I. AT WILL EMPLOYMENT

A. Statute

An employment having no specified term may be terminated at the will of either party on notice to the other, unless otherwise provided by statute. S.D. CODIFIED LAWS § 60-4-4.

B. Case Law

Despite an ever increasing number of challenges, the employment-at-will doctrine is still the law in South Dakota. S.D. CODIFIED LAWS § 60-4-4 states: “An employment having no specified term may be terminated at the will of either party. . . .” Further, when there is no employment contract or specified term of employment and the employer has no established procedures for discharging employees, the employment is terminable at the will of the employer under S.D. CODIFIED LAWS § 60-4-4. Merritt v. Edson Express, Inc., 437 N.W.2d 528 (S.D. 1989).

Personnel in an employment at will arrangement may be dismissed at any time for any reason. Hollander v. Douglas Cnty., 620 N.W.2d 181 (S.D. 2000).

Under the employment-at-will law of South Dakota, an employer owes no duty of continued employment, and therefore may dismiss an employee at any time, for any reason, as long as an employment contract, a statute, or public policy does not indicate otherwise. Reynolds v. Ethicon Endo-Surgery, Inc., 454 F.3d 868 (8th Cir. 2006).

Employees may be terminated at will in South Dakota, except for: (1) terminations that contravene public policy; (2) employees with express "for cause only" agreements or implied "for cause only" cases where an employee handbook contains a detailed list of exclusive grounds for discharge and a mandatory specific procedure that the employer agrees to follow; or (3) an employee who accepted employment after being

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

Exceptions to the employment-at-will doctrine are to be narrowly construed. Larson v. Kreiser’s, Inc., 472 N.W.2d 761, 764 (S.D. 1993).

A. Implied Contract

1. Employee Handbooks/Personnel Materials


[I]t applies when an employer’s discharge policy provides that termination will occur only for cause. The exception can develop in one of two ways. First, an agreement to discharge for cause arises when an employee handbook “explicitly provides, in the same or comparable language that discharge can occur for cause only.” Second, a contract providing that termination will not occur absent cause will be implied “where the handbook contains a detailed list of exclusive grounds for employee discipline or discharge and, a mandatory and specific procedure which the employer agrees to follow prior to any employee’s termination.

Hollander, 620 N.W.2d at 185 (internal citations omitted). The Supreme Court concluded that the County could not treat Hollander like an employee-at-will due to the discharge-for-cause-only provision in its policy. Even though Hollander could only be terminated for cause, the Supreme Court determined that the County had ample evidence to establish cause and, therefore, Hollander was not wrongfully terminated.

In Osterkamp v. Alkota Manufacturing, Inc., 332 N.W.2d 275 (S.D. 1983), Osterkamp was a foreman of a welding crew at the time of his termination. The employer’s general manager terminated Osterkamp for “disloyalty.” Osterkamp brought a civil action claiming that the employer had violated the “corrective discipline procedures” of its “Employees Handbook.” The Handbook enumerated 28 rules as a basis for discipline, but none of those rules related to “disloyalty.”

The “Disciplinary Action” section of the Handbook stated:
The Company will not discharge nor give disciplinary layoff to any employee without just cause. The Company affirms and endorses the theory and practice of ‘corrective discipline.’

The corrective discipline procedures stated:

An employee warning notice will be used for violations of work rules and regulations.

1. FIRST NOTICE -- will be a warning.

2. SECOND NOTICE -- will result in a 1 (one) day suspension.

3. THIRD NOTICE -- will result in a 1 (one) week suspension.

4. FOURTH NOTICE -- will result in discharge.

Violations will be kept in the individual personnel file permanently [sic]. All violations over one year old will be disregarded for discharge purposes.

The South Dakota Supreme Court did not engage in any analysis regarding the binding nature of the Handbook provisions, but held that since there was no dispute that the Handbook procedures were not followed in regard to Osterkamp’s termination, the evidence adduced at trial was sufficient to support a jury verdict of $30,000.00. 332 N.W.2d at 277. Osterkamp was earning approximately $13,000.00 per year at the time of his discharge.

Extraneous provisions in an employee handbook which may be tangentially related to discharge of employees does not create a “for cause only” employment agreement. Hopes v. Black Hills Power & Light Co., 386 N.W.2d 490 (S.D. 1986). In Hopes, the Court discussed performance appraisal procedures regarding work performance and employee development.

An employment manual's list of grounds for termination of an employee, a delivery courier, did not constitute a detailed list of the exclusive grounds for termination, as required to create an implied for-cause contract subject to an employee's wrongful termination suit under South Dakota law; the manual prefaced its list of potential grounds
for termination with a disclaimer that it was not an all-inclusive list. Semple v. Federal Exp. Corp., 566 F.3d 788 (8th Cir. 2009).

2. Provisions Regarding Fair Treatment

   An explicit promise made to an employee that he would become an executive if he continued to work for the company can give rise to an exception to at-will employment. Larson v. Kreiser’s, Inc., 427 N.W.2d 833 (S.D. 1988).

   An employer creates a protected property right in continued employment for its employees when it surrenders its statutory at-will power and adopts a discharge policy that provides termination will occur only for cause. Aberle v. City of Aberdeen, 718 N.W.2d 615 (S.D. 2006)

   The Eighth Circuit Court of Appeals held that the South Dakota Supreme Court would hold that an employer’s letter promising to terminate employees “for good reason” creates a termination-for-cause employment agreement under the narrow exception doctrine expressed in Osterkamp v. Alkota Manufacturing, Inc. See Lesmeister v. Am. Collid Co., 4 F.3d 631, 632 (8th Cir. 1993).

3. Disclaimers

   “Although disclaimers in Employee Handbook were initially sufficient to fully reserve [employer's] right [under South Dakota statute] to discharge . . . employee[s] at will,” an employer contracted to modify such right to extent that it amended handbook to allow discharged employees to utilize peer review policy, and to allow peer review panel to make final and binding decision to reinstate employees. Zavadi v. Alcoa Extrusions, Inc., 363 F.Supp.2d 1187 (D.S.D. 2005).

   An express surrender of an employer’s statutory at-will power occurs when the employer affirmatively indicates such intent by adopting written personnel policies or manuals that explicitly state a for-cause termination procedure must be followed. Aberle v. City of Aberdeen, 718 N.W.2d 615 (S.D. 2006).

4. Implied Covenants of Good Faith and Fair Dealing

   In Breen v. Dakota Gear & Joint Co., 433 N.W.2d 221, 224 (S.D. 1988), the court refused to recognize an implied covenant of good faith and fair dealing in the employment-at-will relationship.

B. Public Policy Exceptions

1. General
Exceptions to the employment-at-will doctrine are to be narrowly construed. Larson v. Kreiser’s, Inc., 472 N.W.2d 761, 764 (S.D. 1993), (citing Johnson v. Kreiser’s, Inc., 433 N.W.2d 225 (S.D. 1988)).

2. Exercising a Legal Right

Neisent v. Homestake Mining Co. of California, 505 N.W.2d 781 (S.D. 1993), recognizes that the public policy exception applies to retaliatory discharge for filing a workers’ compensation claim.

3. Refusing to Violate the Law

In Johnson v. Kreiser’s, Inc., 433 N.W.2d 225 (S.D. 1988), Johnson began working for Kreiser’s in 1979 as the company accountant. He was responsible for properly charging to the corporate officers any personal bills paid by the corporation. Larson, the president and chairman of the board, regularly converted company property to his own personal use. In 1986, Larson became critical of Johnson’s actions in charging such expenses against Larson’s personal account. On March 2, 1987, Johnson was terminated. He filed suit for wrongful termination claiming that he was fired solely because he refused to violate the law by allowing Larson to convert corporate revenue to his own personal use.

The Supreme Court of South Dakota recognized a narrow public policy exception to the at-will employment rule.

An employee has a cause of action for wrongful discharge when the employer discharges him in retaliation for his refusal to commit a criminal or unlawful act. It is repugnant to public policy to expect an employee to commit such acts in order to save his job. Consequently, we carve out this exception to the at-will doctrine codified at SDCL 60-4-4. In doing so, we conclude that a contract action for wrongful discharge is more appropriate than a tort action. A contract action is predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform a criminal or unlawful act.

Johnson, 433 N.W.2d at 227. The Court stated that the concern regarding frivolous lawsuits by employees who are discharged for valid reasons would be allayed by the employee’s burden of proof. The employee must show “the dismissal violate[d] a clear mandate of public policy,” after which the burden shifts to the employer to show the termination was for a valid reason. To prevail, “the employee must prove by a
preponderance of the evidence that the discharge was for . . . impermissible reason[s].”

Id. at 227-28.

In Tiede v. CorTrust Bank, N.A., 748 N.W.2d 748 (S.D. 2008), the South Dakota Supreme Court held that a bank officer stated a claim for retaliatory discharge when she charged she was terminated for filing Suspicious Activity Reports and Currency Transaction Reports that her superiors told her not to file, but which she alleged she was required to file under the federal Bank Secrecy Act.

4. Exposing Illegal Activity (Whistleblowers)

In Dahl v. Combined Insurance Co., 621 N.W.2d 163 (S.D. 2001), the plaintiff was terminated after reporting to the South Dakota Division of Insurance that premiums collected by agents and managers working under him had not been remitted to the company. The Supreme Court held that Dahl stated a cause of action for wrongful discharge under the public policy exception. The Court recognized “[w]histle blowing, or the reporting of unlawful or criminal conduct to a supervisor or outside agency,” as another public policy exception to the employee-at-will doctrine. The Court went on to state, however, that the “exception cannot be invoked by employees to primarily protect their proprietary interests, exact revenge on an employer, or for personal gain.” Id. at 167.

In some cases, “whistleblowers,” persons who report criminal or unlawful activity, are protected under South Dakota law by “public policy exception” to at-will employment doctrine, where termination is contrary to public policy; however, only whistle blowing which promotes public good is protected by public policy exception. Petersen v. ProxyMed, Inc., 617 F. Supp. 2d 835 (D.S.D. 2008).

III. CONSTRUCTIVE DISCHARGE

South Dakota courts appear to recognize constructive discharge claims. The South Dakota Supreme Court has held a former employee, who did not appeal finding by Division of Human Rights of no probable cause arising out of her claims of retaliation or constructive discharge against former employer, failed to exhaust her administrative remedies and, thus, could not reassert matter in civil action alleging employment discrimination. Jansen v. Lemmon Fed. Credit Union, 562 N.W.2d 122 (S.D. 1997).

The general atmosphere of tension in work environment at a credit union was not intolerable, which was required for former employee to establish constructive discharge, as a result of chief executive officer’s demeanor; the employee was unable to show that the CEO singled him out for ill-treatment or that the employer did anything deliberate in an attempt to render his working conditions intolerable, the employee was not told that he should have reported his suspicions that the CEO was doing illegal activities, and no one
told him he should resign or he would be terminated, demoted, or disciplined. Anderson v. First Century Fed. Credit Union, 738 N.W.2d 40 (S.D. 2007).

IV. WRITTEN AGREEMENTS

A. Standard “For Cause” Termination

The Eighth Circuit Court of Appeals held that the South Dakota Supreme Court would hold that an employer’s letter promising to terminate employees “for good reason” creates a termination-for-cause employment agreement under the narrow exception doctrine expressed in Osterkamp v. Alkota Manufacturing, Inc. See Lesmeister v. Am. Collid Co., 4 F.3d 631, 632 (8th Cir. 1993).

South Dakota courts appear to recognize both express "for cause only" agreements, and implied "for clause only" cases in which employee handbook contains detailed list of exclusive grounds for discharge and mandatory specific procedure for employer to follow. Bass v. Happy Rest. Inc., 507 N.W.2d 317 (S.D. 1993).

B. Status of Arbitration Clauses

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This also applies to arbitration agreements between employers and employees or between their respective representatives. S.D. CODIFIED LAWS § 21-25A-1.

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Const., Inc., 701 N.W.2d 430 (S.D. 2005).

V. ORAL AGREEMENTS

A. Promissory Estoppel

"[P]romissory estoppel may be invoked where a promisee alters his position to his detriment in the reasonable belief that a promise would be performed." Canyon Lake Park, LLC v. Loftus Dental, P.C., 700 N.W.2d 729, 739 (S.D. 2005) (citing Garrett v. BankWest, Inc., 459 N.W.2d 833, 848 (S.D. 1990)).

The three elements of promissory estoppel are:

1) the detriment suffered in reliance must be substantial in an economic sense;
2) the loss to the promisee must have been foreseeable by the promisor; and
3) the promisee must have acted reasonably in justifiable reliance on the promise made.

Canyon Lake Park, 700 N.W.2d at 739.

Estoppel is not applicable if any of these elements are lacking or have not been proven by clear and convincing evidence. Century 21 Associated Realty v. Hoffman, 503 N.W.2d 861, 866 (S.D.1993).

A discharged at-will employee had no claim for promissory estoppel under South Dakota law on theory that the employer would be estopped from denying existence of contract because the employer allegedly made an oral promise to the employee of permanent employment; such a promise would be interpreted as indefinite and terminable at-will. Talkington v. Am. Colloid Co., 767 F.Supp. 1495 (D.S.D. 1991).

B. Fraud

One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers. S.D. CODIFIED LAWS § 20-10-1. A deceit within the meaning of § 20-10-1 is either:

(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
(2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
(3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
(4) A promise made without any intention of performing.

S.D. CODIFIED LAWS § 20-10-2.

Employee's claims that he was orally promised to be made a "full partner" after working for one year at reduced salary were contradicted by subsequent written employment contract, and thus, absent showing of material facts indicating that the corporate employer wrongfully induced the employee to enter into the initial employment contract, the employer was not liable to employee for the alleged fraudulent misrepresentation, even though it failed to disclose a voting agreement between existing partners to keep control of the corporation in hands of one of the partners; the contract stated the employer would "consider" selling stock ownership interest to the employee, only on terms acceptable to the shareholders, and that the decision to sell an ownership interest to the employee was wholly within discretion of the corporation and its
shareholders. 

Schwaiger v. Mitchell Radiology Assocs., P.C., 652 N.W.2d 372 (S.D. 2002); see also Poeppel v. Lester, 2013 S.D. 17, ¶24, 827 N.W.2d 58 (holding the issue in Schwaiger was not properly before the Court, and relegating the Schwaiger rule to advisory status).

C. Statutes of Fraud

An agreement that by its terms is not to be performed within a year from the making thereof is not enforceable in the absence of a signed writing. S.D. CODIFIED LAWS § 53-8-2(1).

An employee’s claim of wrongful termination of a permanent employment contract was barred by Statute of Frauds, where there was no writing signed by employer that showed the duration of the employment contract. Harriman v. United Dominion Indus., Inc., 693 N.W.2d 44 (S. D. 2005).

Oral contract of employment, whereby employee, according to her own testimony, was given one year from time she began her duties in which to turn operation around, could not be performed within one year of its making, and thus, was unenforceable under Statute of Frauds, where oral contract was entered one week before employee began her duties, so that time period encompassed minimum of one year and one week. Trovese v. O’Meara, 493 N.W.2d 221 (S.D. 1992).

VI. DEFAMATION

A. General Rule


In Blote v. First Federal Savings & Loan Association of Rapid City, 422 N.W.2d 834 (S.D. 1988), the discharged vice-president of savings and loan association brought action against savings and loan association alleging wrongful discharge and defamation. The Court held inter alia that the association’s argument, in an unemployment compensation proceeding, that it terminated the vice-president for misconduct was a privileged communication, which could not form the basis for a defamation action. Administrative proceedings are “official proceedings” covered by statute providing that malice is not inferred from publication of the communication made in any legislative or
judicial proceeding, or in any other official proceeding authorized by law. The Court also held that a communication, without malice, to an interested person, by an interested person, is privileged.

1. Libel

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. S.D. CODIFIED LAWS § 20-11-3.

2. Slander

Slander is a false and unprivileged publication, other than libel, which:

(1) Charges any person with crime, or with having been indicted, convicted, or punished for crime;

(2) Imputes to him the present existence of an infectious, contagious, or loathsome disease;

(3) Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;

(4) Imputes to him impotence or want of chastity; or

(5) By natural consequence, causes actual damage.

S.D. CODIFIED LAWS § 20-11-4.

B. References

Any employer or agent of the employer, who in writing, discloses information about the job performance of an employee or former employee to a prospective employer of that person at the written request of the prospective employer or the employee or former employee is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, may not be held liable for the disclosure or its consequences. Any written response to the written request shall be made available to the employee or the former employee upon written request. For purposes of this section, the presumption of good faith is rebutted upon a showing that the employer or agent of the employer:
(1) Recklessly, knowingly, or with a malicious purpose, disclosed false or deliberately misleading information; or
(2) Disclosed information subject to a nondisclosure agreement or information that is confidential under any federal or state law.

S.D. CODIFIED LAWS § 60-4-12.

C. Privileges

Communications which are “privileged” are outside the definition of defamation and are defined by statute:

A privileged communication is one made:
(1) In the proper discharge of an official duty;
(2) In any legislative or judicial proceeding, or in any other official proceeding authorized by law;
(3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information;
(4) By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

In the cases provided for in subdivisions (3) and (4) of this section, malice is not inferred from the communication or publication.


The test for determining whether a communication is privileged under S.D. CODIFIED LAWS § 20 11-5(3) involves an inquiry into the individuals or circumstances involved. Peterson, 499 N.W.2d at 915-16 (citing Uken v. Sloat, 296 N.W.2d 540, 542-43 (S.D. 1980)). “An infallible test in determining whether a communication is or is not
privileged is to ask whether, if true, it is a matter of proper public interest in relation to that with which it is sought to associate it.’“

In Settliff v. Akins, 616 N.W.2d 878 (S.D. 2000), one of the issues was that of conditional privileges. The Supreme Court referred to its previous decision in Keiser, wherein the Court noted, “[a]n occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that never sharing the common interest is entitled to know.” Because of the circumstances surrounding the issue of defamation in an alleged conditional privilege, the Supreme Court determined that there was a question of fact for the jury to determine in this matter and ruled that the trial court did not err in denying summary judgment.

Qualified immunity regarding communications between interested parties applied to letter that hospital's employee sent to doctor's employer regarding incident involving hospital's patient, and thus, doctor could not prevail on defamation claim against hospital; communication was not made with malice since employee did not in fact entertain serious doubts as to truth of publications. Schwaiger v. Avera Queen of Peace Health Servs., 714 N.W.2d 874 (S.D. 2006).

D. Other Defenses

1. Truth

Truthful statements do not amount to slander, and the truth of an allegedly defamatory statement is measured by the ordinary implication of the words at the time the statement was made. Guilford v. Nw. Pub. Serv., 581 N.W.2d 178 (S.D. 1998).

In order to prove a slander case, there must be a communication of an objective fact that is false. Manuel v. Wilka, 610 N.W.2d 458 (S.D. 2000).

2. No Publication

Utterance of an alleged defamatory statement by husband to wife in private conversation, not knowing or having reason to believe they could be overheard, has been held not to constitute publication sufficient to support slander action. Springer v. Swift, 239 N.W. 171 (S.D. 1931).
3. **Self-Publication**

The South Dakota Supreme Court has yet to address the doctrine of compelled self-publication. *Schwaiger v. Avera Queen of Peace Health Serv.*, 714 N.W.2d 874, 881 (S.D. 2006).

4. **Invited Libel**

There is no South Dakota case law on this issue.

5. **Opinion**

There is no constitutional privilege for a broad category of speech labeled "opinion"; expressions of opinion may often imply assertions of objective fact, and those statements are actionable. *Paint Brush Corp., Parts Brush Div. v. Neu*, 599 N.W.2d 384 (S.D. 1999).

While opinion is protected by First Amendment even though it may be false, false statements of fact are afforded no constitutional protection. *Krueger v. Austad*, 545 N.W.2d 205 (S.D. 1996).

**E. Blacklisting Statutes**

Denial of right to work because of membership or nonmembership in union is a misdemeanor. No person shall be deprived of life, liberty, or property without due process of law. The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization. S.D. CODIFIED LAWS § 60-8-3.

**F. Non-Disparagement Clauses**

There is no South Dakota case law on this issue.

**VII. EMOTIONAL DISTRESS CLAIMS**

**A. Intentional Infliction of Emotional Distress**

In *Groseth International, Inc. v. Tenneco, Inc.*, 410 N.W.2d 159 (S.D. 1987), the South Dakota Supreme Court set the standard to be applied to determine a prima facie case for intentional infliction of emotional distress. The factors are whether: (1) an act
by defendant amounting to extreme and outrageous conduct; (2) intent on the part of the defendant to cause plaintiff severe emotional distress; (3) the defendant’s conduct was the cause in fact of plaintiff’s injuries; and (4) the plaintiff suffered an extreme disabling emotional response to defendant’s conduct.

Note that in South Dakota, the tort of intentional infliction of emotional distress includes reckless conduct resulting in emotional distress. To establish reckless conduct, a plaintiff must show that a defendant "recklessly acted in a manner which would create an unreasonable risk of harm to him, and that [defendant] knew or had reason to know of facts which would lead a reasonable man to realize that such actions would create the harm that occurred." Wangen v. Knudson, 428 N.W.2d 242, 248 (S.D. 1988). For example, in Wangen, a supervisor falsely told a plaintiff that he was fired after he refused the supervisor's order to participate in an alcohol treatment program. Because the supervisor knew that the plaintiff was suffering from and had been hospitalized for depression, the court upheld a jury award for intentional infliction of emotional distress in favor of the plaintiff, whose depression had worsened following the incident. The court explained that because liability arises "from the actor's knowledge that the other is particularly susceptible to emotional distress by reason of some physical or mental condition or peculiarity[,] ... [a]ctions which may not make [him] liable in one situation may make him liable in another." Id.

In Petersen v. Sioux Valley Hospital Association, 486 N.W.2d 516, 519 (S.D. 1992), the South Dakota Supreme Court held a plaintiff had made a submissible case of intentional infliction of emotional distress based on a supervisor's conduct in failing to warn her about a meeting at which she had to confront co-workers' complaints. Because the plaintiff previously had told the supervisor about her fear of confrontational group meetings, the court held a jury could find the supervisor's conduct "reckless in view of her nature and condition." Id. at 519. On rehearing, the state supreme court clarified the law regarding the tort of intentional infliction of emotional distress. The court adhered to Wangen, reaffirming that the tort "encompasses liability for reckless infliction of emotional distress as stated therein." Petersen, 491 N.W.2d at 469. Accordingly, in Moysis v. DTG Datanet, 278 F.3d 819 (8th Cir. 2002), the Eighth Circuit, applying South Dakota law, held whether the manner in which a former employee was terminated after suffering a brain injury in an auto accident demonstrated reckless disregard of a high probability that the former employee would suffer emotional distress, was a question for the jury.

The South Dakota Supreme Court in French v. Dell Rapids Community Hospital, 432 N.W.2d 285 (S.D. 1988), held the trial court improperly granted summary judgment on French’s intentional infliction of emotional distress claim. In French, the plaintiff was recruited for a position in the hospital by one of the doctors. While a few of the doctors resisted based on plaintiff’s educational background, the plaintiff was hired but placed on a 90-day probationary period. Shortly after the hiring, doctors began to complain. At the expiration of the probationary period, plaintiff was dismissed. The Court held the record did not support the trial court’s grant of summary judgment.
A former employee’s various conditions including difficulty sleeping, irritability, a general feeling that he was not well, and high blood pressure, were no more than ordinary and did not rise to the level necessary to sustain a claim of intentional infliction of emotional distress. Anderson v. First Century Fed. Credit Union, 738 N.W.2d 40 (S.D. 2007).

B. Negligent Infliction of Emotional Distress

In Wright v. Cola Cola Bottling System, 414 N.W.2d 608, 609 (S.D. 1987), the South Dakota Supreme Court formally recognized a claim for negligent infliction of emotional distress. Courts will recognize a cause of action for negligently causing some foreseeable emotional distress accompanied by bodily harm. The Court adopted the standard for negligent infliction of emotional distress set forth in the RESTATEMENT (SECOND) OF TORTS.

In South Dakota, the tort of negligent infliction of emotional distress requires manifestation of physical symptoms. Further, there must be some causal nexus between the distress and the physical injury. Wright, 414 N.W.2d at 609.

In Richardson v. East River Electric Power Cooperative, 531 N.W.2d 23 (S.D. 1995), the Court was unwilling to adopt negligent infliction of emotional distress based on the fact the East River escorted Richardson to her office to gather her belongings and then requested that she immediately leave the building. The Court held that while the incident was not pleasant for either party, East River’s behavior did not rise to the level of extreme or outrageous conduct. It should be noted that the Court seemed to use negligent and intentional inference interchangeably in this case.

VIII. PRIVACY RIGHTS

A. Generally

To recover on an invasion of the right to privacy claim, a claimant must show an "unreasonable, unwarranted, serious and offensive intrusion upon the seclusion of another." Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419, 424 (S.D.1994) (citing Baldwin v. First Nat'l Bank of Black Hills, 362 N.W.2d 85, 88 (S.D.1985)). Furthermore, "[t]he invasion must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities." Montgomery Ward v. Shope, 286 N.W.2d 806, 808 (S.D. 1979) (citations omitted).

B. New Hire Processing
1. Eligibility Verification & Reporting Procedures

In South Dakota, all potential employees must fill out an I-9 Employment Eligibility Verification Form before they start work. Every employer within the state shall furnish to the directory of new hires a report of any newly hired employee which includes the name, address, and social security number as assigned by the Internal Revenue Service. S.D. CODIFIED LAWS § 25-7A-3.3. This information is strictly confidential, and can only be accessed by the Department of Social Services, the Department of Labor and Regulation, and the Department of Education.

2. Background Checks

Criminal background investigations of prospective employees and student teachers in schools are allowed pursuant to S.D. CODIFIED LAWS § 13-10-12. Any county may issue an ordinance requiring any person over eighteen years of age seeking employment with the county to submit to a state and federal criminal background investigation pursuant to S.D. CODIFIED LAWS §§ 7-18A-37 and 9-14-42.

Central registry background checks shall be conducted on all known employees of any child welfare agency. S.D. CODIFIED LAWS § 26-6-23.2.

Each real estate appraiser applicant for initial certification, licensure, or registration must conduct a state and federal criminal background investigation pursuant to S.D. CODIFIED LAWS § 36-21B-2.2.

Persons continuously employed by a South Dakota school district since July 1, 2000 are exempt from criminal background checks. S.D. CODIFIED LAWS § 13-10-14.

C. Other Specific Issues

1. Workplace Searches

According to the South Dakota Department of Labor, there is no South Dakota statute or case law on this issue.

2. Electronic Monitoring
Pursuant to S.D. CODIFIED LAWS § 23A-35A-1 and 23A-35A-20, it is a felony for one who is not a send or receiver of a telephone communication or one who is not present during such a conversation or discussion to intentionally and by means of an instrument or device overhear or record the communication or aid, authorize, employ, procure, or permit another to do so without the consent of either a sender or receiver.

3. Social Media

There is no South Dakota law regarding social media regulations for employees.

4. Taping of Employees


5. Release of Personal Information on Employees

South Dakota has an open records law (S.D. CODIFIED LAWS § 1-27) granting public access to some information obtained by state agencies. The law specifically excludes as non-public personnel information other than salaries and routine directory information.

South Dakota restricts employers from obtaining, seeking to obtain, or using genetic information to discriminate against an employee or a prospective employee. S.D. CODIFIED LAWS § 60-2-20.

6. Medical Information

It is a misdemeanor for any employer to require any employee to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of continued employment. S.D. CODIFIED LAWS § 60-11-2.

7. Opening Employee Mail

In Roth v. Farner-Bocken Co., 667 N.W.2d 651 (S.D. 2003), the South Dakota Supreme Court held evidence that an employer opened a letter from a law firm to a former employee on the employee's age discrimination claim that was mistakenly mailed to the employer; realized it was meant for the employee personally but read the entire contents of package; made photocopies; and disseminated them to its officers, was
sufficient to establish the employer had intruded on the employee's seclusion, for purposes of the employee's invasion of privacy claim.

**IX. WORKPLACE SAFETY**

**A. Negligent Hiring/Supervision/Retention**

Employers can be held responsible for negligent acts of their employees under respondeat superior theory, and negligent hiring and supervision of employee may also give rise to liability. *Rehm v. Lenz*, 547 N.W.2d 560 (S.D. 1996). For instance, in *Rehm v. Lenz*, a husband and wife claimed a mental health center at which a psychologist was employed was negligent based on respondeat superior and failed to exercise care in hiring, supervising, and retaining the psychologist; these claims were governed by three-year limitations period. *Id.* at 566.

In *McGuire v. Curry*, 766 N.W.2d 501(S.D. 2009), a racetrack, which hired an underage employee to transport beer, hard liquor and other items to a concessions area on racetrack property, owed to a motorcycle passenger injured in a traffic accident with the employee a duty to supervise the employee to prevent him from becoming intoxicated at work. Although the racetrack imposed a no-drinking policy for underage employees, it was foreseeable that by providing an underage employee unrestricted and unsupervised access to alcoholic beverages, the employee could consume alcohol while at work, could abuse the alcohol, leave the premises after work unfit to drive, and injure a member of the general public. *McGuire*, 766 N.W.2d at 504.

Conversely, a restaurant supervisor was not required to conduct further background checks on an employee who informed his supervisor that he had a prior felony conviction for a gang-related offense when employee was first hired. Thus, the restaurant was not liable for the plaintiff's injuries arising from the employee's assault of plaintiff in back of restaurant, based on theory of negligent hiring, regardless of whether the employee was subsequently given additional duties that placed him in closer contact with public. The employee was originally hired as utility worker whose responsibilities were to cut and prepare pizzas in back of restaurant and away from public. *Iverson v. NPC Intern., Inc.*, 801 N.W.2d 275 (S.D. 2011).

**B. Interplay with Worker’s Comp. Bar**

Pursuant to S.D. CODIFIED LAWS § 63-3-2, an employee is limited to workers compensation for a remedy related to an injury or death arising out of and in the course of employment, except for those rights and remedies arising from intentional tort.

**C. Firearms in the Workplace**
Effective July 1, 2019, South Dakota will become a permitless carry state. No other laws interfere with an employer’s right to ban employees from bringing weapons to work.

D. Use of Mobile Devices

The only law prohibiting the use of mobile devices in South Dakota pertains to texting and driving. There are no other restrictions on mobile devices in South Dakota.

X TORT LIABILITY

A. Respondeat Superior Liability

See discussion under Section IX.A. above.

B. Tortious Interference with Business/Contractual Relations

a. Interference with Contractual Relations

In Nelson v. Web Water Development Association, Inc., 507 N.W.2d 691 (S.D. 1993), the former manager of a corporation sued the corporation and its directors for breach of contract, conversion, conspiracy, defamation, and other torts including tortious interference with contract. The former manager alleged that the directors had individually interfered with his business relationship or expectancy with his employer. The South Dakota Supreme Court affirmed the trial court’s rejection of the former manager’s claim for damages arising out of a claim for interference with business contract or expectancy. The Court recognized the following elements for the tort of interference with business contract or expectancy:

(1) The existence of a valid business relationship or expectancy;
(2) Knowledge by the interferer of the relationship or expectancy;
(3) An intentional and unjustified 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.

The Court ruled that, as a matter of law, no cause of action for tortious interference with contract may be maintained against a corporate officer who, acting within the scope of his or her authority, discharges an employee. Id., at 700; see also Case v. Murdock, 589 N.W.2d 917 (S.D. 1999); Table Steaks v. First Premier Bank, N.A., 650 N.W.2d 829 (S.D. 2002).

In Gruhlke v. Sioux Empire Federal Credit Union, Inc., 756 N.W.2d 399 (S.D. 2008) the Supreme Court concluded that in the employment context, under limited circumstances, an action for intentional interference with contractual relations against a corporate officer can be maintained in South Dakota. A woman brought claims against her former employer for wrongful discharge, breach of contract, and wrongful interference of contract. Her claim for wrongful interference of contract stemmed from a corporate officer, to advance his own interests, tortiously interfered with her contractual relationship by advocating for the nonrenewal of her employment contract. The court held a claim for tortious interference with contractual relations may be made against a corporate officer, director, supervisor, or co-worker, who acts wholly outside the scope of employment, and who acts through improper means or for an improper purpose. To state a claim, a plaintiff must allege and prove each of the following elements: (1) the existence of valid contractual relationship; (2) intentional interference with that relationship; (3) by a third party; (4) accompanied through improper means or for an improper purpose; (5) a casual effect between the interference and damage to the relationship; and (6) damages.

b. Interference with Business Relations

In Communication Technology System v. Densmore, 583 N.W.2d 125 (S.D. 1998), the court affirmed the order of the lower court that granted summary judgment in favor of appellees, former employee, and rival computer company in an action based upon the hiring of former employee as a computer programming consultant. The court held that the noncompete agreement of appellant computer company was void under state statute.

In Setliff v. Akins, 616 N.W.2d 878 (S.D. 2000), the Supreme Court recognized that a valid business relationship need not be cemented by contract. An at-will employment relationship may be a valid business relationship for purposes of establishing a cause of action for tortious interference.

Under South Dakota law, a person may have a claim for tortious interference with business relations where no contract was intended, and may show tortious interference by
showing that the defendant induced a third person not to enter into a business relation with another, induced a third person not to continue a business relation with another, or prevented a third person from continuing a business relation with another. Sancom, Inc. v. Qwest Comm. Corp., 643 F. Supp. 2d 1117 (D.S.D. 2009).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

S.D. CODIFIED LAWS § 53-9-8 is generally regarded as a prohibition against agreements in “restraint of trade.” However, its provisions are much broader as the statute actually prohibits any agreements which restrain “a lawful profession, trade or business.” In applying the statute to a factual setting, courts must analyze three criteria:

1. Does the conduct of the parties concern a “lawful profession, trade or business”?

2. If so, has there been a material restraint upon exercising that “lawful profession, trade or business”?

3. If so, is the conduct authorized by the statutory exceptions contained in S.D. CODIFIED LAWS § 53-9-9, 53-9-10, or 53-9-11?

S.D. CODIFIED LAWS § 53-9-11 discusses the permissible scope of covenants not to compete or noncompete agreements. It provides:

Employment contract -- Covenants not to compete. An employee may agree with an employer at the time of employment or at any time during his employment not to engage directly or indirectly in the same business or profession as that of his employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers of the employer within a specified county, first or second class municipality, or other specified area for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business therein.
Whether a court reviews a noncompete agreement for reasonableness depends upon the circumstances under which the employment ends. If an employee quits or is fired for good cause, no further showing of reasonableness will be necessary as long as the noncompete agreement complies with S.D. CODIFIED LAWS § 53-9-11. If an employee, however, is fired for no fault of his own, the noncompete agreement will be enforceable only if it is reasonable. To determine whether a noncompete agreement is reasonable, the court will consider factors such as the extent and duration of the restraint, the nature of the business or profession involved, and the public interest. Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513 (S.D. 1996).

B. Blue Penciling


Although the South Dakota statute governing covenants not to compete in employment contracts generally allows employers and employees to make their agreements without making a further showing of reasonableness, for those employees who are fired through no fault of their own, the trial court must balance the competing interests of the former employee, the employer, and the public to determine whether the noncompete agreement is reasonable. Hot Stuff Foods, LLC v. Mean Gene’s Enterprises, Inc., 468 F. Supp. 2d 1078 (D.S.D. 2006).

C. Confidentiality Agreements

S.D. CODIFIED LAWS § 37-29-7 provides that South Dakota’s Trade Secrets Act does not affect “contractual remedies, whether or not based upon misappropriation of a trade secret[.]”

Employment contract nondisclosure clauses are not enforced, under South Dakota law, if: (1) if a trade secret or confidential relationship does not exist; (2) the employer discloses such information to others not in a confidential relationship; and (3) such information is legitimately discovered and openly used by others. Hot Stuff Foods, LLC v. Mean Gene’s Enterprises, Inc., 468 F. Supp. 2d 1078 (D.S.D. 2006).
Under South Dakota law, a secrecy agreement containing standard non-compete agreement was not a waiver of the employer’s right to terminate an employee at will. *Talkington v. Am. Colloid Co.*, 767 F. Supp. 1495 (D.S.D. 1991).

D. Trade Secrets Statute

South Dakota has enacted the Uniform Trade Secrets Act. S.D. CODIFIED LAWS Ch. 37-29.

E. Other Considerations

S.D. CODIFIED LAWS § 53-9-11, which permits some covenants not to compete, applies only to an employee’s agreement not to compete with his or her employer and does not apply to an agreement where one employer agrees not to recruit another employer’s employees. Agreements between businesses prohibiting the recruiting of any of their employees by the other business are not enforceable under S.D. CODIFIED LAWS § 53-9-8. *Commc’n Tech. Sys., Inc. v. Densmore*, 583 N.W.2d 125 (S.D. 1998).

XII. DRUG TESTING LAWS

A. Public Employers

S.D. CODIFIED LAWS § 3-6F-1 provides drug screening programs for applicants to certain positions. The commissioner of the Bureau of Human Resources shall establish and implement a drug screening program for applicants who seek the following employment:

1. Positions at the Human Services Center or the South Dakota Developmental Center whose primary duty includes patient or resident care or supervision;
2. Positions at the South Dakota State Veterans’ Home whose primary duty includes patient or resident care or supervision;
3. Safety sensitive positions; and
4. Positions in the Department of Agriculture, Wildland Fire Suppression Division whose duties include firefighting.

The commissioner may also establish and implement a drug screening program for employees holding those positions based upon reasonable suspicion of illegal drug use by any such employee.
A safety-sensitive position is defined as “any law enforcement officer authorized to carry firearms and any custody staff employed by any agency responsible for the rehabilitation or treatment of any adjudicated adult or juvenile.” S.D. CODIFIED LAWS § 3-6C-1(24).

S.D. CODIFIED LAWS § 27B-1-19 provides a drug screening policy for community support providers. Any community support provider shall have a drug screening policy for applicants seeking employment and current employees whose primary duty includes patient or resident care or supervision.

B. Private Employers

There is no South Dakota case law on this issue.

Note that S.D. CODIFIED LAWS § 62-4-37 provides “No compensation shall be allowed for any injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, illegal use of any schedule I or schedule II drug, or willful failure or refusal to use a safety appliance furnished by the employer, or to perform a duty required by statute. The burden of proof under this section shall be on the defendant employer.”

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

"Employer" means any person within the State of South Dakota who hires or employs any employee, and any person wherever situated who hires or employs any employee whose services are to be partially or wholly performed in the State of South Dakota. S.D. CODIFIED LAWS § 20-13-1(7).

“Employee” means any person who performs services for any employer for compensation, whether in the form of wages, salary, commission, or otherwise. S.D. CODIFIED LAWS § 20-13-1(6).

B. Types of Conduct Prohibited
It is an unfair or discriminatory practice for any person, because of race, color, creed, religion, sex, ancestry, disability, or national origin, to fail or refuse to hire, to discharge an employee, or to accord adverse or unequal treatment to any person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or any term or condition of employment. S.D. CODIFIED LAWS § 20-13-10. Note that South Dakota law does not expressly prohibit age discrimination.

An employee established a prima facie case for a sexually hostile work environment, where she belonged to a protected group, her co-worker's comments were unwelcome sexual harassment, based on sex, her employer knew of the comments, and after comments were made, supervisors began to more closely scrutinize her work, placed her on a work improvement plan, and ultimately discharged her. Williams v. S.D. Dept. of Agriculture, 779 N.W.2d 397 (S.D. 2010).

Genuine issues of material fact, regarding whether customers' alleged discriminatory conduct and employer's acquiescence to that conduct was sufficiently humiliating to an African-American employee to create hostile work environment, precluded summary judgment on the employee's claims against the employer, alleging racial discrimination under § 1981, Title VII and South Dakota law. Mutua v. Texas Roadhouse Mgmt. Corp., 753 F. Supp. 2d 954 (D.S.D. 2010).

C. Administrative Requirements

A state discrimination claim under the South Dakota Human Relations Act must be filed with the Department of Human Rights within 180 days from the last date of discrimination. S.D. CODIFIED LAWS § 20-13-31. A party can “dual charge” a Title VII claim at the same time. Once the Department of Human Rights completes the investigation of a charge, the complainant will receive a written decision containing a summary and analysis of the facts along with a determination regarding probably cause. No probable cause decisions may be appealed to Circuit Court within 30 days pursuant to S.D. CODIFIED LAWS § 1-26-30 and 1-26-31. Also, if the charge was dual filed under Title VII, the complainant may request the EEOC conduct what is called a "substantial weight review". A substantial weight review request would mean that the Division would send its file to the EEOC for review to see if they concur with the Department’s findings. The complainant may request an appeal to Circuit Court and/or an EEOC substantial weight review.

D. Remedies Available

In a civil action, if the court or jury finds that an unfair or discriminatory practice has occurred, it may award the charging party compensatory damages. S.D. CODIFIED LAWS § 20-13-35.1. The court may grant as relief any injunctive order, including
affirmative action, to effectuate the purpose of this chapter. Punitive damages may be awarded under S.D. CODIFIED LAWS § 21-3-2 for a violation of §§ 20-13-20 to 20-13-21.2, inclusive, 20-13-23.4 [these statutes include housing or financial institution discrimination], 20-13-23.7 [this statute includes good faith efforts made to accommodate disabled persons], or 20-13-26 [this statute includes concealing, aiding, compelling, or inducing unlawful discrimination—threats or reprisals].

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No employee may be discharged for serving on jury duty. S.D. CODIFIED LAWS § 16-13-41.1,

B. Voting

No employee may be denied the right to take time off to vote for a period of two consecutive hours during voting time, but only if they do not have two consecutive hours during voting time where they are not required to be at work. S.D. CODIFIED LAWS § 12-3-5. This is a paid leave.

C. Family/Medical Leave

Under S.D. CODIFIED LAWS § 3-6C-13, public employees may donate accrued vested leave to another state employee so long as:

1. The recipient employee is terminally ill and the employee’s condition does not allow a return to work;

2. The recipient employee is suffering from an acutely life threatening illness or injury which has been certified by a licensed physician as having a significant likelihood of terminating fatally and the employee’s physical condition does not allow a return to work for a period of at least ninety consecutive days; and

3. All leave benefits for which the recipient employee is eligible have been exhausted.

The donation is not allowed after the recipient employee is able to return to work or is approved for disability benefits provided for in S.D. CODIFIED LAWS § 3-12-98 or any other public disability benefits.
D. **Day of Rest Statutes**

A day's labor for employees is to the extent as is usual in the business in which they serve not exceeding ten hours in the day unless the employer and employee expressly agree to the contrary. S.D. CODIFIED LAWS § 60-2-18

E. **Military Leave**

S.D. CODIFIED LAWS § 33A-2-9 states any member of the South Dakota National Guard ordered to active duty service by the Governor or the President has all protections afforded to persons serving on federal active duty by the Servicemembers Civil Relief Act of 2003. 54 Stat. 1178, 50 App. U.S.C. §§ 501-548 and 560-591. The service member is also protected by the Uniformed Services Employment and Reemployment Rights Act, 108 Stat. 3149, 38 U.S.C. §§ 4301 to 4333.

XV. **STATE WAGE AND HOUR LAWS**

Under S.D. CODIFIED LAWS § 60-11-9, every employer shall pay all wages due to employees at least once each calendar month unless otherwise provided by law, or on regular agreed pay days designated in advance by the employer, in lawful money of the United States. An employer may pay wages by check, cash, or direct deposit to the employee's bank account, unless an employer and employee agree to another form of payment.

In any action for the breach of an obligation to pay wages, where a private employer has been oppressive, fraudulent, or malicious, in his refusal to pay wages due to the employee, the measure of damages is double the amount of wages for which the employer is liable. S.D. CODIFIED LAWS § 60-11-7.

No employee may be discharged for making a complaint that he has not been paid wages. S.D. CODIFIED LAWS § 60-11-17.1.

Whenever an employee not having a written contract for a definite period quits or resigns that employment, the wages or compensation earned are due and payable not later than the next regular stated pay day for which those hours would have normally been paid or as soon thereafter as the employee returns to the employer all property of the employer in the employee's possession. S.D. CODIFIED LAWS § 60-11-11.
XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in the Workplace

It is a petty offense to smoke tobacco product or carry any lighted tobacco product in a public place or place of employment in South Dakota. S.D. CODIFIED LAWS § 34-46-14. Smoking is permitted in certain licensed establishments where alcohol is sold and certain retail tobacco stores. S.D. CODIFIED LAWS § 34-46-18 and 19. Tobacco product includes vapor products. S.D. CODIFIED LAWS § 34-46-20.

B. Health Benefit Mandates for Employers

According to the South Dakota Department of Labor, all employers must carry workers’ compensation insurance. South Dakota law does not require that employers provide any disability or medical insurance benefits. If benefits are provided, those plans may be subject to ERISA, COBRA, or HIPAA regulations.

C. Immigration Laws


D. Right to Work Laws

In South Dakota, any attempt to form an agreement with, deny, or coerce a person into not working is a violation of the S.D. Const. art. VI § 2 and is a misdemeanor. S.D. CODIFIED LAWS § 60-8-3 through 8-8.

E. Lawful Off-duty Conduct
Under S.D. CODIFIED LAWS § 60-4-11, it is a discriminatory or unfair employment practice for an employer to terminate the employment of an employee due to that employee's engaging in any use of tobacco products off the premises of the employer during nonworking hours unless such a restriction:

(1) Relates to a bona fide occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or

(2) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

Notwithstanding any other provisions of this chapter, the sole remedy for any person claiming to be aggrieved by a discriminatory or unfair employment practice as defined in this section shall be as follows: the person may bring a civil suit for damages in circuit court and may sue for all wages and benefits which have been due up to and including the date of the judgment had the discriminatory or unfair employment practice not occurred. However, nothing in this section may be construed to relieve such person from the obligation to mitigate damages. It is not a discriminatory or unfair employment practice pursuant to this section for an employer to offer, impose or have in effect a health or life insurance policy that makes distinctions between employees for the type of coverage or the cost of coverage based upon the employees' use of tobacco products. The provisions of this section shall not apply to full-time firefighters.

An employer may discharge any employee, whether engaged for a fixed term or not, if the employee is guilty of misconduct in the course of service or of gross immorality though unconnected with the misconduct. S.D. CODIFIED LAWS § 60-4-9. There is no case law defining misconduct or immorality under this section.

F. Gender/Transgender Expression

It is discriminatory to discharge or fail to hire an employee in South Dakota based on sex. S.D. CODIFIED LAWS § 20-13-10. Wage discrimination by sex is also prohibited. S.D. CODIFIED LAWS § 60-12-15. There is currently no South Dakota law protecting transgender expression. Title VII of the Civil Rights Act has afforded the only protection for transgender employees in the State of South Dakota.

G. Other Key State Statutes
a. “An employment having no specified term may be terminated at the will of either party on notice to the other, unless otherwise provided by statute.” S.D. CODIFIED LAWS § 60-4-4. This rule is mitigated by consideration of the length of time adopted for the estimation of wages, and by a provision that if no agreement or custom for the time of payment exists, the employee is presumed to be hired by the month.

b. No employee may be discharged for refusing to perform an abortion. S.D. CODIFIED LAWS § 34-23A-13.

c. Other statutes govern discharge where there is fault or misconduct. S.D. CODIFIED LAWS § 60-4-5 provides that employment even for a specified term may be terminated at any time by employer where there is habitual neglect of duty, continued incapacity to perform or any willful breach of duty by employee. S.D. CODIFIED LAWS § 60-4-9 provides that an employee may be discharged whether engaged for a fixed term or not if guilty of misconduct or gross immorality, even if unconnected with employment. See also S.D. CODIFIED LAWS § 60-4-10 (regarding the discharge of an employee for misconduct which occurs before employment).