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KENTUCKY

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I. AT-WILL EMPLOYMENT

A. Statute

There is no Kentucky statute governing at-will employment.

B. Case Law

Employment in Kentucky is generally at-will, which allows the employer to discharge an employee "for good cause, for no cause, or for a cause that some might view as morally indefensible." *Firestone Textile Co., Div. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983); *Northeast Health Mgmt., Inc. v. Cotton*, 56 S.W.3d 440, 446 (Ky. App. 2001). In accordance with this principle, employment for an indefinite period of time is at-will and may be terminated at any time. *See Edwards v. Kentucky Utilities Co.,* 286 Ky. 341, 150 S.W.2d 916 (1941).

Under Kentucky law, parties can alter the at-will employment relationship, but only with a clear statement of their intent to do so. *Shah v. Am. Synthetic Rubber Corp.*, 655 S.W.2d 489, 492 (Ky. 1983). In *Shah*, the court held that a contract for permanent employment which is not supported by any consideration other than the obligation of services to be performed on the one hand and wages to be paid on the other is a contract for an indefinite period, and, as such, is terminable at the will of either party. 655 S.W.2d at 491.

A contract for a definite term, in contrast, requires reasonable cause in support of a discharge. *Williams v. Leaf Tobacco Co.*, 168 S.W.2d 570, 572 (Ky. 1943). This rule raises the issue of whether the contract was, in fact, for a definite term. The Kentucky Supreme Court in *Shah* observed that the duration of an employment contract must be determined by the circumstances of the particular case, depending on the understanding of the parties, as inferred from their "written or oral negotiations and agreements, the usage of business, the situation and objectives of the parties, the nature of the employment, and all circumstances surrounding the transaction." 655 S.W.2d at 490.

The terms of employment contracts are dependent on the understanding of the parties, ascertained from their written or oral negotiations, the situation, the nature of the employment, and the circumstances surrounding the employment. *Bailey v. Floyd Co. Bd. of Educ.*, 106 F.3d 135, 142 (6th Cir. 1997); *Hammond v. Heritage Communications, Inc.* 756 S.W.2d 152, 155 (Ky. App. 1980).

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Of concern are cases addressing whether an employee handbook creates a contract not terminable at-will. While it appears that such a result is possible, express language in the handbook to the effect that employment is terminable at-will has, in prior cases, defeated a wrongful discharge claim. *Nork v. Fetter Printing Co.,* 738 S.W.2d 824, 828 (Ky. App. 1987); *Shah*, 655 S.W.2d at 492.

However, express personnel policies can become binding "once it is accepted by the employee through his continuing to work when he is not required to do so." *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 362 (Ky. 2005). The concept is similar to estoppel. "Once an employer establishes an express personnel policy and the employee continues to work while the policy remains in effect, the policy is deemed an implied contract for so long as it remains in effect. If the employer unilaterally changes the policy, the terms of the implied contract are also thereby changed." *Id*. at 363.

In *Parts Depot*, the court held that an employer's express statement on the rates of pay for "on-call" employees and "subject to call" employees created a contractual obligation for the employer to pay the stated compensation. The court simply reiterates long-established Kentucky law that an express statement can establish the terms and conditions of employment. 170 S.W.3d at 362-63.

The parties to an employment contract may, without additional consideration, enter into a contract terminable only in accordance with the contract's express terms; to do so, the parties must clearly state their intent. For example, the parties may agree that discharge will occur only for cause. *Shah*, 655 S.W.2d at 490.

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

An employer's policies, procedures, and employment manuals do not create an employment contract absent a clearly stated intention therein to alter the at-will employment relationship and enter an employment contract. *Nork,* 738 S.W.2d at 827. The Kentucky Court of Appeals stated in *Nork*:

> Policy and procedure manuals are to be commended. They can, when followed, remove an element of arbitrariness from employment relationships and thereby improve the entire atmosphere of the workplace. A contract, [however], they do not necessarily make[.]

Id.

The Kentucky Court of Appeals has held that language in an employment letter may support the inference of a contract for a definite term. *Hunter v. Wehr Constructors*, 875 S.W.2d 899, 901 (Ky. App. 1993). For example, language that a project position would "last a minimum of thirteen months," and that an evaluation for continued employment would be made "as mutually agreed upon" could reasonably suggest a 13-month contract. *Id*. at 901.

In *Hunter*, the court found that the question of the parties' intent relating to the duration of the contract was one for the jury, and the issue survived summary judgment. *Id*. at 901.

2. Provisions Regarding Fair Treatment

A claim of good faith and fair dealing is not recognized in Kentucky in the employment context. *Wells v. Huish Detergents, Inc.,* 19 F. App'x 168, 178 (6th Cir. 2001); *McCart v. Brown-Forman Corp.,* 713 F.Supp. 981, 983 (W.D. Ky. 1988); *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985); *Wyant v. SCM Corp.*, 692 S.W.2d 814 (Ky. App. 1985).

3. Disclaimers

Kentucky law requires a clear disclaimer to defeat an employee's breach of implied contract claim. *Jackson v. JB Hunt Transport, Inc.*, 384 S.W.3d 177, 184 (Ky. App. 2012); *Noel v. Elk Brand Mfg. Co.*, 53 S.W.3d 95, 98 (Ky. App. 2000); *Wathen v. GE*, 115 F.3d 400, 408 (6th Cir. 1997). In *Wathen*, GE provided all employees with a manual containing language that prohibited sexual harassment and required that suspected violations be reported. *Id*. at 401-402. The plaintiff claimed that this manual created a contract between herself and GE. The court noted the clear and specific disclaimer contained in the manual, stating that "these policies are not an employment contract. GE does not create any contractual rights by issuing these policies," and held that the district court had properly granted summary judgment for the defendant on this particular claim. *Id*. at 407-408.

Posted rules of conduct may be construed as creating an implied contract between an employee and an employer, especially in the absence of a disclaimer or limiting language. *Hines v. Elf Atochem N. Am.*, 813 F.Supp. 550, 553 (W.D. Ky. 1993).

Employer handbook provisions stating that only certain persons have the authority, in writing, to modify an employee's at-will status will prevent oral modifications to that status by unauthorized persons. *Bisig v. Time Warner Cable, Inc.*, 2018 U.S. Dist. LEXIS 48949, at *18 (W.D. Ky. Mar. 23, 2018).

4. Implied Covenants of Good Faith and Fair Dealing

See "Provisions Regarding Fair Treatment" above.

B. Public Policy Exceptions

1. General

The Kentucky Supreme Court has carved out a "narrow public policy exception" to the general rule of at-will employment. *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983). Only two situations exist where "grounds for discharging an employee are so contrary to public policy as to be actionable":

(1) Where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment; or

> (2) Where the alleged reason for the discharge was the employee's exercise of a right conferred by well-established legislative enactment.

Grzyb, 700 S.W.2d at 402 (Ky. 1985). When a discharged employee seeks to establish a cause of action for wrongful discharge under either of these exceptions, the decision as to whether the reason for discharge is unlawful is "a question of law for the Court to decide." *Meadows*, 666 S.W.2d at 733; *see also Webster v. Allstate Ins. Co.,* 689 F.Supp. 689, 691 (W.D. Ky. 1986).

Under both of these exceptions, a discharged plaintiff must establish a causal connection between the protected activity and subsequent termination by showing the protected activity was a "substantial and motivating factor but for which the employee would not have been discharged." *Follett v. Gateway Reg'l Health Sys., Inc.*, 229 S.W.3d 925, 929 (Ky. App. 2007) (quoting *First Prop. Mgmt. Corp. v. Zarebidaki*, 867 S.W.2d 185, 188 (Ky. 1993)).

2. Exercising a Legal Right

In *Meadows*, 666 S.W.2d 730 (Ky. 1983), Meadows was employed as a maintenance specialist at Firestone Textile Company. He suffered a back injury and missed a substantial amount of work. He alleged he was discharged for filing a workers' compensation claim shortly after returning to work. The Kentucky Supreme Court upheld the verdict of the court of appeals that Meadows had been wrongfully fired in retaliation for filing for his benefits:

> Should courts judicially recognize a cause of action for wrongful discharge where an employee at-will has been discharged solely because he filed a workers' compensation claim? […]
>
> The only effective way to prevent an employer from interfering with his employees' rights to seek compensation is to recognize that the latter has a cause of action for retaliatory discharge when the discharge is motivated by the desire to punish the employee for seeking the benefits to which he is entitled by law.

Id. at 733-34. Since this decision, Kentucky's workers' compensation statute has been amended to expressly prohibit retaliation, harassment, coercion, discharge or discrimination for filing and pursuing a lawful claim. KY. REV. STAT. § 342.197(1).

In *Grzyb*, the Supreme Court of Kentucky clarified its holding in *Meadows*:

> We adopt, as an appropriate caveat to our decision in *Firestone Textile Co. Div. v. Meadows* the position of the Michigan Supreme Court in *Suchodolski v. Mich. Consolidated Gas Co.*, 316 N.W.2d 710 (Mich. 1982). The Michigan court held that only two situations exist where "grounds for discharging an employee are so contrary to public policy as to be actionable" absent "explicit legislative statements prohibiting the discharge." 316 N.W.2d at 711. First, "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." Second, "when the reason for a discharge was the employee's

exercise of a right conferred by a well-established legislative enactment." *Id*. at 711-12.

Grzyb, 700 S.W.2d at 402.

Kentucky's wrongful discharge right of action extends only for the violation of a Kentucky statute or a constitutional provision. *Clark v. Sanofi-Synthelabo, Inc.*, 489 F. Supp.2d 759, 771 (W.D. Ky. 2007); *Shrout v. The TFE Grp.*, 161 S.W.3d 351, 355 (Ky. App. 2005); *Goins v. Interstate Blood Bank, Inc.*, No. 4:03CV-040-M, 2005 U.S. Dist. LEXIS 14163, at *10 (W.D. Ky. July 12, 2005). Additionally, the Kentucky Supreme Court has held that a Rule of Professional Conduct enacted by the Kentucky Supreme Court may qualify as a public policy justification for purposes of a wrongful discharge claim. *Greissman v. Rawlings & Assocs., PLLC*, 571 S.W.3d 561, 567 (Ky. 2019). Specifically, SCR 3.120, Rule 5.6 governing limitations on an attorney's right to practice law is a fundamental, clear statement of public policy upon which to base a wrongful discharge exception. *Id.* By contrast, courts have recently held that Executive Orders related to COVID-19 safety guidelines do not sufficiently confer a specific right sufficient to satisfy the "narrow public policy exception of the terminable at-will doctrine." *McCoy v. Ten Ten Grp., LLC*, No. 2022-CA-0011-MR, 2023 Ky. App. Unpub. LEXIS 196 (Ky. Ct. App. Mar. 24, 2023), *review denied* (Dec. 6, 2023); *see also Breeden v. Exel, Inc.,* No. 3:21-CV-416-CHB, 2022 U.S. Dist. LEXIS 85749 (W.D. Ky. Apr. 12, 2022), *appeal dismissed*, No. 22-5406, 2022 U.S. App. LEXIS 31088 (6th Cir. Oct. 20, 2022) (reaching the same holding as *McCoy*).

This public policy exception has been found not to apply to public policy grounded in federal law. *Clark*, 489 F. Supp. 2d at 771; *Shrout*, 161 S.W.3d at 355. However, not all Kentucky statutes and provisions give rise to a claim. For example, in *Boykins v. Housing Authority of Louisville,* 842 S.W.2d 527 (Ky. 1992), the Kentucky Supreme Court held that the "open courts" provision found in § 14 of the Kentucky Constitution has no nexus to employment rights and does not create an exception to the employment-at-will doctrine, where an employee claimed she was terminated for having filed suit against the Housing Authority based on issues related to her residence at the Housing Authority.

In *First Property Management Corp. v. Zarebidaki,* 867 S.W.2d 185 (Ky. 1993), the court announced that a plaintiff need not prove that the impermissible factor was the sole factor motivating the discharge. Instead, a claim will be valid if the plaintiff proves that the lawfully impermissible factor was a substantial and motivating factor, but for which there would have been no discharge. *Id*. at 188. *But see Mendez v. Univ. of Ky. Bd. of Trustees*, 357 S.W.3d 534, 541 (Ky. App. 2011) (Kentucky Civil Rights Act does not support a Title VII-style "mixed motive" claim).

See also statutes cited in Section XV below.

3. Refusing to Violate the Law

An employer may not discharge an at-will employee for failure or refusal to violate the law in the course of employment. *Nork,* 738 S.W.2d 824 (Ky. App. 1987).

III. CONSTRUCTIVE DISCHARGE

In *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004), the Supreme Court of Kentucky described its constructive discharge standard as follows:

> 'The commonly accepted standard for constructive discharge is whether, based upon objective criteria, the conditions created by the employer's action are so intolerable that a reasonable person would feel compelled to resign.' (internal quotation marks omitted). […]
>
> 'A finding of constructive discharge requires an inquiry into both the objective feelings of an employee, and the intent of the employer.' (internal quotation marks omitted). The latter requires the plaintiff to show 'that the employer intended and could reasonably have foreseen the impact of its conduct on the employee.' *Id.*

Id. at 807-08.

Importantly, the employee must show the conditions created by the employer are so intolerable that a reasonable person would feel compelled to resign. *Id.* at 807. Additionally, among other things, the employee must actually quit his or her job to make out a successful claim of constructive discharge. *See Reed v. Gulf Coast Enters.,* No. 3:15-CV-00295-JHM, 2016 U.S. Dist. LEXIS 955, at *10 (W.D. Ky. Jan. 6, 2016).

In *Darnell v. Campbell County Fiscal Court*, 731 F. Supp. 1309 (E.D. Ky. 1990), the plaintiff was in effect offered to transfer to a position in Alexandria, which had the same duties, pay, and benefits. The court held as a matter of law the fact that a short 20-minute drive was required did not convert the transfer to a "constructive discharge."

> The mere subjective preferences of the plaintiff--such as the desire to go home for lunch--are insufficient to turn a transfer of location into a constructive discharge. A constructive discharge must be based on objective criteria that would create intolerable conditions that a reasonable person could not be expected to bear. Millions of working people are unable to go home for lunch.
>
> A transfer involving loss of prestige or an objectively demeaning change of working conditions--such as removal from a private office--can amount to a constructive discharge.

Id. at 1313 (internal citation omitted). But absent unusual circumstances, "a transfer at no loss of title, pay, or benefits does not amount to a constructive discharge or adverse employment action." *Id.*

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

An employment contract requiring cause for termination is enforceable. *See Shah*, 655 S.W.2d 489 (Ky. 1983).

B. Status of Arbitration Clauses

1. Recent developments in the courts and the legislature

"Arbitration is a generally accepted method for dispute resolution, and it has become more favorable in recent years." *Louisa v. Newland,* 705 S.W.2d 916, 918 (Ky. 1986). Practitioners litigating the issue of arbitration in Kentucky should be mindful of recent changes to the law.

The Kentucky General Assembly enacted the Kentucky Uniform Arbitration Act (KUAA), codified at KY. REV. STAT. §§ 417.045-240, to govern arbitration disputes. KY. REV. STAT. § 417.050 provides that "[a] written agreement to submit any existing controversy to arbitration or a provision in 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 for the revocation of any contract." The Act favors arbitration agreements and is meant to ensure that arbitration agreements are enforced according to the standards applied to other contracts. *Conseco Fin. Servicing Corp. v. Wilder,* 47 S.W.3d 335, 339 (Ky. App. 2001).

Notwithstanding the KUAA's intent to favor arbitration agreements, certain Kentucky statutory provisions purported to prohibit the use of arbitration agreements in the employment context. *See* KY. REV. STAT. § 417.050(1) and § 336.700(2). However, Kentucky courts consistently declined to apply these statutes, finding them preempted by the Federal Arbitration Act (FAA). *Johnson v. Career Sys. Devs./DJI J.V.*, No. 4:09CV-76-M, 2010 U.S. Dist. LEXIS 4052, at *8-11 (W.D. Ky. Jan. 20, 2010); *Vossberg v. Caritas Health Servs., Inc.*, 2005 Ky. App. Unpub. LEXIS 314, at *2 (Ky. App. Mar. 4, 2005).

In an opinion rendered September 27, 2018, the Kentucky Supreme Court held in *Northern Kentucky Area Development District v. Danielle Snyder*, 570 S.W.3d 531 (Ky. 2018), pursuant to KY. REV. STAT. § 336.700(2), that Kentucky employers may not require employees to sign arbitration agreements as a condition of their new or continued employment. The Court expressly held that KY. REV. STAT. § 336.700(2) was not preempted by the FAA.

To prevent this decision from becoming settled law, on March 25, 2019, the Governor signed Kentucky Senate Bill 7, which amended KY. REV. STAT. § 336.700 and applies both prospectively and retrospectively. The new law made arbitration agreements between employers and employees enforceable, effectively nullifying the *Snyder* decision. Senate Bill 7 became effective June 26, 2019. As a result, KY. REV. STAT. § 336.700(3)(a) permits an employer to require an employee to sign an arbitration agreement as a condition of employment.

In addition to overruling *Snyder*, the law included several other substantive amendments to Kentucky law. An arbitration agreement must "safeguard effective vindication of legal rights," including a reasonable location for the arbitration, mutuality of obligation, procedural fairness, including an impartial arbitrator and equitable allocation of costs, and empowering the arbitrator to award all types of relief that would be available in court. *Id.*

Further, the law now allows employers to require employees to execute an agreement reasonably reducing the statute of limitations for filing a claim against the employer, so long as the agreement does not reduce the limitations period by more than fifty percent of the time provided for by the applicable law. *See Croghan v. Norton Healthcare, Inc.,* 613 S.W.3d 37, 42 (Ky. Ct. App. 2020) (holding a contractual provision reducing the limitation period for claims to less than half of the statutory limitation period is not enforceable).

2. Enforceability of arbitration agreements generally

"The burden of establishing the existence of an arbitration agreement that conforms to statutory requirements rests with the party seeking to enforce it, but once prima facie evidence thereof has been presented, the statutory presumption of its validity accrues, and the burden of going forward with evidence to rebut the presumption then shifts to the party seeking to avoid the agreement, and this is a heavy burden." *Valley Constr. Co. v. Perry Host Mgmt. Co.,* 796 S.W.2d 365, 368 (Ky. App. 1990) (internal citation omitted).

Generally, Kentucky law strongly favors arbitration. *See, e.g.*, *Schnuerle v. Insight Communs. Co.*, 376 S.W.3d 561, 574 (Ky. 2012) ("Clearly, it has long been the public policy of Kentucky that arbitration is a favored method of dispute resolution."). In Kentucky, "unlike most jurisdictions, arbitration enjoys the imprimatur of our state Constitution." *Id.*; Ky. Const., § 250. The Kentucky Uniform Arbitration Act reflects the state legislature's public policy favoring arbitration agreements. *See Kindred Nursing Ctrs., L.P. v. Cox*, 486 S.W.3d 892, 894 (Ky. App. 2015); KRS 417.045 *et seq.*

Notwithstanding Kentucky's stated public policy in favor of arbitration, Kentucky courts have on occasion issued decisions that appear at odds with that policy favoring arbitration. *Snyder*, discussed above, is one example. Further, Kentucky courts historically decided questions related to the enforcement and validity of arbitration contracts in light of the "sacred" and "inviolate" right to a jury trial provided by the Kentucky Constitution until the U.S. Supreme Court found this special approach to be contrary to its long-standing precedents interpreting the Federal Arbitration Act. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017).

Kentucky's highest court recently recommitted to the notion of public policy favoring arbitration as a "relatively quick and inexpensive means of resolving disputes." *Green v. Frazier*, 655 S.W.3d 340, 348 (Ky. 2022). There, the Court reversed the conclusion of the Court of Appeals that the arbitration agreement was unconscionable and, thus, unenforceable. *Id.* Contractual agreement to arbitrate are not treated with higher scrutiny than other contracts; rather, written contracts – including arbitration agreements – "are generally enforceable against a party who had an opportunity to read it." *Id.* at 346.

V. ORAL AGREEMENTS

A. Promissory Estoppel

The general elements of a promissory estoppel claim in Kentucky are: (1) a promise; (2) the promisee reasonably relies upon the promise by acting or forbearing to act upon the strength of it; (3) the promisor, at the time of making his promise, foresees or expects that

the promisee would act or forbear in reliance upon it; and (4) enforcement of the promise is necessary to avoid an injustice. *Murton v. Android Indus.-Bowling Green, LLC*, No. 1:13-CV-00112-GNS, 2015 U.S. Dist. LEXIS 72968, at *9 (W.D. Ky. Apr. 14, 2015); *Meade Constr. Co., Inc. v. Mansfield Commercial Elec., Inc.,* 579 S.W.2d 105, 106 (Ky. 1979).

In 1999, the Supreme Court of Kentucky determined whether a United Parcel Service pilot had proved his allegations of fraud, detrimental reliance, and promissory estoppel based on promises purportedly made by UPS. *UPS v. Rickert*, 996 S.W.2d 464 (Ky. 1999). At issue was whether employment with UPS had been guaranteed to pilots who stayed with a contract carrier, Orion Air, through a 16-month transition period from contract cargo carriers to an internal air transport system.

Substantial evidence was presented that showed a promise was made to the plaintiff and other pilots with the intent to induce either action or forbearance on the part of the pilots. The plaintiff testified that he had relied on that promise and remained with Orion Air during the transition period. The court noted that "[t]he standard of proof in a promissory estoppel claim is a preponderance of the evidence." *Id.*, 996 S.W.2d at 470. *But see, McDonald v. Webasto Roof Sys., Inc.*, No. 11-cv-433-JMH, 2013 U.S. Dist. LEXIS 150083, at *16 (E.D. Ky. Oct. 18, 2013) ("An at-will employee cannot assert a promissory estoppel claim against an employer").

At-will employees may not rely on promissory estoppel as a potential remedy because "no prospective or current employee can reasonably rely on a vague promise of employment that can be terminated at any time for any reason." *Clemans v. Nat'l Staffing Sols., Inc.,* 459 F. Supp. 3d 842, 846 (E.D. Ky. 2019) (citing *Jackson v. JB Hunt Transport, Inc.*, 384 S.W.3d 177, 185 (Ky. Ct. App. 2012)("as an at-will employee, [the plaintiff] had no employment security to begin with."); *Harris v. Burger King Corp.*, 993 F.Supp.2d 677, 691 (W.D. Ky. 2014) ("An at-will employee can claim promissory estoppel only if she can show a specific promise of job security."); *McDonald v. Webasto Roof Sys., Inc.*, 570 Fed.App'x 474 (6th Cir. 2014) (plaintiff's at-will status precludes his promissory estoppel claim)).

B. Fraud

In a Kentucky action for fraud, the plaintiff must establish the following six elements by clear and convincing evidence: (a) material representation, (b) which is false, (c) known to be false or made recklessly, (d) made with inducement to be acted upon, (e) acted in reliance thereon, and (f) causing injury. *Rickert*, 996 S.W.2d at 468.

In *Rickert*, 996 S.W.2d 464, a United Parcel Service pilot established detrimental reliance in his fraud action when he presented evidence that he did not look for alternative employment with other airlines based on misrepresentations made by the company. The Kentucky Supreme Court found that sufficient evidence was produced to establish a jury question. The employee presented evidence that UPS promised him a job for the sole reason of inducing him to fly during a contract transition period. *Id*. at 469.

C. Statute of Frauds

The Statute of Frauds does not bar a fraud or promissory estoppel claim based on an oral promise of indefinite employment. *Rickert*, 996 S.W.2d 464.

VI. DEFAMATION

A. General Rule

To establish a *prima facie* case for a defamation claim, the claimant must prove: (1) a false and defamatory language, (2) about the plaintiff, (3) which is published, and (4) which causes special harm. *Toler v. Sud-Chemie*, 458 S.W.3d 276, 281-82 (Ky. 2014). "Defamatory language" is broadly defined as language "tend[ing] to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004), *overruled on other grounds by Toler*, 458 S.W.3d at 287. "[I]t is for the jury to determine, on the basis of competent evidence, whether a defamatory meaning was attributed to it by those who received the communication." *Id.* The language should be construed in its most natural meaning and be measured by the natural and probable effect on the mind of the average reader. *Id*. The plaintiff need not be explicitly identified in the defamatory matter to satisfy element two, "about the plaintiff," if it was reasonably understood by plaintiff's "friends and acquaintances . . . familiar with the incident." *Id*. at 793-94. "Defamatory language is 'published' when it is intentionally or negligently communicated to someone other than the party defamed." *Id*. at 794. KY. REV. STAT. § 413.140(1)(d) requires that claims for libel or slander be commenced within one year of when the defamatory statement was made.

1. Libel

Defamation by writing and by similar means to writing is libel. *Stringer*, 151 S.W.3d at 793. For the elements of libel, *see* discussion under "General Rule."

2. Slander

Defamation communicated orally is slander. *Stringer*, 151 S.W.3d at 793. For the elements of slander, *see* discussion under "General Rule."

B. Defamation per se

Words are actionable per se when there is a conclusive presumption of both malice and damage. *Toler*, 458 S.W.3d at 282. In a claim of defamation per se, damages are presumed, and the person defamed may recover without allegation or proof of special damages. *Stringer*, 151 S.W.3d at 794.

Written or printed publications "which are false and tend to injure one in his reputation or expose him to public hatred, contempt, scorn, obloquy, or shame, are libelous per se." *Courier Journal Co. v. Noble*, 65 S.W.2d 703, 703 (Ky. 1933).

Spoken words are slanderous per se only when they "impute crime, infectious disease, or unfitness to perform the duties of office, or tend to disinherit" the target. *Stringer*, 151 S.W.3d at 795.

C. References

KY. REV. STAT. § 411.225 protects from civil immunity an employer who provides reference information to a prospective employer at the request of the prospective employer, unless the disclosure is false, made with reckless disregard for truth or falsity, or meant to mislead the prospective employer. Discriminatory disclosures as defined under Kentucky's Civil Rights Act, KY. REV. STAT. § 344, are not protected.

D. Privileges

In *Wyant v. SCM Corp.*, 692 S.W.2d 814 (Ky. App. 1985), a former employee sued his employer for an internal report by his manager stating the former employee ruled his store through the use of intimidation, sarcasm, and fear. The Court of Appeals of Kentucky held that such an internal communication was cloaked with a qualified privilege "because they are necessary communications within the employing company." *Id*. at 816.

In another case, an employee hotel manager sued her employer and the general manager and president of the employer based upon statements that implicated the employee in a robbery of the hotel. *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270 (Ky. App. 1981). The court of appeals held such statements to be qualifiedly privileged because such statements were the results of an investigation into a robbery at the hotel which had indications of an "inside job." *Id.* at 275. The court stated that such privilege "was subject to defeat were it proven that it was abused through over-publication or malice." *Id*. at 277. The plaintiff bears the burden of showing such abuse of the privilege. *Toler*, 458 S.W.3d at 284.

In a more recent employment defamation case, the Supreme Court of Kentucky clarified the meaning of qualified privilege stating, "[t]he condition attached to all such qualified privileges is that they must be exercised in a reasonable manner and for a proper purpose. The immunity is forfeited if the defendant steps outside the scope of the privilege, or abuses the occasion." *Stringer*, 151 S.W.3d at 797 (emphasis added); *see also Toler*, 458 S.W.3d at 282-83 (clarifying operation of qualified privilege and noting its applicability in the employment context). The privilege removes the conclusive presumption of malice otherwise attaching to words that are actionable per se. *Id.* Accordingly, false and defamatory statements are only actionable if maliciously uttered. *Id.*

From the above-cited cases, two general propositions can be extracted: (1) Kentucky courts consistently apply a qualified privilege to statements made in the employment context, and (2) the privilege can be forfeited if abused by the defendant.

Kentucky courts have recognized that the defense of absolute privilege extends to executive officers of administrative agencies exercising quasi-judicial and regulatory authority. *Hill v. Ky. Lottery Corp*., 327 S.W.3d 412, 424-425 (Ky. 2010).

Kentucky courts do not recognize the intra-corporate immunity rule adopted by other jurisdictions. This rule provides there is no publication between agents or employees of a corporation acting within the scope of employment. *Biber v. Duplicator Sales & Serv., Inc.*, 155 S.W.3d 732, 736 (Ky. Ct. App. 2004).

See also KY. REV. STAT. § 411.225, discussed above in Section VI.C.

E. Other Defenses

1. Truth

In Kentucky, truth is a complete defense to defamation. *See* KY. REV. STAT. § 411.045 ("In the actions for libel or slander, the defendant may state the truth of the alleged libel or slander"). The defendant has the burden of proving truth as an affirmative defense by a preponderance of the evidence. The modern Kentucky rule is that truth remains an absolute defense even though the publication may have been inspired by malice. *See Stringer*, 151 S.W.3d at 795-96.

2. No Publication

In *Wyant,* 692 S.W.2d 814, the plaintiff, a terminated employee, brought a defamation claim against his former employer based on an internal report. The report, written by a manager, stated that the plaintiff ruled his store through "intimidation, sarcasm, and fear." The Kentucky Court of Appeals found that there was no evidence that the statement was ever published to a third person, and that absent publication, a claim for defamation fails. *Id*. at 816.

3. Self-Publication

Self-publication is not a defense to defamation in Kentucky when the self-publication by the plaintiff is the result of the defendant's own actions. *See Allen v. Wortham*, 13 S.W. 73, 73-74 (Ky. 1890). In *Allen*, the plaintiff received a letter containing defamatory language. Being illiterate, he asked another man to read the letter to him, and in so doing the other person was exposed to the defamatory language. The Court held the plaintiff could maintain a claim, despite his own actions causing the letter to be published, because the publication was the "inevitable consequence" of defendants' actions. *Id.*

A federal district court in Kentucky has held that the self-publication defense may not apply where a discharged employee is "effectively coerced" into repeating the defamatory statements when the employee explains to a new employer why the employee was fired. *See MacGlashan v. ABS Lincs KY, Inc*., 84 F. Supp. 3d 595, 603 (W.D. Ky. 2015).

4. Invited Libel

No Kentucky cases discuss invited libel as a defense to defamation.

5. Opinion

An expression of pure opinion is entitled to absolute privilege. *Welch v. Am. Publ'g Co. of State*, 3 S.W.3d 724, 730 (Ky. 1999); *Yancey v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989). Pure opinion occurs where the commentator states the facts on which the opinion is based, or where both parties to the communication know or assume the exclusive facts on which the comment is clearly based. RESTATEMENT (SECOND) OF TORTS § 566 (1977).

F. Job References and Blacklisting Statutes

See discussion under "References" in subpart B above. There are no blacklisting statutes under Kentucky law.

G. Statements During Judicial Proceeding

"Kentucky has a longstanding acceptance of the rule that statements made during the course of a judicial proceeding shall enjoy an absolute privilege." *Stilger v. Flint*, 391 S.W.3d 751, 754 (Ky. 2013). "The scope of the absolute privilege was extended to cover administrative bodies in the exercise of quasi-judicial powers which they are required by statute to exercise." *Lanier v. Higgins*, 623 S.W.2d 914, 915 (Ky. App. 1981).

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress / Outrage

The Kentucky Supreme Court has recognized a cause of action for the intentional infliction of emotional distress (IIED or outrage) arising from extreme and outrageous conduct. *See Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984); *Miracle v. Bell Cnty. Emergency Med. Servs.*, 237 S.W.3d 555, 560 (Ky. App. 2007). To state an IIED claim, a plaintiff must show that: (1) the conduct was intentional or reckless; (2) the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; (3) a causal connection exists between the offending conduct and the emotional distress suffered by the victim; and (4) the resulting emotional distress was severe. *Hall v. MLS Nat'l Med. Evaluations, Inc.*, No. 05-185-JBC, 2006 U.S. Dist. LEXIS 57965, at *8-*9 (E.D. Ky. Aug. 15, 2006).

Kentucky courts have found plaintiffs' proof of outrageous conduct sufficient to support an outrage/IIED claim in cases where the defendants:

> (1) harassed the plaintiff by keeping her under surveillance at work and home, telling her over the CB radio that he would put her husband in jail and driving so as to force her vehicle into an opposing lane of traffic; (2) intentionally failed to warn the plaintiff for a period of five months that defendant's building, in which plaintiff was engaged in the removal of pipes and ducts, contained asbestos; (3) engaged in a plan of attempted fraud, deceit, slander, and interference with contractual rights, all carefully orchestrated in an attempt to bring [plaintiff] to his knees; (4) committed same-sex sexual harassment in the form of frequent incidents of lewd name calling coupled with multiple unsolicited and unwanted requests for homosexual sex; (5) was a Catholic priest who used his relationship [as marriage counselor for] the [plaintiff] husband and the wife to obtain a sexual affair with the wife; (6) agreed to care for plaintiff's long-time companion-animals, two registered Appaloosa horses, and then immediately sold them for slaughter; and (7) subjected plaintiff to nearly daily racial indignities for approximately seven years.

Stringer, 151 S.W.3d at 789-90 (internal quotations and citations omitted). On the other hand, outrageousness was found deficient in less-egregious cases where the defendant:

> (1) refused to pay medical expenses arising out of an injured worker's compensation claim; (2) wrongfully converted the plaintiffs property in a manner that breached the peace; (3) negligently allowed his vehicle to leave the road and struck and killed a child; (4) committed reprehensible fraud during divorce proceedings by converting funds belonging to his spouse for the benefit of defendant and his adulterous partner; (5) wrongfully terminated the plaintiff; (6) displayed a lack of compassion, patience, and taste by ordering plaintiff, who was hysterical over the fact that she had just delivered a stillborn child in her hospital room, to shut up andthen informing her that the stillborn child would be disposed or in the hospital; (7) erected a billboard referencing defendant's status as a convicted child molester; (8) wrongfully garnished plaintiffs wages pursuant to a forged agreement; and (9) impregnated plaintiffs wife.

Id. at 790 (internal quotations and citations omitted).

Notably, Kentucky courts have expressly held, on a number of occasions, that the provisions of Kentucky's Civil Rights Act preempt and subsume common law claims for IIED. In *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky. App. 2001), the plaintiff filed both a race-discrimination claim under Kentucky's Civil Rights Act and an IIED claim against the former employer. The Kentucky Court of Appeals held that Kentucky's Civil Right Act subsumed the plaintiff's IIED claim, stating:

> KRS Section 344.020(1)(b) extends protection to the "personal dignity and freedom from humiliation" of individuals. This has been interpreted as allowing "claims for damages for humiliation and personal indignity." Similarly, an IIED claim seeks damages for extreme emotional distress "where the statute declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute." Thus, Wilson's IIED claim against Lowe's was subsumed by his KRS Chapter 344 claims.

Id. at 239 (internal citations omitted). Kentucky state and federal courts have continued to recognize that "a KRS Chapter 344 claim preempts a common law IIED/outrageous conduct claim". *Buckley*, 113 S.W.3d at 647 ("When a plaintiff prosecutes a KRS Chapter 344 claim and an outrageous conduct claim concurrently, the former preempts the latter."); *Arterburn v. Wal-Mart Store, Inc.*, No. 1:15-CV-00109-GNS, 2016 U.S. Dist. LEXIS 87803, at *8-*9 (W.D. Ky. July 6, 2016) (same); *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 286 (Ky. 2009) (same); *Messick v. Toyota Motor Mfg. Ky., Inc.*, 45 F. Supp. 2d 578, 582 (E.D. Ky. 1999) (Court found that the plaintiff failed to state a claim for IIED "because damages for embarrassment, humiliation and mental anguish are recoverable under the Kentucky Civil Rights Act[.]"), *overruled on other grounds by Layne v. Huish Detergents, Inc.*, 40 F.App'x. 200 (6th Cir. 2002).

B. Negligent Infliction of Emotional Distress

Kentucky courts also recognize a cause of action for negligent infliction of emotional distress. In *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012), the court eliminated the prior requirement of showing physical impact and explained that a plaintiff must now show a severe or serious emotional injury or mental stress greater than what a reasonable person could be expected to endure. In asserting a claim of negligent infliction of emotional distress,

a plaintiff must prove the recognized elements of a common claim of negligence: (1) the defendant owed a duty of care to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury. Additionally, the plaintiff must prove a "severe" or "serious" emotional injury. A "serious" or "severe" emotional injury occurs where a normally constituted reasonable person would not be expected to endure the mental strain produced by the circumstances. Distress that does not meaningfully affect the plaintiff's everyday life or require significant treatment is not sufficient. A plaintiff claiming emotional distress damages must support the claimed injury by presenting expert medical or scientific proof. *Id*. at 17-18.

VIII. PRIVACY RIGHTS

A. Generally

Privacy law in Kentucky is fairly undeveloped. However, there are several instances in which privacy becomes an issue in the employment area.

The tort of invasion of privacy rests on an individual's right "to be left alone, to be free from unwarranted interference by the public or individuals in matters with which they are not necessarily concerned." *Wheeler v. P. Sorensen Mfg. Co.*, 415 S.W.2d 582, 584 (Ky. 1967).

In 1981, the Kentucky Supreme Court adopted invasion of privacy principles from the RESTATEMENT (SECOND) OF TORTS in *McCall v. Courier-Journal & Louisville Times, Co*., 623 S.W.2d 882, 887 (Ky. 1981). Section 652A of the RESTATEMENT provides:

> 1. One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> 2. The right of privacy is invaded by:
>
> a. Unreasonable intrusion upon the seclusion of another or
> b. Appropriation of the other's name or likeness, or
> c. Unreasonable publicity given to the other's private life, or
> d. Publicity that unreasonably places the other in a false light before the public.

Ghassomians v. Ashland Indep. Sch. Dist., 55 F. Supp. 2d 675, 692 (E.D. Ky. 1998). Kentucky law is clear that an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded. *Mineer v. Williams*, 82 F.Supp.2d 702, 705 (E.D. Ky. 2000).

In *Stewart v. Pantry,* 715 F. Supp. 1361 (W.D. Ky. 1988), an employer conducted polygraph examinations of its employees, resulting in the termination of two employees. The court found no evidence to support the employees' claim of invasion of privacy. *Id*. at 1365.

In *Stringer*,151 S.W.3d, the plaintiffs were terminated for "unauthorized removal of company property" for eating "claims candy," i.e., candy from open or torn bags removed from the store's shelves that had been taken to the store's claims area to be processed by a claims clerk and then discarded or returned. Plaintiffs brought claims for invasion of privacy stemming from their employer's recording them through surveillance cameras, including

audio, without the plaintiffs' knowledge. The court found that the plaintiffs' invasion of privacy claims failed because the plaintiffs could not prove they suffered any damages related to the recording. *Id*. at 801.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Kentucky has not mandated the use of the "E-Verify" system for employers. Employers may voluntarily use the system.

2. Background Checks

KRS 336.700(3)(d) allows an employer to require an employee or applicant to consent to a background check or similar type of personal report.

C. Other Specific Issues

1. Workplace Searches

Kentucky does not have a state statute addressing workplace searches.

The Kentucky Court of Appeals held that during sexual discrimination litigation, a search of non-party employees' personnel files, including medical information, would violate employees' privacy. *Bd. of Educ. v. Lexington-Fayette Urban County Human Rights Comm'n,* 625 S.W.2d 109 (Ky. App. 1981). Kentucky courts, however, have approved of discovery of other claims of racial discrimination at the same facility where plaintiff worked. *See White v. Rainbo Baking Co.*, 765 S.W.2d 26, 29 (Ky. App. 1988); *see also Willoughby v. Gencorp., Inc.*, 809 S.W.2d 858, 862 (Ky. 1990) (other claims of worker's compensation retaliation at same facility admissible).

2. Electronic Monitoring

See "Taping of Employees" in subsection 4 below.

3. Social Media

Kentucky does not have a state statute addressing social media privacy rights, or an employer's ability to monitor an employee's internet usage or email communications.

In Kentucky, an employee may lose an expectation of privacy when he transmits information over the internet or by email. *Pearce v. Whitenack*, 440 S.W.3d 392, 401 (Ky. Ct. App. 2014). In *Pierce,* a police officer was suspended because of a Facebook comment. *Id.* The officer-plaintiff gave up his right to privacy because he "ran the risk that even a posting or communication he intended to remain private would be further disseminated by an authorized recipient." *Id.* at 402.

District courts within Kentucky have held that employees do not maintain a legitimate expectation of privacy in emails sent or received on a work email address. *See Clark v. Teamsters Local Union 651,* 349 F. Supp. 3d 605, 622-23 (E.D. Ky. 2018) (holding

employee had no claim for invasion of privacy because she had no reasonable expectation of privacy in work email or Dropbox account).

4. Taping of Employees

KY. REV. STAT. § 526.010 *et seq.* prohibits eavesdropping, overhearing, recording, amplifying or transmitting by means of any electronic, mechanical or other device any part of a wire or oral communication of others without the consent of at least one party to the communication. KY. REV. STAT. § 526.060 prohibits divulging illegally obtained information as defined by KY. REV. STAT. § 526.010. It is a misdemeanor to divulge information obtained through eavesdropping or tamper with private communications under KY. REV. STAT. § 526.030 and KY. REV. STAT. § 526.050.

5. Release of Personal Information on Employees

Private employers in Kentucky are not required to share copies of an employee's personnel file with the employee.

See discussion above under "Generally." KY. REV. STAT. § 365.732 establishes the duty of an "information holder" (defined to include any business entity conducting business within the state) to disclose data breaches when "personally identifiable information" has been compromised. This duty to disclose may include the individuals whose information is at issue, major statewide media, and credit agencies.

6. Medical Information

During litigation alleging sexual discrimination, a search of non-party employees' personnel files, including medical information, would violate employees' privacy. *Bd. of Educ. v. Lexington-Fayette Urban County Human Rights Comm'n*, 625 S.W.2d 109 (Ky Ct. App. 1981).

7. Restrictions on Requesting Salary History

There is no Kentucky-wide restriction on requesting an employee's salary history. In 2018, the city of Louisville implemented an ordinance restricting the Louisville/Jefferson County Metro Government and any agency of it from asking for job applicants' salary history.

IX. WORKPLACE SAFETY

A. Negligent Hiring/Retention

Kentucky courts recognize the tort of negligent hiring, and have held employers liable when failing to exercise ordinary care in hiring and retaining employees when the failure creates a foreseeable risk of harm to a third person. *Westfield Ins. Co. v. Tech Dry Inc.,* 336 F.3d 503, 510 n.4 (6th Cir. 2003) (citing *Oakley v. Flor-Shin, Inc.,* 964 S.W.2d 438, 442 (Ky. App. 1998)); *Ten Broeck du Pont, Inc v. Brooks*, 283 S.W.3d 705, 735 (Ky. 2009). In *Oakley*, plaintiff, a K-Mart employee, was sexually assaulted by a Flor-Shin employee while the two were working alone at the K-Mart store, where Flor-Shin had a cleaning contract. The court said that Flor-Shin knew or should have known, had it conducted a criminal background

check, of its employee's "extensive criminal record." The court returned the case to the trial court for a jury trial. *Oakley*, 964 S.W.2d at 442.

B. Negligent Supervision/Training

Kentucky courts have also recognized claims for negligent training and supervision. *Dukes v. Mid-E Ath. Conf.*, No. 3:16-cv-00303-CRS, 2016 U.S. Dist. LEXIS 136501 (W.D. Ky. Sep. 30, 2016); *Turner v. Pendennis Club*, 19 S.W.3d 117 (Ky. App. 2000). To succeed on such a claim, the plaintiff must establish that (1) the employer knew or had reason to know of the employee's harmful propensities; (2) that the employee injured the plaintiff; and (3) that the hiring, supervision, training or retention of such an employee proximately caused the plaintiff's injuries. *Gordon v. Turner*, No. 13-136-DLB-CJS, 2016 U.S. Dist. LEXIS 84317, at *33 (E.D. Ky. June 29, 2016); *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 844 (Ky. 2005). "The threshold issue of a negligent hiring, training, or supervision claim is whether the accused tortfeasor was actually an employee of the named defendant." *Southard v. Belanger*, 966 F. Supp.2d 727, 744 (W.D. Ky. 2013).

C. Interplay with Worker's Compensation Bar

KY. REV. STAT. § 342.690(1) maintains that – if an employer properly secures worker's compensation benefits under state law – the liability of the employer for "injury or death" shall be "exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages from such employer" unless the parties have otherwise agreed by written contract. This exemption applies to an employer's carrier as well as all employees, officers, and directors, unless "the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director." This affirmative defense must be plead and proven by the employer to be utilized. *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 283-85 (Ky. App. 2009).

D. Firearms in the Workplace

KY. REV. STAT. § 237.106, prohibits employers from banning employees from keeping firearms or ammunition in their vehicles on the company's property. The statute states that an employer cannot prohibit an employee (or a visitor, vendor, client, customer, or other person) who is legally entitled to carry a firearm from maintaining a firearm in a vehicle on the company's property. The law also creates a private right of action for an employee against an employer who disciplines, discharges, or otherwise punishes the employee for exercising this right. *See also Mitchell v. Univ. of Ky.*, 366 S.W.3d 895, 898 (Ky. 2012) (termination in violation of statute satisfies conditions for a public policy wrongful termination claim). The statute permits an employee to remove the firearm from the vehicle in instances of self-defense, defense of another, defense or property, or as authorized by the owner or lessee of the property. KY. REV. STAT. § 237.106(3); *see also Holly v. UPS Supply Chain Sols., Inc.,* 680 F. App'x 458 (6th Cir. 2017) (holding employee's transfer of his firearm from his vehicle to a coworker's vehicle was not protected by statute).

An employer may require an employee to document the possession of a firearm under this section. *Mullins v. Marathon Petroleum Co., LP*, No. 0:12-CV-00108-HRW, 2014 U.S. Dist. LEXIS 13993, at *9-10 (E.D. Ky. Feb. 5, 2014).

E. Use of Mobile Devices

Pursuant to KY. REV. STAT. § 189.292, drivers under eighteen (18) years of age may not operate a mobile phone while driving unless it is necessary to do so to summon medical help or law enforcement in an emergency situation. Drivers of any age may not compose, send, or read information on a mobile device while driving unless it is (1) part of a global positioning system ("GPS") function; (2) connected to the acceptance or placement of a telephone call; or (3) is done to report illegal activity, summon medical or law enforcement assistance, or prevent injury to a person or property.

X. TORT LIABILITY

A. Respondeat Superior Liability

Kentucky law generally adopts the traditional "scope of employment" understanding of respondeat superior, with an emphasis on whether the employee's actions were motivated to serve the employer. *See Am. Gen. Life & Accident Co. v. Hall*, 74 S.W.3d 688, 692 (Ky. 2002) ("Vicarious liability, sometimes referred to as the doctrine of respondeat superior, is not predicated upon a tortious act of the employer but upon the imputation to the employer of a tortious act of the employee by considerations of public policy and the necessity for holding a responsible person liable for the acts done by others in the prosecution of his business, as well as for placing on employers an incentive to hire only careful employees. Ordinarily, an employer is not vicariously liable for an intentional tort of an employee not actuated by a purpose to serve the employer[.]"); *see also Patterson v. Blair*, 172 S.W.3d 361 (Ky. 2005) (containing fulsome discussion of rule and rationale).

B. Tortious Interference with Business/Contractual Relations

One who intentionally and improperly interferes with another's prospective contractual relation is subject to liability to the other for the financial harm resulting from the loss of benefits from the relation. This interference can include inducing a third person not to enter into or continue a prospective relation, as well as preventing a person from acquiring or continuing the prospective relation, whether the interference consists of: (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation. *Cullen v. South East Coal Co.*, 685 S.W.2d 187, 189-90 (Ky. App. 1983).

The elements of tortious interference with contract are: (1) existence of the contract; (2) defendant's knowledge of the contract; (3) defendant intended to cause a breach of the contract; (4) defendant's actions did cause a breach; (5) damages resulted to plaintiff; and (6) defendant had no privilege or justification to excuse its conduct. *Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 5-6 (Ky. App. 2012). Additionally, a plaintiff generally must show malice or significantly wrongful conduct. *Id.* quoting *Nat'l Collegiate Athletic Ass'n By and Through Bellarmine Coll. v. Hornung*, 754 S.W.2d 855, 859 (Ky. 1988).

By contrast, tortious interference with a prospective business advantage does not require the existence of a contract. Rather, a plaintiff must prove: (1) the existence of a valid business relationship or expectancy; (2) that defendant was aware of this relationship or

expectancy; (3) that defendant intentionally interfered; (4) that the motive behind the interference was improper; (5) causation; and (6) special damages. *Id.* at 6.

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

Kentucky courts have upheld agreements in restraint of trade if, "on consideration and circumstances of the particular case, the restriction is such only as to afford fair protection to the interests of the covenantee and is not so large as to interfere with the public interests or impose undue hardship on the party restricted." *Cent. Adjustment Bureau v. Ingram Ass'n Inc.*, 622 S.W.2d 681, 685 (Ky. App. 1981) (quoting *Ceresia v. Mitchell*, 242 S.W.2d 359, 364 (Ky. 1951)).

Covenants not to compete are often the only way to prevent employees from resigning and attempting to pirate away clients after an employer has expended considerable time, effort and money in training those employees in a particular trade. *Borg-Warner Protective Services Corp. v. Guardsmark, Inc.,* 946 F. Supp. 495, 501-02 (E.D. Ky. 1996). In *Borg-Wagner*, the employer required all employees to enter into a covenant not to compete that, following termination, prohibited employment in security services for a period of twelve (12) months. *Id.* The court held that the employer's covenants not to compete were a reasonable restriction that afforded the employer fair protection for its legitimate business interests. *Id.* at 502.

Moreover, the Kentucky Court of Appeals upheld a restrictive covenant that forbade a doctor from employment that would result in competition with a medical clinic for eighteen months following the termination of his employment. *Daniel Boone Clinic, P.S.C. v. Dahhan*, 734 S.W.2d 488 (Ky. App. 1987). The court noted generally, such provisions are held valid unless serious inequities would result. The court also stated that the doctor and the clinic both entered into the contract willingly, and both benefited from the contract. *Id*. at 490-91.

In *Wells v. Merrill Lynch, Pierce, Fenner & Smith*, 919 F. Supp. 1047 (E.D. Ky. 1994), the federal district court granted a preliminary injunction that enjoined former employee-stockbrokers of Merrill Lynch from soliciting clients of the firm. The former employees had signed employment agreements containing solicitation provisions which prohibited solicitation of Merrill Lynch clients within a certain geographical area for a specified period of time. The court noted the Sixth Circuit Court of Appeals' prior holdings that loss of customer goodwill and competitive losses are likely to irreparably harm an employer. *See Id*. at 1052.

In *Charles T. Creech, Inc. v. Brown*, 433 S.W.3d 345 (Ky. 2014), the Supreme Court of Kentucky held that continued employment, standing alone, is insufficient consideration to support a restrictive covenant – as it did not make the employer forbear the exercise of legal rights or otherwise result in a detriment to the employer. However, the Court of Appeals distinguished *Creech* and held there was sufficient consideration to enforce a non-compete agreement where the employee signed it at the beginning of his employment. *Alph C. Kaufman, Inc. v. Cornerstone Indus. Corp*., 540 S.W.3d 803, 813-14 (Ky. App. 2017). Further, some courts have found that favorable changes in the terms and conditions of employment are sufficient consideration under Kentucky law. *See ARGI Fin. Grp., LLC v. Hardigg*, No. 3:20-CV-587-RGJ, 2020 U.S. Dist. LEXIS 172932 (W.D. Ky. Oct. 27, 2020) (holding increased

compensation, discretionary bonus, and additional supervisory authority received after signing restrictive covenant was sufficient consideration).

In 2022, the Kentucky General Assembly restricted the use of non-compete agreements in the healthcare setting. KY. REV. STAT. § 216.724 restricts healthcare service agencies from entering into non-compete agreements with staff employees or contractors. Contracts in violation of this statue are considered void and an unfair trade practice. KY. REV. STAT. § 216.724(3). Also in 2022, the General Assembly restricted professional employer organizations from interfering with existing restrictive covenants binding employees. KY. REV. STAT. § 336.234.

B. Blue Penciling

When a court finds a restrictive covenant too broad, it may restrict the covenant to "its proper sphere and [enforce] it only to that extent." *Hammons v. Big Sandy Claims Serv., Inc.*, 567 S.W.2d 313, 315 (Ky. App. 1978). *See also Ceresia v. Mitchell*, 242 S.W.2d 359 (Ky. 1951).

C. Confidentiality Agreements

Caselaw reflects that such agreements are enforceable and are governed by general contract law concepts, but *Creech's* holding applies in the context of confidentiality agreements—continued employment alone will not constitute sufficient consideration for such an agreement. *Charles T. Creech, Inc. v. Brown*, 433 S.W.3d 345 (Ky. 2014).

D. Trade Secrets Statute

The Uniform Trade Secrets Act, KY. REV. STAT. § 365.880 *et seq.*, governs misappropriation of trade secrets.

E. Fiduciary Duty and Their Considerations

The Supreme Court of Kentucky has expressed concern for the integrity of employment relationships and, in *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.* 807 S.W.2d 476, 484 (Ky. 1991), held that an upper-echelon employee must not actively compete with his or her employer while employed, even in the absence of an express covenant. Rather, the employee must continue to act in the interests of and on behalf of the employer in accordance with his or her fiduciary duties. *Id*.

XII. DRUG TESTING LAWS

A. Public Employers

Kentucky law, statutory or judicial, does not expressly address drug testing by public employers.

B. Private Employers

Kentucky law, statutory or judicial, does not expressly address drug testing by private employers.

In 2022, Governor Andy Beshear signed an executive order that provided for a full pardon for individuals who possess marijuana if they produce a written certification by a licensed healthcare providers related to a diagnosis of a specified medical condition. In response, the Kentucky General Assembly introduced SB 47, which goes into effect in Kentucky on January 1, 2025. Under SB 47, employers may restrict medicinal cannabis in the workplace; enforce a drug testing policy, drug-free workplace policy, or zero-tolerance policy; and conduct behavioral assessments of employees with medicinal cannabis cards to determine the extent of impairment.

C. Workers' Compensation

If an employee fails a drug test after a workplace injury, the injured employee bears the burden of proof to show the illegal substance was not the proximate cause of the injury.

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

Under the Kentucky Civil Rights Act, KY. REV. STAT. § 344.010 *et seq*., an "employer" is a person who has eight or more employees in the state in each of twenty (20) or more calendar weeks in the current or preceding calendar year and an agent of such a person, except for purposes of determining discrimination based on disability, employer means a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, and any agent of that person. KY. REV. STAT. § 344.030(2).

Under the statute, an "employee" means an individual employed by an employer, but does not include an individual employed by his parents, spouse, or child, or an individual employed to render services as a domestic in the home of the employer. KY. REV. STAT. § 344.030(5)(a).

The Kentucky Equal Pay Act (KY. REV. STAT. § 337.420 *et seq*.) prevents employers from discriminating between employees in the same establishment on the basis of sex by paying wages to any employee less than any employee of the opposite sex for comparable work requiring comparable skill, effort, and responsibility. The Act applies to employers with two or more employees in the state during twenty (20) or more weeks in the current or preceding calendar year. KY. REV. STAT. § 337.420(2).

The Kentucky Equal Opportunities Act (KY. REV. STAT. § 207.140-240) prohibits discrimination in employment on the basis of physical disability. The act applies to employers with eight or more employees, including governmental units, and any person acting in the interest of the employer. KY. REV. STAT. § 207.130(3).

B. Types of Conduct Prohibited

The Kentucky Civil Rights Act, KY. REV. STAT. § 344.040 makes it unlawful for an employer to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate with respect to compensation, terms, conditions, or privileges of employment because of race, color, religion, national origin, sex, age forty or over, because the individual is a qualified individual with a disability or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy on smoking. Courts have interpreted the Act as barring same-gender sexual harassment. *See Brewer v. Hillard*, 15 S.W.3d 1 (Ky. App. 1999). Courts have also held that the Act does not support a Title VII-style "mixed motive" claim, *Mendez v. Univ. of Ky. Bd. of Trustees*, 357 S.W.3d 534, 541 (Ky. App. 2011), and requires that a plaintiff show that the unlawful status was a "substantial and motivating factor" in the adverse employment decision. *Meyers v. Chapman Printing*, 840 S.W.2d 814 (Ky. 1992).

Ky. REV. STAT. § 344.280, which forbids retaliation by "a person," permits the imposition of liability on individuals. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784 (6th Cir. 2000). However, the Kentucky Court of Appeals, following several federal opinions, has held that the intra-corporate conspiracy doctrine bars an individual supervisor from liability for aiding and abetting retaliation arising from his role as an employer's agent. *Cowing v. Commare*, 499 S.W.3d 291, 294-95 (Ky. Ct. App. 2016).

C. Administrative Requirements

KY. REV. STAT. § 344.200 provides that an individual claiming to be aggrieved by an unlawful practice other than a discriminatory housing practice, a member of the Commission, or the Attorney General, may file with the Kentucky Commission on Human Rights ("KCHR") a written sworn complaint stating that an unlawful practice has been committed, setting forth the facts upon which the complaint is based, and setting forth facts sufficient to enable the Commission to identify the persons charged. The Commission staff or a person designated pursuant to its administrative regulations shall promptly investigate the allegations of unlawful practice set forth in the complaint and shall within five days furnish the respondent with a copy of the complaint. The complaint must be filed within 180 days after the alleged unlawful practice occurs. Despite the charging party's ability to file a charge with the KCHR, the statute has not been construed to create an administrative prerequisite, nor an election of remedies; a plaintiff may pursue an administrative charge and a civil action sequentially. *Owen v. University of Kentucky*, 486 S.W.3d 266 (Ky. 2016); *Wilson v. Lowe's Home Ctr.,* 75 S.W.3d 229 (Ky. Ct. App. 2001).

D. Remedies Available

KY. REV. STAT. § 344.450 provides that any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in circuit court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the lawsuit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter. The Kentucky Supreme Court has held that punitive damages are not available under KY. REV. STAT. § 344. *Ky. Dep't of Corr. v. McCullough*, 123 S.W.3d 130 (Ky. 2003). Unlike Title VII, however, the Act has no caps

on compensatory damages. Claims under the Kentucky Civil Rights Act have a five-year statute of limitations. KY. REV. STAT. § 413.120.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

KY. REV. STAT. § 29A.160 provides:

> (1) An employer shall not deprive an employee of his employment, or threaten or otherwise coerce him with respect thereto, because the employee receives a summons, responds thereto, serves as a juror, or attends court for prospective jury service.
>
> (2) If an employer discharges an employee in violation of subsection (1) of this section, the employee may within ninety (90) days of such discharge bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee with full seniority and benefits. Damages recoverable shall not exceed lost wages. If he prevails, the employee shall be allowed a reasonable attorney's fee fixed by the court.

KY. REV. STAT. § 337.415 provides that no employer may discharge an employee for taking time off, as required by law, to appear in a local, state, or federal or administrative tribunal if he gives notice of service. The penalty for such unlawful discharge may include, but is not limited to, reinstatement, costs, fees, and back pay.

B. Voting

KY. REV. STAT. § 121.310 provides that no person shall coerce or direct any employee to vote for any political party or candidate or threaten to discharge any employee for exercising his/her right to vote. Under this statute, however, the guarantee of free speech provided by the First Amendment is a complete and absolute defense to prosecution. *See Kentucky Registry of Election Fin. v. Blevins,* 57 S.W.3d 289 (Ky. 2001). Under KY. REV. STAT. § 118.035, employers shall allow employees no less than four hours on election day during which to vote and may not penalize the employee for taking a reasonable time off to vote, unless the employee did not vote under circumstances which did not prohibit voting, in which case disciplinary action may be imposed. The four-hour window also applies to an employee who is voting absentee and must go to the Clerk's office to do so, as long as the employee has requested time off the day before.

C. Family/Medical Leave

Kentucky employers who meet statutory criteria are subject to the provisions of the federal Family and Medical Leave Act. Covered employers include private employers with 50 or more employees in at least 20 weeks of the preceding year; public agencies; and local education agencies. 29 C.F.R. § 825.104(a).

D. Pregnancy/Maternity/Paternity Leave

Kentucky's disability discrimination statutes make it unlawful for an employer to fail to accommodate an employee affected by pregnancy, childbirth, or a related medical condition. KY. REV. STAT. § 344.030. Named the Kentucky Pregnant Workers Act, the Act applies to all Kentucky employers with more than 15 employees. *Id.*

KY. REV. STAT. § 337.015 provides that, UPON an employee's written request, every employer shall grant reasonable personal leave up to six weeks when the reception of the adoption of a child under the age of ten years old is the reason for the request. If an employer provides paid leave or other benefits to employees who are birth parents after the birth of a child, it must provide the same type, amount, and duration of paid leave and other benefits to employees after the adoption of a child. KY. REV. STAT. § 337.015(2).

E. Day of Rest Statutes

KY. REV. STAT. § 337.050(1) provides: "Any employer who permits any employee to work seven (7) days in any one (1) workweek shall pay him at the rate of time and a half for the time worked on the seventh day," unless the employee is not permitted to work more than forty (40) hours in the work week. "Employees," for the purposes of this section, does not include any officer, superintendent, foreman or supervisor whose duties are principally limited to director or supervising other employees. This section also exempts certain professions and industries. KY. REV. STAT. § 337.050(2)-(3).

F. Military Leave

KY. REV. STAT. § 38.238 provides:

> An employee shall be granted a leave of absence by his employer for the period required to perform active duty or training in the National Guard. Upon the employee's release from a period of active duty or training, he shall be permitted to return to his former position of employment with the seniority, status, pay or any other rights or benefits he would have had if he had not been absent, except that no employer shall be required to grant an employee a leave of absence with pay.

G. Sick Leave

Kentucky does not require an employer to provide its employees with paid or unpaid sick leave benefits. A Kentucky employer may be required to provide unpaid employee sick leave in accordance with the Family and Medical Leave Act or other applicable federal laws.

H. Domestic Violence Leave

Kentucky does not require an employer to provide its employees with leave related to domestic violence.

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

Kentucky's minimum wage is equal to the federal minimum wage (currently $7.25/hour). If the federal minimum wage increases, the Kentucky statute provides that the state minimum wage shall increase to the same amount. KY. REV. STAT. § 337.275. In 2016, the Louisville Metro Government (Jefferson County) and Lexington-Fayette County Government attempted to pass ordinances requiring higher minimum wages (Louisville: $8.25/hour effective July 1, 2015; Lexington: $8.10/hour; both municipalities' minimum wages scheduled to increase further in coming years). *Ky. Rest. Ass'n v. Louisville/Jefferson Cnty. Metro Gov't*, 501 S.W.3d 425, 428-31 (Ky. 2016). However, the Kentucky Supreme Court struck down the ordinances as unconstitutional, invalid and unenforceable, reasoning that a local government's ordinance cannot forbid what a state statute expressly permits. *Id*.

B. Deductions from Pay

Kentucky law prohibits an employer from withholding from any employee any part of the wage unless the employer is expressly authorized to do so by local, state, or federal law or expressly authorized by the employee in writing. KY. REV. STAT. § 337.060. Under no circumstances may an employer deduct the following from the wages of employees: (a) fines; (b) cash shortages in a register or cashbox used by two or more persons; (c) breakage; (d) losses due to acceptance by employee of checks that are dishonored if such employee is given discretion to accept or reject the check; or (e) losses due to defective or faulty workmanship, lost or stolen property, damaged property or non-payment by the customer if such losses are not attributable to the employee's willful or intentional disregard of the employer's interest. *Id.* at § 337.060(2).

According to an Office of the Attorney General Opinion, mandatory direct deposit in a local banking institution was illegal when the employee did not give express permission and the bank assessed monthly service charges for failure to maintain a certain minimum balance. OAG 83-459. According to the Attorney General Opinion, the bank's penalty to an employee for withdrawing his balance constituted an unlawful deduction under the law.

C. Overtime Rules

If an employee works more than forty (40) hours in a work week, that employee is entitled to be paid at a rate of not less than one and one-half times the hourly wage rate of each hour over forty (40) hours worked. KY. REV. STAT. § 337.285. Kentucky employers must pay employees not later than eighteen (18) days after the employee has earned the payment. *Id.* at § 337.020. Employees who work seven days in one workweek are also entitled to overtime pay for the seventh day worked. KY. REV. STAT. § 337.050(1).

D. Time for Payment Upon Termination

KY. REV. STAT. § 337.055 requires that all wages or salary earned must be paid within fourteen (14) days of termination of employment.

E. Employee Scheduling Laws

See "Meals" and "Breaks/Rest Periods" discussion in Subsection F below.

F. Other Wage and Hour Matters

Kentucky wage and hour laws are found in KY. REV. STAT. § 337.010 *et seq*. These statutes cover topics like Kentucky's minimum wage, rest periods, and deductions.

In Kentucky, "wages" include any compensation due to an employee by reason of his employment including salaries, commissions, vested vacation pay, overtime pay, severance or dismissal pay, earned bonuses, or other "similar advantages" provided to employees as established policy. KY. REV. STAT. § 337.010. Accrued vacation must be paid out only if it is required by a contract or employer policy. *Berrier v. Bizer*, 57 S.W.3d 271, 280 (Ky. 2001).

Although Kentucky's Wage and Hour regulations are very similar to their federal counterpart, certain aspects are peculiar to Kentucky. See the following subsections for examples.

1. Meals

Kentucky employers are required to provide employees with "a reasonable period" for lunch as close to the middle of the employee's scheduled work shift as possible. In no case shall an employee be required to take a lunch period sooner than three hours after his work shift commences, nor more than five hours from the time the work shift commences. This provision does not negate any "mutual agreement" between the employer and employee. KY. REV. STAT. § 337.355. Meal periods are not required to be paid.

2. Breaks/Rest Periods

No employer shall require any employee to work without a paid rest period of at least ten (10) minutes for each of four (4) hours worked. These rest periods are in addition to the regularly scheduled lunch period and must be paid breaks. KY. REV. STAT. § 337.365.

3. Wage Discrimination Because of Sex Prohibited

No employer may discriminate against employees in the same establishment on the basis of sex by paying wages to an employee in any occupation at a rate less than the employer pays for an employee of the opposite sex doing comparable work on jobs which have comparable requirements relating to skill, effort, and responsibility. KY. REV. STAT. § 337.423.

4. Statute of Limitations

Claims under the Kentucky Wage and Hour Act have a five-year statute of limitations. KY. REV. STAT. § 413.120.

5. Recordkeeping

Kentucky employers are required to keep a record of the amount paid each pay period to each employee, and the hours worked each day and week by each employee. These records must be kept on file for at least one year. KY. REV. STAT. § 337.320.

6. Availability of Class Action or Collective Action

In 2017, the Kentucky Supreme Court ruled that the Kentucky Wage and Hour Act (KY. REV. STAT. § 337.385) permits class actions for unpaid wages and overtime. *McCann v. Sullivan Univ.*, 528 S.W.3d 331, 335-36 (Ky. 2017). This overruled previous decisions of the Court of Appeals that held that the class-action procedure was not available for such claims in Kentucky.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in the Workplace

Kentucky statutes do not specifically address smoking in private workplaces. Local laws that regulate smoking in public -- at the city, county, or town level -- may also apply to smoking in the workplace in some areas. Kentucky's Civil Rights Act prohibits employers from discriminating against employees on the basis of being a smoker or nonsmoker; however, KY. REV. STAT. §344.040 permits employers to set different contribution rates for smokers and nonsmokers in relation to an employer-sponsored health plan. Employers may also offer incentives or benefits to employees participating in smoking cessation programs without violating KY. REV. STAT. §344.040.

B. Health Benefit Mandates for Employers

There are no health benefits mandated by Kentucky Law.

C. Immigration Laws

There are no immigration requirements mandated by Kentucky Law.

D. Right to Work Laws

A right to work law secures the right of employees to decide whether or not to join or financially support a union. Kentucky is a right to work state.

Kentucky's Right to Work Act, which became effective in 2017, among other things, prohibits an employer from requiring an employee to join a union and/or pay union dues as a condition of employment. Any labor organization, employer or other person who "directly or indirectly violates" this statute is subject to criminal and civil penalties. KY. REV. STAT. § 336.130.

Under the Paycheck Protection Act, effective in 2017, an employer and union may not enter into an agreement whereby the employer withholds earnings from an employee for the purpose of paying union dues or other fees absent written or electronic consent from the

employee. Additionally, an employer may not condition employment on the employee consenting to the payment of union dues. Finally, this law also requires workers to "opt in" if they want union dues withheld from their paycheck as opposed to requiring workers to "opt out" if they do not want their union dues withheld.

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

See Section II.B.2 above discussing tort of wrongful discharge in violation of public policy. *See also* Section XII.B. above discussing Kentucky's executive order related to the use of medical cannabis.

F. Gender/Transgender Expression and Sexual Orientation

Under the Kentucky Civil Rights Act, it is not yet settled law whether discrimination on the basis of sexual orientation is a cognizable claim. Kentucky courts apply Title VII precedent to assess the Kentucky Civil Rights Act. *See Pedreira v. Ky. Baptist Homes for Children, Inc.*579 F.3d 722, 727 (6th Cir. 2009). The Kentucky Supreme Court has not yet considered whether gender identity or sexual orientation are protected categories under the KCRA since the United States Supreme Court's holding in *Bostock v. Clayton County*. 140 S. Ct. 1731 (2020) (holding "Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.").

However, 21 cities in Kentucky have enacted local ordinances that prevent employment discrimination on the basis of sexual orientation. These ordinances, however, do not require businesses to engage in expressive activities that promote "pride" in sexual orientation. *Lexington-Fayette Urban Co. Gov't v. Hands On Originals, Inc.*, Case No. 2015-CA-000745-MR, 2017 Ky. App. Unpub. LEXIS 371 (Ky. App., May 12, 2017) (unpublished decision).

Section 92.01 of the Louisville Metro Government Ordinances states that it is the policy of the Louisville Metro Government to safeguard individuals from discrimination within the area of employment because of gender identity or sexual orientation.

Lexington/Fayette County Urban Government has enacted § 2-33, which safeguards all individuals from discrimination in employment on the basis of sexual orientation or gender identity.

Covington Ordinance § 37.08 prohibits employers from discriminating against an individual based on sexual orientation or gender identity, which is defined as manifesting an identity not traditionally associated with one's biological maleness or femaleness.

Frankfort, Danville, Morehead, and Midway's ordinances amend these cities' housing, public accommodations, and employment non-discrimination ordinances to include sexual orientation and gender identity as protected classifications. Each includes exemptions for religious organizations.

Vicco, Kentucky, has also passed an ordinance that makes it "unlawful for any employer to refuse to hire, or to terminate, discriminate in any way, any individual for . . . sex and/or gender (including gender identity.)"

Additional cities in Kentucky provide sexual orientation and gender identity protections in employment, housing, and public accommodations.

Public employment discrimination against workers of the Commonwealth of Kentucky based on sexual orientation or gender identity is prohibited pursuant to an executive order signed by Gov. Steve Beshear in June 2008.

G. Other Key State Statutes

1. Under KY. REV. STAT. § 311.800(5)(b), no employee may be discharged for refusing to perform or participate in the performance of an abortion by reason of objection thereto on moral, religious, or professional grounds. Further, the statute prohibits disciplinary action on the basis of statements made or attitudes manifested with respect to abortion.

2. Under KY. REV. STAT. § 338.121, no employee may be discharged or discriminated against for exercising rights or participating in proceedings under the state Occupational Health and Safety Act.

3. The Kentucky Whistleblower Act, (KY. REV. STAT. § 61.101-103), prohibits retaliating against a state employee who reports to state officials a suspected or actual violation of law, mismanagement, waste, fraud, abuse of authority or endangerment of public health or safety.

4. Under KY. REV. STAT. § 207.135, no employer shall refuse to hire, discharge, or discriminate against an individual on the basis of HIV, AIDS, or AIDS-related complex unless the disability restricts the individual's ability to engage in the job; a test for HIV or AIDS is impermissible unless the absence of the virus is a bona fide occupational qualification; an employer shall not refuse to hire, discharge, or segregate any individual on the basis of the fact that the individual is a licensed health care professional who provides care or treatment to persons with HIV.

5. Under KY. REV. STAT. § 216B.165, any agent or employee of a health care facility who knows or has reasonable cause to believe that the quality of care of a patient, patient safety, or the health care facility's or service's safety is in jeopardy shall make an oral or written report of the problem to the health care facility or service, and may make it to any appropriate private, public, state, or federal agency. No health care facility or service shall by policy, contract, procedure, or other formal or informal means subject to reprisal, or directly or indirectly use, or threaten to use, any authority or influence, in any manner whatsoever, which tends to retaliate against any agent or employee who makes such a good faith report. *See also Foster v. Jennie Stuart Med. Ctr.*, 435 S.W.3d 629 (Ky. App. 2013) (termination in violation of statute satisfies conditions for a public policy wrongful termination claim).

6. It is unlawful, under KY. REV. STAT. § 336.220, for an employer to require an employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of employment.

7. Prior to 2017, Kentucky's prevailing wage law required that contractors working on public works projects estimated to cost more than $250,000 pay wages equal to or greater than the wages of similar workers in the area where the project is being built. As of January 9, 2017, the prevailing wage rate was repealed and contractors working on public work projects are no longer required to pay their employees a minimum wage. In the absence of a prevailing wage law in Kentucky, cities, counties, and local governments are prohibited from requiring an employer to pay its employees a particular wage or provide certain benefits.

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