

## NEBRASKA

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### **I. AT-WILL EMPLOYMENT**

#### **A. Statute**

There is no statute in Nebraska on at-will employment.

#### **B. Case Law**

The general rule in Nebraska is that all employees are terminable at-will, with or without cause.

When the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability.

*Alford v. Lifesaver’s Inc.*, 210 Neb. 441, 442, 315 N.W.2d 260, 261 (1982); *see also Dossett v. First St. Bank*, 261 Neb. 959, 627 N.W.2d 131 (2001); *Malone v. Am. Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001); *Nebraska Pub. Employees Loc. Union 251 v. Otoe County*, 257 Neb. 50, 595 N.W.2d 237 (1999); *Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999); *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988); *Zwiener v. Becton Dickinson-E.*, 285 Neb. 735, 829 N.W.2d 113 (2013); *O’Brien v. Bellevue Public Schools*, 289 Neb. 637, 858 N.W.2d 731 (2014); *Oldfield v. Nebraska Mach. Co.*, 296 Neb. 469, 894 N.W.2d 278 (2017).

### **II. EXCEPTIONS TO AT-WILL EMPLOYMENT**

The Nebraska Supreme Court has recognized certain exceptions to the “terminable at-will” rule. The exceptions include situations where the discharge infringes upon constitutionally-protected interests of the employee, where termination would affect public policy, or where a statute or contract prohibits an employer from discharging an employee for a particular reason or without

cause. See *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988); *Blair v. Phys. Mut. Ins. Co.*, 242 Neb. 652, 496 N.W.2d 483 (1983); *Ambroz v. Cornhusker Square, Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987); *Nebraska Pub. Employees Loc. Union 251 v. Otoe County*, 257 Neb. 50, 595 N.W.2d 237 (1999).

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

In some circumstances, an employee handbook or personnel manual can form an enforceable contract between employer and employee. A number of Nebraska decisions have made this clear. Representative is the case of *Johnston v. Panhandle Coop. Ass'n*, 225 Neb. 732, 408 N.W.2d 261 (1987). In that case, the Court held:

- (1) The terms of a handbook become enforceable as a unilateral contract even though issued after the hiring of the plaintiff if the following formational requirements are met:
  - a. Terms definite in form;
  - b. Terms communicated to offeree;
  - c. Terms accepted by offeree; and
  - d. Consideration exists for enforceability.

Retaining employment with knowledge of new or changed conditions constitutes acceptance and supplies consideration of the employee's freedom to leave employment.

- (2) The handbook terms were not sufficiently definite to be enforceable in the case at hand, or did not support the plaintiff's claim.

"Dismissals for cause" in the handbook did not constitute a restriction to the discharge only for those reasons. No restrictions on right to discharge were stated.

No disciplinary or grievance procedure stated.

"Probationary period" was not an offer definite in form. "Permanent employment" – which is distinguished from "temporary employment" – does not constitute an offer to discharge only for cause.

*Johnston*, 225 Neb. 732, 408 N.W.2d 261.

2. Provisions Regarding Fair Treatment

Nebraska has determined that a "Fair Treatment Procedure" section contained within an employee handbook can be enforceable. In *Overmier v. Parks*, 242 Neb. 458, 495 N.W.2d 620 (1993) the Nebraska Supreme Court determined the plaintiff's discharge was subject to the fair treatment procedures contained in the employee handbook.

### 3. Disclaimers

The Nebraska Court of Appeals has recognized that a disclaimer in an employee handbook may effectively prevent the handbook from modifying the terms of an employment agreement. In *Stodola v. Hartford Steam Boiler Inspection and Ins. Co.*, 1992 WL 78382 (Neb. Ct. App. 1992) the employee signed an at-will contract and the employee handbook contained provisions regarding steps for discipline and unsatisfactory performance. However, the handbook also contained a disclaimer permitting the employer to discontinue services of the employee at any time, *as appropriate*. The court discussed the implications of the term “as appropriate” and ultimately remanded the case for a determination of whether the disclaimer and employee handbook were applicable to plaintiff’s employment.

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

Nebraska recognizes an “implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.” *Coffey v. Planet Grp., Inc.*, 287 Neb. 834, 843, 845 N.W.2d 255, 263 (2014). In *Coffey*, the Nebraska Supreme Court found that the employer did not act in bad faith in terminating an at-will employee and denying commissions which, under the terms of the Compensation Plan between the parties, were unearned at the time of termination.

#### B. Public Policy Exceptions

##### 1. General

The Nebraska Supreme Court first recognized a public policy exception to the terminable at-will rule in *Ambroz v. Cornhusker Square, Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987).

In that case, Ambroz was employed as a security guard by Cornhusker Square. On May 7, 1985, the director of security demanded that Ambroz submit to a polygraph examination or risk losing his job. Ambroz refused and he was discharged. His petition was dismissed on Cornhusker Square’s general demurrer and he appealed. The Supreme Court of Nebraska held that a cause of action exists for an employee who is discharged for exercising a statutory right.

Ambroz argues that he was discharged for refusing to participate in an activity which is protected under [the Nebraska Licensing of Truth and Deception Examiner’s Act]. The relevant portion of the statute provides: “No employer or prospective employer may require as a condition of employment or as a condition for continued employment that a person submit to a truth and deception examination unless such employment involves public law enforcement.” The court determined the statute was a pronouncement of public policy on the issue of wrongful discharge.

The court recognized public policy exceptions to at-will employment, however it sought to limit this holding by limiting abusive discharge claims of employees at will to manageable clear standards. This court specifically stated that “the right of an employer to terminate employees at-will should be restricted to exceptions created by statute and those instances where a very clear

mandate of public policy has been violated. This case falls within that rule.” *Id.* at 905, 416 N.W.2d 515.

*See also Oldfield v. Nebraska Mach. Co.*, 296 Neb. 469, 470, 894 N.W.2d 278 (2017); *Knapp v. Ruser*, 297 Neb. 639, 640, 901 N.W.2d 31 (2017) (“Under the public policy exception to the at-will employment doctrine, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. The public policy exception is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards. In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.”).

## 2. Exercising a Legal Right

In first recognizing a public policy exception to the terminable at-will rule in *Ambroz v. Cornhusker Square, Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987), the Nebraska Supreme Court also held someone could not be fired for exercising a legal right. In *Ambroz*, the court found the plaintiff had a statutory right not to take a lie detector examination and could not be fired for doing so.

*See also Jackson v. Morris Comm. Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003) (recognizing exception when employee filed workers’ compensation claim); *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988) (recognizing exception when employee reported apparent criminal activity); *Simonsen v. Hendricks Sodding & Landscaping, Inc.*, 5 Neb. App. 263, 558 N.W.2d 825 (1997) (recognizing exception where employee refused to drive defective truck). *But see Malone v. Am. Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001) (declining to recognize an exception based on the Nebraska Wage Payment and Collection Act). The Nebraska Supreme Court also has recognized that *demotion* in retaliation for filing a workers’ compensation claim is sufficient adverse employment action to support a violation of public policy claim. *See Trospen v. Bag ‘N Save*, 273 Neb. 855, 734 N.W. 2d 704 (2007).

## 3. Refusing to Violate the Law

Nebraska recognizes that where an employee is discharged because they refused to commit an act or acts in violation of Nebraska’s criminal laws such employee has been discharged for a motive that contravenes public policy and, therefore, can maintain an action for wrongful discharge despite at-will status. *Simonsen v. Hendricks Sodding & Landscaping Inc.*, 5 Neb. App. 263, 269, 558 N.W.2d 825, 829 (1997).

## 4. Exposing Illegal Activity (Whistleblowers)

The State of Nebraska provides a narrow “Whistleblower” exception to at-will employment by statute through sections 81-2701 to 81-2711 of the Nebraska Revised Statutes, entitled the “State Government Effectiveness Act.” The Act *only* applies to public officials and employees of the State of Nebraska, and it prohibits retaliatory/personnel action by a state employer for an employee’s reporting of allegations of wrongdoing. NEB. REV. STAT. § 81-2705. “Personnel

action” is defined in § 81-2703 as “dismissing, demoting, transferring, reassigning, suspending, reprimanding, admonishing, reducing in rank, or reclassifying an employee, withholding work from an employee of an agency, requiring an employee to submit to a fitness-for-duty examination or take disability retirement, any other involuntary action taken against an employee, or any threat made against an employee.”

The Nebraska Revised Statutes state an additional exception in the Nebraska Fair Employment Practice Act at NEB. REV. STAT. § 48-1114. The Act makes it an unlawful employment practice for an employer to discriminate against an employee or applicant, or an employment agency to discriminate against any person, or a labor organization to discriminate against a member because an individual has: (1) opposed any practice made an unlawful employment practice by the Nebraska Fair Employment Practice Act; (2) made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the act; or (3) opposed any practice or refused to carry out any action unlawful under federal law or the laws of Nebraska.

Nebraska further recognizes a narrow common law exception to at-will employment where an employee acts in good faith and upon reasonable cause in reporting his employer’s suspected violation of the criminal code. *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 92, 421 N.W.2d 755, 759 (1988). In this case, the Nebraska Supreme Court recognized that enforcement of the criminal code is a basic public policy and that enactment of a criminal statute is a declaration of public policy against the criminalized act.

### **III. CONSTRUCTIVE DISCHARGE**

In *Sanders v. May Broadcasting Co.*, 214 Neb. 755, 336 N.W.2d 92 (1983), Sanders accepted a position as sports director and sports announcer for KMTV on June 2, 1980. The contract was for 24 months and included a clause permitting either party to terminate the agreement by paying an amount equal to six months’ salary to the other party.

On April 15, 1981, Keith Nichols, the news director and Sanders’ immediate supervisor, issued a memorandum to Sanders for the following month. He was told that if all tasks were not completed, he would be terminated. Sanders stated that he considered this memorandum to be a constructive discharge from the 1980 contract and an offer of a new, more burdensome employment contract without an increase in compensation. KMTV responded that it viewed Sanders’ reply as a resignation.

Sanders filed suit to recover the liquidated damages, alleging that he had been constructively discharged from his employment. The jury returned a verdict for Sanders, and KMTV appealed. The Nebraska Supreme Court affirmed the verdict on the grounds that Sanders’ employment burdens were increased without a corresponding increase in pay, and the demands were made regardless of whether they could be accomplished in the time allotted.

The federal courts have defined constructive discharge as it is used in labor and civil rights litigation. The doctrine of constructive discharge is applied when an employer deliberately renders an employee’s working conditions intolerable, thus forcing him to quit his job.

In the present case the demands made upon Sanders in the April 15 memorandum materially

changed the duties of the position. While no one item listed in the memorandum seems clearly outside the scope of his duties as a sports director, the fact that each was to be accomplished within 30 days was a substantial change from the original contract. No justification for these demands was proffered by KMTV . . . The fact that the demands were made without regard to whether it was possible to accomplish them in the time allotted warrants a conclusion that the demands were unreasonable and were designed to make working conditions intolerable so that Sanders would quit. The jury could find that Sanders was entitled to treat the memorandum as a constructive discharge and breach of the employment contract.

*Sanders*, 214 Neb. at 760-61, 336 N.W.2d at 96.

Constructive Discharge also exists in other circumstances. *See Gavin v. Rogers Technical Servs., Inc.*, 276 Neb. 437, 755 N.W.2d 47 (2008) (Constructive discharge under Title VII occurs when an employer deliberately renders the employee's working conditions intolerable, thereby forcing her to quit).

#### **IV. WRITTEN AGREEMENTS**

##### **A. Standard “For Cause” Terminations**

In *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995), Walpus alleged that METCO Policy No. A0450, which outlined the company procedure for terminating district managers, was consistent with a requirement for “good cause” termination and therefore relevant. The METCO policy required the approval of certain corporate executive officers before any salaried employee (including district managers) could be terminated. Walpus contended that the procedural policy created an inference that METCO needed cause to terminate those employees.

The Nebraska Supreme Court held that Walpus’ argument was without merit. First, nothing in the record indicated that Walpus knew of the METCO policy during his employment with the company. It follows that the METCO policy did not constitute an offer definite in form which was communicated to and accepted by Walpus. Therefore, the METCO policy could not form the basis for Walpus’ alleged employment contract. Second, the termination procedure could only be relevant to the instant proceedings if Walpus alleged that METCO failed to follow its termination procedures when it decided to discharge him. The record clearly indicated that METCO complied with its termination procedure policy in arriving at the decision to terminate Walpus. Thus, the district court correctly excluded the termination procedure policy as irrelevant. *Walpus*, 248 Neb. at 151-53, 532 N.W.2d at 321-22 (citations omitted).

##### **B. Status of Arbitration Clauses**

NEB. REV. STAT. §§ 25-2601 – 22-2622 (the Uniform Arbitration Act), controls arbitration provisions. Arbitration provisions are valid between employers and employees, subject to certain conditions. Certain language mandated by the statutes must be included in an arbitration clause. The Act does not apply to tort actions and certain other contract actions including claims under Nebraska’s Fair Employment Practices Act.

## V. ORAL AGREEMENTS

In *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982), the Court, under a traditional contract waiver/modification analysis, held that written employment contracts may be waived, in whole or in part, by oral agreements, and that a written contract may be changed by a subsequent oral agreement before breach.

### A. Promissory Estoppel

In *Hebard v. American Telephone & Telegraph Co., Inc.*, 228 Neb. 15, 421 N.W.2d 10 (1988), Hebard was a telemarketing consultant for Northwestern Bell Telephone Company who alleged that he was involuntarily transferred to AT&T and then reclassified as an account executive. Although Hebard underwent the mandatory certification training, he was demoted to a communication servicing consultant, a position for which he had no training. Hebard retired under protest and sued the corporation.

The Nebraska Supreme Court held that an oral contract of employment sufficient to alter an at-will relationship may exist between two parties in certain circumstances.

This court has several times held an employee's "at-will" status can be modified by contractual terms and that may be created by employee handbooks and oral representations. Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee.

*Hebard*, 228 Neb. at 17, 421 N.W.2d at 12 (citations omitted). The Court held that it was a question of fact for the jury whether AT&T, in making certain representations, indicated a promise that might constitute terms of an employment contract.

*Goff-Hamel v. Obstetricians & Gynecologists, P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999), is also instructive on this issue. On July 27, 1993, Goff-Hamel was offered a job by Obstetricians, and she accepted the job at that time. She then gave notice to her current employers that she would be resigning to begin work for Obstetricians on October 4, 1993. One day before she was scheduled to begin work at Obstetricians, Goff-Hamel was told not to report to work because the spouse of one of the doctors opposed her hiring. The trial court concluded that Goff-Hamel's employment could be terminated at any time, even before it commenced, because her employment was at-will.

On appeal, the Nebraska Supreme Court held that promissory estoppel may be asserted with regard to the offer of at-will employment. *Goff-Hamel*, 256 Neb. 19, 588 N.W.2d 798. The elements of a promissory estoppel claim are:

- i. Whether the employer made a definite promise of employment to the potential employee which the employer reasonably expected or should have expected would induce the potential employee to terminate her present employment;
  - ii. Whether the potential employee was, in fact, induced to act by such offer;
  - iii. Whether the action taken by the potential employee was detrimental to him or her;
- and

- iv. Whether justice requires that the employer reimburse the potential employee for damages incurred as a result of the promise of employment.

*Goff-Hamel*, 256 Neb. at 29, 588 N.W.2d at 804-05.

The Court granted summary judgment in favor of Goff-Hamel, finding that she was offered employment which induced her to act to her detriment by quitting her job of eleven years. The Court further held that the amount of damages was a question of fact to be determined by the circumstances of each case as justice requires. *Goff-Hamel*, 256 Neb. at 30, 588 N.W.2d at 805.

In *Clark v. Kellogg Co.*, 205 F.3d 1079 (8th Cir. 2000), the Court distinguished the rule established in *Goff-Hamel* and drew the line between a definite and an indefinite promise of employment. The plaintiffs, a group of seasonal employees working under an oral contract for Kellogg during the summer months, filed an action, inter alia, in promissory estoppel to enforce an alleged promise of employment. They alleged that they were repeatedly told by Kellogg's management that they would be hired for full time employment when "1) openings for permanent positions became available, 2) they 'kept their noses clean,' and 3) they continued to work for Kellogg every summer season until permanent jobs became available." *Clark*, 205 F.3d at 1081. The plaintiffs claimed that they relied upon the promise and turned down full time employment with other employers because of it.

The Court concluded that the rule in *Goff-Hamel* requires any plaintiff seeking promissory estoppel to prove that a *definite* promise of employment had been made. It was determined that the promise made in *Goff-Hamel* was definite because the parties had established a starting date, wages, vacation days and the plaintiff had been given uniforms and a schedule for her first week of work. *Clark*, 205 F.3d at 1083. The Court in *Clark* stated that "[i]n contrast to *Goff-Hamel*, this case involves parties who never agreed to any specific starting date, salary, benefits package, work schedule, or exactly how employees should go about keeping their noses clean for an indefinite period of time while they waited for permanent positions to materialize." *Clark*, 205 F.3d at 1083. The Court held that the plaintiffs failed to prove that a definite promise of employment had been made and affirmed the lower court's order granting summary judgment in favor of Kellogg. *Clark*, 205 F.3d at 1084.

Most recently, the Nebraska Supreme Court addressed the issue of promissory estoppel in *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809 (2006). In *Blinn*, the employee was employed at will as executive director of medical staff development by Beatrice Community Hospital. In June 2002, he received a job offer from a Kansas hospital that would have given him more responsibility and income potential than his job at Beatrice. Blinn was 67 years old at the time he received the offer and understood the offer to be a position he could keep until retirement. Blinn went to the administrator of Beatrice with a drafted resignation letter he stated he intended to submit unless he received full assurances about the permanency of his current position. According to Blinn, both the administrator and the chairman of Beatrice's board of directors assured him that they wanted him to stay and understood that Blinn was seeking assurances that, should he choose to stay, he would be staying until retirement. Blinn turned down the Kansas job and stayed on at Beatrice. However, Blinn's employment with Beatrice was terminated in February 2003. Blinn sued Beatrice for breach of contract and promissory estoppel.

The Nebraska Supreme Court did not state that assurances that an employee would be retained “until retirement” would constitute an agreement for modification of at-will employment status, but rather, stated that a company may be estopped from claiming an individual is an at-will employee if it was foreseeable that the employee would reasonably rely on such assertions. The Court determined that promissory estoppel may preclude an employer from arguing that an employee’s at-will employee status had not been modified where one already employed on an at-will basis has something more than a bare subjective belief that the company has made a promise of continued employment, and where the employee has acted on that belief. The Court held that although the oral assurances made by Beatrice were not specific enough to constitute an oral contract of continued employment, there did not need to be the same determination of specificity where there was a claim applying the principles of promissory estoppel.

Other cases involving promissory estoppel include: *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402, 407 (1994)(finding applicant failed to establish cause of action for promissory estoppel because she was not terminated until approximately four months after her hire for at-will employment and employer, therefore, fulfilled its promise to employ her); and *Conradi v. Eggers Consulting Co.*, 2004 W.L. 51208 (Neb. App. 2004)(finding cause of action where prospective employee quit her job, moved, bought a vehicle and incurred other expenses based upon promises made by prospective employer).

#### B. Fraud

There is no Nebraska law regarding fraud with oral agreements.

#### C. Statutes of Fraud

An oral employment agreement may be enforceable, subject to the proscriptions of Nebraska’s Statute of Frauds. NEB. REV. STAT. § 36-202. In *Ridenour v. Kuker*, 185 Neb. 321, 175 N.W.2d 287 (1970), the Court held that generally the statute of frauds does not apply where the contract has been performed by one party, and where the oral promise meets the requirements for a valid contract.

In *Blinn* (discussed above), the Nebraska Court of Appeals stated that, while an oral agreement to employ someone until a certain age would be invalid under the Statute of Frauds, an agreement to employ someone until that age or until he retired could be performed within one year, and thus, fall outside the Statute of Frauds requirement.

## VI. DEFAMATION

#### A. General Rule

Defamation is defined in Nebraska as: Any language, the nature and obvious meaning of which is to impute to a person the commission of a crime, or to subject the person to public ridicule, ignominy, or disgrace. *Helmstadter v. N. Am. Biological*, 5 Neb. App. 440, 559 N.W.2d 794 (1997). The elements of a defamation claim are:

- i. a false and defamatory statement concerning the plaintiff,
- ii. an unprivileged publication to a third party,
- iii. fault amounting to at least negligence on the part of the publisher; and
- iv. either actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication.

*Norris v. Hathaway*, 5 Neb. App. 544, 547-48, 561 N.W.2d 583, 585 (1997). *See also Nolan v. Campbell*, 13 Neb. App. 212, 690 N.W.2d 638 (2004); *Steinhausen v. HomeServices of Nebraska, Inc.*, 289 Neb. 927, 857 N.W.2d 816 (2015);

In defamation actions, words may be actionable per se, that is, in themselves, or actionable per quod, that is, only upon allegation and proof of the defamatory meaning of the words and the special damages resulting there from.

Words are actionable per se only if they are unambiguous in their meaning and without further proof, they falsely impute the commission of a crime involving moral turpitude, falsely impute an infectious disease, falsely impute unfitness to perform the duties of an office or employment, or prejudice one in his or her profession or trade or tend to disinherit one.

## 1. Libel

Nebraska recognizes two forces which shape the libel landscape. The first force is the status of the plaintiff: “whether the plaintiff is a public official or figure, or is instead a private figure.” *Hoch v. Prokop*, 244 Neb 443, 507 N.W.2d 626 (1993); *Moats v. Republican Party of Nebraska*, 281 Neb. 411, 796 N.W.2d 854 (2011) *cert. denied*, 132 S.Ct. 251, 181 L.Ed.2d 145 (U.S. 2011). The second force is the nature of the speech: “whether the speech at issue is of public concern.” *Hoch, Moats*.

When allegedly libelous communication involves a public figure and the speech is a matter of public concern, then the plaintiff must surmount higher barrier than those present in simple common-law libel because of the First Amendment. *Hoch*.

In public-libel cases, actual malice is an element of the plaintiff’s prima facie case, thus, the petition must contain facts which would support the conclusion that the defendant acted with knowledge of falsity or reckless disregard for the truth. *Hoch*.

Further, the plaintiff in a public-libel action must establish that the alleged statement is false by clear and convincing evidence and establish special damages. *Moats*.

## 2. Slander

In deciding whether a statement is slander per se, it is appropriate to consider the circumstances under which the statement was made, including the character of the audience, its relationship to the person allegedly defamed, and the effect the publication may have had upon the audience.

*Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991); *Moats*.

If a statement is slander per se, no proof of actual harm to reputation or any other damage is required to recover nominal or substantial damages.

Words which are ambiguous in their meaning and require further proof of extraneous facts are actionable per quod.

When words are slanderous per quod, a plaintiff must specifically allege the defamatory nature of the statements. *K Corp. v. Stewart*, 247 Neb. 290, 526 N.W.2d 429 (1995); *Moats*.

If words are slanderous per quod, they do not constitute a basis for recovery of damages in the absence of a specific allegation of special damages. *Hruby v. Kalina*, 228 Neb. 713, 424 N.W.2d 130 (1988).

## B. References

There are no references to defamation in Nebraska, other than the case law outlined above.

## C. Privileges

Nebraska case law recognizes two privileges in defamation actions: qualified privilege and absolute privilege. Nebraska statutory law recognizes a third privilege arising out of communications to the Department of Labor regarding the Nebraska Employment Security Law. All must be pled as affirmative defenses.

### 1. Qualified Privilege

Statements are qualifiedly privileged in Nebraska if “made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty.” *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987); *Young v. First United Bank of Bellevue*, 246 Neb. 435, 516 N.W.2d 256 (1994); *Potter v. Board of Regents of the University of Nebraska*, 287 Neb. 732, 844 N.W.2d 741 (2014).

Even if a qualified privilege exists, a plaintiff may still recover damages if he or she can prove that the publication was made with actual malice. NEB. REV. STAT. § 25-840.

- (1) Malice is defined as “hate, spite, or ill will.”
- (2) Malice may not be presumed from the mere act or publication. NEB. REV. STAT. § 25-840.
- (3) Where a qualified privilege exists, it is necessary to allege malice. *Helmstadter*, 5

Neb. App. 440, 559 N.W.2d 794 (1997).

## 2. Absolute Privilege

Nebraska has recognized that an absolute privilege applies to statements made incident to and in the course of judicial and quasi-judicial proceedings, so long as the defamatory matter has some relation to the proceeding. *Drew v. Davidson*, 12 Neb. App. 69, 667 N.W.2d 560 (2003); *Prokop v. Cannon*, 7 Neb. App. 334, 583 N.W.2d 51 (1998); *Beckenhauer v. Predoehl*, 215 Neb. 347, 338 N.W.2d 618 (1983); *McKinney v. Okoye*, 282 Neb. 880, 806 N.W.2d 571 (2011). Nebraska has also extended this privilege to include releases made to the news media by the defendants and co-counsel as part of a judicial proceeding in which the attorneys participated as counsel. *Prokop, supra*.

## 3. Employment Security Law Privilege

Nebraska also recognizes as privileged communications from an employer or his or her workers to each other or to the Department of Labor regarding the Employment Security Law.

All letters, reports, communications, or any other matters, either oral or written, from an employer or his or her workers to each other or to the commissioner or any of his or her agents, representatives, or employees which shall have been written or made in connection with the requirements and administration of the Employment Security Law, or the rules and regulations thereunder, shall be absolutely privileged and shall not be made the subject matter or basis for any suit for slander or libel in any court of this state, unless the same be false in fact and malicious in intent.

NEB. REV. STAT. § 48-612 (Reissue 2017).

The Nebraska Supreme Court has held that such information provided by the employer to the Department of Labor is privileged and cannot be the basis for a libel suit unless the information is both false and malicious. *Molt v. Lindsay Mfg. Co.*, 248 Neb. 81, 89, 532 N.W.2d 11, 17 (1995).

### D. Other Defenses

#### 1. Truth

Truth of the defamatory statement is a defense which must be affirmatively pled. *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, Inc.*, 296 Neb. 818, 863, 896 N.W.2d 156, 188 (2017).

- i. As with the qualified privilege, even if the defendant can prove that the statement is true, the plaintiff may still recover if it is shown that the statement was made with actual malice. NEB. REV. STAT. § 25-840.
- ii. It is the defendant's burden to prove that the statement is true. *Helmstadter*, 5 Neb. App. 440, 559 N.W.2d 794 (1997).

- iii. If the defendant shows that the statement is true, the burden shifts to the plaintiff to prove that the publication was made with actual malice. *Turner*, 226 Neb. 275, 411 N.W.2d 298 (1987).

## 2. No Publication

Since unprivileged publication to a third party is a required element of a defamation claim, a defendant can show no defamation exists if he is able to show no publication took place. See *Nolan v. Campbell*, 13 Neb. App. 212, 218, 690 N.W.2d 638, 646-647 (2004) (claim of defamation requires unprivileged publication to a third party); *Moats*, 281 Neb. 411, 796 N.W.2d 854 (2011). Furthermore, if the words are communicated only to the person defamed, no publication has taken place. *Molt v. Lindsay Manufacturing Company*, 248 Neb. 81, 91, 532 N.W.2d 11, 18 (1995).

## 3. Self-Publication

There is no Nebraska law regarding the defense of self-publication in Nebraska.

## 4. Invited Libel

There is no Nebraska law regarding the defense of invited libel in Nebraska.

## 5. Opinion

Nebraska has adopted the position of the Restatement (Second) of Torts § 566 with regard to the defense of opinion:

A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

*Moats v. Republican Party of Nebraska*, 281 Neb. 411, 425, 796 N.W.2d 584, 596 (2011) cert. denied, 132 S. Ct. 251, 181 L. Ed. 2d 145 (U.S. 2011).

Absence of malice is also a defense which must be proven by the defendant.

## E. Job References and Blacklisting Statutes

Employers in Nebraska are presumed to be acting in good faith and immune from liability for furnishing employment information about an employee or former employee to a prospective employer. Employers must obtain specified written consent from the employee or former employee before providing information on his or her employment history. The types of information about employees and former employees that employers can share with prospective employers include:

- Date and duration of employment;
- Pay rate and wage history;
- Job description and duties;

- The most recent written performance evaluation provided to the employee;
- Attendance information;
- Drug and alcohol test results received within 1 year before the reference request;
- Threats of violence, harassing acts, or threatening behavior related to the workplace or directed at another employee;
- Whether termination was voluntary or involuntary and the reasons for termination; and
- Whether the employee is eligible for rehire.

The presumption of good faith can be rebutted upon a showing by preponderance of the evidence that the information provided was false, and the employer providing the information knew it was false or acted with reckless disregard for the truth. *See* NEB. REV. STAT. § 48-201 (2012).

There are no Nebraska blacklisting statutes.

#### F. Non-Disparagement Clauses

There is no Nebraska law regarding non-disparagement clauses.

### VII. EMOTIONAL DISTRESS CLAIMS

Nebraska recognizes three forms of emotional distress claims: (1) intentional infliction of emotional distress; (2) negligent infliction of emotional distress; and (3) bystander claims for emotional distress. In the employment context, the Nebraska Supreme Court has yet to take an emotional distress claim head on. However, there are at least two cases in which the Nebraska Supreme Court has recognized the possibility of emotional distress claims in the employment context.

#### A. Intentional Infliction of Emotional Distress

In order to maintain an action for intentional infliction of emotional distress, the Nebraska Supreme Court has delineated a three-part test that the plaintiff must meet. The plaintiff must show:

- i. that there has been intentional or reckless conduct;
- ii. that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community; and
- iii. that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.

*Foreman v. AS Mid-America, Inc.*, 255 Neb. 323, 346, 586 N.W.2d 290, 305 (1998); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 718, 508 N.W.2d 907, 910 (1993) (quoting *Nichols v. Busse*, 243 Neb. 811, 817, 503 N.W.2d 173, 179 (1993)); *Gall v. Great W. Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985); *Kant v. Altayar*, 270 Neb. 501, 704 N.W.2d 537 (2005); *Ashokkumar v. Elbaum*, 932 F. Supp. 2d 996 (D. Neb. 2013).

The burden to prove severe emotional distress is very high. At a minimum, it would appear that

the emotional distress must manifest itself with physical symptoms and be medically diagnosable and significant. See *Parish v. Omaha Pub. Power Dist.*, 242 Neb. 731, 496 N.W.2d 914 (1993); *Sell v. Mary Lanning Mem. Hosp. Ass'n*, 243 Neb. 266, 498 N.W.2d 522 (1993); *Andreasen v. Gomes*, 244 Neb. 73, 504 N.W.2d 539 (1993) disapproved of on other grounds; *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003). However, medically diagnosable physical symptoms may not be enough, in and of themselves, to prove “extraordinary” emotional distress. For instance, in *Parrish*, the Nebraska Supreme Court denied an emotional distress claim brought by the daughter of a construction worker who died when he was electrocuted on the job. 242 Neb. at 731, 496 N.W.2d at 914. In *Parrish*, the evidence showed that news of her father’s death caused the plaintiff to cry so much “she constantly had headaches and constantly was to the point of not breathing.” *Parrish*, 242 Neb. at 733, 496 N.W.2d at 915. However, the Court noted that because she did not require any medical or psychological treatment as a result of her father’s death, she could not prove that news of the death had an “extraordinary effect.” *Parrish*, 242 Neb. at 734, 496 N.W.2d at 915.

Similarly, in *Sell*, the Nebraska Supreme Court denied an emotional distress claim brought by a mother who was erroneously told by hospital personnel that her son had died as the result of a motorcycle accident. 243 Neb. at 266, 498 N.W.2d at 522. The evidence showed that after being told her son had died, the plaintiff was so distraught that she could not eat or sleep, and required medication to rest. *Sell*, 243 Neb. at 271-72, 498 N.W.2d at 525. However, the Court held that the plaintiff failed to meet her burden of proof because she could not prove that her grief was medically diagnosable or medically significant. *Sell*, 243 Neb. at 271-72, 498 N.W.2d at 525.

Finally, in *Andreasen*, the Nebraska Supreme Court denied an emotional distress claim brought by the parents of a stillborn child. 244 Neb. at 73, 504 N.W.2d at 539. The evidence in *Andreasen* showed that the plaintiff’s emotional distress “was manifested by headaches, nightmares, loss of sleep, and nausea, which an expert characterized as constituting ‘severe emotional distress.’” 244 Neb. at 76-77, 504 N.W.2d at 542. However, the Court held that the plaintiffs had failed their burden of proving that the distress claimed by the plaintiffs was not any different from the distress claimed in *Parrish*, and therefore was not extraordinary. *Andreasen*, 244 Neb. at 76-77, 504 N.W.2d at 542.

Some plaintiffs have attempted to avoid that high burden surrounding emotional distress claims by seeking emotional damages in other tort claims. For instance, in *Sabrina W. v. Willman*, 4 Neb. App. 149, 540 N.W.2d 364 (1995), the plaintiff sought damages for emotional distress under an invasion of privacy theory. In *Sabrina*, the plaintiff was a tanning salon customer who was photographed by the owner of the salon while she was in various stages of undress. After a verdict in favor of the plaintiff, the defendant appealed, arguing that the plaintiff failed to prove severe emotional distress. On appeal, the Nebraska Court of Appeals stated that while severe emotional distress is necessary in claims for intentional or negligent infliction of emotional distress, it was not a necessary element under Nebraska’s privacy statutes.

#### B. Negligent Infliction of Emotional Distress

In order to maintain a case for negligent infliction of emotional distress, the plaintiff must show: (1) that the defendant was negligent; (2) that the defendant’s negligence proximately caused the

plaintiff's injury; and (3) that the plaintiff suffered emotional distress so severe that no reasonable person could be expected to endure it. Evidence of concurrent physical injury is not required to prove a claim of negligent infliction of emotional distress. *Farm Bureau Ins. Co. v. Martinsen*, 265 Neb. 770, 659 N.W.2d 823 (2003); *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 351 (2003). Where there is no impact or physical injury to the Plaintiff, the Plaintiff seeking to bring an action for negligent infliction of emotional distress must show either:

(1) that he or she is a reasonably foreseeable 'bystander' victim based upon an intimate familial relationship with a seriously injured victim of the defendant's negligence; or (2) that the plaintiff was a 'direct victim' of the defendant's negligence because the plaintiff was within the zone of danger of the negligence in question.

*Catron v. Lewis*, 271 Neb. 416, 420, 712 N.W.2d 245, 249 (2006)

In *Pittman v. Western Engineering Co., Inc.*, the surviving-spouse of an employee who died in a work related accident brought a claim for bystander negligent infliction of emotional distress against employer and co-worker. 238 Neb. 913, 813 N.W.2d 487 (2012). Ultimately the court determined that the claim was barred by exclusivity provision of the Workers' Compensation Act; the surviving spouse accepted workers' compensation benefits from employer and its insurer, thereby releasing employer, and his claim arose from the employee's injury and death. *Id.* Additionally, the employer's immunity extended to the employee's co-workers, in the absence of willful conduct, who allegedly negligently maintained the semi-trailer truck involved in accident. *Id.*

## **VIII. PRIVACY RIGHTS**

### **A. Generally**

NEB. REV. STAT. § 20-201 states:

It is the intention of the Legislature to provide a right of privacy as described and limited by sections 20-201 to 20-211 and 25-840.01, and to give to any natural person a legal remedy in the event of violation of the right.

Liability based on invasion of privacy takes three forms in Nebraska:

- i. Exploitation of a person for advertising or commercial purposes;
- ii. Trespass or intrusion upon a person's solitude; and
- iii. Placing a person before the public in false light.

See NEB. REV. STAT. §§ 20-202, 20-203, and 20-204, respectively.

In an action for invasion of privacy, a plaintiff may recover general damages for harm to the plaintiff's interest in privacy which resulted from invasion; damages for mental suffering; special damages; and if none of these are proven, nominal damages. *Sabrina W. v. Willman*, 4 Neb. App.

149, 540 N.W.2d 364 (1995).

Nebraska law also has several specific statutory entitlements regarding privacy rights.

NEB. REV. STAT. § 20-202 states:

Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy. The provisions of this section shall not apply to:

- (1) The publication, printing, display, or use of the name or likeness of any person in any printed, broadcast, telecast, or other news medium or publication as part of any bona fide news report or presentation or noncommercial advertisement having a current or historical public interest and when such name or likeness is not used for commercial advertising purposes;
- (2) The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property when such person has consented to the use of his or her name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof so long as such use does not differ materially in kind, extent, or duration from that authorized by the consent as fairly construed; or
- (3) Any photograph of a person solely as a member of the public when such person is not named or otherwise identified in or in connection with the use of such photograph.

“Section 20-202 typically applies to cases in which a photograph or other likeness of a person is distributed without that person’s consent for commercial gain.” *Wilkinson v. Methodist, Richard Young Hosp.*, 259 Neb. 745, 612 N.W.2d 213 (2000).

NEB. REV. STAT. § 20-203 states: Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy.

In *Wilkinson*, the court held that § 20-203 “[e]ncompasses situations such as a reporter entering a hospital room and taking the photograph of a person suffering from a rare disease, “window peeking” or wiretapping by a private detective, obtaining access to a person’s bank records pursuant to a forged order, or the continuance of frequent telephone solicitations.” 259 Neb. 745, 612 N.W.2d 213.

*See also Ritchie v. Walker Mfg. Co.*, 963 F.2d 1119 (8th Cir. 1992) (holding that NEB. REV. STAT. § 20-203 is applicable to employee drug-testing in the private sector; however, when an employer conforms with the statutorily-imposed drug-testing procedures, the intrusion does not violate Nebraska’s privacy laws); *Polinski v. Sky Harbor Air Service, Inc.*, 263 Neb. 406, 640 N.W.2d 391 (2002) (holding that taking a specimen for drug testing purposes in accordance with NEB. REV.

STAT. § 48-1901 et seq. is not contrary to the provisions of NEB. REV. STAT. § 20-203).

NEB. REV. STAT. § 20-204 states:

Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy, if:

- (1) The false light in which the other was placed would be highly offensive to a reasonable person; and
- (2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

“In order to recover under § 20-204, the matter must be communicated to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.” *Wilkinson*, 259 Neb. 745, 612 N.W.2d 213. *See generally, Wadman v. State*, 1 Neb. App. 839, 510 N.W.2d 426 (1993); *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989).

NEB. REV. STAT. § 20-205 states:

Any publication or intrusion otherwise actionable under section 20-202, 20-203, or 20-204 shall be justified and not actionable under sections 20-201 to 20-211 and 25-840.01 if the subject of such publication or intrusion expressly or by implication consents to the publicity or intrusion so long as such publication or intrusion does not differ materially in kind, extent, or duration from that implicitly or expressly authorized by the consent as fairly construed. If such person is a minor, such consent may be given by a parent or guardian. If the subject of the alleged invasion of privacy is deceased, such consent may be given by the surviving spouse, if any, or by the personal representative.

*See Miller v. Am. Sports Co., Inc.*, 237 Neb. 676, 467 N.W.2d 653 (1991).

NEB. REV. STAT. § 20-206 states:

In addition to any defenses and privileges created in sections 20-201 to 20-211 and 25-840.01, the statutory right of privacy created in sections 20-201 to 20-211 and 25-840.01 shall be subject to the following defenses and privileges:

- (1) All applicable federal and Nebraska statutory and constitutional defenses;
- (2) As to communications alleged to constitute an invasion of privacy, the defense that the communication was made under circumstances that would give rise to an applicable qualified or absolute privilege according to the law or defamation; and
- (3) All applicable, qualified, and absolute privileges and defenses in the common law of privacy in this state and other states.

NEB. REV. STAT. § 20-207 states:

The action for invasion of privacy created by sections 20-201 to 20-211 and 25-840.01 shall be personal to the subject of the invasion and shall in no case be assignable.

NEB. REV. STAT. § 20-209 states:

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or other tort founded upon any single publication, exhibition, or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience of any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

NEB. REV. STAT. § 20-210 states:

A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication, exhibition, or utterance as described in section 20-209 shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication, exhibition, or utterance.

NEB. REV. STAT. § 20-211 states:

An action for invasion of privacy must be brought within one year of the date the cause of action arose.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

There is no Nebraska law regarding eligibility verification & reporting procedures. *See Ritchie v. Walker Mfg. Co.*, 963 F.2d 1119 (8th Cir. 1992) (holding that Nebraska's statutory right of privacy extends to place of employment). However, to recover for intrusion of privacy under Neb. Rev. Stat. §20-203 the intrusion must be "highly offensive to a reasonable person." *Id.* at 1123.

2. Background Checks

Nebraska employers are permitted to conduct background checks. Nebraska employers are required to conduct background checks for prospective employees seeking employment in some industries, including law enforcement, assisted living facilities, adult day services, child care facilities, security or private detective agencies, social services being provided to family, children and youth, real estate brokers and agents, and lottery operators or workers. *See* NEB.REV.STAT. §§ 71-5908; 81-885.17; 81-1410; 9-1,104; and 23-1701.01. *See also* Neb. Admin. Code §§ 175-4-006; 391-3-001 to 003; 474-6-002 and 435-5-002.

The following cases discuss an employer's use of a background check. *See Hammerling v. Happy Cab Co.*, 241 Neb. 919, 530 N.W.2d 916 (1995); *Potter v. Board of Regents of the University of Nebraska*, 287 Neb. 732, 844 N.W.2d 741 (2014).

## C. Other Specific Issues

### 1. Workplace Searches

There is no Nebraska law regarding workplace searches

### 2. Electronic Monitoring

There is no Nebraska law regarding electronic monitoring.

### 3. Social Media

Nebraska employers are prohibited pursuant to the Workplace Privacy Act from requiring or asking an employee or applicant to: (1) disclose any user name or password or any other related account information in order to gain access to the employee's or applicant's personal internet account by way of an electronic communication device; (2) log into a personal internet account by way of an electronic communication device in the presence of the employer in a way that enables the employer to view the contents of the personal internet account or provides the employer access to the account; (3) add anyone, including the employer, to the list of contacts on the personal account; or (4) change the settings on the personal account affecting the ability of others to view the content of the account.

No adverse action can be taken against an employee or applicant based upon refusal to provide or disclose information or take actions specified in the statute or because a complaint is filed. An employer cannot require an employee or applicant to waive any protection under the Act.

If an employer inadvertently learns the user name, password, or other means of access to an employee's or applicant's personal Internet account through the use of otherwise lawful technology that monitors the employer's computer network or employer-provided electronic communication devices for service quality or security purposes, the employer is not liable for obtaining the information, but the employer shall not use the information to access the employee's or applicant's personal Internet account or share the information with anyone. The employer shall delete such information as soon as practicable.

NEB. REV. STAT. §§ 48-3501 – 3511 (2016).

### 4. Taping of Employees

There is no Nebraska law regarding taping of employees.

### 5. Release of Personal Information on Employees

Nebraska employers are prohibited from: publicly posting, displaying or otherwise making available to the general public or the employee's co-workers more than the last four digits of an employee's social security number. NEB. REV. STAT. § 48-237.

## 6. Medical Information

With respect to genetic testing restrictions, employers are prohibiting from: refusing to hire, recruit or promote an employee or applicant because of genetic information that is unrelated to the duties of a particular job or position; discriminating against an employee or applicant because of genetic information that is unrelated to the ability to perform the duties of a position; or require an employee or applicant to submit to genetic testing or to provide genetic information as a condition of employment or promotion. NEB. REV. STAT. § 48-236.

With respect to HIV status restrictions, employers are prohibited for refusing to hire, discharging or otherwise discriminating against an individual on the basis that the employee is or suspected of suffering from HIV. NEB. REV. STAT. § 20-168.

## 7. Restrictions on Requesting Salary History

There is no Nebraska law regarding restrictions on requesting the salary history of employees or applicants.

# IX. WORKPLACE SAFETY

## A. Negligent Hiring

An employer is subject to liability for physical harm to third persons caused by failure to exercise reasonable care in selecting the employee, even if such employee is an independent contractor. *Kime v. Hobbs*, 252 Neb. 407, 418-419, 562 N.W.2d 705, 713 (1997); *Greening v. School District of Millard*, 223 Neb. 729, 737, 393 N.W.2d 51, 57 (1986). In addition, the plaintiff must also show the conduct of the incompetent employee was a proximate cause of injury to another. *Greening*, 223 Neb. 729, 737, 393 N.W.2d 51, 58 (1986).

## B. Negligent Supervision/Retention

Person conducting activity through servant or other agent is subject to liability for harm resulting from such conduct if employer is negligent or reckless in employment of improper person or instrumentality for work involving risk of harm to another. *Greening v. School District of Millard*, 223 Neb. 729, 737, 393 N.W.2d 51, 57 (1986). Underlying requirement in actions for negligent supervision and negligent training is that employee is individually liable for tort or guilty of claimed wrong against third person, who then seeks recovery against employer. *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993).

## C. Interplay with Workers' Compensation Bar

There is no Nebraska law regarding interplay with the Workers' Compensation Bar.

#### D. Firearms in the Workplace

If an employer wants to prohibit a concealed carry permit holder from carrying a concealed handgun into a place of business and the place is open to the public, the employer must post a conspicuous notice that carrying a concealed handgun is prohibited in or on the place or premises, or directly request through an authorized representative that the permit holder remove the concealed handgun.

A permit holder carrying a concealed handgun in a vehicle or on his/her person while riding in a vehicle or onto any public parking area (other than parking areas where concealed handguns are prohibited under federal law) does not violate Nebraska law if that person locks the handgun inside the glove box, trunk, or other compartment of the vehicle prior to exiting the vehicle.

An employer may prohibit employees or other persons who are permit holders from carrying concealed handguns in vehicles owned by the employer.

NEB. REV. STAT. § 69-2441.

#### E. Use of Mobile Devices

All motor vehicle operators within the state of Nebraska are prohibited from using a handheld wireless communication device to read, manually type, or send written communication while operating a vehicle in motion, except in the case of an emergency or if the operator is a law enforcement officer performing official duties. NEB. REV. STAT. § 60-6, 179.01.

Operators of commercial motor vehicles, school buses, or a vehicle designed to carry between nine and fifteen passengers are prohibited from using a handheld mobile telephone or texting while driving such vehicles, unless doing so is necessary to communicate with law enforcement officials or other emergency services. Operators of such vehicles may utilize a GPS or navigation system or use hands-free technology provided no more than a single button is necessary to dial or answer a call. NEB. REV. STAT. § 60-6, 179.02.

### X. TORT LIABILITY

#### A. Respondeat Superior Liability

Under the doctrine of respondeat superior, an employer may be held vicariously liable for negligent acts of an employee committed while the employee was acting within the scope of the employer's business. *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996); *Cruz as Next Friend of Cruz v. Lopez*, 301 Neb. 531, 919 N.W.2d 479 (2018). For doctrine of "respondeat superior" to apply, an employee must be liable for a tort committed in the scope of his/her employment. *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993).

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

In *Huff v. Swartz*, 258 Neb. 820, 825, 606 N.W.2d 461 (2000), the Nebraska Supreme Court

identified the elements of tortious interference with a business relationship or expectation as:

- (1) The existence of a valid business relationship or expectancy,
- (2) Knowledge by the interferer of the relationship or expectancy,
- (3) An unjustified intentional act of interference on the part of the interferer,
- (4) Proof that the interference caused the harm sustained, and
- (5) Damage to the party whose relationship or expectancy was disrupted.

To be actionable as tortious interference with a business relationship, the interference must necessarily impact a valid business relationship or expectancy. *Id.* At-will employment status, in and of itself, does not preclude a claim for tortious interference with the employment relationship. *Id.* See also *The Lamar Co., LLC v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009).

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

### **A. General Rule**

The general rule in Nebraska is that covenants not to compete between employees are not *per se* unenforceable. However, as partial restraints on trade, such restrictive covenants are generally very closely scrutinized by the courts. There are three questions which must be asked in determining whether such an agreement is enforceable:

- i. Is the restriction reasonable in the sense that it is not injurious to the public?
- ii. Is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest?
- iii. Is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee?

*Aon Consulting, Inc. v. Midlands Financial Benefits, Inc.*, 275 Neb. 642, 653, 748 N.W.2d 626,638 (2008); *H & R Block Tax Services, Inc. v. Circle A Enterprises Inc.*, 269 Neb. 411, 417, 693 N.W.2d 548, 553-554 (2005); *Prof. Bus. Servs. v. Rosno (Rosno II)*, 268 Neb. 99, 680 N.W.2d 176 (2004); *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001).

See also, *Moore v. Eggers Consulting Co., Inc.*, 252 Neb. 396, 562 N.W.2d 534 (1997); *Am. Sec. Servs., Inc. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986).

An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee. *Prof'l Bus. Servs. Co. v. Rosno (Rosno II)*, 268 Neb. 99, 680 N.W.2d 176 (2004); *Moore*.

In *Aon Consulting*, 275 Neb. at 653, 748 N.W.2d at 638, the Court distinguished between ordinary and unfair competition by analyzing the employee's opportunity to appropriate goodwill and customers. The Court held that the non-solicitation agreement focused on the employer's legitimate purpose of protecting its goodwill and was not unduly broad as to prevent regular competition or cause public injury.

Although the Court has recognized the legitimate business interests of the employer against disclosure of trade secrets and “unfair” competition by an employee, *Prof. Bus. Servs., Co. v. Rosno (Rosno I)*, 256 Neb. 217, 589 N.W.2d 826 (1999); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986), the second and third elements of this test have proven very difficult for employers to satisfy.

The length of time the restraint is in effect:

- i. Must be “no greater than is reasonably necessary to protect the employer in some legitimate interest.” *Sec. Acceptance Corp. v. Brown*, 171 Neb. 406, 106 N.W.2d 456 (1960).
- ii. Any restriction longer than one year will be closely scrutinized and may be unenforceable in the absence of a compelling justification. *See, e.g., Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992).

Scope of restraint and geographic limitation:

- i. The type of competition from which the employee is limited must be restricted. *Rosno I*, 256 Neb. 217, 589 N.W.2d 826. For instance, an employer generally may not prohibit an employee’s contact with “all” of the employer’s customers, even those whom he had never met. *Moore v. Eggers Consulting Co., Inc.*, 252 Neb. 396, 562 N.W.2d 534 (1997) (a covenant not to compete in an employment contract may be valid only if it restricts the former employee from working for or soliciting the former employer’s clients or accounts *with whom the former employee actually did business and had personal contact*) (emphasis added). *See also C & L Industries, Inc. v. Kiviranta*, 13 Neb. App. 604, 698 N.W.2d 240 (2005).
- ii. Any limitation purporting to have more than a regional scope will be closely scrutinized. *See, e.g., Moore*, 252 Neb. 396, 562 N.W.2d 534.

Restrictions on the reasonable post-employment activities of the employee:

- i. To be enforceable, a restraint cannot be “unduly harsh and oppressive” on the employee. *Sec. Acceptance Corp. v. Brown*, 171 Neb. 406, 106 N.W.2d 456 (1960); *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991); *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001).
- ii. The courts apply a “balancing test” to determine whether this element was satisfied, involving several considerations. *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982); *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991).
  - (1) Degree of inequality in bargaining power;
  - (2) Risk of the employer losing customers;
  - (3) Extent of participation by the employee in securing and remaining customers;
  - (4) The employee’s good faith

- (5) Independent sources of knowledge of trade secret or customers;
- (6) Nature of the position held by the employee, as well as his education and training;
- (7) Necessity of the employee changing his residence or vocation as a result of the covenant;
- (8) The employee's current conditions of employment.

B. Blue Penciling

Nebraska has absolutely refused to follow a “blue pencil” or any other form of severability. Courts in Nebraska will not rewrite an unenforceable restrictive covenant in any way to make it enforceable. Either the Court enforces the entire agreement as written, or it invalidates the entire agreement. *Unlimited Opportunity, In. v. Waadah*, 290 Neb. 629, 861 N.W.2d 437 (2015); *H & R Block Tax Services, Inc. v. Circle A. Enterprises, Inc.*, 269 Neb. 411, 415-17; 693 N.W.2d 548, 552-53 (2005); *CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 518 N.W.2d 652 (1994); *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987).

C. Confidentiality Agreements

There is no Nebraska law regarding confidentiality agreements.

D. Trade Secrets Statute

The Nebraska Trade Secrets Act is found at NEB. REV. STAT. §§ 87-501 et seq., and became effective in 1988.

A “trade secret” under the statute is defined as information, including a drawing, formula, pattern, compilation, program, device, method, technique, or process, that:

- i. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons; who can obtain economic value from its disclosure or use, and
- ii. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

No Nebraska cases discuss the applicability of trade secrets in the specific context of employee non-compete agreements.

E. Fiduciary Duty and Other Considerations

There is no Nebraska law regarding fiduciary duty in restrictive covenants.

NEB. REV. STAT. § 27-508:

- i. Allows a person to “refuse to disclose” or “prevent other persons from disclosing” a trade secret, in the context of pretrial discovery and trial testimony.
- ii. An exception to the privilege exists where the allowance of the privilege will

“conceal fraud” or “otherwise work injustice.” If disclosure is ordered, the judge “shall” take required protective measures.

See *In re Application of Northwestern Bell Tel. Co.*, 223 Neb. 415, 390 N.W.2d 495 (1986), for a discussion of this provision.

There are numerous other provisions creating independent protection for trade secrets, or providing penalties for disclosure of trade secrets under particular circumstances. For example:

NEB. REV. STAT. § 54-861 declares the disclosure of a method, record, formulation, or process under the Commercial Feed Act, by any person to be Class IV misdemeanor;

NEB. REV. STAT. § 66-1341 provides specific trade secret protection to academic and scientific research work filed with an application for funds for Commercial development of ethanol;

NEB. REV. STAT. § 71-4615 provides specific trade secret protection for certain information relating to manufactured homes and recreational vehicles.

## **XII. DRUG TESTING LAWS**

### **A. Public Employers**

Nebraska has specific statutes addressing drug and alcohol testing. They appear at NEB. REV. STAT. §§ 48-1901 et seq., and were enacted “to help in the treatment and elimination of drug and alcohol use and abuse in the workplace while protecting the employee’s rights.” The statutes provide that the result of any drug or alcohol test cannot be used to deny continued employment, or in any disciplinary or administrative act, unless specific drug and alcohol testing procedures set forth in the statute are followed. In addition, the statutes contain requirements for maintaining specimens and disclosing test results. Finally, the statutes provide that an employee who refuses a lawful directive to provide a body fluid or breath sample, as provided in the Act, may be subjected to disciplinary action, including denial of continued employment.

The Nebraska Supreme Court addressed the provisions of NEB. REV. STAT. §§ 48-1901 et seq. in *Polinski v. Sky Harbor Air Servs.*, 263 Neb. 406, 640 N.W.2d 391 (2002). In *Polinski*, the plaintiff alleged that his right to privacy had been violated when he was given an employment-related drug test, that he had been wrongfully terminated from his employment in contravention of the drug and alcohol testing statutes, and that his former employer impermissibly disclosed the results of the drug test to the “public” in violation of section 48-1906. The district court granted the defendant’s motion for summary judgment as to all of Polinski’s claims. The Court of Appeals, in an unpublished opinion, reversed the grant of summary judgment on the cause of action alleging wrongful termination, but affirmed the district court’s decision as to the other claims.

Polinski sought further review of those portions of the Court of Appeals’ decision affirming the district court. On further review, the Supreme Court affirmed. Specifically, the Court held that the accusation of drug use at the workplace, without more, is not contrary to NEB. REV. STAT. § 20-203. Additionally, the Court held that the release of the drug test results to the Omaha Airport

Authority was not a release to the “public” under section 48-1906. *Polinski*, 263 Neb. 406, 640 N.W.2d 391.

*See also Ritchie v. Walker Mfg. Co.*, 963 F.2d 1119 (8th Cir. 1992) (holding that NEB. REV. STAT. § 20-148 is inapplicable to drug-testing by private employers); *Poole v. Burlington N. R.R. Co.*, 987 F. Supp. 753 (D. Neb. 1997) (finding that smelling alcohol on plaintiff’s breath is not a “test” under NEB. REV. STAT. § 48-1903).

#### B. Private Employers

Nebraska law does not distinguish between public and private employers. NEB. REV. STAT. § 48-1902(8) states that employer shall mean the State of Nebraska and its political subdivisions, all other governmental entities, or any individual, association, corporation, or other organization doing business in the State of Nebraska unless it, he, or she employs a total of less than six full-time and part-time employees at any one time. Therefore, the law for private employers is the same as it is for public employers, which is discussed above.

### **XIII. STATE ANTI-DISCRIMINATION STATUTES**

The Nebraska Fair Employment Practices Act, NEB. REV. STAT. §§ 48-1101 et seq., is the primary Nebraska statute dealing with employment discrimination.

#### A. Employers/Employees Covered

All employers, including state and local governmental bodies, employing fifteen or more employees within the state for each working day in each of the twenty or more calendar weeks in the current or preceding calendar year.

#### B. Types of Conduct Prohibited

The FEPA prohibits discrimination in almost any aspect of employment, on the basis of race, color, sex, religion, national origin, disability or marital status.

#### C. Administrative Requirements

A charge of discrimination must be filed with the Nebraska Equal Opportunity Commission within 300 days from the occurrence of the alleged unlawful act.

#### D. Remedies Available

The remedies are much the same as those found in Title VII. However, punitive damages are not available under Nebraska’s FEPA.

Nebraska also has an act prohibiting discrimination in employment because of age. It is based on the federal Age Discrimination in Employment Act. A covered employer under Nebraska’s Age Discrimination in Employment Act is one having twenty or more employees. It prohibits

discrimination with respect to any individual aged forty years or older regarding the terms, conditions or privileges of employment, based upon that individual's age. Any charge of discrimination under the Age Discrimination in Employment Act must be filed with the Nebraska Equal Opportunity Commission within 300 days after the occurrence of the alleged unlawful employment practice. In addition, a court may grant such legal or equitable relief as it deems appropriate. *See* NEB. REV. STAT. §§ 48-1001 et seq.

Nebraska also has an Equal Pay Act, NEB. REV. STAT. §§ 48-1219 et seq., which is much the same as the federal act. It applies to employers of two or more employees, and prohibits wage differentials based on gender. Court action must be commenced no later than four years after the cause of action accrues.

Affected employees under the Equal Pay Act may recover the amount of their unpaid wages, and in an instance of a willful violation, an additional amount as liquidated damages. In addition, attorney fees and costs are available.

In addition, the cities of Lincoln and Omaha have municipal ordinances prohibiting discrimination. *See Omaha Municipal Code*, available at [https://www.municode.com/library/ne/omaha/codes/code\\_of\\_ordinances](https://www.municode.com/library/ne/omaha/codes/code_of_ordinances); *Lincoln Municipal Code*, available at <http://online.encodeplus.com/regs/lincoln-ne/doc-viewer.aspx#secid--1>

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

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

NEB. REV. STAT. § 25-1640 provides that “[a]ny person who is summoned to serve on jury duty shall not be subject to discharge from employment, loss of pay, loss of sick leave, loss of vacation time, or any other form of penalty, as a result of his or her absence from employment due to such jury duty, upon giving reasonable notice to his or her employer of such summons. Any person who is summoned to serve on jury duty shall be excused upon request from any shift work for those days required to serve as a juror without loss of pay. No employer shall subject an employee to discharge, loss of pay, loss of sick leave, loss of vacation time, or any other form of penalty on account of his or her absence from employment by reason of jury duty, except that an employer may reduce the pay of an employee by an amount equal to any compensation, other than expenses, paid by the court for jury duty. Any person violating the provisions of this section shall be guilty of a Class IV misdemeanor.”

##### **B. Voting**

NEB. REV. STAT. § 32-922 provides that “[a]ny registered voter who does not have two consecutive hours in the period between the time of the opening and closing of the polls during which he or she is not required to be present at work for an employer shall be entitled on election day to be absent from employment for such a period of time as will in addition to his or her nonworking time total two consecutive hours between the time of the opening and closing of the polls. If the

registered voter applies for such leave of absence prior to or on election day, the registered voter shall not be liable for any penalty and no deduction shall be made from his or her salary or wages on account of such absence. The employer may specify the hours during which the employee may be absent.”

C. Family/Medical Leave

There are no Nebraska statutes governing family/medical leave.

D. Pregnancy/Maternity/Paternity Leave

There is no Nebraska statute addressing maternity leave. In *Richards v. Omaha Public Schools*, the Court held that a maternity leave policy requiring a teacher to begin leave at the beginning of the semester was not unlawful because NEB. REV. STAT. § 48-1108 provides that it is not unlawful to discriminate on the basis of sex if it is reasonably necessary to the normal operation of that particular business of enterprise. *Richards v. Omaha Public Schools*, 194 Neb. 463 (1975).

NEB. REV. STAT. §48-234 provides that if employers provide a leave of absence for child birth, the employer must provide that same leave of absence to adoptive parents at the commencement of the parent-child relationship.

In 2015, Nebraska added an amendment to the Nebraska Fair Employment Practice Act requiring reasonable accommodations for pregnant employees with “known physical limitations.” The amendment provided that reasonable accommodations with respect to pregnancy, childbirth, or related medical conditions include: acquisition of equipment for sitting, more frequent or longer breaks, periodic rest, assistance with manual labor, job restructuring, light-duty assignments, modified work schedules, temporary transfers to less strenuous or hazardous work, time off to recover from childbirth, or break time and appropriate facilities for breast-feeding or expressing breast milk. The law makes it an unlawful employment practice to discriminate against an individual who is pregnant, who has given birth, or who has a related medical condition, or who has made a request for a reasonable accommodation. It also restricts the circumstances under which an employer may require a pregnant worker to take leave. NEB. REV. STAT. § 48-1102

E. Day of Rest Statutes

There are no Nebraska statutes governing day of rest.

F. Military Leave

NEB. REV. STAT. §§ 55-160, 55-161, 55-164, 55-165, and 55-501 to 55-507 govern military leave.

§ 55-160 states that all employees, including elected officials of the State of Nebraska, who are members of the National Guard, Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, and Coast Guard Reserve, are entitled to military leave without loss of pay.

§ 55-161 states that the Federal Uniformed Services and Reemployment Rights Act of 1994, is

adopted into Nebraska law. This section is applicable to all person employed in the State of Nebraska and shall include all officers and permanent employees, including teachers employed on a one-year contract basis and elected officials.

§ 55-164 states that if any employer fails to comply with §§ 55-160 or 55-161, that the employee may, at his or her election, bring an action at law for damages for such noncompliance. The employee may also apply to the courts for such equitable relief as may be just and proper under the circumstances.

§ 55-165 states that any person, firm, or organization violating section 55-160 or 55-161 shall be guilty of a Class IV misdemeanor and, in addition thereto, shall restore to the employee all rights of which he or she has been illegally deprived.

§§ 55-501 to 55-507 state that employers must provide unpaid leave to a spouse or parent of a person called to military service for more than 179 days. The employee must also be restored to the same or equivalent position upon returning from leave.

#### G. Sick Leave

There is no Nebraska state law requiring employers to provide employees with sick leave.

In *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008) the Nebraska Supreme Court held that while the Nebraska Wage Nebraska Wage Payment and Collection Act (NEB. REV. STAT. §§ 48-1228 to 48-1234) requires “unpaid wages” to be paid to a separated employee, sick leave is considered a fringe benefit unless the benefit is vested. In *Loves*, the sick leave was only able to be used in the event of illness or injury and had no monetary value if not used. The employer’s sick leave policy did not indicate the sick leave was a vested benefit. See also NEB. REV. STAT. § 48-1229(4) (“Fringe benefits includes sick and vacation leave plans.”); *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009) (holding enactment of Wage Payment and Collection Act did not grant state employee property rights in his accumulated sick leave).

#### H. Domestic Violence Leave

There is no Nebraska state law requiring employers to provide employees with domestic violence leave. However, victims and witnesses of crimes have the right to be provided with appropriate employer intercession services to insure that employers of victims and witnesses will cooperate with the criminal justice process in order to minimize an employee’s loss of pay and other benefits resulting from court appearances. NEB. REV. STAT. § 81-1848. This could be interpreted to mean that employers should not retaliate against employees who miss work to appear in court as a victim or witness.

#### I. Other Leave Laws

**Election Duty Leave.** Employees appointed to serve as an election official must be excused upon

request from any shift without loss of pay, overtime, sick leave, vacation time or otherwise be penalized for hours required to serve. The employee must provide reasonable notice. If an employee is required to serve eight hours or more as an election official, the employee must be excused from shift work eight hours before and after the election service. Employers may reduce the hourly pay by the amount the employee is paid by the county for service as an election official. NEB. REV. STAT. § 32-241.

**Bone Marrow Donation.** Nebraska employers are not required to provide time off for employees to donate bone marrow. However, Nebraska law encourages employers to grant paid leaves of absences to employees wanting to donate. NEB. REV. STAT. §71-4820.

**Emergency Response Leave.** Employers having 10 or more employees are prohibited from taking adverse employment action against an employee absent from or late to work due to responding to an emergency occurring prior to the time the employee is required to report to work. An employer may deduct from an employee's earned wages the time spent away from work to respond to an emergency. The employee must make a reasonable effort to notify the employer. NEB. REV. STAT. §§ 35-1403 to 1405.

**Unrestricted Paid Time Off.** Accrued and unused paid time off that is not restricted in its use, must be paid out upon termination in the same manner as accrued unused vacation leave. In *Fisher v. Payflex*, the Nebraska Supreme Court held that accrued, unused PTO must be paid to employees upon termination of employment. *Fisher v. PayFlex Sys. USA, Inc.*, 285 Neb. 808, 810, 829 N.W.2d 703, 707 (2013)(“PayFlex had agreed to provide PTO hours as compensation for labor or services, and the appellees had met the conditions for receiving this compensation. Because the appellees had an absolute right to take this time off for any purpose they wished, under § 48–1229, their earned but unused PTO hours must be treated the same as earned but unused vacation hours.”), *see also* NEB. REV. STAT. § 48–1229(6)(“ Paid leave, other than earned but unused vacation leave, provided as a fringe benefit by the employer shall not be included in the wages due and payable at the time of separation, unless the employer and the employee or the employer and the collective-bargaining representative have specifically agreed otherwise.”)(emphasis added).

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

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

NEB. REV. STAT. § 48-1203 defines Nebraska's minimum wage. Under (1), every employer must pay each of his or her employees wages at a minimum rate of nine dollars per hour. Under (2), for persons compensated by way of gratuities such as waitresses, waiters, and bellhops, the employer shall pay wages at the minimum rate of two dollars and thirteen cents per hour, plus all gratuities given to them for services rendered.

NEB. REV. STAT. §48-1203.01 defines a training rate and its limitations. The section states “[a]n employer may pay a new employee who is younger than twenty years of age and is not a seasonal or migrant worker a training wage of at least seventy-five percent of the federal minimum wage for ninety days from the date the new employee was hired. An employer may pay such new employee the training wage rate for an additional ninety-day period while the new employee is participating in on-the-job training which (1) requires technical, personal, or other skills which are

necessary for his or her employment and (2) is approved by the Commissioner of Labor. No more than one-fourth of the total hours paid by the employer shall be at the training wage rate.

An employer shall not pay the training wage rate if the hours of any other employee are reduced or if any other employee is laid off and the hours or position to be filled by the new employee is substantially similar to the hours or position of such other employee. An employer shall not dismiss or reduce the hours of any employee with the intention of replacing such employee or his or her hours with a new employee receiving the training wage rate.”

NEB. REV. STAT. § 48-1205 requires every employer subject to the provisions of sections 48-1201 to 48-1209 to keep a summary of the sections, furnished by the Commissioner of Labor without charge, posted in a conspicuous place on or about the premises wherein any person subject to the provisions of sections 48-1201 to 48-1209 is employed.

#### B. Deductions from Pay

NEB. REV. STAT. § 48-1230(1) provides that employers may only deduct, withhold, or divert a portion of an employee’s wages if the employer is required to do so by law, by an order of the court, or if the employer has a written agreement with the employee to do so.

Subsection (2) of § 48-1230 provides employers must deliver or make available at the place of business, through mail or electronically, a wage statement showing at minimum the following: the identity of the employer, the hours for which the employee is being paid (unless the employee is exempt from overtime under the FLSA), the wages earned and deductions being taken.

#### C. Overtime rules

There is no Nebraska statute requiring overtime pay. Overtime wages can be claimed under the Nebraska Wage Payment and Collection Act, but only if there existed a previous agreement between the employer and employee. Even in the absence of an agreement, an employee may be eligible for overtime pay for hours worked in excess of forty hours under the Fair Labor and Standards Act. *Freeman v. Central States Health and Life Co. of Omaha*, 2 Neb.App. 803 (1994); *Kreus v. Stiles Service Center*, 250 Neb. 526 (1996) (“The FLSA provides that no employer shall employ any employee for a workweek exceeding 40 hours unless the employee is compensated for all hours beyond 40 at a rate of 1½ times the “regular rate” at which he is employed.”).

#### D. Time for payment upon termination

NEB. REV. STAT. § 48-1230(4) enumerates the requirements for payment upon termination. Unpaid wages become due, if the employer is not a political subdivision, on the next regular payday or within two weeks of the date of termination, whichever is sooner. If the employer is a political subdivision, unpaid wages become due within two weeks of the next regularly scheduled meeting of the governing body of the political subdivision if the employee is separated from the payroll at least one week prior to the meeting. If longer than one week, the unpaid wages are due within two weeks of the following regularly scheduled meeting of the governing body.

NEB. REV. STAT. § 48-1229(6) states “Paid leave, other than earned but unused vacation leave,

provided as a fringe benefit by the employer shall not be included in the wages due and payable at the time of separation, unless the employer and the employee or the employer and the collective bargaining representative have specifically agreed otherwise. . . . Unless the employer and employee have specifically agreed otherwise through a contract effective at the commencement of employment or at least ninety days prior to separation, whichever is later, wages includes commissions on all orders delivered and all orders on file with the employer at the time of separation of employment less any orders returned or canceled at the time suit is filed.” This statutory provision allows employers to provide paid sick leave, paid funeral leave and other types of paid leave and not have to pay that leave out at separation so long as the employer has not specifically agreed to pay it out.

The Nebraska Supreme Court has decided that unrestricted “paid time off” is equivalent to vacation leave under Wage Payment Act, and must be paid out at termination. *Fisher v. PayFlex Sys. USA, Inc.*, 285 Neb. 808, 829 N.W.2d 703 (2013). Earned, but unused “vacation leave,” for which, under the Wage Payment and Collection Act, an employee is entitled to compensation upon separation from employment, is not conditioned upon an event, such as a holiday, an illness, or a funeral, and is not conditioned upon anything other than the employee's rendering services for the employer; instead, an employee may use his or her earned vacation leave for any personal reason without conditions, including for an illness or disability. *Id.* An employee is not entitled to compensation for unused paid “sick leave” at separation of employment under the Wage Payment and Collection Act, unless an employer has a policy stating sick leave will be paid out. *Id.* See also *Prof'l Business Servs. Co. v. Rosno*, 286 Neb. 99, 680 N.W. 2d 176 (2004) (requiring payment of sick leave where employee handbook provided for payment when employment last at least seven months).

NEB. REV. STAT. § 48-1230.01 addresses when commission shall be due upon termination. Upon termination, unpaid commission becomes due the next regular payday following the employer's receipt of payment for the goods or services from the customer from which the commission was generated. The employer must provide an employee with a periodic accounting of outstanding commissions until all commissions have been paid or the orders have been returned or canceled by the customer.”

In *Coffey v. Planet Group, Inc.*, 287 Neb. 834, 845 N.W.2d 255 (2014), the Court held that NEB. REV. STAT. § 48-1229(4) allows employers and employees to contractually define when commission becomes wages, irrespective of whether that agreement contradicts the Wage Act. Coffey and Planet Group contractually agreed that commissions were only due if Coffey was employed at the time of the client's signature and down payment. The Court found Coffey was not employed at the time the projects in question were signed. While previously Coffey's commission would have been due in accordance with the statutory definition of wages, the Court held the employment agreement was valid under amended section 48-1229(4). Thus, Coffey was not owed commission, pursuant to the agreement.

In *Pick v. Norfolk Anesthesia, P.C.*, 276 Neb. 511, 755 N.W.2d 382 (2008), the Court held that employees were not entitled to bonuses because the parties had not expressly agreed that year-end bonuses would be paid even if the employees resigned. In reaching its decision, the Court first noted that bonuses would be considered wages under the Nebraska Wage Payment and Collection Act if they were (1) compensation for labor, (2) previously agreed to, and (3) all prerequisites were fulfilled. In determining whether the third element had been met, the Court distinguished between bonuses intended to “improve productivity” and “retain long-term employees.” The Court then

implied that the second rationale existed in deciding that the employees had no right in the bonuses until the completion of the year. *See Eikmeier v. City of Omaha*, 280 Neb. 173, 783 N.W.2d 795 (2010).

NEB. REV. STAT. § 48-1230 enumerates regular payday requirements. The section states that except as otherwise provided in limited circumstances listed in § 48-1230, each employer shall pay all wages due its employees on regular days designated by the employer or agreed upon by the employer and employee. Furthermore, if the employer wishes to alter the pay schedule, 30 days written notice is required.

NEB. REV. STAT. § 48-313 prevents any child under the age of sixteen from being employed in any work which by reason of the nature of the work or place of performance is dangerous to life or limb or in which his or her health may be injured or his or her morals may be depraved.

NEB. REV. STAT. § 48-310(2) prohibits persons under sixteen years of age from working as a door-to-door solicitor, (3) although a person under sixteen years of age may be engaged in the delivery or distribution of newspapers or shopping news, and (4) a person under the age of sixteen is permitted to work as a door-to-door solicitor if he or she is working on behalf of their own individual entrepreneurial endeavor.

#### E. Breaks and Meal Periods

Employers in assembly plants, mechanical establishments and workshops are required to allow a 30 minute lunch period in each shift of at least 8 hours. Employees must be allowed to go off-premises during the lunch period. The requirement can be waived through a collective bargaining or written agreement. Neb. Rev. Stat. § 48-212.

For all other businesses, break and meal periods are not required and are given solely at the discretion of the employer regardless of the length of the work shift.

<https://dol.nebraska.gov/LaborStandards/FAQ/General>

#### F. Employee Scheduling Laws

NEB. REV. STAT. § 48-310 places hour restrictions on persons under the age of sixteen. The statute provides that “[n]o person under sixteen years of age shall be employed or permitted to work in any employment as defined in section 48-301 more than forty-eight hours in any one week, nor more than eight hours in any one day, nor before the hour of 6 in the morning, nor after the hour of 8 in the evening if the child is under the age of fourteen, nor after the hour of 10 in the evening if such child is between the ages of fourteen and sixteen. The person issuing the work certificate may limit or extend the stated hour in individual cases by endorsement on the certificate, except a child shall only be permitted to work after the hour of 10 p.m. if there is no school scheduled for the following day and, if he or she is between fourteen and sixteen years of age, he or she has consented to such extension by signing his or her name on the endorsement extension, and his or her employer has obtained a special permit from the Department of Labor.” Furthermore, a special permit may be issued for periods not to exceed ninety days and may be renewed only after

reinspection. The fee for each permit or renewal shall be established by rule and regulation of the Commissioner of Labor, and all money so collected by the commissioner shall be remitted to the State Treasurer who shall credit the funds to the General Fund. Every employer shall post in a conspicuous place in every room where such children are employed a printed notice stating the hours required of them each day, the hours of commencing and stopping work, and the time allowed for meals. The printed form of such notice shall be furnished by the Department of Labor.

NEB. REV. STAT. § 75-363(9) adopts and amends Title 49 of the Code of Federal Regulations. The statute section provides hour limitations for motor carriers and drivers who engage in interstate commerce. The statute makes four limitations. No driver shall drive: more than twelve consecutive hours after eight consecutive hours off; after being on duty for sixteen hours after having eight consecutive hours off; more than seventy hours in seven days if the carrier does not operate every day of the week; or more than eighty hours in eight days if the carrier operates every day of the week.

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

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

NEB. REV. STAT. § 71-5716 to 71-5734, known as the Nebraska Clean Indoor Act, prohibits a person from smoking in a place of employment. Guest rooms and suites, research institutions conducting research related to smoking, tobacco retail outlets, and cigar shops are exempt from this provision. Additionally, the Act does not prohibit smoking in outdoor areas.

### **B. Health Benefit Mandates for Employers**

There is no Nebraska law mandating employers provide health benefits. However, employers may be subject to federal regulations mandating benefits.

### **C. Immigration Laws**

NEB. REV. STAT. § 4-114 requires that public employers and contractors must use a federal immigration verification system (E-verify) to determine the work eligibility status of new employees physically performing services in the State of Nebraska. Every contract between a public employer and public contractor must contain a provision requiring the contractor to use a federal immigration verification system.

### **D. Right to Work Laws**

NEB. REV. STAT. § 48-214 provides that no representative agency of labor, in collective bargaining with employers, may discriminate in such bargaining against a person because of race or color.

NEB. REV. STAT. § 48-215 makes it is unlawful for a person, firm or corporation, engaged in manufacturing or distributing military or naval equipment for the State of Nebraska or the

government of the United States, to refuse to employ any person in any capacity, if said person is a citizen and is qualified, on account of race, color, creed, religion or national origin.

NEB. REV. STAT. § 48-216 makes a violation of section 48-215 a Class III misdemeanor.

NEB. REV. STAT. § 48-217 prohibits the denial of employment because of membership or affiliation with a labor organization or refusal to join such an organization. No individual or corporation may contract to exclude persons because of membership or non-membership in a labor organization.

NEB. REV. STAT. § 48-219 makes any corporation entering into a contract in violation of section 48-217 guilty of a Class IV misdemeanor.

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

There is no Nebraska law regarding lawful off-duty conduct.

F. Gender/Transgender Expression

There is no Nebraska law regarding gender/transgender expression.

G. Other Key State Statutes

1. NEB. REV. STAT. § 48-1114 – prohibits discrimination against employee or applicant who has opposed any unlawful employment practice, made a charge, testified or assisted in an investigation, proceeding or hearing, or has opposed any practice or refused to carry out any unlawful act.
2. NEB. REV. STAT. § 55-166 – makes it a Class IV misdemeanor to discharge an employee because of membership in the National Guard and requires employer to reinstate employee.
3. NEB. REV. STAT. § 48-1227 – prohibits discrimination against an employee who has made complaint of discriminatory wage practices based on gender.
4. NEB. REV. STAT. § 48-824 – prohibits discharge or discrimination against a PUBLIC employee who has filed an affidavit, petition or complaint under the Industrial Relations Act or because the employee has joined, formed or chosen to be represented by any employee organization.
5. NEB. REV. STAT. § 48-443 – prohibits discharge or discrimination against any employee who makes an oral or written complaint to the safety committee or any governmental agency having regulatory responsibility for employee safety.
6. Civil Rights, NEB. REV. STAT. § 20-168 – prohibits discrimination against employee or applicant on the basis that the individual is suffering from or is suspected of suffering from human immunodeficiency virus or acquired immunodeficiency syndrome.

7. NEB. REV. STAT. § 25-1558 – prohibits discharge of employee by reason of the fact that employee’s earnings are subject to garnishment. The statute also outlines the percentage of wages that can be subject to garnishment.
8. NEB. REV. STAT. § 25-1640 – prohibits discharge of employee for serving on a jury.
9. NEB. REV. STAT. § 28-338 – prohibits discharging an employee for refusing to participate in an abortion.
10. NEB. REV. STAT. § 81-1901 et seq. – restricts employers from conditioning employment or continued employment on employee’s submission to a lie detector examination.
11. NEB. REV. STAT. § 48-601 et seq. - the Nebraska Employment Security law provides unemployment benefits to employees separated from employment.
12. NEB. REV. STAT. § 48-2209 – Pursuant to the Non-English-Speaking Workers Protection Act, any employer employing 100 or more employees at any one time, except for seasonal employment of not more than twenty weeks in any calendar year, who actively recruits or hires non-English speaking employees residing more than 500 miles from the place of employment and if more than 10% of the workforce is non-English speaking and speak the same, non- English language must: (1) provide a bilingual employee; (2) provide a statement to the commissioner identifying the bilingual employee; and (3) provide transportation at no cost to the recruited employees within set periods of time after resignation or the last day of employment.
13. NEB. REV. STAT. §§ 48-220 to 223. If an employer requests or requires an applicant to undergo a medical examination as a condition of employment, the employer must pay the costs of the examination.

## **XVII. OTHER DEVELOPMENTS**

### **A. Free Speech**

The Nebraska Supreme Court addressed the issue of an employee’s right to free speech in connection with his/her employment in *Cox v. Civil Serv. Comm. of Douglas County*, 259 Neb. 1013, 614 N.W.2d 273 (2000). In *Cox*, the employee, a guard for the Douglas County Department of Correctional Services, was terminated after speaking to a reporter about allegations of racial discrimination within the department. The Civil Service Commission affirmed this decision as did the district court.

The Nebraska Supreme Court reversed. In doing so, the Court decided that the Plaintiff’s speech was regarding a matter of public concern. The Court then balanced the employee’s interest in making the statement against the interest of the government, as an employer, in promoting the

efficiency of the public services it performs through its employees. After conducting this balancing test, the Court held that the plaintiff's termination violated his constitutionally protected interest in freedom of speech. *Cox*, 259 Neb. 1013, 614 N.W.2d 273. *See also Dossett v. First St. Bank*, 261 Neb. 959, 627 N.W.2d 131 (2001) (holding that without a statement of facts to support an allegation of state action, the plaintiff's petition did not sufficiently plead a cause of action for wrongful discharge brought under NEB. REV. STAT. § 20-148 for a violation of her state constitutional right to free speech under Article I, Section 5 of the Nebraska Constitution).