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DELAWARE

I. AT-WILL EMPLOYMENT

A. Statute

There is no Delaware statute addressing at-will employment other than prohibiting employment discrimination (*See* Section XIII), a statute relating to lie detector testing (*See* Section XV.E.1.), refusal to participate in abortion (*See* Section XV.E.2.), and whistleblower protection (*See* Section II.B.4).

B. Case Law

An at-will employee may be discharged without just cause at any time, and there is a strong presumption that employment relationships are at-will unless otherwise stated. However, the parties can alter an employment at-will relationship and there are exceptions to the doctrine. *Lord v. Souder*, 748 A.2d 393, 400 (Del. Super. Ct. 2000).

Where plaintiff (1) admitted that she was not hired by defendant on the basis of a written contract setting out the terms, conditions or duration of her employment; (2) agreed that defendant never orally promised her employment for a definite length of time; and (3) conceded that she did not consider herself bound to work for defendant for a fixed term of employment, the Superior Court's determination that plaintiff was an employee at-will was not erroneous as a matter of settled Delaware law. *Heideck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095 (Del. Super. Ct. 1982).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

Under Delaware law, an at-will employment relationship can be modified by some clearly affirmative conduct on the part of the employer, such as the provisions of a handbook. In *Mann v. Cargill Poultry, Inc.*, 1990 Del. Super. Ct. LEXIS 225 (Del. Super. Ct. June 13, 1990), *aff'd*, 584 A.2d 1228 (Del. 1990), the court noted that courts in Delaware have held that handbooks which (1) were not accompanied by a written contract; or (2) lacked any explicit provision in the Handbook granting an employee a specific term of employment; or (3) were issued after the employee began his or her employment; or (4) lacked consideration, or some combination of factors thereto, did not provide enforceable contract right or alter the at-will employment relationship. *Id*. at *14. In granting the employer's motion for summary judgment, the court found that none of the provisions in the

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Handbook originally given to the employees indicated the employer's intention to modify their at-will status. Therefore, the employees could be terminated with or without cause.

Delaware courts have also found that employee handbooks that do not provide for employment of a specific duration do not disturb the at-will status of employees. *Bunting v. Citizens Fin. Group, Inc.*, 2006 WL 1067321 (Del. Super. Ct. April 13, 2006).

In *Williams v. Christina Sch. Dist.*, 2014 WL 7462997, (D. Del. Dec. 31, 2014) the plaintiff contended because Christina School District was a public sector employer, she had a constitutionally protected property interest in her employment and was not an at-will employee. In dismissing her claims, the Court reasoned: "A public employee may have an expectation of continued employment if her employer sets out guidelines as to her grounds for discharge." (citations omitted). The plaintiff failed to plausibly allege that this occurred, and she has offered nothing more than merely conclusory allegations that she was not an at-will employee.

By comparison, in *Caruso v. Superior Court of Delaware*, 2013 WL 1558023 (D.Del. Apr. 12, 2013), the Court held that a public employee had a property interest in her employment position, as there were guidelines regarding grounds for discharge. The employment was governed by the Supreme Court of Delaware Judicial Branch Personnel Rules, and the employee would have been entitled to a pre-termination hearing in the Personnel Rules if she had not elected to resign in anticipation of termination.

2. Provisions Regarding Fair Treatment

Delaware has no statute addressing fair treatment.

3. Disclaimers

The mere existence of a handbook does not eliminate employment at will. See *Layfield v. Beebe Med. Ctr., Inc.*, 1997 Del. Super. Ct. LEXIS 472 (Del. Super. Ct. Nov. 24, 1997) (holding that the handbook explained the at-will nature of the employment by disclaiming any express or implied guarantee of employment and by noting that either party can terminate the employment relationship at any time for any reason); *Peterson v. Beebe Med. Ctr., Inc.*, 623 A.2d 1142 (Del. Super. Ct. 1993); *see also Bunting*, 2006 WL 1067321. The existence of an employee handbook does not change an employee's status from at-will unless there is clear language in the handbook that places express limits on the employer's right to discharge. *McCoy v. Occidental Chem. Corp.*, 1996 Del. Super. Ct. LEXIS 55 (Del. Super. Ct. Feb. 7, 1996) (existence of an employee handbook does not change an employee's status from at-will unless there is clear language in the handbook that places express limits on the employer's right to discharge).

4. Implied Covenant Of Good Faith And Fair Dealing

An implied covenant of good faith and fair dealing exists in connection with at-will employment contracts but must "constitute 'an aspect of fraud, deceit, or misrepresentation.'" *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 101 (Del. Super. Ct. 1992). Absent bad faith, an employer has the freedom to terminate an at-will employment relationship for its own legitimate business, or even highly subjective reasons. *Peterson v. Beebe Med. Ctr, Inc.*, 623 A.2d 1142 (Del. Super. Ct. 1993). Similarly, "an employee's alleged failure to follow written policy or procedure, by itself, will not support a viable claim for breach of implied covenant of good faith and fair dealing, because Delaware adheres to the at-will doctrine that sets a high threshold for an actionable breach of that covenant." *Nye v. Univ. of Del.*, 897 A.2d 768 (Del. 2006).

In a case involving a supervisor who intentionally and maliciously "misrepresented employee's responsibilities to superiors," the Supreme Court affirmed that employment at-will is still the rule in Delaware. *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (Del. 1996) (en banc). However, the court held that an implied covenant of good faith and fair dealing exists in every at-will employment contract, and that a cause of action for breach of the covenant can arise from an employee's termination. The covenant "relates solely to an act or acts of the employer manifesting bad faith or unfair dealing achieved by deceit or misrepresentation in falsifying or manipulating a record to create fictitious grounds to terminate employment." The Court specifically stated that "[d]islike, hatred or ill will, alone, cannot be the basis for a cause of action for termination of an at-will employment." *Id*. at 444. *Pressman* is a narrowly interpreted exception to the at-will doctrine. *Gilliland v. St. Joseph's at Providence Creek,* 2006 WL 258259 at *7 (Del. Super. Ct. January 27, 2006).

The covenant of good faith and fair dealing contains a "heavy presumption" of at-will employment and applies only in very limited categories. *Ayres v. Jacobs & Crumplar, P.A.*, 1997 Del. Super. Ct. LEXIS 521 (Del. Super. Ct. Dec. 19, 1997). The employer's conduct must constitute some element of fraud, deceit, or misrepresentation. Specifically, there are three exceptions to the at-will employment status which include: (1) a public policy exception; (2) an employer misrepresentation upon which the employee relies to her detriment; and (3) an employer depriving the employee of clearly identifiable compensation which is related to services already given. *Ayers*, 1997 Del. Super. Ct. LEXIS 521 at *13. The implied covenant does not create a duty under *Pressman* for the employer to protect the employee from false accusations. *Gilliland* 2006 WL 258259 at *8.

"[B]reach of the covenant of good faith and fair dealing can be claimed only when an employee has been fired or constructively discharged." *Meltzer v. City of Wilmington*, 2008 WL 4899230 (Del. Super. Aug. 6, 2008).

B. Public Policy Exceptions

1. General

In *Lord v. Souder*, 748 A.2d 393 (Del. Super. Ct. 2000), the court held that to prove a public policy exception to employment at-will, the plaintiff must establish the employee asserted a public interest recognized by legislative, administrative or judicial authority, and the employee must occupy a position with responsibility for advancing or sustaining that particular interest. However, public policy exceptions are "narrowly drawn and generally statutory." *Gaines v. Wilmington Trust Co.*, 1991 Del. Super. Ct. LEXIS 207, *208 (Del. Super. Ct. June 3, 1991), *aff'd*, 608 A.2d 727 (Del. 1991).

2. Exercising a Legal Right

See discussion of *Lord v. Souder* in Section II, B,1.

3. Refusing To Violate the Law

See discussion of *Lord v. Souder* in Section II, B, 1.

4. Exposing Illegal Activity (Whistleblowers)

In *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (Del. Super. Ct. 1996) (en banc), the employee attempted to circumvent his at-will status by arguing that his termination for disclosing a potentially unlawful act by the employer was a violation of public policy. The court determined that a public policy exception, arising either from a tort or arising from a covenant, generally requires "a clear mandate of public policy." *Id*. at 441. The court found that the employee's claim did not fit within the public policy exception since it did not identify an "explicit and recognizable public policy." *Id*.

In *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578 (Del. Ch. 1994), an attorney was terminated from her employment for refusing to violate her ethical obligation under the Code of Professional Responsibility. *Id*. The court found that the attorney may, in fact, have a cause of action stating: "Employees who seek protection from firing on the basis that their actions were protected by a public policy, must assert a public interest recognized by some legislative, administrative or judicial authority." *Id*. at 587-89. In this case the court found that the public had an interest in the ethical behavior of attorneys as determined by the Code of Ethics.

In *Heller v. Dover Warehouse Market., Inc.*, 515 A.2d 178 (Del. Super. Ct. 1986). an employee was forced to take a polygraph test and then terminated when she did not pass. Title 19, section 704 of the Delaware Code, applicable at the time, indicated that no employee may be required to take a lie detector test as a condition of employment. The superior court held that the at-will doctrine "must yield to applicable constitutional and statutory proscriptions which support a private cause of action." *Heller*, 515 A.2d at 181.

Further, an employee, terminated for reporting employer's illegal billing scheme, had a cause of action for wrongful discharge even though employee had participated in the scheme. *Paolella v. Browning-Ferris, Inc.*, 158 F.3d 183 (3d Cir. 1998). The court determined that there was sufficient evidence to support a jury verdict of $597,000.00 in front pay but ordered a remittitur of $132,000.00 due to the employee's participation in the scheme.

Similarly, an employee who was allegedly discharged for refusing to carry out criminal conduct requested by employer stated a valid cause of action. *Henze v. Alloy Surfaces Co., Inc.*, 1992 Del. Super. Ct. LEXIS 553 (Del. Super. Ct. March 16, 1992).

Finally, Delaware Code Annotated, title 29, section 5115 provides that no state, county, municipal, or school district employee may be discharged for reporting suspected violations of state or federal law, unless the employee knows the report is false. Section 5115 acts as a waiver of the state's sovereign immunity but does not subject individual defendants to liability. *Tomei v. Sharp,* 902 A.2d 767 (Del. Super. Ct. 2006). An employee who is constructively discharged can pursue a claim under the Whistleblower Act, on the same basis as if she had been formally discharged. *Smith v. Delaware State University*, 47 A.3d 472 (Del. 2012).

III. CONSTRUCTIVE DISCHARGE

"A constructive discharge occurs . . . when an employer deliberately causes or allows the employee's working conditions to become 'so intolerable' that the employee is forced into an involuntary resignation." *Thayer v. Tandy Corp.*, 1987 Del. Super. Ct. LEXIS 1126, *6 (Del. Super. Ct. April 29, 1987) (reversed on other grounds), citing *Beye v Bureau of Nat'l Affairs*, 477 A.2d 1197, 1201 (Md. Ct. App. 1984).

In *Caruso v. Superior Court of Delaware*, 2013 WL 1558023 (D. Del. Apr. 12, 2013) the Court held that the employee raised a plausible claim at the motion to dismiss phase that her resignation was coerced (i.e., constructively discharged) to rebut the presumption that she resigned voluntarily. She was given the option of resignation or termination/requesting a pre-termination hearing; however, factors such as the unexpected nature of the decision, the short amount of time the employee had to make the decision, the lack of control over her effective resignation date, and the lack of assistance of an attorney demonstrated that her resignation was involuntary.

A constructive discharge can occur where the employee is given the choice of resigning or accepting a demotion to a position formerly occupied, under the supervision of former peers, with no opportunity for promotion. *Bali v. Christiana Care Health Services*, 1999 Del. Ch. LEXIS 128 (Del. Ch. June 16, 1999).

An employee who is constructively discharged can pursue a claim under the Whistleblower Act, on the same basis as if she had been formally discharged. *Smith v. Delaware State University*, 47 A.3d 472 (Del. 2012).

If an individual (i.e., a union representative) applies pressure to an employee to resign, but that individual is not an agent of the employer, there is no constructive discharge. *State, Dept. of Correction v. Potter*, 2011 WL 5966720 (Del. Super. Nov. 29, 2011).

An employee terminated her employment because of "undesirable" working conditions in *Gryzwyna v. Department of Corrections*, 1982 Del. Super. Ct. LEXIS 935 (Del. Super. Ct. Oct. 27, 1982), *aff'd*, 467 A.2d 453 (Del. 1983). The employee testified that she could not get along with a co-worker, that there was no communication between them, and that the co-worker was simply nit-picking. The Unemployment Insurance Appeal Board found that plaintiff had a personality conflict with co-worker and that she had voluntarily resigned from her job without good cause attributable to the work. Although the plaintiff contended that this was a case of constructive discharge, the court found this argument without merit stating: "There is no substantial evidence to establish that the appellant was forced or induced to resign under pressure by the employer or on account of a truly serious deficiency in her working conditions." *Id.* at *4.

In *Rizzitiello v. McDonald's Corp.*, 868 A.2d 825 (Del. 2005), the defendant resigned prior to the conclusion of an investigation of an inventory shortage. The court held that such a resignation precludes recovery based on a theory of constructive discharge.

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

the controlling test to determine just cause was determined by the superior court in *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super. Ct. 1967). In *Abex*, the superior court indicated that just cause generally refers to a willful or wanton act in violation of either the employer's interest, or the duties of the employee, or of the employee's expected standard of conduct. *Abex*, 235 A.2d at 272. *See also Avon Prods., Inc. v. Wilson*, 513 A.2d 1315 (Del. Super. Ct. 1986) (just cause termination occurs when an employee is terminated for acts that are willful or wanton in violation of an employer's interest, employee's duties or employee's expected standard of conduct). Wanton connotes a heedless, malicious

or reckless act, but does not require actual intent to cause harm; while willful implies actual, specific or evil intent. *Ringer v. State Personnel Office*, 1995 Del. Super. Ct. LEXIS 380 (Del. Super. Ct. Sept. 9, 1995). Willful and wanton conduct requires a showing that one was conscious of his conduct or recklessly indifferent of its consequences; it need not necessarily connote a bad motive, ill design or malice. *Id*.

Where the decision to terminate an employee is based on misconduct, the burden rests with the employer to establish that misconduct. *Ringer*, 1995 Del. Super. Ct. LEXIS 380.

A violation of a reasonable company rule may constitute just cause for discharge. However, the employee must be aware that the policy exists and may a cause for discharge. *Ringer*, 1995 Del. Super. Ct. LEXIS 380 *12, *citing Pavusa v. Tipton Trucking Co., Inc.*, 1993 WL 562196 (Del. Super. Ct. Dec. 1, 1993) (outlining two step analysis: (1) whether a policy existed, and if so, what conduct was prohibited; and (2) whether the employee was apprised of the policy, and if so, how was the employee made aware of the policy). Knowledge of a policy may be established where there is a written policy, such as a handbook, or where an employee had been previously warned regarding the objectionable conduct. *Id*. In addition, fundamental fairness requires an employer to warn an employee that his conduct could lead to termination if there is no explicit policy. *Id*. *7. If, however, an employee's single act is "patently egregious," discharge can occur without warning. *See e.g.*, *Coleman v. Dep't of Labor*, 288 A.2d 285, 288 (Del. Super. Ct. 1972) (employer was justified in firing without warning when an employee came to work intoxicated waving a toy gun). *See also*, *Price v. Kirby & Holloway*, 1994 Del. Super. Ct. LEXIS 496 (Del. Super. Ct. Oct. 27, 1994) (just cause for discharge based upon a single incident which consisted of an irate verbal confrontation between the employee and a supervisor in front of customers including the use of profanity).

In *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265 (Del. Super. Ct. 1981), the supreme court found that the employees' actions in leaving work early without permission were willful (in that they did so "voluntarily, intentionally, and deliberately"), and in violation of the employer's interest, the employees' duties, and expected standard of conduct. The court held that, even though this was a single instance of failure to heed their employer's directions, the employer had just cause to terminate the employees.

In another case, the appellant sought unemployment benefits from his former employer after being discharged from his sales manager's position because of a sexual tryst between himself and the wife of a subordinate employee. *Baynard v. Kent County Motors, Inc.*, 548 A.2d 778 (Del. Super. Ct. 1988). Appellant was denied benefits upon a finding that he was discharged for "good cause." The Board found that the employer had good cause for terminating appellant because he engaged in a "willful or wanton act in violation of either the employer's interest, or of the employee's duties or of the employee's expected standard of conduct." *Id*., citing *Abex Corp.*, A.2d at 227. Appellant argued that since he engaged in a single private act, outside of the employer's property or time, and unrelated to his work duties, the Board erred in its determination of good cause. The court disagreed, stating; "Simply because his conduct occurred other than on the job site or during working hours does not excuse his acts. His conduct had a sufficient nexus to his job performance. It disrupted a working, productive, positive relationship with his subordinates." *Baynard*, 548 A.2d at 778. The court affirmed the decision of the Board.

In *Ringer*, 1995 Del. Super. Ct. LEXIS 380, the appellant was employed as an internal auditor for the Delaware Pensions Office for approximately ten years. Appellant was fired after the employer discovered that the appellant had sent approximately 70 personal letters using the state mail system.

Upon determining that the appellant was the individual responsible, he was terminated immediately and without warning. Employer testified that appellant would not have been terminated but for the content of the letters that he sent. Appellant admitted sending the letters but asserted that he did not know it was wrong and that he should have been warned before his termination. The Board denied appellant unemployment benefits finding that he had been terminated for good cause. The court reversed, finding that appellant was entitled to a warning before termination in light of the fact that he did not know that his conduct was wrong and because he would not have been terminated but for the conduct. *Id*. The court concluded that if the discharge was based solely on the use of the state mail, the discharge was without just cause because the Appellant was entitled to a warning given the fact that the behavior was not egregious, serious, or willful or wanton.

In *Barrios v. Perdue*, 1995 Del. Super. Ct. LEXIS 395 (Del. Super. Ct. Aug. 17, 1995), the plaintiff was employed as a general laborer for Perdue from October 1993 until he was terminated in September 1994. During his tenure, the plaintiff received several warnings, was disciplined several times for various acts, and was told, on at least one occasion, that additional disciplinary action could lead to termination. In addition to the formal proceedings, the plaintiff was issued several informal warnings for poor work performance. The plaintiff testified that he was not responsible for his poor performance which was due to the size of the chickens. The plaintiff appealed the decision of the Unemployment Insurance Appeal Board which found that he was terminated for just cause.

The court noted that an employer has the burden to show that an employee is terminated for just cause. An employee can be fired for just cause if his or her conduct constitutes a "willful or wanton act or pattern of conduct in violation of the employer's interest, the employee's duties, or the employee's expected standard of conduct." *Id*. at *6. The court defined wanton conduct as heedless, malicious or reckless and willful conduct which a person does voluntarily, intentionally and deliberately, or which the employee does with reckless indifference to his or her actions' consequences. The court further stated that just cause generally does not include dismissal for "mere inefficiency, unsatisfactory conduct, or failure of performance as a result of inability or incapacity, inadvertence in isolated instances or good faith errors of judgment." *Id*., citing *Starkey v. Unemployment Ins. Appeal Bd.*, 340 A.2d 165, 166-67 (Del. Super. Ct. 1975).

The court was not convinced that plaintiff's conduct was willful in nature, and found that the plaintiff's poor work performance alone did not constitute just cause. However, the court determined that (1) the multitude of the plaintiff's infractions including poor performance, tardiness, failure to comply with rules and instructions; and (2) the fact that his supervisors warned him repeatedly that his misconduct could lead to termination but did nothing to adapt his behavior, constituted wanton conduct and was good cause for termination. *Id*. at *9; see also *Hudson Transfer & Constr. Co. v. Vick*, 385 A.2d 145 (Del. 1978) (concluding that negligent performance may come to constitute 'just cause' if it occurs despite warnings and is not excusable as an expected result of either the nature of the job or the ability of the employee); *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d at 1265, 1268 (Del. Super. Ct. 1981) (holding that a single instance of employee misconduct, under circumstances indicating that the employer acted reasonably in warning the employees of the consequences of their actions and that he had not tolerated similar actions in the past, may be the basis for discharge from employment for just cause); *Cartwright v. Last Straw, Inc.*, 2006 WL 2001439 (Del. Super. Ct. July 19, 2006) ("Even if Appellant's excuses were legitimate, at some point chronic absence from work can amount to cause for discharge.").

B. Status of Arbitration Clauses

In *Little Switzerland, Inc. v. Hopper*, 867 A.2d 955 (Del. Ch. 2005), the court recognized that, if an employment agreement requires the arbitration of disputes arising out of the agreement, arbitration is the exclusive remedy.

V. ORAL AGREEMENTS

A. Promissory Estoppel

In *Asher v. A.I. DuPont Inst. of the Nemours Found.*, 1987 Del. Super. Ct. LEXIS 1206 (Del. Super. Ct. June 19, 1987), the employee, a medical lab technician, was told that after a 90-day probationary period he would be considered a permanent employee and could only be terminated for cause. The employee was terminated after the probationary period because of conflicts that arose with his supervisor. The employer moved for summary judgment arguing that the employee was employed at-will. The court granted the employer's motion, finding that the employee gave no consideration for the oral assurances: specifically, oral assurances given to an employee that the employment is intended to be permanent are not enforceable against an employer without some basic contract consideration, i.e., detrimental reliance by the employee upon the representations made by the employer. *See also Keating v. Bd. of Educ.*, 1993 WL 460527 (Del. Ch. Nov. 3, 1993) aff'd, 650 A.2d 1305 (Del. 1994) (holding that to prevail on promissory estoppel theory, plaintiff must show that a promise was made, that it was a reasonable expectation of the promisor to induce action or forbearance of the promisee, that the promisee relied upon the promise to his detriment, and that such promise is binding because injustice can be avoided only by enforcement of the promise).

In *Konitzer v. Carpenter*, 1993 Del. Super. Ct. LEXIS 458 (Del. Super. Ct. Dec. 29, 1993), the employee filed an action against the employer for a breach of an oral employment agreement as head groundskeeper. Plaintiff alleged that after leaving his position with the employer and taking a full time job elsewhere, the employee wrote to an agent of employer expressing his interest in a second position and listing his salary requirement for a six year period. During a meeting with employer and the agent, the employee was told that he could be employed as head groundskeeper so long as he resided on the property and for as long as he wanted the job. The employee's letter was discussed, and the agent made certain handwritten notations setting forth various terms of employment. The employee then left his full time job, moving from West Chester Pennsylvania to Delaware, and began working for the employer. The employee was subsequently terminated and filed an action for breach of an oral agreement. The employee maintained that he was promised employment for a six year term and that he was assured that he would be employed as groundskeeper so long as he resided on the property. In addition, the employee argued that he relied to his detriment upon the oral assurance of the agent. The employer denied that he promised the employee the head groundskeeper position for any length of time and that his employment was at-will.

The court found that the employee was in fact employed at-will, however, the court noted that this would not prohibit a claim for promissory estoppel if the employee can prove, by "clear and convincing" evidence that (1) a promise was made, (2) with the intent to induce the employee to accept employment, (3) upon which the employee relied, and (4) suffered injury. *Id*. at **22-23. The court denied the employer's motion for summary judgment on the employee's promissory estoppel claim, concluding that a jury may be able to find that the employee could prove his claim by clear and

convincing evidence. *See also Lord v. Souder*, 748 A.2d 393 (Del. Super. Ct. 2000) (post-hire promises can give rise to a cause of action under the theory of promissory estoppel).

B. Fraud

During an interview, prior to accepting employment, the employee expressed concern over his ability to perform the position due to his inexperience in the required areas. *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96 (Del. Super. Ct. 1992). An agent of employer assured employee that he would receive adequate support and training, and employee accepted the job. Less than one month later, employer began receiving complaints regarding employee's performance. Approximately four months after signing the contract, employee was terminated. He filed suit, alleging, among other things, that employer fraudulently induced him into accepting employment by promising to train him. Employee alleged that employer never intended to employ him for longer than it took to "start up" the operation he was heading, and that by promising he would receive training, he was fraudulently induced into the employment. Employee testified, at his deposition, that he knew that his position was not permanent, and that the written employment agreement clearly indicated the at-will nature of his employment. The court noted that an essential element of a common law action for fraud is that the victim not be aware of the truth of the facts being misrepresented. In this case the court found that employee could not prove that he did not know his position was only temporary, and therefore could not prevail on a claim for fraud.

In another case, the employee filed a complaint against her employer alleging a breach of an oral agreement for "permanent employment" based upon fraudulent and negligent misrepresentation (two of six theories of liability alleged in her complaint). *Shockley v. Gen. Foods Corp.*, 560 A.2d 491 (Del. 1989). Employee was employed as a lab technician at one of employer's manufacturing plants. After three years of employment, she was terminated because her position was being phased out and based upon the company's decision to cut salary costs. Employee claimed that employer falsely and fraudulently represented to her that she would have permanent employment with benefits. Employee further alleged that these promises were reduced to writing in the form of a memorandum. The court affirmed the lower court's holding that the memorandum did not alter her at-will status. Specifically, fraud consists of (1) a false representation, usually one of fact, made by another; (2) defendant's knowledge or belief that the representation was false or was made with reckless indifference to the truth; (3) an intent to induce plaintiff to act or refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance. In this case, the facts indicated that employee received what she had been promised up until the time she was terminated, and thus there was no fraud. *See also Hudson v. Wesley College, Inc.*, 1998 Del. Ch. LEXIS 235 (Del. Ch. Dec. 23, 1998), aff'd., 734 A.2d 641 (Del. 1999) (traditional elements of fraud must be present in the evidence to maintain a cause of action. A plaintiff must prove that: (1) defendant had a duty to disclose material information, (2) defendant misrepresented or omitted material information, (3) defendant did so with bad faith or malice, (4) which caused an adverse employment action, (5) which harmed plaintiff).

C. Statute of Frauds

The statute prohibits enforcement of any "agreement that is not to be performed within the space of one year from the making thereof . . . unless the contract is reduced to writing, or some memorandum, or notes thereof, are signed by the party to be charged therewith." Del. Code. Ann. tit. 6, § 2714(a). Contracts of employment for longer than one year fall within the statute of frauds and are

unenforceable unless they are in writing. *Konitzer v. Carpenter*, 1993 WL 562194 (Del. Super. Ct. Dec. 29, 1993).

VI. DEFAMATION

A. General Rule

To prevail on a claim for defamation, the plaintiff must show (1) the defamatory character of the communication; (2) publication; (3) that the communication refers to the plaintiff; (4) the third party's understanding of the communication's defamatory character; and (5) injury. *Layfield v. Beebe Med. Ctr.*, 1997 Del Super. Ct. LEXIS 472 (Del. Super. Ct. July 18, 1997).

1. Libel

Libel is written defamation. Any publication which is libelous is actionable without proof of special damages. *Spence v. Funk*, 396 A.2d 967 (Del. 1978); *see also Laymon v. Lobby House, Inc.*, 2008 WL 1733354 (D. Del. 2008).

2. Slander

Slander is oral defamation. Slander is not actionable without special damages, unless it qualifies as slander per se. Slander per se involves statements which: 1) malign one in a trade; 2) impute a crime; 3) imply that one has a loathsome disease; or 4) impute unchastity to a woman. *Spence v. Funk*, 396 A.2d 967.

B. References

No cases in Delaware have addressed this issue. However, employers are protected by statute from civil liability for disclosing employment information.

> (a) An employer or any person employed by the employer who discloses information about a current or former employee's job performance to a prospective employer is presumed to be acting in good faith; and unless lack of good faith is shown by clear and convincing evidence, is immune from civil liability for such disclosure or its consequences. For purposes of this section, the presumption of good faith is rebutted upon a showing that the information disclosed by such employer was knowingly false, was deliberately misleading or was rendered with malicious purpose; or that the information was disclosed in violation of a nondisclosure agreement, or was otherwise confidential according to applicable federal, State, or local statute, rule or regulation.
>
> (b) For purposes of this section, the work 'information' includes:
>
> (1) information about an employee's or former employee's job performance or work-related characteristics;
>
> (2) any act committed by such employee which would constitute a violation of federal, State or local law; or

(3) an evaluation of the ability or lack of ability of such employee or former employee to accomplish or comply with the duties or standards of the position held by such employee or former employee.

Del. Code Ann. tit. 19, § 709.

C. Privileges

Employee brought an action against employer for defamation and intentional infliction of mental distress after a performance evaluation led to his demotion. *Battista v. Chrysler Corp.*, 454 A.2d 286 (Del. Super. Ct. 1982). The court stated that in Delaware, any communications made by employee's supervisor regarding an evaluation of employee's performance made to agents of the employer were protected by a qualified privilege. The Court noted that the benefit of this conditional privilege could be forfeited if it is abused 1) by excessive or improper publication, 2) by the use of the occasion for a purpose not embraced within the privilege, or 3) by making a statement which the speaker knows is false. *Id*. at 291. In addition, a finding of a conditional privilege conditionally negates the presumption of malice and shifts the burden to the plaintiff to show actual malice. *Id*. Absent a finding of express malice, if the privilege is not abused, the employee has no action for defamation. *Id*.

Alternatively, the plaintiff must prove the statement was not made in good faith, or that it was made with malice or intent to harm the plaintiff. *Meades v. Wilmington Housing Auth.*, 2006 WL 1174005 at *3 (Del. Super. Ct. April 28, 2006). "Malice can be shown through excessive or improper publication or publishing statements that are known to be false." *Gilliland v. St. Joseph's at Providence Creek,* 2006 WL 258259 at *9 (Del. Super. Ct. Jun. 27, 2006).

In *Battista*, the employee conceded that the comments about his work performance were confined to employer's personnel, that the remarks only concerned his performance and were only made by persons acting within the scope of their employment. 454 A.2d 286. The court noted, therefore, that the employee could not show that the communication served a purpose not contained within the privilege. *Id*. As such, there was no evidence that the employer abused its qualified privilege. In addition, employee failed to show malice on his supervisor's part. The court granted the employer's motion to dismiss. *See also Durig v. Woodbridge Bd. of Educ.*, 1992 Del. Super. Ct. LEXIS 523 (Del. Super. Ct. Dec. 8, 1992) (statements in the evaluation report were protected by a conditional privilege and the defendant exercised the conditional privilege with good faith, without malice and absent any knowledge of falsity or desire to cause harm, and plaintiff failed to produce evidence to establish actual malice).

In *Heller v. Dover Warehouse Market*, 515 A.2d 178 (Del. Super. Ct. 1986), former employee sued employer *inter alia* for defamation because of statements made by employer to police concerning the suspected theft by employee of employer's property. The employer moved to dismiss the defamation claim. The Delaware Superior Court concluded that the statement by the employer to the police was conditionally privileged because "(a) there was information affecting a sufficiently important public interest, and (b) the public interest requires communication of defamatory matter to a public officer who is authorized to take action if the defamatory matter is true." *Heller*, 515 A.2d at 181, citing RESTATEMENT (SECOND) OF TORTS § 598. The court then held that dismissal of the defamation claim was not appropriate at the early stage of the proceedings because the conditional privilege is defeated where "there was actual malice by the defendants in passing along their suspicions [to the police]. The plaintiff must show that the privilege was abused because either: (a) defendant knew the matter to be false, or (b) defendant acted in reckless disregard as to the truth or falsity of the statement." *Id*. at 182, *citing* RESTATEMENT

(SECOND) OF TORTS § 600. As there remained a fact issue as to abuse of the privilege, the employer's motion to dismiss was denied.

Another case involved claims for breach of the implied covenant of good faith and fair dealing, intentional interference with contract, and defamation. *Layfield v. Beebe Med. Ctr.*, 1997 Del. Super. Ct. LEXIS 472 (Del. Super. Ct. July 18, 1997). The plaintiff was a nurse employed with the medical center from September 1980 until January 1995. The medical center's employment handbook stated that the employment relationship was at-will and disclaimed any expressed or implied guarantee of employment by noting that either party could terminate the employment relationship at any time for any reason. After a complaint by a patient's family, the medical center reviewed the plaintiff's patient charts for the six (6) months prior to the complaint and found several errors, including the possibility that plaintiff had falsified records. In addition, the plaintiff admitted that she failed to follow the medical center's documentation procedures. The plaintiff was terminated from her employment based upon a "lack of confidence in [Plaintiff] due to [Plaintiff's] failure to comply with Beebe Medical Center policies, practices and procedures regarding patient treatment and medical documentation." *Id*. at *7. The plaintiff sued alleging that the medical center defamed her by, among other things, filing a complaint with the Delaware Board of Nursing. The court found that this complaint failed because, as a matter of Delaware law, a qualified privilege shields "communications made between persons who have a common interest for the protection of which the allegedly defamatory statements were made." *Id*. at *20. The court found that any communications to the Board were privileged because the medical center and the Board had a common interest in the competence and professionalism of nurses who practice in Delaware. *Id*. This privilege may be lost however if (1) the defendant knew that the matter to be false, or (2) the defendant acted in reckless disregard as to the truth or falsity of the statement. *Id*. The court found no evidence of either in this case.

D. Other Defenses

1. Truth

Truth is an absolute defense to a defamation action. *Barker v. Huang*, 610 A.2d 1341 (Del. 1992).

2. No Publication

Publication is an essential element of establishing a defamation claim. *Bray v. L. D. Caulk Dentsply Intern.*, 1999 WL 1225966 (Del. Super. Ct. Oct. 22, 1999).

3. Self-Publication

The Delaware Superior Court has refused to recognize the tort of self-publication of defamatory information by a discharged employee who must explain the circumstances of her termination to future prospective employers. *Lynch v. Mellon Bank of Del.*, 1992 Del. Super. Ct. LEXIS 551 (Del. Super. Ct. March 12, 1992); *see also Gilliland v. St. Joseph's at Providence Creek*, 2006 WL 258259, *8 (Del. Super. Ct. Jan. 27, 2006).

4. Invited Libel

There is no Delaware authority on invited libel.

5. Opinion

Delaware courts will not impose liability for the expression of opinions, unless the opinion implies the existence of an undisclosed defamatory factual basis. *Ramunno v. Cawley*, 705 A.2d 1029 (Del. Super. Ct. 1998).

E. Job References and Blacklisting Statutes

1. Job References

An employer or any person employed by the employer who discloses information about a current or former employee's job performance to a prospective employer is presumed to be acting in good faith; and unless lack of good faith is shown, is immune from civil liability for such disclosure or its consequences. "Information" includes information about an employee's job performance or work-related characteristics; an act committed by the employee that would constitute a violation of law; or an evaluation of the ability or lack of ability of such employee or former employee to accomplish or comply with the duties or standards of the position held by such employee or former employee. Del. Code. Ann. tit. 19, § 709.

2. Blacklisting Statute

Delaware does not have a blacklisting statute.

F. Non-Disparagement Clauses

No application in Delaware.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

"[A]n employee's common law claim against an employer for intentional infliction of emotional distress is barred by the exclusivity provision of the Workers' Compensation Act." *Meltzer v. City of Wilmington*, 2008 WL 4899230 (Del. Super. Aug. 6, 2008).

In deciding questions of law certified to the court by the Third Circuit Court of Appeals, the Delaware Supreme Court held that state common law tort claims for assault and battery brought because of sexual harassment on the job are precluded by the Delaware Workers' Compensation Act ("the Act"). *Konstantopoulos v. Westvaco Corp.*, 690 A.2d 936 (Del. Super. Ct. 1996). Section 2304 of the Act limits an employee's recovery for personal injuries arising out of and during the course of employment to the compensation provided under the Act, thereby excluding all other claims against the employer. The court found that sexual harassment, and common law torts arising from sexual harassment were not excluded from the operation of section 2304. *See also Limehouse v. Steak & Ale Restaurant Corp.*, 850 A.2d 302 (Del. 2004); *Rizzo v. E.I. DuPont de Nemours & Co.*, 1989 WL 135651 (Del. Super. Ct. Oct. 31, 1989). The court also held that the sexual harassment did not fall within an exclusion provided for an act "not directed against the employee as an employee or because of the employee's employment." Del. Code

Ann. tit. 19, § 2301(15)(b). The court held that Section 2301(15)(b) applied to injuries "caused by conduct with origins outside of the work place." *Konstantopoulos*, 690 A.2d at 939.

In another case, an employee brought an action against employer for defamation and intentional infliction of mental distress after a performance evaluation led to his demotion. *Battista v. Chrysler Corp.*, 454 A.2d 286 (Del. Super. Ct. 1982). Finding employee's mental "injury" to be a direct result of his demotion, the court dismissed his claim as being barred by the Delaware Workers' Compensation Act.

B. Negligent Infliction of Emotional Distress

Plaintiff filed an action for sexual harassment against her employer and a client of employer's alleging, *inter alia*, negligent infliction of emotional distress. *Drainer v. O'Donnell*, 1995 Del. Super. Ct. LEXIS 229 (Del. Super. Ct. May 30, 1995). The court dismissed this claim, finding that such claims are barred by the Delaware Workers' Compensation Act, Del. Code Ann. tit. 19, §§ 2301-2397. The court noted that the Act provides the exclusive remedy for employees suffering personal injury arising out of and in the course of employment. *Id*. at § 2304. Citing to *Battista v. Chrysler Corp.*, 454 A.2d 286 (Del. Super. Ct. 1982), the court found that the Act covers all mental trauma, whether intentionally or negligently inflicted.

Proof of such a claim must be offered in a form additional to the plaintiff's testimony, such as through evidence of physical manifestations, or through corroborating testimony. See *Pekala v. E.I. duPont de Nemours and Co., Inc.*, 2006 WL 1067275 (Del. Super. Ct. Mar. 31, 2006).

VIII. PRIVACY RIGHTS

A. Generally

The Delaware Supreme Court first recognized the tort of invasion of privacy in *Barbieri v. News-Journal Co.*, 189 A.2d 773 (Del. 1963). The supreme court determined that the elements of this tort include (1) intrusion on plaintiff's physical solitude; (2) publication of private matters violating ordinary senses; (3) putting plaintiff in a false position in the public eye; and (4) appropriation of some element of plaintiff's personality for commercial use. *Barbieri*, 189 A.2d at 774.

The Delaware Court of Chancery has recognized the possibility that an employee could suffer an actionable invasion of privacy in the workplace. *Seaford Nylon Employees Council, Inc. v. E.I. duPont de Nemours & Co.*, 1986 WL 11533 (Del. Ch. Oct. 10, 1986).

In *Avallone v. Wilmington Med. Ctr., Inc.*, 553 F. Supp. 931 (D. Del. 1982), a nurse brought an action against the hospital alleging various torts, including invasion of privacy. The hospital terminated the nurse after she questioned a change in the hospital's policy regarding tube feeding. The sole basis of the nurse's claim was the fact that, after she left her employment, several people asked her why she left. The nurse testified that in her opinion, "every time someone asks, my privacy is infringed upon." *Id*. at 938. The district court found that the "mere fact that plaintiff was asked by other why she left . . . is insufficient, as a matter of law, to constitute the tort of invasion of privacy." *Id.* at 938. Summary judgment was granted for the hospital.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Other than requiring pre-hire inquiries, there is no Delaware statute addressing these issues.

2. Background Checks

There are certain Delaware statutes requiring employers to conduct background checks for certain employees and/or applicants: Delaware Health and Social Service employees working at the Delaware Psychiatric Center (Del. Code Ann. tit. 16, § 5138); nursing facilities (Del. Code Ann. tit. 16, § 1141); prison education personnel (Del. Code Ann. tit. 11, § 6531A; childcare providers (Del. Code Ann. tit. 11, § 8560); childcare personnel of a Department of Services for Children, Youth and Their Families facility (Del. Code Ann. tit. 31, § 309); public school employees (Del. Code Ann. tit. 11, § 8570); student teachers (Del. Code Ann. tit. 11, § 8591); bus drivers (Del. Code Ann. tit. 21, § 2708); adult bookstores and entertainment applicants and employees (Del. Code Ann. tit. 24, § 1620).

Delaware state agencies and political subdivisions of the State (with certain exceptions) cannot consider a job applicant's criminal record, criminal history, credit history, or credit score during the application process, up to and including the first interview. Once an applicant is deemed otherwise qualified and a conditional offer of employment is extended, the public employer may inquire into the applicant's criminal and credit history. An employer's inquiry into an applicant's criminal history is limited to felony convictions within the prior ten years and misdemeanor convictions within the prior five years. The statute provides that public employers shall consider certain mitigating factors when evaluating the applicant's criminal history, such as the nature and gravity of the offense or conduct; the time that has passed since the offense or conduct and/or the completion of the sentence; and the nature of the job held or sought. Del. Code Ann. Tit. 19, § 711 (g).

C. Other Specific Issues

1. Workplace Searches

See discussion on general privacy rights in Section VIII.A.

2. Electronic Monitoring

A Delaware statute prohibits employers from monitoring any telephone conversation, e-mail, or internet use unless the employer provides an electronic notice of such monitoring to the employee at least once during each day or provides a onetime notice of monitoring in a writing signed by the employee. Del. Code Ann. tit. 19, § 705.

3. Social Media

A Delaware statute prohibits employers from requiring or requesting an employee or applicant to do any of the following: disclose a username or password for the purpose of enabling the employer to access personal social media; access personal social media in the presence of the employer; use personal social media as a condition of employment; divulge any personal social media (with certain exceptions noted in the statute); add a person, including the employer, to the list of contacts associated with the employee's or applicant's personal social media, or invite or accept an invitation from any person, including the employer, to join a group associated with the employee's or applicant's personal social

media; and/or alter the settings on the employee's or applicant's personal social media that affect a third party's ability to view the contents of the personal social media. Del. Code Ann. tit. 19, § 709A.

4. Taping of Employees

No authority in Delaware except to the extent taping falls under the statute prohibiting electronic monitoring. *See* Section VIII.C.2. above.

5. Release of Personal Information on Employees

An employer or any person employed by the employer who discloses information about a current or former employee's job performance to a prospective employer is presumed to be acting in good faith; and unless lack of good faith is shown, is immune from civil liability for such disclosure or its consequences. "Information" includes information about an employee's job performance or work-related characteristics; an act committed by the employee that would constitute a violation of law; or an evaluation of the ability or lack of ability of such employee or former employee to accomplish or comply with the duties or standards of the position held by such employee or former employee. Del. Code. Ann. tit. 19, § 709.

6. Medical Information

Medical information falls within the scope of the statutory definition of "personnel file." Del. Code Ann. tit. 19, § 731(3). Medical records shall be treated as confidential and may not be released without consent. Del. Code Ann. tit. 16, § 2220.

IX. WORKPLACE SAFETY

A. Negligent Hiring

"An employer is liable for negligent hiring or supervision where the employer is negligent in giving improper or ambiguous orders, or in failing to make proper regulations, or in the employment of improper persons involving risk of harm to others, or in the supervision of the employee's activity. The deciding factor is whether the employer had or should have had knowledge of the necessity to exercise control over its employee. Thus, under either theory, the basis for liability rests upon whether it was fore-seeable that the employee would engage in the type of conduct that caused the injury." *Doe #7 v. Indian River Sch. Dist.*, 2012 WL 1980562, *4 (Del. Super. Apr. 11, 2012) (internal quotations and citations omitted). In a sex abuse case where a principal sexually abused a student, the school district was not found to have been grossly negligent in the hiring of the principal. The Court found even if the district had delved more deeply into the principal's background in response to certain "red flags," there would have been no indication that the principal had a propensity to carry on a sexual relationship with a student. At worst, the district would have learned that the principal had a propensity to be verbally abusive and discriminatory.

An employer may be liable under the claims of negligent hiring and negligent retention for the wrongful conduct of its employees if the employer does not use due care in selecting and retaining employees. *Knerr v. Gilpin, Van Trump & Montgomery*, 1988 WL 40009 (Del. Super. Ct. April 8, 1998); *see also* RESTATEMENT (SECOND) OF TORTS § 411 (1965). An employer may also be liable for negligent entrustment. However, when an employer conducts a background check on an employee, is not aware that the employee's license is suspended, and has in place reasonable policies requiring employees to

notify the employer of changes in license status, the employer is not liable for negligent entrustment when the employee negligently causes a traffic-related death due to his negligent driving. *Estate of Alberta Rae v. Murphy*, 2006 WL 1067277 (Del. Super. Ct. Mar. 13, 2006)

B. Negligent Supervision/Retention

In *Doe #7 v. Indian River Sch. Dist.*, 2012 WL 1980562, (Del. Super. Apr. 11, 2012), the Court found that there were genuine issues of material fact concerning whether the principal's abuse of a student was foreseeable. For example, there was some evidence in the record that an employee informed the Superintendent and two members of the Board that she felt as though the principal could carry on a relationship with a student. Additionally, there was some evidence that school officials were presented with information regarding text messages between the principal and students. Two assistant principals testified about female students adjusting their clothing to request favors from the principal. At least one assistant principal, in addition to multiple faculty members, witnessed girls spending inappropriate amounts of time in the principal's office. The Court denied summary judgment on plaintiff's gross negligence supervision claim.

In *Thomas v. Brandywine Sch. Dist.*, 759 F.Supp.2d 477 (D.Del. 2010), a teacher sexually abused a student. The Court denied summary judgment regarding the gross negligent supervision claim citing evidence in the record where the teacher had been sitting on student's laps; hugging and kissing students on the cheek; driving students home in a personal vehicle even after being directed not to do so; instant messaging students late at night; socializing with students on weekends; and calling students "boo" or "baby." There was also evidence supporting the plaintiff's contention that the district failed to suspend the teacher, failed to interview students and parents, failed to investigate the teacher's insubordination, failed to exercise effective oversight, failed to warn students, failed to increase the teacher's classroom monitoring, failed to report the teacher's behavior to the appropriate authorities, and failed to follow the District's own policy. The Court found that there were genuine issues of material fact, and a reasonable jury could find that the district's responses to the teacher's behaviors were grossly inadequate.

C. Interplay with Worker's Comp. Bar

Pursuant to Del. Code Ann. tit. 19, § 2304, Worker's Compensation is the exclusive remedy for any personal injury or death by accident arising out of and in the course of employment, regardless of negligence. *See also* Section VII.

D. Firearms in the Workplace

There is no such Delaware statute.

E. Use of Mobile Devices

Other than the statute governing the use of mobile devices in a vehicle which pertains to all drivers (Del. Code Ann. tit. 21, § 4176C), there is no such Delaware statute.

X. TORT LIABILITY

A. Respondeat Superior Liability

Responsibility for an employee's tortious conduct, committed in the scope of employment, will be imputed to the employer by the doctrine of respondeat superior. *Draper v. Olivere Paving Construction, Inc*., 181 A.2d 565, 570 (Del. 1967).

Delaware Courts apply the Restatement of Agency (2d) § 228 when analyzing respondeat superior liability to determine if conduct is within the scope of employment if, "(1) it is of the kind he is employed to perform; (2) it occurs within the authorized time and space limits; (3) it is activated, in part at least, by a purpose to serve the master; and (4) if force is used, the use of force is not unexpectable." In *Doe v. State*, the police officer sexually assaulted a detainee in his police car while on duty and offered to let her go if she performed oral sex. The Court found the officer was in uniform, on-duty, carrying out a police duty by transporting the detainee to court. The sexual assault took place in the police car, during the time that Giddings was supposed to be carrying out police duties. These facts would satisfy the first two factors under the Restatement—the officer was doing the kind of work he was employed to perform, and he was acting within authorized time and space limits. The Court noted the third factor—whether the officer was activated in part to serve his employer—has been construed broadly as a matter for the jury to decide. The Court found that a sexual assault can be considered a service to the police on the theory that part of what the officer was doing was transporting a prisoner. The Court noted to be within the scope of employment, any force used must be "not unexpectable." The Court concluded the record did not establish the officer's conduct was unforeseeable. *Doe v. State*, 76 A.3d 774, 776 (Del. 2013).

The Superior Court distinguished a case from *Doe v. State* in *Bates v. Caesar Rodney School District* (Del. Super. Ct. Dec. 31, 2018). At the time of print, this case was on appeal to the Delaware Supreme Court. The Superior Court held that Section 219(2)(d)of the Restatement of Agency does not apply the teacher-student relationship, and Section 219(2)(c) does not apply to school districts because the coercive authority of teachers is not comparable to the authority of a police officer who places a person under arrest. Thus, school districts are not responsible under Section 219 for torts committed by teachers.

B. Tortious Interference with Business/Contractual Relations

The elements of establishing an action for tortious interference with prospective business opportunity are: (1) reasonable probability of a business opportunity; (2) intentional interference by the defendant with that opportunity; (3) proximate causation; and (4) damages. Proof of these elements must be considered in light of a defendant's privilege to compete, or protect its business interest, in a fair and lawful manner. *Bowl-Mor Co. v. Brunswick Corp*., 297 A.2d 61 (Del. Ch. 1972).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

In a leading case in this area, a public accounting partnership brought an action to enjoin a former employee from violation a covenant not to compete. *Faw, Casson & Co. v. Cranston*, 375 A.2d 463 (Del. Ch. 1977). The defendant, a certified public accountant, was offered a promotion to manager of plaintiff's offices in Dover, Delaware in November of 1975. The defendant was told that acceptance of this position would require that he sign an agreement not to compete against plaintiff in the business of accounting prior to December 1978. The defendant began working in his new position in December 1975 but did not sign the agreement not to compete until January 1976. During the interim, the parties discussed the force and effect of the agreement. The agreement was contained in the form of a letter to

the defendant which stated: "In discussing this position with you, we stated that the partnership would like to have an agreement from you stating you would refrain from practicing public accounting on the Delmarva Peninsula other than with [the partnership] until December 1, 1978. Your signature on this letter will confirm our agreement." *Id*. at 465. The letter was signed by a member of the partnership and by the defendant. In October, 1976, the defendant left his employment with the partnership to form his own firm. Subsequently a number of clients, used to working with the defendant, left the partnership and transferred their accounts to defendant's organization, resulting in this litigation.

> Although an agreement by an employee not to compete, limited in time and geographical area, must be closely scrutinized, such is not void as against public policy when the purpose of such agreement and its reasonable effect is to protect an employer from sustaining damages which an employee's subsequent competition may cause.

Id. at 465. The elements therefore are mutual assent and consideration.

The Court held that (1) a letter signed by the former employee sufficiently indicated that the partnership and the employee fully intended to make a binding contractual commitment in regard to the covenant not to compete; (2) the covenant was an element of consideration tendered by the former employee in exchange for his promotion to the position of manager of the partnership business in a particular location; (3) the covenant was not excessively broad in restricting the former employee from accepting rather than actively soliciting former clients; (4) a certified accountant's covenant not to compete is not per se unreasonable; (5) the covenant was not excessively broad in encompassing the Delmarva Peninsula; (6) the covenant would be regarded as not enforceable north of the Chesapeake and Delaware Canal; and (7) the evidence warranted a finding that a partner had not made a statement that the agreement not to compete was not enforceable. The court granted plaintiff's request for a judgment and damages. *Id*. at 469.

Stated more generally, the standard for enforcement is reasonableness as to scope and duration, and the protection of a legitimate economic interest. *Elite Cleaning Co., Inc. v. Capel*, 2006 WL 1565161 *7-8 (Del. Ch. June 2, 2006).

In another case, the employer, an insurance agency with its principal offices in Kent County, Delaware, sought specific enforcement of certain covenants restricting, *inter alia*, competition against a former employee. *C. Edgar Wood, Inc. v. Clark*, 1986 Del. Ch. LEXIS 517 (Del. Ch. Jan. 21, 1986). After several years of employment, employer and former employee entered into a written agreement which included a covenant restricting former employee's ability to engage in the insurance business and from soliciting the employer's clients for a period of three years from the date of the termination of the agreement within Kent County. Employee resigned from his position with employer and contacted several insurance underwriting and bonding companies to become appointed as an agent in Delaware, including a major client of employer. Employer sued alleging that former employee's action would cause economic harm to his business in Kent and Sussex Counties. The employer argued further that the covenants involved were reasonable in time and scope and were designed to protect his economic interests. The former employee argued that the covenants were not reasonably necessary to protect employer's economic interests or that they were reasonable in time and scope because they were not limited geographically.

The court found that the restriction precluding former employee from doing business in Kent County for a period of three years was reasonable since the size of the area was within limits found

acceptable in similar cases. *See, e.g., Equitable Life Ins. Co. v. Young*, 1985 Del. Ch. LEXIS 422 (Del. Ch. May 6, 1985) (area defined as "the district where [defendant] was employed"); *Burris Foods, Inc. v. Razzano*, 1984 Del. Ch. LEXIS 593 (Del. Ch. July 18, 1984) (area approximating the Delmarva Peninsula found reasonable; injunction denied on other grounds); *Faw, Casson & Co. v. Cranston*, 375 A.2d 469 (Del. Ch. 1977) (area included the Delmarva Peninsula).

As to the restriction upon soliciting clients of employer, the court found it enforceable. Noting that employer's clients are largely or exclusively residents of Kent and Sussex Counties, the court found that, as a practical matter, the impact of the restriction would be limited to those counties. Therefore, the restriction was reasonable, particularly since only a small portion of the total population of Sussex County was affected by the restriction. In addition, the court found that the three year limitation was reasonable under the circumstances.

When an employer seeks to enforce a covenant not to complete, it bears the burden of proof by clear and convincing evidence. *Elite Cleaning v. Capel*, 2006 WL 1565161 at *3 (Del. Ch. 2006). In Elite, the Court rejected the employer's argument that a non-compete agreement was created solely because non-competition language existed in the company's employee handbook. *Id*. at *5.

If a former employer sues a former employee to enforce a non-compete provision, but the employer commits a material breach of the agreement, the employer is precluded from enforcing the non-compete provision. *L&W Ins., Inc. v. Harrington*, 2007 WL 809512 (Del. Ch. Feb 21, 2007). Harrington worked for L&W as an insurance broker and entered into an agreement containing covenants restricting Harrington's post-employment solicitation of L&W clients. The agreement also specified how Harrington would be paid commissions. L&W withheld commissions insisting that Harrington was liable for money due on one of his client's accounts. Harrington resigned and in his resignation letter stated that L&W breached the employment agreement; therefore, he was not subject to the non-compete provision of the agreement. Harrington began working at a competitor and sent letters to his previous clients soliciting their business. L&W moved for a preliminary injunction for breach of the non-solicitation covenant. L&W also sued Lyons for tortuous interference with contract. The Court denied the motion for preliminary injunction because L&W failed to meet their burden on two of the elements – balancing of the equities and irreparable harm. The Court found that L&W likely breached the employment agreement first by impermissibly withholding commissions and unilaterally offsetting bad-debt write offs against earned commissions. Thus, L&W could not enforce the non-compete.

B. Blue Penciling

Delaware is a "blue pencil" jurisdiction in that courts may modify the scope of a restrictive covenant to make the restriction reasonable. *See e.g.*, *Knowles-Zeswitz Music, Inc. v. Cara*, 260 A.2d 171 (Del. Ch. Nov. 25, 1969).

In *Delaware Elevator, Inc. v. Williams, No.*, 2011 WL 1005181, at *10–11 (Del. Ch. Mar. 16, 2011), judgment entered, (Del. Ch. Mar. 16, 2011), the Court applied Maryland law and narrowed the geographic scope and time period of the employer's non-compete agreement using the "blue pencil" approach. Vice Chancellor Laster, however, noted his dislike for the "blue pencil" approach and stated that it was his view that "a court should not allow an employer to back away from an overly broad covenant by proposing to enforce it to a lesser extent than written."

C. Confidentiality Agreements

Such agreements are enforceable if the information is in fact confidential and the plaintiff demonstrates disclosure will inevitably or probably occur. *E.I. duPont de Nemours and Co. v. Am. Potash & Chem. Corp.*, 200 A.2d 428 (Del. Ch. May 5, 1964).

D. Trade Secrets Statute

Injunctive relief and damages may be recovered by the disclosure or misappropriation of trade secrets.

> (4) "Trade secret" shall mean information, including a formula pattern, compilation, program, device, method, technique or process, that:
>
> a. 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
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Del. Code. Ann. tit. 6 § 2001(4).

E. Fiduciary Duty and Other Considerations

A covenant not to compete in an employment, partnership, or corporate agreement "between and/or among physicians which restricts the right of a physician to practice medicine in a particular locale and/or for a defined period of time, upon the termination of the principal agreement of which the said provision is a part, shall be void." Del. Code Ann. tit. 6, § 2707. The fact that such an agreement contains a void restrictive covenant does not affect the enforceability of the remainder of the agreement's provision, including provisions which require the payment of damages in an amount that is reasonably related to the injury suffered by reason of termination of the principal agreement. Provisions which require the payment of damages upon termination of the principal agreement may include, but are not limited to, damages related to competition.

The employer's material breach of the employment agreement will preclude enforcement of the non-compete against a former employee. *Elite* at *6.

In certain cases, Courts have found that an employee owes a fiduciary duty to his employer. A breach of fiduciary duty occurs when a fiduciary commits an unfair, fraudulent, or wrongful act, including misuse of confidential information, solicitation of employer's customers before cessation of employment, conspiracy to bring about mass resignation of an employer's key employees, or usurpation of the employer's business opportunity. *Beard Research, Inc. v. Kates*, 8 A.3d 573, 602-603 (Del. Ch. 2010).

> "Although employees do enjoy a privilege allowing them to make preparations to compete with their employer before their employment relationship ends, that privilege is not without limitations. Under some circumstances, the purported exercise of the privilege may breach the employee's fiduciary duty of loyalty. For example, an employee may be denied the protection of the privilege when they have misappropriated trade secrets, misused confidential information, solicited the employer's customers before cessation of employment, conspired to effectuate mass resignation of key employees, or usurped a business opportunity of the employer. Ultimately, the determination of whether an

> employee has breached his fiduciary duties to his employer by preparing to engage in a competing enterprise 'must be grounded upon a thoroughgoing examination of the facts and circumstances of the particular case.'"

Triton Const. Co., Inc. v. Eastern Shore Elec. Services, Inc., 2009 WL 1387115, *11 (Del. Ch. May 18, 2009).

In *Craig v. Graphic Arts Studio, Inc*., 166 A.2d 444 (Del. Ch. 1960), the Court found that the president breached his fiduciary duty to the employer and caused harm to that employer when he left to manage a rival business which he set up while still working for his former employer.

XII. DRUG TESTING LAWS

A. Public Employers

Delaware statutory law subjects all employees of the Department of Correction in security sensitive positions to random testing for illegal drugs as a condition of employment or continued employment and for any incident or reasonable suspicion testing. Del. Code Ann. tit. 29, § 8922. This section does not limit the Department's authority pursuant to any other statute, regulation, policy, procedure, contract or other source of authority to test any Department employee for drugs. See also Del. Code Ann. tit. 11, § 6531A.

Similarly, school bus drivers must submit to random drug tests. Del. Code Ann. tit. 21, § 2708(a)(8); Del. Code Ann. tit. 14, § 2910. A positive test result, or the refusal to submit to testing, results in the loss of the required CDL license.

See also Del. Code Ann. tit. 2, § 502 (operators of aircraft); 1 Del. Code Regs. § 3 1000 1001-47 (Sept. 2006) (jockeys); Del. Code Ann. tit. 29, § 6908 (employees working on public works projects); Del. Code Ann. tit. 29, § 9020 (certain Division of Family Service employees); Del. Code Ann. tit. 16, § 5139 (Delaware Health and Human Service employees working at the Delaware Psychiatric Center).

B. Private Employers

There is no Delaware case law prohibiting private employers from requiring drug testing as a condition of hiring, or a condition of continued employment.

Applicants to nursing homes cannot be hired without a negative drug test. Del. Code Ann. tit. 16, § 1142.

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

Delaware's Discrimination in Employment Act, Del. Code Ann. tit. 19, §§ 710 *et seq*., provides slightly more protection for employees in certain areas than does Title VII.

A. Employers/Employees Covered

Employer includes the State or any political subdivision or board or department, commission or school district thereof and any person (broadly defined) employing four (4) or more persons within the State. Del. Code Ann. tit. 19, § 710(6).

The term employer with respect to discriminatory practices based upon sexual orientation does not include religious corporations, associations or societies whether supported, in whole or part, by government appropriations, except where the duties of the employment or employment opportunity pertain solely to activities of the organization that generate unrelated business taxable income subject to taxation under §511(a) of the Internal Revenue Code of 1986 [26 U.S.C. §511(a)]. Del. Code Ann. tit. 19, § 710(6).

B. Types of Conduct Prohibited

It is an unlawful employment practice for an employer to:

(1) Fail or refuse to hire or to discharge any individual or otherwise discriminate with respect to compensation, terms, conditions or privileges of employment because of the individual's race, marital status, genetic information, color, age, religion, sex (including pregnancy), sexual orientation, gender identity, or national origin;
(2) Limit, segregate or classify employees in way which would deprive or tend to deprive any individual of employment or otherwise adversely affect the individual's status as an employee because of the individual's race, marital status, genetic information, color, age, religion, sex (including pregnancy), sexual orientation, gender identity, or national origin[.]

Del. Code Ann. tit. 19, § 711 (a).

It is also unlawful for an employment agency to fail or refuse for employment or otherwise to discriminate against any individual because of race, marital status, genetic information, color, age, religion, sex (including pregnancy), sexual orientation, gender identity, or national origin or to classify or refer for employment any individual on the basis of race, marital status, genetic information, color, age, religion, sex (including pregnancy), sexual orientation, gender identity, or national origin. *Id*. § 711(b).

It shall be an unlawful employment practice for a labor organization to:

(1) Exclude or expel from its membership or otherwise to discriminate against any individual because of race, marital status, color, age, religion, sex or national origin;
(2) Limit, segregate or classify its membership or to classify or fail or refuse to refer for employment any individual in any way which would deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect the individual's status as an employee or as an applicant for employment because of such individual's race, marital status, genetic information, color, age, religion, sex (including pregnancy), sexual orientation, gender identity, or national origin;
(3) Cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Del. Code Ann. tit. 19, § 711(c).

Similarly, it is unlawful for any employer, labor organization or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of race, marital status, genetic information, color, age, religion, sex (including pregnancy), sexual orientation, gender identity, or national origin in

admission to employment in any program established to provide apprenticeship or other training. Del. Code Ann. tit. 19, § 711(d).

C. Administrative Requirements

The Department of Labor is empowered . . . to prevent any person from engaging in any unlawful employment practice set forth in . . . this title. Del. Code Ann. tit. 19, § 712(a). A charge of discrimination must be filed within 90 days after the alleged unlawful employment practice or 120 days after discovery thereof, whichever is later. *Id*. § 712(d).

> The Department shall serve a copy of the charge on the employer . . . and shall make an investigation thereof. Charges shall be in writing and shall contain such information and be in such form as the Department requires. If the Department determines after such investigation that there is reasonable cause to believe that the charge is not true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the [employer] of its action. Such notice shall be in writing and shall set forth the facts upon which the decision is based.

Del. Code Ann. tit. 19, § 712(b).

If the Department finds reasonable cause, "the Department shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion . . .. *Id*. § 712(c). Reasonable cause determinations are to be made within 120 days of the charge's filing date. *Id*.

If the Department determines that it cannot secure a conciliation agreement:

> The Department shall issue and cause to be served upon the [employer] a complaint stating the facts upon which the allegation of unlawful employment practice is based together with a notice of hearing before a review board not less than five days after service of the complaint provided that the [employer] has sufficient time to respond thereto.

Del. Code Ann. tit. 19, § 712(e).

Notably, the statute provides that an accepted conciliation agreement between the Department and the person aggrieved is not reviewable in any court. *Id*.

D. Remedies Available

Statutory remedies include cease and desist injunctive relief, reinstatement, back pay (subject to the duty to mitigate), attorneys fees, and costs. Del. Code. Ann. tit. 19, § 712(g) and (j).

XIV. STATE SEXUAL HARASSMENT LAW

A. Definition

Sexual harassment of an employee is an unlawful employment practice when the employee is subjected to conduct that includes unwelcome sexual advances, requests for sexual favors, and other

verbal or physical conduct of a sexual nature when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an employee's employment; (2) submission to or rejection of such conduct is used as the basis for employment decisions affecting an employee; or (3) such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment. Del. Code. Ann. tit. 19 § 711A (c).

B. Employer Liability

An employer is responsible for sexual harassment of an employee when: (1) A supervisor's sexual harassment results in a negative employment action of an employee; (2) The employer knew or should have known of the non-supervisory employee's sexual harassment of an employee and failed to take appropriate corrective measures; or (3) A negative employment action is taken against an employee in retaliation for the employee filing a discrimination charge, participating in an investigation of sexual harassment, or testifying in any proceeding or lawsuit about the sexual harassment of an employee. Del. Code. Ann. tit. 19 § 711A (d).

C. Employer Affirmative Defenses

The following are affirmative defenses for the employer: (1) The employer exercised reasonable care to prevent and correct any harassment promptly; and (2) The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. Del. Code. Ann. tit. 19 § 711A (e).

D. Training

There are training requirements for employers with other 50 employees. Del. Code. Ann. tit. 19 § 711A (g).

XV. STATE LEAVE LAWS

A. Jury/Witness Duty

An employer who discharges (or threatens) an employee who serves on a jury, or reports for jury service, violates Del. Code Ann. tit. 10, § 4515. In addition to fines which may be imposed on the employer, the discharged employee has a right to sue for lost wages, reinstatement, and attorney's fees.

B. Voting

There is no voting leave statute in Delaware.

C. Pregnancy/Family/Medical Leave

Full-time employees of the State and school districts, who have been employed by the State for at least 1 year, are entitled to 12 weeks of paid leave upon the birth of a child of the employee, or upon the adoption by the employee of a child who is 6 years of age or younger. Del. Code Ann. tit. 29, § 5120.

D. Day of Rest Statutes

There is no such statute in Delaware.

E. Military Leave

Employees of Delaware school districts (Del. Code Ann. tit. 14, § 1327) and the State (Del. Code Ann. tit. 29, § 5105) are entitled to a leave of absence (which is paid, but in an amount reduced by military salary payments) to cover the period of military service not to exceed three years (five years for non-school district employees), or until the term of service to which such employee has been called or volunteered has been terminated. For up to two years, the employee and the employee's dependents are entitled to continue receiving benefits.

XVI. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

1. Coverage of Delaware's Minimum Wage Act

a. Employee Defined

Employee includes any individual employed by an employer. The employees exempt from coverage include individuals:

(1) employed in agriculture;
(2) employed in domestic service;
(3) employed in a bona fide executive, administrative, professional, or outside sales capacity;
(4) employed by the United States;
(5) who perform gratuitous services for educational, charitable, religious or nonprofit organizations;
(6) involved in fishing, farming, canning, packing of aquatic animals or vegetable life;
(7) under age 18, and employed as camp counselors by nonprofit summer camps; and
(8) in the custody of the Department of Corrections who are involved in work release or similar programs unless employed by an employer other than the State, or a political subdivision of the State.

Del. Code Ann. tit. 19, § 901(5).

b. Employer Defined

Employer includes any individual, entity, or group of persons acting directly or indirectly in the interest of an employer in relation to an employee. Del. Code. Ann. tit. 19, § 901(2).

2. Minimum Wage

a. Minimum Wage Rate

The minimum wage under the Delaware Minimum Wage Act is $8.75 per hour effective January 1, 2019 and $9.25 per hour effective October 1, 2019.

The Delaware Minimum Wage Act is tied to the Fair Labor Standards Act in the sense that, if the federal minimum wage exceeds the State minimum wage, the state minimum wage shall be equal to the federal minimum wage. *Id*. § 902(a). For the current federal minimum wage, see 29 U.S.C.A. § 206(a)(1)(A).

b. Tips

The minimum wage rate of $2.23 per hour applies to employees in occupations where tips in excess of $30 per month are customarily and regularly received. Del. Code Ann. tit. 19, § 902(b). Tips are the property of the employee. Del. Code Ann. tit. 19, § 902(d)(1).

(1) Service Charge

Employers may establish a service charge which is the property of management if clear and conspicuous notice (type of at least 18 point on the placard, or 10 point or larger on all other notices) is given to the customer indicating all or part of the service charge is the property of management. In the absence of such notice, the service charge is the property of the primary direct service employee. Del. Code Ann. tit. 19, § 902(c)(4).

(2) Pooling Tips

Employees may establish a system for sharing or pooling tips among direct service employees so long as the employer does not require or coerce employees to agree to such a system. Where more than one employee provides personal service to the same customer, the employee may require such employees establish a tip pooling system not to exceed 15% of the tips received by the primary direct service employees. Del. Code Ann. tit. 19, § 902(d)(2).

c. Disabled Workers In Sheltered Workshops

Employers of individuals working in not-for-profit workshops carrying out a rehabilitation program for disabled workers may apply for a certificate of exemption from the minimum wage requirements. The certificate provides for a lower individual minimum wage for disabled workers. Del. Code Ann. tit. 19, § 905; Reg. 905.1-905.14 (Delaware Department of Labor Regulations).

d. Disabled Workers in Competitive Employment

Employers of individuals working in for-profit industries may apply for a certificate authorizing the employment of such individuals as trainees, for a period not exceeding 90 days, at wages lower than the minimum wage, but not less than 50% of the wages paid to nondisabled workers for the same type, quality and quantity of work. Such certificates are issued upon a showing the special minimum wage is necessary to avoid curtailment of the trainee's opportunities for employment, and the earning or productive capacity of the worker is impaired by age of disability. Del. Code Ann. tit. 19, § 905; Reg. 905.15-905.27 (Delaware Department of Labor Regulations).

e. Employment of Apprentices

The Delaware DOL may permit the employment of learners and apprentices at wage rates lower than the minimum wage rate if it deems it necessary to prevent curtailment of opportunities for employment. The apprenticeship program must provide training in a skilled trade, and the apprentice must receive a progressively increasing schedule of wages aimed at paying the apprentice at least 50% of the journeyman's rate over the period of the apprenticeship. Del. Code Ann. tit. 19, § 906; Reg. 906.1-906.11. (Delaware Department of Labor Regulations).

f. Special Minimum Wage For Student Learners

Employers of student learners receiving instruction in an accredited school who are employed on a part-time basis pursuant to vocational training program may apply for a certificate authorizing payment of wages lower than the minimum, but not less than 85% of the minimum wage. Del. Code Ann. tit. 19, § 906; Reg. 906.12-906.22 (Delaware Department of Labor Regulations). Such certificates are granted if deemed necessary to prevent curtailment of opportunities for employment. *Id*. The application must demonstrate the process by which the student-learner will be engaged in training on the job. *Id*. The student learner must be at least 14 years of age, and the number of hours of instruction and work may not exceed 40 hours a week. Del. Code Ann. tit. 19, § 906; Reg. 906.12-906-22 (Delaware Department of Labor Regulations).

g. Regulations

The Delaware Department of Labor has the authority to promulgate regulations for the administration and enforcement of the Minimum Wage Act. Del. Code Ann. tit. 19, § 904.

h. Judicial Review of Regulations

The Act provides for judicial review of any regulation promulgated under the Act. Such a petition must be filed within 20 days of "notice that such regulation will affect the interested person's business operations or employment conditions or compensation." Del. Code Ann. tit. 19, § 909(a). The standard for modifying or revoking a regulation is a finding the petitioner has been, or may be aggrieved, and the regulation is not in accordance with the law.

i. Records

The employer must maintain, for at least three (3) years, the following records:

(1) The name, address and occupation of each employee;
(2) Each employee's rate of pay and the amount paid each pay period; and
(3) The hours worked each day and each work week by every employee.

Del. Code Ann. tit. 19, § 907.

j. Posting of Notices

A summary of the Act must be posted in a conspicuous location (i.e., a location employees normally pass) at the employer's premises. Del. Code Ann. tit. 19, § 908. The Delaware DOL provides such a poster to employers without charge.

k. Penalties

Employers are subject to a civil penalty not less than $1,000 nor more than $5,000, per violation, for any of the following:

(1) Hindering or delaying the Delaware DOL in the performance of its duties;
(2) Refusing to admit the Delaware DOL to the premises or place of employment in violation of any court order;
(3) Failing to make, keep and preserve records required under the Act, or falsifying such records;
(4) Refusing to make records available to the Delaware DOL;
(5) Refusing to furnish a sworn statement;
(6) Failing to post a summary of the Act or any regulations;
(7) Failing to pay the wages required by the Act; or
(8) Discriminating against any employee who complains or gives information to the Delaware DOL pursuant to the Act, causes or is about to cause proceedings to be instituted, or testifies or is about to testify in any such proceedings.

Del. Code Ann. tit. 19, § 910.

3. Remedies

Employees may bring claims under the Act in any court of competent jurisdiction, or file a claim with the Delaware DOL. Relief includes the wages due, costs of the action, and attorneys' fees. Del. Code Ann. tit. 19, § 911.

B. Deductions from Pay

1. Introduction

The Delaware Wage Payment and Collection Act (the "Wage Payment Act") governs when and how wages must be paid, what may be withheld from wages and establishes remedies and penalties for violations of the Wage Payment Act. Unlike other Delaware Wage and Hour Laws, a well-developed body of case law assists in the interpretation and application of the Wage Payment Act.

2. Who Is an Employee?

The test is whether: (1) the employee retained control of the means and method of doing the work; (2) the person is taxed like an employee; and (3) other benefits consistent with a standard employment contract were provided. *Rypac Packaging Mach. Inc. v. Coakley*, 2000 WL 567895 (Del. Ch. May 1, 2000). The Wage Payment Act does not apply to employees of the United States, the State of Delaware, or any political subdivision thereof. Del. Code Ann. tit. 19, § 1101(a)(3) & (4).

3. What Constitutes Wages?

a. General Definition

"'Wages' means compensation for labor or services rendered by an employee, whether the amount is fixed on a time, task, piece, commission, or other basis of calculation." Del. Code Ann. tit. 19, § 1101(a)(2).

b. Annual Bonus, Commission, Incentive Compensation

A year end commission or bonus or incentive compensation constitutes wages under the Act. *SCOA Indus., Inc. v. Bracken*, 374 A.2d 263 (Del. 1977); *Seitz v. Siegfried Group, LLP*, 2001 WL 1198941 (Del. Super. Ct. Oct. 2, 2001).

c. Nonrecurrent Bonus

A nonrecurrent enterprise appreciation bonus does not constitute wages. *Compass v. Am. Mirrex Corp.*, 72 F. Supp. 2d 462 (D. Del. 1999).

d. Severance Pay

Severance pay is not wages under the Act. *Dept. of Labor ex rel. Commons v. Green Giant Co.*, 394 A.2d 753 (Del. Super. Ct. Sept. 28, 1978). The non-exclusive definition in § 19 Del. C. § 1109(b) of benefits or wage supplements was broad enough to encompass the annual payments due to a physician who voluntarily left a medical group and agreed to receive four annual payments. *Manley v. Assocs. in Obstetrics & Gynecology, P.A.*, 2001 WL 946489 (Del. Super. Ct. July 27, 2001).

e. Fringe Benefits

Fringe benefits which constitute "health, welfare or retirement" benefits are not wages. *State ex rel. Lawrence v. Am. Ins. Co.*, 559 A.2d 1247 (Del. 1989).

f. Holiday Pay

Holiday pay is not included as wages under the Act. *GMC v. Local 435 of Int'l Union*, 546 A.2d 974 (Del. 1988).

4. Vacation Pay and Sick Leave

Employers may adopt vacation and sick leave policies, so long as such policies do not discriminate on the basis of protected status. Unless otherwise specified in writing by the employer, the Delaware DOL generally treats vacation pay as a form of compensation covered by the Wage Payment Act. Sick leave, on the other hand, is not normally viewed as compensation.

5. Payment of Wages on Regular Paydays

a. Regular Paydays

Wages must be paid on the regular payday designated by the employer. The regular payday must be at least once a month. Del. Code Ann. tit. 19, § 1102(a). If the regular payday falls on a non-workday, payment shall be made the preceding workday. Id. § 1102(b). If an employee is not present on the

regular payday, payment shall be made by mail if requested by the employee, or on the next regular workday the employee is present. Id. § 1102(c).

b. Mode of Payment

Payment must be in cash, or a check which may be cashed at a bank convenient to the place of employment. Del. Code Ann. tit. 19, § 1102(a). Upon written request of an employee, an employer may pay an employee all wages due by credit to a bank designated by the employee. Del. Code Ann. tit. 19, § 1102(a).

c. Close of Pay Period

Wages must be paid within seven (7) days of the close of the pay period in which the wages are earned. Del. Code Ann. tit. 19, § 1102(b).

d. Regular Payday Falls within Pay Period

If the regular payday is within the pay period, and the pay period does not exceed 16 days, the employer may delay until the next pay period payment of wages for: (1) Overtime; (2) Employees hired or resuming employment during the pay period; (3)Part-time or temporary employees working irregular hours. Del. Code Ann. tit. 19, § 1102(b).

6. Prime Contractors Responsible for Payment

A prime contractor is liable for payment of wages, exclusive of liquidated damages, to employees of its subcontractors in the event the subcontractor fails to make payment. Del. Code Ann. tit. 19, § 1105.

7. May the Employer Withhold from Wages?

a. Statutory Limitation

The Act prohibits an employer from withholding or diverting any portion of wages unless: (1) The employer is required or permitted to do so by state or federal law; (2) The deductions are for health care; or (3) The employee signed an authorization for deductions for a lawful purpose accruing to the benefit of the employee. Del. Code Ann. tit. 19, § 1107.

b. Shortage Deductions

Controlling regulations make it clear cash and/or inventory shortages may not be deducted from wages. Any written agreement to the contrary is in violation of the Wage Payment Act. Reg. WP 2 (Delaware Department of Labor Rules Regulating Deductions From Wages For Wage Payment And Collection.)

c. Cash Advances and Charges for Goods and Services

A cash advance, or charges for goods or services, may only be repaid through payroll deduction if the employer and employee sign an agreement identifying the amount of the advance, or value of goods or services, the repayment schedule, and the method of payment. The repayment schedule shall not

provide for a repayment schedule in excess of 15% of an employee's gross wages per pay period. If such an employee is terminated owing an amount greater than 15% of gross wages due, the amount owed may be withheld from the final paycheck if the agreement permitting such deductions so provides. Reg. WP 3.

d. Damaged Property

A loss suffered by the employer due to damages to property (the employer's or a customer's property) may not be deducted from an employee's pay even if there is an agreement permitting such deductions. Reg. WP 4.

e. Return of Employer's Property

An employer shall not withhold an employee's, or former employee's, wages until such time as the employee returns the employer's property. Reg. WP 5.

f. Deposit on Property

An employer may request a deposit be paid on property. The deposit shall not be deducted absent the employee's written consent. Any such deposit paid from the employee's wages must be paid in full by the first regular payday following the employee's receipt of the property. If property subject to the deposit is returned to the employer, the deposit must be returned to the employee no later than the next payday. Reg. WP 5.

8. When Must the Final Paycheck be Received?

The Delaware Wage Payment & Collection Act requires that an employee voluntarily or involuntarily terminated for any reason must receive wages the next regularly scheduled payday either through the usual pay channels, or by mail, if requested by the employee. Del. Code Ann. tit. 19, § 1103(a).

With respect to a deceased employee, the employer may make payment of up to $300 of wages due a deceased employee upon demand, and in the absence of actual notice of the pendency of probate proceedings without requiring letters testamentary of administration, in the following order of preference: (1) The parent, guardian or custodian of surviving children under 21 years of age, in equal shares; (2) Surviving spouse; (3) Surviving children 21 years of age and older, in equal shares; and (4) Parents, in equal shares, or survivor. Del. Code Ann. tit. 19, § 1106.

9. Different Rates of Pay Based upon Sex

Employers cannot establish different rates of pay based upon sex for employees performing equal work, with equal levels of skill, effort and responsibility. Differing rates of pay may be based upon seniority, merit systems, quantity or quality of production, or factors other than sex. Del. Code Ann. tit. 19, § 1107A.

10. Notification, Posting And Records

Employers of three (3) or more employees must:

a. Notify employees in writing, at the time of hiring, rate of pay, and the day, hour and place of payment;
b. Notify employees in writing, or through an accessible, posted notice, of reductions in rates of pay or changes to the day, hour or place of payment prior to the time effective date of such a change;
c. Notify employees in writing, or through an accessible, posted notice, of vacation, sick leave and comparable policies;
d. At the time of payment, furnish employees with a statement showing wages due, the pay period, itemized deductions and, for hourly rate employees, the total number of hours worked during the pay period;
e. Post and maintain a summary of the Act (supplied upon request by the Delaware DOL without charge) in an accessible location; and
f. Maintain payroll records for three (3) years.

Del. Code Ann. tit. 19, § 1108.

11. Benefits and Wage Supplements

Benefits or wage supplements must be provided within 30 days after such payments are required to be made. Such amounts include, but are not limited to, reimbursement for expenses, health, welfare or retirement benefits, and vacation, separation or holiday pay. Del. Code. Ann. tit. 19, § 1109.

12. Powers of the Delaware DOL

Where reasonable grounds exist to believe there is a violation of the Wage Payment Act, the Delaware DOL has broad power to investigate, including entering an employer's place of business and inspecting records. Del. Code Ann. tit. 19, § 1111.

13. Penalties for Violations

a. Liquidated Damages

In the event an employer, without any reasonable grounds for dispute, fails to pay an employee wages as required by the Wage Payment Act, such an employer is "liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day, except Sunday and legal holidays, upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller." Del. Code Ann. tit. 19, § 1103(b).

Liquidated damages are not assessed if the failure to pay wages occurs after the employer files a bankruptcy petition, or the employer "is unable to prepare the payroll due to a labor dispute, power failure, blizzard or like weather catastrophe, epidemic, fire or explosion." *Id*. § 1103(b).

b. A Reasonable Dispute over the Amount of Wages Due

If there is a dispute over the amount of wages, the employer is required to pay the amount it concedes to be due. The employer shall not require the employee to release the employee's claim for additional wages as a condition of accepting partial payment. Del. Code Ann. tit. 19, § 1104.

14. Remedies Available for a Violation

Employees with small claims typically lodge a complaint with the Delaware DOL which conducts an investigation and makes a determination. If the matter is not resolved at that stage, the Delaware DOL may initiate an action to recover the wages due. Employees may also, with or without filing an administrative complaint, initiate an action to recover wages due under the Act. Del. Code Ann. tit. 19, §§ 1113(a) and (b).

15. Recovery of Attorneys' Fees

In addition to the ability to recover an amount up to double the amount of the wages in the absence of a reasonable dispute, the employee, or former employee, may also recover attorney's fees. Del. Code Ann. tit. 19, § 1113(c).

16. Civil Penalties

An employer who violates the Act may be subject to civil penalties of not less than $1,000, nor more than $5,000 for each violation. Furthermore, an employer who discharges, or in any other matter discriminates against an employee, because the employee engaged in protected activity under the Act, is subject to a civil penalty of not less than $1,000, nor more than $5,000 for such violation. Del. Code Ann. tit. 19, § 1112.

C. Overtime Rules

There is no Delaware statute addressing overtime requirements.

D. Time for Payment upon Termination

Whenever an employee quits, resigns, is discharged, suspended, or laid off, the wages earned by the employee shall become due and payable by the employer on the next regularly scheduled paydays(s) either through the usual pay channels or by mail, if requested by the employee, as if the employment had not been suspended or terminated. Del. Code Ann. tit. 19, § 1103.

XVII. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in the Workplace

The Clean Indoor Air Act prohibits smoking in any indoor enclosed area to which the general public is invited or in which the general public is permitted. Del. Code Ann. Tit. 16, § 2903.

B. Health Benefit Mandate for Employers

There is no such Delaware statute.

C. Immigration Laws

There is no such Delaware statute.

D. Right to Work Laws

There is no such Delaware statute.

E. Lawful off-duty conduct

There is no such Delaware statute.

F. Gender/Transgender expression

Gender identity is a protected category included in the Delaware Discrimination in Employment Act and is defined as "a gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth. Gender identity may be demonstrated by consistent and uniform assertion of the gender identity or any other evidence that the gender identity is sincerely held as part of a person's core identity; provided, however, that gender identity shall not be asserted for any improper purpose." Del. Code Ann. tit. 19, § 710 (10).

G. Other key state statutes

1. Lie Detector Test

No employer may require or suggest that an employee or prospective employee take a lie detector test as a condition of employment. Del. Code Ann. tit. 19, § 704 (1985 & Supp. 1992).

2. Refusal To Participate in Abortion

It is unlawful to take disciplinary action against an employee who refuses to participate in an abortion. Del. Code Ann. tit. 24, § 1791 (1987).

3. Inspection of Personnel File

Employees are allowed to inspect his or her personnel files used to determine his or her qualifications for employment, promotion, additional compensation, termination or other disciplinary action, upon request, at a reasonable time under specified circumstances and procedures. Del. Code Ann. tit. 19, §§ 732 - 735.

4. Compensation History

It is an unlawful employment practice for an employer to: (1) Screen applicants based on their compensation histories, including by requiring that an applicant's prior compensation satisfy minimum or maximum criteria; and (2) Seek the compensation history of an applicant from the applicant or a current or former employer.

An employer and applicant are permitted to discuss compensation expectations provided that the employer or employer's agent does not request or require the applicant's compensation history. An employer can seek the applicant's compensation history after an offer of employment with terms of

compensation has been extended to the applicant and accepted, for the sole purpose of confirming the applicant's compensation history. Del. Code Ann. tit. 19 § 709B.

5. Delaware Medical Marijuana Act

Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon (a) The person's status as a cardholder; or (b) A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment. Del. Code Ann. tit. 16, § 4905A.

Delaware Superior Court held the Delaware Medical Marijuana Act created a private right of action. In *Chance v. Kraft Heinz Foods Company,* an employee (who possessed a medical marijuana card) brought a claim against his employer when he was terminated for testing positive for marijuana on the job. 2018 WL 6655670 (Del. Super. Dec. 17, 2018).

6. Meal Breaks

a. General Requirement

Delaware employers must generally provide an unpaid meal break of at least thirty (30) consecutive minutes to employees who work seven and one-half (7-1/2) or more consecutive hours. The break must occur after the first two hours of work, and before the last two hours of work. Del. Code Ann. tit. 19, § 707.

b. Exemptions

Professional employees employed by Delaware school districts are exempt from the meal break requirement if they work directly with students. Written agreements between employees and employers, or collective bargaining agreements, may provide for deviation from the meal break requirement. In addition, exemptions may occur where:

i. Compliance would adversely affect public safety;
ii. Only one (1) employee may perform the duties of a position;
iii. An employer has fewer than five (5) employees on a shift at a single place of business (in which case the exemption applies only to that shift); or
iv. The continuous nature of an employer's operations, such as chemical production or research experiments, requires employees to respond to urgent or unusual conditions at all times, and the employees are compensated for meal break periods.

Del. Code Ann. tit. 19, § 707(a).

Employees subject to these exemptions must be permitted to eat meals at their workstations, use restroom facilities as reasonably necessary, and receive compensation for time spent using restroom facilities, as well as time devoted to eating meals. Delaware Department of Labor, "Rule Relating to Exemptions From Meal Break Requirement."

c. Retaliation

An employer who discharges, or otherwise discriminates against an employee, who complains to, or provides information to, the Delaware DOL regarding a violation of the meal breaks law, is subject to a penalty of nor more than $1,000 for each violation. Del. Code. Ann. tit. 19, § 707(b).

d. Penalties

Civil Penalties of $1,000 to $5,000 may be imposed for violating this section, or retaliating against an employee complaining of a violation. Claims for violations may be brought in any court of competent jurisdiction. Del. Code Ann. tit. 19, § 707(c).

e. Occupations with Special Rules

i. Public Sector Employment

1. Delaware Wage Payment Act

The Delaware Wage Payment Act does not apply to employees of the United States, the State of Delaware, or any political subdivision of the state. Del. Code Ann. tit. 19, § 1101(3).

2. Salary Deductions

The State may deduct from a state employee's salary such sum(s) an employee directs by written authorization. In addition, the State may deduct for employee health, life and dental insurance premiums. Del. Code Ann. tit. 29, § 5106.

3. Saturday as Holiday

Saturday is statutorily designated as a legal holiday throughout the year for all state employees, except state police, employees of the Department of Safety, and employees assigned to rotating shift work. For employees of the Department of Safety, Saturday is a holiday except for the last two Saturdays of each quarter. Del. Code Ann. tit. 19, § 5104.

7. Child Labor Act

a. Coverage

Delaware's Child Labor Act applies to all employers who employ children under the age of 18. Del. Code Ann. tit. 19, § 502(1).

b. Exemptions in Delaware

Employment of children in the following situations is not subject to the requirements of the Act:

i. Children receiving industrial education furnished by the United States, the State of Delaware or any municipality, if the education is approved by a school board or committee or other duly constituted public authority;

ii. Children performing nonhazardous work as ordered by Family Court as a condition of probation;
iii. Nonhazardous farm work;
iv. Domestic work performed at a private home;
v. Work performed for a business owned by a parent, or one legally standing in the place of a parent, in a nonhazardous occupation;
vi. Work performed by non-paid volunteers in a charitable or non-profit organization with the written consent of a parent, or one legally standing in the place of a parent;
vii. Caddying on a golf course;
viii. Delivery of newspapers to the consumer;
ix. Employment of a graduate of an accredited school in a hazardous occupation in which a course of study has been completed, but only to the extent the hazardous occupation would otherwise be prohibited;
x. Hazardous work performed by nonpaid volunteers 14 years of age or older of a volunteer fire department or volunteer rescue squad who have completed or are taking a course relating to fire fighting or rescue; and
xi. Any child over the age of 14 years employed in any nonhazardous occupation in any facility used for the purpose of canning or preserving, or preparation for canning or preserving, perishable fruits and vegetables.

Del. Code Ann. tit. 19, § 502(2); *see also* Delaware DOL Child Labor Law Handbook as amended October 31, 1998 ("DE DOL Handbook").

c. Hours of Work

i. 14 and 15 Year-Old Employees

Employees who are 14 or 15 years old are not permitted to work:
(1) Before 7:00 a.m. or after 7:00 p.m. (except from June 1 through Labor Day during which time the child is permitted to work until 9:00 p.m.) Del. Code Ann. tit. 19, § 506(e);
(2) During the school day. *Id*. at § 506(a)(1);
(3) More than
(a) 4 hours on any day when school is in session;
(b) 8 hours on any day when school is not in session;
(c) 18 hours in any week when school is in session for 5 days:
(d) 40 hours in any week when school is not in session;
(e) 6 days in any week; or
(f) 5 hours continuously without a nonworking period of at least one-half hour.

Id. § 506(d).

Hours worked in a work-study or student-learner program when school is normally in session shall not be counted in calculating the permissible hours of work. *Id*. § 506(f).

ii. 16 and 17 Year-Old Employees

Employees who are 16 and 17 years old shall:

(1) Not spend more than 12 hours in a combination of school hours and work hours per day. Del. Code Ann. tit. 19, § 507(c);

(2) Have at least eight (8) consecutive hours of nonwork, nonschool time each twenty-four (24)-hour day. *Id*. § 507(d); and

(3) Not be employed or permitted to work more than five hours continuously without a nonworking period of at least one-half hour. *Id*. § 507(e).

d. Employment Certificates

Children under the age of 18 must have a verified and validated employment certificate. The employer is required to keep the certificate on file and make it accessible to the Delaware DOL upon request. Del. Code Ann. tit. 19, § 504(a). Such certificates are issued by the Delaware DOL, and at the various junior and senior high schools throughout the State. *Id*. § 504(b).

e. Prohibited Occupations

i. 14 and 15 Year-Old Employees

Children under the age of 16 shall not be employed or permitted to work in, about, or in connection with:

(2) Any occupation prohibited by the United States Secretary of Labor under the Fair Labor Standards Act 29 U.S.C. § 201 et seq.;

(3) The operation, cleaning, or adjusting of any power-driven machinery, appliances, or tools, other than office machinery and food or beverage dispensing machines where the moving parts are not exposed to the operator;

(4) Meat slicers;

(5) Deep fat fryers;

(6) Steamers and pressure cookers used in the preparation of food;

(7) Boilers;

(8) Stripping and sorting tobacco;

(9) Construction or demolition projects;

(10) Tunnels or excavations;

(11) Mines, quarries, or borrow pits;

(12) Coal breakers or coke ovens; or

(13) Any other occupation which, following a public hearing by the Delaware DOL, the Secretary deems to be injurious to the health, safety, welfare, or morals of the minor.

Del. Code Ann. tit. 19, § 506(a).

The prohibitions listed above do not apply to (a) enrollment in a work-study, student-learner or similar program where the employment is part of the course of study, and the employment is procured and supervised by a school district; or (b) the practice of farm labor with adult supervision. *Id*. § 506(c).

ii. Employees under 18 Years of Age

A child under the age of 18 shall not be employed or permitted to work in, about, or in connection with:

(1) Any occupation prohibited by the United States Secretary of Labor pursuant to the Fair Labor Standards Act 29 U.S.C. §§ 201 et seq.;
(2) Blast furnaces;
(3) Docks of wharves, other than marinas where pleasure boats are sold or serviced;
(4) Railroads;
(5) The erection and/or repair of electrical wires;
(6) Distilleries where alcoholic beverages are manufactured, bottled, labeled, wrapped, or packaged;
(7) The manufacturing of dangerous or toxic chemicals or compounds;
(8) Any other occupation which the Secretary deems injurious to the health, safety, welfare or morals of the minor;
(9) Any occupation as a pilot, fireman, or engineer on any vessel or boat engaged in commerce; or
(10) Any occupation as a messenger for a telegraph, telephone or messenger company in the distribution, delivery, collection, or transmission of goods or messages before 6:00 a.m. or after 10:00 p.m. or any day in any town or city having a population of over 20,000 persons.

Del. Code. Ann. tit. 19, § 507(a).

The prohibitions listed above shall not apply to: (a) a minor under 18 years of age enrolled in a work-study, student-learner, apprenticeship, or similar program where the employment is part of the course of study, and the employment is procured and supervised by a school district; or (b) by a federal or state monitored apprenticeship program. *Id*. § 507(b).

f. Penalties

Employers who employ or permit a minor to work in violation of the Act are subject to a civil penalty up to $10,000 for each violation. Del. Code Ann. tit. 19, § 509(b). Interfering with or hindering the Delaware DOL in the performance of its duties under the Act, or knowingly providing Delaware DOL false information is punishable by a civil penalty of not less than $1,000 nor more than $5,000 for each such violation. *Id*. § 509(b). The discharge or discrimination against an employee for making a complaint or giving information to the Delaware DOL results in a civil penalty of not less than $1,000 nor more than $5,000 for each such violation. *Id*. § 509(c). A civil penalty claim may be filed in any court of competent jurisdiction. *Id*. 509(d).

g. Statute of Limitations

No action for the recovery of wages shall be brought after the expiration of one year from the accruing of the cause of action. Del. Code Ann. tit. 10, § 8111. While parties may shorten the period of limitations, a contractual attempt to extend the period violates public policy. *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384 (Del. Super. Ct. Nov. 6, 1978).

7. Health policy

Delaware's Mini-COBRA statute requires that a group policy renewed or delivered or issued for delivery by an insurer that insures employees and their eligible dependents for hospital, surgical or major

medical insurance to provide that covered employees or eligible dependents whose coverage under the group policy would otherwise terminate because of a qualifying event shall be entitled to continue their hospital, surgical or major medical coverage for an additional three months. Del. Code Ann. tit. 18, § 3571F.