

INDIANA

Candace A. Bankovich
LEWIS WAGNER, LLP
501 Indiana Avenue
Suite 200
Indianapolis, Indiana 46202
Phone: (317) 237-0500
Fax: (317) 630-2790
Web: www.lewiswagner.com
Email: cbankovich@lewiswagner.com

Celia M. Pauli
LEWIS WAGNER, LLP
501 Indiana Avenue
Suite 200
Indianapolis, Indiana 46202
Phone: (317) 237-0500
Fax: (317) 630-2790
Web: www.lewiswagner.com
Email: cpauli@lewiswagner.com

I. **AT-WILL EMPLOYMENT**

A. Statute

In Indiana, the employment at-will doctrine is based on common law, not statute.

B. Case Law

Indiana recognizes two basic forms of employment: (1) employment for a definite or ascertainable term; and (2) employment-at-will. If there is no definite or ascertainable term of employment, then the employment is at-will and is presumptively terminable at any time, with or without cause. The parties may choose to include clear job security provision in an employment contract; however, that presumption may be rebutted. The presumption of at-will employment is strong. Whether employment is at-will is a determination of law for the court. Wynkoop v. Town of Cedar Lake, 970 N.E.2d 230, 235 (Ind. Ct. App. 2012). Consistent with the concept that courts will normally not interfere with the affairs of business, cases such as Thayer v. Vaughan, 801 N. E. 2d 647 (Ind. Ct. App. 2004), all repeat a common theme: A court will “not sit as a super-personnel department that re-examines an entity's business decisions.”

The employment at-will presumption is rebutted if the employee provides consideration, independent of the employment contract, indicating that the parties intended to establish a relationship in which the employer may terminate the employee only for good cause. It is not sufficient consideration, for instance, for an employee to surrender another job or move to another location to accept a new position, because this was necessary to accept the new job and does not constitute adequate independent consideration to change the employee's at-will status. Lavery v. Southlake Center for Mental Health, 566 N.E.2d 1055 (Ind. Ct. App. 1991). Adequate independent consideration is provided when the employer is aware that the employee had a position with

assured permanency and the employee accepted the new position only after receiving assurances guaranteeing similar permanency, or when the employee entered into a settlement agreement releasing the employer from liability on an employment related claim against the employer. Peru Sch. Corp. v. Grant, 969 N.E.2d 125, 132 (Ind.2012); see also Romack v. Public Service Co., 511 N. E.2d 1024 (Ind. 1987). To establish that an employer either promised permanent employment or that an employee could not be fired without cause, Indiana courts require employees to present evidence that the employee explicitly bargained for job security. N. Ind. Pub. Serv. Co. v. Dabagia, 721 N.E.2d 294, 300 (Ind. Ct. App. 1999).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/ Personnel Materials

In Orr v. Westminster Vill. N., Inc., 689 N.E.2d 712 (Ind. 1997), the Indiana Supreme Court declined to establish a broad new exception to the at-will doctrine for employee handbooks, and held that the handbook at issue in that case did not constitute a unilateral contract. The court also refused to retreat from the very considerable body of Indiana law recognizing that employment manuals lacking a definite term and adequate independent consideration does not create employment contracts which alter the at-will employment relationship. Therefore, an employee handbook, accompanied by disclaimers that the handbook is not a contract, generally, as a matter of law, does not create a unilateral contract, particularly when the employee has signed the disclaimers. Uhlman v. Panares, 908 N.E.2d 650, 655 (Ind. Ct. App. 2009).

However, Indiana recognizes an exception to the majority held view, that an employer is an at-will employee, for promissory estoppel in the employment context. To successfully invoke the doctrine of promissory estoppel, an employee must assert and demonstrate that the employer made a promise; that the employee relied on that promise to their detriment; and that the promise otherwise fits within the Restatement test for promissory estoppels. Wynkoop, 970 N.E.2d at 238 (citing Orr, 689 N.E.2d at 718.)

2. Provisions Regarding Fair Treatment

There are no significant Indiana cases.

3. Disclaimers

In Orr, 689 N.E.2d 712, an employee was required to sign a statement which stated that the handbook was not a contract and its terms could be changed at any time. The Indiana Supreme Court held that an employment handbook bearing such a disclaimer generally does not create a unilateral contract. This concept applies even where the employee claims to be given consideration in the form of moving near the new employer, since this is viewed as merely doing what is necessary to accept the job, and does not transform a handbook into a contract of employment. Lavery, 566 N.E.2d at 1057.

In McCalment v. Eli Lilly & Co., 860 N.E.2d 884 (Ind. Ct. App. 2007), the plaintiff brought an action for breach of a written contract (among other claims), alleging that the employment manual served as an employment contract and that he was improperly terminated. Eli Lilly's handbook contained a disclaimer that the handbook did not create a contract of employment, and thus the court held that the manual did not create a unilateral contract.

In a more recent case, Hayes v. Trustees of Indiana University, 902 N.E.2d 303, 312 (Ind. Ct. App. 2009), the court held that an employee's handbook bearing or accompanied by disclaimers, particularly when the employee signs one of the disclaimers, generally, as a matter of law, does not create a unilateral contract.

4. Implied Covenants of Good Faith and Fair Dealing

In Northern Indiana Public Service Co. v. Dabagia, 721 N.E.2d 294 (Ind. Ct. App. 1999), the Indiana Court of Appeals affirmed summary judgment on a terminated employee's claim of breach of an implied covenant of good faith and fair dealing. The court reasoned that Indiana does not recognize such a cause of action in an employment at-will situation.

However, in Coates v. Heat Wagons, Inc., 942 N.E.2d 905 (Ind. Ct. App. 2011), the Plaintiff sought to escape the requirements of good faith and fair dealing in an employment agreement that formalized the employment relationship between himself and the defendant beyond the normal at-will situation. In Indiana, implied covenants of good faith and fair dealing apply only to insurance and employment contracts or where contracts are ambiguous as to the application of the covenants or expressly impose them. Among the duties imposed by the covenants of good faith and fair dealing in an employment relationship is that of loyalty to the employer and avoiding self-serving conduct.

B. Public Policy Exception

1. General

The public policy exception to the employment at-will doctrine was established in Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973). In Frampton, the Indiana Supreme Court held that when an employee is discharged solely for exercising a statutorily-conferred right to file a worker's compensation claim, a cause of action can be maintained for retaliatory discharge.

In McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390, 392-393 (Ind. 1988), the Indiana Supreme Court extended the public policy exception to include a separate but tightly defined exception to the employment at will doctrine when an employer discharges an employee for refusing to commit an illegal act for which the employee would be personally liable.

Indiana courts have narrowly construed the public policy exception recognized in Frampton. See Baker v. Tremco Inc., 917 N.E.2d 650, Tony v. Elkhart County, 851 N.E.2d 1032 (Ind. Ct. App. 2006), Wilmington v. Harvest Ins. Co., 521 N.E.2d 953 (Ind. Ct. App. 1988); Lawson v. Haven Hubbard Homes, 551 N.E.2d 855 (Ind. Ct. App. 1990); Knight v. Pillsbury Co., 761 F.Supp. 618 (S.D. Ind. 1990); and Smith v. Elec. Sys. Div. of Bristol Corp., 557 N.E.2d 711 (Ind. Ct. App. 1990). But see McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390 (Ind. 1988); Call v. Scott Brass, Inc., 553 N.E.2d 1225 (Ind. Ct. App. 1990).

2. Exercising a Legal Right

In Meyers v. Meyers, 861 N.E.2d 704 (Ind. 2007), an employee at will brought a retaliatory discharge claim alleging that he was fired when he complained about the employer's failure to pay him overtime wages. The Indiana Supreme Court affirmed the trial court's decision to grant the

defendant's motion to dismiss, holding that Indiana does not recognize such an exception to the employment at-will doctrine.

In Purdy v. Wright Tree Serv., Inc., 835 N.E.2d 209 (Ind. Ct. App. 2005), a former employee brought a wrongful termination claim alleging that he was discharged in retaliation for filing a worker's compensation claim. After being injured on the job, Purdy was sent for medical treatment and was restricted from returning to work. The employer put him on leave pursuant to the Family Medical Leave Act (FMLA). When the 12-week FMLA leave expired and Purdy was unable to return to work, he was terminated. The Indiana Court of Appeals affirmed summary judgment for the employer because Purdy failed to show that his discharge was solely in retaliation for the exercise of a statutory right. Of course, this limited analysis does not take into consideration whether the employee has the right to be accommodated with additional leave under the Americans with Disabilities Act once the FMLA leave has been exhausted.

The word "solely" only means that any and all reasons for the discharge must be unlawful in order to sustain the claim for retaliatory discharge. See Markley Enters., Inc. v. Grover, 716 N.E.2d 559, 566 (Ind. Ct. App. 1999); Dale v. J.G. Bowers, Inc., 709 N.E.2d 366, 369 (Ind. Ct. App. 1999).

In M.C. Welding & Machining Co., Inc. v. Kotwa, 845 N.E.2d 188 (Ind. Ct. App. 2006), the Court of Appeals affirmed the jury's verdict in favor of Kotwa that he was discharged in retaliation for applying for unemployment benefits. The Court distinguished Lawson v. Haven Hubbard Homes, Inc., 551 N.E.2d 855 (Ind. Ct. App. 1990), stating that unlike Lawson, Kotwa was only temporarily laid off from work, and that the parties stipulated that an employee who is temporarily laid off from work through no fault of his own is eligible for unemployment compensation if the employee follows the statutory procedures. The employer also did not object to the instruction regarding retaliation for seeking unemployment benefits. Therefore, the employer waived any argument that Lawson prevents an employee from claiming retaliatory discharge after being terminated for applying for unemployment benefits.

3. Refusing to Violate the Law

In McClanahan, 517 N.E.2d 390 (Ind. 1988), the Indiana Supreme Court expanded Frampton to a case involving an interstate truck driver who was fired after he refused to drive a truck into Illinois because the truck weight was more than permitted under Illinois law. The court stated that firing an employee for refusing to commit an illegal act for which he would be personally liable is as much a violation of public policy declared by the legislature as firing an employee for filing a worker's compensation claim.

In McGarrity v. Berlin Metals, Inc., 774 N.E.2d 71 (Ind. Ct. App. 2002), it was held that an at-will employee fired for refusing to certify financial records and tax records, in violation of laws for which the employee could be personally liable, had a cause of action for wrongful discharge.

4. Exposing Illegal Activity (Whistleblower)

An employee of a private employer that is under public contract may report in writing the existence of a violation of federal law or regulation, a violation of a state law, a violation of an ordinance of a political subdivision, or the misuse of public resources. Ind. Code. § 22-5-3-3. An employee, for making such a report, may not be dismissed, have salary changes, be transferred, be denied promotion that the employee would have otherwise received, or be demoted. Id.

The public policy exception does not extend to employees terminated in retaliation for having reported misconduct on the part of a superior. In Campbell v. Eli Lilly & Co., 413 N.E.2d 1054 (Ind. Ct. App. 1980), the plaintiff was employed by a pharmaceutical company and made serious allegations of misconduct on the part of his superiors involving the safety of drugs. Summary judgment for the employer on his wrongful termination claim was affirmed.

In Coutee v. Lafayette Neighborhood Hous. Services, Inc., 792 N.E.2d 907 (Ind. Ct. App. 2003), a former employee sued her employer, alleging that she was unlawfully discharged in retaliation for reporting what she believed to be a misuse of public resources. It was held that her claim was not actionable under common law or Indiana's whistleblower statute, IND. CODE § 22-5-3-3. Misuse of public resources for purposes of the statute does not include allegations of ineffective managerial style that might result in increased costs.

To bring an action under Indiana's private employer whistle-blower statute, a plaintiff must be an employee of a private employer that is under public contract, and that plaintiff must report violations or misuse of resources involving the employer's public contract. Ryan v. Underwriters Labs., Inc., No. 1:06-cv-1770-JDT-TAB, 2007 WL 2316474, at *4-5 (S.D. Ind. Aug. 8, 2007).

Our courts have found that the public policy exception is inapplicable when the Indiana General Assembly has provided a remedy for violation of a statutory right in the statute itself. See Kodrea v. City of Kokomo, Ind., 458 F.Supp.2d 857 (S.D. Ind. 2006) and Jennings v. Warren County Commissioners, No. 4:04-CV-94, 2006 WL 694742, at *8 (N.D. Ind. Mar. 14, 2006).

With regard to state employees, their remedy for allegedly being retaliated against for whistleblower activity is through the Indiana Whistleblower law, IND. CODE § 4-15-10-4. See Shoemaker v. Indiana State Police Dep't., 62 N.E.3d 1242, 1249 (Ind. Ct. App. 2016).

III. CONSTRUCTIVE DISCHARGE

The issue in constructive discharge cases is whether a reasonable person faced, with the allegedly intolerable employment action or conditions of employment, could have no reasonable alternative except to quit. In Baker v. Tremco Inc., 890 N.E.2d 73 (Ind. Ct. App. 2008), the Indiana Court of Appeals held that an employee was not constructively discharged so as to form the basis of a wrongful discharge claim even if the employee was pressured into engaging in wrongful conduct and watched the employer defraud some of its customers, where reasonable alternatives to quitting remained open, such as informing the authorities of the alleged illegal activities.

In Tony v. Elkhart County, 851 N.E.2d 1032 (Ind. Ct. App. 2006), the Court of Appeals overruled a previous decision in Cripe, Inc. v. Clark, 834 N.E. 2d 731 (Ind. Ct. App. 2005), agreeing with the dissenting opinion in Cripe, holding that Indiana should adopt the doctrine of constructive discharge that an employee can raise in the context of a common law retaliatory discharge claim brought against his employer. In order to survive an Ind. Trial Rule 12(B)(6) motion to dismiss on a constructive retaliatory discharge claim, the employee must allege: (1) in his complaint that he is entitled to bring a retaliatory discharge claim under an exception to the employment-at-will doctrine; and (2) that he was constructively discharged. Id. The court held that Tony satisfied these requirements and remanded the case to the trial court. Id.

IV. WRITTEN AGREEMENT

A. Standard “For Cause” Termination

If there is an employment contract for a definite term, and the employer has not reserved the right to terminate the employment before the conclusion of the contract, the employer generally may not terminate the employment relationship before the end of the specified term except for cause or by mutual agreement. If there is no definite or ascertainable term of employment, then the employment is at-will, and is presumptively terminable at any time, with or without cause by either party. Orr, 689 N.E.2d at 718.

In Seco Chemicals Inc. v. Stewart, 349 N.E.2d 733 (Ind. Ct. App. 1976), a discharged salesman, who had an employment agreement for a definite term, sued his former employer for wrongful termination. The Indiana Court of Appeals said that discharge for cause can be based on “material matters but not on trivialities.” Id. at 739, citing Hamilton v. Love, 152 Ind. 641 (Ind. 1899). The case turned on a factual dispute as to whether the salesman’s “scarcity of sales was due to his incompetence or lack of effort or was due to circumstances beyond his control.” Id. “Under Indiana law, just cause for termination normally must be related to performance.” Tackett v. Delco Remy, a Div. of Gen. Motors Corp., 959 F.2d 650 (7th Cir. Ind. 1992), reversed and remanded on other grounds, sub nom. Tackett v. GMC, Delco Remy Division, 93 F. 3d 332(7th Cir. 1996). An employee, although engaged for a definite term of service, may be dismissed for inefficiency, unskillfulness, neglect or carelessness because the law implies a stipulation or undertaking of an employee in entering into a contract of employment that he is competent to perform the work undertaken. Id. at 653.

B. Status of Arbitration Clauses

Arbitration is a matter of contract and a party cannot be required to submit to arbitration unless he has agreed to do so. Green Tree Servicing, LLC v. Brough, 930 N.E.2d 1238, 1241 (Ind. Ct. App. 2010). When determining whether the parties have agreed to arbitrate a dispute, we apply ordinary contract principles governed by state law. Id. The court should attempt to determine the intent of the parties at the time the contract was made by examining the language used to express their rights and duties. Id. at 1242. When construing arbitration agreements, every doubt is to be resolved in favor of arbitration. Id. Indiana, however, recognizes a strong policy favoring enforcement of arbitration agreements. Indiana CPA Society, Inc. v. GoMembers, Inc., 777 N.E.2d 747, 750 (Ind. Ct. App. 2002).

Although Indiana has adopted the Uniform Arbitration Act – Indiana Code. § 34-57-2-1, the statute does not specify the proper disposition of the litigation upon determination of whether the trial court must compel arbitration or forgo arbitration and proceed with litigation. Id. at 750. The trial courts have great discretion to either stay or dismiss litigation based on the nature of the contested issues that should first be submitted to arbitration. Id. at 752.

In Mislenkov v. Accurate Metal Detinning, Inc., 743 N.E.2d 286, 289 (Ind. Ct. App. 2001), a former employer's claim against its former employee for misappropriation of trade secrets did not fall within purview of an arbitration clause of their employment agreement because the

employee's acts took place before he entered into agreement. The arbitration clause merely required parties to arbitrate disputes arising out of or relating to the agreement, and did not refer to disputes arising during employment relationship which pre-existed agreement. Id. The court reasoned that a party seeking to compel arbitration must satisfy a two-prong burden of proof. Id. First, the party must demonstrate the existence of an enforceable agreement to arbitrate the dispute, and second the party must prove that the disputed matter is the type of claim that the parties agreed to arbitrate. Id. Since Mislenkov was unable to satisfy both prongs, the court ruled that the trial court did not abuse its discretion in not granting Mislenkov's Motion to Dismiss, alleging that claim had to be brought through arbitration. Id.

V. ORAL AGREEMENTS

A. Promissory Estoppel

Indiana has recognized that an employee can in certain circumstances invoke the doctrine of promissory estoppel. Harris v. Brewer, 49 N.E.3d 632, 645 (Ind. Ct. App. 2015); See also Hinkel v. Sataria Distribution & Packaging, Inc., 920 N.E.2d 766, 771 (Ind. Ct. App. 2010). The doctrine of promissory estoppel provides that a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise. Hinkle, 920 N.E.2d at 771. The elements of promissory estoppels are: (1) a promise by the promissory; (2) made with the expectation that the promise will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by an enforcement of the promise. Id. Specifically, the employee must assert and demonstrate that the employer made a promise to the employee, that the employee relied on that promise to his detriment, and that the promise otherwise fits within the Restatement test for promissory estoppel. Id.

In Hinkel, 920 N.E.2d 766, however, the former employee could not recover one year's salary and insurance benefits, under a theory of promissory estoppel following his involuntary termination based on employer's alleged oral promise to pay salary and insurance upon termination, despite employee's claim that such promise induced him to leave previous employment and give up "security associated therewith." Id. The court reasoned that the employee was provided with employment at substantial salary and severance pay, and therefore, he did not suffer injury so independent and severe such that injustice could be avoided only by enforcement of alleged oral promise. Id.

In Whiteco Industries, Inc. v. Kopani, 514 N.E.2d 840, 844 (Ind. Ct. App. 1987), employees urged that promissory estoppel/constructive fraud should be invoked to prevent Whiteco from relying upon the statute. They further urge that the reasons which supported the Statute of Frauds legislation are no longer valid; that equity should not permit the use of the statute to work a fraud rather than to prevent one; and that in any event they should be entitled to relief in accord with Restatement of Contracts. Id. However, promissory estoppel could not be invoked to prevent an employer from relying on the statute of frauds defense to employee's action alleging breach of employment contract. Id.

Recently, in Peters v. Gilead Scis., Inc., 533 F.3d 594 (7th Cir. Ind. 2008), the Seventh Circuit Court of Appeals found that an employee handbook gave rise to recovery under the theory of promissory estoppel. Gilead's employee handbook promised twelve weeks of medical leave to all employees that met minimum service requirements, but the plaintiff was denied twelve weeks leave. The Court of Appeals remanded the case to the district court for consideration of Gilead's liability and the plaintiff's reliance damages under Indiana state law.

B. Fraud

In Eby v. York-Division, Borg-Warner, 455 N.E.2d 623, 628 (Ind. Ct. App. 1983), the Court of Appeals upheld the trial court's decision to grant summary judgment since actual fraud cannot be found on promises of future performance. Thus the court ruled that the employer was not liable to the employee under a theory of actual fraud, for promising an employee a job in Florida which was not available when employee reported to work there. Id. The court reasoned that actual fraud can only exist when such fraud contemplates only misrepresentations of past or existing facts. Id.

The Court also ruled that the plaintiffs have no cause of action for constructive fraud since there was no evidence that was presented that employer gained any advantage by its representations to employee of job in Florida. This genre of fraud can be based on promissory misrepresentations. The court then laid out the elements for constructive fraud which are similar to the elements of actual fraud. Id.

The major distinction between the two types of fraud is that actual fraud is intentional or reckless deception whereas constructive fraud provides a remedy on more equitable grounds by refusing to sanction behavior which procures an unconscionable advantage to one party over another regardless of the intent. Id.

In Biberstine v. New Yorker Blower Co., 625 N.E.2d 1308, 1316 (Ind. Ct. App. 1993), the court laid out the elements for constructive fraud which are: 1) a duty existing by virtue of the relationship of the parties, 2) representations or omissions made in violation of that duty, 3) reliance thereon by the complaining party, 4) injury to the complaining party as a proximate result thereof, and 5) the gaining of an advantage by the party to be charged at the expense of the complaining party. Id. Furthermore, the court analyzed in what situations is reliance justified, and typically that issue is a matter for the jury to determine. Id. However, where the evidence is so clear as to be susceptible of only one reasonable inference, it is for the court to determine as a matter of law whether plaintiff was justified in relying on the representation. Id. When confronted with representations which are "simply not the stuff that fraud is made of," this court may find as a matter of law either that the representations are not actionable or that the plaintiff had no right to rely as a matter of law. Id. When confronted with representations which are "simply not the stuff that fraud is made of," this court may find as a matter of law either that the representations are not actionable or that the plaintiff had no right to rely as a matter of law. Under this theory the court held that the plaintiff reliance on the employer's representation that he could retain his stock in the event of termination was misplaced when there was direct contravention in the express terms of the Exercise Agreement which was signed by the plaintiff prior to the purchase of the stocks. Id.

C. Statute of Frauds

IND. CODE § 32-21-1-1(b)(5) provides that an action involving an agreement that cannot be performed within one year cannot be brought unless the agreement is in writing and signed by the party against whom the action is brought.

In Rodts v. Heart City Automotive, Inc., 933 N.E.2d 548, 552 (Ind. Ct. App. 2010), the Plaintiff was seeking to be paid \$2,000 a week, but made an oral contract to work for the defendant for a base salary of \$1,000 a week and a bonus for a five (5) year commitment. Further, there was an oral agreement that Defendant, at the end of the term, would be paid the additional money. Id. Once term was over, Defendant brought suit once employer refused to pay additional money owed. Id. The Plaintiff tried to argue that the contract was enforceable because performance of the contract occurred each week and thus fell within the one (1) year limit. Id. The Court ruled that this argument was flawed because the Plaintiff could have only completed his contractual duty at the expiration of his five (5) year term, and therefore the Statute of Frauds applied. Id. The Plaintiff also tried to argue that the contract term was indefinite, and thus the Statute of Frauds does not apply, however, the court ruled that since evidence was clear that the contract was for a five (5) year term, this argument was also flawed. Id.

The court identified promissory estoppel and part performance as exceptions to the Statute of Fraud defense, but refused to rule on those defenses since Plaintiff failed to raise them during trial. Id. at 554.

VI. **DEFAMATION**

A. General Rule

Under Indiana law, defamation is that which tends to injure reputation or to diminish esteem, respect, good will, or confidence in the plaintiff, or to excite derogatory feelings or opinions about the plaintiff. Lovings v. Thomas, 805 N.E.2d 442 (Ind. Ct. App. 2004). To establish a defamation claim, a plaintiff must prove the existence of a communication with defamatory imputation, malice, publication, and damages. Dugan v. Mittal Steel USA Inc., 929 N.E.2d 184, 186 (Ind. 2010) (quoting Trail v. Boys & Girls Club of N.W. Ind., 845 N.E.2d 130, 136 (Ind. 2006)). A defamation per se action arises when the language of a statement, without reference to extrinsic evidence, constitutes an imputation of 1) criminal conduct, 2) a loathsome disease, 3) misconduct in a person's trade, professions, office, or occupation, or 4) sexual misconduct. Id. In contrast, if the words that are used are not defamatory by themselves, but become defamatory based upon perception, they are considered defamatory *per quod*. Id. In actions for defamations per se, the damages are presumed, but in cases for defamation per quod, they must be proven. Id.

In Dugan, 929 N.E.2d 184, comments were made by other employees about the Plaintiff stealing time and working with her boss in a conspiracy to defraud the company. Id. at 187. After hearing these comments, the Defendant discharged her, and subsequently the Plaintiff brought suit on the grounds of defamation. Id. at 185. The court held that certain portions of the statements made constituted as defamation per se as there were imputing criminal conduct or occupational misconduct, and these clearly fell within categories of comments that are defamatory

per se. Id. at 189. However, the court held that although these statements constituted as defamation *per se*, they were protected under a qualified privilege, because the statements were made at the employer's request, to assist in an internal investigation that resulted in criminal charges. Id. at 188. Thus, the statements were protected by a qualified privilege that protects communications, made in good faith, made by a party that has an interest or a duty, either public or private, either legal or moral, if made to a person having a corresponding interest or duty. Id. (quoting Schrader, 639 N.E.2d at 262 (Ind. 1994)).

In Glasscock v. Corliss, 823 N.E.2d 748 (Ind. Ct. App. 2005), the defendant was employed by a corporation as National Marketing Director for fourteen (14) years. In 1995 she was fired and told that her unpaid sales commissions were forfeited on the grounds that there were discrepancies in her expense account. Id. at 752. The corporation sued the defendant, who responded with a counterclaim for defamation. The appeal relates solely to defamation counterclaims against two corporate executives. Id. In response to a motion for summary judgment, the only evidence of defamation was an affidavit indicating that an executive had said to some people (at a meeting of corporate employees) that the defendant had been fired due to "discrepancies in her expense report" and that she had bought gifts for her family and friends. Id. The Court held that this was sufficient to support a claim of defamation. Id. at 756. The Court also acknowledged that mere "discrepancies" in an expense account do not necessarily imply criminal conduct. Id. The Court reasoned that the two statements taken together, and in context, imputed criminal conduct by implying that Corliss used company money to purchase gifts for friends and members of her family. Id. The case also shows that defamation per se can support an award of substantial damages, even in the absence of evidence of special damages. The court affirmed \$100,000 in compensatory damages plus \$125,000.00 in punitive damages. Id. at 757.

Ethnic slurs and epithets are generally not defamatory in the absence of particular circumstances which make them so. In Dabagia, 721 N.E.2d at 303, executives of the defendant employer were heard to refer to the plaintiff as "the camel jockey leading the way," and "that Arab." It was held that although the remarks were racist, there was no evidence that they had a meaning to those who heard them which would lower the plaintiff in their esteem or deter them from associating with the plaintiff. Id.

In Town of W. Terre Haute v. Roach, 52 N.E.3d 4, 10-11 (Ind. Ct. App. 2016), the court held that the "speculative effect the defendants' non-actionable silence" had on a plaintiff's reputation could not constitute defamation. In Roach, the plaintiff was wrongly accused of misappropriating funds from the Vigo County Treasury, and pressed a claim for defamation, alleging that the town council president failed to "speak up about [her] substantial exoneration by the final audit during a news conference." Id. at 10. The Roach court held that it "would be an odd use of the defamation doctrine to hold that silence constitutes actionable speech." Id. at 11.

1. Libel

Libel is a species of defamation under Indiana law. Branham v. Celadon Trucking Services, Inc., 744 N.E.2d 514, 522 (Ind. Ct. App. 2001). "Defamation is an invasion of the interest in reputation and good name and is made up of the twin torts of libel and slander." Baker, 890 N.E.2d at 82, affirmed in part and superseded in part, 917 N.E. 2d 650 (Ind. 2009); quoting Gibson v. Kincaid, 140 Ind. App. 186, 200, 221 N.E.2d 834, 842 (Ind. Ct. App. 1966). "False defamatory words, if written and published, constitute libel; if spoken, a slander." Id., quoting Branaman v. Hinkle, 137 Ind. 496, 502, 37 N.E. 546, 548 (1894). Indiana case law has preserved this distinction. See Kelley v. Tanoos, 865 N.E.2d 593, 596-97 (Ind. 2007), citing Rambo v. Cohen,

587 N.E.2d 140, 145-46 (Ind. Ct. App. 1992).

“As a general rule, defamation by libel has given rise to liability more readily than does defamation by slander, which, due to its transitory nature, is considered less harmful.” Baker, 890 N.E.2d at 82, affirmed in part and superseded in part, 917 N.E. 2d 650 (Ind. 2009).

2. Slander

See the above section regarding libel.

B. References

In Passmore V. Multi-Mgmt. Services, Inc., 810 N.E.2d 1022, 1025 (Ind. 2004), a nursing home hired a new worker in reliance on a favorable reference from a former employer. The plaintiff was an Alzheimer’s patient who later was allegedly assaulted by the new employee. The personal representative of the deceased patient brought suit against the former employer who provided the employment reference. The Indiana Supreme Court adopted RESTATEMENT (SECOND) OF TORTS § 310, which imposed liability for a knowing misrepresentation involving an unreasonable risk of physical harm. Id. However, the Court held that the evidence did not establish any knowing misrepresentation. Id. at 1027. The case is helpful to employers because the court refused to impose liability for negligently providing an employment reference. Id.

C. Privileges

In Indiana, intra-company communications regarding the fitness of an employee are protected by a qualified privilege. In Badger v. Greater Clark County Schools, No. 4:03-CV-00101-SEB-WGH, 2005 WL 1320107 (S.D. Ind. June 1, 2005), it was held that communications between and among school board members relating to school personnel are privileged. An employment reference given by a former employer to a prospective employer is also protected by this privilege. Van De Leuv v. Methodist Hosp. of Ind., Inc., 642 N.E.2d 531 (Ind. Ct. App. 1994). However, a statement loses its privileged character on a showing that (1) the communication was primarily motivated by ill will; (2) there was excessive publication of the statement; or (3) the statement was made without belief or grounds for belief in the truth of the statement. Schrader, 639 N.E.2d at 262. Additionally, intra-company communication of an employee’s evaluation information to other personnel may constitute “publication” for purposes of defamation action. Bals v. Verduzco, 600 N.E.2d 1353, 1356 (Ind. 1992).

In Bals, 600 N.E.2d at 1354, the plaintiff, who was under the direct supervision of the defendant, was terminated following a series of employee evaluations submitted by the defendant. The plaintiff subsequently commenced this action against the defendant alleging defamation. Id. The plaintiff alleged that the qualified privilege of intra-company privilege had been abused when the defendant published the statements with a lack of belief or grounds for belief in the truth of what was published. Id. at 1357. The Court maintained that Summary Judgment in favor of the defendant was proper since the plaintiff could not provide any evidence that raised an issue of material fact regarding whether his supervisor’s statements, regarding poor performance, were pretextual and whether the supervisor made statements in the plaintiff’s file “without belief or grounds for belief in its truth.” Id.

As mentioned above, in Dugan, 929 N.E.2d at 188, the Indiana Supreme Court has recognized that communication that was made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty,

public or private, legal, moral, or social, if made to a person having a corresponding interest is protected by a qualified privilege.

In Wells v. Bernitt, 936 N.E.2d 1242, 1245 (Ind. Ct. App. 2010), the defendant followed the plaintiff to a bar, and witnessed the plaintiff stagger across the street and proceeded to drive away. The Defendant called the police and told the police he suspected the plaintiff of driving while intoxicated and reported to the police his observations. Id. The plaintiff filed a complaint alleging defamation against the defendant. Id. The Court held that the comment made by the defendant was a matter of public interest protected by the public interest privilege because the courts want to promote individuals to take the initiative to maintain public safety. Id. at 1248-49.

D. Other Defenses

1. Truth

Under the Indiana State Constitution, true statements never give rise to liability for defamation. Ind. Const. Art. 1 §10; Conwell v. Beatty, 667 N.E.2d 768 (Ind. Ct. App. 1996). In Dabagia, 721 N.E.2d at 301, it was held that the statement of a corporate vice president regarding the Plaintiff's termination was not defamatory because the statement was true.

2. No Publication

In a defamation action, the plaintiff must show that the alleged defamatory matter was published, that is, communicated to a third person or persons. Bals, 600 N.E.2d at 1353. An employee's evaluation information conveyed intercompany to management personnel may be considered published for purposes of a defamation action. Id.

3. Self Publication

No significant Indiana cases.

4. Invited Libel

In Boxdorfer v. Thrivent Financial for Lutherans, No. 1:09-cv-0109-DFH-JMS, 2009 WL 2448459 (S.D. Ind. Aug. 10, 2009), the plaintiff was the managing partner in Indiana, Kentucky, and Cincinnati for Thrivent. The plaintiff decided to seek new employment. Id. When the defendant learned of the plaintiff's desire to leave, the defendant subjected him to an audit of his financial records. Id. The defendant claims to have found several irregularities in the plaintiff's accounting practices. Id. Ultimately, the plaintiff resigned with the defendant, but the defendant still had to report file termination documents with the Financial Industry Regulatory Authority (FINRA). Id. Before the form was submitted to FINRA, the defendant contacted the plaintiff to discuss the proposed language to be submitted to FINRA, and there was discussion and a request to shorten the language on the form. Id. FINRA proceeded to begin an investigation, and the plaintiff sued for defamation alleging that the report consisted of untrue and unsupported allegations. Id. The Court examined the notion that consent to the publication of material gives the publisher an absolute privilege that precludes recovery on a defamation claim. Id. (quoting Eitler v. St. Joseph Reg'l Med. Ctr. South-Bend Campus, Inc., 789 N.E.2d 497 (Ind. Ct. App. 2003)). However, the Court held that since the plaintiff did not have any authority to prevent the publication of a report required by the defendant's membership in FINRA, the publication did not constitute as publication required for defamation. Id. The Court reasoned that the defendant's

decision to publish the report was dictated not by the plaintiff's assent but by its obligations as a member of the FINRA. Id.

5. Opinion

With respect to defamatory imputation, some communications are reasonably susceptible to either a defamatory or a nondefamatory interpretation. McQueen v. Fayette County School Corp., 711 N.E.2d 62, 65 (Ind. Ct. App. 1999). Words not actionable in themselves may become actionable by their allusions to some extrinsic facts, or by being used and understood in a different sense from their allusion to some extrinsic fact, or by being used and understood in a different sense from their natural meaning. Id. In McQueen, 711 N.E.2d at 66, the defendant argued that statements made about the plaintiff were opinions and such statements were absolutely privileged. The court held that the dispositive question in determining if a statement was protected by an opinion privilege was whether a reasonable fact finder could conclude that the statements implies facts which maybe proven true or false. Id. If a defendant expresses a derogatory opinion without disclosing the facts on which it is based, he is subject to liability if the comment created the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts. Id. at 66. (quoting Restatement of Torts (Second) § 566). The Court held that the statement by the defendant implied verifiable facts regarding the plaintiff's performance and conduct, and thus was not privileged as an opinion. Id. at 67.

E. Job References and Blacklisting Statutes

A person, who after having discharged any employee from his service, prevents the discharged employee from obtaining employment with another organization commits a Class C infraction and is liable in penal damages to the discharged employee to be recovered by civil action, however, an employer can inform another, in writing, truthful statements for the reason for the discharge. Ind. Code § 22-5-3-1. An employer who discloses information about a current or former employee is immune from civil liability for the disclosure and the consequence caused by the disclosure. Id. Upon written request by the prospective employee, the prospective employer will provide copies of any written communications from current or former employers that may affect the employee's possibility of employment with the future employer. Id.

F. Non – Disparagement Clauses

No significant Indiana cases.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

Indiana first recognized intentional infliction of emotional distress as a separate cause of action in Cullison v. Medley, 570 N.E.2d 27 (Ind. 1991). In order to establish a claim of intentional infliction of emotional distress, a plaintiff must prove that the defendant: 1) engages in extreme and outrageous conduct 2) which intentionally or recklessly 3) causes 4) severe emotional distress to another. Haggert v. McMullan, 953 N.E. 2d 1223, 1235 (Ind. Ct. App. 2011) (quoting Curry v. Whitaker, 943 N.E.2d 354, 361 (Ind. Ct. App. 2011)). It is the intent to harm the plaintiff emotionally that constitutes the basis of the tort, and the requirement to prove the elements of the tort are rigorous. Id.

The cases have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or

even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by “malice,” or by a degree of aggravation which would entitle the Plaintiff to punitive damages for another tort. Bradley v. Hall, 720 N.E.2d 747, 752-53 (Ind. Ct. App. 1999).

In Haggert, 953 N.E.2d at 1236, there was no evidence that a supervisory employee at the university intended to cause subordinate professor emotional distress when she filed sexual harassment complaint against him within the university, as the supervisor acted according to scope of her responsibilities at the university, and filed a harassment complaint when she believed the university's zero-tolerance policy had been violated.

In Branham, 744 N.E.2d at 523, actions of supervisor and co-employee in taking and circulating photograph showing co-employee in underwear with hand over genitals, and standing next to sleeping employee were done with no intent to harm employee and, thus, did not constitute tort of intentional infliction of emotional distress since the co-employee testified that he and others viewed photograph as joke. The supervisor further testified that he did not think photograph would be hurtful or painful, and employee testified that supervisor said with apparent sincerity that photograph was meant as joke. Id.

In Raess v. Doescher, 883, N.E.2d 790 (Ind. 2008), a perfusionist brought an action for intentional infliction of emotional distress against a heart surgeon. A jury verdict in the amount of \$325,000 was initially reversed by the appellate court because the probative value of the testimony of a “workplace bully” expert was deemed to have been substantially outweighed by the danger of unfair prejudice. Id. at 793. Further, the Court held that not giving a jury the instruction was an abuse of discretion. Id. However, the Indiana Supreme Court granted transfer and affirmed the trial court’s judgment on the verdict. Id. at 799.

B. Negligent Infliction of Emotional Distress

To maintain a cause of action for negligent infliction of emotional distress under Indiana law, a plaintiff must satisfy the “impact rule.” Powdertech, Inc. v. Joganic, 776 N.E.2d 1251, 1263 (Ind. Ct. App. 2002). The impact rule was modified which now maintains the requirement that the plaintiff demonstrate that he suffered a direct physical impact. Id. (citing Conder v. Wood, 716 N.E.2d 432, 434 (Ind. 1999)). Specifically the impact rule states:

“ [W]hen a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, ... such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.”

Id. (quoting Shuamber v. Henderson, 579 N.E.2d 452, 456 (Ind. 1991)). The impact does not need to cause physical injury to the plaintiff, and the emotional trauma suffered by the plaintiff need not result from a physical injury caused by the impact. Id. In Powdertech, 776 N.E.2d at 1263-1264, since the defendant was merely terminated, defendant did not have an action for negligent infliction of emotional distress as there was no physical impact.

In Munsell v. Hambright, 776 N.E.2d 1272, 1280 (Ind. Ct. App. 2002), neither the plaintiff nor any of his close relatives suffered direct physical impact from counselors' alleged negligent acts of discussing patient's diagnosis of voyeurism with patient's employer, and thus patient could not maintain claim of negligent infliction of emotional distress against counselors. The court held

that summary judgment was proper since there was no direct physical impact and therefore no cognizable action under Indiana law. Id.

In Atl. Coast Airlines v. Cook, 857 N.E.2d 989 (Ind. 2006), airline passengers brought an action against airlines for negligent infliction of emotional distress. The plaintiffs alleged that they had experienced a physical impact by breathing the smoke from an alleged terrorist's lit cigarette and experienced the vibrations from his stomping feet and "constructive impact" by virtue of the physical effects on the Plaintiffs' body functions in increased breathing, sweating, pulse, heart rate, adrenaline and acuteness of the senses. Id. In order to recover damages for negligent infliction of emotional distress, a plaintiff must satisfy either the modified impact rule or the bystander rule. Id. at 998. It was held that because the physical impact was slight to non-existent, and the alleged mental anguish was viewed by the court as speculative, the trial court appropriately entered summary judgment on the negligent infliction of emotional distress claim. Id. at 1000.

VIII. PRIVACY RIGHTS

A. Generally

The general tort, invasion of privacy, includes four distinct injuries: (1) intrusion upon seclusion, (2) appropriation of likeness, (3) public disclosures of private facts, and (4) false-light publicity. Dietz v. Finlay Fine Jewelry Corp., 754 N.E.2d 958, 966 (Ind. Ct. App. 2001).

In Dietz, 754 N.E.2d at 966, the plaintiff brought suit for invasion of privacy, along with unlawful detainment and other claims when she was asked by a security officer at her place of employment to come to a room and answer a few questions. The questioning was a result of a questionable ten percent discount given to an "irate" customer after a transaction for a diamond ring had taken longer than usual. Id. The court held that summary judgment on behalf of the defendant for the invasion of privacy claim was proper because the release of private facts to two co-employees did not satisfy the public requirement for the invasion of privacy injury based on the disclosure of private facts to the public.

In Brown v. Wabash Nat'l Corp., 293 F.Supp.2d 903, 905 (N.D. Ind. 2003), an employee filed suit alleging that the employer's electronic placement of confidential personal information on a limited shared network computer drive constituted invasion of privacy. The court noted that the tort of invasion of privacy based on public disclosure of private facts encounters a considerable obstacle in the truth-in-defense provisions of the Indiana Constitution. Id. In essence, the Indiana Supreme Court will not allow a claim for public disclosure of private facts because it "serves as an alternative for truthful defamation," forbidden by the Indiana Bill of Rights. Id.

B. New Hire Processing

1. Eligibility Verification

A state agency or political subdivision shall use the E-Verify program to verify the work eligibility status of all employees of the state agency or political subdivision hired after June 30, 2011. Ind. Code § 22-5-1.7-10.

Furthermore, a state agency or political subdivision may not enter into or renew a public contract for services with a contractor unless the contract requires that the contractor enroll in and verify the work eligibility status of all newly hired employees of the contractor through the E-Verify program and a provision in the contract that states the contractor does not have to verify the eligibility of the workers if E-Verify program no longer exists. Ind. Code. § 22-5-1.7-11.

Additionally, the contractor must sign an affidavit affirming that the contractor does not knowingly employ an unauthorized alien. Id. A contractor or subcontractor may not knowingly employ or contract with an unauthorized alien or retain an employee or contract with a person that the contractor or subcontractor subsequently learns is an unauthorized alien. Ind. Code § 22-5-1.7-12. If a contractor violates this section the state agency or political subdivision shall require the contractor to remedy the violation within thirty (30) days after the date the state agency or political subdivision notifies the contractor of the violation. Id.

2. Background Checks

A criminal history provider may not knowingly provide a criminal history report that provides criminal history information relating to a record (1) that has been expunged or otherwise removed from public access, (2) a record that is restricted by a court or the rules of a court and is marked as restricted from public disclosure or removed from public access, (3) a record indicating a conviction of a Class D felony if the class D felony conviction has been recorded or converted into a Class A misdemeanor, or (4) a record that the criminal history provider knows to be inaccurate. Ind. Code. § 24-4-18-6. However, a criminal history provider may provide information if the person requesting the history report is required by state or federal law or the information will be solely used for a public bond. Id.

Additionally, a report provider cannot knowingly include criminal history information in a criminal history report if the criminal report information fails to reflect material changes to the official record occurring sixty (60) days or more before the date the criminal history report is delivered. Ind. Code. § 24-4-18-7.

C. Specific Issues

1. Workplace Searches

In Terrell v. Rowsey, 647 N.E.2d 662, 664 (Ind. Ct. App. 1995), a former employee, who had been terminated for drinking on the job, brought an action against his former employer for, among other things, invasion of privacy. It was held that a supervisor opening the employee's car door and reaching behind the driver's seat to grab an empty beer bottle did not constitute an invasion of the employee's privacy, because the intrusion was not unreasonable in light of the employee's diminished privacy interest while on the employer's property, the employer's obligation to provide employees with a safe workplace, and the momentary nature of the entrance into the car with no physical contact with the employee. Id. at 667.

2. Electronic Monitoring

No significant Indiana cases or statutes.

3. Social Media

No significant Indiana cases or statutes.

4. Taping of Employees

In Branham, 744 N.E.2d at 519 (Ind. Ct. App. 2001), an employee and his wife brought suit against an employer and a supervisor for invasion of privacy, among other claims. It was held that the defendants did not intrude upon the employee's private physical space or his emotional privacy so as to support the claim of invasion of privacy by intrusion when they took

sexually suggestive photographs of the employee with a co-employee while the employee was sleeping, where other people were in the break room when the employee fell asleep, and the employee did not suffer emotional disturbance from taking the picture. Id. at 524. It was held that the employee did not suffer false light invasion of privacy because the photograph was an accurate depiction of the employee asleep with a partially clad co-employee standing beside him. Id. at 525.

In Creel v. I.C.E. & Assoc., Inc., 771 N.E.2d 1276, 1278 (Ind. Ct. App. 2002), the subject of an insurance investigation brought an action against a private detective agency for invasion of privacy. The claim was based on videotaping of the plaintiff during a church service. Id. The Indiana Court of Appeals affirmed summary judgment for the defendant. Id. at 1281. The decision states that to establish a claim for invasion of privacy by intrusion, the plaintiff must demonstrate that there was an intrusion upon the plaintiff's physical solitude or seclusion as by invading his home or conducting an illegal search. Id. It was also noted that the plaintiffs were neither alone nor secluded when videotaped, and that the videotape surveillance took place in areas of a church that was open to the public. Id. Under the circumstances, it was held that the Creels had no reasonable expectation of privacy in their activities, so summary judgment was appropriate. Id.

In Emerson v. Markle, 539 N.E.2d 35, 37 (Ind. Ct. App. 1989), a teacher who was called into the principal office to discuss her future employment with the school was terminated as the principal cited that the school board had made that decision. Before this meeting, the teacher had gone to Emerson seeking advice on how to handle any meetings with the principal, and was told that they needed to record the conversation and the meeting with at least a tape recorder. Id. Eventually, the tape recording was played at a board meeting out loud and in front of all the attendees. Id. The tape recording has some private information that the principal had told the teacher while in the closed confines of the meeting. Id. The Court held that the defendant, whose conversation with the teacher was taped on suggestion of a union representative, had reasonable expectation of privacy with respect to what was said to the teacher. Id. at 39. Since there was an overwhelming evidence of the defendant's malice towards the plaintiff, defendant's uses of the tape recorded statement, which violated the plaintiff's reasonable expectation of privacy, justified punitive damages.

In the Matter of Vickery, 468 N.E.2d 849 (Ind. 1984), the respondent willfully intercepted the telephone conversations of individuals, both employees and non-employees, who used the business and public telephones located on the premises of Respondent's business. The respondent then hid the cassette recordings in a hotel room and refused to give the cassettes up when the F.B.I. came to the hotel with warrant to seize the evidence. The Court held that this action not only frustrated the administration of justice, but also infringed upon the privacy of unsuspecting people. The Court noted that the respondent disregarded the privacy rights of the others.

In Newman v. Jewish Cmty. Ctr. Ass'n. of Indianapolis, 875 N.E.2d 729 (Ind. Ct. App. 2007), Newman, a volunteer at the Jewish Community Center, brought suit against the Center, employees, and others alleging defamation, invasion of privacy by false light, and invasion of privacy by intrusion after she was put under surveillance and had people watching her inside and outside of the building after several incidents occurred. The Court of Appeals found that the facts alleged in the plaintiff's complaint did not state a claim for invasion of privacy by false light because they did not allege an invasion of her physical personal space; instead she focused on surveillance to support her claim. The Court pointed out that "[t]here have been no cases in Indiana in which a claim of intrusion was proven without physical contact or invasion of the plaintiff's physical space such as the plaintiff's home." Id. at 736.

5. Release of Personal Information on Employees

In Brown v. Wabash Nat. Corp., 293 F. Supp. 2d 903, 905 (N.D. Ind. 2003), the plaintiff argued that when he commenced his employment with the defendant, the plaintiff requested that the defendant transfer certain confidential and sensitive information of his personal affairs from a laptop he used while employed with a previous employer to his computer at the defendant's location. Eventually, the defendant placed the information to the shared computer drive of the defendant's work. Id. The plaintiff then brought claims of invasion of privacy due to the publication of his confidential and personal information. Id. However, the court ruled that the information placed on a shared network drive does not meet the threshold necessary to state a claim for a tort of invasion of privacy based in public disclosure of private facts. Id.

In Felsher v. University of Evansville, 755 N.E.2d 589, 591 (Ind. 2001), a professor was employed by the University, but ultimately was terminated in 1991. In 1997, the employee created Internet websites and electronic mail accounts containing portions of the names of certain members of the university. Id. The websites had articles that the professor had written alleging that these members of the University had violated the Handbook. Id. Using the email accounts he had created, the employee sent mail to several universities nominating each of them for various academic positions, and in the application then directed the reader to the website that he had created posting information about the various employees of the University. Id. The employees and the University alleged invasion of privacy. Id. The professor claims that a corporation is not entitled to a right of privacy claim. Id. This was an issue of first impression for the Indiana Supreme Court, and the Court looked to other jurisdictions which stated that a corporation was not a person and could not experience the emotions such as humiliation, intimate personal distress, and emotional injury and thus in those jurisdiction privacy claims were barred. Id. at 593-94. However the Indiana Supreme Court declined to rule on this issue, and rather looked to relevant internet activities and look to business law for protection against the misappropriation of a corporation's name. Id. at 595.

In Lemaster v. Spartan Tool, LLC, No. 1:08-cv-00731-WTL-DML, 2009 WL 700240 (S.D. Ind. Mar. 16, 2009), a former employee's allegation that the former employer impermissibly used his social security number and other personal information to terminate his account with a cell phone company did not support a claim for invasion of privacy under Indiana common law. Defendants argued that the plaintiff cannot assert a claim for intrusion because he has not alleged that the defendants intruded upon his physical solitude or invaded his home which is required under Indiana common law to maintain an action for invasion of privacy. Although plaintiff alleges the defendant impermissibly used his social security number and other personal information to terminate his account with Verizon, he alleged no physical contact or invasion of his physical space. The allegations by the plaintiff therefore do not support a claim for invasion of privacy under current Indiana Law. Id. at *4. Additionally, the plaintiff alleged that the defendants misappropriated his name and likeness by using his social security number and other personal information. The Court ruled however that this allegation did not suggest that defendants were seeking to obtain any benefit or advantage for themselves when they used plaintiff's personal information and thus the Motion to Dismiss was granted. Id. at *5.

6. Medical Information

In Al-Challah v. Barger Packaging, 820 N.E.2d 670, 671 (Ind. Ct. App. 2005), the plaintiff brought suit against a former employer alleging that defendant had terminated her because of a disability and had disclosed medical information to a prospective employer, which she claimed was a violation of the Americans with Disability Act. However, the plaintiff filed a complaint

originally in federal court, and then sought to have the court to voluntarily dismiss the case so she could file her complaint in state court. Id. Unfortunately, the Indiana Court of Appeals stated that her statute of limitations to file the case in state court had expired since it was more than two (2) years after the alleged violation and disclosure of medical records. Id. at 675.

In Doe v. Methodist Hosp., 690 N.E.2d 681, 683 (Ind. 1997), a postal worker sued a fellow employee for disclosure to other workers that the plaintiff had tested positive for HIV. The Indiana Supreme Court affirmed judgment for the defendant, stating that a tort claim for invasion of privacy based on public disclosure of private facts is not recognized in Indiana. Id. at 693. It should be noted however, that only one judge concurred with the opinion, and three judges concurred only in the result. Id.

In Hambright, 776 N.E.2d at 1273 (Ind. Ct. App. 2002), a patient, who had attended therapy sessions for voyeurism, filed suit against his counselors. In dicta, the court said that the plaintiff did not have a claim for invasion of privacy based on the public disclosure of private facts. Id. at 1283. The plaintiff had complained of the counselor's communication to one or two of the patient's supervisors. Id. However, a communication to a single person or a small group of persons is not actionable as invasion of privacy. Id. The court noted that some other courts take the view that a disclosure is actionable if made to a "particular public with a special relationship to the Plaintiff." Id.

The opinion also rejected the possibility that the plaintiff might have had a claim for intrusion. Id. To establish a claim for invasion of privacy by intrusion, plaintiff must demonstrate that there was an intrusion upon his or her physical solitude or seclusion, as by invading his home or other quarters. Id. In this case the defendants only made a series of non-threatening telephone calls over a period of a few weeks in the course of treating the plaintiff, so it was said that the facts could not support a claim for intrusion into seclusion. Id.

IX. WORKPLACE SAFETY

A. NEGLIGENT HIRING

Indiana has long recognized a cause of action for negligent hiring and retention of an employee. Konkle v. Henson, 672 N.E.2d 450 (Ind. Ct. App. 1996) (overruled on other grounds). Under the theory of negligent hiring and retention, employers owe a duty of care only to its customers, patrons, and invitees. Baughner v. A Hattersley & Sons, Inc., 436 N.E.2d 126 (Ind. Ct. App. 1982).

Additionally, under Indiana common law, it is well established that an employer does not have a duty to supervise the work of an independent contractor to assure a safe workplace and consequently is not liable for the negligence of the independent contractor. Stumpf v. Hagerman Const. Corp., 863 N.E.2d 871, 876 (Ind. Ct. App. 2007). However, there are five (5) exceptions to this general rule: (1) where the contract requires the performance of intrinsically dangerous work; (2) where one party is by law or contract charged with performing the specific duty; (3) where the performance of the contracted act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal. Id. However in the absence of negligent hiring of the independent contractor, an employee of an independent contractor has no claim against the general contractor based solely upon the first and fourth exception. Helms v. Carmel High School Vocational Building Trades Corp., 854 N.E.2d 345, 347 (Ind. 2006).

Additionally, a master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming other or from so conducting himself as to create an unreasonable risk of bodily harm to them. Clark v. Aris, Inc., 890 N.E.2d 760, 763 (Ind. Ct. App. 2008) (quoting RESTATEMENT (SECOND) OF TORTS § 317). Therefore the master may subject himself to liability by retaining in his employment servants who, to his knowledge, are in the habit of mis-conducting themselves in a manner dangerous to others. Id.

B. Negligent Supervision/ Retention

Negligent retention and supervision is a distinct tort from respondeat superior; it may impose liability on an employer when employee steps beyond the recognized scope of their employment to commit a tortious injury upon a third party. Scott v. Retz, 916 N.E.2d 252, 257 (Ind. Ct. App. 2009) (quoting Clark v. Arkis., 890 N.E.2d 760, 765 (Ind. Ct. App. 2008). In Scott v. Retz, 916 N.E.2d at 257, the defendant was an employee of IU Health, who had stolen morphine from the hospital. She proceeded to inject herself with the morphine, and then reported her suicide attempt to the hospital. Id. The plaintiff, who was investigating the drug use of the defendant, was stuck with the needles that the plaintiff had used to inject the morphine. The needles were improperly capped by several IU health employees. Id. The plaintiff brought claims against IU Health sound in respondent superior and negligent retention and supervision. The court noted that the difference between respondeat superior and negligent supervision, is that under the doctrine of respondeat superior, an employer is liable for tortious acts committed by the employee while in the scope of employment. Id. at 257. As mentioned above, negligent retention and supervision requires the employee to be acting outside their scope of employment before liability can accrue. Id. The Court ruled however, that since both claims are subject to the elements of liability, that proximate cause issues were dispositive to all of the plaintiff's claims. Id.

In Davis v. Macey, 901 F. Supp. 2d 1107, 1108 (N.D. Ind. 2012), a truck owner's own admission that the truck driver was acting within the scope of his employment when he collided with vehicle driver rendered driver's claims under Indiana law of negligent retention and supervision unnecessary, warranting a dismissal of claims. Id. at 1111. The court noted that Negligent supervision claims are generally not brought against a defendant employer under Indiana law, as respondeat superior provides the proper vehicle for a direct action aimed at recovering the damages resulting from a specific act of negligence committed by an employee within the scope of employment. Id. at 1112.

In Hansen v. Board of Trustees of Hamilton Southeastern School Corp., 551 F.3d 599, 602 (7th Cir. 2008), the parents of a high school student brought an action against the school's district board of trustees and against a teacher after the teacher had engaged in improper sexual relationship with student. The parents had alleged negligent hiring and negligent supervision. The Court noted that Indiana has adopted the standard of reasonable care in hiring, supervising, or retaining an employee to determine whether the particular duty associated with negligent supervision as breached. Id. at 609. The Court stated that Indiana courts are somewhat unclear on the applicable standard for holding an employer liable for negligent hiring, retention, or supervision. Some decisions state that to be liable an employer must have actual knowledge of an employee's habit of misconduct and fail to respond reasonably. Id. See Levinson v. Citizens Nat'l Bank of Evansville, 644 N.E.2d 1264, 1269 (Ind. Ct. App. 1994). Other courts in Indiana, it is simply sufficient to show that the employer should have known or had reason to know of their employee's misconduct and failed to take appropriate action. See Frye v. Am. Painting Co., 642 N.E.2d 995,998 (Ind. Ct. App. 1994). The Court determined that the plaintiff provided no evidence that the school knew or should have known, or had reason to know that the teacher was in the habit

of mis-conducting himself.

C. Interplay with Worker's Compensation Bar

In DePuy Inc. v. Farmer, 847 N.E.2d 160, 163 (Ind. 2006) (overruled on other grounds), injuries that employee sustained in a scuffle with co-worker while at work “arose out of” his employment for workers' compensation purposes; employee started to clock out at the end of his shift and he brushed his time card against co-worker's side, and in response, co-worker, who weighed approximately 470 pounds, yelled at employee, pinned him against machine, and bent him backwards over it, and employee's injuries were incurred while he was performing services for employer and co-worker's loss of control and unprovoked attack did not change that. Id. The Indiana Supreme Court agreed with the Court of Appeals that a participant in horseplay is not entitled to worker's compensation because the horseplay is not for the benefit of the employer and therefore does not arise out of the employment, but an innocent victim of horseplay by others is entitled to worker's compensation benefits. Id. at 164. Therefore, the Court had to determine whether the behavior that instigated the fight, was outside the scope of employment. Id.

The Court stated that an injury “arises out of” employment when a causal nexus exists between the injury or death and the duties or services performed by the injured employee. Id. The court looks to an employee's duties, the reasonableness of the employee's act in relation to the sum total of conditions, and the knowledge of the employer in situation where acts incidental to employment are being done in violation of company rules. Id. at 165 (quoting Global Const., Inc. v. March, 813 N.E.2d 1163 (Ind. 2004)). The Court held that the incident was within the scope of employment of ordinary courtesies to a fellow employee, and thus the defendant's injuries arose out of his employment. Id.

Typically, the workers compensation act (WCA) states that if the injured employee gets a judgment or settles with a third party the liability of the employer to pay further compensation under the WCA terminates. Id. at 166. However, if there is settlement for less, then the employee can still collect under WCA. Id. The tort claim was settled for less than what the worker's compensation benefits owed by the employer was going to be, and therefore this was an issue of first impression to the Indiana courts. Thus, the employee could continue his workers' compensation claim contingent upon his remitting to employer the settlement sum which he received in his civil suit against co-worker who intentionally assaulted him, and because employer had not yet begun payment of employee's workers' compensation award, employee should have been allowed to keep the settlement sum and employer should have been permitted a credit against any future compensation; this carried out the humane purpose of workers' compensation law, and also prevented double recovery. Id. at 170.

In Foshee v. Shoney's Inc., 637 N.E.2d 1277, 1279 (Ind. 1994), the court held that when an employee files a tort action against an employer for injuries apparently covered by the WCA, employee must establish that court's exercise of jurisdiction is proper. Two requirements must be met before injury can be said to have been intended by employer, and thus not within scope of Worker's Compensation Act: tort must have been committed by employer or by employer's alter ego; and employer must have also intended injury or actually known that injury was certain to occur. Id. at 1281. The Court held that employee failed to prove that injury was intended by employer, thus her exclusive remedy was under Worker's Compensation Act; employee failed to establish that corporation was tort-feasor's alter ego, or to suggest existence of any regularly made policy or decision which prompted her injuries. Id.

D. Firearms in the Workplace

In Hemings v. Redford Lounge, Inc., 485 N.E.2d 1378, 1379 (Ind. Ct. App. 1985), a negligence action was brought against a security guard and his employer, arising out of incident wherein the plaintiff was shot by a bar patron using the security guard's gun. The plaintiff alleged that the employer was liable on theory of respondeat superior and in training the security guard and providing him with the gun. Id. In particular, the security guard had given the gun to a patron after the patron had requested to observe the gun, and gun accidentally discharged and shot the patron in the head. Id. The question raised by the plaintiff was whether the defendant was negligent in entrusting the security officer who worked at the Lounger with a firearm. Id. at 1381. A new trial, however, was ordered by the Court of Appeals because of the contradictory verdicts given by the jury on the issue on the independent acts of negligence in action against the security guard and his employer. Id. at 1385.

Additionally, in 2011, the Indiana State Legislature passed Indiana Code § 34-28-8-6, which states that a public or private employer doing business in Indiana may not:

- (1) require an applicant for employment or an employee to disclose information about whether the applicant or employee owns, possesses, uses, or transports a firearm or ammunition, unless the disclosure concerns the possession, use, or transportation of a firearm or ammunition that is used in fulfilling the duties of the employment of the individual; or
- (2) condition employment, or any rights, benefits, privileges, or opportunities offered by the employment, upon an agreement that the applicant for employment or the employee forego the rights of the applicant or employee or otherwise lawful ownership, possession, storage, transportation, or use of a firearm or ammunition.

Ind. Code § 34-28-8-6 (2019). This statute was enacted in response to employer's reactions to Indiana's "Guns in the Workplace" Law which was enacted by the State Legislature in 2010. Essentially the "Guns in the Workplace" states that an employer may not adopt or enforce a policy that prohibits an employee from possessing a firearm or ammunition that:

- (1) is locked in the trunk of the employee's vehicle
- (2) kept in the glove compartment of the employee's locked vehicle stored out of plain sight in the employee's locked vehicle.

See House Enrolled Act 1065. The law does not apply to schools, colleges, child care institutions, emergency shelters, group homes, personal residences, and personal vehicles of employees who transport developmentally disabled people. Indiana Code § 34-28-8-6 effectively now creates a do not ask do not tell policy concerning employees' firearms on an employer's premises so long as the requirements of the House Enrolled Act 1065 are satisfied.

E. Use of Mobile Devices

No significant Indiana cases or statutes.

X. TORT LIABILITY

A. Respondeat Superior Liability

The doctrine of respondeat superior imposes liability on an employer for the wrongful acts of his employees committed within the scope of employment. Hurlow v. Managing Partners, Inc., 755 N.E.2d 1158, 1161 (Ind. Ct. App. 2001). The critical inquiry focuses in whether the employee is in the service of his employer when he commits the wrongful act. Id. (citing Warner Tucking, Inc. v. Carolina Cars. Ins. Co., 686 N.E.2d 102, 105 (Ind. 1997)). Even if an employee violates the employer's rules, orders, or instructions or engages in expressly forbidden actions, the employer will still be held accountable as long as the employee was acting within the scope of employment. Id. However, an act does not fall within the scope of employment simply because the act could not have occurred without access to the employer's facilities. Id. (citing Konkle v. Henson, 672 N.E.2d 450, 457 (Ind. Ct. App. 1996)). In some circumstances, an employee maybe said to have acted within the scope of employment when committing a crime, thereby rendering the employer liable under respondeat superior. Gomez v. Adams, 462 N.E.2d 212, 223 (Ind. Ct. App. 1984).

In addition to determining whether the employee's act furthered the employer's business interest, a court also examines the association between the employee's authorized acts and his unauthorized acts. Stropes v. Heritage House of Childrens Ctr. of Shelbyville, Inc., 547 N.E.2d 244, 247 (Ind. 1989). If there is a sufficient association between the authorized acts and the unauthorized acts, the unauthorized acts may fall within the scope of employment. Konekle 672 N.E.2d at 457. When a finding is made that some of the employee's acts were authorized, then the question of whether the unauthorized acts were within the scope of the employment goes to the jury. Id. Conversely, where none of the employee's acts were authorized, there is no respondeat superior liability and a directed verdict is proper. Id.

In sum, an employer is liable under respondeat superior if (1) an employee's act furthered the employer's business interest to an appreciable extent, or (2) if an employee's authorized acts and unauthorized acts are so closely associated that the employee can be said to have acted within the scope of employment. Hurlow, 755 N.E.2d at 1163.

In Hurlow, 755 N.E.2d at 1163, the Court held that the night club was not liable to the plaintiff for his injuries, which occurred when the plaintiff was shot by an employee of the nightclub with a pellet gun. The court reasoned that the employee's acts were unauthorized by the nightclub, and the unauthorized acts did not originate from or bear in close association to his authorized duties as the employee's pellet gun was not part of his employment relationship with the nightclub. Id. The court further reasoned that the evidence did not establish that the employee's joking around with the pellet gun furthered the nightclub's business or was within the scope of the employee's employment. Id. at 1164.

In Southport Little League v. Vaughn, 734 N.E.2d 261, 266 (Ind. Ct. App. 2000), a youth baseball league volunteer, who held the position of equipment manager, vice president, board member, and member of the board of directors, was an employee of league so that league could be held vicariously liable for his actions under the doctrine of respondeat superior. Id. The Court reasoned that the volunteer was under direct supervision of league's board of directors, whom had a right to discharge him from his position and also exercised control over him. Id. Further, the

board of directors also believed he was an employee of the league. Id. In determining whether the volunteer was an employee, the Court looked to several factors in determining this relationship including: (1) the right to discharge, (2) mode of payment, (3) supplying tools or equipment, (4) belief by the parties in the existence of an employer-employee relationship, (5) control over the means used in the results reached, (6) length of employment, and (7) establishment of the work boundaries. Id. at 268, n.6 (citing Hale v. Kemp, 579 N.E.2d 63, 67 (Ind. 1991)). Based upon the fact that the volunteer was acting as an employee and within his scope of employment with the league in fitting the youths with baseball uniforms, when the volunteer sexually molested the youths and touched their genitals, the league was vicariously liable for his actions under the doctrine of respondeat superior. Id.

In contrast, in Barnett v. Clark, 889 N.E.2d 281, 283 (Ind. 2008), the plaintiff was seeking damages from the defendant, who was a trustee for the Trustees of Pleasant Township for rape, sexual battery, and false imprisonment. The trial court granted summary judgment in favor of the Township and the court of Appeals reversed. Id. The Indiana Supreme Court concluded that the injurious actions by the defendant were not sufficiently associated with his employment duties as to fall within the scope of employment. Id. at 286. The Court reasoned that other than handshakes and greetings, the employee was not explicitly or implicitly authorized to touch or confine applicants for assistance. Id. The sexual touching and raping of the plaintiff did not fall within the extension of authorized physical contact. Id. Therefore summary judgment was proper, according to the Court, on behalf of the Township under the doctrine of respondeat superior liability. Id.

B. Tortious Interference with Business/ Contractual Relations

Indiana has long recognized that intentional interference with a contract is an actionable tort. Bilimoria Computer Systems, LLC v. America Online, Inc., 829 N.E.2d 150, 156 (Ind. Ct. App. 2005) (citing Winkler v. V.G.Reed & Sons, Inc. 638 N.E.2d 1228, 1234 (Ind. 1994)). The tort reflects the public policy that contract rights are property, and under proper circumstances, parties are entitled to enforcement and protection from those who tortiously interfere with those rights. Id.

The five elements necessary for recovery for tortious interference with a contractual relationship are: (1) the existence of a valid and enforceable contract; (2) defendant's knowledge of the existence of the contract; (3) defendant's intentional inducement of breach of the contract; (4) the absence of justification; and (5) damages resulting from defendant's wrongful inducement of the breach. Id. (citing Winkler 638 N.E.2d at 1235). For element four, the justifiability of the conduct involves consideration of the following facts:

- (a) the nature of the defendant's conduct;
- (b) the defendant's motive;
- (c) the interests of the plaintiff with which the defendant's conduct interferes;
- (d) the interests sought to be advanced by the defendant;
- (e) the social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff;
- (f) the proximity or remoteness of the defendant's conduct to the interference; and
- (g) the relations between the parties.

Id., citing Winkler 638 N.E.2d at 1234.

In Bilimoria Computer Systems, LLC., 829 N.E.2d 150,151, the plaintiff was a corporation conducting business of selling computer parts primarily to school corporations. In the course of conducting business, the plaintiffs received several counterfeit checks that were initially honored by the bank but later dishonored. Id. The Court held that even if the putative drawer of the counterfeit checks could have been deemed to have communicated with the depositor's bank, in which the bank froze the check proceeds held in the depositor's checking account, such communication was justified and therefore the punitive drawer did not tortiously interfere with the depositor's contractual relationship with its bank as any such communication occurred during an active investigation into the counterfeiting scheme. Id. at 156-157. The court held that the lack of justification, as an element of tortious interference with contractual relationship, is established only if the defendant acted intentionally without a legitimate business purpose, and since actions in this case were taken as part of a federal investigation, there was a legitimate justification. Id.

In Coleman v. Vukovich, 825 N.E.2d 397, 398 (Ind. Ct. App. 2005), the defendant worked for the plaintiff in the magnet industry for several years, and then he left his employment with the plaintiff to become a principal in two other ventures. Id. Within a few months after the defendant's departure, problems arose such that the plaintiff believed that the defendant was handling accounts in a manner that diverted income to the defendant's ventures. Id. Additionally, the plaintiff wished to sell his company, but the potential purchaser would not buy the company unless the defendant executed a covenant not to compete, which he declined to do. Id.

The plaintiff brought suit against the defendant under several legal theories, including tortious interference with contractual relations, claiming that the Defendant tortiously interfered with the plaintiff's contractual relationship with the potential purchaser by refusing to sign a covenant not to compete. Id. at 403. The court found that the claim of tortious interference with a contractual relationship failed because the plaintiff did not have a valid and enforceable contract with the potential purchaser. Id.

To establish a claim for tortious interference with a business relationship, a plaintiff must prove: (1) the existence of a valid relationship; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from defendant's wrongful interference with the relationship. Felsher v. Univ. of Evansville, 755 N.E.2d 589, 601, n.21 (Ind. 2001), citing Levee v. Beeching, 729 N.E.2d 215, 222 (Ind. Ct. App. 2000). In addition to the aforementioned elements, the plaintiff must also establish that the defendant's interference was illegal. Mfg. Direct, LLC v. Directbuy, Inc., No. 2:05-CV-451, 2006 WL 2095247, at *8 (N.D. Ind., July 26, 2006). The Southern District of Indiana has held that a breach of contract alone is not sufficient "illegal conduct" for purposes of a tortious interference with business relationship claim. Id. at *9 (citing HAS, Inc. v. Bridgton, Inc., No. IP 98-0167-C H/G, 1999 WL 1893209, at *16 (S.D. Ind., Sep. 20, 1999)). See also Rice v. Hulsey, 829 N.E.2d 87 (Ind. Ct. App. 2005) (soliciting a competitor's customers following the sale of a business, without doing so by improper means, is not tortious interference of a business relationship).

XI. RESTRICTIVE COVENANTS/ NON-COMPETE AGREEMENTS

A. General Rule

Indiana courts have generally recognized and respected the freedom to contract. However, covenants not to compete are generally not favored in Indiana because they restrain trade and restrict employment. Noncompetition agreements are strictly construed against the employer and are enforced only if reasonable. Covenants must be reasonable with respect to the legitimate interests of the employer, restrictions on the employee, and the public interest. Coffman v. Olson & Co., P.C., 906 N.E.2d 201, 207 (Ind. Ct. App. 2009) (quoting Pathfinder Communications Corp. v. Macy, 795 N.E.2d 1103 (Ind. Ct. App. 2003)).

To determine the reasonableness of the covenant, the Courts first consider whether the employer has asserted a legitimate interest that may be protected by a covenant. If the employer has asserted such an interest, the Courts then determine whether the scope of the agreement is reasonable in terms of time, geography, and types of activity prohibited. The employer bears the burden of showing that the covenant is reasonable and necessary in light of the circumstances. In other words, the employer must demonstrate that the former employee has gained a unique competitive advantage or ability to harm the employer before such employer is entitled to the protection of a noncompetition covenant. Id.

Ultimately, a legitimate interest is an advantage possessed by an employer, the use of which by the employee after the end of the employment relationship would make it “unfair to allow the employee to compete with the former employer.” Coates v. Heat Wagons, Inc. 942 N.E.2d 905, 913 (Ind. Ct. App. 2011) (quoting MacGill v. Reid, 850 N.E.2d 926, 930 (Ind. Ct. App. 2006)). Indiana courts have held that goodwill, including secret or confidential information such as the names and address of customers and the advantage acquired through representative contact is a legitimate protectable interest. Id. Also subject to protection as goodwill is the competitive advantage gained for an employer through personal contacts between employee and customer when the products offered by competitors are similar. Id. However, the general skills acquired in working for an employer, may be transferred unless this occurs “under circumstances where their use [is] adverse to his employer and would result in irreparable injury.” Id. (quoting Pathfinder, 795 N.E.2d at 1110)

In Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 728 (Ind. 2008), the Indiana Supreme Court held that an employer had a legitimate interest in protecting the goodwill of its business and that the covenant’s two-year limitation period was reasonable. Furthermore, the Court found that the covenant’s geographic restriction, which barred the former employee from practicing podiatry in the eight counties in which the former employer had offices and their adjacent counties, was unreasonably broad. Id. at 729-730. The Court enforced a narrower geographic restriction, prohibiting the physician from working in counties where he had worked during the two (2) years immediately preceding his termination. Id. The Court refused to extend the restriction to contiguous counties because there was no evidence that many of the physician’s patients crossed county lines to visit his practice. Id.

B. Blue Penciling

If a covenant is clearly divisible into parts, and some parts are reasonable while others are unreasonable, a court may enforce the reasonable portions only. Sharvelle v. Magnante, 836 N.E.2d 432, 439 (Ind. Ct. App. 2005). Under this process known as blue penciling, a court strikes unreasonable provisions from the covenant. Id. When applying the blue pencil, a court must not

add terms that were not originally part of the agreement, but rather unreasonable restraints are rendered reasonable by scratching out any offensive clauses to give effect to the parties' original intent. Id.

In Sharvelle v. Magnante, 836 N.E.2d at 439, the Indiana Court of Appeals held that a noncompetition agreement prohibiting a former ophthalmologist from practicing health care of any kind was overly broad and could not be blue penciled. On the other hand, the Court blue penciled and struck out the terms "former" and "future" and limited the non-solicitation agreement to merely prohibiting the solicitation of present patients or employees. Id. at 440. Thus, the non-solicitation agreement was enforceable as to present customers, but unenforceable as to past or prospective customers. Id.

In Gleeson v. Preferred Sourcing, LLC, 883 N.E.2d 164, 168 (Ind. Ct. App. 2008), the plaintiff began working for the defendant as a sales representative. She was eventually presented with a non-compete and confidentiality agreement which she signed. Id. The agreement prevented her from selling or otherwise provides or solicits the sale of any product or service which competes directly or indirectly with any competing business during 12 months immediately preceding the termination date. Id. The plaintiff asserted that this non-compete agreement was unreasonable and that the court should use the blue pencil doctrine. Id. However, the court determined that they could not make the provision reasonable without adding terms to limit its applications to solicitation of sales and therefore the blue penciling doctrine was not applicable. Id. at 177.

In Central Indiana Podiatry, P.C. v. Kruger, 882 N.E.2d 723, 726 (Ind. 2008), a non-compete agreement existed that prohibited the defendant from practicing podiatry for two years within a geographic area defined as the fourteen listed central Indiana counties or in any other county adjacent to any of the foregoing counties. The court looked to determine whether the geographic and time restriction of the covenant was reasonable, and if not could the blue pencil doctrine be enforced. Id. at 730-731. The court determined that the geographic scope of the non-compete agreement as it related to the contiguous counties was unreasonable and used the blue pencil doctrine to only enforce the covenant to the counties to where the defendant practiced. Id. at 731.

C. Confidentiality Agreements

In terms of trade secrets (see below), employers should consider having employees with access to technical, financial, sensitive, proprietary, or customer information sign confidentiality agreements in order to satisfy the requirement that employer take reasonable efforts to maintain the information's secrecy.

For example, in Vukovich, 825 N.E.2d 397, one of the reasons why the court determined that the customer information at issue was not a trade secret was that not all the employees were required to sign agreements with confidentiality promises. Therefore, the court determined that the employer did not make reasonable efforts to maintain the customer information's secrecy. Id. at 405.

D. Trade Secrets Statutes

A protectable trade secret has four characteristics: (1) information, (2) which derives independent economic value, (3) is not generally known, or readily ascertainable by proper means by other person who can obtain economic value from its disclosure or use, and (4) is the subject of efforts reasonable under the circumstances to maintain its secrecy. Steve Silveus., Inc., v. Goshert, 873 N.E.2d 165, 179 (Ind. Ct. App. 2007).

Trade secrets are defined and governed by the Indiana Uniform Trade Secrets Act. Ind. Code. § 24-2-3-2. Whether information constitutes a trade secret is fact-sensitive determination, but ultimately it is a determination for the court to make as a matter of law. Goshert, 873 N.E.2d at 179. The burden of proof is on the party asserting the trade secret to show that it is included in the categories of protectable trade secret information listed in the trade secret statute. U.S. Land Servs., Inc. v. U.S. Surveyor, Inc., 826 N.E.2d 49, 63 (Ind. Ct. App. 2005).

An action for misappropriation of a trade secret must be brought within three (3) years after the misappropriation is discovered or by the exercise of reasonable care should have been discovered. Ind. Code § 24-2-3-7. The Uniform Trade Secrets Act provides for injunctive relief, damages for misappropriation, unjust enrichment, royalties, and exemplary damages. Ind. Code §§ 24- 2-3-3, 24-2-3-4.

In U.S. Surveyor, Inc., 826 N.E.2d at 63, the court had to determine whether a companies' customer, prospect, and surveyors lists were trade secrets under the Indiana Uniform Trade Secrets Act. The defendants argued the lists are not trade secrets, and thus the trial court was wrong in granting the preliminary injunction. However, the Court of Appeals held that a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process and operation of which, in unique combination, affords a competitive advantage and is a protectable secret. Id. The development through the years of propriety and confidential information, including information of databases regarding clients, prospects, and surveyors constituted as a trade secret pursuant to Indiana law, and thus was protected from misappropriation. Id. at 64.

Conversely, in M.K. Plastics Corp. v. Rossi, 838 N.E.2d 1068 (Ind. Ct. App. 2005), the Indiana Court of Appeals held that sales binders that included drawings of manufacturer's products did not constitute protected trade secrets under the Uniform Trade Secrets Act, where the materials were regularly distributed to independent manufacturer representatives and consulting engineers in the marketplace.

In N. Elec. Co., Inc., v. Torma, 819 N.E.2d 417, 425-429, the Court ruled that the defendant, an employee that repaired servo motors, misappropriated a data compilation of information regarding customers. During his employment for the plaintiff, the defendant compiled a data compilation first in a notebook and then in a computer. Id. at 420. He kept the information locked in a toolbox, with him, or took it home. Id. When he left his employment with the company, the defendant refused to return the data that he had compiled during the course of his employment with the plaintiff. Id. The court ruled that without the compilation of data, Northern Electric would lose a distinct advantage, and defendant's own security measures regarding the information contributed to the maintenance of confidentiality, and that the defendant's refusal to return the data (compiled on the company's behalf) was unauthorized and improper. Id. at 425-429.

In an important 2004 Indiana Supreme Court case, Infinity Prod., Inc. v. Quandt, 810 N.E.2d 1028, 1029-1031 (Ind. 2004), the court, as a matter of first impression, ruled that respondeat superior is unavailable in an action covered by the Indiana Trade Secrets Act. The defendant was fired from his job by the plaintiffs, and when he left, he took boxes and file folders of customer information with him. Id. Four (4) days later he started employment at Fabri-Tech, and eventually several customers stopped ordering from the Plaintiff, and began ordering from Fabri-Tech. Id. The plaintiff sued the defendant and Fabri-Tech for misappropriation of trade secrets and conversion. Id.

However, the legislative history of the Indiana Trade Secrets Act reveals that it is based on the Uniform Trade Secrets Act, and that the Act was meant to displace “all conflicting laws of this state pertaining to the misappropriation of trade secrets, except contract and criminal law.” Quandt, 810 N.E.2d at 1033, citing Ind. Code Ann. § 24-2-3-1(c). Respondeat superior is a common law doctrine under which liability is imposed upon the master for his servant’s acts regardless of the master’s complicity in the acts. Id. Liability may be imposed even when the master directs the servant to the contrary. Id.

The Indiana Trade Secrets Act requires that a claimant demonstrate that the defendant “knows or has reason to know” that the trade secret at issue was acquired by improper means. Id., citing IND. CODE § 24-2-3-2. The court found that the Trade Secrets Act and the common law doctrine of respondeat superior conflict, and therefore, respondeat superior is displaced by the provisions of the Indiana Trade Secrets Act.

E. Fiduciary Duty and Their Consideration

In SJS Refractory Co., LLC. v. Empire Refractory Sales, Inc., 952 N.E.2d 758, 762-64 (Ind. Ct. App. 2011), SJS was sued by Empire for breach of fiduciary duty. There were discussions by the owners of SJS to buy Empire, but when discussions were ongoing, although bleak, the owners of SJS quit Empire and started SJS as their own company. Id. The employees of Empire were all supposed to sign noncompete agreements but they were never signed and therefore, they were able to begin SJS. Id. However, while starting SJS, the owners of the company began actively trying to recruit and sign Empire’s clients away using company lists and knowledge gained by working at Empire. The court held that owners of SJS breached their fiduciary duties owed towards Empire. The Court reasoned that an employee who plans to leave his current job and go into competition with his current employer must walk a fine line. Id. at 768. Specifically, “prior to his termination, an employee must refrain from actively and directly competing with his employer for customers and employees and must continue to exert his best efforts on behalf of his employer.” Id. (citing Kopka, Lamdau & Pinkus v. Hansen, 874 N.E.2d 1065, 1070 (Ind. Ct. App. 2011)). The employee cannot properly use confidential information specific to his employer's business before the employee leaves his employ. Id. These rules balance the concern for the integrity of the employment relationship against the privilege of employees to prepare to compete against their employers without fear of breaching their fiduciary duty of loyalty. Id. Therefore, although a valid non-compete agreement may prevent an employer from directly competing with their former employer, absent a non-compete agreement, an employee still owes to an employer a fiduciary duty. Id.

XII. DRUG TESTING LAWS

“Covered Entities” may:

1. Prohibit the illegal use of drugs and the use of alcohol at the workplace of all employees.
2. Require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace.
3. Require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.).
4. Hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that the employer holds other employees, even if the unsatisfactory job performance or behavior is related to the drug use or alcoholism of the employee. Ind. Code § 22-9-5-24. (2019).

Entities covered by Indiana Code § 22-9-5 et seq. include an employer, employment agency, labor organization or joint labor-management committee. Ind. Code § 22-9-5 et seq. does not apply to a bona fide private membership club other than a labor organization that is exempt from taxation under Section 501(c) of the Internal Revenue Code. See IND. CODE § 22-9-5-10(c)(2). The term “employer” does not include the United States, a corporation wholly-owned by the government of the United States, or an Indiana Tribe. Ind. Code § 22-9-5-10(c)(1).

There are no restrictions on private employers from engaging in any form of drug testing. Note that the drug testing of employees of public works contractors is governed by Ind. Code § 4-13-18 et seq., and that Ind. Code § 12-17.2-3.5-12.1 concerns drug testing of caregivers in child care programs.

A. Public Employers

In Oman v. State, 737 N.E.2d 1131 (Ind. 2000), the Indiana Supreme Court followed the precedent established by the United States Supreme Court, upholding the constitutionality of government testing programs by recognizing that the affected employees were engaged in safety-sensitive tasks, so that “special needs” existed beyond the normal enforcement to justify a departure from the usual warrant and probable cause requirements of the Fourth Amendment. The Supreme Court was careful to note that this was for administrative purposes however, and drug tests of public officials was not designed as a pretext to enable law enforcement to gather evidence of penal law violations. Oman, 737 N.E.2d at 1142. The Indiana Supreme Court also decided in Oman, that an administrative drug test could be used against an employee could be used as the basis of a criminal investigation regardless of the circumstance of who is seeking the results. Id.

B. Private Employers

In Butler v. Review Bd. of Indiana Dept. of Employment and Training Services, 633 N.E.2d 310, 312-13 (Ind. Ct. App. 1994), the Indiana Court of Appeals looked to several United States Supreme Court cases stating that the Courts have consistently limited the application of the Fourth Amendment to government intrusion. The Court ruled in Butler, that since the employee had notice of the employer's policy, and there was no state action, the plaintiff's Fourth Amendment right to be free from unreasonable searches was not implicated. Id. A private employer has a right to insure that its workers are drug and alcohol free while on the job. Id.

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

Indiana has anti-discrimination statutes regarding civil rights, age discrimination, and disability.

A. Employers/ Employees Covered

1. Civil Rights

The Civil Rights Statute covers "employers" that are the state, any political or civil subdivision thereof, and any person employing six (6) or more persons within the state. It does not include (1) any nonprofit corporation or association organized exclusively for fraternal or religious purposes; (2) any school, educational or charitable religious institution owned or conducted by or affiliated with a church or religious institution; or (3) any exclusively social club, corporation, or association that is not organized for profit. Ind. Code § 22-9-1-3(h).

An "employee" is any person employed by another for wages or salary. This does not include any individual employed by his parents, spouse, or child, or in the domestic service of another person. Ind. Code § 22-9-1-3(i).

2. Age Discrimination

The Age Discrimination Statute defines an employer as any person in the state employing one or more individuals, and that is not subject to the ADEA. The definition includes labor organizations, the state and all political subdivisions, boards, departments, and commissions. The definition of employer does not include certain religious and charitable organizations. Ind. Code § 22-9-2-1. The statute covers persons that have attained the age of forty (40) years and have not attained the age of seventy-five (75) years. Id.

3. Disability Discrimination

Under Indiana's Disability Discrimination Statute, Ind. Code § 22-9-5, et seq., after July 25, 1994, an employer is defined as a person engaged in an industry affecting commerce that has at least fifteen (15) employees for each working day of each of at least twenty weeks in the current or preceding year. Ind. Code § 22-9-5-10. An employee is defined as an individual employed by an employer. Id. at § 22-9-5-9.

B. Types of Conduct Prohibited

1. Civil Rights

Under the Indiana Civil Rights Statute, employment opportunities are considered civil rights, and it is a discriminatory practice to deny employment opportunities to qualified persons by reason of race, religion, color, sex, disability, national origin, or ancestry of such persons. Ind. Code § 22-9-1-2(a) and (b). A denial of employment opportunities based on these factors is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of the State of Indiana. Id.

2. Age Discrimination

Under the statute, it is an unfair employment practice and against public policy to dismiss from employment, or to refuse to employ or rehire, any person solely because of his age if such person is at least forty (40) years old, but less than seventy-five (75) years old. Ind. Code § 22-9-2-2. It is also an unfair employment practice for any labor organization to deny full and equal membership rights to any applicant for membership or to fail or refuse to classify properly or refer for employment any member solely because of the age of such applicant or member if such person is at least forty (40) years old, but less than seventy-five (75) years old. Id. at § 22-9-2-3.

3. Disability Discrimination

A covered entity (an employer, an employment agency, a labor organization, or a joint labor-management committee) may not discriminate against a qualified individual with a disability because of the disability of that individual regarding (1) the job application process; (2) the hiring, advancement, or discharge of employees; (3) employee compensation; (4) job training; and (5) other terms, conditions, and privileges of employment. Ind. Code § 22-9-5-19.

To establish a prima facie case of disability discrimination, the claimant must show that he or she suffers from a disability, that there was a position available for which he or she was qualified, and that the position was given to a person who was not disabled. Ind. Civil Rights Comm'n v. S. Ind. Gas & Elec. Co., 648 N.E.2d 674, 683 (Ind. Ct. App. 1995).

4. Armed Forces Discrimination

Indiana Code § 22-9-1-2 was amended in 2014 to prohibit employment discrimination against veterans of the armed forces. I.C. § 22-9-1-2(f).

C. Administrative Requirements

1. Civil Rights

The Indiana Civil Rights Statute created the Indiana Civil Rights Commission which has powers, including but not limited to, formulating policies to effectuate the purposes of the statute, receiving and investigating complaints alleging discriminatory practices, conducting hearings and issuing orders requiring persons to cease and to desist unlawful discriminatory practices, and promoting the creation of local civil rights agencies.

No complaint shall be valid unless filed within 180 days from the date of the occurrence of the alleged discriminatory practice. Ind. Code § 22-9-1-3(p).

2. Age Discrimination

If voluntary compliance cannot be obtained through informal methods of conference,

conciliation and persuasion, the commissioner of labor is empowered to issue a complaint stating the charges and giving not less than ten (10) days' notice of a hearing before the commissioner of labor. Ind. Code § 22-9-2-6. A complaint issued must be issued within four (4) months after the alleged employment practices were committed. Id. The employer shall have the right to file an answer to the complaint and may appear at the hearing with or without counsel to present evidence and to examine and cross-examine witnesses. Id.

3. Disability Discrimination

The Indiana Civil Rights Commission shall adopt rules under Ind. Code § 4-22-2 to carry out the disability discrimination statute. Ind. Code § 22-9-5-27. These rules must not be in conflict with the provisions of the federal rules adopted under the employment discrimination provisions of the Americans with Disabilities Act (ADA). Id.

D. Remedies Available

1. Civil Rights

Pursuant to Ind. Code § 22-9-1-6(j), the Commission shall state its findings of fact after a hearing, and if the Commission finds that a person has engaged in unlawful discriminatory practices, it shall serve an order requiring the person to cease and desist from any unlawful discriminatory practices and requiring further affirmative action such as:

- a. Restoring the complainant's losses incurred as a result of the discriminatory treatment, as the Commission may deem necessary to assure justice. In the employment context, this shall only include wages, salary, or commissions;
- b. Requiring the posting of a notice setting forth the public policy of Indiana concerning civil rights and the employer's compliance with the policy in places of public accommodations;
- c. Requiring proof of compliance to be filed by the employer at periodic intervals; and
- d. Requiring a person who has been found to be in violation of the Civil Rights Statute and who is licensed by a state agency authorized to grant a license to show cause to the licensing agency why his license should not be revoked or suspended.

Id.

2. Age Discrimination

The Age Discrimination Statute does not provide for a remedy.

3. Disability Discrimination

The remedies under the state disability discrimination statute are limited to those remedies provided under Ind. Code § 22-9-1-6(j) discussed above in the section regarding remedies under the Indiana Civil Rights Statute. Ind. Code § 22-9-5-26.

XIV. STATE LEAVE LAWS

A. Jury/ Witness Duty

In Indiana, an employer may not knowingly or intentionally dismiss an employee, deprive an employee of employment benefits, or threaten dismissal or deprivation because the employee (1) has received or responded to a summons; (2) served as a juror; or (3) attended court for prospective jury service. Ind. Code § 35-44.1-2-11. A violation of this section constitutes interference with jury service, a Class B misdemeanor. Id.

An employee who is dismissed in violation of Ind. Code § 35-44.1-2-11 may bring a civil action against the employer within ninety (90) days of the dismissal to recover the wages that the employee lost as a result of the dismissal and to obtain an order against the employer requiring reinstatement. Ind. Code § 34-28-4-1. If the employee obtains a judgment against the employer, the court shall award reasonable attorney's fees. Id.

In Call v. Scott Brass, Inc., 553 N.E.2d 1225 (Ind. Ct. App. 1990), in reversing summary judgment in favor of the employer, the Indiana Court of Appeals found that an attorney's termination for complying with a jury summons fit within the narrow exception of the employment at-will doctrine and thus the employee had an action for retaliatory discharge against the employer because she was terminated for exercising a statutorily conferred right. An action pursuant to Ind. Code § 34-4-29-1 was not the sole avenue of recovery for the employee.

B. Voting

Indiana does not have a relevant statute regarding employee leave for voting. Indiana does not require employers to give time off to vote.

C. Family/ Medical Leave

The Family and Medical Leave Act of 1993, entitles certain employees to twelve weeks of unpaid leave for the employee's serious health condition, the birth or adoption of a child, or the employee's need to care for a seriously ill family member. Gary Community School Corp v. Powell, 906 N.E.2d 823, 827 (Ind. 2009). Following the qualified leave, an employee is entitled to be restored to the former position or one with equivalent benefits, pay, and conditions of employment. Id. An employee may sue in federal or state court for damages, equitable relief, and fees if an employer interfered with the employee's FMLA rights or retaliates for the exercise of those rights. Id. at 828.

In Gary Community School Corp, a teacher of the school corporation, who was a math teacher but also the head football coach, lost his job as the football coach when he had to take medical leave to treat an injured leg. The Indiana Supreme Court held that an employee filling multiple positions with the same employer is eligible for FMLA leave as to all positions if that employee has completed 1,250 total hours of service to that employer in the twelve months preceding the request for the leave, and therefore the distinction of two separate positions did not matter as to whether the teacher was indeed eligible for FMLA leave and how that affected his

status as the football head coach. Id. at 829.

Indiana does not have a parallel statute regarding family and medical leave. However, a public employee may be able to use sick leave for medical care for him or herself or for family members pursuant to Ind. Code § 5-10-6-1(b), which states: “Employees of the political subdivisions of the state may be granted a vacation with pay, sick leave, paid holidays, and other similar benefits by ordinance of the legislative body of a county, city, town, township, or controlling board of a municipally owned utility, board of directors or regents of a cemetery, or board of trustees of any library district.” (emphasis added).

D. Pregnancy/ Maternity/ Paternity Laws

Indiana does not have parallel statutes regarding pregnancy/maternity/paternity laws for private employers. Rather, such leave is up to the discretion of the individual company. Additionally, maternity leave can be taken as part of FMLA leave if the requirements for FMLA have been satisfied. A father is also able to use FMLA leave for the birth of a child and to care for his spouse who is incapacitated (due to the pregnancy of the child). The Pregnancy Discrimination Act, prohibits discrimination on the basis of pregnancy when it comes to any aspect of employment, including the hiring, firing, pay, job assignments, promotions, layoff, training, and fringe benefits such as leave and health insurance, and any other term or condition of employment. Therefore, a company is required to give mothers and fathers who are expecting a newborn child the same benefits and pay as was given to another disabled employee of the company.

Indiana, however, does have specific pregnancy laws pertinent to school teachers. A teacher who is pregnant may continue in active employment as late into pregnancy as the teacher wishes, if the teacher can fulfill the requirement of the teacher’s position. Ind. Code. § 20-28-10-5. A teacher who is pregnant shall be granted leave of absence any time between the commencement of the teacher’s pregnancy and one (1) year following the birth of the child, if the teacher wishes to start the leave. Id. The teacher must provide, with the notice, a physician’s statement certifying teacher’s pregnancy; or a copy of the birth certificate of the new born. Id. Additionally, all or part of a leave taken by a teacher because of a temporary disability caused by pregnancy may be charged, at the teacher’s discretion, to the teacher’s available sick days, unless the teacher’s physicians certify that the teacher is capable of performing the teacher’s regular teaching duties. Id. Then the teacher is entitled to complete the remaining leave without pay. Id.

E. Day of Rest Statutes

Indiana does not have a day of rest statute. However, Ind. Code § 22-2-2-4(1)(3)(F) (Minimum Wage Statute) requires extra compensation be paid to employees who work on “days of rest” as well as those who work on weekends and holidays.

F. Military Leave

Indiana employers may not terminate reservists or members of the United States armed forces that leave their employment in order to receive military training for not more than fifteen (15) days in a calendar year. Under Ind. Code §§ 10-17-4-1 and 10-17-4-4, such persons are entitled to be restored to the person's previous or a similar position with the same status and pay.

Additionally, absence for military training does not affect an employee's right to receive normal vacation, sick leave, bonus, advancement, and other advantages of the employee's particular position. Id. at § 10-17-4-2.

Furthermore, an employee who has been employed for at least twelve (12) months, and has worked at least (1,500) hours during the twelve (12) month period immediately preceding the day the leave begins; and is the spouse, parent, grandparent, child or sibling of a person who is ordered to active duty is entitled to an unpaid leave of absence (1) during the (30) days before active duty orders are in effect; (2) during a period in which the person ordered to active duty is on leave while active duty orders are in effect; and (3) during the thirty (30) days after the active duty orders are terminated. Ind. Code. § 22-2-13-11. An employee who takes leave subject to Indiana Code § 22-2-13-11, must be restored to the position that the employee held before the leave, or a position equivalent to the position that the employee held before the leave, with equivalent seniority, pay, benefits, and other terms and conditions of employment. Ind. Code. § 22-2-13-13. Additionally, all health care benefits that the employee received shall continue during absence. Ind. Code. § 22-2-13-14.

XV. STATE WAGE AND HOUR LAWS

Indiana does not have a significant number of state wage and hour laws, but it does regulate state minimum wage, child labor of children under the age of eighteen (18), and the frequency of wage payments to employees.

A. Current Minimum Wage in State

Except for in a few narrow exceptions, all Indiana employers employing at least two (2) employees during a work week must pay each of the employees in any work week beginning on or after June 30, 2007, wages of not less than the federal minimum wage. Ind. Code. § 22-2-2-4(h).

B. Deductions from Pay

Any assignment of the wages of an employee is valid if all of the following conditions are satisfied:

- 1) The assignment is writing;
- 2) signed by the employee personally;
- 3) by its terms revocable at any time by the employee upon written notice to the employer, and
- 4) agreed to in writing by the employer.

Ind. Code. § 22-2-6-2. A wage assignment under Indiana Code § 22-2-6-2 may be made for (1) the premiums on a policy insurance provided by the employer;(2) a pledge or contribution of the

employee to a charitable or nonprofit organization; (3) purchase price of bonds, securities, or stocks of the employing company or the United States; (4) purchase price of shares of stock, or fractional interests therein, of the employing company, or of a company owning the majority of the issued and outstanding stock of the employing company, whether purchased from such company, in the open market or otherwise. However, if such shares are to be purchased on installments pursuant to a written purchase agreement, the employee has the right under the purchase agreement at any time before completing purchase of such shares to cancel said agreement and to have repaid promptly the amount of all installment payments which theretofore have been made; (5) dues owed by the employee to a labor organization to which the employee is a member; (6) purchase price of merchandise sold by the employer to the employee; (7) amount of loan made to the employee by the employer and evidenced by a written instrument; (8) contributions, assessments, or dues to an employees' association or to a hospital service or a surgical or medical expense plan; (9) Payment to any credit-union, nonprofit organization, or association of employees of such employer; (10) payment to any person or organization regulated under the Uniform Consumer Credit Code; (11) Premiums on insurance and annuities purchased by the employee on the employee's life; (12) the purchase price of shares or fractional interest in shares in one (1) mutual fund; (13) a judgment owed by the employee if the payment is made in accordance between the employee and the creditor and is not a garnishment under Ind. Code § 34-25-3; (14) the purchase of uniforms and equipment necessary to fulfill the duties of employment; (15) reimbursement for education or employee skills training; (16) an advance of payroll or vacation pay; and (17) drug education and addiction treatment services under Ind. Code § 12-23-23. Ind. Code § 22-2-6-2.

If wages are to be garnished per court order, then upon receipt of a court's garnishment order, an employer must withhold certain amounts from an employee's disposable earnings to pay the debt owed by the employee. The maximum amount subject to garnishment is the lesser of twenty-five percent (25%) of the employee's disposable income for the week or thirty (30) times the federal minimum hourly wage. Ind. Code. § 24-4.5-5-105(2). The employer can collect a fee for the deductions, and the employer may not discharge an employee who is subject to a garnishment order for the reason the employee is subject to the order. Ind. Code §§ 24-4.5-5-105(5), 24-4.5-5-106. If an individual shows good cause why the amount should be reduced, the amount of garnishment could be less than 25%, as long as it is at least 10%. Ind. Code § 24-4.5-5-105(2)(a).

Sixty percent (60%) of the employee's disposable income may be withheld unless the employee is supporting a spouse or dependent child other than the child for whom the support is ordered. If the employee is supporting another child, then only fifty percent (50%) of the disposable income may be withheld. Ind. Code § 24-4.5-5-105(3)(a). Child support withholding takes priority over a garnishment order. Id. at § 24-4.5-5-105(8).

Furthermore, an employer must withhold child support obligations from an employee's pay once it receives written notice from a court or child support agency. The notice must state the amount of money to be withheld each pay period and the court or agency to which to send the amount withheld. After receiving the notice, an employer must begin withholding from the employee's pay no later than the first pay period that occurs after fourteen (14) days following the date the notice was received by the income payor; and report to the state central collection unit the date on which the income was withheld from the obligor's income. Ind. Code § 31-16-15- 3.5.

C. Overtime Rules

Except as provided in Indiana Code § 22-2-2-4, no employer shall employ an employee for a work week longer than forty (40) hours unless the employee receives compensation from

employment in excess of the hours specified at a rate not less than one and one-half (1.5) times the regular rate at which the employee is employed. Ind. Code. § 22-2-2-4(k). An employer will not have violated the law by employing an individual who works in excess of forty (40) hours in a week if the employee is so employed: (1) in pursuance of an agreement, made as a result of a collective bargaining agreement in accordance to the National Labor Relations Board (NLBR), or (2) employment is pursuant to an individual contract, or a collective bargaining agreement that specifies a regular rate of pay not less than the minimum hourly rate and compensation at not less than one and one-half (1.5) times that rate for all hours worked in excess of the maximum work week, and specified pay is not for more than sixty (60) hours a week. Ind. Code §§ 22-2-2-4(m), (n).

Additionally, no employer shall be considered to have violated Indiana Statute by employing any employee for a work week in excess of the maximum work week applicable to the employee under that subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by the employee in the work week in excess of the maximum work week applicable to the employee under that subsection: (1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half (1.5) times the bona fide piece rates applicable to the same work when performed during nonovertime hours; (2) in the case of an employee performing two (2) or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half (1.5) times those bona fide rates applicable to the same work when performed during nonovertime hours; or (3) is computed at a rate not less than one and one-half (1.5) times the rate established by the agreement or understanding as the basic rate to be used in computing overtime compensation thereunder, provided that the rate so established shall be substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if the employee's average hourly earnings for the work week exclusive of payments described in this section are not less than the minimum hourly rate required by applicable law, and extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate. Ind. Code § 22-2-2-4(o).

D. Time for payment upon termination

Whenever an employer separates any employee from the pay-roll, the unpaid wages or compensation of such employee shall become due and payable at regular pay day for pay period in which separation occurred; provided, however, that this provision shall not apply to railroads in the payment by them to their employees. Ind. Code § 22-2-9-2.

In the event of suspension of work, as the result of an industrial dispute, the wages and compensation earned and unpaid at the time of suspension shall become due and payable at the next regular pay day. Id.

E. Repeal of Common Construction Wage

Effective July 1, 2015, through House Enrolled Act 1019, Indiana repealed the Indiana Common Construction Wage Act, Indiana Code § 5-16-7-1 et seq. Unless federal or state law provides otherwise, a public agency may not establish, mandate or otherwise require a wage scale or wage schedule for a public works contract awarded by the public agency after July 1, 2015. Work performed on federally-funded projects covered by Davis-Bacon and Related Acts is not affected by the repeal.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in the Workplace

In Indiana, smoking is prohibited in (1) a public place; (2) a place of employment; (3) a vehicle owned, leased, or operated by the state if the vehicle is being used for a governmental function; (4) the area within eight (8) feet of a public entrance to a public place or a place of employment. Ind. Code § 7.1-5-12-4. An owner, operator, or official in charge of a public place or place of employment shall remove ashtrays or other smoking paraphernalia from area of the public place or place of employment where smoking is prohibited. Id.

However, Smoking is still allowed at (1) horseracing facilities; (2) a riverboat; (3) a facility that operates under a gambling game license; (4) a satellite facility licensed by the commission; (5) any business that permitted smoking before December 31, 2012 and prohibits entry by an individual who is less than twenty one (21) years of age; and the owner of business holds beer, liquor, or wine retailers, and limits smoking to only cigars or a hookah device; during the preceding calendar year, at least ten (10%) of the business's annual gross income was from: the sale of cigars and the rental of onsite humidors or the sale of loose tobacco for use in a waterpipe or hookah device; the person in charge of the business posts in the establishment conspicuous signs that display the message that cigarette smoking is prohibited; (6) a premise regularly used for activities of a business that meets all of the following if the business is exempt from federal income taxation, and the business meets the requirements to be considered a club under IC 7.1-3-20-1; or is a fraternal club (as defined in IC 7.1-3-20-7); and the business provides food or alcoholic beverages only to its bona fide members and their guests; the business, during a meeting of the business's members, voted within the previous two (2) years to allow smoking on the premises; the business provides a separate, enclosed, designated smoking room or area that is adequately ventilated to prevent migration of smoke to nonsmoking areas of the premises; allows smoking only in the room or area described; and does not allow an individual who is less than eighteen (18) years of age to enter into the room or area described; (7) retail tobacco store; (8) a bar or tavern; (9) cigar manufacturing facility that does not offer retail sales; (10) a premises of a cigar specialty store to which all of the following apply: the owner or operator of the store held a valid tobacco sales certificate issued under Ind. Code § 7.1-3-18.5 on June 30, 2012; the sale of tobacco products and tobacco accessories account for at least fifty (50%) percent of the store's annual gross sales; the store has a separate, enclosed, designated smoking room that is adequately ventilated to prevent migration of smoke to nonsmoking areas; smoking is allowed only in the room described; individuals who are less than eighteen (18) years of age are prohibited from entering into the room described; cigarette smoking is now allowed on the premises of the store; the owner or operator of the store posts a conspicuous sign on the premises of the store that displays the message that cigarette smoking is prohibited; food or beverages are not sold in a manner that requires consumption on the premises, and there is not an area set aside for customers to consume food or beverages on the premises; (11) a business that is located in the business owner's private residence of the only employees of the business who work in the residence are the owner and other individuals who reside at the residence. Ind. Code § 7.1-5-12-5.

Additionally, under this statute, an employer may not require, as a condition of employment, an employee or prospective employee to refrain from using; or discriminate against an employee with respect to the employee's compensation and benefits; or terms and conditions of employment; based on the employee's use of tobacco products outside the course of the employee's or prospective employee's employment. Ind. Code § 22-5-4, et seq. An employer may implement financial incentives: intended to reduce tobacco use; and related to employee health benefits provided by the employer. Ind. Code § 22-5-4-1.

This statute does not apply to an employer that is a church, a religious organization, or a school or business conducted by a church or religious organization. Ind. Code § 22-5-4-4.

This statute does not prohibit an employer from restricting or prohibiting smoking at the workplace. Ind. Code § 7.1-5-12-4.

B. Health Benefit Mandates for Employers

Indiana's "Patient Protection and Affordable Care Act" refers to the federal Patient Protection and Affordable Care Act as amended by the federal Health care and Education Reconciliation Act of 2010, as amended from time to time, and regulations or guidance issued under those acts. Ind. Code § 4-1-12-1.

"Health plan" is defined as a policy, contract, certificate, or agreement offered or issued, to provide, deliver for, or reimburse the costs of health care services. Ind. Code § 4-1-12-2.

Notwithstanding any other law, an Indiana resident may not be required to purchase coverage under a health plan. A resident may delegate to the resident's employer the resident's authority to purchase or decline to purchase coverage under the act. Ind. Code § 4-1-12-3.

The office of the secretary of family and social services and the department of insurance: shall investigate; and may apply for a waiver under 42 U.S.C. § 18052 of the Patient Protection and Affordable Care Act. Ind. Code § 4-1-12-4.

C. Immigration Law

A state agency or political subdivision shall use the E-Verify program to verify the work eligibility status of all employees of the state agency or political subdivision hired after June 30, 2011. Ind. Code § 22-5-1.7-10.

Furthermore, a state agency or political subdivision may not enter into or renew a public contract for services with a contractor unless the contract requires the contractor to enroll in and verify the work eligibility status of all newly hired employees of the contractor through the E-Verify program and a provision in the contract that states the contractor does not have to verify the eligibility of the workers if E-Verify program no longer exists. Ind. Code. § 22-5-1.7-11. Additionally, the contractor must sign an affidavit affirming that the contractor does not knowingly employ an unauthorized alien. Id. A contractor or subcontractor may not knowingly employ or contract with an unauthorized alien or retain an employee or contract with a person that the contractor or subcontractor subsequently learns is an unauthorized alien. Ind. Code § 22-5-1.7-12. If a contractor violates this section the state agency or political subdivision shall require the contractor to remedy the violation within thirty (30) days after the date the state agency or political subdivision notifies the contractor of the violation. Id. There is a rebuttable presumption that a

contractor did not knowingly employ an unauthorized alien if the contractor verified the work eligibility status of the employee through the E-Verify Program. Id.

D. Right to Work

A person may not require an individual to become or remain a member of a labor organization, and pay dues, fees, assessments, or other charges of any kind or amount to a labor organization; or pay to a charity or a third party charges required of members of labor organization as a condition of employment or continuation of employment. Ind. Code § 22-6-6-8. A contract between a labor organization and an employer that violates Indiana Code § 22-6-6-8 is unlawful and void. Ind. Code. § 22-6-6-9.

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

Indiana does not have a relevant statute regarding lawful marijuana use, as Indiana has not passed any laws permitting medical or recreational use of same. In the 2015 legislative session, Sen. Karen Tallian sponsored HB 1487, a medical marijuana bill. However, the bill did not make it out of committee to receive a public hearing.

F. Gender/Transgender Expression

Marion and Monroe Counties prohibit employment discrimination on the basis of sexual orientation and gender identity. The cities of Bloomington, Carmel, Columbus, Evansville, Muncie, Michigan City, Indianapolis, Hammond, Kokomo, New Albany, South Bend, Terre Haute, West Lafayette and Zionsville also prohibit employment discrimination on the basis of sexual orientation and gender identity.

G. Indiana's Religious Freedom Restoration Act

The law provides that a state or local government may not substantially burden a person's right to the exercise of religion unless it is demonstrated that applying the burden to the person's exercise of religion is: (1) essential to further a compelling governmental interest; and (2) the least restrictive means of furthering the compelling governmental interest. Ind. Code § 34-13-9-8. Therefore, "in order to substantially burden a person's exercise of religion, the government must show that 'it lacks other means of achieving its desired goal without imposing' that burden, which requires a 'focused inquiry' that 'scrutinizes the asserted harm . . . to particular religious claimants.'" House of Prayer Ministries v. Rush Cty. Bd. of Zoning Appeals, 91 N.E.3d 1053, 106 (Ind. Ct. App. 2018) (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779-80 (2014)). The act allows a person who asserts a burden as a claim or defense to obtain appropriate relief, including: (1) injunctive relief; (2) declaratory relief; (3) compensatory damages; and (4) recovery of court costs and reasonable attorney's fees. Ind. Code § 34-13-9-10.

In House of Prayer Ministries, the organizers of a religious summer youth camp objected to the board of zoning appeals granting a special exception to allow the construction and operation of a concentrated animal feeding operation ("CAFO") upwind from their facility. 91 N.E.3d at 1057. The camp organizers asserted that granting the exception would substantially burden their exercise of religion by "imperiling the health of the children" at the camp, thereby lowering its attendance. Id. at 1064. While the court rejected this argument, it was on the grounds that the board of zoning appeals' decision was based on evidence from the CAFO's operators that they would be able to mitigate any smell originating from the waste stored at their facility. Id. at 1065. In doing so, the House of Prayer Ministries court seemed to leave the door open for this argument in a situation where an administrative decision *was not* based on substantial evidence on the record as a whole.