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I. AT-WILL EMPLOYMENT

A. Statute

Arkansas has no statute that determines the status of an employee.

B. Case law

An employer or an employee may terminate an employment relationship at-will, except where there is an agreement that the employment is for a specified time, in which case termination may only be for cause. *Crain Indus., Inc. v. Cass*, 810 S.W.2d 910, 305 Ark. 566 (1991). Additionally, a termination may only be for cause where an employer's employment manual contains an express and definite provision stating that the employee will only be dismissed for cause and that provision is relied on by the employee. *Id.*

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

Where an employment manual contains provisions stating that employment is at-will and that the employer may terminate the employment "at any time for any reason," other provisions of the manual setting forth disciplinary procedures and written explanations for termination do not modify at-will employment. See *Thompson v. Adams*, 268 F.3d 609 (8th Cir. 2001) (concluding that the plaintiff had no property interest giving rise to due process protections under Arkansas law).

A policy and procedures manual distributed to employees in which the employer states that discipline shall be for cause, but also explicitly states that termination may be without cause, does not modify an employment at-will relationship under the employee handbook/policy manual exception to the at-will doctrine. See *Bennett v. Watters*, 260 F.3d 925 (8th Cir. 2001) (finding that the plaintiff had no property interest protected by due process under Arkansas law).

A grievance process adopted by an employer is not the same as a for-cause provision in an employment manual and does not give rise to an exception to at-will employment. See *Faulkner v. Ark. Children's Hosp.*, 69 S.W.3d 393, 347 Ark. 941 (2002).

A list of terminable conduct in an employment manual does not constitute an implied promise by the employer not to dismiss the employee for other unlisted conduct where nothing in the manual indicates that the list of terminable conduct is exhaustive. See *Mertyris v. P.A.M. Transp., Inc.*, 832 S.W.2d 823, 310 Ark. 132 (1992).

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In *Gladden v. Ark. Children's Hosp.*, the Arkansas Supreme Court held that a modification of the at-will rule is appropriate in two respects:

where an employee relies upon a personnel manual that contains an express provision against termination except for cause he may not be arbitrarily discharged in violation of such a provision. Moreover, we reject as outmoded and untenable the premise...that the at will rule applies even where the employment agreement contains a provision that the employee will not be discharged except for cause, unless it is for a definite term. With those two modifications we reaffirm the at will doctrine.

728 S.W.2d 501, 505, 292 Ark. 130 (1987) (affirming dismissals of the plaintiffs' cases where neither employment manual in question contained an express provision that discharge would not be without cause).

In *Crain Indus.*, two former employees who had been discharged as the result of a reduction in force claimed that their discharges were in violation of the following provision in the employee handbook:

In the event it should become necessary to reduce the number of employees in the work force, employees will be laid off on a seniority basis by department. The last employee hired would be the first to be laid off. This policy will be adhered to with one possible exception; that is, under circumstances where the efficiency of a department would be impaired by the loss of some particular employee's skill.

810 S.W.2d at 911.

The Arkansas Supreme Court concluded that, "when an employer makes definite statements about what its conduct will be, an employee has a contractual right to expect the employer to perform as promised," and affirmed the jury's determination that the handbook provision was sufficient to form the basis of a contract and that the employer could only lay off employees in accordance with the provisions of the handbook—*i.e.*, by departmental seniority. *Id.* at 912-915.

Relying on *Crain Indus.*, the Arkansas Court of Appeals found in *Cisco, et al. v. King, et al.* that an employment handbook with the following language created an exception to the employment-at-will doctrine:

Except as otherwise provided in these policies and procedures, the tenure of an employee with permanent status shall continue during good behavior and satisfactory performance of his duties except the Road Supervisor and Chief Deputies who are At Will Employees.

205 S.W.3d 808, 810, 90 Ark. App. 307 (2005).

2. Provisions Regarding Fair Treatment

See above discussion regarding *Crain Indus.*, 810 S.W.2d at 910.

3. Disclaimers

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In *St. Edward Mercy Med. Ctr. v. Ellison*, an employee handbook contained an express provision that “employees are employed at will and for an indefinite term” and that the “employee handbook does not constitute a contract and does not confer any contractual rights on the employee.” 946 S.W.2d 726, 727, 58 Ark. App. 100 (1997). Based on this language, the Arkansas Court of Appeals held that the employee handbook's progressive disciplinary policy could not be construed as a guarantee that an employee could only be terminated in accordance with the policy. *Id.*

4. Implied Covenants of Good Faith and Fair Dealing

Under Arkansas law, every employment contract, even one that is terminable at will, contains "an implied covenant of good faith and fair dealing, which under limited circumstances may make discharge actionable," and thus prohibits discharge for a reason that contravenes public policy. *Smith v. Am. Greetings Corp.*, 804 S.W.2d 683, 684, 304 Ark. 596 (1991).

B. Public Policy Exceptions

1. General

An at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state. *M.B.M. Co., Inc. v. Counce*, 596 S.W.2d 681, 268 Ark. 269 (1980). This is a limited exception to the employment at-will doctrine and is not meant to protect merely private or proprietary interests. *Id.*

It is generally recognized that the public policy of a state is found in its constitution and statutes. *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 294 Ark. 239 (1988). An employer's failure to adhere to its own internal policies or the labor laws of foreign countries is not a violation of Arkansas' public policy. *Lynn v. Wal-Mart Stores, Inc.*, 280 S.W.3d 574, 102 Ark. App. 65 (2005).

2. Exercising a Legal Right

In *Scholtes v. Signal Delivery Serv., Inc.*, the court concluded that Arkansas law would recognize at least four exceptions to the at-will doctrine, excluding implied contracts and estoppel:

These are: (1) cases in which the employee is discharged for refusing to violate a criminal statute; (2) cases in which the employee is discharged for exercising a statutory right; (3) cases in which the employee is discharged for complying with a statutory duty; and (4) cases in which employees are discharged in violation of the general public policy of the state.

548 F. Supp. 487, 494 (W.D. Ark. 1982).

3. Refusing to Violate the Law

See above discussion under “Exercising a Legal Right.”

4. Exposing Illegal Activity (Whistleblowers)

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In *Sterling Drug, Inc. v. Oxford*, the Arkansas Supreme Court rejected the employer's argument on appeal that there was no cause of action for wrongful discharge in violation of the public policy of the state:

We are now squarely faced with the decision of whether or not to recognize the public policy exception to the employment-at-will doctrine... [W]e acknowledge that an employer should not have an absolute and unfettered right to terminate an employee for an act done for the good of the public. Therefore, we hold that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state. This is a limited exception to the employment-at-will doctrine. It is not meant to protect merely private or proprietary interests.

743 S.W.2d at 38 (citations omitted). The court further stated that the exclusive remedy for such a wrongful discharge was pursuit of contractual damages. *Id.*

Arkansas law recognizes a cause of action for wrongful discharge if an at-will employee is discharged for reporting a violation of federal or state law. *See Jarrett v. ERC Props., Inc.*, 211 F.3d 1078 (8th Cir. 2000) (concluding that the Arkansas Supreme Court would not hold as a matter of law that an employee's participation, under duress, in a public policy violation precludes a claim for wrongful discharge under the doctrine of *Sterling Drug*).

III. CONSTRUCTIVE DISCHARGE

A constructive discharge exists when an employer intentionally renders an employee's working conditions intolerable and thus forces him or her to resign. *See Sterling Drug*, 743 S.W.2d at 386. It exists only when a reasonable person would have resigned under the same or similar circumstances. *Id.*

"To act reasonably, an employee has an obligation not to assume the worst and not to jump to conclusions too quickly." *Summit v. S-B Power Tool*, 121 F.3d 416 (8th Cir. 1997) (quoting *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir. 1996)). An employee who quits without giving his or her employer a chance to resolve the problem is not constructively discharged. *Id.*

Frustration or embarrassment at not being promoted does not make work conditions sufficiently intolerable to constitute constructive discharge. *See West v. Marion Merrell Dow, Inc.*, 54 F.3d 493 (8th Cir. 1995).

Where an employee complained of abusive sexual harassment from a co-worker, the employer's half-hearted responses to the employee's complaints, threats against the employee's job because of her complaints, poorly conducted investigation, failure to transfer either employee, and failure to respond to the co-worker's lewd gestures toward the employee demonstrated an intolerable working environment and supported the jury's finding of constructive discharge. *See Henderson v. Simmons Foods, Inc.*, 217 F.3d 612 (8th Cir. 2000).

Constructive discharge through placement in a job that is "intolerable" may be shown by a deliberate placement in a job for which one is not qualified and that one is unable to perform, regardless of whether the environment is intolerably abusive or oppressive. *See Sanders v. Lee County Sch. Dist. No. 1*, 669 F.3d 888 (8th Cir. 2012).

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IV. WRITTEN AGREEMENTS

A. Standard “For Cause” Termination

An exception to the at-will doctrine in Arkansas is where the employment agreement contains a provision that the employee will not be discharged except for cause, even if the agreement has an unspecified term. *Lynn*, 280 S.W.3d at 574.

Initially, the employee bears the burden of proving the existence of an *express* provision in an employee handbook that states the employee will only be discharged “for cause.” Thus, when an employee fails to elicit such proof of an express provision, summary judgment or directed verdict is proper. *See Gladden*, 728 S.W.2d at 501; *see also Schmidly v. Perry Motor Freight, Inc.*, 735 F.2d 1086 (8th Cir. 1984) (the former employees claiming wrongful termination have the burden of proof to show that they were discharged in violation of their employment contracts).

In *Leggett v. Centro, Inc.*, a contention on appeal was that the trial court erroneously instructed the jury regarding the elements of the plaintiff’s *prima facie* case in a wrongful discharge action. 887 S.W.2d 523, 318 Ark. 732 (1994). In holding that a portion of the instruction was erroneous, the Arkansas Supreme Court approved the remaining portion, which stated that the employee had the burden to establish a *prima facie* case of wrongful discharge by showing (1) he sustained damages; (2) he was discharged from employment with the employer; (3) a cause of the discharge was the filing of his workers’ compensation claim; and (4) the wrongful discharge was the proximate cause of his damages. *Id.* at 524.

The remainder of the instruction that was approved went on to state that, if the jury found that each of these four propositions had been proved, then the burden of proof shifted to the employer to prove that there was a legitimate non-retaliatory reason for the discharge. *Id.* at 525.

B. Status of Arbitration Clauses

1. The Arkansas Uniform Arbitration Act

The Arkansas Uniform Arbitration Act (AUAA), codified at Ark. Code Ann. §§ 16-108-201, *et seq.*, by its very terms, does not apply to “[e]mployer-employee disputes.” Ark. Code Ann. § 16-108-233(b)(2); *see also Doe v. Central Arkansas Transit*, 900 S.W.2d 582, 50 Ark. App. 132 (1995). The only labor and employment law-related provision in the AUAA states that “an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.” Ark. Code Ann. § 16-108-204(b)(4). Thus, the court will look to prior Arkansas law, the common law, and federal law to resolve employment issues under arbitration provisions.

In a series of consumer cases, the Arkansas Supreme Court has refused to enforce arbitration agreements on the ground that the agreements lacked mutuality of obligation because the consumer was bound to arbitrate substantially all claims, while the seller was not. The court’s analysis was based on state contract law, and thus, would appear to apply equally in the employment context. *See, e.g., The Money Place, LLC v. Barnes*, 78 S.W.3d 730, 349 Ark. 518 (2002); *Showmethemoney Check Cashers, Inc. v. Williams*, 27 S.W.3d 361, 342 Ark. 112 (2000); *see also Alltel Corp. v. Rosenow*, 2014 Ark. 375, at 11 (refusing to reject the court’s precedent requiring mutuality as an essential element for an enforceable arbitration agreement and noting its disagreement with *Enderlin v. XM Satellite Radio Holdings, Inc.*, 2008

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WL 830262, at *10 (E.D. Ark. Mar. 25, 2008) (“Arkansas law requiring mutuality within the arbitration paragraph itself is preempted by the FAA...”).

C. The Federal Arbitration Act

The Federal Arbitration Act (FAA) applies to a transaction that involves “interstate commerce, even if the parties did not contemplate an interstate commerce connection.” *Pest Mgmt., Inc. v. Langer*, 240 S.W.3d 149, 154, 96 Ark. App. 220 (2007) (quoting *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995)).

In addition, parties have the power to contractually adopt choice-of-law provisions that select which arbitration laws will govern their agreement, whether federal or state. *See id.* (although the parties contractually agreed through a choice-of-law provision that the federal act would govern their agreement, the fact that the parties also contractually agreed that the transaction itself involved interstate commerce made a factual determination of whether the contract actually involved interstate commerce unnecessary); *see also Terminix Intern. Co., LLC v. Trivitt*, 289 S.W.3d 485, 488, 104 Ark. App. 122 (2008) (“The arbitration agreement at issue plainly states that it is to be governed under the FAA and not Arkansas law. We have held that, where the parties designate in the arbitration agreement which arbitration statute they wish to have control, the court should apply their choice.”).

The Arkansas Supreme Court has reiterated that the FAA, instead of the AUAA, applies when the underlying dispute involves interstate commerce. *Pest Mgmt.*, 240 S.W.3d at 154 (citation omitted).

V. ORAL AGREEMENTS

A. Promissory estoppel

Under Arkansas law, an employer can be estopped from denying an employment contract where the employee detrimentally relied on the actions, statements, or conduct of the employer. *Mansfield v. Am. Tel. & Tel. Corp.*, 747 F. Supp. 1329 (W.D. Ark. 1990).

An employee can demonstrate detrimental reliance by showing that he or she “passed up” other favorable employment opportunities, such as relocating at the employer’s insistence, or that he or she reasonably incurred certain expenses in reliance upon continued employment. *Scholtes*, 548 F. Supp. at 492.

Estoppel removes an employment contract from the statute of frauds. *Country Corner Food & Drug, Inc. v. Reiss*, 737 S.W.2d 672, 22 Ark. App. 222 (1987); *see also Van Dyke v. Glover*, 934 S.W.2d 204, 326 Ark. 736 (1996).

B. Fraud

In *Interstate Freeway Services, Inc. v. Houser*, the Arkansas Supreme Court applied the elements of fraud in an employment context. 835 S.W.2d 872, 310 Ark. 302 (1992) (elements of fraud include: (1) a false representation of a material fact; (2) knowledge or belief on the part of the person making the representation that the representation is false; (3) an intent to induce the other party to act or refrain from acting in reliance on the misrepresentation; (4) a justifiable reliance by the other party; and (5) resulting damages)).

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The plaintiff in *Interstate Freeway* was induced to accept employment as the manager of a new diner; after working four days, he was terminated. *Id.* at 873. The employer then hired a new manager, and the diner remained in business for some time. *Id.* The court determined that the plaintiff was fraudulently induced to accept the job and discussed the appropriate measure of damages for an award; because the plaintiff was an at-will employee, the court determined that he was entitled to recovery for lost wages between the date of his termination and the date the restaurant closed. *Id.* at 873-76.

C. Statute of Frauds

Ark. Code Ann. § 4-59-101(a)(6) states that, absent some memorandum memorializing the agreement, an oral contract that is not to be performed within one (1) year from its making cannot be enforced. This provision is applicable to employment contracts that cannot be performed within one year. *Blanton Co. v. Stewart*, 33 S.W.2d 50, 182 Ark. 934 (1931); *but see Johnson v. Harrywell, Inc.*, 885 S.W.2d 25, 47 Ark. App. 61 (1994) (fact that commissions might be paid to an employee for a period of time longer than one year does not bring employment contract within the statute of frauds).

This statute is inapplicable, however, to a contract of employment for an indefinite duration. Even if the statute of frauds were applicable, detrimental reliance removes the contract from the operation of the statute of frauds. *Country Corner Food & Drug*, 737 S.W.2d at 672.

VI. DEFAMATION

A. General Rule

1. Libel

The following elements must be proved to support a claim of defamation, whether it be by the spoken (slander) or written word (libel): (1) the defamatory nature of the statement of fact; (2) that statement's identification of or reference to the plaintiff; (3) publication of the statement by the defendant; (4) the defendant's fault in the publication; (5) the statement's falsity; and (6) damages. *Faulkner*, 69 S.W.3d at 402.

In defamation actions, there must be evidence that demonstrates a causal connection between defamatory statements made and injury to the plaintiff's reputation. *Boellner v. Clinical Study Ctrs., LLC*, 378 S.W.3d 745, 757, 2011 Ark. 83 (2011) (citation omitted). A plaintiff must establish actual damage to his reputation, but the showing of harm may be slight. *Id.* "It is not necessary to prove the literal truth of the accusation in every detail but that the imputation is substantially true, or as it is often put, to justify the gist, the sting, or the substantial truth of the defamation." *Id.*

2. Slander

See discussion above under "Libel."

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Ark. Code Ann. § 11-3-204 provides that a current or former employer may disclose the following information about a current or former employee's employment history to a prospective employer of the current or former employee upon receipt of written consent from the current or former employee:

- Date and duration of employment;
- Current pay rate and wage history;
- Job description and duties;
- The last written performance evaluation prepared prior to the date of the request;
- Attendance information;
- Results of drug or alcohol tests administered within one (1) year prior to the request;
- Threats of violence, harassing acts, or threatening behavior related to the workplace or directed at another employee;
- Whether the employee was voluntarily or involuntarily separated from employment and the reasons for the separation; and
- Whether the employee is eligible for rehire.

The current or former employer disclosing the information may present it in a format, including any electronic format, convenient to the current or former employer. *Id.* § 11-3-204(a)(4).

The current or former employer disclosing such information shall be presumed to be acting in good faith and shall be immune from civil liability for the disclosure or any consequences of such disclosure *unless* the presumption of good faith is rebutted upon a showing by a preponderance of the evidence that the information disclosed by the current or former employer was false, and the current or former employer had knowledge of its falsity or acted with malice or reckless disregard for the truth. *See id.* § 11-3-204(a)(3).

The current or former employee's written consent must be signed and dated and is valid for a maximum of six (6) months. *Id.* § 11-3-204. An applicant's written consent must be valid for the length of time that the application is considered active by the prospective employer; if the applicant is hired and remains with the new employer for more than six (6) months, then the consent is valid for no longer than six (6) months. *Id.* § 11-3-204(b)(3)(A)-(B). If the applicant is hired and remains with the new employer for less than six (6) months, the consent is valid for six (6) months after termination of the employee. *Id.* § 11-3-204(b)(3)(C).

Ark. Code Ann. § 11-3-204(a)(2) authorizes school districts to disclose without consent the employment information of their current and former employees. The code section specifically lists what information may be disclosed. Additionally, a school district may disclose to another school district, without consent, any additional information that may have some bearing upon the hiring of a current or former employee. *Id.*

C. Privileges

A communication is held to be qualifiedly privileged when it is made in good faith upon any subject matter in which the person making the communication has an interest or in reference to which he has a duty, and to a person having a corresponding interest or duty, although it contains matters which, without such privilege, would be actionable. *Navorro-Monzo v. Hughes*, 763 S.W.2d 635, 297 Ark. 444 (1989).

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“Arkansas law recognizes a qualified privilege for employers and supervisory employees dealing with matters that affect their business.” *Freeman v. Bechtel Constr. Co.*, 87 F.3d 1029, 1031 (8th Cir. 1996) (an investigation of sexual harassment and the recording of discipline in an employee’s personnel file falls within the scope of this qualified privilege; the plaintiffs also failed to allege that the reports in their personnel files were in fact published to a non-privileged third party).

In *Dillard Dept. Stores, Inc. v. Felton*, 634 S.W.2d 135, 276 Ark. 304 (1982), a former employee sued the employer for defamation based upon statements by supervisory employees accusing the former employee of theft. The court stated that the qualified privilege is lost where the statement is published to persons who do not share the corresponding interest with the publisher or is made with “malice.” *Id.* at 138.

Malice does not exist where the statement was made “in good faith with reasonable grounds for believing [the statement] to be true....” *Id.* at 135; *see also Wal-Mart Stores, Inc. v. Lee*, 74 S.W.3d 634, 348 Ark. 707 (2002) (statements are not protected by a qualified privilege where the author of the statements lacks belief in their truthfulness); *Richmond v. Southwire Co.*, 980 F.2d 518, 520 (8th Cir. 1992) (“Under Arkansas law, when the defamation defendant establishes a qualified privilege, ‘the burden shifts to the plaintiff to prove the privilege has been abused by excessive publication, by use of the occasion for an improper purpose, or by lack of belief or grounds for belief in the truth of what is said.’”) (citations omitted).

When the plaintiff does not present proof of malice, he or she is limited to recovering damages for the actual injury. This includes “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” *United Ins. Co. of Am. v. Murphy*, 961 S.W.2d 752, 755, 331 Ark. 364 (1998). Defamation *per se* is no longer applicable in Arkansas, and the plaintiff in a defamation case must prove reputational harm to recover damages. *Id.*

D. Other Defenses

1. Truth

A statement of fact must be false in order to satisfy required elements of a cause of action for defamation. *Faulkner*, 69 S.W.3d at 402-403.

2. No Publication

There must be publication of the defamatory statement to satisfy one of the required elements of defamation. *Faulkner*, 69 S.W.3d at 402.

3. Self-Publication

The Eighth Circuit has held, in an unpublished opinion, that the doctrine of compelled self-publication is not available under Arkansas law. *O’Connor v. Clorox Co.*, 14 Fed. Appx. 745, 746, 2001 WL 839001, at *2 (8th Cir. July 26, 2001); *see also Gibson v. Regions Fin. Corp.*, 2008 WL 110917, at *6 (E.D. Ark. Jan. 9, 2008).

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4. Invited Libel

There is no applicable statute or case law in Arkansas on this issue.

5. Opinion

The allegedly defamatory statement must also imply an assertion of an objective verifiable fact. To determine whether a statement may be viewed as implying an assertion of fact, the following factors must be weighed: (1) whether the author used figurative or hyperbolic language that would negate the impression that he or she was seriously asserting or implying a fact; (2) whether the general tenor of the publication negates this impression; and (3) whether the published assertion is susceptible of being proved true or false. *Faulkner*, 69 S.W.3d at 402-403; see also *Valor Healthcare, Inc. v. Pinkerton*, 620 F.Supp.2d 974, 981 (W.D. Ark. 2009).

6. Actual Harm to Reputation Recognized

Actual harm to reputation proximately caused by the conduct of the defendant is a necessary element of a defamation claim. “In the absence of proof of reputation injury, proximately caused by the conduct of the [d]efendant, [a plaintiff] cannot prevail on [a] defamation claim.” *Roeben v. BG Excelsior Ltd. P’ship*, 2009 Ark. App. 646, 3, 344 S.W.3d 93, 96 (2009).

E. Job References and Blacklisting Statutes

See above discussion under “References.” Additionally, Ark. Code Ann. § 11-3-202 provides:

(a)(1) In this state, every person who shall send or deliver, make or cause to be made for the purpose of being delivered or sent, part with the possession of any paper, letter, or writing, with or without a name signed thereto, sign with a fictitious name, or with any letter, mark, or other designation, or publish or cause to be published any false statement for the purpose of preventing another person from obtaining employment in this state or elsewhere shall, upon conviction, be adjudged upon conviction, be adjudged guilty of a misdemeanor.

(2) Every person who shall blacklist any person by writing, printing, or publishing, or causing any of these things to be done, the name or any mark or designation representing the name of any person in any paper, pamphlet, circular, or book, together with any false statement concerning the person so named, or shall publish that anyone is a member of any secret organization, for the purpose of preventing that other person from securing employment, shall upon conviction be adjudged guilty of a misdemeanor.

(3) Any person who shall do any of the things mentioned in this section for the purpose of causing the discharge of any person employed by any railroad or other company, corporation, or individual shall upon conviction be adjudged guilty of a misdemeanor.

(b) A person convicted shall be fined in the sum of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or imprisoned in the county jail for twelve (12) months, or both fined and imprisoned.

F. Non-Disparagement Clauses

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There is no applicable statute or case law in Arkansas on this issue.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

A person is subject to liability for outrage (also known as intentional infliction of emotional distress) if he or she willfully or wantonly causes severe emotional distress to another by extreme and outrageous conduct. In order to sustain a claim for outrage under Arkansas law, a plaintiff must prove the following elements:

- The actor intended to inflict emotional distress or knew or should have known that emotional distress was likely to result;
- The conduct was extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized community;
- The actions of the defendant were the cause of the plaintiff's distress; and
- The emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it.

Island v. Buena Vista Resort, 103 S.W.3d 671, 681, 352 Ark. 548 (2003) (citing *Faulkner*, 69 S.W.3d 393).

Arkansas has consistently taken a narrow view in recognizing claims for the tort of outrage that arise out of the discharge of an employee because an employer must be given considerable latitude in dealing with employees, and at the same time, an employee will frequently feel considerable insult when discharged. See *Crawford County v. Jones*, 232 S.W.3d 433, 365 Ark. 585 (2006); *City of Green Forest v. Morse*, 873 S.W.2d 155, 316 Ark. 540 (1994); see also *Mertyris*, 832 S.W.2d at 826 (while a claim of outrage by an at-will employee cannot be predicated upon the fact of discharge alone, the manner in which the discharge is accomplished or the circumstances under which it occurs may render the employer liable).

In the employment context, strained working relationships, deliberate attempts to undermine an employee's authority over subordinates and procedures within the employee's control, false accusations of shoddy work, false accusations and rumors of mental illness, and being placed on leave are insufficient to establish outrage. See *Faulkner*, 69 S.W.3d at 404. Similarly, refusals to grant promotions, the use of derisive and occasionally profane language, unsatisfactory resolutions of employee disputes, and discriminatory practices in pay and scheduling fail to rise to the level of outrage. See *Evans v. Autozone Stores, Inc.*, 2008 WL 697752, at *10 (W.D. Ark. March 13, 2008).

Tandy Corp. v. Bone, 678 S.W.2d 312, 283 Ark. 399 (1984), presents the rare case in which the Arkansas Supreme Court found that a plaintiff met the standard for proving the tort of outrage in the employment context. The plaintiff suffered from a personality disorder that required him to take tranquilizers and was more susceptible to stress and fear than an average person. When the defendant suspected the plaintiff of stealing either money or merchandise from its store, he was questioned at 30-minute intervals throughout the day-the interrogating security officers cursed at him, threatened him, and refused to allow him to take his medication on three occasions. *Id.* at 317. The plaintiff was also asked to take a polygraph examination, which he agreed to do. *Id.* at 315. Eventually, the plaintiff hyperventilated and was transported by ambulance to a local hospital. A few days later, the plaintiff called a psychiatrist for help and was hospitalized for a week. *Id.* In upholding the jury's finding of

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outrage, the court emphasized that “the notice to the employer of [the employee’s] condition is the only basis for the jury question of extreme outrage.” *Id.* at 317.

B. Negligent Infliction of Emotional Distress

Arkansas does not recognize a cause of action for the negligent infliction of emotional distress. *See Dowty v. Riggs*, 385 S.W.3d 117, 2010 Ark. 465 (2010).

VIII. PRIVACY RIGHTS

A. Generally

Arkansas courts have adopted the approach of the RESTATEMENT (SECOND) OF TORTS, which delineates four separate torts grouped under the rubric “invasion of privacy.” *See Wal-Mart Stores, Inc. v. Lee*, 74 S.W.3d 634. A claim for intrusion of privacy requires: (1) an intrusion; (2) that is highly offensive; (3) into some matter in which a person has a legitimate expectation of privacy. *Id.* A legitimate expectation of privacy is the “touchstone” of the tort of intrusion. *Id.* at 644.

The elements of the tort of false-light privacy include: (1) damages; (2) publication of a matter that places the claimant in a false light; (3) the false light in which the person is placed would be highly offensive to a reasonable person; (4) the defendant acted with knowledge or with reckless disregard as to the falsity of the publicized matter; (5) the defendant had serious doubts as to the truth of the matter publicized; and (6) damages were proximately caused by the publication. *Id.* at 656. A false-light privacy claim must be proved by clear and convincing evidence. *Id.*

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

All employers and labor organizations in Arkansas are required to report newly hired and re-hired employees to the Arkansas New Hire Reporting Center for inclusion in the State New Hire Registry. *See* Ark. Code Ann. § 11-10-902. The report must include the name, address, and social security number of the employee and the name, address, and federal taxpayer identification number of the employer, and it shall be received not later than twenty (20) days after the date the employer hires the employee or, in the case of an employer transmitting reports magnetically or electronically, by two (2) monthly transmissions, if necessary, not less than twelve (12) days nor more than sixteen (16) days apart. *Id.* §§ 11-10-902(b)(3)(A)-(B), (b)(4)(C).

2. Background Checks

All employees and volunteers of child welfare agencies who have not lived in Arkansas continuously for the past five (5) years are required to submit to a fingerprint-based criminal background check. Ark. Code Ann. § 9-28-409(c). The requirements for these background checks can be found at Ark. Code Ann. § 9-28-409.

All applicants and employees of home- and community-based health and home health care services providers, hospice programs, and long-term care facilities must undergo background checks. Ark.

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Code Ann. § 20-38-103. The requirements for these background checks can be found at Ark. Code Ann. §§ 20-38-101, *et seq.*

Contractors contracting with a state agency and applicants for state agency positions who have to provide care, supervision, treatment, or any other services to the elderly, to mentally ill or developmentally disabled persons, to persons with mental illnesses, or to children who reside in any state-operated facility or a position in which the applicant or employee will have direct contact with a child or a person who is elderly, mentally ill, or developmentally disabled are required to undergo background checks. *See* Ark. Code Ann. §§ 21-15-101, 102. Contractors contracting with a state agency in certain financial or information technology positions must also undergo criminal background checks. *See id.* The requirements for these background checks can be found at Ark. Code Ann. §§ 21-15-101, *et seq.*

The Arkansas State Police also provide the Arkansas Criminal History System that enables employers to obtain accurate criminal history information. *See* Ark. Code Ann. §§ 12-12-1501, *et seq.* An employer that is allowed access to criminal history information “shall maintain the written consent document in its files for at least three (3) years.” *Id.* § 12-12-1506(a)(4)(A)(i). It is a Class A misdemeanor to knowingly release or disclose to any unauthorized person any information collected and maintained in a criminal background check. *Id.* § 12-12-1511.

C. Other Specific Issues

1. Workplace Searches

See above discussion under “Generally.”

2. Electronic Monitoring

An employer is prohibited from asking on an employment application or during an interview if a prospective employee will consent to having a microchip implanted in his or her body and from requiring an employee to have a microchip implanted in his or her body as a condition of employment. *See* Ark. Code Ann. §§ 11-5-501(b)-(c). Additionally, an employer may not coerce an employee into consenting to have a microchip implanted in his or her body or create a hostile work environment for an employee who does not consent to having a microchip implanted, among other things. *Id.* § 11-5-501(e).

An employer is required to gain written consent from an employee before microchip implantation and pay all costs associated with implanting and removing the microchip implant, as well as pay any medical costs incurred by the employee as a result of any bodily injury caused by the implantation or presence of the microchip in the employee’s body. *Id.* §§ 11-5-501(f)-(g). An employer must also disclose to the employee the data that may be maintained on the microchip and how the data that is maintained on the microchip will be used by the employer. *Id.* § 11-5-501(g).

3. Social Media

An employer is prohibited from requiring, requesting, suggesting, or causing a current or prospective employee to (1) disclose the username and password for his or her social media account; or (2) change the privacy settings associated with his or her social media account. Ark. Code Ann. § 11-2-124(b)(1). An employer is further prohibited from requiring a current or prospective employee to add another employee, supervisor, or administrator to the list or contacts associated with his or her social

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media account. *Id.* § 11-2-124(b)(2). In addition, an employer is prohibited from retaliating against an applicant or employee for refusing to comply with any of these prohibited acts. *Id.* §§ 11-2-124(c)(1)-(2).

Ark. Code Ann. § 11-2-124 applies only to an employee's personal social media account (*e.g.*, Facebook, Twitter, LinkedIn, Instagram, blog, or podcast). *See id.* §§ 11-2-124(a)(3)(B)(i)-(iv) (excluding social media accounts opened at the request of an employer, provided by an employer, or created on behalf of or for the benefit of an employer). However, if a personal social media account is relevant to the investigation of an employee's alleged violation of law or written employment policy, an employer may obtain and use the employee's login information for the limited purpose of investigating those allegations. *Id.* § 11-2-124(e).

An employer who inadvertently receives an employee's social media account username, password, or other login information through the use of an electronic device provided to the employee by the employer, or a program that monitors an employer's network, is not liable for having such information as long as the employer does not use it to gain access to the employee's social media account. *Id.* § 11-2-124(b)(3). Additionally, an employer is not prohibited from viewing information about a current or prospective employee that is publicly available on the Internet. *Id.* § 11-2-124(d).

The Arkansas Department of Labor may assess a civil money penalty or seek injunctive relief for violations of Ark. Code Ann. § 11-2-124. *See* ADL Rule 010.14-500.

4. Taping of Employees

Ark. Code Ann. § 5-60-120 allows taping of communications of an employee if one of the parties is a participant in the conversation or there has been prior written consent by the participant.

5. Release of Personal Information on Employees

See above discussion under "Background Checks."

6. Medical Information

Under Arkansas' Genetic Information in the Workplace Act, employers shall not seek to obtain, use, or require a genetic test or genetic information of an employee or prospective employee for the purposes of distinguishing between, discriminating against, or restricting any right or benefit otherwise due or available to an employee or prospective employee. *See* Ark. Code Ann. §§ 11-5-401, *et seq.* Violation of this law is a misdemeanor punishable by up to one (1) year in jail, a \$25,000 fine, or both imprisonment and a fine. *Id.* § 11-5-404.

Additionally, Arkansas law prohibits an employer from requiring an applicant or employee, as a condition of employment or continued employment, to submit to or take a physical, medical examination, or drug test unless (1) the physical, medical examination, or drug test is provided at no cost to the applicant or employee, and (2) a true and correct copy of the examiner's report is furnished at no cost to the applicant or employee. *Id.* § 11-3-203(a)(1).

7. Restrictions on Requesting Salary History

There is no applicable statute or case law in Arkansas on this issue.

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IX. WORKPLACE SAFETY

A. Negligent Hiring

Under Arkansas law, a plaintiff can recover under a negligent hiring theory where there is proof of something in the employee's history that (1) would have been found by an "adequate" background check, and (2) would have put the employer on notice that the employee was predisposed to commit a criminal or violent act. *Saine v. Comcast Cablevision of Arkansas, Inc.*, 126 S.W.3d 339, 344-45, 354 Ark. 492 (2003).

There must be a direct causal connection between an inadequate background check and the criminal or violent act for which the plaintiff is attempting to hold the employer liable. *Id.* at 345 (affirming summary judgment on negligent hiring claim where the employee had passed a pre-employment drug screen and the employer's background check showed that the employee had been honorably discharged from the military and had job-related experience with no indication that he might be a risk to customers or predisposed to commit a sexual assault).

B. Negligent Supervision/Retention

Arkansas recognizes the torts of negligent supervision and negligent retention. *Saine*, 126 S.W.3d at 342. Under both theories of recovery, employers are subject to direct liability for their negligent supervision or negligent retention of employees when third parties are injured as a result of the tortious acts of those employees. *Id.* The employer's liability rests upon proof that the employer knew or, through the exercise of ordinary care, should have known that the employee's conduct would subject third parties to an unreasonable risk of harm. *Id.*

As with any other negligence claim, a plaintiff must show that the employer's negligent supervision or negligent retention of the employee was a proximate cause of injury and that harm to third parties was foreseeable. *Id.* It is not necessary that the employer foresee the particular injury that occurred, but only that the employer reasonably foresee an appreciable risk of harm to others. *Id.*

C. Interplay with Worker's Comp. Bar

Where the acts of an employer that result in injury to an employee are deemed willful and intentional, the employer loses exclusive workers' compensation remedy protection. *See Sontag v. Orbit Value Co.*, 672 S.W.2d 50, 283 Ark. 191 (1984).

D. Firearms in the Workplace

An employee may store a legally owned firearm in the employee's private vehicle in a private employer' parking lot when the firearm is lawfully possessed and stored out of sight inside a locked private vehicle. *See Ark. Code Ann. § 11-5-117.* A private employer generally will not be liable in a civil action for damages, injuries, or death resulting from or arising out of an employee's (or a third party's) actions involving a handgun transported or stored in its parking lot. *Id.* § 16-120-802(a), (b) (theft of a handgun occurring in a private employer's parking lot must be reported to the employer and a local enforcement agency within 24 hours of an employee obtaining knowledge of such theft).

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E. Use of Mobile Devices

Under Arkansas law, drivers are prohibited from operating a motor vehicle while using a wireless telecommunications device to engage in texting, or to access, read, or post to a social networking site. Ark. Code Ann. §§ 27-51-1504(a)(1)(A)-(B), (b)(1)-(3) (setting forth limited exemptions for certain professions and drivers in emergency situations). In addition, the use of a wireless telecommunications device for any purpose while operating a motor vehicle is prohibited when (1) passing a school building or school zone during school hours when children are present, and (2) in a highway work zone when a highway worker is present. *Id.* §§ 27-51-1605, 1606.

Drivers between the ages of 18 and 20 may use a hands-free wireless telephone or device while operating a motor vehicle. *Id.* § 27-51-1604. Drivers under the age of 18 are prohibited from using a wireless telecommunications device or a hands-free wireless telephone or device while operating a motor vehicle. *Id.* § 27-51-1603.

X. TORT LIABILITY

A. Respondeat Superior Liability

Under the doctrine of *respondeat superior*, an employer is responsible for negligent acts of the employee when the employee is acting within the scope of his or her employment. *See St. Joseph's Regional Health Ctr. v. Munos*, 934 S.W.2d 192, 195, 326 Ark. 605 (1996). “For purposes of *respondeat superior*, whether an employee is acting within the scope of employment is not necessarily dependent upon the situs of the occurrence but on whether the individual is carrying out the object and purpose of the enterprise, as opposed to acting exclusively in his own interest.” *J.B. Hunt Transport, Inc. v. Doss*, 899 S.W.2d 464, 468-69, 320 Ark. 660 (1995) (citation omitted).

Arkansas courts also recognize the borrow-servant doctrine, which provides that one who is the general servant of another may be lent or hired by his master to another for some special service, so as to become as to that service the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired.

Id. (citation omitted). The most significant question regarding a borrowed employee is which company has direction and control of the employee. *McMullen ex rel. Estate of McMullen v. Healthcare Staffing Assocs., Inc.*, 424 S.W.3d 404, 408, 2012 Ark. App. 617 (2012).

B. Tortious Interference with Business/Contractual Relations

The elements of tortious interference are: (1) the existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship; and (4) resultant damage to the party whose relationship has been disrupted. *See Stewart Title Guaranty Co. v. American Abstract & Title*, 215 S.W.3d 596, 363 Ark. 530 (2005).

In addition, the Arkansas Supreme Court has added the requirement that the conduct of the defendant must be “improper.” *Id.* Arkansas courts look to § 767 of the RESTATEMENT (SECOND) OF TORTS for

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guidance in determining whether the conduct is improper. *See Baptist Health v. Murphy*, 373 S.W.3d 269, 2010 Ark. 358 (2010).

Another essential element of a tortious-interference-with-contractual-relations claim is that there must be some third party involved. *Faulkner*, 69 S.W.3d at 405. A party to a contract and its employees and agents, acting within the scope of their authority, cannot be held liable for interfering with the party's own contract. *Id.*

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

Under Arkansas law, “[a] covenant not to compete is enforceable if the agreement is ancillary to an employment relationship or part of an otherwise enforceable employment agreement or contract.” Ark. Code Ann. § 4-75-101(a). The employer must have a protectable business interest, and the covenant not to compete must be limited with respect to time and scope that is not greater than necessary to defend the protectable business interest of the employer. *See id.* §§ 4-75-101(a)(1)-(2), (c)(1), (d) (two-year post-termination restriction is presumptively reasonable; absence of a defined geographic restriction does not make a covenant not to compete agreement overly broad). An employee’s continued employment is sufficient consideration for a covenant not to compete. *Id.* § 4-75-101(g).

An employer’s protectable business interest includes the employer’s: trade secrets; intellectual property; customer lists; goodwill with customers; knowledge of its business practices; methods; profit margins; costs; other confidential business information that is confidential, proprietary, and increases in value from not being known by a competitor; training and education of its employees; and other valuable employer data that the employer has provided to an employee that an employer would reasonably seek to protect or safeguard from a competitor in the interest of fairness. *Id.* § 4-75-101(b).

The reasonableness of a covenant not to compete agreement is determined based on: (1) the nature of the employer’s protectable interest; (2) the geographic scope of the employer’s business and whether or not a geographic limitation is feasible under the circumstances; (3) whether or not the restriction placed on the employee is limited to a specific group of customers or other individuals or entities associated with the employer’s business; and (4) the nature of the employer’s business. *Id.* § 4-75-101(c)(2).

The covenant not to compete law does not apply to agreements between employers and employees that do not concern competition or competitive work, such as non-solicitation, confidentiality, and nondisclosure agreements or terms and conditions of employment. *Id.* § 4-75-101(i)(1). Nor does the law apply to medical professionals. *Id.* § 4-75-101(j)(1).

B. Blue Penciling

If an Arkansas court finds the restrictions in a covenant not to compete agreement to be unreasonable, the court “shall” reform the agreement to cause the limitations in the agreement to be reasonable and impose a restraint that is not greater than necessary to protect the protectable business interest. *Id.* § 4-75-101(f)(1). The court shall then enforce the agreement under the reformed terms and conditions. *Id.* § 4-75-101(f)(2).

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While the Arkansas Supreme Court has not addressed the issue, a federal court in the Eastern District of Arkansas has held that Ark. Code Ann. § 4-75-101 does not provide for retroactive application and applies only to non-compete agreements entered *on or after July 22, 2015*, the effective date of the law. See *CGB Diversified Servs., Inc. v. Mills*, 2016 WL 7487913, at *7 (E.D. Ark. Jan. 14, 2016).

C. Confidentiality Agreements

Although it was not at issue on appeal, the Arkansas Supreme Court noted in *R.K. Enterprises, LLC v. Pro-Comp Man., Inc.* the trial court's finding that the defendants breached the confidentiality provisions of their employment contracts by removing and disclosing confidential information, including employee files and a computer program. 158 S.W.3d 685, 356 Ark. 565 (2004).

In the trade secrets context, the existence of a confidentiality provision has been found to be evidence of an employer's efforts to guard the secrecy of information and, thus, weighs in favor of the information constituting a trade secret. See *ConAgra, Inc., v. Tyson Foods, Inc.*, 30 S.W.3d 725, 342 Ark. 672 (2000).

D. Trade Secrets Statute

Pursuant to Arkansas' trade secrets statute, codified at Ark. Code Ann. §§ 4-75-601, *et seq.*, a "trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

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

Id. § 4-75-601(4).

The statute of limitations for an action under the trade secrets statute is three (3) years after the misappropriation is discovered or should have been discovered by the exercise of reasonable diligence, and the relief for such an action would be an injunction and/or damages for actual loss due to misappropriation. *Id.* §§ 4-75-604, 606. In addition, the court must do all that is reasonable to protect the trade secret during the court proceedings, including protective orders for discovery proceedings, in camera hearings and sealing the records. *Id.* § 4-75-605.

The question of what constitutes a trade secret is fact intensive. See *Bradshaw v. Alpha Packaging, Inc.*, 379 S.W.3d 536, 2010 Ark. App. 659 (2010). In *ConAgra*, which involved three former Tyson employees who resigned and immediately went to work for competitor ConAgra, the Arkansas Supreme Court held that Tyson failed to restrain the post-employment disclosure of confidential information. 30 S.W.3d at 729. The court considered whether the information at issue constituted a trade secret using the following factors:

- The extent to which the information is known outside the business;
- The extent to which the information is known by employees and others involved in the business;
- The extent of measures taken by the company to guard the secrecy of the information;

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- The value of the information to the company and to its competitors;
- The amount of effort or money expended by the appellee in developing the information; and
- The ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. at 729 (citations omitted).

The court ultimately found that Tyson “had in place no protection against postemployment revelation of confidential information by [the employees at issue].” *Id.* at 730. The court explained that while a post-employment confidentiality agreement is one way for an employer to protect the secrecy of information, it is not an absolute requirement for trade secret protection—other acceptable measures for protecting confidential information include physical security, computer security measures, restrictions in customer contracts that prevent disclosure to third parties, and the implementation of company policies. *Id.* at 729-30.

Customer lists can be considered a trade secret. An important factor in determining whether a customer list constitutes a trade secret is whether the employer took actions to guard the secrecy or preserve the confidentiality of the list. *See Allen v. Johar, Inc.*, 823 S.W.2d 824, 308 Ark. 45 (1992). For instance, where an employer’s customer lists, vendor list, pricing list, service agreement, inventory checklist, marketing plans, and computer software were generally known or readily ascertainable because the company did not take adequate steps to protect the information from being acquired or duplicated by others, use by former employees did not constitute appropriation of trade secrets. *See Weigh Sys. S., Inc. v. Mark’s Scales and Equip., Inc.*, 68 S.W.3d 299, 347 Ark. 868 (2002).

E. Fiduciary Duty and other Considerations

In Arkansas, an employer and an employee stand in a fiduciary relationship and are required to meet the standards of fair dealing, good faith, honesty, and loyalty. *See Cole v. Laws*, 76 S.W.3d 878, 883, 349 Ark. 177 (2002). These fiduciary duties essentially prohibit self-dealing in the absence of consent by the employer. *Id.*

An employee owes his or her employer a duty of loyalty, which precludes the employee from soliciting other employees or customers to leave the company with the employee. *See Vigoro Industries, Inc. v. Crisp*, 82 F.3d 785 (8th Cir. 1996). Unless otherwise restricted by contract, an employee may, while still employed, notify customers of his or her intention to resign, subsequently go into business for him or herself, and accept business from other customers when offered. *Id.* at 788. However, the duty of loyalty is breached if the employee’s pre-resignation communications with his or her employer’s customers cross the line from simple notification of resignation to active solicitation of new business, and if the employee secures commitments from other employees to join the employee at his or her new business while still working for the employer. *Id.* at 789.

XII. DRUG TESTING LAWS

A. Public Employers

Arkansas’ voluntary drug-free workplace law, Ark. Code Ann. §§ 11-14-101, *et seq.*, provides that for public employers, “testing shall be limited to the extent permitted by the Arkansas Constitution and the United States Constitution.” *See* Ark. Code Ann. § 11-14-104(a)(1).

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B. Private Employers

It is unlawful under Arkansas law for an employer to require an applicant or employee to pay for, either directly or indirectly, any part of the cost of (1) a physical, medical examination, or drug test, or (2) a copy of the examiner's report. Ark. Code Ann. § 11-3-203(a)(2). However, if an employee tests positive for an illegal drug, the employer and employee may agree in writing who will bear the cost of future drug tests or screens required as a condition of continued employment. *Id.* § 11-3-203(a)(3).

Arkansas' voluntary drug-free workplace law, codified at Ark. Code Ann. §§ 11-14-101 *et seq.*, provides notice, education, and procedural requirements governing drug-free workplace programs. Employers who qualify as having drug-free workplace programs are entitled to certain discounts or benefits relating to worker's compensation insurance. *Id.* § 11-14-112.

Pursuant to Ark. Code Ann. § 11-10-514(a)(1), an employee shall be denied unemployment benefits if he is discharged for misconduct in connection with his work. "Misconduct" for purposes of disqualifying someone for unemployment benefits involves the following:

- Disregard of the employer's interest;
- Violation of the employer's rules;
- Disregard of the standards of behavior which the employer has the right to expect; and
- Disregard of the employee's duties and obligations to his employer.

See Rucker v. Price, 915 S.W.2d 315, 52 Ark. App. 126 (1996) (concluding that the former employee was not discharged for off-duty conduct but was instead terminated pursuant to the employer's drug-free workplace policy by testing positive for drugs; because his conduct was in violation of the employer's rules, the former employee was "discharged for misconduct in connection with the work" and not qualified for unemployment benefits); *see also Grace Drill v. Ramsey*, 790 S.W.2d 907, 31 Ark. App. 81 (1990).

In addition, testing positive for illegal drugs pursuant to a U.S. Department of Transportation-qualified drug screen conducted in accordance with an employer's bona fide written drug policy is grounds for disqualification from unemployment benefits. Ark. Code Ann. § 11-10-514(b)(2)(A).

XIII. STATE ANTI-DISCRIMINATION STATUTES

The Arkansas Civil Rights Act of 1993 (the "ACRA") prohibits discrimination based on various protected categories. *See* Ark. Code Ann. §§ 16-123-101, *et seq.*

A. Employers/Employees Covered

The ACRA provides that an employer is any "person who employs nine (9) or more employees in the State of Arkansas in each of twenty (20) or more calendar weeks in the current or preceding year." *Id.* § 16-123-102(7).

B. Types of Conduct Prohibited

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No employer acting under color of any statute, ordinance, regulation, custom, or usage of the State of Arkansas may deprive another person of “any rights, privileges, or immunities secured by the Arkansas Constitution.” *Id.* § 16-123-105(a).

An employer is prohibited from discriminating against an applicant or employee “because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability.” *Id.* § 16-123-107(a). The ACRA does not protect an individual without a presently occurring disability who is merely regarded as disabled. *See Faulkner*, 69 S.W.3d at 393; *see also Wang v. Walmart Stores, Inc.*, 424 Fed. Appx. 608, 609 (8th Cir. June 24, 2011) (applying Arkansas law).

Pursuant to the “Creating a Respectful and Open World for Natural Hair Act” (CROWN Act), which amended the ACRA effective August 1, 2023, race and national origin discrimination encompasses discrimination on account of a “natural, protective, or cultural hairstyle,” which includes “afros, dreadlocks, twists, locs, braids, cornrow braids, Bantu knots, curls and hair styled to protect hair texture or for cultural significance.” Ark. Code Ann. §§ 16-123-102(2)-(3), (10).

Finally, the ACRA prohibits an employer from retaliating against an individual who, in good faith, opposed an act illegal under the ACRA or “made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing.” *Id.* § 16-123-108(a). And an employer may not coerce, intimidate, threaten, or interfere with an individual who exercises the rights available to him or her under the ACRA or who has encouraged others to exercise such rights. *Id.*

C. Administrative Requirements

There are no administrative requirements to bringing suit under the ACRA. However, if a Charge of Discrimination is filed with the Equal Employment Opportunity Commission (EEOC), suit must be filed within ninety (90) days of the receipt of a Right to Sue letter or notice of Determination, or within one (1) year after the alleged employment discrimination occurred, whichever is later. Ark. Code Ann. § 16-123-107(c)(4).

If no EEOC Charge is filed, suit must be filed under the ACRA within one (1) year of the alleged discriminatory or retaliatory act. *Id.*

D. Remedies Available

In an employment discrimination or retaliation claim filed under the ACRA, the court may award injunctive relief, back pay, interest on back pay, and reasonable attorney’s fees and costs. *Id.* §§ 16-123-107(c)(1)(A), 108(c)(2).

An individual may also recover compensatory and punitive damages as follows:

Number of Employees:	Damages Cap:
9-14	\$15,000
15-100	\$50,000
101-200	\$100,000
201-500	\$200,000
More than 500	\$300,000

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Id. §§ 16-123-107(c)(2)(A)-(B).

Damages awarded under the ACRA “shall not duplicate or increase an award for damages over the statutory limit allowed by state law or any federal law, as the federal law existed on January 1, 2017.” *Id.* § 16-123-107(c)(3).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

Employees may not be discharged for answering a summons to serve on a jury, nor shall they be subject to loss of sick leave, loss of vacation time, or any other type of penalty. *See* Ark. Code Ann. § 16-31-106.

A public employee serving as a juror shall be entitled to full compensation in addition to any fees paid for such services and shall not be subject to loss of annual leave. *Id.* § 21-4-213(a). A public employee subpoenaed as a witness to attend a deposition, hearing, or appear in court is entitled to his or her salary if the matter is within the employee’s scope of state employment, or if the employee is neither a paid expert witness nor a party to the matter that is outside the employee’s scope of state employment; if the employee is a paid expert witness or a party to the matter outside the scope of his or her state employment, the employee is required to take annual leave. *Id.* § 21-4-213(b).

B. Voting

Under Ark. Code Ann. § 7-1-102, employers in the state must schedule the work hours of employees on election days so that each employee will have an opportunity to exercise the right of franchise. Any employer who fails or refuses to comply with the provisions of this section is subject to a fine of not less than \$25.00 and no more than \$250.00. *Id.*

C. Family/Medical Leave

Public employees may be granted sick leave with pay when they are incapacitated for the performance of their duties by sickness, injury, or for medical, dental, or optical treatment. Ark. Code Ann. § 21-4-206(a). Public employees may also be granted sick leave due to the death or serious illness of an employee’s immediate family, which means a father, mother, sister, brother, husband, wife, child (including a child in foster care who has been placed in the home of the employee), grandmother, grandfather, grandchild, in-law, or any individual acting as a parent or guardian of the employee. *Id.* § 21-4-206(b).

Public employees may donate earned sick or annual leave to a catastrophic leave bank, and catastrophic leave with pay may be granted when an employee is unable to perform his or her duties due to a catastrophic illness. *Id.* §§ 21-4-214(b)-(c).

D. Pregnancy/Maternity/Paternity Leave

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For public employees, maternity leave shall be treated as any other leave for sickness or disability, and accumulated sick leave and annual leave, if requested by the employee, shall be granted for maternity use, after which leave without pay may be used. Ark. Code Ann. § 21-4-209(a).

Catastrophic leave may be used for maternity purposes. *Id.* §§ 21-4-209(b), 214(c). A female employee who has been employed by the state, or previously employed by a public school district or a state-supported institution of higher education, for one (1) year or more may receive up to twelve (12) consecutive weeks of catastrophic leave with pay after the birth of the employee's biological child, or the placement of an adoptive child under one (1) year of age or the foster placement of an infant under one (1) year of age in the home of the employee. *Id.* §§ 21-4-214(d)-(e) (a female employed by a public school district or a state-supported institution of higher education for less than one (1) year may also be eligible if she meets certain criteria).

A public employee may be eligible for forty (40) hours per calendar year of foster care leave with pay when a child in foster care has been placed in the employee's home. *Id.* § 21-4-218 (emergency, intermittent, probationary, or extra-help employees and female employees eligible for catastrophic leave for maternity purposes not eligible for foster care leave with pay).

E. Day of Rest Statutes

There is no applicable Arkansas statute on this issue.

F. Military Leave

Public employees who are members of the armed forces shall be granted leave at the rate of fifteen (15) days per calendar year, plus necessary travel time for annual training requirements or other duties performed in an official duty status. *See* Ark. Code Ann. § 21-4-212. Arkansas' law specifically pertaining to military leaves of absence for public employees is located at Ark. Code Ann. §§ 21-4-301, *et seq.*

G. Sick Leave

See above discussions under "Family/Medical Leave" and "Pregnancy/Maternity/ Paternity Leave."

H. Domestic Violence Leave

An employer may not discharge or discipline a victim of a crime or a representative of that victim for taking time off to participate at the prosecuting attorney's request in preparation for a criminal justice proceeding or taking time off to attend a criminal justice proceeding if the attendance is reasonably necessary to protect the interests of the victim. *See* Ark. Code Ann. § 16-90-1105.

I. Other Leave Laws

Public employees are entitled to up to seven (7) days of paid leave for serving as a bone marrow donor and thirty (30) days of paid leave for serving as an organ donor. Ark. Code Ann. § 21-4-215.

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Private employees are entitled to up to ninety (90) days of unpaid leave for serving as an organ donor or bone marrow donor—if not eligible for leave through the Family Medical Leave Act (FMLA)—in addition to any medical, personal, or other paid leave provided by the employer. Ark. Code Ann. § 11-3-205. If the employer agrees to pay the employee’s regular salary or wages during the leave of absence, the employer is entitled to a credit against the employer’s Arkansas withholding tax liability. *Id.*

Any employee who is elected to a public office or appointed by the Governor to a board or commission in the State of Arkansas that requires the employee’s absence from their employment shall be granted a leave of absence for the period that the employee requests, so long as it does not exceed the duration of the term of office to which the employee has been elected. Ark. Code Ann. § 21-4-101.

Under Arkansas’ “Crump’s Law,” a paid firefighter for the state or any political subdivision of the state who has completed five (5) or more years of employment as a paid firefighter shall be granted a minimum of 1,456 hours of paid leave upon the initiation of treatment for an occupationally caused cancer. *See id.* §§ 21-4-107(a)(1), (3) and 21-5-705(a)(3)(A)(i) (setting forth the circumstances under which a firefighter is considered to have an occupationally caused cancer). An occupationally caused cancer is presumed to result from a firefighter’s employment if, at the time of employment, the firefighter underwent a physical examination that did not reveal substantial evidence that the occupationally caused cancer existed before his or her employment as a firefighter. *Id.* § 21-4-107(a)(4)(A)(ii)(a). The leave provided under Crump’s Law does not reduce the accrued sick leave or annual vacation leave of the firefighter and does not impact any other employment benefit of the firefighter. *Id.* § 21-4-107(a)(2).

XV. STATE WAGE AND HOUR LAWS

The Arkansas Minimum Wage Act (AMWA) covers all employers with four or more employees in Arkansas. *See* Ark. Code Ann. §§ 11-4-201, *et seq.* An individual must file a written consent to become a party plaintiff to an action under the AMWA, which has a two-year statute of limitations. *Id.* §§ 11-4-218(e)(4), (g).

An employer that violates the AMWA may be liable for the full amount of the wages owed, less any amount actually paid to the employee, plus costs and reasonable attorney’s fees. *Id.* § 11-4-218(a)(1). The employee may also be awarded liquidated damages in an amount equal to or less than the amount of wages awarded if the employee proves a willful violation of the AMWA. *Id.* § 11-4-218(a)(2).

The Arkansas Department of Labor may assess additional civil penalties for a willful violation of the AMWA. *Id.* § 11-4-206.

A. Current Minimum Wage in State

The minimum hourly wage rate in Arkansas is \$11.00. Ark. Code Ann. § 11-4-210(a)(3) (effective January 1, 2021). The minimum hourly cash wage for tipped employees in Arkansas is \$3.62. *Id.* § 11-4-212(a).

The AMWA’s minimum wage requirements do not apply to full-time students at an accredited Arkansas school. *Id.* § 11-4-210(b) (full-time students limited to twenty (20) hours of work/week while school is in session or forty (40) hours of work/week when school is not in session at a wage rate of at least 85 percent of the current minimum hourly wage rate).

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B. Deductions from Pay

Under Ark. Code Ann. § 11-4-213, an employer of an employee engaged in any occupation in which board, lodging, apparel, or other items and services are customarily and regularly furnished to the employee for his or her benefit may take an allowance for any value provided. The allowance cannot exceed thirty cents (30 cents) per hour, and the employer must be cautious not to violate state and federal minimum wage laws. *Id.*

C. Overtime Rules

Ark. Code Ann. § 11-4-211 provides for overtime compensation of not less than 1.5 times the regular rate for hours worked over forty (40) in a week. Arkansas' overtime pay requirements do not apply to agricultural employees or any employee exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) pursuant to the provisions of 29 U.S.C. §§ 213(b)(1)(24) and (b)(28)-(30), as they existed on March 1, 2006.

D. Time for Payment upon Termination

An employer that discharges an employee is required to pay all wages due by the next regular payday; if the employer fails to make the payment within seven (7) days of the next regular payday, the employer shall owe the employee double the wages due. Ark. Code Ann. § 11-4-405.

E. Breaks and Meal Periods

Rest periods of short duration, running from five (5) minutes to about twenty (20) minutes, must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. *See* ADL Rule 010.14-108(C)(1).

Bona fide meal periods—ordinarily rest periods of thirty (30) minutes or more that do not include coffee breaks or time for snacks—may not be counted as work time. Employees must be completely relieved from duty for the purpose of bona fide meal periods. An employee that is required to perform any duties, whether active or inactive, while eating is not completely relieved from duty; however, it is not necessary that an employee be permitted to leave the employer's premises if otherwise completely freed from duties during the meal period. *See* ADL Rule 010.14.1-108(C)(2); *see also* ADL Rule 010.14-313(c) (Arkansas Department of Labor regulations governing breaks and meal periods for children employed in the entertainment industry).

Nursing mothers must be provided reasonable unpaid break time each day—as well as a private, secure, and sanitary room or other location in close proximity to the employee's work area—for the purpose of expressing breast milk. *See* Ark. Code Ann. §§ 11-5-116(a)(1), (b)(1)-(2) (the room or location may not be a toilet stall but may include the employee's normal workspace). The employee must make reasonable efforts to minimize disruption to the employer's operations. *Id.* § 11-5-116(d); *see also id.* § 11-5-116(c) (an employer may not be required to provide break time for expressing breast milk if doing so would create an undue hardship on its operations).

F. Employee Scheduling Laws

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There is no applicable statute or case law in Arkansas on this issue.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

The Arkansas Clean Indoor Air Act of 2006 prohibits smoking in all public places and enclosed areas within places of employment. Ark. Code Ann. § 20-27-1804. Workplaces of any employer with fewer than three employees are exempt. *Id.* § 20-27-1805. Any person who violates the law is subject to a fine of up to \$500. *Id.* § 20-27-1809.

B. Health Benefit Mandates for Employers

Employers who make available any health benefits to their employees, excluding workers' compensation, are required to inform and notify employees of the nature of the benefits (i.e., whether they are self-insured, fully insured, or Employee Retirement Income Security Act-qualified) and to provide the necessary information to enable employees to contact the authority regulating the benefits. Ark. Code Ann. § 11-2-122.

C. Immigration Laws

Ark. Code Ann. § 19-11-105(b) prohibits state agencies from entering into or renewing “a public contract for services with a contractor who knows that the contractor or subcontractor employs or contracts with an illegal immigrant to perform work under the contract.” Before executing a public contract, the contractor must certify that they do not employ or contract with an illegal immigrant. *Id.* § 19-11-105(c). If the contractor violates the law, they are required to correct the violation within sixty (60) days or the state must terminate the contract. *Id.* § 19-11-105(d).

Aliens are ineligible for unemployment benefits unless the alien is an individual who was lawfully admitted for permanent residence at the time he or she performed services, was lawfully present for purposes of performing the subject services, or was permanently residing in the United States under color of law at the time the services were performed, including an alien who was lawfully present in the United States as a result of the application of the provisions of § 212(d)(5) of the Immigration and Nationality Act. *Id.* § 11-10-511(a).

D. Right to Work Laws

Arkansas Constitutional Amendment 34 establishes Arkansas as a “right to work” state. In addition,

No person shall be denied employment because of membership in or affiliation with a labor union, nor shall any person be denied employment because of failure or refusal to join or affiliate with a labor union, nor shall any person, unless he or she shall voluntarily consent in writing to do so, be compelled to pay dues or any other monetary consideration to any labor organization as a prerequisite to, condition of, or continuance of employment.

Ark. Code Ann. § 11-3-303.

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Pursuant to Ark. Code Ann. § 11-3-304, no person, group of persons, firm, corporation, association, or labor organization can contract to exclude those who are members, are not members, or are former members of a labor union; penalties for violations of the law are set forth in this provision.

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

The Arkansas Medical Marijuana Amendment was passed by the voters in November 2016. See AR Const. Amend. 98. The state legislature modified the amendment in March 2017 to address, among other things, employment-related issues for medical marijuana.

An employer is prohibited from discriminating against an applicant or employee (which includes not hiring, disciplining, failing to promote, or terminating) or penalizing an applicant or employee based upon his or her past or present status as a qualifying patient. AR Const. Amend. 98, § 3(f)(3)(A). An employer is defined as an “entity who employs nine (9) or more employees in the State of Arkansas in twenty (20) or more calendar weeks in the current or preceding calendar year.” *Id.*, § 2(22). A qualifying patient is a person who has been diagnosed by a physician as having a qualifying medical condition and registered with the Arkansas Department of Health as required under the amendment. *Id.*, § 2(14).

An employer is also prohibited from:

- Disciplining a qualifying patient for the medical use of marijuana in accordance with the amendment if he or she possesses not more than 2 1/2 ounces;
- Disciplining a qualifying patient for giving usable marijuana to another qualifying patient for medical use if nothing is transferred in return;
- Disciplining anyone for giving a qualifying patient or designated caregiver paraphernalia to facilitate the use of medical marijuana; and
- Disciplining a person for being in the presence or vicinity of the medical use of marijuana as allowed by the amendment or for directly assisting a physically disabled qualifying patient with the medical use of marijuana.

Id., §§ 3(a), (c), (h)-(k).

An employer is not required to accommodate the ingestion of marijuana in the workplace or an employee working while under the influence of marijuana. *Id.* § 6(b). In addition, an employer is allowed to:

- Have and enforce drug-free workplace and substance abuse testing policies that apply to both applicants and employees;
- Discipline an employee if there is a good faith belief that he or she used or possessed medical marijuana on site or during work hours;
- Discipline an employee if there is a good faith belief that he or she was under the influence of medical marijuana on site or during work hours; and
- Exclude an employee or applicant from a safety-sensitive position if there is a good faith belief that he or she is a current user of medical marijuana.

Id. § 3(f)(3)(B).

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Under certain circumstances when dealing with applicants or employees with a medical marijuana license, an employer may monitor and assess the job performance of an employee, reassign an employee to a different position or job duties, place an employee on paid or unpaid leave, suspend or terminate an employee, require successful completion of a substance abuse program before returning to work, and refuse to hire an applicant. *Id.* § 3(f)(3)(C).

Damages in an employment discrimination claim filed under the amendment are limited to the damages available for an employment discrimination claim under the ACRA. *Id.* § 3(f)(3)(D) (citing Ark. Code Ann. § 16-123-107(c)). Any action based on employment discrimination must be filed under the amendment within one year of the alleged discrimination. *Id.* § 3(f)(3)(E).

F. Gender/Transgender Expression

Under the “Given Name Act” enacted in 2023, faculty members, teachers, and employees of public schools and state-supported institutions of higher education in Arkansas are prohibited from using students’ preferred names and pronouns without parental consent. *See* Ark. Code Ann. § 6-1-108.

G. Other Key State Statutes

1. Lie Detector Tests

There is no applicable Arkansas statute on this issue.

2. Discrimination for Filing a Workers’ Compensation Claim

An employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work on account of an individual's claim for workers’ compensation benefits, or obstructs or impedes the filing for workers’ compensation benefits, is subject to a fine of up to \$10,000. *See* Ark. Code Ann. § 11-9-107. The fine is payable to the Second Injury Trust Fund and paid by the employer, not the carrier; the employee is entitled to recover costs and a reasonable attorney’s fee from the amount of the fine. *Id.* The employer may also be guilty of a class D felony. This is an employee’s exclusive remedy against the employer for discrimination for filing a workers' compensation claim. *Id.*; *but see* Ark. Code Ann. § 16-118-107 (victims of felonies can pursue damages).

3. Political Freedom of Public Employees

It is unlawful for a public employer to discipline, threaten to discipline, reprimand (orally or in writing), place any notation in a public employee’s personnel file disciplining or reprimanding him or her, or to otherwise discriminate against a public employee because he or she exercised the right to communicate with an elected public official or exercised a right or privilege under the Freedom of Information Act of 1967. *See* Ark. Code Ann. § 21-1-503(c).

4. Personnel Files

Employers subject to the state’s Freedom of Information Act are required to make available personnel records to the person about whom the records are maintained or to that person’s designated representative. *See* Ark. Code Ann. § 25-19-105(c)(2).

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5. Arkansas Equal Pay Act

The Arkansas Equal Pay Act is located at Ark. Code Ann. §§ 11-4-601, *et seq.* Pursuant to Ark. Code Ann. § 11-4-601,

(a) Every employer in the state shall pay employees equal compensation for equal services, and no employer shall discriminate against any employee in the matter of wages or compensation solely on the basis of the sex of the employee.

(b) An employer who violates or fails to comply with the provisions of this section shall be guilty of a Class C misdemeanor, and each day that the violation or failure to comply continues shall be a separate offense.

In addition, Ark. Code Ann. § 11-4-610 specifically prohibits wage discrimination between the sexes, providing that:

(a) No employer shall discriminate in the payment of wages as between the sexes or shall pay any female in his or her employ salary or wage rates less than the rates paid to male employees for comparable work.

(b) Nothing in §§ 11-4-607 – 11-4-612 shall prohibit a variation in rates of pay based upon a difference in seniority, experience, training, skill, ability, differences in duties and services performed, differences in the shift or time of the day worked, or any other reasonable differentiation except difference in sex.

H. Volunteer Activities and Reports

There is no applicable Arkansas statute on this issue.

I. Commission Sales Representation

Under the Arkansas Sales Representative Act, a contract between a principal and sales representative under which the sales representative is to solicit wholesale orders within Arkansas must be in writing and set forth the method by which the sales representative's commission is to be computed and paid. *See* Ark. Code Ann. § 4-70-302. The Act establishes penalties to businesses for failure to pay agreed-upon commissions.

J. Commercial Motor Vehicle Operators

For an employee of a motor carrier employed in a driving capacity, he or she is not entitled to payment of minimum wages or overtime compensation for the following activities: travel to/from the driver's personal residence, personal activities, and time logged as off-duty or in a sleeper berth. *See* Ark. Code Ann. § 11-4-221(3).

K. Arkansas Labor Relations Act

There is no applicable Arkansas statute on this issue.

L. Abortion

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Abortion is prohibited under Arkansas law except to save the life of a pregnant woman in a medical emergency. Ark. Code Ann. § 5-61-304(a).

M. Local Ordinances

There are no new ordinances to report.

N. New Developments (including COVID permanent changes)

Arkansas law prohibits the state, a state agency or entity, a political subdivision of the state, or a state or local official from mandating or requiring an individual to receive a COVID-19 vaccine, which “shall not be a condition of education, employment, entry, or services.” Ark. Code Ann. § 20-7-146(b)-(c). The same entities are also prohibited from discriminating against or coercing an individual for refusing to receive a COVID-19 vaccine or immunization. *Id.* § 20-7-146(a), (e).

The Arkansas legislature enacted in 2023 a law prohibiting public schools and institutions of higher learning from requiring employees to complete or participate in implicit bias training and from taking adverse employment action against school employees for failing or refusing to complete or participate in implicit bias training. Ark. Code Ann. §§ 6-60-120(a) and 6-17-124(a).