P.2d 323, 168 Ariz. 71 (1991); and *Burns v. Davis*, 993 P.2d 1119, 1129, 196 Ariz. 155, 165 (Ct. App. 1999). As an essential element of defamation, without publication, there can be no defamation.

In *Huff v. Adidas Am.*, 131 F. App'x 104 (9th Cir. 2005), the Ninth Circuit Court of Appeals held that an employee must prove that the statements by other Adidas employees were actually published rather than mere privileged intercorporate communications. Under this reasoning, communications made between co-employees regarding another employee do not qualify as publication and cannot therefore give rise to a defamation claim.

3. Self-Publication

While some courts have recognized a tort of compelled “self-publication,” Arizona courts are not among them. The RESTATEMENT (SECOND) OF TORTS § 577, comment m provides that, “[t]here is no defamation where the defamed person is the recipient of the communication and then publishes it to a third person.” Because there is no Arizona authority on point and because the RESTATEMENT is consistent with Arizona’s defamation common law, the Arizona Supreme Court would follow the RESTATEMENT. *Spratt v. N. Auto. Corp.*, 958 F.Supp. 456 (D. Ariz. 1996).

4. Invited Libel

Neither Arizona nor the federal courts in the Ninth Circuit have dealt with the defense of “invited libel” in a defamation case.

5. Opinion

“Publication of an ‘opinion’ is not an absolute defense or entitled to special protection. Instead, the relevant question is whether the statement makes or implies a provable false assertion of fact.” *Milkovich v. Lorain Journal Company*, 497 US 1, 19-20,20-22, 110 S.Ct. 2695, 2706-7 (1990); *see also, Yetman v. English*, 168 Ariz. 71, 75-77, 811 P.2d 323, 327-29 (1991).

E. Job References and Blacklisting Statutes

See VI(B) above; ARIZ. REV. STAT. § 232-1361.

F. Non-Disparagement Clauses

FreeLife Intern., Inc. v. American Educational Music Publications, Inc., 2009 WL 3241795 (Ariz.D.Ct.). “Under Arizona law, courts generally enforce boilerplate language or clauses in non-negotiated, standardized contracts. *Gordinier v. Aetna Cas. & Sur. Co.*, 154 Ariz. 266, 742 P.2d 277, 283 (Ariz.1987); *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 682 P.2d 388, 399 (Ariz.1984). These clauses are not enforced, however, when the ‘drafter had reason to believe that the adhering party would not have assented to the particular term had he or she known of its presence.’ *Gordinier*, 742 P.2d at 283. This ‘[r]eason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that

it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction.’ *Darner*, 682 P.2d at 397.”

“Under Arizona law, contract provisions can be procedurally or substantively unconscionable. Both are questions of law for the Court. *Maxwell v. Fidelity Fin. Servs., Inc.*, 184 Ariz. 82, 907 P.2d 51, 56 (Ariz.1995). To evaluate procedural unconscionability, courts look to a contract's formation and factors that bear on the ‘voluntary meeting of the minds’ such as age, education, intelligence, business experience, bargaining power, and who drafted the contract. *Maxwell*, 907 P.2d at 58 (quoting *Johnson v. Mobil Oil Corp.*, 415 F.Supp. 264, 268 (E.D.Mich.1976)).” Procedural unconscionability, however, is assessed at the time the contract is made, not months or years later. A.R.S. § 47–2302 (2009); *Maxwell*, 907 P.2d at 53.

“Arizona law does not hold that contracts of adhesion—which are by definition drafted by only one party and non-negotiable—are unenforceable. And in many jurisdictions, online contracts of adhesion are regularly upheld as long as the applicant expresses assent to the terms of the agreement. *See, e.g., Feldman v. Google, Inc.*, 513 F.Supp.2d 229, 236 (E.D.Pa.2007); *Specht v. Netscape Comms. Corp.*, 306 F.3d 17, 22 (2d Cir.2002).

Because a non-disparagement clause is typically part of a private contract, it is not protected by the First Amendment. “The First Amendment protects individuals from government infringement on speech, not private infringement. *George v. Pacific–CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir.1996).”

What does “disparagement” mean? “Contract terms are construed according to the intent of the parties at the time the contract was made. *Polk v. Koerner*, 111 Ariz. 493, 533 P.2d 660, 662 (Ariz.1975). If the intent cannot be determined, contract terms will be given their plain meaning. *Horton v. Mitchell*, 200 Ariz. 523, 29 P.3d 870, 874 (Ariz.Ct.App.2001).” “Disparage means ‘[t]o bring discredit or reproach upon; to dishonour, discredit; to lower in credit or esteem.’ Oxford English Dictionary (2d ed.1989).”

For the Court to enter summary judgment on breach of the non-disparagement clause, the facts must be such that a reasonable jury could come to no conclusion other than that Burge's website disparages FreeLife or its products.” Translation - summary judgment on this claim will be very difficult.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

Arizona has long recognized intentional infliction of emotional distress as a valid tort claim in Arizona. *See, Robinson v. Fred Meyers Stores, Inc.*, 252 F.Supp.2d 905, 915 (D. Ariz. 2002) *citing Savage v. Boies*, 272 P.2d 349, 77 Ariz. 355 (1954).

Mintz v. Bell Atlantic Systems Leasing Intern., Inc., 183 Ariz. 550, 905 P.2d 559 (Ct.App. 1995). Elements of intentional infliction of emotional distress: (1) conduct of the defendant was extreme and outrageous, (2) defendant intended to cause emotional distress or

recklessly disregarded the near certainty that distress would result, (3) severe emotional distress did occur. *Citing Ford v Revlon*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987).

An employer is rarely liable for intentional infliction of emotional distress when an employee claims sexual harassment by another unless the employer completely fails to investigate or undertake to remedy the problem. *Craig v. M&O Agencies*, 496 F.3d 1047 (9th Cir. 2007).

Sampling of court decisions:

Craig v. M & O Agencies, Inc., 496 F.3d 1047, 1059 (9th Cir. 2007) (supervisor repeatedly propositioning employee, following employee into bathroom, and sticking his tongue in her mouth could be extreme and outrageous conduct);

Mintz v. Bell Atl. Sys. Leasing Int'l, Inc., 183 Ariz. 550, 553–54, 905 P.2d 559, 562–63 (Ct. App. 1995) (firing an employee by letter delivered to hospital bed where the employee was being treated for severe emotional problems was not extreme and outrageous);

Nelson v. Phoenix Resort Corp., 181 Ariz. 188, 199-200, 888 P.2d 1375, 1386 (Ct. App. 1994) (escorting employee out of premises in middle of night by armed security team, allowing employee to use bathroom on way out only if accompanied into stall by armed escorts, and firing employee in lobby in front of coworkers and media was not extreme and outrageous);

Pankratz v. Willis, 155 Ariz. 8, 15, 744 P.2d 1182, 1189 (Ct. App. 1987) (stealing child from parent was extreme and outrageous);

Ford v. Revlon, Inc., 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987) (corporation's delay of more than a year in investigating an employee's claims of sexual assault and continuing threats and harassment by her supervisor, which led to the employee's attempted suicide, was extreme and outrageous);

Midas Muffler Shop v. Ellison, 133 Ariz. 194, 198, 650 P.2d 496, 500 (Ct. App. 1982) (six phone calls over a three-month period by collection agency after payment was made was not extreme and outrageous);

Watts v. Golden Age Nursing Home, 127 Ariz. 255, 257, 619 P.2d 1032, 1035 (1980) (nursing home's two-day delay in informing wife that her husband was diagnosed with terminal pneumonia, which caused his death four days after diagnosis, was not extreme and outrageous).

Perez v. Curcio, 710 F.Supp. 259, 262 (D. Ariz. 1989) (a demotion and subsequent termination, without more, was not sufficiently outrageous).

Guy v. City of Phoenix, 668 F.Supp. 1342 (D. Ariz. 1987)(black police officer alleged that he had been harassed and subjected to derogatory comments but isolated and addressed by supervisors; not sufficiently outrageous).

Spratt v. N. Auto Corp., 958 F.Supp. 456, 461 (D. Ariz. 1996)(mere allegations of crying, being stressed and upset, and having headaches are insufficient to support intentional infliction claim).

B. Negligent Infliction of Emotional Distress

Arizona has adopted section 313 of the RESTATEMENT (SECOND) OF TORTS regarding negligent infliction of emotional distress. In order to recover for negligent infliction of emotional distress, there must be (1) a manifestation through physical injury; (2) the plaintiff must have been in the zone of danger that the defendant's negligence created so as to put the plaintiff at unreasonable risk of bodily harm; and (3) the emotional distress must come from the plaintiff's witnessing of injury to a person with whom the plaintiff has a close personal relationship or, in fact, the plaintiff is the person injured. *Quinn v. Turner*, 745, P.2d 972, 974, 155 Ariz. 225, 227 (Ariz. Ct. App. 1987).

Claims of negligent infliction of emotional distress in an employment context are governed by A.R.S. §§ 23-1022(A) and 23-906(A), Arizona's worker's compensation statutes. Arizona law provides that "[t]he right to recover compensation pursuant to this chapter for injuries sustained by an employee . . . is the exclusive remedy against the employer or any co-employee acting in the scope of his employment. (Emphasis added). As a result, a plaintiff's claim of negligent infliction of emotional distress as a result of an alleged workplace injury could be barred by the Arizona worker's compensation scheme. *See, Hunley v. Orbital Sciences Corp.*, CV-05-1879-PHX-DGC, 2006 WL 2460631 (D. Ariz. Aug. 22, 2006).

Arizona law does have a willful misconduct exception to the exclusive remedy of the workers' compensation statute. The court in *Mosakowski v. PSS World Med. Inc.*, 329 F.Supp.2d 1112, 1129 (D. Ariz. 2003) ruled that when an employee's injury results from an employer's willful misconduct, defined as "an act done knowingly and purposely with the direct object of injuring another," this conduct falls outside of the workers' compensation statute.

VIII. PRIVACY RIGHTS

A. Generally

Arizona first recognized a cause of action for invasion of privacy in *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 162 P.2d 133 (1945). In 1986, Arizona adopted the RESTATEMENT (SECOND) OF TORTS': 1) publication of statements placing another in a false light; 2) public disclosure of private facts about another; 3) appropriation of another's name or picture for commercial advantage; and 4) intrusion upon another's solitude or seclusion.

Rutledge v. Phoenix Newspapers, Inc., 715 P.2d 1243, 148 Ariz. 555 (Ariz. Ct. App. 1986); *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 162 Ariz. 335 (1989)(false light claim elements); *see also* RESTATEMENT (SECOND) OF TORTS § 652(D) (1977) (elements of public disclosure privacy tort); RESTATEMENT (SECOND) OF TORTS § 652(C)(commercial appropriation); RESTATEMENT (SECOND) OF TORTS § 652(B) (intrusion upon seclusion).

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

a. Eligibility Verification

A.R.S. § 23-214 regarding verification of employment eligibility provides:

A. After December 31, 2007, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the e-verify program and shall keep a record of the verification for the duration of the employee's employment or at least three years, whichever is longer.

B. In addition to any other requirement for an employer to receive an economic development incentive from a government entity, the employer shall register with and participate in the e-verify program. Before receiving the economic development incentive, the employer shall provide proof to the government entity that the employer is registered with and is participating in the e-verify program. If the government entity determines that the employer is not complying with this subsection, the government entity shall notify the employer by certified mail of the government entity's determination of noncompliance and the employer's right to appeal the determination. On a final determination of noncompliance, the employer shall repay all monies received as an economic development incentive to the government entity within thirty days of the final determination.

C. Every three months the attorney general shall request from the United States department of homeland security a list of employers from this state that are registered with the e-verify program. On receipt of the list of employers, the attorney general shall make the list available on the attorney general's website.

b. Reporting Procedures

A.R.S. § 23-722.01 regarding Employer reporting, exceptions, retention of records, unauthorized disclosure, civil penalty, new hire directory:

A. Subject to the requirements of subsection E, the department of economic security shall implement a program to require all employers doing business in this state to report the following to the department of economic security: (1) The hiring of any employee who resides or works in this state. (2) The rehiring or returning to work of any employee who was laid off, furloughed, separated, granted a leave without pay or terminated from employment.

B. The department of economic security shall eliminate all unnecessary reporting of the information requested to reduce the burden on employers.

C. Employers shall report by submitting a W-4 form or an equivalent form at the option of the employer. The information may be submitted magnetically, electronically or by first class mail, tele facsimile or any other means that are authorized by the department of economic security.

D. Employers shall submit the reports within twenty days after the employee is hired or rehired or returns to work. Employers who submit reports magnetically or electronically shall submit the reports in two monthly transmissions not more than sixteen days apart. The report shall contain all of the following: (1) The employee's name, address and social security number. (2) The employer's name, address and federal tax identification number. (3) The date the employee first performed services for pay.

E. An employer who has employees who are employed in two or more states and who transmits new hire reports magnetically or electronically may comply with the new hire reporting requirements by designating one state in which the employer has employees to transmit the report. An employer who has employees in two or more states shall notify the United States secretary of health and human services of the state to which the employer shall send reports.

F. Except as provided in subsection L, the department of economic security or its agent may use the information collected pursuant to this section only for the following purposes: (1) The administration and enforcement of child support pursuant to title IV-D of the social security act. Except as provided by federal law, the information collected shall only be used to locate a person to establish paternity and to establish, modify and enforce support obligations. The information may be disclosed to an agent under contract with the department of economic security to carry out this purpose. The information may also be disclosed to agencies of this state, political subdivisions of this state, federal agencies involved with support and other states and their political subdivisions seeking to locate persons to enforce support pursuant to title IV-D of the social security act; (2) The identification and prevention of benefit fraud in assistance programs under title 46, chapter 2, article 5.1; (3) The administration of employment security services pursuant to this chapter and workers' compensation programs pursuant to chapter 6 of this title.

G. The information collected pursuant to this section shall not be disclosed pursuant to title 39, chapter 1.3. An employee or agent of this state who discloses any information collected pursuant to this section without authorization is subject to a civil penalty of one thousand dollars for each offense. The department of economic security may impose and collect the penalty and shall deposit any collections in the state general fund. Any unauthorized release of information is cause for the administrative discipline of the employee or agent.

H. The department shall operate a state directory of new hires comprised of information received from employers. The department shall enter information received from

employers into the state directory of new hires within five business days after receipt. The information shall be forwarded to the national directory of new hires within three business days after entry into the state directory of new hires. For the purposes of this section, a business day is a day when state offices are open for regular business.

I. The department of economic security shall conduct, directly or by contract, an automated comparison of social security numbers reported by employers pursuant to this section and the social security numbers on record in the state case registry of child support orders.

J. If a comparison conducted pursuant to subsection I reveals a match of the social security number of an obligor required to pay support in a title IV-D case, the department, within two business days, shall issue an income withholding order to the employer of the person obligated to pay support directing the employer to withhold the ordered amount from the income of the employee.

K. This section does not allow the department to impose penalties on employers for failing to comply with this section's reporting requirements.

L. The department of economic security and the Arizona health care cost containment system administration may use the information collected pursuant to this section to verify eligibility under title XIX of the social security act.

2. Background Checks

Arizona employers must comply with federal Form I-9 for employment eligibility status.

Arizona has a specific statute governing background checks for employees of school districts. A.R.S. §15-512.

A.R.S. 44-1692(A)(3)(b) allows credit reports to be pulled and used for employment purposes.

See also A.R.S. 23-211, *et seq.* and pending legislation cited above.

C. Other Specific Issues

1. Workplace Searches

Restatement (Second) of Torts § 652(B) sets forth the tort of intrusion upon seclusion, thus: one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable person. The Restatement illuminates the tort in comment b: the invasion may be physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be the use of

the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be some other form of investigation or examination into his private concerns, as by opening his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The Restatement places the following limits on the tort: the defendant is subject to liability under the rule stated in this section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. However, an individual's privacy rights under Arizona law do not allow an employee to refuse to consent to a private employer's mandatory drug test. *Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 280, 947 P.2d 846, 854 (Ct. App. 1997). "Arizona's constitutional right to privacy does not support a wrongful termination suit against a private employer" by an employee who refuses to consent to a mandatory drug test. *Id.* The appellate court held in this way when it affirmed the trial court's granting of summary judgment for an employer that terminated employees after they refused to submit to the employer's mandatory drug test. *Id.*

2. Electronic Monitoring

Arizona's eavesdropping statute makes it a crime for a non-party to a conversation to overhear or record a conversation by instrument or device. A.R.S. § 13-3005. A.R.S. §13-3012 provides numerous exceptions including consent of the parties to the conversation.

3. Social Media

Anthony v. Morgan, 2016 WL 3364989 (Ariz.Ct.App.). The wife and children of a deceased police officer sought to permanently enjoin online news blog from publishing autopsy photographs of deceased. "Public records may be lawfully withheld when 'the interests of privacy, confidentiality, or the best interest of the state in carrying out its legitimate activities outweigh the general policy of open access.'" *Carlson v. Pima County*, 141 Ariz. 487,491, 687 P.2 1242, 1246 (1984)." The superior court should hold *in camera* inspection of the materials or information to determine if public interest or privacy should prevail. In this case, privacy prevailed.

Nash v. Nash, 232 Ariz. 473, 307 P.3d 40 (Ct.App. 2013). The family law court order was upheld barring the divorcing parents from disparaging one another on social media. The Court of Appeal affirmed saying it did not violate their First Amendment right to free speech. The presumption that any restriction to free speech is patently unconstitutional can be overcome with evidence: "that it serves a compelling governmental interest, is necessary to serve the asserted [compelling] interest, is precisely tailored to serve that interest, and is the least restrictive means readily available for that purpose. *Hobbs v. County of Westchester*, 397 F.3d 133, 149 (2nd Cir. 2005)." *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892 (9th Cir. 2008). "Do users of text messaging services such as those used by Arch Wireless have a reasonable expectation of privacy in their text messages stored on the service provider's network? We hold that they do." Reversed by *City of Ontario, Calif. v. Quon*, 560 US 746m 130 S.Ct. 2619 (2010), not to negate expectation of privacy but the search of his texts was deemed

reasonably necessary to serve a legitimate work-related purpose so the 4th Amendment was not violated.

United States v. Forrester, 512 F.3d 500, 510 (9th Cir. 2008). “[E]-mail ... users have no expectation of privacy in the to/from addresses of their messages... because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing information.” There remains no ruling on the privacy expectation of the contents of emails.

US v. Heckenkamp, 482 F.3d 1142 (9th Cir. 2007). A university student did not relinquish expectation of privacy for contents of computer even though university had a policy of accessing computer data in limited circumstances while connected to the university network.

US v. Ziegler, 474 F. 3d 1184 (9th Cir. 2007). An employee had an expectation of privacy of computer data kept in locked office despite company policy that computer usage would be monitored.

4. Taping of Employees

A.R.S. 12-731(A) provides for civil damages for violating ARS 13-3019 (Illegal Filming and Photography Law).

A.R.S. 13-3019(C) allows for photographing, videotaping, filming or digitally recording for security purposes so long as provisions for notice are fulfilled.

5. Release of Personal Information on Employees

Arizona public employees’ privacy interests do not disappear simply because information may be available through other public sources. *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 191 Ariz. 297, 301, 955 P.2d 534, 538 (1998). The Arizona Supreme Court also concluded that a person, including a public school teacher, has a privacy interest in his or her birth date. *Id.*

6. Medical Information

Tucson Woman’s Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004). Individuals have a constitutional right of privacy from the disclosure of personal matters or information. *Whalen v. Roe*, 429 US 589, 97 S.Ct. 869 (1977). But, like other constitutional rights, it may be infringed if there is a proper governmental interest being served. *Planned Parenthood of Southern Arizona v. Lawall*, 307 F.3d 783 (9th Cir. 2002). The factors to consider if infringement is warranted: “(1) the type of information requested, (2) the potential for harm with any non-consensual disclosure, (3) adequacy of safeguards to prevent unauthorized disclosure, (4) the degree of need for the information, and (5) whether there is an express statutory mandate, articulated public policy or other recognizable public interest mitigating towards access.” Using this 5 part test, this Court declared several Arizona laws unconstitutional as intrusive infringements on the right of privacy of medical information.

7. Restrictions on Requesting Salary History

None.

IX. WORKPLACE SAFETY

A. Negligent Hiring

A claim of negligent hiring or supervision arises when an injured third party asserts that the employer either negligently failed to conduct background checks, which would have revealed previous violent or illegal activity, or negligently failed to train or supervise the employee. The tort of negligent hiring or supervision is distinct from the doctrine of respondeat superior. Liability for negligent hiring or supervision exists only if all the elements of negligence are satisfied. *Boyle v. City of Phoenix*, 563 P.2d 905, 907, 115 Ariz. 106, 108 (1977).

However, in requiring that all elements of an ordinary negligence claim be met, “[a]n employer will not be liable for an act of an employee that was not foreseeable.” *Pruitt v. Pavelin*, 685 P.2d 1347, 141 Ariz. 195 (Ct. App. 1984). The employer will be liable only if it knew, or should have known, of the risk that resulted in the injury or harm. RESTATEMENT (SECOND) OF TORTS § 320 cmt.d. In *Kassman v. Busfield Enterprises, Inc.*, 639 P.2d 353, 131 Ariz. 163 (Ct. App. 1981), the plaintiff brought suit for personal injuries alleging negligent supervision and hiring after he was shot by the doorman of a bar. The employer checked the employee’s references prior to his employment, revealing no prior problems that would have put the employer on notice. The plaintiff argued that the employer had a duty to inquire as to the doorman’s criminal history. The court disagreed because the nature of the doorman’s job did not require the use of weapons or dealing with security problems.

In a negligent hiring or supervision case in Arizona, an employer can be found not negligent as a matter of law if the plaintiff is unable to prove tort liability on the part of the employee. *Mulhern v. City of Scottsdale*, 799 P.2d 15, 165 Ariz. 395 (Ct. App. 1990); *see also, Kuehn v. Stanley*, 91 P.3d 346, 208 Ariz. 124 (Ct. App. 2004).

If an employee has a claim against an employer for negligent hiring and/or negligent supervision, and alleges that he was injured as a result of negligent workplace conduct, such claims are barred by Arizona’s worker’s compensation scheme. *See St. George v. Home Depot U.S.A. Inc.*, CV-04-1210-PCT-LOA, 2006 WL 3147661 (D. Ariz. Nov 1, 2006).

B. Negligent Supervision/Retention

See discussion above in Section A.

C. Interplay with Worker’s Comp. Bar

A.R.S. 23-1022 establishes workers’ compensation as the exclusive remedy for an employee against an employer except in cases of intentional acts.

Article 18, Section 8 of the Arizona Constitution mandates that an employee receive workers' compensation if the employee is injured in "any accident arising out of and in the course of such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment...."

The Supreme Court of Arizona held that the legislature may not define legal causation that conflicts with the Arizona Constitution. *Grammatico v. Indus. Comm'n*, 211 Ariz. 67, 72, 117 P.3d 786, 791 (2005). In *Grammatico*, the Supreme Court held that ARIZ. REV. STAT. § 23-1021(D) impermissibly restricts legal causation and thus was unconstitutional. Section 23-1021(D) provided that "an employee who fails to pass, refuses to cooperate with, or refuses to take a qualified alcohol or drug test, is prohibited from receiving compensation, even if his or her injury would otherwise require compensation, unless the employee can prove that the intoxication or unlawful drug use was not a contributing cause of the accident." The Court in *Grammatico* also held that ARIZ. REV. STAT. § 23-1021(C) was unconstitutional. Section 23-1021(C) provided "an employee's injury or death shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter if the impairment of the employee is due to the employee's use of alcohol...and is a substantial contributing cause of the employee's personal injury or death...." *Grammatico* did hold that intentionally self-inflicted injuries, however, bar compensation only to those employees who clearly have purposely inflicted their injuries. *Id.*

Peetz v. Indus. Comm'n, 124 Ariz. 324, 604 P.2d 255 (1979), a city police officer sought workers' compensation for an accidental shooting while off duty. His benefits were denied by the Industrial Commission and the Court of Appeals set aside the award. The Supreme Court affirmed the Industrial Commission's decision and held that the off-duty police officer's injury arising out of showing his gun's safety to his wife did not arise during his employment within the meaning of the Workman's Compensation Statute.

Bennett v. Indus. Comm'n of Arizona, 163 Ariz. 534, 789 P.2d 401 (Ct. App. 1990). In *Bennett*, an employee sustained a fatal gunshot wound at his place of employment when his own gun accidentally discharged. *Id.* The decedent worked for Southwest Charter Lines and his employment duties included cleaning buses, maintain bus fuel and oil and cleaning the bus yard. *Id.* The decedent and his brother both worked for the bus company and carried handguns while at work; the employer did not object to this practice. The sales manager at the bus company owned a new pickup truck and would occasionally permit other employees to use his truck, however, he instructed his secretary not to permit anyone to use his truck in his absence while on a vacation. *Id.* While the sales manager was on vacation, the decedent borrowed the truck to run errands; the decedent was bending over a box while using the sales manager's truck and accidentally shot himself. *Id.* The widow filed for death benefits using the unexplained death rule. The Court in *Bennett* describes the unexplained death rules as follows:

"As Larson describes the rule, '[w]hen an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death, most courts will indulge a presumption or inference that the death arose out of the employment.' 1 A. Larson, Workmen's Compensation

Law § 10.32, at 3–100 (hereinafter Larson), *quoted with approval* in Martin v. Indus. Comm'n, 75 Ariz. 403, 411, 257 P.2d 596, 601 (1953). *See also*, Downes v. Indus. Comm'n, 113 Ariz. 90, 93, 546 P.2d 826, 829 (1976) (“There is a ... presumption that when a workmen [sic] is killed on the job he was, at the time of the fatal accident, within the scope and course of his employment.”).”

Id. The Court held it was inexplicable from the evidence presented what the decedent was doing at the sales manager’s truck when his gun discharged and applying Larson, “a totally inexplicable action, undertaken while the employee is otherwise in the course of employment, does not break the continuity of employment, when the action makes no more sense as a personally-motivated act than as a work-motivated act.” *Id.* As a result, the Court set aside the Industrial Commission’s finding of non-compensability.

D. Firearms in the Workplace

A.R.S. 12-781(A) Effective: September 30, 2009.

A. A property owner, tenant, public or private employer or business entity shall not establish, maintain or enforce a policy or rule that prohibits a person from lawfully transporting or lawfully storing any firearm that is both:

1. In the person's locked and privately owned motor vehicle or in a locked compartment on the person's privately owned motorcycle.
2. Not visible from the outside of the motor vehicle or motorcycle.

B. Any policy or rule that is established or maintained or the attempted enforcement of any policy or rule that is in violation of subsection A is contrary to public policy, is null and void and does not have legal force or effect.

C. This section does not apply if:

1. The possession of the firearm is prohibited by federal or state law.
2. The motor vehicle is owned or leased by a public or private employer or business entity and is used by an employee in the course of the employment, unless the employee is required to store or transport a firearm in the official discharge of the employee's duties or if the public or private employer or business entity consents to the transportation or storage of the firearm.
3. The property owner, tenant, public or private employer or business entity provides a parking lot, parking garage or other area designated for parking motor vehicles, that:
 - (a) Is secured by a fence or other physical barrier.
 - (b) Limits access by a guard or other security measure.

(c) Provides temporary and secure firearm storage. The storage shall be monitored and readily accessible on entry into the premises and allow for the immediate retrieval of the firearm on exit from the premises.

4. The property owner's, tenant's, public or private employer's or business entity's compliance with this section necessitates the violation of another applicable federal or state law or regulation.

5. The property owner, tenant, public or private employer or business entity is a nuclear generating station that provides a secured and gated or fenced parking lot, parking garage or other area designated for parking motor vehicles and provides temporary and secure firearm storage. The storage shall be readily accessible on entry into the premises and allow for the immediate retrieval of the firearm on exit from the premises.

6. The parking lot, parking garage or other area designated for single family detached residence.

7. The property owner, tenant, public or private employer or business entity is a current United States department of defense contractor and the property is located in whole or in part on a United States military base or a United States military installation. If any part of the property is not located on the United States military base or United States military installation, the property shall be contiguous with the base or installation.

8. The property owner, tenant, public or private employer or business entity provides alternative parking in a location reasonably proximate to the primary parking area for individuals who desire to transport or store a firearm in the individual's motor vehicle and does not charge an extra fee for such parking.

E. Use of Mobile Devices

No developments at this time.

X. TORT LIABILITY

A. Respondeat Superior Liability

An employer is vicariously liable under the doctrine of *respondeat superior* for the negligent work-related actions of its employees. *See, Tarron v. Bowen Mach. & Fabricating, Inc.*, 225 Ariz. 147, 150, 235 P.3d 1030, 1033 (2010). *See also, Engler v. Gulf Interstate Eng'g, Inc.*, 230 Ariz. 55, 57, 280 P.3d 599, 601 (2012). An employer is vicariously liable only if the employee is acting within the course and scope of employment when the accident occurs. *Id. citing State v. Super. Ct. (Rousseau)*, 111 Ariz. 130, 132, 524 P.3d. 951, 953 (1974). In making a determination as to whether an employee was acting within the course and scope of

employment, Arizona courts have considered the extent to which the employee was subject to the employer's control. *See, Rousseau*, 111 Ariz. at 132, 524 P.2d at 953.

Arizona courts have applied the factors listed in the Restatement (Second) §228 with respect to whether the employer exercised actual control or retained the right to control the employee's conduct when the negligent act occurred. The factors include the previous relations between the employer and the employee and whether the act: (a) was the kind the employee was hired to perform; (b) was commonly done by the employee; (c) occurred within the employee's working hours, and (d) furthered the employer's purposes or fell outside the employer's "enterprise." *See, Higgins v. Assmann Elec. Inc.*, 217 Ariz. 289, 297, 173 P.3d 453, 461 (Ct. App. 2007).

B. Tortious Interference with Business/Contractual Relations

In *Wagonseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1041, 147 Ariz. 370, 386 (Ariz. 1985), the court held that the tort of interference with contractual relations applied equally in the at-will employment context and that no formal contract is required. The court in *Wagonseller* rejected the formalistic privilege to terminate concept and adopted the RESTATEMENT (SECOND) OF TORTS §§ 766 and 767. These provisions require that the employee show "improper" interference for liability to attach. "Thus, as to motive and means." *Id.* at 1043, 147 Ariz. at 388.

In *Varsity Gold, Inc. v. Markwood*, 1 CA-CV 06-0748, 2007 WL 5462119 (Ariz. Ct. App. Nov. 29, 2007), the court held that a competitor's interference is not improper if at least part of its purpose is to advance competitor's own interest.

In *Lindsey v. Dempsey*, 735 P.2d 840, 843, 153 Ariz. 230, 233 (Ariz. Ct. App. 1987), a head basketball coach filed suit against the university's athletic director and president for tortious interference with contract. The court held that there was no improper interference because the plaintiff had the burden to prove improper motive or action and failed to produce any evidence thereof.

In *Woerth v. City of Flagstaff*, 808 P.2d 297, 167 Ariz. 412 (Ct. App. 1990), a terminated firefighter brought an action for tortious interference. Again the plaintiff failed to prove that there as improper motive for termination and summary judgment for the defendants was granted.

In *Neonatology Associates, Ltd. v. Phoenix Perinatal Associates Inc.*, 164 P.3d 691, 694 216 Ariz. 185, 188 (Ct. App. 2007), a group of doctors ("D1"), who were in-network providers under various healthcare insurance plans, brought an action against another group of doctors ("D2"), alleging that D2's practice of referring patients out-of-network to D2's own doctors, rather than to D1, interfered with D1's contractual relationship with healthcare insurance plans.

The court in *Neonatology* stated that the Supreme Court of Arizona established seven factors for determining whether conduct is improper for purposes of a tortious interference

claim: 1) the nature of the actor's conduct; 2) the actor's motive; 3) the interests of the other with which the actor's conduct interferes; 4) the interests sought to be advanced by the actor; 5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; 6) the proximity of remoteness of the actor's conduct to the interference; and 7) the relations between the parties.

The court, in upholding summary judgment for D2, held that a business-driven motive is not an improper motive. A competitor has not acted improperly if the competitor's "purpose at least in part is to advance its own economic interests." *Id.* at 695, 216 Ariz. at 189; *see also, Arunski v. Pet Pool Products, Inc.*, CA-CV 08-0629, 2010 WL 987164 (Ariz. Ct. App. Mar. 18, 2010).

In *Dube v. Desai*, 186 P.3d 587, 590, 218 Ariz. 362, 365 (Ariz. Ct. App. 2008), a graduate student at a state university sued his doctoral advisor for tortious interference with business relationship or expectancies after the advisor wrote and distributed numerous letters to the graduate student's dissertation committee questioning his work and character. The court recognized that the advisor was retaliating against the graduate student for his dissertation that undermined the doctoral advisor's work. However, the court stated that the doctoral advisor was not liable because his actions were not motivated, at least in part, to serving his employer. The court held that "an employee's improper actions, even those serving personal desires, will be deemed motivated to serve the employer if those actions are incidental to the employee's legitimate work activity."

Dube also filed a lawsuit against University of Arizona official Peter Likins and Richard Powell alleging tortious interference with a business relationship. *Dube v. Likins*, 167 P.3d 93, 216 Ariz. 406 (Ct. App. 2007). In that case, the court held that Dube failed to prove that he had a valid business expectancy. The court reasoned that a plaintiff's claim for tortious interference with a business expectancy is insufficient unless the plaintiff can allege facts which demonstrate that the expectancy constitutes more than a mere "hope." *Id.* at 99-100, 216 Ariz. at 413-414.

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

Arizona courts recognize the need for appropriate employer protection in maintaining customer relationships after an employee leaves, and will enforce reasonable restrictive covenants between an employer and an employee limiting the employee's right to compete against the employer after employment. The most common restrictive covenants are non-competition covenants, non-solicitation covenants, and non-disclosure and proprietary rights agreements. A non-competition clause precludes a former employee from engaging in the same type of business as the employer for a certain time period in a specified area. There are two types of non-solicitation clauses: employee non-solicitation clauses and customer non-solicitation clauses. A non-solicitation clause restricts the former employee from asking company employees or customers to leave the company and join the former employee's new company. Non-disclosure agreements protect trade secrets or other proprietary information by restricting the former employee from using or disclosing this information to third parties.

“Restrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored” and strictly construed against the employer. *Amex Distrib. Co., Inc. v. Mascari*, 724 P.2d 596, 600, 150 Ariz. 510, 514 (App. 1986); *Hilb, Rogal & Hamilton Co. of Arizona, Inc. v. McKinney*, 190 Ariz. 213, 216, 946 P.2d 464, 467 (App. 1997). A contrasting rule applies to a covenant given in connection with the sale of a business. As to the latter, courts are more lenient because of the need to see that goodwill is effectively transferred. *Amex Distrib.*, 150 Ariz. at 514, 724 P.2d at 600; *Gann v. Morris*, 122 Ariz. 517, 596 P.2d 43 (App. 1979); *Esmark, Inc. v. McKee*, 118 Ariz. 511, 578 P.2d 190 (App. 1978); *see also, Harlan M. Blake, Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 647 (1960) (A restraint accompanying the sale of a business is necessary for the buyer to get full goodwill value for which it has paid.)

Non-compete and non-solicitation clauses are enforceable in Arizona where tied to a legitimate business interest and narrowly tailored in duration and geographic scope. Restrictive covenants that are overly broad or overreaching or that lack necessary consideration are not enforceable. Generally, courts will not modify restrictive covenants found to be overly broad or overreaching to make them enforceable.

1. Statute of Limitations

The statute of limitation for a written contract is six years. A.R.S. § 12-548. However, if the restrictive covenant is contained in an employment agreement, a one-year limitations period would apply. A.R.S. § 12-541(3).

2. Consideration

An employer must give consideration in exchange for a non-competition covenant. Arizona courts recognize the employee “really gets nothing other than the opportunity to work in exchange for giving up this aspect of freedom.” *Valley Med. Specialists v. Farber*, 950 P.2d 1184, 1186, 190 Ariz. 563, 566 (1997), *overruled on other grounds*, 982 P.2d 1277, 194 Ariz. 363 (1999). In Arizona, future or continued employment may constitute consideration for a non-compete. *Lessner Dental Laboratories, Inc. v. Kidney*, 16 Ariz. App. 159, 160, 492 P.2d 39, 40 (App. 1971) (holding that an implied promise of future employment is sufficient consideration to enforce a covenant not to compete; *Mattison v. Johnston*, 152 Ariz. 109, 730 P.2d 286 (App. 1986).)

3. Reasonableness of the Restrictive Covenant

In order for a court to uphold a restraint, it must be reasonable. *Valley Med. Specialists*, 982 P.2d 1277, 1281, 194 Ariz. 363, 367. The ultimate question of reasonableness is a question of law. “But reasonableness is a fact-intensive inquiry that depends on weighing the totality of circumstances” such that each case hinges on its own particular facts. *Id.*; *Fearnow v. Ridenour, Swenson, Cleere & Evans*, 213 Ariz. 24, 26, 138 P.3d 723, 725 (2006); *Advantech AMT Corp. v. Foster*, 2009 WL 8629, at *5 ¶¶ 21-23 (Ariz. Ct. App. Jan. 2, 2009).

The Arizona Court of Appeals described the reasonableness test as follows:

“The test of validity of restrictive covenants is one of reasonableness. A contract wherein the employee agrees that following termination of employment he will not engage in a competitive business within a reasonably limited time and space is valid and enforceable if the restraint is not: (1) beyond that reasonably necessary for the protection of the employer’s business; (2) unreasonably restrictive upon the rights of the employee; and (3) in contravention of public policy.” [emphasis added.]

Lessner Dental Labs., 16 Ariz.App. at 160-161, 492 P.2d at 40-41; *Valley Med. Specialists*, 982 P.2d at 1283, 194 Ariz. at 369. (“A restriction is unreasonable and thus will not be enforced: (1) if the restraint is greater than necessary to protect the employer’s legitimate interest; or (2) if that interest is outweighed by the hardship to the employee and the likely injury to the public.”)

4. An Employer’s Protectable Interest

The Supreme Court of Arizona has held that in order for a restrictive covenant to be enforced it must do more than simply prohibit fair competition by the employee. It will not be valid unless it protects some legitimate interest beyond the employer’s desire to protect itself from competition. *Amex. Distrib.*, 150 Ariz. at 518, 724 P.2d at 604.

A non-competition covenant is “enforceable as long as it is no broader than necessary to protect an employer’s legitimate business interests.” *Liss v. Exel Transp. Servs.*, 2007 WL 891167, at *7 (D. Ariz. March 20, 2007); *see also* Restatement (Second) of Contracts § 188 (1981). Employers’ protectable interests include: “(1) their desire to retain their customer base; (2) their confidential agent and vendor lists; and (3) their goodwill with customers, agents and vendors.” *Id.* “The burden is on the employer to prove the extent of its protectable interest.” *Bryceland v. Northey*, 160 Ariz. 213, 216, 772 P.2d 36, 39 (Ct. App. 1989).

Employers have a legitimate protectable interest in retaining their customer base. *Bryceland v. Northey*, 160 Ariz. at 217, 772 P.2d at 40. Employer’s customers are an asset of value which has been acquired by virtue of effort and expenditures over a period of time. An employer’s interest in its clientele is balanced with the employee’s right to them. Courts are more reluctant to enforce restrictive covenants where the employee took an active role in bringing customers to the company. Restrictive covenants are designed to protect an employer’s customer base by preventing “a skilled employee from leaving an employer and, based on his skill acquired from that employment, luring away the employer’s clients or business while the employer is vulnerable-that is-before the employer has had a chance to replace the employee with someone qualified to do the job.” *Id.*

5. Scope of the Restrictive Covenant

The scope of a restrictive covenant is defined by its duration and geographic area. In Arizona, courts routinely scrutinize these elements of the covenant in favor of the departing employee.

A. Geographic/Territorial Limitations

The geographic scope of a non-competition covenant must be reasonably necessary to protect the employer's business and must not "unreasonably restrict the right of the employee to work in his chosen occupation." *Olliver/Pilcher Insurance, Inc. v. Daniels*, 148 Ariz. 530, 532, 715 P.2d 1218, 1220 (1986). No bright line rule defines the acceptable geographic scope of a non-compete agreement. The reasonableness of the geographic limitation depends heavily on the particulars of the employer's business and the former employee's work. Arizona courts approach reasonableness of geographic scope by analyzing "the whole subject matter of the contract, the kind, character, and location of the business... the purpose to be accomplished by the restriction, and the circumstances which show the intention of the parties." *Id; Gann*, 122 at 518, 596 P.2d at 44.

Arizona courts have not sustained territorial limitations prohibiting competition on a statewide basis. *Olliver/Pilcher Ins.*, 148 Ariz. at 532, 715 P.2d at 1220 (finding the scope of a statewide non-compete agreement unreasonable). Geographic limitations that are city-wide or greater and that generally prohibit competition within Arizona's two largest cities have also been rejected. *Truly Nolen Exterminating, Inc. v. Blackwell*, 610 P.2d 483, 125 Ariz. 481 (Ct. App. 1980) and *Bryceland v. Nathey*, 160 Ariz. at 219, 772 P.2d at 40.

Arizona courts, however, have upheld smaller geographic limitations. The Supreme Court upheld a covenant prohibiting a former employee from competing in the field of veterinary medicine for 5 years within 12 miles of the City of Mesa, the third largest city in Arizona. *Lassen v. Benton*, 346 P.2d 137, 86 Ariz. 323 (1959), opinion modified on reh'g, 347 P.2d 1012, 87 Ariz. 72 (1959). In *Bed Mart, Inc. v. Kelly*, 202 Ariz. 370, 45 P.3d 1219 (Ct. App. 2002), the court enforced a Phoenix metropolitan area non-compete agreement that prohibited a salesperson from working for any business for which the sale of mattresses accounted for more than 50% of sales revenue within a 10-mile radius of any of the former employer's stores, but did not prevent the former employee from working as a salesman within the territorial area for all other employers who sold mattresses. In *Highway Technologies, Inc. v. Porter*, 2009 WL 1835114, at *2-3, 5 (D. Ariz. June 26, 2009), the court found a 200-mile restriction for a two-year period reasonable in the pavement industry because of the widespread nature of the industry and its finding that the former employees gained their skills and customers solely from their employment.

B. Time/Temporal Limitations

Arizona courts have not held any specific time limitation to be unenforceable. Non-compete agreements are generally upheld only so long as necessary to remove any identification between the employer and the former employee in the minds of customers and long enough to permit the employer to find and train a replacement. "The idea is to give the employer a reasonable amount of time to overcome the former employee's loss, usually by hiring a replacement and giving that replacement time to establish a working relationship... '[w]hen the restraint is for the purpose of protecting customer relationships, its duration is reasonable only if it is no longer than necessary for the employer to put a new man on the job and for the new

employee to have a reasonable opportunity to demonstrate his effectiveness to the customers.”” *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 370, 982 P.2d 1277, 1284 (1999), 982 P.2d at 1284, 194 Ariz. at 370 (citing *Amex Distrib.*, 724 P.2d at 604, 150 Ariz. at 519).

In *Amex Distributing*, the court opined that a non-competition covenant of some duration was justifiable where the training period for a replacement of the former employee was between one to two years. That said, the court found that the three-year restraint contained in the agreement was unnecessary and unenforceable, explaining that “under any reasonable view of the evidence, a covenant could not have extended three years.” *Id.*, 150 Ariz. at 519, 724 P.2d at 605. Additionally, in *Zep, Inc. v. Brody Chem. Co., Inc.*, 2010 WL 1381896, at *5 (D. Ariz. Apr. 6, 2010), 12-month and 18-month covenants prohibiting solicitation of customers of an industrial cleaning products company were held unenforceable where replacement of former employees was often handled by reassignment of customers to existing representatives and even where new employees had to be trained, “skilled sales people can transition to commission-based pay with as little as three weeks of training.”

C. Blue Pencil

Arizona has adopted a blue-pencil rule; however, the courts will not rewrite contracts for parties. If it is clear from the terms of the contract that the terms are intended to be severable, Arizona’s blue-pencil rule allows the court to enforce the lawful portions and eliminate the unlawful portions. *Olliver/Pilcher Ins.*, 148 Ariz. at 533, 715 P.2d at 1221. “Where the severability of the agreement is not evident from the contract itself, the court cannot create a new agreement for the parties to uphold the contract.” *Id.*

In *Amex Distributing*, 724 P.2d at 605, 150 Ariz. at 519, the non-competition covenant contained a “severability” clause, stating that “if any portion of the agreement is invalid for any reason, the remainder shall remain in full force and effect.” This clause allowed the court to consider the valid portions of the covenant. If portions are severed due to being overbroad and unreasonable and are therefore rendered void, the court must then determine whether what remains is intelligible and enforceable. If the remainder is not intelligible and enforceable, the agreement will be voided regardless of the severability language. Ultimately, the court would not rewrite the three-year restraint contained in the agreement to enforce a shorter, justifiable time period. *Id.*

In an effort to take advantage of Arizona’s blue-pencil rule, employers now include step-down provisions within their non-compete clauses. *Compass Bank v. Hartley, Jr.*, 430 F.Supp.2d 973 (D. Ariz. 2006). Step-down provisions in restrictive covenants provide the parties with several scenarios that may be later determined by a court to be reasonable. In *Compass Bank*, the step-down provisions in the non-compete agreement included several duration ranges and geographical scopes. If a court subsequently finds the covenant unreasonable and uses the step-down provisions to amend the covenant, such a modification is not significant because it has already been contemplated. *Id.*

D. Confidentiality Agreements

“In Arizona, an overly broad confidentiality agreement amounts to a noncompetition agreement. (citations omitted) In turn, a noncompetition agreement must be limited in time and in geography or it is unreasonable.” *Joshua David Mellberg, LLC v. Will*, 96 F.Supp.3d 952 (UCDC AZ 2015), citing, *Orca Communications Unlimited, LLC v Noder*, 233 Ariz. 411, 314 P.3d 89, 95 (Ct.App. 2013).

Trade secrets may be some of the most valuable assets owned by a company. Arizona courts will enforce the protection of trade secrets and other confidential information. A confidentiality provision is used to protect trade secrets and other propriety information, including designs, ideas, techniques, methods and processes, research and development, customer lists and other confidential information.

E. Trade Secret Statute

Arizona adopted the Uniform Trade Secret Act, A.R.S. § 44-401 et seq. To prevail under the Act, the complaining party must demonstrate the trade secret information was misappropriated through improper means. First, the party must show it has trade secret information. Arizona’s statute defines a “trade secret” as, among other things, information that derives independent economic value because it is not generally ascertainable by proper means. Material is deemed a trade secret if it is not readily available to competitors and the complaining party has made reasonable efforts to maintain its secrecy. Next, misappropriation includes acquiring the trade secret by an improper means or disclosure of the secret without consent. And, “improper means” includes, theft, misrepresentation, even espionage through electronic or other means.

Under Arizona’s trade secrets law, a complaining party can: 1) seek injunctive relief, i.e., enjoin competitors from further misappropriation and use of the data; or 2) sue any or all of its competitors for damages. A court may award reasonable attorneys’ fees to the prevailing party if the misappropriation was in bad faith, or was willful and malicious. A.R.S. § 44-404. Damages may include both the actual loss caused by the misappropriation as well as unjust enrichment to the competitor. In lieu of damages measured otherwise, damages may be measured by imposing a “reasonable royalty” on the misappropriating party. A.R.S. § 44-403.

F. Fiduciary Duty and Other Considerations

Officers, directors, and other employees who resign their positions with their employer and accept employment with the employer’s competitor have not breached their fiduciary duty unless they act with malice or bad-faith. *Motorola, Inc. v. Fairchild Camera & Instrument Corp.*, 366 F.Supp. 1173 (D.Ariz. 1973). For example, a manager can breach his or her fiduciary duty by inducing fellow employees to terminate their employment and join a competing company. *Security Title Agency, Inc. v. Pope*, 219 Ariz. 480, 200 P.3d 977 (App. 2008).

When drafting an employment agreement, be specific, list exceptions where appropriate, and include step-down provisions. For instance, direct competitors should be identified where appropriate and the agreement should account for exceptions for clients and inventions that the employee brought to the company.

XII. DRUG TESTING LAWS

A. Public Employers

School transportation employees are required to submit to drug and alcohol testing if the employee's supervisor has probable cause to believe that the employee's job performance has been impaired by the use of drugs or alcohol. A.R.S. § 15-513(A). Transportation employees must also submit to drug and alcohol tests after an accident involving a vehicle used to transport students. *Id.* §15-513(B). If the results of the tests are positive, the district may charge the costs to the employee. *Id.* § 15-513(D). A transportation employee who refuses to submit to a drug or alcohol test may be terminated. The employee, however, retains the right to appeal prior to his dismissal. *Id.* § 15-513(E).

The Supreme Court of Arizona addressed privacy considerations as well as drug testing laws in *Petersen v. City of Mesa*, 83 P.3d 35, 207 Ariz. 35 (Ariz. 2004). In that case, the court analyzed the City of Mesa Fire Department's drug testing policy which allowed for "suspicionless, random" drug testing of firefighters. Petersen, a firefighter, challenged a portion of the policy as violating Article II, Section 8 of the Arizona Constitution ("No person shall be disturbed in his private affairs . . . without authority of the law"). Arizona's trial court concluded the drug testing policy was an unreasonable invasion of privacy, the Court of Appeals reversed, and the Supreme Court of Arizona reversed again agreeing with the trial court.

Rationalizing that a firefighter's job does not require carrying a gun or coming in contact with illegal drugs, the court held that the interest of the City did not outweigh Petersen's privacy interest. The City was unable to identify a real and substantial risk of drug use within the department or offer evidence of any incidents related to drug abuse. The court characterized the City's interest as a generalized and unsubstantiated interest in deterring and detecting a hypothetical drug abuse problem.

In re Leopoldo L., 209 Ariz. 249, 99 P.3d 578 (Ct. App. 2004), the drug and alcohol testing fell within the special-needs exception and did not violate the right to privacy.

B. Private Employers

In 1994, the Arizona legislature adopted a comprehensive drug and alcohol testing law. See A.R.S. §§ 23-493 et seq. The Employee Drug Testing Law codifies private employers' right to test their employees for the presence of drugs and alcohol, provides procedural safeguards for employees, and limits the ability of employees to sue employers as a result of adverse action based on a testing program.

Generally, the law permits testing of both current employees and applicants. Testing is allowed for any job-related purpose consistent with business necessities, including: 1) investigation of possible individual employee impairment; 2) investigation of accidents; 3) safety reasons; 4) maintenance of productivity and quality of products and services; 5) security of property or information; and 6) when based upon reasonable suspicion that an employee may be affected by drugs or alcohol which may adversely affect the job performance.

In addition, employees or groups of employees may be required to undergo drug testing on a random basis. See A.R.S. §§ 23-493 et seq. This type of testing should occur when there is a behavioral or safety justification. The more safety sensitive or dangerous a job is, the more appropriate to choose random testing. Steven G. Biddle, 2 ARIZONA EMPLOYMENT LAW HANDBOOK 8.3-13 (Thomas M. Rogers ed., State Bar of Arizona 2007)(1995).

Before an employer can test employees, there must be a written policy that has been distributed to all employees and prospective employees. The written policy must inform the employee or prospective employee of the policy regarding drug and alcohol use by employees: a description of those employees/applicants who are subject to testing; circumstances under which testing may be required; substances for which testing may be required; description of the testing methods and collection procedures; the consequences of a refusal to participate in the testing; any adverse personnel action that may be taken based on the testing procedures or results; the right of an employee, on request, to obtain the written test results; the right of an employee, on request, to explain in a confidential setting the reasons for a positive test result; and a statement of the employer's policy regarding the confidentiality of test results. A.R.S. § 23-493.04.

The law also sets forth requirements for testing procedures, scheduling of tests, and collection of samples. A.R.S. § 23-493.01 states that an employer may designate the type of sample used for testing. The Employee Drug Testing Law specifically grants the employer the right to take disciplinary action against those with positive test results and those who refuse to participate.

In *Hart v. Seven Resorts, Inc.*, 947 P.2d 846, 851, 190 Ariz. 272, 277 (Ct. App. 1997), the Arizona Court of Appeals upheld the trial court's granting of summary judgment for an employer that terminated employees after they refused to submit to the employer's mandated drug test. The court upheld the trial court's decision to dismiss all counts including invasion of privacy, intentional infliction of emotional distress and wrongful termination. As to the employee's claim of a right to privacy, the court found that this right does not restrict a private employer's actions.

Once there is a positive drug test, A.R.S. § 23-493.03 states that there must be a second confirmatory drug test.

In *Grammatico v. Indus. Comm'n*, 90 P.3d 211, 208 Ariz. 10 (Ariz. Ct. App. 2004) *aff'd* 117 P.3d 786, 211 Ariz. 67 (Ariz. 2005), the issue of drug testing arose in the worker's compensation setting. In 1999, Arizona's legislature amended A.R.S. § 23-1021 to provide that if an employer implements a drug-free workplace policy, a worker who suffers a workplace injury and then tests positive for alcohol impairment or illegal drug use is not eligible for worker's compensation benefits unless one of three exceptions applies. (The exception at issue in this case was employee proof that the alcohol or unlawful substance was not a contributing cause of the injury). When Grammatico was injured after falling at work and subsequently tested positive for methamphetamines and marijuana, his benefits were denied.

Grammatico argued that the Arizona statute violated Article 18, Section 8 of the Arizona Constitution by restricting legal causation. The Industrial Commission argued that the new statute only regulates the method of proving medical causation, and does not affect legal causation. The Court of Appeals disagreed, finding the statute unconstitutional as applied to these facts.

Under A.R.S. § 23-493.08, before a cause of action for defamation of character, libel, slander, or damage to reputation can be brought against an Employer that has a drug or alcohol testing program in compliance with the Employee Drug Testing Law, all of the following conditions must apply: 1) the test results were disclosed to a person other than the employer, the test subject, or another person authorized or privileged by law to receive the information; 2) the disclosed information was a false positive test result; 3) the false positive test result was disclosed negligently; and 4) all elements of an action for defamation, libel, slander, or damage to reputation are satisfied.

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

Arizona has enacted the Arizona Civil Rights Act. A.R.S. § 41-1401 et seq.

A. Employers/Employees Covered

The Act applies to an employer, other than a tax-exempt private club, the federal government, or businesses located on Indian reservations, that have 15 or more employees (including part-time and temporary employees) for 20 or more weeks in the current or preceding year. A.R.S. § 41-1461(2).

B. Types of Conduct Prohibited

The Arizona Civil Rights Act prohibits discrimination in employment on the basis of race, color, religion, national origin, sex, age, and physical disability. A.R.S. § 14-1463. The Act also makes it an unlawful employment practice for an employer to discriminate against any individual because the individual complained of unlawful employment discrimination or filed a charge or otherwise participated in an investigation by the Arizona Civil Rights Division of the Attorney General's Office. A.R.S. § 41-1464.

C. Administrative Requirements

The Arizona Civil Rights Act created an administrative agency, the Arizona Civil Rights Division, much like Title VII of the Civil Rights Act of 1964 created the EEOC. A.R.S. § 41-1401. Under the Arizona Civil Rights Act, a charge of discrimination must be filed with the Arizona Civil Rights Division within 180 days after the most recent act of discrimination. The charge must be filed before any action alleging a violation of the Arizona Civil Rights act can be brought in a state or federal court. A.R.S. § 14-1481.

After a charge has been filed, the Civil Rights Division has exclusive jurisdiction to investigate that charge for 60 days before a lawsuit can be brought. A.R.S. § 41-1481. The Civil

Rights Division may waive its exclusive jurisdiction if it concludes that the EEOC is in a better position than the Civil Rights Division to investigate a charge.

If, at the conclusion of 60 days, the Civil Rights Division has not brought a lawsuit on behalf of the complaining party, the complaining party may request a Right to Sue letter and may then file a complaint in state or federal court based upon the charge. If no such letter is requested, the Civil Rights Division will automatically issue one at the conclusion of the investigation or 9 months after the charge is filed, whichever comes sooner. A.R.S. § 41-1481(D).

All lawsuits brought pursuant to the Arizona Civil Rights Act must be filed with the court within one year from the date that the charge of discrimination was filed with the Civil Rights Division, and within 90 days of the receipt of the Right to Sue letter. A.R.S. § 41-1481(B).

If the Division concludes that immediate judicial action is necessary to carry out the purposes of the Act, either the Division or the complaining party may bring an action for appropriate temporary or preliminary relief pending final disposition of the charge. A.R.S. § 41-1481(E).

If no settlement occurs during the investigation, the Civil Rights Division will conclude its investigation and make a determination on the merits of the charge. Pursuant to Section 41-1481, the Division is required to issue an order dismissing the charge if it finds no reasonable cause to believe that discrimination has occurred. *Id.* The complaining party may appeal this determination in writing within 20 days of the issuance of the order by submitting new evidence under oath. If it is concluded that the discrimination did occur, the Civil Rights Division must issue findings of fact setting forth the basis for its conclusions. A.R.S. § 41-1481(B). If a “cause finding” is issued, the Civil Rights Division must attempt to obtain a conciliation agreement acceptable to both parties to the charge and to the Civil Rights Division.

Regardless of whether the Civil Rights Division has issued a “cause finding” or an order dismissing the charge, the complaining party has an absolute right to pursue his or her claim in court on a de novo basis. In such an action, the division’s findings are admissible in a trial on the merits and may be given whatever weight the court deems appropriate.

The Supreme Court of Arizona held that EEOC reasonable cause determinations are not “per se admissible in state court discrimination actions under Title VII.” *Shotwell v. Donahoe*, 85 P.3d 1045, 1047, 207 Ariz. 287, 289 (2004). In this case, the former employee alleged sexual harassment against his employer under Title VII. The state court judge granted the employer’s motion *in limine* to exclude the EEOC’s reasonable cause determination letter. Finding that Arizona’s Rules of Evidence apply to adjudication of federal claims in state courts as long as their application does not impair a litigant’s substantive federal rights, The Supreme Court of Arizona ruled, contrary to Ninth Circuit Court of Appeal’s rule, that reasonable cause determinations are not automatically admissible in state court actions. Instead, the judge must weigh the probative value against the prejudicial impact. *Id.*

D. Remedies Available

A prevailing complaining party is presumptively entitled to reinstatement or hiring into the position in question, back wages and fringe benefits, attorneys' fees, costs, and other appropriate injunctive or affirmative relief. A.R.S. § 41-1481(G). Where a comparable position to that applied for by an applicant who proved unlawful employment discrimination is not immediately available, "front pay, constituting the difference between what the applicant would have earned in a comparable position and the amount he or she earns in mitigation, is available until such time as the applicant has an opportunity to move into his or her position." *See Civil Rights Div. of Arizona Dept. of Law v. Superior Court in and for Pima Cnty.*, 706 P.2d 745, 751, 146 Ariz. 419, 425 (Ct. App. 1985).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

Pursuant to the Arizona Employment Protection Act, an employee cannot be terminated in retaliation for jury service, as protected by section 21-236 of the Arizona Revised Statutes. *See* A.R.S. § 23-1501(A)(3)(c)(iv).

B. Voting

An employee has a cause of action against an employer who terminates his employment in retaliation for the exercise of voting rights. ARIZ. REV. STAT. § 23-1501(A)(3)(c)(v).

C. Family/Medical Leave

Arizona has no separate family/medical leave statute.

D. Pregnancy/Maternity/Paternity Leave

Arizona has no separate pregnancy or maternity leave statute.

E. Day of Rest Statutes

There is no pertinent Arizona statute on this issue.

F. Military Leave

An employee has a cause of action against an employer who terminates his employment in retaliation for service in the National Guard or armed forces. ARIZ. REV. STAT. § 23-1501(A)(3)(C)(vii).

G. Sick Leave

H. Domestic Violence Leave

I. Other Leave Laws

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

Pursuant to A.R.S. §23-363 Employers shall pay employees no less than the minimum wage, which shall be not less than:

1. \$10 on and after January 1, 2017;
2. \$10.50 on and after January 1, 2018;
3. \$11 on and after January 1, 2019;
4. \$12 on and after January 1, 2020.

A.R.S. §23-363(A)

The minimum wage shall be increased on January 2021 and on January 1 of successive years, by the increase in the cost of living to be calculated as the statute dictates. § 23-363(B).

Employees who receive tips or gratuities, the employer may deduct up to \$3/hour of the minimum wage if the criteria set forth in the statute are met. § 23-363(C).

B. Deductions from Pay

None.

C. Overtime Rules

A.R.S. § 23-391 deals with overtime pay for public employees.

Subsection A provides in relevant part, “to be eligible for overtime compensation one who is required to work in excess of the person's normal workweek shall be compensated for the excess time at the following rates:

1. One and one-half times the regular rate at which the person is employed or one and one-half hours of compensatory time off for each hour worked if overtime compensation is mandated by federal law.
2. If federal law does not mandate overtime compensation, the person shall receive the regular rate of pay or compensatory leave on an hour for hour basis at the discretion of the board or governing body.”

D. Time for payment upon termination

A.R.S. §23-353 governs payment of wages of a discharged employee. Section A provides an employee who is discharged from the service of an employer shall be paid wages

due him within seven working days or the end of the next regular pay period, whichever is sooner. According to subsection B, if an employee quits he shall be paid in the usual manner all wages due no later than the regular payday for the pay period during which the employee quit.

Arizona's Wage Act governs the requirements for timely payment of wages, definition of wages, and the penalties for violations of the law. ARIZ. REV. STAT. § 23-350 et seq. Arizona follows the federal Fair Labor Standards Act of 1938 in setting its minimum wage. ARIZ. REV. STAT. § 23-362. The Arizona Wage Act applies only to wages for services actually rendered. It does not apply to breach of employment contract claims. *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638, 642 (9th Cir. 1984); see also, *Ufheil v. Carraba's Italian Grill, LLC*, CV-11-0659-PHX-DGC, 2011 WL 3665382 (D. Ari8z. Aug. 22, 2011). Under the wage statute, wages must be paid at least twice a month, on fixed paydays, and not more than 16 days apart. ARIZ. REV. STAT. § 23-351. However, the employer and employee may agree, in writing, to other pay arrangements.

Also, direct deposit is authorized under Arizona law with written authorization of the employee. *Id.*

The employee may be entitled to treble damages if the employer withholds wages that are not the subject of a good faith dispute. A.R.S. § 23-355. The good faith dispute may apply to the question of whether the wages are actually owed or the amount owed. *Schade v. Dietrich*, 760 P.2d 1050, 158 Ariz. 1 (1988); see also, *Thompson v. Streetsmarts Inc.*, CV-10-1885-PHX-LOA, 2011 WL 2600744 (D. Ariz. June 30, 2011). However, this applies only to the amount actually in dispute and does not entitle the employer to withhold any portion of the wages not in dispute. *Sanborn v. Brooker & Wake Prop. Mgmt. Inc.*, 874 P.2d 982, 178 Ariz. 425 (Ariz. Ct. App. 1994).

In *Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi*, 183 P.3d 544, 549, 218 Ariz. 293, 298 (Ct. App. 2008), the court found that an oral agreement between an employee and an employer that the employee would receive a referral fee as a bonus for bringing in a new client, was an "employment contract." As an employment contract, the breach of contract claim was subject to the one year statute of limitations period.

There are no limitations placed on the hours that may be worked by children who are 16 years of age and over. However, there are limitations for children who are under 16 if they are enrolled in school. See A.R.S. § 23-233 et seq. for details on the various restrictions on working hours for students.

E. Breaks and Meal Periods

No state specific laws. Employers must abide by applicable federal law.

F. Employee Scheduling Laws

Not applicable.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

A.R.S. § 36-601.01 is the Smoke-free Arizona Act. Smoking is prohibited in all public places and places of employment within the state of Arizona, except the following:

1. Private residences, except when used as a licensed child care, adult day care, or health care facility.
2. Hotel and motel rooms that are rented to guests and are designated as smoking rooms; provided, however, that not more than fifty percent of rooms rented to guests in a hotel or motel are so designated.
3. Retail tobacco stores that are physically separated so that smoke from retail tobacco stores does not infiltrate into areas where smoking is prohibited under the provisions of this section.
4. Veterans and fraternal clubs when they are not open to the general public.
5. Smoking when associated with a religious ceremony practiced pursuant to the American Indian religious freedom act of 1978.
6. Outdoor patios so long as tobacco smoke does not enter areas where smoking is prohibited through entrances, windows, ventilation systems, or other means.
7. A theatrical performance upon a stage or in the course of a film or television production if the smoking is part of the performance or production.

C. The prohibition on smoking in places of employment shall be communicated to all existing employees by the effective date of this section and to all prospective employees upon their application for employment.

D. Notwithstanding any other provision of this section, an owner, operator, manager, or other person or entity in control of an establishment, facility, or outdoor area may declare that entire establishment, facility, or outdoor area as a nonsmoking place.

E. Posting of signs and ashtray removal.

1. “No smoking” signs or the international “no smoking” symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly and conspicuously posted by the owner, operator, manager, or other person in control of that place identifying where smoking is prohibited by this section and where complaints regarding violations may be registered.

2. Every public place and place of employment where smoking is prohibited by this section shall have posted at every entrance a conspicuous sign clearly stating that smoking is prohibited.

3. All ashtrays shall be removed from any area where smoking is prohibited by this section by the owner, operator, manager, or other person having control of the area.

F. No employer may discharge or retaliate against an employee because that employee exercises any rights afforded by this section or reports or attempts to prosecute a violation of this section.

B. Health Benefit Mandates for Employers

The prevailing law in Arizona is that ERISA preempts all state laws and state law causes of action as they relate to any employee benefit plan. *See generally, Satterly v. Life Care Centers of Am., Inc.*, 204 Ariz. 174, 61 P.3d 468 (2003).

C. Immigration Laws

A.R.S. § 23-211 et seq., see amended laws above, VIII(B)(2).

D. Right to work Laws

The Arizona Constitution provides the right to work in the State of Arizona. Article 25 provides, “[n]o person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization. *See also* A.R.S. § 23-1302.

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

In 2010, the Arizona Medical Marijuana Act was passed. See A.R.S. §§ 36-2801 et seq. Pursuant to the statute, a qualified patient suffering from a debilitating medical condition may obtain a medical marijuana card permitting him/her to use an “allowable amount of marijuana” as outlined in the statute.

Arizona courts have yet to deal with employer drug testing since this law has been passed.

F. Gender/Transgender Expression

Arizona does not have statutes providing workplace protections based on sexual orientation. Arizona does not have statutes providing workplace protections based on gender identity or expression.

G. Other Key State Statutes

None.