

NEW HAMPSHIRE

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I. AT-WILL EMPLOYMENT

A. Statute

New Hampshire has no at-will employment statute.

B. Case Law

New Hampshire recognizes the common-law rule that a hiring is presumed to be at will and terminable at any time by either party. *Cloutier v. Great Atl. & Pac. Tea Co.*, 436 A.2d 1140, 1142-43, 121 N.H. 915, 919 (1981).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

An employer who distributes a handbook to allegedly at-will employees indicating that they will not be fired without cause, or without the benefit of some administrative due process, states in effect that the employer will no longer treat the relationship as being literally at-will. *Panto v. Moore Bus. Forms, Inc.*, 547 A.2d 260, 265-66, 130 N.H. 730, 737 (1988). The employee does not have to formally agree to or bargain for the provisions, but need only have notice of them.

2. Provisions Regarding Fair Treatment

While the New Hampshire Supreme Court has not addressed the specific issue, provisions promising fair treatment of employees would seem to indicate a modification of the at-will relationship, perhaps even to the level of requiring just cause for termination.

3. Disclaimers

New Hampshire courts recognize the ability of the employer to disclaim any contractual and binding effect of the provisions of an employee handbook. *See Butler v. Walker Power, Inc.*, 629 A.2d 91, 94, 137 N.H. 432, 437 (1993) (holding disclaimer was sufficiently clear to negate any inference that the handbook alters the presumptively at-will nature of the employment relationship); *Panto*, 547 A.2d at 268, 130 N.H. at 742 (noting that an employer could have avoided contractual liability by announcing in the written policy that the policy was not an offer, nor was it enforceable as a contractual obligation). In order to disclaim an intent to alter the at-will nature of the employment, the disclaimer must specifically state such an intent. *See Butler*, 629 A.2d at 94, 137 N.H. at 437. *See also Jesep v. Ne. Health Care Quality Found.*, No. 04-cv-77-JD, 2005 D.N.H. 73 at *7 (April 27, 2005) (granting summary judgment on breach of contract claim based on disclaimer in handbook); *Donovan v. Castle Springs, LLC*, No. 01-413-M, 2002 D.N.H. 220 at *6 (Dec. 20, 2002) (granting summary judgment for employer on breach of contract claim based on "Employee Acknowledgment Clause" affirming at-will employment); *Riesgo v. Heidelberg Harris, Inc.*, 36 F.Supp.2d 53, 60 (D.N.H. 1997) (granting summary judgment for employer on breach of contract claim where handbook disclaimer provided that the policies did not "express or imply contractual terms and conditions of employment or other contractual commitments").

4. Implied Covenants of Good Faith and Fair Dealing

Although every contract in New Hampshire is interpreted as including an implied covenant of good faith and fair dealing, the New Hampshire Supreme Court has not interpreted this as including a covenant to terminate only for cause in every employment relationship. *See Harper v. Healthsource N.H.*, 674 A.2d 962, 964-65, 140 N.H. 770, 776 (1996); *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 190-91, 132 N.H. 133, 139 (1989). Instead, as discussed below, in order to state a wrongful discharge claim under New Hampshire law, the plaintiff must allege that the employer acted out of malice or bad faith and in contravention of public policy. *Harper*, 674 A.2d at 965, 140 N.H. at 776; *Centronics*, 362 A.2d at 191, 132 N.H. at 140. In *Donovan v. Castle Springs, LLC*, the federal district court granted summary judgment for the employer on the plaintiff's breach of good faith and fair dealing claim, finding no promise of employment for a year. No. 01-413-M, 2002 D.N.H. 220, at *7.

B. Public Policy Exceptions

1. General

Two early cases recognized the common law wrongful discharge theory. In *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 550, 114 N.H. 130 (1974), after working for Beebe Rubber in a union shop, Olga Monge applied to fill an opening on a press machine at higher wages. The foreman informed her that if she wanted the position, she would have to be "nice" to him. Monge got the job and was then asked out by the foreman. Monge turned him down, explaining that she was married. After about three weeks on the job, Monge was demoted and her overtime pay was taken away. She also endured ridicule by her foreman. *Id.* Subsequently, Monge missed several days of work due to illness. When she attempted to return to work, she fell

unconscious and had to be taken to the hospital. The personnel manager told her that since she missed three consecutive days of work, she was deemed a "voluntary quit."

Monge filed suit for wrongful discharge and breach of an oral contract of employment, claiming she was harassed because she refused to go out with the foreman, which ultimately resulted in her termination. The Supreme Court of New Hampshire condemned such behavior and reversed Beebe Rubber's judgment notwithstanding the verdict, stating:

In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract. Such a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.

Monge, 316 A.2d at 551-52, 114 N.H. at 133 (citations omitted).

Cilley v. N.H. Ball Bearings, Inc., 514 A.2d 818, 128 N.H. 401 (1986), involved a plaintiff who was terminated after many years of service. The company claimed Cilley was fired because he failed to obey his superiors and he misused company resources. Cilley contended his discharge was motivated by a senior company official's desire to "get revenge" against him for refusing to lie to the company president. Cilley had out produced the official and refused to lie and cover for him.

Cilley filed a wrongful discharge action, and the company moved for summary judgment on the grounds that his forced resignation did not contravene a specific public policy. *Id.* at 819-20, 128 N.H. at 404. The trial court found in favor of the company and Cilley appealed. The New Hampshire Supreme Court held that the case should be remanded because it was possible that Cilley's discharge did involve a public policy.

[W]e do conclude that Cilley has alleged sufficient facts, which if believed by a jury, could lead that jury to conclude that his termination resulted from acts that public policy would encourage. A jury could find, for example, that Cilley was discharged for refusing to lie and that public policy supports such truthfulness.

Id. at 821 128 N.H. at 406.

Subsequent decisions by the New Hampshire Supreme Court have limited the *Monge* decision to cases where "an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn." *Howard v. Dorr Woolen Co.*, 414 A.2d 1273, 1274, 120 N.H. 295, 297 (1980) (citations omitted). Therefore, the test for wrongful discharge has two prongs: (1) the employer was motivated by

bad faith, malice or retaliation, and (2) the employee was discharged because he performed an act that public policy would encourage or refused to do something that public policy would condemn. *See Monge*, 316 A.2d at 551-52, 114 N.H. at 133; *Howard*, 414 A.2d at 1274, 120 N.H. at 297.

The public policy may be based on either statutory or nonstatutory policy. *Karch v. BayBank FSB*, 794 A.2d 763, 775, 147 N.H. 525, 537 (2002). The New Hampshire Supreme Court held, in *Wenners v. Great State Bevs., Inc.*, 663 A.2d 623, 625, 140 N.H. 100, 103 (1995), that a common law wrongful discharge claim could not survive where the legislature had intended to replace it with a statutory remedy. *Id.*, citing *Howard*, 414 A.2d at 1274, 120 N.H. at 297 (1980). This principle has been applied by the U.S. District Court for the District of New Hampshire, resulting in dismissal of pendent state law wrongful discharge claims. *Murdy v. Nashua Sch. Dist.*, No. 05-CV-174-PB, 2006 D.N.H. 148 at *8 (D.N.H. Dec. 19, 2006) (age discrimination claim); *Parker v. MVM, Inc.*, No. 05-cv-380-SM, 2006 D.N.H. 70 at *7-8 (D.N.H. July 11, 2006) (age discrimination claim). However, the existence of a statutory remedy does not supersede the common law remedy unless expressly intended. *See Bliss v. Stow Mills, Inc.*, 786 A.2d 815, 818, 146 N.H. 550, 554 (2001) (considering the Federal Surface Transportation Assistance Act); *Karch*, 794 A.2d at 775, 147 N.H. at 537 (considering the New Hampshire Whistleblowers' Protection Act); *Slater v. Verizon Communications, Inc.*, No. 04-303-SM, 2005 D.N.H. 23 at *12-13 (D.N.H., Mar. 3, 2005) (considering USERRA). In *Snelling v. City of Claremont*, 931 A.2d 1272, 155 N.H. 674 (2007), the New Hampshire Supreme Court affirmed a jury verdict on a city employee's claims of wrongful termination and violation of First Amendment rights where the employee was terminated following his comments, as a private citizen, about the fairness of the city's tax system and potential abuses of that system. *Id.* at 1286-87, 155 N.H. at 689.

As a general principle, the existence of a public policy is an issue for the jury to determine. *Short v. SAU No. 16*, 612 A.2d 364, 370, 136 N.H. 76, 84 (1992). However, the New Hampshire Supreme Court has ruled that where the existence or absence of a public policy is so clear that the court may so rule as a matter of law, the issue must be taken from the jury. *Id.* *See also Cooper v. Thomson Newspapers, Inc.*, 6 F.Supp.2d 109, 115 (D.N.H. 1998); *Bourque v. Town of Bow*, 736 F.Supp. 398, 402 (D.N.H. 1990). In *Short*, the New Hampshire Supreme Court held that an employee's disagreement with management policy is not an act protected by public policy. 612 A.2d at 370. Finally, the federal district court in *Slater v. Verizon* reaffirmed the necessity of articulating some act or refusal to act by the plaintiff which is supported by public policy, not merely the articulation of a public policy. 2005 D.N.H. at *20. Thus, in that case, a wrongful discharge claim asserting that a termination resulted from an unfair investigation failed to articulate the necessary public policy and was dismissed. *Id.* (citation omitted).

In *Porter v. City of Manchester*, 849 A.2d 103, 151 N.H. 30 (2004), the New Hampshire Supreme Court clarified that a wrongful discharge is a cause of action in tort and allowed recovery for emotional distress and lost future earnings. *See id.* at 118-19, 151 N.H. at 44. The federal district court has allowed an employee hired pursuant to a written agreement to nonetheless pursue a wrongful discharge theory. *Attard v. Benoit*, No. 06-CV-355-PB, 2007 D.N.H. 155 at *8-9 (Dec. 12, 2007).

2. Exercising a Legal Right

New Hampshire's Law Against Discrimination contains a provision which states: "It shall be an unlawful discriminatory act to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this chapter." N.H. REV. STAT. ANN. § 354-A:11. Similarly, the statute concerning pay equity claims prevents the discharge of, or any form of discrimination against, employees who institute, or testify or participate in, an investigation, proceeding, hearing or action brought under that statute. N.H. REV. STAT. ANN. § 275:38-a.

The Crime Victim Employment Leave Act also contains a provision prohibiting discrimination against those who use leave. It states: "No employer shall discharge, threaten, or otherwise discriminate against any employee regarding such employee's compensation, terms, conditions, location, or privileges of employment because the employee has exercised his or her right to leave work as provided under this subdivision." N.H. REV. STAT. ANN. § 275:64.

3. Refusing to Violate the Law

See following entry.

4. Exposing Illegal Activity (Whistleblowers)

The New Hampshire Whistleblowers' Protection Act, N.H. REV. STAT. ANN. §§ 275-E:1-7, prohibits retaliation or discrimination against employees who refuse to engage in or report illegal activities by their employers. See *In re Hardy*, 917 A.2d 1237, 1246, 154 N.H. 805, 816 (2007) (holding that award of attorneys' fees was permissible even prior to statutory amendment); *In re Ne. Rehab. Hosp.*, 816 A.2d 970, 972, 149 N.H. 83, 85 (2003) (holding that statute does not apply to person who was not an employee when report was made); *In re Fred Fuller Oil Co., Inc.*, 744 A.2d 1141, 1143, 144 N.H. 607, 609 (2000); *In re Leonard*, 809 A.2d 762, 767, 147 N.H. 590, 595-96 (2002) (appeal following remand of *Fuller Oil*, defining what constitutes a "report" under the Act); *In re Seacoast Fire Equip. Co.*, 777 A.2d 869, 872, 146 N.H. 605, 608 (2001); and *In re Montplaisir*, 787 A.2d 178, 182, 147 N.H. 297, 300 (2001) (both holding that Title VII burden-shifting scheme for retaliation claims applies to Whistleblower claims); *In re Linn*, 761 A.2d 502, 505, 145 N.H. 350, 354 (2000) (requiring employee to exhaust employer's internal grievance procedure prior to filing whistleblower claim).

III. CONSTRUCTIVE DISCHARGE

The New Hampshire Supreme Court has recognized that, under certain circumstances, an employee's voluntary resignation was in fact a dismissal by the employer. *Porter v. City of Manchester*, 849 A.2d 103, 117, 151 N.H. 30, 42 (2004); *Karch v. BayBank FSB*, 794 A.2d 763, 774, 147 N.H. 525, 536 (2002). This doctrine of constructive discharge applies when an employer renders an employee's working conditions so difficult and intolerable that a reasonable person in the employee's situation would feel compelled to resign. *Porter*, 849 A.2d at 117, 151

N.H. at 42. The adverse conditions must be “ongoing, repetitive, pervasive, and severe.” *Id.* (internal quotation omitted). *See also Godfrey v. Perkin-Elmer Corp.*, 794 F. Supp. 1179, 1186 (D.N.H. 1992) (applying “totality of circumstances” test) (overturned on other grounds, *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 436 n.11 (1st Cir. 1996).

In *LaCasse v. Spaulding Youth Ctr.*, 910 A.2d 1262, 154 N.H. 246 (2006), the New Hampshire Supreme Court reversed summary judgment for the employer on the plaintiff’s constructive discharge claim. *Id.* at 1263, 154 N.H. at 247. The court ruled that the evidence of the supervisor’s prior comment about forcing other employees to quit by making things miserable for them and evidence that the supervisor’s hostile behavior continued even after the employer launched an investigation, could be sufficient for a jury to conclude that a reasonable person in plaintiff’s shoes would have felt compelled to resign. *Id.* at 1264-65, 154 N.H. at 248. *See also Scannell v. Sears Roebuck & Co.*, No. 06-CV-227-JD, 2006 WL 2570601 at * 4 (D.N.H. Sept. 6, 2006) (refusing to dismiss plaintiff’s constructive discharge claim).

Similarly, only employees who voluntarily leave work without good cause are disqualified from receiving New Hampshire unemployment compensation. N.H. REV. STAT. ANN. § 282-A:32(I). By showing that his or her resignation was reasonable under the totality of circumstances, an employee has most likely proven good cause and will be eligible for unemployment compensation. *In re T&M Assoc., Inc.*, 598 A.2d 209, 212, 134 N.H. 617, 621 (1991).

The New Hampshire Supreme Court has held that a plaintiff’s cause of action for wrongful discharge begins to accrue, for statute of limitations purposes, when she receives notice that her contract would not be renewed, rather than on her last day of employment. *Cluff-Landry v. Roman Catholic Bishop of Manchester*, 169 N.H. 670, 673, 156 A.3d 147 (2017). The Court concluded that because the plaintiff’s wrongful discharge claim was based on her employer’s decision not to renew her contract, and at the time she received the notice, all of the elements required to prove wrongful discharge were present. *See also Jeffery v. City of Nashua*, 163 N.H. 683, 688 (2012) (holding that the plaintiff’s constructive discharge claim began to accrue for statute of limitations purposes on the date she tendered her resignation, rather than the last day of her employment).

IV. WRITTEN AGREEMENTS

A. Standard “For Cause” Termination

New Hampshire is still an employment-at-will state and has not adopted any statute requiring good cause for termination. The New Hampshire Supreme Court also has not had occasion to interpret a “for cause” employment contract. However, it can be anticipated that the court would place the burden on the employer to prove good cause.

In *Chisholm v. Ultima Nashua Indus. Corp.*, 834 A.2d 221, 150 N.H. 141 (2003), the New Hampshire Supreme Court upheld a jury verdict awarding the plaintiff severance pay pursuant to a document entitled “Proposed Employment Contract Outline” which had been signed by the plaintiff and the company’s president. *Id.* at 223, 150 N.H. at 143. The court also

affirmed an award of liquidated damages against the president under N.H. REV. STAT. ANN. § 275:44(IV), finding that the failure to pay the required severance had been “willful and without good cause.” *Id.* at 226, 150 N.H. at 146.

B. Status of Arbitration Clauses

The New Hampshire Supreme Court has not yet ruled on the enforceability of an arbitration provision contained in an employee handbook. However, it has enforced an arbitration provision contained in an independent sales representative agreement. *John A. Cookson Co. v. N.H. Ball Bearings, Inc.*, 787 A.2d 858, 863, 147 N.H. 352, 356 (2001). The court has also ruled that the right to seek judicial review of an arbitrator’s award under N.H. REV. STAT. ANN. § 542:8 cannot be assigned by a union to an aggrieved employee. *Dillman v. Town of Hooksett*, 898 A.2d 505, 507, 153 N.H. 344, 345 (2006).

In an unpublished decision, the U.S. District Court for the District of New Hampshire enforced an arbitration clause, requiring a terminated employee to arbitrate her claim for unpaid wages. *CIGNA Health Corp. v. Lencki*, No. 1:2006-CV-0016, 2006 WL 1424453, at *3 (D.N.H. May 18, 2006).

The First Circuit Court of Appeals has held that since traditional principles of contract law govern arbitration agreements, an arbitration clause in an employee or policy handbook is binding on employees only if the employees can be deemed to have intentionally and voluntarily agreed to it. *Ramirez de Arellano v. American Airlines, Inc.*, 133 F.3d 89, 90-91 (1st Cir. 1997). The First Circuit held that the unilateral and adhesive nature of the employee handbook did not allow for such a finding. *Id.* However, the court did note the decision of another federal appeals court that the following arbitration clause, executed and removed from the handbook, was binding on employees:

IMPORTANT! Acknowledgment Form

I also understand that as a condition of my employment and continued employment, I agree to submit any complaints to the published process and agree to abide by and accept the final decision of the arbitration panel as ultimate resolution of my complaint(s) for any and all events that arise out of employment or termination of employment.

Id. at 91, citing *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997). While the employer in *Patterson* was careful to disclaim all other provisions of the handbook, the Eighth Circuit concluded that the language, tone, contractual terms and special treatment of the arbitration section made it a separate and distinct agreement by the employee. 113 F.3d at 835.

V. ORAL AGREEMENTS

A. Promissory Estoppel

The New Hampshire Supreme Court has ruled that continued service by an at-will employee can constitute consideration for a promise for improved employment terms. *Panto v. Moore Business Forms, Inc.* 130 N.H. 730, 736 (1980). Continued employment after alleged promises of an equity stake in the company was also found to be sufficient evidence of reliance to support a fraudulent misrepresentation claim. *Phillips v. Veraz Corp.*, 138 N.H. 240, 247 (1994). However, in *Donovan v. Castle Springs, LLC*, No. Civ.-01-413-M, 2002 WL 31906183 (D.N.H. Dec. 20, 2002), the federal district court, applying New Hampshire law, granted summary judgment for the employer on the plaintiff's claim that an offer of an annual salary and discussion of off-season hours constituted a promise of employment for a full year. *Id.* at *7.

B. Fraud

See Phillips v. Veraz Corp., 138 N.H. 240, 247 (1994), discussed above.

C. Statute of Frauds

The Statute of Frauds, N.H. REV. STAT. ANN. § 506:2, provides that an unwritten contract that cannot be fully performed within one year is unenforceable. The New Hampshire Supreme Court, however, has held that:

While an oral contract "not to be performed within one year from the time of making it," is unenforceable under the statute . . . it is settled law that a contract for personal services does not fall within the statute if performance could be completed within one year without breach by either party. Thus, the possibility of death of a party or legitimate termination, as here, removes the contract from the statute's requirements.

Ives v. Manchester Subaru, Inc., 498 A.2d 297, 300, 126 N.H. 796, 800 (1985) (citations omitted).

VI. DEFAMATION

A. General Rule

To prove defamation, New Hampshire law requires a private individual plaintiff to show that:

- (1) the defendant failed to exercise reasonable care in publishing,
- (2) without a valid privilege,
- (3) a false and defamatory statement of fact about the plaintiff,
- (4) to a third party.

Indep. Mech. Contractors, Inc. v. Gordon T. Burke & Sons, Inc., 635 A.2d 487, 492, 138 N.H. 110, 118 (1993). *See also Duchesnaye v. Munro Enters.*, 480 A.2d 123, 125-26, 125 N.H. 244,

250 (1984) (“liability in defamation actions has traditionally rested upon the defendant's intention to communicate the defamatory statement to someone other than the plaintiff, or at least upon negligent responsibility for such communication”).

The federal district court has had several occasions to consider defamation claims in the context of an employment relationship. *See, e.g., Moss v. Camp Pemigewasset, Inc.*, No. Civ-01-220-M, 2001 WL 1326674 at *3 (D.N.H. Oct. 10, 2001) (unpublished) (granting employer’s motion to dismiss on grounds that statements about reasons for plaintiff’s termination were either not defamatory, were substantially true or were statements of opinions) (*aff’d in part rev’d in part*, 312 F.3d 503, 512 (1st Cir. 2002)) (affirming summary judgment with respect to statement of opinion but reversing with respect to statements which could be proven to be false); *Straughn v. Delta Airlines*, 170 F.Supp.2d 133, 152 (D.N.H. 2000) (dismissing defamation claim against former employer on grounds that statements about reason for the plaintiff’s termination, if made, were substantially true); *Butler v. Hitchiner Mfg. Co.*, No. CV-96-624-JD, slip op. at 12 (D.N.H. Dec. 4, 1997) (unpublished) (recognizing cause of action arising out of false criticism made in front of co-workers); *Foster v. Gen. Elec. Co.*, No. CV-96-151-SD, slip op. at 6 (Sept. 2, 1998) (unpublished) (refusing to dismiss defamation suit based on statements made by General Electric to customers of its former employee about its decision to terminate his access to its premises).

1. Libel

See previous entry.

2. Slander

See previous entry.

B. References

The New Hampshire Supreme Court recently affirmed a lower court’s ruling that an employer’s allegedly defamatory statements could not form the basis of a former employee’s defamation suit because the statements were solicited by agents of the plaintiff. *Cluff-Landry v. Roman Catholic Bishop of Manchester*, 169 N.H. 670, 679 (2017). In *Cluff-Landry*, the plaintiff, was concerned the principal was giving her a bad reference when contacted by other schools, so she hired a company to do a reference check. *Id.* at 673. The principal told the reference company that plaintiff did not leave on good terms, did not get along with her peers, was put on a plan and her contract had not been renewed. *Id.* at 678. The Court, agreeing with decisions from other state and federal jurisdictions, concluded that the principal’s allegedly defamatory statements were invited by the plaintiff and therefore were not sufficient to support an action for defamation. *Id.* at 679.

Although the issue has not yet been addressed by the New Hampshire Supreme Court, other jurisdictions have imposed liability on a former employer for not providing pertinent information about a former employee to a prospective employer where the risk of injury to a third party was reasonably foreseeable. For example, a school district which dismisses a male teacher for inappropriate behavior with female students might be liable for not warning a second

school district of the basis for the teacher's dismissal. However, employers must still be cautious in making such disclosures since unnecessary and excessive dissemination will destroy the qualified privilege. *Jones v. Walsh*, 222 A.2d 830, 832, 107 N.H. 379, 380 (1966) (citation omitted).

C. Privileges

An employer does have a qualified privilege entitling it to communicate the reasons for an employee's discharge to other employees. *Robinson v. Caronia Corp.*, No. CV-92-306-B, slip op. at 4 (D.N.H. Jan. 4, 1996) (unpublished). See also *Caouette v. Office Max, Inc.*, 352 F. Supp. 2d 134, 143 (D.N.H. 2005) (applying qualified privilege to employee allegations of sexual harassment). Also, "a conditional privilege exists 'if the facts, although untrue, were published on lawful occasion, in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds,' [that the statements are true], provided that the statements are not made with actual malice." *Simpkins v. Snow*, 661 A.2d 772, 776-77, 139 N.H. 735, 741 (1995), quoting *Chagnon v. Union Leader Co.*, 174 A.2d 825, 833, 103 N.H. 426, 437 (1961).

Earlier cases explained that a statement may be "conditionally privileged when the circumstances induce a correct or reasonable belief that (a) facts exist which affect a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest." *Jones v. Walsh*, 222 A.2d at 832, 107 N.H. at 381 (1966), citing RESTATEMENT (SECOND) TORTS § 594. "However, to come within that privilege "the defamatory communication must be made to a person whose knowledge of the defamatory matter because of his social or legal duty or his interest thereto is likely to prove useful in the protection of that interest." *Id.* Further, a "privilege may be so far abused by an unnecessary and excessive publication that the immunity is lost." *Id.* at 832, 107 N.H. at 381 (citations omitted).

A privilege may also be lost if the plaintiff shows that the defendant acted "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Thomson v. Cash*, 402 A.2d 651, 655, 119 N.H. 371, 377 (1979), citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

The New Hampshire Supreme Court has held that public officials, acting in their official capacity, are entitled to absolute immunity for their comments made during a town meeting and regarding town matters. *Voebel v. Town of Bridgewater*, 747 A.2d 252, 253, 144 N.H. 599, 600 (2000) (citations omitted) (comments regarding dismissal of police chief).

D. Other Defenses

1. Truth

Straughn v. Delta Airlines, 170 F.Supp.2d 133 (D.N.H. 2000), recognized truth as a defense to a defamation claim arising in the employment context. *Id.* at 152.

2. No Publication

The United States District Court for the District of New Hampshire has considered the element of “publication” necessary in a constitutional deprivation of liberty claim, finding that circulating a termination letter among supervisors, but not to the public or prospective employers, was not sufficient dissemination to give rise to such a claim. *Marin v. Gonzales*, No. 05-DS-247-SM, 2005 WL 3464389 at *5 (D.N.H. Dec. 19, 2005).

3. Self-Publication

The federal court considered whether a cause of action for “compelled self-publication” was recognized in New Hampshire. *Slater v. Verizon Communications, Inc.*, No. Civ.-04-303-SM, 2005 WL 488676 at *8-*9 (D.N.H. Mar. 3, 2005). The plaintiff claimed that his former employer “effectively forced him to republish to potential employers the false and defamatory” reasons which the former employer stated as reasons for his termination. *Id.* The district court looked to decisions from Massachusetts and to the RESTATEMENT (SECOND) OF TORTS and concluded that the New Hampshire Supreme Court “would decline to adopt a self-defamation theory.” *Id.* at *9.

4. Invited Libel

See section VI B.

5. Opinion

Whether a statement is or implies a statement of fact, or is an opinion, is a question of law for the court. *Pease v. Telegraph Publ’g Co., Inc.*, 426 A.2d 463, 465, 121 N.H. 62, 65 (1981).

E. Job References and Blacklisting Statute

New Hampshire does not have a statute specifically prohibiting the blacklisting of an employee or in some way publishing the name of an employee for the purpose of preventing the employee from securing employment. However, the common law claims of defamation and interference with economic or contractual relations might be available to such an employee.

F. Non-Disparagement Clauses

There are no New Hampshire cases interpreting non-disparagement clauses.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

New Hampshire has recognized a cause of action for intentional infliction of emotional distress where the plaintiff alleges that the defendant engaged in extreme and outrageous conduct

which intentionally or recklessly caused severe emotional distress. *Morancy v. Morancy*, 593 A.2d 1158, 1159, 134 N.H. 493, 495-96 (1991). However, termination alone is insufficient to support a claim for intentional infliction of emotional distress. *Konefal v. Hollis/Brookline Co-op Sch. Dist.*, 723 A.2d 30, 33, 143 N.H. 256, 260 (1998).

The New Hampshire Workers' Compensation Statute, N.H. REV. STAT. ANN. § 281-A:8, however, bars all common law actions by an employee against the employer for personal injuries resulting from negligent or intentional acts arising out of and in the course of employment. The U.S. District Court for the District of New Hampshire has held that a claim for intentional infliction of emotional distress, occasioned solely by reason of discharge, falls within the statutory definition of "personal injury" arising out of the employment relationship, and is therefore barred by the Workers' Compensation Statute. *See Kopf v. Chloride Power*, 882 F.Supp. 1183, 1191 (D.N.H. 1995), *overruled on other grounds Weners v. Great State Bevs.*, 663 A.2d 623, 625, 140 N.H. 100, 103, *as recognized by Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 429 n.11 (1st Cir. 1996)); *Censullo v. Brenka Video, Inc.*, 989 F.2d 40,43 (1st Cir. 1993); *Godfrey v. Perkin-Elmer Corp.*, 794 F.Supp. 1179, 1187 n.8 (D.N.H. 1992), *overruled on other grounds Weners*, 663 A.2d at 625, 140 N.H. at 103; *Bourque v. Town of Bow*, 736 F.Supp. 398, 403-04 (D.N.H. 1990); *Brewer v. K.W. Thompson Tool Co.*, 647 F.Supp. 1562, 1566 (D.N.H. 1986). *But see Yale v. Town of Allenstown*, 969 F.Supp. 798, 800 (D.N.H. 1997) (holding that an intentional infliction of emotional distress claim can be asserted against a co-employee).

The state workers' compensation statute, however, was amended, effective August 10, 2001, to specifically exclude "mental injury" arising out of "disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action, taken in good faith by an employer." N.H. REV. STAT. ANN. § 281-A:2(XI). Thus, it would appear that claims for emotional distress resulting from such actions will no longer be barred by the Workers' Compensation Statute. *See Karch v. BayBank FSB*, 794 A.2d 763, 770, 147 N.H. 525, 530 (2002).

The New Hampshire law also does not bar actions against individual officers, directors or co-workers based on intentional torts. N.H. REV. STAT. ANN. § 281-A:8(I)(b). *See also Karch*, 794 A.2d at 770,147 N.H. at 531. In *Karch*, the New Hampshire Supreme Court held that the plaintiff's allegations that a bank vice president had invaded her privacy, threatened, intimidated and retaliated against her, abused a position of power and threatened to monitor plaintiff's conversations and discipline her without a legal right to do so, were sufficient to state a claim for intentional infliction of emotional distress. *Id.* at 770-71, 147 N.H. at 531.

B. Negligent Infliction of Emotional Distress

As stated above, the New Hampshire Workers' Compensation Statute, N.H. REV. STAT. ANN. § 281-A:8, bars all common law actions by an employee against the employer based on negligence. However, given the recent amendment which excludes most mental injuries from coverage under the statute, it is likely that claims of negligent infliction of emotional distress relating to those specific types of employment actions (discipline, evaluation, termination, etc.) will be actionable.

VIII. PRIVACY RIGHTS

A. Generally

While the New Hampshire Constitution does not contain an express provision for the right to privacy, New Hampshire common law has recognized the tort of invasion of privacy. The courts have recognized claims based on intrusion upon the plaintiff's physical and mental solitude or seclusion, and public disclosure of private facts. *Fisher v. Hooper*, 732 A.2d 396, 400, 143 N.H. 585, 589 (1999); *Hamberger v. Eastman*, 206 A.2d 239, 241, 106 N.H. 107, 110-11 (1964).

O'Brien v. Papa Gino's of Am., Inc., 780 F.2d 1067 (1st Cir. 1986), was the first New Hampshire case that directly addressed privacy in the workplace but it was decided in the federal, not state, courts. An employee was suspected of off-duty drug use and was subjected to a polygraph test where the questions concerned his off-duty behavior. *Id.* at 1070. The First Circuit Court of Appeals upheld a jury verdict finding that the polygraph test would be highly offensive to a reasonable person and was invasive of plaintiff's privacy. *Id.* at 1072. The court rejected defendant's argument that the employee had contracted away his right to privacy and consented to any investigative techniques by virtue of a company personnel manual which prohibited drug use by employees. *Id.* The court also held that even if that were true, the offensiveness of the testing would far exceed any implied consent. *Id.*

The New Hampshire Supreme Court has considered claims of intrusion upon physical and mental solitude and public disclosure in the context of an employer's alleged unlawful wiretapping and eavesdropping. In *Karch v. BayBank FSB*, 794 A.2d 763, 147 N.H. 525 (2002), the plaintiff, a bank employee, was disciplined after a telephone conversation between she and her friend, a co-worker, in which they discussed bank business was overheard by two unnamed defendants ("John and Jane Doe") who reported it to a bank vice president, Defendant Gordon. *Id.* at 768-69, 147 N.H. at 528. The plaintiff claimed that after she hired an attorney to challenge the discipline, her work environment became pervasively hostile. *Id.* at 769, 147 N.H. at 529. She eventually resigned following a medical leave due to stress. *Id.* Although the court noted that a claim of intrusion upon physical and mental solitude could not lie against Defendant Gordon, because there was no allegation that Gordon had intruded as she did not engage in the alleged eavesdropping, the court held that the allegation Gordon had "willfully disclosed and shared the contents of the plaintiff's communication to and with . . . other BayBank FSB employees and/or officers" was sufficient to state a cause of action for invasion of privacy based on public disclosure. *Id.* at 774, 147 N.H. at 536.

B. New Hire Processing

1. Eligibility Verification and Reporting Procedures

New Hampshire law requires employers to obtain and maintain such documentation of eligibility to work in the United States as is required by federal law. N.H. REV. STAT. ANN. § 275-A:4-a. Abiding by the duties imposed by federal law could not reasonably result in

employer liability under any invasion of privacy theory. *See, e.g.* N.H. REV. STAT. ANN. § 275-A:4-b,II (providing that an employer who receives verification of employment eligibility from Social Security Administration, E-Verify or other reputable organization will be deemed to have used reasonable care and will have an affirmative defense to a cause of action for misuse of an individual's social security number).

Employers must report all new hires to the New Hampshire Department of Employment Security within 20 days. N.H. REV. STAT. ANN. § 282-A:117-a (4)(a). The mandatory report must state the new hire's full name, date of birth, social security number, and first date of work, in addition to information concerning the employer. *Id.*

2. Background Checks

Employers in New Hampshire may conduct background checks and drug screening prior to extending an offer of employment to a prospective worker. The only statutory limitation is that an employer, other than a law enforcement agency, may not inquire about previously annulled criminal charges or convictions. N.H. REV. STAT. ANN. §651:5, X(f). Certain employers are required to conduct criminal background checks on prospective employees. *See, e.g.*, N.H. REV. STAT. ANN. § 189:13-a (public school districts) and N.H. REV. STAT. ANN. § 151:2-d (health care facilities).

C. Other Specific Issues

1. Workplace Searches

While federal constitutional restrictions only apply to government employers, New Hampshire case law, including *O'Brien v. Papa Gino's of Am., Inc.*, 780 F.2d 1067 (1st Cir. 1986), seems to place restrictions on employee searches by private, as well as public employers. *See Rossi v. Town of Pelham*, 35 F.Supp.2d 58, 64 (D.N.H. 1997) (holding that town clerk had reasonable expectation of privacy in her office at the town hall which was violated by warrantless search by police). The employer's reason for the search must outweigh the compelling interests of the employee's expectation of privacy. The employer also must show that it has reasonable grounds for believing that the search will reveal work-related misconduct, and that the methods utilized are reasonably related to the objectives and not overly intrusive, given the nature of the misconduct. *See* Section VIII. A above.

2. Electronic Monitoring

While the federal Electronic Communications Privacy Act of 1986 (18 U.S.C. §2510 *et seq.*) allows interception of wire, oral and electronic communications if one of the parties to the conversation has given prior consent, New Hampshire statutes generally require consent from all parties. *Compare*, 18 U.S.C. § 2511(2)(d) (2000) *with* N.H. REV. STAT. ANN. §§ 570-A, 644:9 (2000, 2007). Also, New Hampshire law does not recognize an exception based merely on the fact that the equipment is used in the ordinary course of the employer's business. Therefore, an

employer can only limit possible liability for invading the privacy of employees by advising them that communications are subject to monitoring.

3. Social Media

New Hampshire Revised Statutes Annotated 275:73-:75 were enacted in 2014, and provide for civil penalties if employers: "Request or require that an employee or prospective employee disclose login information for accessing any personal [social media] account or service through an electronic device," or "request or require that an employee or applicant add anyone, including the employer or employer's agent, to a list of contacts associated with an electronic mail account or personal [social media account] or require an employee or applicant to reduce the privacy settings associated with any electronic mail or personal [social media] account that would affect a third party's ability to view the contents of the account," or "take or threaten to take disciplinary action against any employee for such employee's refusal to comply with a request or demand" that violates the statute. N.H. REV. STAT. ANN. § 275:74 I-III (2014).

4. Taping of Employees

See paragraph 2, above.

5. Release of Personal Information on Employees

Although there is no case-law directly on-point, various courts have held that New Hampshire employees do have a privacy interest in their personnel records. *Kassel v. United States Veterans' Administration*, 709 F. Supp. 1195, 1199 (D.N.H. 1989) (decided under federal Freedom of Information Act, 5 U.S.C. § 552a(b) (1988)). It has been noted that "it would certainly be an invasion of privacy to publish the salary of a person not a public employee." *Mans v. Lebanon School Bd.*, 112 N.H. 160, 165, 290 A.2d 866, 869 (1972) (Grimes, J., dissenting). Employers in New Hampshire are well-advised to take pains to preserve the confidentiality of all non-public information about their employees.

6. Medical Information

Communications between a physician and patient are privileged and confidential under New Hampshire law. N.H. REV. STAT. ANN. § 329:26; *see also* N.H. REV. STAT. ANN. § 330-A:19 (psychological treatment). Thus, employers will not be able to access medical and psychological treatment records of employees or prospective employees without their prior written authorization. Employers that do access such records must take care to preserve their confidentiality and prevent unwarranted disclosure. In particular, N.H. REV. STAT. ANN. § 141-F prohibits unauthorized disclosure of the identity of persons infected with HIV and requires that all HIV testing records be maintained as confidential and protected from inadvertent or unwarranted intrusion. Similarly, N.H. REV. STAT. ANN. § 141-H severely limits and, in most circumstances, prohibits employers from obtaining or using employees' genetic testing information. New Hampshire law also requires that "health, fitness, lifestyle and other information" obtained by an employer in connection with health risk assessments or wellness programs must not be maintained in personnel files. N.H. REV. STAT. ANN. §275:56(IV).

7. Restrictions on Requesting Salary History

N.H. REV. STAT. ANN. § 275:38-a I(b) makes it unlawful to discharge or otherwise discriminate against any employee who “inquired about, discussed, or disclosed his or her wages or those of another employee.”

IX. WORKPLACE SAFETY

A. Negligent Hiring/Supervision

New Hampshire has recognized a cause of action against an employer for negligently hiring or retaining an employee whom the employer knew or should have known was unfit for the job so as to create a danger of harm to third parties. *Marquay v. Eno*, 662 A.2d 272, 280, 139 N.H. 708, 718 (1995), citing *Cutter v. Town of Farmington*, 498 A.2d 316, 320, 126 N.H. 836, 840-41 (1985).

In *Dupont v. Aavid Thermal Techs., Inc.*, 798 A.2d 587, 147 N.H. 706 (2002), the New Hampshire Supreme Court held that an employer owes its employees a duty to protect them from imminent danger of harm which is known to the employer or to management level employees. *Id.* at 594, 147 N.H. at 714. In *Dupont*, the plaintiff’s decedent was shot and killed by a co-worker in the parking lot of his employer’s facility. *Id.* at 589, 147 N.H. at 708. The court found that the facts alleged by the plaintiff were sufficient to put the employer on notice of the imminent danger of harm. *Id.* at 594, 147 N.H. at 714. In particular, the plaintiff alleged that the supervisors knew that the co-worker was armed and agitated, and that there was a prior history of similar incidents in the workplace. *Id.* at 589, 147 N.H. at 708. In fact, it was alleged that the supervisors escorted the two employees out of the building and into the parking lot and observed their conversation becoming more heated. *Id.*

The court specifically declined to express any opinion as to whether the claims may be barred by the New Hampshire Workers’ compensation statute since that was not argued on appeal. *Id.* at 594, 147 N.H. at 714.

B. Negligent Supervision/Retention

New Hampshire recognizes a cause of action for negligent supervision or retention. *See Exeter Hosp. v. N.H. Ins. Guaranty Assoc.*, 158 N.H. 400, 405, 965 A.2d 1159 (2009). Such causes of action are simply a reformulation of a standard claim for negligence, requiring proof of a duty, breach, causation and damages. *Tessier v. Rockefeller*, 162 N.H. 324, 342, 33 A.3d 1118, 1133 (2011).

C. Interplay with Worker’s Comp. Bar

The New Hampshire Supreme Court has not addressed the interplay between the Workers’ Compensation bar and negligent hiring, training, supervision or retention claims. *See Dupont*, 798 A.2d at 594, 147 N.H. at 714. However, the plain language of the statute suggests

that injuries caused by the negligent hiring, training or retention of a fellow employee would only be compensable under the Workers' Compensation scheme. *See* N.H. REV. STAT. ANN. § 281-A:8 (2001) (“An employee of an employer subject to this chapter shall be conclusively presumed to have...waived all rights of action ... [e]xcept for intentional torts, against any officer, director, agent, servant or employee acting on behalf of the employer.”)

D. Firearms in the Workplace

New Hampshire law does not prohibit the carrying of firearms in the workplace, and as of February 2017, New Hampshire citizens are permitted to carry loaded and concealed guns without a license. N.H. REV. STAT. ANN. § 159:6. Federal law prohibits carrying firearms or other dangerous weapons in some workplaces, such as federal “facilities,” 18 U.S.C. § 930, and schools. 18 U.S.C. § 922(q). There is no reason that private employers cannot prohibit firearms in the workplace in New Hampshire.

E. Use of Mobile Devices

There is no statute or case law in New Hampshire defining the scope of an employer's liability for an employee's negligent acts while using a cellular phone or other mobile devices. Because the negligent use of a cellular phone while driving can expose individuals to criminal sanctions, it seems likely that an employee's negligent use of a mobile device in the scope of employment could expose employers to vicarious liability claims. *See State v. Dion*, 62 A.3d 792, 796, 164 N.H. 544, 549 (2013) (upholding negligent homicide conviction based on distraction caused by cellular phone use, notwithstanding lawfulness of such use).

X. TORT LIABILITY

A. Respondeat Superior Liability

An employer in New Hampshire can be held derivatively liable for the negligence of an employee if the employee's acts are 1) of the kind the employee is engaged to perform; 2) they occur substantially within the time and space limits set by the employer; and 3) they are actuated, at least in part, by a purpose to serve the employer. *Porter v. City of Manchester*, 849 A.2d 103, 115, 151 N.H. 30, 40 (2004). Of course, an agency relationship must exist before respondeat superior liability can attach. To determine if such a relationship exists, New Hampshire courts look at the totality of the circumstances, examining a long list of factors to make that determination. Those factors are:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;

- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Porter v. City of Manchester, 921 A.2d 393, 398-99, 155 N.H. 149, 154 (2007) (“*Porter II*”). In *Porter II*, one of the central issues was whether or not the acts of an elected city official could give rise to derivative liability against the City. *Id.* at 398, 155 N.H. at 154. Because the elected official took directions from the city’s mayor, drew a regular paycheck, and ran a city department for more than a “short” time, the New Hampshire Supreme Court held it was not error for the trial court to deny the City’s motion for summary judgment.

Respondeat superior liability is widely available under New Hampshire law, and has been approved for such diverse theories of recovery as negligent misrepresentation in the provision of legal services, *Tessier v. Rockerfeller*, 33 A.3d 1118, 1132, 162 N.H. 324, 342 (2011), retaliation, *Porter II*, 921 A.2d at 393, 155 N.H. at 152, and, of course, negligence. *Trahan-LaRoche v. Lockheed Sanders*, 657 A.2d 417, 419, 139 N.H. 483, 486 (1995).

B. Tortious Interference with Business/Contractual Relations

In addition to defamation, an employee may claim that the employer or former employer, by making a statement, tortiously interfered with the employee's economic or contractual relations.

New Hampshire recognizes a cause of action for tortious interference with economic or contractual relations. See *Roberts v. General Motors Corp.*, 643 A.2d 956, 961, 138 N.H. 532, 539 (1994); *Montrone v. Maxfield*, 449 A.2d 1216, 1218, 122 N.H. 724, 726 (1982). To maintain such a claim, a plaintiff must show that: (1) he had an economic relationship with a third party; (2) the defendant knew of this relationship; (3) the defendant intentionally and

improperly interfered with this relationship; and (4) he was damaged by such interference. *Demetracopoulos v. Wilson*, 640 A.2d 279, 280-81, 138 N.H. 371, 375 (1994).

In *Griswold v. Heat Inc.*, 229 A.2d 183, 108 N.H. 119 (1967), an accountant sought damages from a corporate director and officer for, inter alia, interference with the accountant's contractual relations with the corporation. *Id.* at 187, 1078 N.H. at 124-25. The court held that the general principle of tort law governing this issue is the following: "one who, without a privilege to do so, induces or otherwise purposely causes a third person not to perform a contract with another is liable to the other for the harm caused thereby." *Id.* (citation omitted). However, the court recognized that the defendant's interference may be privileged, defeating the action. *Id.* Officers, directors or stockholders who have an interest in the activities of a corporation or the duty to advise or direct such activities are held immune from liability in an action for inducing the corporation to breach its contract if the predominant purpose underlying their action is the pursuit in good faith of the best interest of the corporation. *Id.* (citation omitted). *See also O'Neil v. Valley Reg'l Hosp.*, No. 00-441-JD, 2001 WL 276968 at *3 (D.N.H. Mar. 21, 2001) (dismissing claim of intentional interference with employment relationship where plaintiff alleged that supervisor was acting in the scope of his employment in his effort to force plaintiff from her position).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

The New Hampshire Supreme Court has consistently looked with disfavor on restrictive covenants and non-competition provisions. In 2005, the court decided the case of *Merrimack Valley Wood Prods., Inc. v. Near*, 876 A.2d 757, 152 N.H. 192 (2005), and upheld a trial court's refusal to enforce a restrictive covenant contained in an outside sales agreement. *Id.* at 764, 152 N.H. at 200. The court held that in order to be reasonable and enforceable, any restrictive covenant in an employment agreement must:

- a) Be no greater than necessary for the protection of the employer's legitimate interest (with regard to geographic area, duration, and activities);
- b) Not impose undue hardship on the employee; and
- c) Not be injurious to the public interest.

Id. at 762, 152 N.H. at 197, (citing *Tech. Aid Corp. v. Allen*, 591 A.2d 262, 265-66, 134 N.H. 1, 8 (1991)).

The court found the restrictive covenant in *Merrimack Valley* to be overly broad in that it sought to keep the employee from doing business with all of the employer's customers, even though the employee only had contact with a small percentage of those customers. *Id.* at 764, 152 N.H. at 200. *See also Syncom Indus., Inc. v. Wood*, 920 A.2d 1178, 1186, 155 N.H. 73, 81 (2007) (finding restrictive covenant overly broad and unenforceable where it extended to all customers, including those with whom the employee had no contact). *Cf. ACAS Acquisitions*,

Inc. v. Hobert, 923 A.2d 1076, 1087-88, 155 N.H. 381, 393 (2007) (enforcing restrictive covenant where employee had contact with many customers and potential customers and had access to all customer information).

In an earlier case, the court had enforced a covenant against a doctor, but only as to former patients of the employer with whom the doctor had had actual contact. *Concord Orthopaedics Prof'l Ass'n. v. Forbes*, 702 A.2d 1273, 1276, 142 N.H. 440, 443 (1997). However, the court has refused to enforce a restrictive covenant contained in employment contracts between a temporary employment agency and its employees, since the employees did not have access to confidential information, trade secrets or good will and thus, the restrictive covenants were not aimed at protecting any legitimate interest on the part of the employer. *Nat'l Employment Serv. Corp. v. Olsten Staffing Serv., Inc.*, 761 A.2d 401, 405, 145 N.H. 158, 161 (2000).

In 2012, the legislature adopted a provision which requires that any non-compete or non-piracy agreements be provided to prospective employees either prior to or concurrent with a job offer. Failure to do so renders the restriction void and unenforceable. N.H. REV. STAT. ANN. § 275:70. In 2016, the legislature eliminated any future non-compete agreements for physicians. N.H. REV. STAT. ANN. § 329:31-a. This prohibition only affects agreements that postdate August 5, 2016; physician noncompete agreements entered into prior to this date will remain enforceable according to the rule of *Concord Orthopaedics*, discussed above.

Although New Hampshire Courts do look with disfavor on restrictive covenants, where such covenants are negotiated as part of a sale of business, they may be more liberally interpreted. In *Centorr-Vacuum Indus., Inc. v. Lavoie*, 609 A.2d 1213, 135 N.H. 651 (1992), the New Hampshire Supreme Court remanded the case for a determination of whether the defendant had breached the covenant which prohibited "indirect" competition by loaning money to family members to start a competitive business. *Id.* at 1215, 135 N.H. at 654.

B. Blue Pencil

The decision in *Concord Orthopaedics Prof'l Ass'n v. Forbes*, 702 A.2d 1273, 142 N.H. 440 (1997), demonstrated the court's power to modify the parameters of a restrictive covenant to render it reasonable and enforceable, rather than throw out the entire provision. *See id.* at 1276, 142 N.H. at 443; *Smith, Bachelder & Rugg v. Foster*, 406 A.2d 1310, 1311, 119 N.H. 679, 682 (1979); *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1471 (1st Cir. 1992). In *Syncom Indus. v. Wood*, 920 A.2d 1178, 1187, 155 N.H. 73, 81 (2007), the court remanded to the trial court to determine whether reformation was appropriate.

However, in *Merrimack Valley Wood Products, Inc. v. Near*, 876 A.2d 757, 152 N.H. 192 (2005), the court refused to modify the terms of the covenant on the grounds that the employer had acted in bad faith by not discussing the terms of a restrictive covenant until six months after the defendant had begun his employment and making his continued employment contingent upon his execution of the agreement. *Id.* at 764-45, 152 N.H. at 200-01.

The U.S. District Court for the District of New Hampshire applied the principle described in *Merrimack Valley* and refused to issue an injunction with respect to a non-compete agreement that extended for three years and covered a geographic region where the employer did not even have customers. Declining to reform the time and geographic restrictions, the court held that the employer did not meet its burden of showing that it had acted in good faith in executing the agreement. *Maddog Software, Inc. v. Sklader*, 382 F.Supp.2d 268, 283-84 (D.N.H. 2005).

C. Confidentiality Agreements

The New Hampshire Supreme Court has recognized the validity of confidentiality or nondisclosure agreements. The court applied the same three prong test used for non-competition agreements to a non-disclosure agreement. *ACAS Acquisitions, Inc. v. Hobert*, 923 A.2d 1076, 1084, 155 N.H. 381, 389 (2007). The court had no difficulty finding that an employer has a legitimate interest in protecting its good will by prohibiting employees from disclosing its trade secrets and proprietary or confidential information. *See id.* The court also concluded that such restriction did not impose an undue hardship on the employee nor was injurious to the public since it only applied to the employer's proprietary information, not to information in the public domain. *Id.* at 1088-89, 155 N.H. at 394. In *Syncom Indus., Inc. v. Wood*, 920 A.2d 1178, 155 N.H. 73 (2007), while the court found the non-competition provision of the restrictive covenant to be overly broad and unenforceable, it nonetheless upheld the trial court's ruling that the defendant had violated the non-disclosure portion of the same covenant by taking customer lists, data bases, policies, pricing, etc. from the employer and disclosing it to his future employer. *Id.* at 1185, 155 N.H. at 79.

D. Trade Secrets Statute

New Hampshire has adopted the Uniform Trade Secrets Act, N.H. REV. STAT. ANN. § 350-B, which protects a business's interests in information that derives independent economic value from not being generally known or readily ascertainable by other persons, or is the subject of reasonable efforts to maintain its secrecy. This statute lends credence to an employer's attempts to restrict former employees from appropriating such assets since they are legitimately property of the employer. *See Concord Orthopaedics Prof'l Ass'n. v. Forbes*, 702 A.2d 1273, 1276, 142 N.H. 440, 443 (1997).

E. Fiduciary Duty and Other Considerations

An employee may be held liable for breaching the fiduciary obligation owed her or his employer under New Hampshire law. Although such claims are independent of contractual claims based on non-compete agreements, non-solicitation agreements, and statutory claims, such as appropriation of trade secrets, they require a similar showing. *ACAS Acquisitions, Inc. v. Hobert*, 923 A.2d 1076, 1092, 155 N.H. 381, 398 (2007).

XII. DRUG TESTING LAWS

A. Public Employers

New Hampshire does not have a statute which specifically addresses the topic of drug testing, therefore, employers may test an employee for drug use, refuse to hire, or fire an employee who tests positive or refuses to be tested. However, without the guidance of a statute, employers risk legal challenge in the courts on the methods and reasonableness of the testing. Once again the effect of *O'Brien v. Papa Gino's of Am., Inc.*, 780 F.2d 1067, 1070-72 (1st Cir. 1986), discussed above in Section VII.A., must be considered.

B. Private Employers

See discussion above.

XIII. STATE ANTI-DISCRIMINATION STATUTES

A. Employers/Employees Covered

New Hampshire's Law Against Discrimination, N.H. REV. STAT. ANN. § 354-A, applies to all private New Hampshire employers with six or more employees, to labor organizations, and to all state and local governmental employers. Non-profit social clubs and fraternal, charitable, educational and religious organizations are excluded from the statute.

B. Types of Conduct Prohibited

N.H. REV. STAT. ANN. § 354-A:7 prohibits employers from refusing to hire, from discharging, and from discriminating against any individual in compensation or in terms, conditions, or privileges of employment, because of the individual's age (over 18), race, color, national origin, religion, physical or mental disability, sex, gender identity, sexual orientation or marital status, unless such action is based upon a bona fide occupational qualification. *Id.* Employers are also prohibited from using advertisements or making pre-employment inquiries which express, directly or indirectly, any limitation, specification, or discrimination on the basis of any of the above characteristics. *Id.* at § (II). Employers are required to permit leaves of absence for the period of temporary disability associated with pregnancy and childbirth. *Id.* at § (VI). Finally, employers are prohibited from discharging or retaliating against an employee who opposes unlawful practices or testifies in proceedings under the law. *Id.* § 354-A:11.

N.H. REV. STAT. ANN. § 275:36 *et seq.* requires employers to pay men and women the same wage rate for equal work or work on the same operations. Employers who violate the statute may be subject to criminal penalties and liability for double the employee's unpaid wages. *Id.* Employees may file in state court within one year of any alleged violation. *Id.*

N.H. REV. STAT. ANN. § 275:37-a prohibits discrimination in employment against smokers, provided the employee or applicant complies with workplace policies regarding smoking.

C. Administrative Requirements

As initially enacted, N.H. REV. STAT. ANN. § 354-A did not provide any private right of action and employees aggrieved by unlawful discriminatory practices were limited to the administrative proceeding, subject to judicial review. The statute was amended in 2000, however, to provide parties with the opportunity for a jury trial in superior court. *Id.* at §354-A:21-a. An aggrieved employee must still file a complaint with the New Hampshire Commission for Human Rights within 180 days of the alleged discriminatory act and must then allow the Commission 180 days to investigate before the matter can be removed to superior court. The Commission may investigate complaints, hold public hearings and make findings.

An aggrieved employee may also file a charge with the EEOC within 300 days from the date of the alleged act or within 30 days from receipt of notice of termination of proceedings by the Commission, whichever occurs earlier; most plaintiffs file concurrently with the New Hampshire Commission and the EEOC.

D. Remedies Available

If the Commission finds a violation, it may order hiring, reinstatement, promotion, payment of back pay, attorney's fees, administrative fines, or compensatory damages. N.H. REV. STAT. ANN. §354-A:21, II (d). Compensatory damages may include future losses, mental anguish, pain and suffering, and loss of enjoyment of life, and are neither limited in amount (unlike under federal law) nor limited to cases of intentional discrimination. Punitive damages, however, are not authorized under New Hampshire law even though they may be available under federal statutes.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No employee may be discharged for serving on jury duty. N.H. REV. STAT. ANN. § 500-A:14. Violation of the law constitutes contempt of court, and subjects an employer to a civil suit by the employee for recovery of lost wages, reinstatement, and attorney fees. In addition, the Crime Victim Employment Act, N.H. REV. STAT. ANN. § 275:62, entitles employees who have been victims of crimes to time off from work without pay to attend court or other legal or investigative proceedings.

B. Voting

There are no statutes or cases respecting employee leave for voting in New Hampshire.

C. Family/Medical Leave

There are no statutes or cases respecting state family/medical leave in New Hampshire. However, N.H. REV. STAT. ANN. § 354-A:7(VI) does require leave for pregnancy, childbirth and related medical conditions.

D. Pregnancy/Maternity/Paternity Leave

New Hampshire employers with six or more employees are required to provide leave for any period of temporary disability caused by pregnancy, childbirth, or related medical conditions. N.H. REV. STAT. ANN. 354-A:7, VI. There is no additional statutory provision for maternity or paternity leave. Although employers are not required to provide any leave beyond that provided for other temporary disabilities, if an employer offers leave for the purpose of child-rearing, that leave must be available to both genders. *See* N.H. REV. STAT. ANN. 354-A:6.

E. Day of Rest Statutes

New Hampshire prohibits work on Sundays, unless the employee is given 24 consecutive hours off in the ensuing six days. Employers are required to post in a conspicuous place if Sunday work is required and to designate the employees who are subject to Sunday work and the alternative day of rest. N.H. REV. STAT. ANN. §§ 275:32-33.

F. Military Leave

N.H. REV. STAT. ANN. § 112:9 requires military leave for certain public employees and N.H. REV. STAT. ANN. § 112:12 encourages such leave for private employees.

G. Sick Leave

There are no statutes or cases that require private employers to grant their employees sick leave in New Hampshire. Public employees' sick leave is provided for in N.H. Admin Rules Per. Sec. 1203.

H. Domestic Violence Leave

There are no statutes or cases requiring employers to provide a leave of absence for a victim of domestic violence. However, an employee's status as a victim of domestic violence, harassment, sexual assault, or stalking is a protected class under New Hampshire law. N.H. REV. STAT. ANN. § 275:71.

I. Other Leave Laws

Employers with 25 or more employees must provide an employee who is a victim of a crime, or whose family member is the victim of a crime, with unpaid leave from work to allow the employee to attend court and other legal or investigative proceedings. N.H. REV. STAT. ANN. § 275:62. An employer is not required to compensate an employee on crime victim leave, however, the employee may use his or her accrued paid time off. *Id.*

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in New Hampshire

The federal minimum wage law controls in New Hampshire, and so minimum wage is set at \$7.25. N.H. REV. STAT. ANN. § 279:21. There is currently active legislation proposing a state minimum wage and providing for adjustments over the following three years.

B. Deductions from Pay

New Hampshire law allows deductions without a signed agreement from the employee only in the case of deductions the employer is required or empowered to make under state law. These deductions include payroll taxes. N.H. REV. STAT. ANN. § 275:48, I. There is an enumerated list of other deductions an employer may make so long as the employee has agreed to them in writing. N.H. REV. STAT. ANN. § 275:48, I(b). Other deductions are allowed for medical care or services, *id.* at § (c), or for reimbursement of various employer-paid benefits. *Id.* at §§ (d)-(e).

C. Overtime Rules

New Hampshire has essentially adopted the federal Fair Labor Standards Act (“FLSA”) overtime rules. N.H. REV. STAT. ANN. § 279:21, VIII. Thus, workers not exempt under the FLSA must be paid time and a half for all hours worked in excess of 40. As under the FLSA, this rule does not apply to seasonal, recreational or amusement employees of an establishment that does not operate for more than 7 months in any calendar year, or that derives more than 75 percent of its annual income from six or fewer months of operations in any calendar year. *Id.*

The only departure from the FLSA is that New Hampshire employers may not use the “fluctuating workweek” method of overtime payment, as allowed by federal regulation. *Id.* (*citing* 29 C.F.R. § 778.114). In addition, “salaried” employees must receive their full salary for any *pay period* in which work is performed, while the FLSA only requires payment of full salary for the work week. N.H. REV. STAT. ANN. § 275:43-b.

D. Time for Payment Upon Termination

Whenever an employer discharges an employee, the employer shall pay the employee's wages in full within 72 hours. N.H. REV. STAT. ANN. § 274:44, I (1967). Where an employee resigns, wages must be paid no later than the next regular payday. *Id.* at § II. Where an employee resigns with at least one pay period's notice, however, all wages are due within 72 hours of separation. *Id.* Willfully failing to pay the final wages due an employee in these time periods will result in liquidated damages of ten percent of the total amount due per day for each day the wages are overdue, exclusive of Sundays and legal holidays. *Id.* at § III. These liquidated damages are capped at an amount equal to the final wages due. *Id.*

E. Breaks and Meal Periods

Employers must grant a 30 minute break to any employee who works more than five consecutive hours unless it is feasible for the employee to eat during the performance of his/her work, and the employer permits him/her to do so. N.H. REV. STAT. ANN. § 275:30-a. This 30 minute meal period is not required to be paid. However, if an employee's meal period is

interrupted by work, or is less than 25 minutes, it must be paid. There is currently no legal requirement for private employers to provide rest breaks, however, state employees are entitled to paid 15 minute rest periods that are to be taken insofar as practicable in the middle of each four-hour period of working time. N.H. Amin. Rules, Per 1201.02.

F. Employee Scheduling Laws

On any day an employee reports to work at an employer's request, he or she shall be paid not less than 2 hours pay at the employee's regular rate of pay. N.H. REV. STAT. ANN. § 275:43-a. There is an exception if the employer makes a good faith effort to inform the employee not to report to work. *Id.*

Employees 16 and 17 years old may not work more than 8 hours in any 24 hours, no more than six consecutive days, and no more than 30 hours a week while in school or no more than 48 hours a week during school vacations. Students with a four-day week of school may work up to six consecutive days and 40 ¼ hours. Students with a school week less than four days may work up to 48 hours. Anyone under the age of 16 may not work earlier than 7:00 a.m. or later than 9:00 p.m., no more than 3 hours per day on school days and no more than 23 hours per week during school weeks. On non-school days, they may work 8 hours a day and during vacations, they may work 48 hours per week. N.H. REV. STAT. ANN. § 276-A:4.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT

1. PRACTICES

A. Smoking in the Workplace

Smoking in enclosed workspaces is forbidden under New Hampshire law. N.H. REV. STAT. ANN. § 155:66. In some workplaces, *e.g.*, public educational facilities, hospitals, and restaurants, smoking is forbidden entirely. *Id.* at § I. In others, smoking may be permitted in an enclosed space that can be "effectively segregated." *Id.* at § II. "Effectively segregated" means that a designated smoking area has been established with due regard to employee preference, designed so that smoke does not cause harm or unreasonably intrude into non-smoking areas, and are reasonably proximate to exhaust vents if the building has a ventilation system. N.H. REV. STAT. ANN. § 155:65, V (2007).

Specific written policies must be in place with respect to smoking policies, and must be provided to all employees. N.H. REV. STAT. ANN. § 155:68 (1991). In addition to policies concerning smoking in enclosed spaces, New Hampshire employers have the option of creating an entirely smoke-free campus, including non-enclosed spaces. Although New Hampshire forbids discrimination in employment based on tobacco use, that law only applies to tobacco use "outside the course of employment." N.H. REV. STAT. ANN. § 275:37-a.

B. Health Benefit Mandates for Employers

New Hampshire law does not impose any health benefit mandate on employers. The only mandate for employers in New Hampshire to provide healthcare benefits is the federal Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)).

C. Immigration Laws

New Hampshire law prohibits an employer from hiring an employee without obtaining documentation showing the employee’s eligibility to work in the United States. N.H. REV. STAT. ANN. § 275:A-4-a.

D. Right to Work Laws

New Hampshire’s legislature has not enacted a “Right to Work” statute despite several efforts to do so. *E.g.* 2011 House Bill No. 474 (vetoed by Governor Lynch on May 11, 2011). Most recently, the New Hampshire House defeated a bill in 2017 that was passed by the State Senate and supported by the Governor.

E. Lawful Off-duty Conduct (Including Lawful Marijuana Use)

Although New Hampshire does permit the therapeutic use of cannabis under certain conditions, the statute enabling such use makes clear that it does not require "any accommodation of the therapeutic use of cannabis on the property or premises of any place of employment[,]" and also that it in "no way limit[s] an employer's ability to discipline an employee for ingesting cannabis in the workplace or for working under the influence of cannabis." N.H. REV. STAT. ANN. § 126-X:3, III(c) (2013). This is a relatively new law, and there has been no guidance from the New Hampshire Supreme Court as to whether employers may continue to exclude employment applicants on the basis of detectable levels of cannabis in their blood or urine, or to discipline or terminate employees for having detectable levels of cannabis in their blood or urine notwithstanding any evidence that may suggest that the employee was not intoxicated at work. Where New Hampshire's definition of "disability" in N.H. REV. STAT. ANN. §354-A:2, IV excludes the "current, illegal use of or addiction to a controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802 §102)" and where cannabis remains a schedule I drug with no recognized therapeutic use under that federal law, it is unlikely that a New Hampshire employee could make out a disability discrimination claim if terminated for using therapeutic cannabis.

Because New Hampshire is an at-will employment state and the therapeutic cannabis bill appears to provide no additional protections for lawful cannabis users, it is presumed that employers may continue to test for, and exclude applicants or terminate employees for, off-duty cannabis use. This is an evolving area of law, however, and employers should always consult counsel before taking any adverse action on the basis of an employee's lawful use of therapeutic cannabis.

F. Gender/Transgender Expression

New Hampshire added “gender identity” to the list of protected classes under the New Hampshire Law Against Discrimination in 2018. N.H. REV. STAT. ANN. § 354-A. Under the amended statute, “gender identity” is defined as “a person’s gender-related identity, appearance, or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.” N.H. REV. STAT. ANN. § 354-A XIV-e. “Gender identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity, or any other evidence that the gender-related identity is sincerely held as part of a person’s core identity provided, however, that gender-related identity shall not be asserted for any improper purpose.” *Id.*

G. Other Key State Statutes

N.H. REV. STAT. ANN. § 275 is protective legislation addressing various issues, including hiring replacement workers during a strike or labor dispute, wage and hour issues, equal pay issues, notification requirements, and employee access to personnel files. *See* N.H. Dep’t of Labor Regs. (Rule Lab 800). *Compare Chisholm v. Ultima Nashua Indus. Corp.*, 834 A.2d 221, 226, 150 N.H. 141, 146 (2003) (upholding award of liquidated damages under N.H. REV. STAT. ANN. § 275:44(IV), where failure to pay severance was “willful and without good cause.”) *with New England Homes, Inc. v. R.J. Guarnaccia*, 846 A.2d 502, 508, 150 N.H. 732, 740 (2004) (reversing award of liquidated damages where there was a legitimate dispute about whether plaintiff was owed wages). *See also Labor Ready Ne., Inc. v. N.H. Dep’t of Labor*, 798 A.2d 48, 50, 147 N.H. 721, 723 (2002) (holding that New Hampshire Department of Labor does not have statutory authority to pursue wage adjustments in the absence of a wage claim by an employee).

Effective January 1, 2006, N.H. REV. STAT. ANN. § 275:51 has been amended to allow the Department of Labor to pursue wage claims on behalf of employees.

Effective January 1, 2008, N.H. REV. STAT. ANN. §275:67 was added which prohibits healthcare employers from requiring nurses to work more than 12 consecutive hours, except in certain limited circumstances. Where mandatory overtime is allowed, the employee must be given at least 8 hours of consecutive off duty time before being required to report back to work. N.H. REV. STAT. ANN. §275:67, II.

The following New Hampshire statutes are also relevant to employment practice:

- A. N.H. REV. STAT. ANN. § 276-A --Youth Employment Law.
- B. N.H. REV. STAT. ANN. § 277 -- Safety and Health of Employees.
- C. N.H. REV. STAT. ANN. § 277-A -- Toxic Substances in the Workplace.
- D. N.H. REV. STAT. ANN. § 277-B -- Employee Leasing Companies.
- E. N.H. REV. STAT. ANN. § 281-A --Worker's Compensation.

F. N.H. REV. STAT. ANN. § 282-A -- Unemployment Compensation. *See also In re Riendeau*, 877 A.2d 207, 210, 152 N.H. 396, 398 (2005) (holding that employee who was fired for deliberate violation of company policy designed to protect the legitimate interests of the employer was terminated for misconduct and disqualified for benefits under N.H. REV. STAT. ANN. § 282-A:32, I (b)).