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I. AT-WILL EMPLOYMENT

A. Statute

There is no statutory codification of the at-will employment doctrine in Nevada.

B. Case Law

"All employees in Nevada are presumed to be at-will employees." *Am. Bank Stationery v. Farmer*, 106 Nev. 698, 701, 799 P.2d 1100, 1101–02 (1990). An at-will employee can be dismissed "with or without cause as long as the dismissal did not offend public policy." *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998) (*citing Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 777 P.2d 366, 369 (1989)); *Martin v. Sears, Roebuck & Co.*, 111 Nev. 923, 899 P.2d 551 (1995); *but see Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984) (stating that the at- will doctrine is subject to strong public policy exceptions). "An employee may rebut [the at-will] presumption by proving by a preponderance of the evidence that there was an express or implied contract between his employer and himself that his employer would fire him only for cause." *Farmer*, 106 Nev. at 701, 799 P.2d at 1102 (citing *Bally's Employees' Credit Union v. Wallen*, 105 Nev. 553, 779 P.2d 956, 957 (1989)); *cf. Ringle v. Bruton*, 120 Nev. 82, 86, P.3d 1032 (2004) (finding a presumption of the continuation of an employment contract when an employee continues to render the same services following the expiration of the employment contract). However, "an employee's subjective expectations cannot create a contract of employment." *Barmettler*, 114 Nev. at 449, 956 P.2d at 1387 (citing *Vancheri*, 105 Nev. at 421, 777 P.2d at 369).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

In *Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 668 P.2d 261 (1983), Ahmad brought a claim for breach of contract arising from the alleged failure of the employer to follow the termination clause of an employee information and benefits handbook, a copy of which was provided to the employee. Ahmad recovered a judgment against Southwest Gas who appealed the judgment. In affirming the judgment, the court stated:

> The fact that the company issued such handbooks to its employees and that Ahmad had knowledge of the pertinent provisions therein supports an inference that the handbook formed part of the employment contract of the parties.

> There is also evidence of formal delivery of the handbook after the commencement of employment. Her continued employment after formal delivery of the handbook provides sufficient consideration for modifying the employment agreement by inclusion of the handbook provisions.

Id. at 595, 668 P.2d at 261 (citations omitted).

Then, in *Smith v. Cladianos*, 104 Nev. 67, 752 P.2d 233 (1988), the court addressed whether provisions in an employment handbook could create an implied contract of employment. The trial court found that the plaintiff was an at-will employee as a matter of law and granted the defendant's motion for summary judgment. *Id.* at 68, 752 P.2d at 234. On appeal, the plaintiff argued that an implied contract for employment existed in view of the parties' conduct, the defendant's personnel policies, the length of the plaintiff's employment (4 1/2 years), and reliance by the plaintiff on an employee handbook. *Id.* The Supreme Court of Nevada rejected the plaintiff's contentions, finding that under the facts of the case, Smith was clearly an at-will employee. *Id.* The court stressed that the handbook contained no provisions altering the at-will employment doctrine. *Id.* at 68–69, 752 P.2d at 234. Although the handbook discussed termination of probationary employees, the plaintiff had long since completed her probationary employment period. *Id.* at 69, 752 P.2d at 234–35. Thus, those provisions had no relationship to the manner in which the plaintiff was terminated. *Id.* In any event, the most significant difference between the handbook in *Ahmad* and the handbook in *Smith* is that the former had a provision specifically covering employee terminations, while the latter did not.

In *Sands Regent v. Valgardson*, 105 Nev. 436, 777 P.2d 898 (1989), the Supreme Court of Nevada reiterated its earlier holding that employee handbooks would not be deemed to alter an employee's at-will status unless the handbook contains provisions relating to termination. The plaintiffs in *Valgardson* were allegedly terminated because they were too old. *Id.* at 438–37, 777 P.2d at 898–99. The plaintiffs brought their actions based upon alleged statutory violations, as well as breach of contract and both tortious and bad faith discharge. *Id.* at 438, 777 P.2d at 899. A jury returned general verdicts in favor of the plaintiffs and awarded them compensatory and punitive damages. *Id.* On appeal, the court reasoned that unless the plaintiffs' common law theories of recovery were sustainable, the plaintiffs would be limited to damages allowable under their statutory theories of recovery. *Id.* at 439, 777 P.2d at 899. The court then held that the common law theories were not available. *Id.* The plaintiffs' assertion that the employee handbook created an implied contract was not persuasive since no provision in the handbook modified the employer's common law right to terminate the plaintiffs' at-will employment. *Id.* The plaintiffs were otherwise unable to establish any contractual right of continuing employment; therefore, the court held that the breach of contract and bad faith discharge theories were not sustainable. *Id.*; *see also Beales v. Hillhaven, Inc.*, 108 Nev. 96, 825 P.2d 212 (1992).

Again, in *D'Angelo v. Gardner*, 107 Nev. 704, 819 P.2d 206 (1991), the court reiterated that in certain circumstances, a handbook may be evidence of an enforceable contract between an employer and employee. *Id.* at 708 n.3, 819 P.2d at 209 n.3. However, in this case, the court recognized that any inference that the handbook formed part of the employment contract can be easily prevented by the employer by "including in its handbook an express disclaimer of implied contractual liability." *Id.* at 708 n.4, 819 P.2d at 209 n.4.

The United States District Court for the District of Nevada in *Clark v. Wells*, No. 2:13-cv-0082-GMN-CWH, 2014 WL 5107062 (D. Nev. Oct. 9, 2014), confirmed the use of a disclaimer to prevent a contract negating the employment at-will presumption. Specifically, the terminated plaintiff pointed out that a company handbook illustrated steps that "may be followed" in terminating an employee, however the handbook further specified that "these disciplinary steps are not exclusive and that the company's use of any of these steps is discretionary." *Id.* at *2. As such, the district court confirmed the Supreme Court of Nevada's decisions stating that an employee handbook containing a progressive disciplinary process is insufficient to establish a contract negating the at-will employment presumption. *Id.*

In a wrongful termination action in which the plaintiff alleged that an implied contract of employment was created by provisions in the employee handbook, the court rejected a finding that a long-term contract of employment existed. *Yeager v. Harrah's Club*, 111 Nev. 830, 897 P. 2d 1093 (1995). Instead, the court found that there was nothing in the employee handbook that stated that the listed infractions were the exclusive causes for termination. *Id.* at 837.

The court has held that the question of whether a handbook, or any disclaimer found therein, gives rise to an employment contract is primarily a question of fact that should be left to the jury; the court should only intervene to address the handbook issue if it presents a question of law. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 451, 956 P.2d 1382, 1389 (1998).

2. Provisions Regarding Fair Treatment

In *D'Angelo v. Gardner*, 107 Nev. 704, 819 P.2d 206 (1991), a wrongful termination of employment case, the Supreme Court of Nevada rejected the employee's claim based on breach of the implied covenant of good faith and fair dealing. The court explained:

> [T]he covenant of good faith and fair dealing implied in an employment contract for indefinite future employment could, under certain limited circumstances, be the basis for tort liability in a manner comparable to the tort liability incurred by insurance companies when they deal in bad faith with their policyholders.

Id. at 717, 819 P.2d at 215 (citing *K Mart Corp. v. Ponsock*, 103 Nev. 39, 51, 73 P.2d 1364, 1372 (1987), *abrogated on other grounds by Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990)). Furthermore, the court stated:

> In *K Mart Corp.* we made it clear that "mere breach of an employment contract" does not itself "give rise to tort damages" and that the kind of breach of duty that brings into play the bad faith tort arises only if there are "special relationships between the tort-victim and the tortfeasor."

Id. (quoting *K Mart Corp.*, 103 Nev. at 49, 73 P.2d at 1370).

3. Disclaimers

It is recognized that an employer has the ability to include an express disclaimer that will prevent a handbook from being construed as a contract of employment. *D'Angelo*, 107 Nev. at 708 n.4, 819 P.2d at 209 n.4; *see also Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 966, 194 P.3d 96, 106 (2008) and *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 910–11 (D. Nev. 1993).

In *Southwest Gas Corp. v. Vargas*, the employee was able to rebut the presumption of at-will employment by introducing into evidence the provision in the employee's manual guaranteeing long-term employment. 111 Nev. 1064, 901 P.2d 693 (1995). In so holding, the court recognized that the "employer can easily prevent the inference that a handbook is part of the employment contract from arising by including in its handbook an express disclaimer of implied contractual liability of the type found in *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1088 (Miss. 1987)." *Id.* at 698, 901 P.2d at 1071 (quoting *D'Angelo*, 107 Nev. at 708 n.4, 819 P.2d at 209 n.4).

The court in *Southwest Gas* further explained that cases involving rights allegedly arising from employee handbooks are murky and are to be determined by the trier of fact. *Id.* at 1071–72, 901 P.2d at 697. Because of this:

> [T]he disclaimer is merely one factor to consider in ascertaining whether the handbook as a whole conveys credible promises that should be enforced..... The disclaimer, which necessarily militates against enforcement, should be weighed in the balance along with other handbook provisions..... [A] handbook that contains both promissory language and a disclaimer should be viewed as inherently ambiguous. [T]hus,..... the entire handbook, including any disclaimer, should be considered in determining whether the handbook gives rise to a promise, an expectation and a benefit.

Id. at 1072, 901 P.2d 697 (quoting *Fleming v. Borden, Inc.*, 450 S.E.2d 589, 596 (S.C. 1994) (internal citation and quotation marks omitted))

4. Implied Covenants of Good Faith and Fair Dealing

In order to find that an implied covenant of good faith and fair dealing exists, there must be an employment contract and a special relationship based upon special reliance, trust, and dependency. *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 910 (D. Nev. 1993) (citing *K Mart Corp.*, 103 Nev. at 51, 732 P.2d at 1372). The special relationship "is one of particular reliance as found in insurance, partnership, and franchise agreements where there is a need for special protection arising from the skewed balance of power between the parties and the heavy reliance on the credibility by one party on the other." *Id.* This type of relationship is not present in all employer/employee relationships. *Id.*

In *K mart Corp.*, Ponsock was hired as a forklift driver at Kmart's Distribution Center in 1972. His immediate supervisor deemed him an excellent employee. 103 Nev. at 43, 732 P.2d at 1366. On March 30, 1982, only six months before the vesting of his retirement benefits, Ponsock was fired for applying gray primer spray paint to the battery cover of the forklift he operated. *Id.* Ponsock claimed that the battery cover had become "sticky and gunky" and, when the maintenance department failed to respond to the problem, he attempted to correct it himself with the primer paint. *Id.* Ponsock protested his termination, but the company refused to listen. *Id.* at 44, 732 P.2d at 1367. At trial, testimony revealed that other forklifts had unauthorized paint on them but that no other employee had ever been fired for the application. *Id.* In addition, another employee testified that he hid one such forklift from Ponsock's attorneys. *Id.* The

Supreme Court of Nevada held that Kmart had breached an implied covenant of good faith and fair dealing in Ponsock's employment contract, and that Ponsock was entitled to the damages he received at trial. *Id.* at 52, 732 P.2d at 1372–73. The court explained that tort damages were necessary to prevent unfair practices by an employer, drawing an analogy to insurance cases. *Id.* at 51–52, 732 P.2d at 1372. The court further noted that "[t]he bad faith discharge case finds its origins in the so-called covenant of good faith and fair dealing implied in law in every contract." *Id.* at 48, 732 P.2d at 1370. Moreover, the court stated that:

> Ponsock was just as dependent in "specially relying" on Kmart's commitment to his extended employment and subsequent retirement benefits as is an insurance policy holder dependent on the good faith indemnity promised by the insurance carrier. To permit only contract damages as the sole remedy for this kind of conduct would be to render Kmart totally unaccountable for these kinds of actions. If all a large corporate employer had to do was to pay contract damages for this kind of conduct, it would allow and even encourage dismissals of employees on the eve of retirement with virtual impunity. Having to pay only contract damages would offer little or no deterrent to the type of practice apparently engaged in by Kmart in this case.

Id. at 51, 732 P.2d at 1372.

B. Public Policy Exceptions

1. General

Although employment contracts are presumed to be at-will, and an employer may fire an employee for any reason or for no reason at all, an exception to this general rule has been carved out where an employer terminates an employee in a manner violative of public policy. *Bielser v. Prof'l Sys. Corp.*, 321 F. Supp. 2d 1165, 1168 (D. Nev. 2004) (citing *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 989 P.2d 882, 884–85 (1999) (en banc)).

The Supreme Court of Nevada first introduced this public policy exception in *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984). *See also Camco, Inc. v. Baker*, 113 Nev. 512, 936 P.2d 829 (1997). In this first exception, the court stated that there is a strong public policy favoring protecting employees in workers' compensation claims. *Hansen*, 100 Nev. at 63, 675 P.2d at 396. Therefore, the court stated that an exception to the general rule of at-will employment included retaliatory discharge for filing a workers' compensation claim. *Id.*

In *Blankenship v. O'Sullivan Plastics Corp.*, 109 Nev. 1162, 866 P.2d 293 (1993), an at-will employee was terminated for refusing to sign a substance abuse agreement. *Id.* at 1163, 866 P.2d at 294. The employee claimed that the substance abuse provision was a violation of the public policy exception to the at-will doctrine because it violated his constitutional rights against self-incrimination. *Id.* In affirming the propriety of the dismissal of the employee, the court stated, "we are unaware of any prevailing public policy against employers seeking to provide safe and lawful working conditions through testing programs designed to identify and eliminate the use of illicit drugs and alcohol." *Id.* at 1166, 866 P.2d at 295.

In *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905 (D. Nev. 1993), the court considered whether there was a breach of an employment contract when the hotel denied the plaintiff's requested transfer to another location based upon an alleged policy of only employing young "barbie doll" type women (i.e. sexually attractive). *Id.* at 908–09. While the court acknowledged that "it is against the law to terminate an employee for reasons contrary to public policy, this tort is not dependent upon or directly related to a contract of continued employment." *Id.* at 910. The court also noted that the public policy tortious discharge has been interpreted to protect against specific and limited actions contrary to public policy, "such as the discharge of an employee for seeking industrial insurance benefits, for performing jury duty, for refusing to work under unreasonably dangerous conditions, or for refusing to violate the law." *Id.* The court specifically noted that "there is no public policy against choosing 'barbie doll' type employees over others." *Id.*

The public policy exception to the at-will employment doctrine is a narrow one. *Bigelow v. Bullard*, 111 Nev. 1178, 1181, 901 P.2d 630, 632 (1995). In order to prevail, the employee must show that the dismissal was based upon either (1) the employee's refusal to engage in conduct that is violative of public policy, or (2) the employee's engagement in conduct that public policy favors (such as performing jury duty or applying for industrial insurance benefits). *Id.* (citing *D'Angelo v. Gardner*, 107 Nev. 704, 718, 819 P.2d 206, 215–16 (1991)).

The courts will not accept a claim for tortious discharge when "an adequate statutory remedy exists, as it would be unfair to a defendant to allow additional tort remedies under such circumstances." *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 561, 216 P.3d 788, 791 (2009) (citing *D'Angelo*, 107 Nev. at 720, 819 P.2d at 217). In *Ozawa*, the plaintiff took the lead in opposing new training requirements and left the company shortly thereafter. *Id.* at 558–59, 216 P.3d at 790. The court found that the plaintiff had an alternative remedy under the Federal Railway Labor Act, 45 U.S.C. 151-188 (2006), and therefore had no claim for tortious discharge. *Id.* at 561, 216 P.3d at 791–92.

2. Exercising a Legal Right

In *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984), the Supreme Court of Nevada consolidated two appeals regarding wrongful discharge for filing workers' compensation claims. The first case involved Hansen, a pinball-video repairman for Harrah's. *Id.* at 62, 675 P.2d at 395. He was injured at work and filed a claim for benefits which Harrah's, a self-insured employer, rejected. *Id.* Hansen filed a complaint alleging retaliatory discharge and the trial court granted Harrah's motion to dismiss. *Id.*

In the second case, Lewis filed suit for wrongful discharge against the Reno MGM, another self-insured employer. *Id.* Lewis alleged that he was fired for filing a workers' compensation claim, but the trial court declined to recognize a retaliatory discharge exception to the at-will employment rule. *Id.*

The Supreme Court of Nevada reversed both decisions and remanded the cases for further proceedings, stating:

> We know of no more effective way to nullify the basic purposes of Nevada's workmen's compensation system than to force employees to choose between a continuation of employment or the submission of an industrial claim It would not only frustrate the statutory scheme, but also provide employers with an inequitable advantage if they were

> able to intimidate employees with the loss of their jobs upon the filing of claims for insurance benefits as a result of industrial injuries We elect to support the established public policy of this state concerning injured workmen and adopt the narrow exception to the at-will employment rule recognizing that retaliatory discharge by an employer stemming from the filing of a workmen's compensation claim by an injured employee is actionable in tort.

Id. at 64, 675 P.2d at 397.

Then, in 1999, the court held that retaliatory discharge by an employer in response to an injured employee filing a workers' compensation claim does support a claim for tortious discharge. *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 377, 989 P.2d 882, 885 (1999). The court reiterated its finding in *Hansen* that "Nevada's workmen's compensation laws reflect a clear public policy favoring economic security for employees injured while in the course of their employment." *Id.*

3. Refusing to Violate the Law

In *D'Angelo v. Gardner*, 107 Nev. 704, 819 P.2d 206 (Nev. 1991), the Supreme Court of Nevada found a tortious discharge in violation of public policy wherein employers terminated employees for (1) refusing to violate the law and (2) refusing to work under conditions unreasonably dangerous to the employee.

4. Exposing Illegal Activity (Whistleblowers)

Under Nevada law, employment contracts are presumed to be at-will unless the employee is terminated for reasons contrary to public policy. *D'Angelo*, 107 Nev. at 711–12, 819 P.2d at 211. Exposing illegal activity of an employer is recognized by the whistleblowing public policy exception to at-will employment and constitutes a tortious discharge. *Ainsworth v. Newmont Min. Corp.*, No. 56250, 2012 WL 987222, at *2 (D. Nev. Mar. 20, 2012) (citations omitted).

Section 357.250(1) of the Nevada Revised Statutes states that if an employee is "discharged, demoted, suspended, threatened, harassed or discriminated against in the terms and conditions of employment as a result of any lawful act of the employee," then the employee is "entitled to all relief necessary" to make to make the employee whole. Such relief includes, but is not limited to:

> [R]einstatement with the same seniority as if the discharge, demotion, suspension, threat, harassment or discrimination had not occurred or damages in lieu of reinstatement if appropriate, twice the amount of lost compensation, interest on the lost compensation, any special damage sustained as a result of the discharge, demotion, suspension, threat, harassment or discrimination and punitive damages if appropriate. The employee, contractor or agent may also receive compensation for expenses recoverable pursuant to NRS 357.180, costs and attorney's fees.

Nev. Rev. Stat. § 357.250(1).

In *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 970 P.2d 1062 (1998), a former loan officer of the defendant bank, who claimed he was terminated for reporting several loans to the Federal Housing Administration ("FHA") which violated FHA regulations, sought review by the Supreme Court of Nevada of the trial court's refusal to give jury instructions permitting recovery for retaliatory discharge if he was terminated "at least in part" for "whistle-blowing." *Id.* at 1318, 970 P.2d at 1065. In upholding the trial court's ruling in refusing to give the "mixed motive theory" instruction, the court stated:

> Although this court has not specifically addressed whether a mixed motives analysis applies in tortious discharge . . . we take this opportunity to adopt the approach followed by other states and federal courts that have considered the issue. We hold that recovery for retaliatory discharge under state law may not be had upon a "mixed motive" theory; thus, a plaintiff must demonstrate that his protected conduct was the proximate cause of his discharge.

Id. at 1319–20, 970 P.2d at 1066.

However, in *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432 (1989), the court held that if an employee discovers the illegal activity of his/her employer, the employee must report it to an appropriate authority outside of the company in order to support a whistleblowing public policy exception. *Id.* at 293, 774 P.2d at 433. Simply reporting the activity to a supervisor within the company was ruled unprotected private conduct involving no public policy. *Id.* To qualify for this limited public policy exception to the at-will employment doctrine, the court stated that the employee's actions must be for the public good and not merely private or proprietary. *Id.*; *see also Wagner v. City of Globe*, 150 Ariz. 82, 89, 722 P.2d 250, 257 (1986) (disagreed with by *Demasse v. ITT Corp.*, 194 Ariz. 500, 984 P.2d 1138 (1999), on other grounds).

Applying *Wiltsie* to *Bielser v. Professional Systems Corp.*, 321 F. Supp. 2d 1165 (D. Nev. 2004), while the plaintiff was an employee of Professional Systems Corp., she discovered that the defendant was fraudulently overcharging a client. She brought the problem to the attention of her supervisor and claimed that her employment was subsequently terminated in retaliation for reporting the illegal activity. *Id.* at 1166. The court found that the plaintiff did not report the illegal activity to an authority outside of the company but rather reported it to her supervisor within the company, making her actions private in nature and unable to support a tortious discharge claim under the whistleblowing exception. *Id.* at 1169. On appeal, the United States Court of Appeals for the Ninth Circuit upheld the district court's finding that there is no Nevada precedent to support a finding that an internal report of illegal conduct is sufficient to support a claim of tortious discharge for whistleblowing. *Bielser v. Prof'l Sys. Corp.*, 177 F. App'x 655, 657 (9th Cir. 2006).

III. CONSTRUCTIVE DISCHARGE

"A constructive discharge occurs when, looking at the totality of the circumstances, a reasonable person in the employee's position would have felt that he was forced to quit because of intolerable and discriminatory working conditions." *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 912 (D. Nev. 1993) (citing *Jordan v. Clark*, 847 F.2d 1368, 1377 (9th Cir. 1988)).

In *Martin v. Sears, Roebuck & Co.*, 111 Nev. 923, 899 P.2d 551 (1995), the Supreme Court of Nevada defined constructive discharge as follows:

> A constructive discharge has been held to exist when an employer creates working conditions so intolerable and discriminatory that a reasonable person in the employee's position would feel compelled to resign. More particularly, the court in *Brady v. Elixir Industries*, 196 Cal. App. 3d 1299, 242 Cal. Rptr. 324 (Cal. Ct. App. 1987), held that a tortious constructive discharge is shown to exist upon proof that: (1) the employee's resignation was induced by actions and conditions that are violative of public policy; (2) a reasonable person in the employee's position at the time of the resignation would have also resigned because of the aggravated and intolerable employment actions and conditions; (3) the employer had actual or constructive knowledge of the intolerable actions and conditions and their impact on the employee; and (4) the situation could have been remedied.

Id. at 925–26, 899 P.2d at 553 (internal citations omitted).

The court has recognized a split between the federal courts regarding the proper standard to be used in constructive discharge claims. *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1579, 908 P.2d 720, 723 (1995). Under the "objective" standard, followed by the Ninth Circuit, a constructive discharge occurs when "a reasonable person . . . would have felt that he was forced to quit because of intolerable . . . working conditions." *Id.* at 1579, 908 P.2d at 723 (quoting *Satterwhite v. Smith*, 744 F.2d 1380, 1381 (9th Cir. 1984)). A minority of the courts apply a "subjective" standard requiring the employee to "prove that his or her employer *deliberately* attempted to force him or her to quit." *Id.* at 1580, 908 P.2d at 723 (citation omitted). While the court did not explicitly state which it adopted, the court stated that the "facts surrounding the instant case as well as age discrimination cases in general suggest that this court adopt the objective standard." *Id.* at 1580, 908 P.2d at 724.

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

In *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995), the Supreme Court of Nevada held that a discharge for just or good cause is "one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence, and (2) reasonably believed by the employer to be true." *Id.* at 1077, 901 P.2d at 700. Although the court found that unsubstantiated and clearly baseless allegations of fact against the employer may not be sufficient to overcome summary judgment, adequate averments of fact tending to show a lack of good faith, conspicuous absence of substantial evidence in support of a reasonable belief in the presence of good cause, or demonstrably capricious cause for termination represent a genuine and material issue for trial. *Id.* at 1078, 901 P.2d at 701–02.

In *American Bank Stationery v. Farmer*, 106 Nev. 698, 799 P.2d 1100 (1990), the Supreme Court of Nevada found that the employee had an express oral contract which permitted firing only for good cause. *Id.* at 704, 799 P.2d at 1103. This finding was supported by evidence that the job offer included (1) an explicit promise to keep the employee on the job if he performed adequately, and (2) extensive references to the employee handbook stating that the employee could be discharged only for cause. *Id.* at 702, 799

P.2d at 1102. Specifically, the finding that the employer did not have just cause to terminate the employee was supported by evidence that the employee was popular with those who worked under him, instrumental in a major sale, supported by almost all his supervisors, ranked as number one salesperson for one quarter, and had incomparable annual sales figures. *Id.* at 703, 799 P.2d at 1103.

In *Pressler v. Reno*, 118 Nev. 506, 50 P.3d 1096 (2002), Pressler, the Director of Parks and Recreation for the City of Reno, was terminated following an investigation into allegations of sexual harassment against him. *Id.* at 508, 50 P.3d at 1097. Pressler had been employed by the city for over 26 years. *Id.* Pressler brought an action in district court, claiming that the investigation and hearing violated his right to due process. *Id.* at 509, 50 P.3d at 1098. The district court granted the City of Reno's motion for summary judgment on the premise that Pressler was an at-will employee. *Id.* at 510, 50 P.3d at 1098. Under Nevada law, at-will employees have no property interest in their continued employment, making any due process claim for such property non-existent. *Id.* at 510, 50 P.3d at 1098–99. Pressler appealed his decision. *Id.* at 509, 50 P.3d at 1098.

At the time of Pressler's appointment as Director of Parks, the city charter included a clause stating that employees in appointed positions could only be terminated for cause. *Id.* at 510–11, 50 P.3d at 1099. In 1997, a revision of the charter removed the "for cause" provision for appointed employees. *Id.* at 511, 50 P.3d at 1099. The City of Reno argued that these revisions applied to Pressler's employment contract as well, making him an at-will employee, even though the revisions were enacted subsequent to his appointment. *Id.*

The Supreme Court of Nevada held that unless otherwise stated by the legislature, statutes only have a prospective effect. *Id.* Nothing in the 1997 statute revising the city charter indicated that the revisions would apply to all city employees retrospectively. *Id.* Since Pressler's appointment occurred when the "for cause" provision was still in effect, Pressler was not an at-will employee and thus had a property right in his continued employment. *Id.* at 512, 50 P.3d at 1099–1100. The court reversed the district court's decision and allowed Pressler's due process claim to proceed. *Id.* at 512–13, 50 P.3d at 1100.

The plaintiff in *Ringle v. Bruton*, 120 Nev. 82, 86 P.3d 1032 (2004), signed a written employment agreement to work as a general manager of the Stagecoach Casino and Hotel for a period of 2 years. *Id.* at 86, 86 P.3d at 1034–35. However, the plaintiff continued to work for the defendant in this capacity for 4 years. *Id.* at 86, 86 P.3d at 1035. The employment agreement was never amended, terminated, or renewed. *Id.* The parties disputed whether or not the plaintiff resigned or was terminated. *Id.* at 87, 86 P.3d at 1035. The plaintiff was awarded damages in his employment contract case, which the defendant subsequently appealed. The defendant claimed that there was no written employment contract, making the plaintiff's employment with the Casino presumptively at-will. *Id.* at 88, 86 P.3d at 1036.
The court held:

> [W]hen an employee continues to work after his contract of employment expires, it is presumed that all terms of the employment contract continue to govern the conduct of the employer and employee until the parties properly amend or terminate the contract or until the employee ceases working for the employer. The contract duration, however, does not renew.

Id. at 85–86, 86 P.3d at 1034. The court upheld the lower court's decision, finding that the plaintiff was not an at-will employee. *Id.*

B. Status of Arbitration Clauses

The Supreme Court of Nevada established that, when "determining whether to issue a stay pending disposition of an appeal," the court will consider four factors: "(1) whether the object of the appeal will be defeated if the stay is denied, (2) whether appellant will suffer irreparable or serious injury if the stay is denied, (3) whether respondent will suffer irreparable or serious injury if the stay is granted, and (4) whether appellant is likely to prevail on the merits in the appeal." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). While no single factor carries more weight than the others, when "one or two factors are especially strong, they may counterbalance other weak factors." *Id*. at 251, 89 P.3d at 38.

In *Mikohn*, the parties entered into separate employment and indemnification agreements. *Id.* at 250, 89 P.3d at 38. The employment agreement included an arbitration clause, which subjected certain controversies arising from employment to binding arbitration. *Id.* The corporation moved via interlocutory appeal to dismiss and/or compel arbitration. *Id.* at 250–51, 89 P.3d at 38. The Supreme Court of Nevada held that it was unclear if arbitration of the employee's claims was required by the employment agreement arbitration clause. *Id.* at 254, 89 P.3d at 40. In so holding, the court explained:

> Nevada's version of the Uniform Arbitration Act clearly favors arbitration. And we have previously recognized a strong policy in favor of arbitration, stating that courts are not to deprive the parties of the benefits of arbitration they have bargained for, and arbitration clauses are to be construed liberally in favor of arbitration. . .Arbitration, as an alternative dispute resolution mechanism, is generally designed to avoid the higher costs and longer time periods associated with traditional litigation.

Id. at 252, 89 P.3d at 39 (internal citations and quotation marks omitted). As such, because the necessity of arbitration was undetermined and spending time and money preparing for trial would potentially negate the benefits of arbitration, extending the stay for the duration of the appeal was the equitable course of action. *Id*. at 254, 89 P.3d at 40 (internal citations omitted).

In *Kindred v. Second Judicial District Court*, 116 Nev. 405, 996 P.2d 903 (2000), the petitioner employee signed an agreement containing arbitration clauses that required the petitioner to arbitrate any disputes related to her employment. *Id.* at 408, 996 P.2d at 905–06. The petitioner later filed a complaint in court alleging sexual harassment. *Id.* at 408, 996 P.2d at 906. Her employer sought to compel arbitration. *Id.* at 408–09, 996 P.2d at 906. To determine whether to compel arbitration of federal statutory claims, the court will examine: (1) whether the parties have made an agreement to arbitrate; (2) the scope of the agreement; and (3) whether the federal statutory claims are arbitrable. *Id.* at 410, 996 P.2d at 907 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1984); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 844 (2d Cir. 1987)). Further, the court has held that "[p]arties to a written arbitration agreement are bound by its conditions regardless of their subjective beliefs at the time the agreement was executed." *Id.* at 411, 996 P.2d at 907 (quoting *Campanelli v. Conservas Altamira, S.A.*, 86 Nev. 838, 841, 477 P.2d 870, 872 (1970)). Thus, here, the court approved arbitration as a means to resolve petitioner's claims and concluded that the district court did not abuse its discretion in concluding that the petitioner's claims were arbitrable. *Id.* at 414–15, 996 P.2d at 909–10.

The court may also consider reasons to avoid enforcement of the contract term such as fraud and unconscionability. *Lyman v. Mor Furniture for Less, Inc*., No. 3:06-CV-0666-ECR (RAM), 2007 WL 2300683, at *3 (D. Nev. Aug. 7, 2007) (citing *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 554, 96 P.3d 1159, 1162 (2004)). Also, the court may determine that the arbitration agreement is not valid if one of the parties to the agreement did not voluntarily agree to it. *Whitemaine v. Aniskovich*, 124 Nev. 302, 312 n.31, 183 P.3d 137, 144 n.31 (2008). This requires a showing of four factors: (1) the parties' negotiations, (2) the provision's conspicuousness, (3) the parties' relative bargaining power, and (4) the waiving party's opportunity to have counsel review the provision. *Id.*

Two instruments may constitute a single agreement if "(1) they are contemporaneously executed, (2) they concern the same subject matter, and (3) one of the instruments refers to the other." *Id.* at 309, 183 P.3d at 141 (citations omitted). In *Whitemaine*, the plaintiff signed an employment agreement with Bank of America, which did not contain an arbitration clause and three days later signed another employment agreement with BAIS, a subsidiary of Bank of America, which referred to the previous agreement and contained an arbitration clause. *Id.* at 306, 183 P.3d at 139–40. Because the first agreement was not only executed around the same time as the second agreement but also referred to in it, the court determined that they constituted a single agreement. Based on this determination, the court found that the arbitration clause contained in the second agreement applied to both the first and second agreements. *Id.* at 308, 183 P.3d at 141.

In Nevada federal court, it has been acknowledged that while the Federal Arbitration Act ("FAA") governs the substantive law of arbitrability, federal courts will apply state law to determine the "validity, revocability, and enforceability of contracts generally," including whether the arbitration clause is unconscionable. *See Kidneigh v. Tournament One Corp.*, No. 2:12-cv-02209-APG-CWH, 2013 WL 2245920, at *1 (D. Nev. May 21, 2013) (citations omitted).

V. ORAL AGREEMENTS

A. Promissory Estoppel

In *Vancheri v. GNLV Corp.*, 105 Nev. 417, 777 P.2d 366 (1989), the Supreme Court of Nevada held that the doctrine of promissory estoppel, which embraces the concept of detrimental reliance, is intended as a substitute for consideration. *Id.* at 421, 777 P.2d at 369. "Accordingly, the first prerequisite of the agreement is a promise." *Id.* (citation omitted). The court recognized that contracts of employment cannot be created by the subjective expectations of the employee. *Id.* (citation omitted). Because the employee failed to present evidence that GNLV's conduct expressed an intention to create something other than an at-will employment relationship, the employer could not be held liable based upon the doctrine of promissory estoppel. *Id.* at 422, 777 P.2d at 369.

This was reiterated in *Bally's Grand Employees' Federal Credit Union v. Wallen*, 105 Nev. 553, 779 P.2d 956 (1989), wherein the Supreme Court of Nevada found that an implied-in-fact employment contract cannot be created by the subjective expectations of the employee. *Id.* at 556, 779 P.2d at 957–58. Here, the employee testified that "during a pre-employment polygraph examination she indicated that she was seeking permanent employment, that she believed she would be promoted to assistant manager and that she entered into all long-term employee benefit programs." *Id.* at 556, 779 P.2d 956, 958. However, the "evidence . . . established nothing more than [a] subjective expectation[ ] of continued employment, and .

. . is legally insufficient to rebut the presumption of at-will employment." *Id.* Based on the foregoing, the court found that the employee did not put forth substantial evidence to show that her employment was anything other than at-will; therefore, the court held that the breach of contract theory was not sustainable. *Id.* at 556, 779 P.2d at 957.

B. Fraud

The elements of a fraud claim under Nevada Law include: "(1) A false representation made by the defendant; (2) Defendant's knowledge or belief that the representation is false (or insufficient basis for making the representation); (3) Defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) Plaintiff's justifiable reliance upon the misrepresentation; and (5) Damage to the plaintiff resulting from such reliance." *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (citing *Lubbe v. Barbra*, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975)). Further, in order to prevail, the plaintiff must prove each and every element by clear and convincing evidence. *Id.* at 110–11, 825 P.2d at 592.

In *Risinger v. SOC LLC*, 936 F. Supp. 2d 1235 (D. Nev. 2013), the plaintiff was employed as an armed guard by SOC to provide security assistance to the United States military in the Republic of Iraq. *Id.* at 1239. He claimed that, contrary to his employment agreement, he was not paid his represented salary and was forced to work seven days a week without overtime compensation or meal or rest periods. *Id.* at 1240. While denying SOC's motion to dismiss, the court found that the plaintiff had properly pled his cause of action for fraud, highlighting the fact that he alleged the misrepresentations about the conditions of his employment and future pay were made intentionally as part of SOC's recruitment push for security guards. *Id.* at 1243.

C. Statute of Frauds

The Statute of Frauds arises in oral employment contracts when there is an issue as to whether the contract can be performed in less than a year. *See* Nev. Rev. Stat. § 111.220. In *Stone v. Mission Bay Mortgage Co.*, 99 Nev. 802, 672 P.2d 629 (1983), the employee had an oral contract to work for "not less than one year." *Id.* at 803, 672 P.2d at 629. However, the statute of frauds did not apply because the employee could have been terminated during an initial 30-day probationary period of employment and as such, it was possible for the contract to be performed in less than a year. *Id.* at 805, 672 P.2d at 630–31.

VI. DEFAMATION

A. General Rule

"Defamation is a publication of a false statement of fact." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (2002). In order to prove defamation, the following elements must be satisfied: "(1) a false and defamatory statement by a defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Id.* at 718, 57 P.3d at 90 (quoting *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 483, 851 P.2d 459, 462 (1993)); *see also Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 385, 213 P.3d 496, 503 (2009).

1. Libel

"Under Nevada law, 'it is well-established that statements are libelous only if they are presented as fact rather than opinion, and only if the facts asserted are false.'" *Churchill v. Barach*, 863 F. Supp. 1266, 1274 (D. Nev. 1994) (quoting *Wellman v. Fox*, 108 Nev. 83, 825 P.2d 208, 210 (1992)); *see also Reilly v. Nevada*, No. 2:04-CV-00784-KJD-LRL, 2007 WL 983848, at *5 (D. Nev. Mar. 30, 2007); *Simpson v. Mars Inc.*, 113 Nev. 188, 191, 929 P.2d 966, 967 (1997).

In *Branda v. Sanford*, 97 Nev. 643, 637 P.2d 1223 (1981), the Supreme Court of Nevada reasoned that, because both libel and slander are generally accepted as questions of law, it is within the province of the court to determine if a statement is capable of a defamatory construction. *Id.* at 646, 637 P.2d at 1225 (citing *Thompson v. Powning*, 15 Nev. 195 (1880)). If it is susceptible on multiple constructions, one of which is defamatory, then resolution of the ambiguity is a question of fact for the jury. *Id.* at 646, 637 P.2d at 1225–26; *see also Churchill*, 863 F. Supp. at 1274.

2. Slander

In *Moen v. Las Vegas International Hotel, Inc.*, 90 Nev. 176, 521 P.2d 370 (1974), the employees, who were dealers for the hotel, were discharged during a publicized investigation into cheating. *Id.* at 177, 521 P.2d at 370. During the investigation, comments were made to the media by sheriff's deputies who were acting independently of the hotel. *Id.* at 177, 521 P.2d at 371. The Supreme Court of Nevada found that the employers were not associated with any false and defamatory statements affecting the employees' professional reputations. *Id.* at 177, 521 P.2d at 371. Additionally, the court held that "the timing of a discharge is not alone sufficient to support an action of slander." *Id.* at 178, 521 P.2d at 371.

In *Ornatek v. Nevada State Bank*, 93 Nev. 17, 558 P.2d 1145 (1977), the Supreme Court of Nevada granted a partial summary judgment for the ex-employer bank and its vice-president as to the former employee's allegation of slander. The plaintiff, a loan officer, left the bank for a new bank. *Id.* at 18–19, 558 P.2d at 1146. The plaintiff's new employer then conducted an investigation and learned that the plaintiff had misrepresented his indebtedness on his employment application. *Id.* at 19, 558 P.2d at 1146–47. The new employer fired the plaintiff after learning from the vice-president of the bank that the plaintiff was not credit worthy. *Id.* In granting a partial summary judgment, the court found that nothing in the defendant's statements carried a defamatory meaning, whether per se or per quod. *Id.* at 20, 558 P.2d at 1147. The court stated:

> The statements of McDaniel in the context within which they were made do not, as a matter of law, constitute either slander per se or per quod. Words, charged to be either libelous or slanderous per se are to be taken in their plain and natural import according to the ideas they convey to those to whom they are addressed; reference being had not only to the words themselves but also to the circumstances under which they were used Words may be slanderous per quod when the defamation does not appear from the words themselves, but arises from extrinsic circumstances, when viewed with the statement, conveys a defamatory meaning.

Id. (citations omitted).

B. References

There are no cases or statutes in Nevada discussing a letter of recommendation or reference letter constituting defamation. *See generally* discussion on "Privileges" below.

C. Privileges

In *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 657 P.2d 101 (1983), an action was brought against the former employer based on statements made concerning the plaintiff's discharge from employment. The Supreme Court of Nevada held:

> A qualified or conditional privilege exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or a duty, if it is made to a person with a corresponding interest or duty.

Id. at 62, 657 P.2d at 105 (citations omitted).

Thus, a former employer has a qualified or conditional privilege to make otherwise defamatory statements about the character or conduct of former employees to prospective employers of the same, as they have a common interest in the subject matter of the statements. *Id.* at 63, 657 P.2d at 105; *see also Riddle v. Washington*, No. 2:07-cv-01127-RCJ-VCF, 2012 WL 3135381, at *6 (D. Nev. Aug. 1, 2012). However, the conditional privilege "may be abused by publication in bad faith, with spite or ill will or some other wrongful motivation toward the plaintiff and without belief in the statement's probable truth." *Circus Circus*, 99 Nev. at 62 n.2, 657 P.2d at 105.

In *Bank of America Nevada v. Bourdeau*, 115 Nev. 263, 982 P.2d 474 (1999), the court found that "[a] background investigation of an employee is subject to conditional privilege, and any defamatory statements therein are not actionable unless the privilege is abused by publishing the statements with malice." *Id.* at 267, 982 P.2d at 476.

In *Pope v. Motel 6*, 121 Nev. 307, 114 P.3d 277 (2005), Pope was hired as a housekeeper; however, she was later terminated by the Motel 6 manager for making inappropriate comments about the management. *Id.* at 310, 114 P.3d at 279. According to Pope, her manager falsely accused her of stealing from Motel 6. *Id.* Subsequently, Pope filed a defamation claim, asserting that the Motel 6 manager informed both a Motel 6 area manager and the local police of the alleged theft. *Id.* This case was the first time in which the Supreme Court of Nevada decided what type of privilege applies to communications with a police officer prior to the commencement of criminal proceedings. *Id.* at 315, 114 P.3d at 282. The court determined that, in this case, a qualified privilege applied to the communications with the police. *Id.* at 317, 114 P.3d at 283. In order to "overcome the qualified privilege . . . [Pope] was required to establish that [her manager] acted with reckless disregard for veracity or with knowledge of falsity[,]" which she failed to do. *Id.* at 318, 114 P.3d at 284.

With regard to the statements made to upper management, the court found that "the district court improperly relied on [the] decision in *M&R Investment Co. v. Mandarino* for the proposition that intracorporate communications cannot constitute publication." *Id.* at 318, 114 P.3d at 284. The court clarified that the defendant corporation bears the burden of proving the alleged privilege's existence. *Id.* at 319, 114 P.3d at 284–85. Motel 6 did not meet that burden. *Id.* at 319, 114 P.3d at 285.

D. Other Defenses

1. Truth

The Supreme Court of Nevada has held that a statement is not defamatory if it is "absolutely true" or "substantially true." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 57 P.3d 82, 88 (2002). In addition, generalizations or exaggerations do not constitute defamation if they could reasonably be interpreted as "mere rhetorical hyperbole." *Id.* (quoting *Wellman v. Fox*, 108 Nev. 83, 88, 825 P.2d 208 (1992)).

The determination of whether a statement is true or false is a question of fact for the jury. *Fink v. Oshins*, 118 Nev. 428, 437, 49 P.3d 640, 646 (2002). Similarly, in the context of criminal defamation, a defendant must be acquitted if the jury determines that the statement is true. Nev. Rev. Stat. § 200.510(3).

2. No Publication

In *Jones v. Golden Spike Corp.*, 97 Nev. 24, 623 P.2d 970 (1981), the court adopted the rule that agents and employees of a corporate defendant in a libel action are not third persons for the purposes of publication of a libel. 97 Nev. at 26, 623 P.2d at 971. Shortly thereafter, the court overruled the law set forth in *Jones*, instead choosing to adopt the RESTATEMENT (SECOND) OF TORTS § 577(1) which states "that publication of defamatory material to anyone other than the person defamed, even to agents, is publication for the purpose of making a prima facie case of defamation." *Simpson v. Mars Inc.*, 113 Nev. 188, 191, 929 P.2d 966, 968 (1997). The court in *Simpson* explained that "[c]orporations may have the defense of privilege to allegations of defamation, but the burden of alleging and proving the privilege are on the defendant corporation, not the plaintiff." *Id.* at 192, 929 P.2d at 968.

In *Blanchard v. Circus Casinos, Inc.*, 127 Nev. 1119, 373 P.3d 896 (2011), the court indicated that "[p]ublication occurs when the statement is communicated to a third person." *Id.* (citing *M & R Investment Co. v. Mandarino*, 103 Nev. 711, 715, 748 P.2d 488, 491 (1987)). Further, the court explained that:

> A defamatory statement made between employees of a corporation, however, does not constitute publication. Normally, publication to a third party is proven by direct evidence that the third party heard the defamatory statement, but circumstantial evidence may be used to prove that the defamatory statement was communicated to a third person when evidence is presented "regarding the tone in which the defamatory statement was made or the proximity of third parties."

Id. (quoting *M & R Investment Co.*, 103 Nev. at 715–16, 748 P.2d at 491).

3. Self-Publication

Generally, the originator of a defamatory statement is not liable for damage that comes as a result of the defamed person's decision to voluntarily repeat said statement to others. *Xi Lin v. Circuit City, Inc.*, 106 F.3d 412, 3 (9th Cir. 1996) (citing *Shoemaker v. Friedberg*, 80 Cal.App.2d 911, 916 (1947)). An exception to this rule exists "where the originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third

person." *Xi Lin*, 106 F.3d at 3 (quoting *McKinney v. County of Santa Clara*, 110 Cal.App.3d 787, 796 (1980)). "A 'strong compulsion' may exist when a job seeker must tell a prospective employer the reasons he was terminated in order to explain away a negative job reference from his former employer." *Xi Lin*, 106 F.3d at 3 (citing *Live Oak Publishing Co. v. Copenhagen*, 234 Cal.App.3d 1277, 286 Cal.Rptr. 198 (1991)).

In *Xi Lin*, Lin failed to show that his former employer did, or that he had a reason to believe they would, give him a negative job reference. *Xi Lin*, 106 F.3d at 3. Lin stated that he left his previous job due to personal reasons on at least one job application, indicating an absence of a strong compulsion to disclose the actual reason he was fired. *Id*. Further, the only statement made by his former employer to prospective employers suggested that Lin left due to personal reasons, thus nullifying any reason he may have had to believe that his former employer gave him a negative reference. *Id*. Because Lin was unable to show a strong compulsion for him to disclose the reasons for which he was fired from his previous job, the court held that Lin's former employer had not defamed him under the theory of compelled self-publication and granted summary judgment on the matter.

While this case is unpublished, it is the only decision on the matter in Nevada and thus may be considered persuasive when considering a self-publication defamation claim.

4. Invited Libel

There are no cases or statutes in Nevada discussing the viability of a defamation claim where an employee invites the publication of a libelous statement about himself or herself.

5. Opinion

"In Nevada, statements of opinion cannot be defamation as a matter of law, because there is no such thing as a false idea." *Blanck v. Hager*, 360 F. Supp. 2d 1137, 1159 (D. Nev. 2005), aff'd, 220 F. App'x 697 (9th Cir. 2007). "To prevail on a defamation claim, a party must show publication of a false statement of fact." *Id.* (quoting *Posadas v. City of Reno*, 109 Nev. 448, 851 P.2d 438, 443 (1993)). Although pure opinions are protected by the First Amendment, a statement that may imply a false assertion of fact is actionable. *Riggs v. Clark Cty. Sch. Dist.*, 19 F. Supp. 2d 1177, 1180 (D. Nev. 1998) (citation omitted).

6. Actual Harm to Reputation Recognized

In *Firebaugh v. United States,* the court awarded damages to the plaintiff after a defamatory statement made by his former employers caused him to suffer a loss of income. (D. Nev. 2015). The defendants responded to requests for employment references in regard to the plaintiff by stating that he had refused to comply with a drug test when, in reality, the plaintiff was fired "for refusing to drive with unsafe equipment and threatening to report the company for using such equipment. *Id* at 1. The Department of Labor (DOL) discovered the improper reason for which the plaintiff was fired and issued a preliminary order requiring the defendants to (1) pay back wages to the plaintiff, (2) remove any adverse statements relating to the plaintiff's discharge in his file, and (3) refrain from making any additional adverse statements relating to the plaintiff's discharge in any future requests for employment references. *Id* at 2. Despite the actions taken by the DOL, the plaintiff was still refused employment by several employers who had been told that he refused to submit to a drug test. *Id* at 1. Though the plaintiff was able to secure some form of employment, his wages were significantly less than that which he could have earned had he been

able to obtain employment with the companies that refused to hire him based on the defamatory statements. *Id*. The court awarded the plaintiff damages amounting to the difference between the wages he could have earned and those that he actually earned. *Id*. This award was "based on the competent evidence that [the plaintiff] offered about his inability to find comparable work due to [the defendants'] false statements." *Id* at 2.

E. Job References and Blacklisting Statutes

Blacklisting is prohibited in Nevada. Nev. Rev. Stat. § 613.210. Any person who engages in this activity is guilty of a misdemeanor. *Id.*

"A person shall not blacklist or cause to be blacklisted or publish the name of or cause to be published the name of any employee, mechanic or laborer discharged by that person with the intent to prevent that employee, mechanic or laborer from engaging in or securing similar or other employment from any other person." Nev. Rev. Stat. § 613.210(2).

Further, if "any officer or agent or any person blacklists or causes to be blacklisted or publishes the name of or causes to be published the name of any employee, mechanic or laborer discharged by that person with the intent to prevent that employee, mechanic or laborer from engaging in or securing similar or other employment from any other person in any manner conspires or contrives, by correspondence or otherwise, to prevent that discharged employee from procuring employment, he is guilty of a misdemeanor." Nev. Rev. Stat. § 613.210(3).

Pursuant to Section 613.210(4), subsections 2 and 3 do not prohibit any person from giving in writing, at the time the employee leaves or is discharged from the service of the employer, a truthful statement of the reason for such leaving or discharge, nor do subsections 2 and 3 prevent any employer from giving any employee or former employee any statement with reference to any meritorious services which the employee may have rendered to that employer. The employer shall supply statements as provided in this subsection upon demand from the employee, but no such statement is required unless the employee has been in service for a period of not less than 60 days. Only one such statement may be issued to that employee. Nev. Rev. Stat. § 613.210(4).

F. Non-Disparagement Clauses

There are no cases or statutes in Nevada discussing the viability of a defamation claim where an employee or employer violated a non-disparagement clause by publishing defamatory statements.

VII. EMOTIONAL DISTRESS CLAIMS

Courts in Nevada have, in certain circumstances, recognized claims for negligent and intentional infliction of emotional distress in the employment context. In *Shoen v. Amerco, Inc*., 111 Nev. 735, 896 P.2d 469 (1995), the court determined that issues of fact remained where (1) the defendant allegedly discontinued the plaintiff's retirement compensation for the expressed purpose of causing the plaintiff "extreme financial hardship and emotional distress," (2) the defendant was prosecuting litigation solely to harass the plaintiff, and (3) there was some additional threatening behavior. *Id.* at 747, 896 P.2d at 477. Further, the Supreme Court of Nevada has recognized "claims for intentional and negligent infliction of

emotional distress in the context of wrongful employment termination." *State v. Eighth Judicial Dist. Court*, 118 Nev. 140, 152, 42 P.3d 233, 241 (2002) (citing *Shoen*, 111 Nev. at 747, 896 P.2d at 476). However, in order to sustain such a claim, "the plaintiff needs to show that there was extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress." *Id.* (citations and internal quotation marks omitted).

"[A] plaintiff must show more than just termination to establish extreme and outrageous conduct to sustain a claim for infliction of emotional distress." *Hirschhorn v. Sizzler Restaurants Int'l, Inc.*, 913 F. Supp. 1393, 1400 n.1 (D. Nev. 1995). Conduct is extreme and outrageous enough to permit recovery when it "is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Minshew v. Donley*, 911 F.Supp.2d 1043, 1063 (D. Nev. 2012) (quoting *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 953 P.2d 24, 26 (1998)). In *Minshew*, it is alleged that the defendant "negligently inflicted emotional distress on Minshew by discharging her at a time of significant unemployment and economic adversity in Las Vegas." *Minshew*, 911 F.Supp.2d at 1063. While certain circumstances may support the viability of a claim alleging negligent infliction of emotional distress in the employment context, "as a general matter, terminating an employee, even if discriminatory, does not amount to extreme and outrageous conduct in and of itself." *Id*. (citing *Alam v. Reno Hilton Corp.*, 819 F.Supp. 905, 911 (D. Nev. 1993)). The court ultimately granted the defendant's motion for summary judgment, holding that "[a]n employer rescinding an offer of employment, even if the plaintiff is the sole breadwinner in difficult economic times, is not outside all bounds of decency or utterly intolerable in a civilized community." *Minshew*, 911 F.Supp.2d at 1063.

A. Intentional Infliction of Emotional Distress

In *Burns v. Mayer*, 175 F. Supp. 2d 1259 (D. Nev. 2001), the plaintiff filed a sexual harassment suit against Harrah's Las Vegas Inc., alleging unwanted physical contact in the workplace which resulted in both intentional and negligent infliction of emotional distress. *Id.* at 1263. The United States District Court for the District of Nevada stated:

> To establish a cause of action for intentional infliction of emotional distress, the plaintiff must establish the following: (1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation.

Id. at 1268 (citing *Olivero v. Lowe*, 995 P.2d 1023, 1025 (Nev. 2000)).

The court went on to explain that "[l]iability for emotional distress generally does not extend to 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" *Id.* (quoting *Candelore v. Clark Cty. Sanitation Dist.*, 752 F. Supp. 956, 962 (D. Nev. 1990) (quoting The Restatement (Second) of Torts § 46 cmt. d (1965)), *aff'd*, 975 F.2d 588 (9th Cir. 1992)). However, unwelcome sexual advances, sexual remarks, crude innuendos, inappropriate physical touching, and retaliation may reasonably be regarded as extreme and outrageous conduct. *Id.* (citation and internal quotation marks omitted).

In *Burns*, the defendants challenged the plaintiff's allegation that she suffered severe emotional distress. *Id.* The court held that the plaintiff did suffer severe emotional distress where the "plaintiff allegedly suffers from severe headaches, stomach aches, stress and depression. Plaintiff has undergone

psychiatric treatment and has been diagnosed with adjustment disorder as a result of her allegedly hostile work environment." *Id.* at 1268–69. The court further explained that "[g]eneral physical or emotional discomfort is insufficient to demonstrate severe emotional distress." *Id.* at 1268 (citing *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 482, 851 P.2d 459, 462 (1993)). Rather, "the stress must be so severe and of such intensity that no reasonable person could be expected to endure it." *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 911 (D. Nev. 1993) (citing *Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141, 1145 (1983)).

B. Negligent Infliction of Emotional Distress

The Supreme Court of Nevada had its first opportunity to decide whether a plaintiff may recover for negligent infliction of emotional distress caused by negligent acts committed directly against him or her. *Chowdhry v. NLVH, Inc*., 109 Nev. 478, 482 (1993). In *Chowdry*, as a result of his being accused of patient abandonment, Chowdry was purportedly upset and had trouble sleeping. *Id*. at 483. The court concluded that "[i]nsomnia and general physical or emotional discomfort are insufficient to satisfy the physical impact requirement." *Id*. Because Chowdry was unable to produce evidence of serious emotional distress, physical injury or illness, or that which could demonstrate the existence of extreme or outrageous conduct, the court granted directed verdicts on this claim.

In *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005), Jane Doe, an employee of Safeway and a mentally handicapped female, was sexually assaulted by an employee of the company who provided janitorial services at the Safeway location where Doe worked. *Id.* at 727, 121 P.3d at 1028. The plaintiff filed a complaint alleging five causes of action, including negligent infliction of emotional distress. *Id.* at 728, 121 P.3d at 1029. The Supreme Court of Nevada held that the district court properly granted summary judgment in favor of Safeway and Action Cleaning because the Nevada Industrial Insurance Act ("NIIA") provides the exclusive remedy for Doe's injuries. *Id.* at 732, 121 P.3d at 1031. In *Fanders v. Riverside Resort & Casino, Inc.*, 126 Nev. 543, 245 P.3d 1159 (2010), this ruling was clarified and limited, wherein the Supreme Court of Nevada found that, while the NIIA is the exclusive remedy against the employer, the employee can pursue separate tort claims against co-employees and independent contractors. *Id.* at 550, 245 P.3d at 1164.

In *Burns v. Mayer*, 175 F. Supp. 2d 1259 (D. Nev. 2001), the plaintiff brought claims of intentional and negligent infliction of emotional distress, assault, battery, and false imprisonment. *Id.* at 1263. Harrah's, a hotel and casino located in Las Vegas, asserted that the intentional and negligent infliction of emotional distress claims brought against it were preempted by Nevada's anti-discrimination statute. *Id.* at 1267 (citing Nev. Rev. Stat. §§ 613.330 *et seq.*). However, the United States District Court for the District of Nevada held that the claims were not preempted by Nevada's anti-discrimination statute. *Id.* at 1267–68. In so holding, the court stated:

> Most courts, including those of Nevada's sister states of California and Arizona, permit both a sexual harassment claim under state anti-discrimination laws and an emotional distress claim under common law. The Court believes that, if presented with the issue, the Nevada Supreme Court would side with the California and Arizona high courts and find that Nevada's anti-discrimination law also does not preempt common law tort claims.

Id. (internal citations omitted).

Moreover, the court defined negligent infliction of emotional distress as requiring "the plaintiff to show that the defendant acted negligently (i.e. breached a duty owed to plaintiff) and either a physical impact . . . or, in the absence of physical impact, proof of 'serious emotional distress' causing physical injury or illness." *Id.* at 1269 (citing *Barmettler v. Reno Air Inc.*, 114 Nev. 441, 956 P.2d 1382, 1387 (1998)).

VIII. PRIVACY RIGHTS

A. Generally

"As early as 1972, in *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), the United States Supreme Court established that a terminated employee has a constitutionally based liberty interest in clearing his name when stigmatizing information regarding the reasons for his termination is publicly disclosed." *Blanck v. Hager*, 360 F. Supp. 2d 1137, 1153 (D. Nev. 2005). "Placement of stigmatizing information in an employee's personnel file constitutes publication when the governing state law classified an employee's personnel file as a public record." *Id.*

Nevada requires encryption of sensitive human resources data such as employee's name, social security number, employee identification number, driver's license number, and credit or debit cards or financial account information. There are several protections employees are required to use for this sensitive information. First, employees who electronically transfer information outside of the internal secure system, other than via a fax system, must use "encryption to ensure the security of electronic transmission." Nev. Rev. Stat. § 603A.215(2)(a). Further, the employer shall not "[m]ove any data storage device containing personal information beyond the logical or physical controls of the data collector, its data storage contractor or, if the data storage device is used by or is a component of a multifunctional device, a person who assumes the obligation of the data collector to protect personal information, unless the data collector uses encryption to ensure the security of the information." Nev. Rev. Stat. § 603A.215(2)(b). This includes computers, cell phones, disk drives and virtually any other medium used to store electronic information. Nev. Rev. Stat. § 603A.215(5)(b). This, however, does not apply to "[d]ata transmission over a secure, private communication channel for: (1) [a]pproval or processing of negotiable instruments, electronic funds transfers or similar payment methods or (2) [i]ssuance of reports regarding account closures due to fraud " Nev. Rev. Stat. § 603A.215(4)(b).

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Section 613.570 of the Nevada Revised Statutes prohibits Nevada employers from making an adverse employment decision based on credit information or from requesting or requiring any prospective or current employee to submit a consumer credit report as a condition of employment, with limited exceptions. Specifically, Section 613.570 makes it unlawful for any Nevada employer to:

1. Directly or indirectly require, request, suggest or cause any employee or prospective employee to submit a consumer credit report or other credit information as a condition of employment;

2. Use, accept, refer to or inquire about a consumer credit report or other credit information;

3. Discharge, discipline, discriminate against in any manner or deny employment or promotion to, or threaten to take any such action against any employee or prospective employee:

   a. Who refuses, declines or fails to submit a consumer credit report or other credit information; or

   b. On the basis of the results of a consumer credit report or other credit information; or

4. Discharge, discipline, discriminate against in any manner or deny employment or promotion to, or threaten to take any such action against any employee or prospective employee who has:

   a. Filed any complaint or instituted or caused to be instituted any legal proceeding pursuant to NRS 613.520 to 613.600, inclusive;

   b. Testified or may testify in any legal proceeding instituted pursuant to NRS 613.520 to 613.600, inclusive; or

   c. Exercised his or her rights, or has exercised on behalf of another person the rights afforded to him or her pursuant to NRS 613.520 to 613.600, inclusive.

Nev. Rev. Stat. § 613.570.

Section 613.580 of the Nevada Revised Statutes outlines the exceptions in which the use of credit information is permissible to evaluate an employee or prospective employee for employment, promotion, reassignment, or retention. As such, an employer may request or consider an employee or potential employee's credit if:

1. The employer is required or authorized, pursuant to state or federal law, to use a consumer credit report or other credit information for that purpose;

2. The employer reasonably believes that the employee or prospective employee has engaged in specific activity which may constitute a violation of state or federal law; or

3. The information contained in the consumer credit report or other credit information is reasonably related to the position for which the employee or prospective employee is being evaluated for employment, promotion, reassignment, or retention as an employee.

Nev. Rev. Stat. § 613.580.

With regard to the last exception, Nevada Revised Statute § 613.580(3), "reasonably related" includes positions which involve one or more of the following non-exclusive categories:

a. The care, custody and handling of, or responsibility for, money, financial accounts, corporate credit or debit cards, or other assets;

b. Access to trade secrets or other proprietary or confidential information;

c. Managerial or supervisory responsibility;

d. The direct exercise of law enforcement authority as an employee of a state or local law enforcement agency;

e. The care, custody and handling of, or responsibility for, the personal information of another person;

f. Access to the personal financial information of another person;

g. Employment with a financial institution that is chartered under state or federal law, including a subsidiary of affiliate of such a financial institution; or

h. Employment with a licensed gaming establishment, as defined in NRS 463.0169.

According to Nevada Revised Statute § 613.600, the Nevada Labor Commissioner may impose administrative fines of up to $9,000 for each violation of the law and may bring a civil action to restrain any violations, seek injunctive relief, or request the payment of lost wages or benefits. Further, individuals will be able to seek equitable relief in a private civil action against employers for violations under this law, as well as the payment of lost wages and benefits, legal costs, and attorneys' fees. *See* Nev. Rev. Stat. § 613.590. This statute also authorizes class action lawsuits brought on behalf of similarly situated applicants or employees. *See id.*

2. Background Checks

Section 1681 in Title 15 of the United States Code states that a consumer report may be procured for employment purposes when:

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

15 U.S.C. § 1681b(b)(2)(A).

In *Luna v. Hansen and Adkins Auto Transport, Inc.*, 956 F.3d 1151 (9th Cir. 2020), Luna alleged that Hansen and Adkins (H&A) violated the Fair Credit Reporting Act (FCRA) "by providing a FCRA disclosure simultaneously with other employment materials, and by failing to place a FCRA authorization on a standalone document." *Id*. at 1152. H&A's hiring process involved a multi-form, multi-page employment agreement that "included notices and authorizations permitting [H&A] to retrieve safety history and driving records, and conduct drug and background checks." *Id*. In completing this agreement, applicants signed two forms pertaining to the consumer report: (1) the disclosure, stating "that reports verifying your previous employment, previous drug and alcohol test results, and your driving record may be obtained on you for employment purposes"; and (2) the authorization, indicating that his or her signature authorize H&A "or their subsidiaries or agents to investigate my previous record of employment." *Id*. In affirming the district court's decision, the court concluded that requiring procurement of a consumer report to occur as a standalone event, absent additional forms or otherwise, would stretch "the statute's requirements beyond the limits of law and common sense." *Id*. As such, disclosure and authorization of a background check pursuant to the FCRA's requirements are sufficiently accomplished by providing both to the prospective employee on a separate form and in a clear and concise manner, whether done so simultaneously with other forms or not.

In *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082 (9th Cir. 2020), the court held that a disclosure informing a prospective employee that a consumer report may be obtained during the hiring process may also include "some concise explanation of what that phrase means." *Id*. at 1088. "For example, a company could briefly describe what a 'consumer report' entails, how it will be 'obtained,' and for which type of 'employment purposes' it may be used." *Id*. at 1088–89. As such, an employer may include a brief statement explaining that an investigative report may be obtained as said reports are a subcategory of consumer reports. *Id*. at 1089.

In *Ruiz v. Shamrock Foods Company*, 804 Fed.Appx. 657 (9th Cir. 2020), the court considered the legality of a consumer report procured during the employment process as a result of the prospective employee's inability to understand his employment agreement. A job applicant is deprived of his rights to privacy and information protected by 15 U.S.C. § 1681b(b)(2)(A) if he "is unaware that he is authorizing the procurement of a consumer report due to a prospective employer's failure to provide a clear and conspicuous written disclosure." *Id*. at 660 (citing *Syed v. M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017). By asserting a claim that they were confused about and did not know what they were authorizing when signing their employment forms, the plaintiffs, Guerrero and Torres, produced sufficient evidence to support a justifiable inference that they "were deprived of their substantive rights to information and privacy." *Id*. at 661. As such, the burden of proof was shifted to Shamrock to demonstrate that the two plaintiffs knew about the alleged Fair Credit Reporting Act (FCRA) violations at the time they signed their employment agreements, or "that a reasonably diligent plaintiff would have discovered the facts constituting the violation." *Id*. (quoting *Drew v. Equifax Info. Servs., LLC*, 690 F.3d 1100, 1109 (9th Cir. 2012), *Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1206 (9th Cir. 2012). Shamrock was able to sufficiently show that Guerrero constructively knew about the alleged FCRA violations when signing the forms because he testified to understanding that a background check was involved in the hiring process and his job offer clarified that said check would include a consumer report. *Id*. Shamrock could not, however, make the same showing for Torres, given that Torres' job offer mentioned a background check but did not describe what said check would consist of and Shamrock did not provide any additional clarification. *Id*. As such, the court

rejected the alleged FCRA violation rooted in misunderstanding when the job offer provided additional clarification but accepted the same when the job offer made no such clarification. *Id*.

C. Specific Issues

1. Workplace Searches

In *United States v. Bulacan*, 156 F.3d 963 (9th Cir. 1998), the court established that administrative searches were exempt from the reasonableness standard expressed in the Fourth Amendment and were instead subject to a balancing test performed by the court that considers "the need to search against the invasion which the search entails." *Id*. at 967. This decision was subsequently cited in *United States v. Gonzalez*, 300 F.3d 1048 (9th Cir. 2002), when the court explained that this type of "intrusion has to be limited to what is consistent with the administrative need that justifies it" or rather that "the search must be 'justified at its inception and…reasonably related in scope to the circumstances that justified it." *Id*. at 1054 (quoting *Ortega v. O'Connor*, 146 F.3d 1149, 1158 (9th Cir. 1998)). In *Gonzalez*, the McChord Air Force Base Exchange had a policy in place which permitted store detectives to randomly search the bags on employees as they left at the end of their shifts. *Id*. at 1050. Each employee was required to sign a document indicating that he or she understood the policy before starting work. *Id*. Gonzalez was leaving the Exchange at the end of his shift when he was stop by a store detective who searched his backpack and ultimately found four packages of spark plugs. *Id*. The court held that "[t]he store was entitled to search his backpack for stolen merchandise, even though the search was on a random basis without reasonable suspicion, but only because he had clear notice before he ever came to work with his backpack that he would be subject to just such a search, and the search did not go beyond the scope appropriate to looking for stolen merchandise." *Id*. at 1055. As such, prior notice of potential, reasonable searches may be a viable way for government employees to circumvent potential Fourth Amendment violations in the workplace.

While the type of search described in *Gonzalez* is constitutional, an employer that is implementing a mandatory package and bag exit search for all of its employees must pay said employees for the time spent undergoing the search. The court in *Frlekin v. Apple, Inc.*, 979 F.3d 639 (9th Cir. 2020) looked to Cal. Code Regs. tit. 8, § 11070(4)(B), which states that time spent by employees waiting for and undergoing exit searches pursuant to an employer's bag search policy was compensable as "hours worked," when it ruled in favor of the plaintiffs. It reasoned that "Apple's exit searches are required as a practical matter, occur at the workplace, involve a significant degree of control, are imposed primarily for Apple's benefit, and are enforced through threat of discipline. Thus, according to the 'hours worked' control clause, plaintiffs 'must be paid.'" *Frlekin*, 979 F.3d 639, 644. (quoting *Frlekin v. Apple, Inc.*, 8 Cal.5th 1038, 1056 (2020)).

In *United States v. Ziegler*, 474 F.3d 1184 (9th Cir. 2007), Cochenour, the owner of Frontline Processing, contacted Special Agent Kennedy of the FBI in regard to a tip that one of his employees had accessed child pornography on his workplace computer. *Id*. at 1185. Kennedy contacted Frontline's IT Administrator, Softich, who confirmed the tip that Cochenour received and stated that the address and log-in information indicated that the offensive sites had been accessed on the computer in Ziegler's office. *Id*. at 1186. Further, Kennedy was informed by another individual in Frontline's IT department, Schneider, that each computer had a device capable of monitoring each employee's internet activity, of which the employees were aware. *Id*. This device suggested that Ziegler had viewed several images of child pornography and searched terms such as "underage girls." *Id*. Softich and Schneider obtained a key to Ziegler's private office from Frontline's Chief Financial Officer, Reavis, and adequately dismantled the casing

of his computer to permit them to make two copies of the hard drive. *Id*. at 1187. Shortly thereafter, Freeman, Frontline's corporate counsel, contacted Kennedy to inform him that the FBI would not need a search warrant for the premises because they intended to fully cooperate with the FBI's investigation. *Id*.

The court did not ultimately find the entry into Ziegler's office by Softich and Schneider to be a violation of Ziegler's Fourth Amendment rights because Softich and Schneider were given permission to enter Ziegler's office by Reavis, who had the requisite authority. *Id*. at 1192. However, it did conclude that Ziegler had a reasonable expectation of privacy in his office, due in part to the fact that he kept it locked and did not share it with co-workers, which could have been sufficiently infringed upon by the government to constitute a Fourth Amendment violation had the entry been completed by a government employee. *Id*. at 1190. This case illustrates the fact that an employee may have a reasonable expectation of privacy in his or her office from searches made by the government without consent, but that the necessary consent can be given by said employee's employer.

The court expanded its decision in *Ziegler* when it concluded that, "except in the case of a small business over which an individual exercises daily management and control, an individual challenging a search of workplace areas beyond his own internal office must generally show some personal connection to the places searched and the materials seized." *United States v. SDI Future Health, Inc*., 568 F.3d 684, 698 (9th Cir. 2009). It went on to establish a set of three factors that a court should consider when trying to determine the strength of the requisite personal connection: "(1) whether the item seized is personal property or otherwise kept in a private place separate from other work-related material; (2) whether the defendant had custody or immediate control of the item when officers seized it; and (3) whether the defendant took precautions on his own behalf to secure the place searched or things seized from any interference without his authorization." *Id*. Based on this decision, it is possible for an employee to assert a privacy right beyond the four walls of his or her private office, assuming he or she is able to make a proper showing of a strong personal connection to the place or object to be searched.

2. Electronic Monitoring

Under Nevada Revised Statute § 200.650:

> [A] person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

This statute was subsequently amended in 1973 to include that a person could eavesdrop if the person met the requirements of the wiretap statutes. 1973 Nev. Stat., ch. 791, §§ 10, 11, at 1749. As defined by statute, a wire communication is "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception." NRS 179.455. The Supreme Court of Nevada established that this definition is applicable to cellular telephone calls and text messages, making Nevada's electronic communication statute as protective as the Electronic Communications Privacy Act enacted by Congress in 1986. *Sharpe v. State*, 131 Nev. 269 (2015).

In *Regional Transportation Commission of Washoe County v. Teamsters Local 533*, 749 Fed.Appx. 627 (9th Cir. 2019), the court established that video and audio monitoring devices on public buses were not in violation of NRS § 200.650 when a company that has contracted to use buses belonging to a third-party elects to install cameras equipped with microphones after first notifying its employees of the installation and posting a notice in the front of each bus. *Id*. at 627. The court made it clear in this decision that proper notice circumvents the illegality associated with electronic monitoring as defined by NRS § 200.650.

3. Social Media

Nevada Revised Statute § 613.135 makes it a crime for an employer to require an employee or prospective employee to provide personal social media information, such as usernames and passwords. Section 613.135(4) defines a "social medial account" as "any electronic service or account or electronic content, including, without limitation, videos, photographs, blogs, video blogs, podcasts, instant and text messages, electronic mail programs or services, online services or Internet website profiles." As such, pursuant to Section 613.135(1), it is unlawful for an employer to:

> (a) Directly or indirectly, require, request, suggest or cause any employee or prospective employee to disclose the username, password or any other information that provides access to his or her personal social media account.
>
> (b) Discharge, discipline, discriminate against in any manner or deny employment or promotion to, or threaten to take any such action against any employee or prospective employee who refuses, declines or fails to disclose the username, password or any other information that provides access to his or her personal social media account.

However, it "is not unlawful for an employer in [Nevada] to require an employee to disclose the user name, password or any other information to an account or a service, other than a personal social media account, for the purpose of accessing the employer's own internal computer or information system." Nev. Rev. Stat. § 613.135(2).

In regard to discipline in the workplace based on an employee's social media activity, the United States Supreme Court established a framework within which to balance a government employee's right to free speech under the First Amendment and the government's interest in maintaining discipline and avoiding disruption in the workforce. Under this framework, the plaintiff must first establish that "(1) she spoke on a matter of public concern; (2) she spoke as a private citizen rather than a public employee; and (3) the relevant speech was a substantial or motivating factor in the adverse employment action." *Moser v. Las Vegas Metropolitan Police Department*, 984 F.3d 900, 904 (9th Cir. 2021) (quoting *Barone v. City of Springfield, Or.*, 902 F.3d 1091, 1098 (9th Cir. 2018). "If the plaintiff establishes this prima facie case, the burden then shifts to the government to show 'that (4) it had an adequate justification for treating [its employee] different than other members of the general public; or (5) it would have taken the adverse employment action even absent the protected speech.' If the government does not meet its burden, then the First Amendment protects the plaintiff's speech as a matter of law." *Id*. at 904–905. The court in *Moser* reversed and remanded the case for application of this framework by the district court. *Id*. at 912. In doing so, it stated that "[f]or private employers, it is their prerogative to take action against an intemperate tweet

or a foolish Facebook comment. But when the government is the employer, it must abide by the First Amendment." *Id*. at 911–912. As such, in terms of adverse employment actions based on social media activity, private entities are free to choose what is and is not acceptable, while the government must take an objective approach under the framework expressed above.

Further, in a non-employment matter, a Nevada district court concluded that if a Twitter user maintains a public setting and tweets, "he or she intends that anyone that wants to read the tweet may do so, so there can be no reasonable expectation of privacy." *Rosario v. Clark Cty. Sch. Dist.*, No. 2:13-CV-362 JCM (PAL), 2013 WL 3679375, at *1 (D. Nev. July 3, 2013). On the other hand:

> [When] a user maintains a private setting, then only his or her followers may read the tweet. If a person who is not a follower of a private user's profile searches and finds that private user's profile, that person who searched and found the profile may not read any of the private user's tweets. A Twitter user with his or her privacy setting set to private has a more colorable argument about the reasonable expectation of privacy in his or her tweets than a user with a public setting.

Id. at 6.

4. Taping of Employees

See discussion under "Electronic Monitoring" above. In *Lane v. Allstate Insurance Co.*, 114 Nev. 1176, 969 P.2d 938 (1998), an employee tape-recorded telephone several conversations with his employer, in violation of Section 200.650 of the Nevada Revised Statutes. *Id.* at 1179, 969 P.2d at 940. The lower court dismissed the employee's suit against his employer as a sanction for the illegal recordings. *Id.* at 1181, 969 P.2d at 941.

5. Release of Personal Information on Employees

According to Nevada Revised Statute § 613.075(1):

> Any person or governmental entity who employs and has under his or her direction and control any person for wages or under a contract of hire, or any labor organization referring a person to an employer for employment, shall, upon the request of that employee or person referred:
>
> (a) Give the employee or person referred a reasonable opportunity, during the usual hours of business, to inspect any records kept by that employer or labor organization containing information used:
>
> (1) By the employer or labor organization to determine the qualifications of that employee and any disciplinary action taken against the employee, including termination from that employment; or
>
> (2) By the labor organization with respect to that person's position on its list concerning past, present and future referrals for employment; and

(b) Furnish the employee or person referred with a copy of those records.

Further, "[t]he records to be made available do not include confidential reports from previous employers or investigative agencies, other confidential investigative files concerning the employee or person referred or information concerning the investigation, arrest or conviction of that person for a violation of any law." Nev. Rev. Stat. § 613.075(1).

According to Nevada Revised Statute § 613.075(7), no copies of the employee's records may be "furnished to an employee or former employee under this statute unless the employee or former employee has been or was employed for more than 60 days."

6. Medical Information

In *Roberts v. Clark County School District*, 215 F.Supp.3d 1001 (2016), the plaintiff, Roberts, worked for the Clark County School District (CCSD) police department. While employed with CCSD, Roberts began the process of transitioning from female to male. *Id*. at 1005. Between 2011 and 2012, Roberts changed both his name and gender and requested that CCSD accept said changes. *Id*. After making this request, Roberts was prohibited from using the male restrooms on CCSD property and asked for medical records documenting his genital surgery, despite providing CCSD with his updated driver's license and the order for his name change. *Id*. at 1005–07. The court held that CCSD's demand for Roberts' medical records constituted discrimination under Nevada's Anti-Discrimination Statute and his required use of gender-neutral restrooms was an adverse employment action under the same, in large part due to his being treated differently than similarly situated employees. *Id*. As such, in the State of Nevada, demanding medical records for customary changes to an employee's file, such as his or her name, is generally not permitted.

7. Restrictions on Requesting Salary History

There are no specific cases or statutes in Nevada concerning restrictions on requesting Salary History.

IX. WORKPLACE SAFETY

A. Negligent Hiring/Supervision/Retention

"The tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position." *Burnett v. C.B.A. Sec. Serv.,* 107 Nev. 787, 789, 820 P.2d 750, 752 (1991). Negligent hiring "constitutes a failure to prevent an assault and battery." *Hernandez v. First Fin. Ins. Co.,* 106 Nev. 900, 902, 802 P.2d 1278, 1280 (1990). In Nevada, the elements for negligent supervision/retention include: (1) a general duty on the employer to use reasonable care in the training, supervision, and retention of employees to ensure that they are fit for their positions, (2) breach, (3) injury, and (4) causation. *See Hall v. SSF, Inc*., 112 Nev. 1384, 1392, 930 P.2d 94, 99 (1996); *see also Visnovits v. White Pine Cty. Sch. Dist.*, No. 3:14-CV-00182-LRH, 2015 WL 1806299, at *5 (D. Nev. Apr. 21, 2015) and *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189, 1195 (D. Nev. 2002). An employer breaches the duty "when it hires an employee even though the employer

knew, or should have known, of that employee's dangerous propensities." *Hall*, 112 Nev. at 1392, 930 P.2d at 98.

In *Bell v. Harge*, 81 Fed.Appx. 943, 945 (2003), a school district hired an individual after first submitting his fingerprints to the Nevada Highway Patrol's central repository and receiving no disqualifying information as a result. Apparently, this check did not include submission of the fingerprints to the Federal Bureau of Investigation because a prior, out-of-state conviction for lewd conduct was overlooked. *Id*. However, the Nevada statute governing this process imposes on the Highway Patrol the duty to submit fingerprints it receives to the FBI if its initial search does not turn up any information. *Id*. As such, the school district was not held liable for negligent hiring given that it had relied on statutory processes for the purpose of upholding its duty to use reasonable care in hiring its employees.

In *Long v. Diamond Dolls of Nevada, LLC*, 2020 WL 6381673 (2020), an employee of Diamond Dolls complained, on numerous occasions, about the fact that another employee of the same was sexually assaulting her. Diamond Dolls did not take action on these complaints. *Id* at 7. The District Court for the District of Nevada concluded that, while Diamond Dolls did not owe this employee "a duty to provide her a sexual harassment free work environment," they did still owe her "a duty to conduct reasonable background checks on potential employees." *Id*. Based on the court's finding in this case, it is apparent that failing to take action on serious complaints or allegations in the workplace can cause an employer to be liable for the negligent retention of one of its employees.

B. Interplay with Worker's Compensation Bar

It is possible for employers to claim that an employee or former employee is barred from pursuing a separate civil action against the employer if he or she has received compensation under the worker's compensation provisions. Nev. Rev. Stat. § 617.017. This Section, specifically titled "Rights and remedies exclusive; provisions of chapter conclusive and obligatory; exclusive remedy extends to architects and engineers working for contractor; compensation bars recovery in other states," establishes the following:

> 1. The rights and remedies provided in this chapter on account of an occupational disease sustained by an employee, arising out of and in the course of the employment, are exclusive, except as otherwise provided in this chapter, of all other rights and remedies of the employee, the employee's personal or legal representative, dependents or next of kin, at common law or otherwise, on account of the disease.
>
> 2. The terms, conditions, and provisions of this chapter for the payment of compensation and the amount thereof for such diseases sustained or death resulting from such diseases are conclusive, compulsory, and obligatory upon both employers and employees coming within the provisions of this chapter.
>
> 3. The exclusive remedy provided by this section to a principal contractor extends, with respect to any occupational disease sustained by an employee of any contractor in the performance of the contract, to every architect or engineer who performs services for the contractor or any such beneficially interested persons.

> 4. If an employee receives any compensation or medical benefits under this chapter, the acceptance of the compensation or benefits is in lieu of any other compensation, award, or recovery against his or her employer under the laws of any other state or jurisdiction and the employee is barred from commencing any action or proceeding for the enforcement or collection of any benefits or award under the laws of any other state or jurisdiction.

Id.

Further, Nevada Revised Statute § 617.200, titled "Employers to provide compensation; employer and insurer relieved from liability," provides that:

> 1. Every employer within the provisions of this chapter, and those employers who accept the terms of this chapter and are governed by its provisions, shall provide and secure compensation according to the terms, conditions and provisions of this chapter for all occupational diseases contracted by an employee arising out of and in the course of the employment.
>
> 2. In such cases the employer or any insurer of the employer is relieved from other liability for recovery of damages or other compensation for those occupational diseases, unless otherwise provided by the terms of this chapter.

In *Wilson v. Ayers*, 2009 WL 1940102 (2009), the District Court for the District of Nevada applied this statute when it stated that "employers are immune from civil suits for injuries or accidents arising out of the scope of employment." *Id.* at 3, citing *Tucker v. Action Equipment and Scaffold Co*., 113 Nev. 1349, 951 P.2d 1027, 1029–30 (Nev. 1997). "The purpose of this immunity is to allow an employer to provide workers' compensation coverage in return for limited liability." *Id*.

C. Firearms in the Workplace

There are no specific cases or statutes in Nevada concerning firearms in the workplace. However, Nevada Revised Statute § 202.265 makes it unlawful to possess a firearm while on the property of the Nevada System of Higher Education, a public or private school or child care facility, or while in a vehicle belonging to the same. The statute includes exceptions for peace officers, school security guards, and other persons who have received permission. Nev. Rev. Stat. § 202.265(3)(a).

Furthermore, Nevada's concealed firearm statute places limitations on an employee's ability to possess a firearm while on the premises of: a public building that is located on the property of a public airport (Section 202.3673(2)); a public building that is located on the property of a public school or child care facility or the property of the Nevada System of Higher Education (Section 202.3673(3)(a)); a public building that has a metal detector at each public entrance or a sign at each public entrance prohibiting firearms (Section 202.3673(3)(b)). The limitations in Section 202.3673(3)(b) do not, however, apply to judges, prosecuting attorneys of agencies or political subdivisions of the United States or of Nevada, persons employed in said public building, and those who have been given permission to do so. Nev. Rev. Stat. 202.3673(4).

A letter from the Office of the Attorney General for the State of Nevada written to Mr. Damon Haycock, in his capacity as the Executive Officer of the Public Employees' Benefits Programs (PEBP), in 2018 states that Section 202.3673(1) of the Nevada Revised Statutes "provides without qualification that holders of permits to carry concealed firearms 'may carry' their firearms on the premises where they are employed, negating any authority on the part of the employer to impose conditions of employment that would effectively deny employees the ability to carry concealed firearms in accordance with this statutory authorization." It further explained that the statute "grants to permittees unqualified authority to carry concealed firearms in certain public building where they are employed." While this letter is not a binding decision made by the court, it does provide insight into how the court may be inclined to interpret this statute should it ever be presented with a case regarding the same.

D. Use of Mobile Devices

There are no specific cases or statutes in Nevada concerning the use of mobile devices in the workplace, though Nevada does have a statute that prohibits the use of handheld, wireless communication devices while operating a motor vehicle. Nev. Rev. Stat. § 484B.165. Specifically, Section 484B.165 prohibits typing, texting, reading, or sending messages through a cellular telephone or other such device while operating a motor vehicle in the State of Nevada. *Id.*

Prohibitions on the use of mobile devices while operating a motor vehicle do not apply to the following categories of individuals: (a) paid or volunteer firefighters, emergency medical technicians, ambulance attendants or other persons trained to provide emergency medical services who are acting within the course and scope of their employment; (b) law enforcement officers or designees who are acting within the course and scope of their employment; (c) persons who are reporting a medical emergency, safety hazard, or criminal activity or requesting assistance relating to one of the aforementioned situations; (d) persons who are responding to a situation requiring immediate action to protect the health, welfare, or safety of the driver or another person and stopping the vehicle would be inadvisable, impractical, or dangerous; (e) persons who are licensed by the Federal Communications Commission as an amateur radio operator and providing a communication service in connection with an actual or impending disaster or emergency, participating in a drill, test, or other exercise in preparation for a disaster or emergency, or otherwise communicating public information; or (f) employees or contractors of a public utility who use handheld wireless communication devices. Nev. Rev. Stat. § 484B.165(2)(a)–(f).

X. TORT LIABILITY

A. Respondeat Superior Liability

In Nevada, employers are liable for the actions of employees that occur during the course and within the scope of employment. However, an employer is not liable for the intentional conduct of an employee if the conduct of the employee was a truly independent venture not committed in the course of the very task assigned to the employee and not reasonably foreseeable under the facts and circumstances of the case. Nev. Rev. Stat. § 41.745. As such, Nevada courts have declined to extend liability to employers for an employee's acts that arose out of his or her own purpose and were not undertaken on the employer's behalf or in light of a sense of duty to the employer. *Wood v. Safeway, Inc.*, 121 Nev. 724, 738, 121 P.3d 1026, 1035 (2005).

Though decided many years ago, one of the cases cited most often on this subject in Nevada is *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 469 P.2d 399 (1970). This case involved a blackjack dealer who became angered at a statement made by a player and subsequently hit said player without leaving the table. *Id.* at 391, 469 P.2d at 400. The Supreme Court of Nevada determined that the employer hotel was liable for the dealer's actions because "his willful tort occurred within the scope of the very task assigned to him, that of dealing cards." *Id.* at 392, 469 P.2d at 400.

More recently, in *Sabreco, Inc. v. Dagger Properties 1, LLC*, 451 P.3d 82 (2019), the Supreme Court of Nevada found a business owner liable when he provided pre-signed checks to his bookkeeper and failed to properly supervise her in her duties as the same, thus enabling her to misappropriate and embezzle funds from various property owner accounts. The court concluded that, based on the facts of the case, "a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and probability of injury." *Id*. citing Nev. Rev. Stat. § 41.745(1).

In *Magdaluyo v. MGM Grand Hotel, LLC*, 2017 WL 736875 (2017), Magdaluyo, a dealer at MGM, sued his employer after he was suspected of theft when a valuable chip went missing in 1996. While he was never directly accused of committing said act, Magdaluyo alleges that he was closely monitored from 1996 through 2013, even being required to have his bag searched in 2012 to 2014. *Id*. Magdaluyo documented several instances of harassment in various journals and complained to MGM Human Resources on numerous occasions. *Id*. One specific occasion involved another dealer whistling at Magdaluyo and charging up to his face with the intention to head butt him and spray saliva in his face. *Id*. Magdaluyo asserted that said dealer was directed by MGM to test his patience by "serially whistling at him," a direction which could assign MGM vicarious liability as the dealer's employer. *Id*. The court determined, however, that "Magdaluyo fail[ed] to explain how, even if MGM had directed [the dealer] to try Magdaluyo's patient by whistling, it was reasonably foreseeable that [said dealer] would commit an assault or battery against Magdaluyo." *Id*. Based on the court's decision in this case, it is apparent that the standard for establishing reasonable foreseeability is quite high.

B. Tortious Interference with Business/Contractual Relations

"To establish a prima facie case of intentional interference with prospective contractual relations, a plaintiff must present evidence to show that the interference is intentional." *M & R Inv. Co. v. Goldsberry*, 101 Nev. 620, 622, 707 P.2d 1143, 1144 (1985).

"In Nevada, the elements of a cause of action for tortious interference are: (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts designed to disrupt the contractual relationship; (4) actual disruption of the contractual relationship; and (5) resulting damages." *Churchill v. Barach*, 863 F. Supp. 1266, 1276 (D. Nev. 1994). "[M]ere knowledge of the contract is insufficient to establish that the defendant intended or designed to disrupt the plaintiff's contractual relationship; instead, the plaintiff must demonstrate that the defendant intended to induce the other party to breach the contract with the plaintiff." *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 276, 71 P.3d 1264, 1268 (2003).
In Nevada, a party cannot, as a matter of law, tortiously interfere with its own contract. *Bartsas Realty, Inc. v. Nash*, 81 Nev. 325, 402 P.2d 650 (1965). "[A]gents acting within the scope of their employment, i.e. the principal's interest, do not constitute intervening third parties, and therefore cannot tortiously interfere with a contract to which the principal is a party." *Blanck v. Hager*, 360 F. Supp. 2d 1137, 1154 (D. Nev. 2005) (citing *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 911–12 (D. Nev. 1993) (citation omitted)).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

The geographical scope of a restriction on competition must be limited to areas where the employer has "established customer contacts and good will." *Shores v. Glob. Experience Specialists, Inc.*, 422 P.3d 1238, 1241 (2018) (quoting *Camco, Inc. v. Baker*, 113 Nev. 512, 520, 936 P.2d 829, 834 (1997) (citations and internal quotation marks omitted)).

In *Shores*, the Supreme Court of Nevada held that, despite the former employer being labeled a nationwide business, the requirement that the geographical scope must be limited to the areas where the employer had established customer contacts and goodwill was not eliminated. 422 P.3d at 1241–43. Non-compete covenants are subject to careful scrutiny when made in an employment context. *Id.*

In *Camco, Inc.*, several former at-will employees of SuperPawn, a pawn shop owned by Camco, Inc., opened their own pawn shop in Bullhead City, Arizona, a town just outside of Nevada. 113 Nev. at 513, 936 P.2d at 829. While employed at SuperPawn, the former employees each signed a contract wherein they agreed not to compete with SuperPawn within 50 miles of any SuperPawn store then existing, under construction, or the target of its plan for expansion, for a period of two years. *Id.* The district court denied Camco Inc.'s motion for preliminary judgment after determining, as a matter of law, that an at-will employee's continuing employment was insufficient consideration for the non-compete thereby making it invalid. *Id*. at 520, 936 P.2d at 834. The Supreme Court of Nevada rejected the district court's opinion on the issue of consideration, instead adopting the majority rule which stated that "an at-will employee's continued employment is sufficient consideration for enforcing a non-competition agreement." *Id*. at 517, 936 P.2d at 832.

The court further explained that "[c]ourts have concluded that in an at-will employment context continued employment is, as a practical matter, equivalent to the employer's forbearance to discharge; many courts have concluded that the consideration is equally valid phrased as a benefit to the employee or a legal detriment to the employer." *Id*. at 517 n.7, 936 P.2d at 832 n.7. Moreover, the court found that:

> There is no substantive difference between the promise of employment upon initial hire and the promise of continued employment subsequent to day one. A contrary holding might leave the employer in a position of having to fire an at-will employee and then rehire that same employee with the restrictive covenant in place, or have the covenant held unenforceable for want of consideration. . . .
>
> Upon review of the reasoning behind the majority rule, we hold that continued employment in an at-will employment context should be deemed sufficient consideration to uphold a post hire non-competition covenant.

Id. at 517–18, 936 P.2d at 832 (internal citations and quotation marks omitted).

Lastly, the court reiterated previous court holdings, stating:

> An agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable. Where the public interest is not directly involved, the test usually stated for determining the validity of the [non-competition] covenant as written is whether it imposes upon the employee any greater restraint than is reasonably necessary to protect the business and good will of the employer. A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted. The period of time during which the restraint is to last and the territory that is included are important factors to be considered in determining the reasonableness of the agreement.

113 Nev. at 518, 936 P.2d at 832–33 (quoting *Hansen v. Edwards*, 83 Nev. 189, 191–92, 426 P.2d 792, 793 (1967) (citations omitted)); *see also Jones v. Deeter*, 112 Nev. 291, 294, 913 P.2d 1272, 1274 (1996) (quoting *Hansen*, 83 Nev. at 191–92, 426 P.2d at 793); *Ellis v. McDaniel*, 95 Nev. 455, 458, 596 P.2d 222, 224 (1979) (citations omitted); *Hansen*, 83 Nev. at 191, 426 P.2d at 793 (citations omitted).

In *Golden Road Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151 (2016), the court held that an agreement limiting all types of employment within a given industry unreasonably restricts an employee's ability to be gainfully employed and is therefore unenforceable. *Id.* at 155–56.

In *Traffic Control Services, Inc. v. United Rentals Northwest, Inc.*, 120 Nev. 168, 87 P.3d 1054 (2004), Burkhardt, an employee of NES Trench and Shoring, signed a one-year non-competition covenant as a condition of his employment in exchange for $10,000. *Id.* at 170, 87 P.3d at 1055. Approximately one year after Burkhardt began working for NES, the company's assets were purchased by United Rentals Northwest, Inc. *Id.* at 170, 87 P.3d at 1056. The contract-for-purchase included a list of "assumed contracts" and expressly stated that all contracts and agreements that were not listed in the contract itself were excluded from the sale of NES. *Id.* While Burkhardt's non-competition covenant was not expressly listed as an assumed contract, other non-compete agreements were. *Id.* Burkhardt and 81 other essential employees were each asked to sign a new non-competition covenant with United a week before the asset transfer was complete, to which Burkhardt refused. *Id.* He remained employed by United through the transitional period of the sale but quickly became dissatisfied with United's customer service. *Id.* at 171, 87 P.3d at 1056. Believing that his non-competition covenant was no longer valid, Burkhardt accepted a new position with Traffic Control, a direct competitor of United. *Id.* United brought an action to enforce Burkhardt's non-competition covenant, claiming that it was assigned to them by NES under the terms of the purchase agreement. *Id.* The district court granted a preliminary injunction, finding the covenant to be an assignable asset which was validly transferred to United. *Id.*

Upon appeal, the Supreme Court of Nevada reversed the district court and held that:

> Covenants not to compete are personal in nature and therefore are not assignable absent the employee's express consent. Further, an employer must obtain such consent through arm's-length negotiation with the employee, supported by valuable consideration beyond that necessary to support the underlying covenant.

Id. at 176, 87 P.3d at 1060.

The Supreme Court of Nevada has since limited the applicability of *Traffic Control Services, Inc.* to other types of asset acquisitions. For example, the court determined that a merger, unlike an assignment, is a statutory creation wherein the acquiring company is responsible for the former company's debts. *HD Supply Facilities Maint., Ltd. v. Bymoen*, 125 Nev. 200, 207, 210 P.3d 183, 187 (2009). Therefore, the court held that "*Traffic Control's* rule of nonassignability does not apply when a successor corporation acquires restrictive employment covenants as the result of a merger." *Id*. at 207, 210 P.3d at 187–88.

Generally, employer-employee non-competition covenants are not assignable unless they contain a clause expressly permitting assignment. *Id.* at 210, 210 P.3d at 189. "[The] assignability clauses must be negotiated at arm's length and supported by additional and separate consideration from that given in exchange for the covenant itself." *Id.* at 175, 87 P.3d at 1059. "This places the burden on the employer to seek assignability and adequately compensates the party with the lesser bargaining power for the possibility that a stranger to the covenant may ultimately assume the right to its enforcement." *Id.*

B. Blue Penciling

According to Nevada Revised Statute § 613.200, an employer can enforce an agreement that bars an employee from "[p]ursuing a similar vocation in competition with or becoming employed by a competitor of the person, association, company or corporation . . . if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration." Nev. Rev. Stat. § 613.200(4)(a). While Nevada has not expressly adopted a "blue pencil" rule for non-compete agreements, in *Hansen v. Edwards*, 83 Nev. 189 (1967), the Supreme Court of Nevada chose to modify unreasonable geographic and time restraint provisions in the employer's covenant-not-to-compete provision rather than invalidate the entire clause. However, Nevada Revised Statute § 613.200 concerns only persons who seek subsequent employment with another person, not those who engage in self-employment. *Id.* at 193, 426 P.2d at 794.

Similarly, when seeking a preliminary injunction for the enforcement of a noncompete agreement, "the court must look to whether the terms of the noncompete agreement are likely to be found reasonable at trial." *Shores v. Global Experience Specialists, Inc.*, 134 Nev. 503, 505–06, 422 P.3d 1238, 1241 (2018) (citing *Camco, Inc. v. Baker*, 113 Nev. 512, 518, 936 P.2d 829, 832 (1997)). "Reasonable restrictions are those that are 'reasonably necessary to protect the business and goodwill of the employer.'" *Id*. (citing *Jones v. Deeter*, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (1996)). The Supreme Court of Nevada has established that it "evaluates post-employment noncompete agreements with a higher degree of scrutiny than other kinds of noncompete agreements because of the seriousness of restricting an individual's ability to earn an income." *Id*. (citing *Ellis v. McDaniel*, 95 Nev. 455, 459, 596 P.2d 222, 224 (1979)). Based on the precedent set by the court, it is clear that sufficiently proving the validity of a noncompete agreement is a difficult task.

C. Confidentiality Agreements

Confidentiality agreements are governed by Nevada Revised Statute § 613.200(4) which permits agreements barring an employee from:

> [D]isclosing any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his or her employment with the person, association, company or corporation if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration."

Nevada courts generally consider whether information is trade secret as a question of fact. *Finkel v. Cashman Professional*, 128 Nev. 68, 74, 270 P.3d 1259, 1264 (2012). The factors of such an analysis include: (1) the extent to which the information is known outside of the business and the ease with which the acquired information could be properly acquired by others; (2) whether the information was confidential or secret; (3) the extent to and manner in which the employer guarded the secrecy of the information; and (4) the former employee's knowledge of customer's buying habits and other customer data and whether this information is also known by the employer's competitors. *Id.* at 74–75, 270 P.3d at 1264 (citing *Frantz v. Johnson*, 116 Nev. 455, 467, 999 P.2d at 358–59 (2000)).

D. Trade Secret Statute

Generally, the elements required for successfully pleading a cause of action for misappropriation of trade secrets are: "(1) a valuable trade secret; (2) misappropriation of the trade secret through use, disclosure, or nondisclosure of use of the trade secret; and (3) the requirement that the misappropriation be wrongful because it was made in breach of an express or implied contract or by a party with a duty not to disclose." *Switch Ltd. v. Fairfax*, No. 2:17-cv-02651-GMN-VCF, 2018 WL 4181626, at *3 (D. Nev. Aug. 30, 2018) (citing *Frantz*, 116 Nev. at 466, 999 P.2d at 358); *see generally* Nev. Rev. Stat. § 600A.

E. Fiduciary Duty and Their Considerations

"A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." The Restatement (Second) of Torts § 874, comment a (1979). "Thus, a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship." *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009). However, there are no statutes or case law in Nevada that discuss fiduciary duties in the context of restrictive covenants or non-compete agreements.

1. Injunctive Relief

The court has established that, when seeking injunctive relief for violation of a fiduciary duty owed, a party need not show damages in order to recover. In *Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198 (2003), the appellants asserted that the trustees failed to keep adequate records thus breaching their fiduciary duty to the company. Said appellants sought injunctive relief in the form of "either an order requiring that the trustees keep more thorough records in the future or that the trustees be removed." *Id*. at 1202. Because "[t]he question of whether a fiduciary violated his fiduciary duty is independent from the question of loss," the appellants claims were capable of surviving a motion to dismiss for failure to state a claim. *Id*. In drawing this conclusion, the court stated that "[r]equiring a showing of loss in such a case would be to say that the fiduciaries are free to ignore their duties so long as they do no

tangible harm." *Id*. The case was ultimately remanded to the district court for analysis under the above consideration.

2. Forum Selection Clauses

The Court, in deciding *Tompkins v. 23andMe, Inc*., 840 F.3d 1016 (9th Cir. 2016), established that an adhesion contract, such as an employment contract, that contains a forum selection clause "will be enforced as long as the clause provided adequate notice to the [party] that he was agreeing to the jurisdiction cited in the contract." *Id*. at 1028 (quoting *Intershop Communications v. Superior Court*, 104 Cal.App.4th 191, 201, 127 Cal.Rptr.2d 847 (Cal. Ct. App. 2002)). It further explained that "mere inconvenience or additional expense" are not sufficient for the purposes of finding a mandatory forum selection clause to be unreasonable. *Id*. (quoting *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh*, 12 Cal.App.4th 1666, 1679, 16 Cal.Rptr.2d 417 (Cal. Ct. App. 1993).

3. Enforcement by Successors and Assigns

Under Section § 151 of the United States Code Annotated, a successor employer's obligations under the National Labor Relations Act include the duty to bargain in good faith with the union which represented its workers with their previous employer and to provide back pay and reinstatement to individual victims of predecessor's unfair labor practice. Successor employers are not bound by substantive terms of contract between the union and its predecessor nor is the business entity which replaces another obligated to hire all or any of its predecessor's employees. *Id*. In *Slack v. Havens*, 552 F.2d 1091, 1094–95 (9th Cir. 1975), the court established that the successorship doctrine applies to obligations under Title VII when it held the successor liable for redressing an individual victim of discrimination. However, "courts have refrained from imposing liability under Title VII on succeeding employers where unwarranted by the facts of the case." *Bates v. Pacific Maritime Association*, 744 F.2d 705 (1984) (citing *In re National Airlines*, 700 F.2d 695 (11th Cir. 1983).

XII. DRUG TESTING LAWS

A. Public Employers

Nevada Revised Statutes Sections 284.406 through 284.407 permit drug testing public employees within the scope of their employment. Nevada Administrative Code 284.880 through 284.894 provides the specific guidelines for testing said employees. A person applying for a position "affecting public safety" must submit to a drug test unless the employee worked in a position of public safety within the last year. Nev. Admin Code § 284.886. Otherwise, drug testing is required only upon "[o]bjective facts upon which an appointing authority may base a reasonable belief that an employee is under the influence of alcohol or drugs." Nev. Admin Code § 284.888. The administration of the screening test must comply with the standards and procedures adopted by the United States Department of Health and Human Services. Nev. Admin Code § 284.882. An applicant who tests positive for drugs must submit to counseling, pursuant to Nev. Admin Code § 284.892, and may not be hired in a position requiring a drug test within one year of the test pursuant to Nev. Admin Code § 284.894.

B. Private Employers

In *Blankenship v. O'Sullivan Plastics Corp.*, 109 Nev. 1162, 866 P.2d 293 (1993), an employee alleged he was wrongfully discharged as a consequence of his refusal to sign a substance-abuse employee agreement which included a provision requiring each employee to waive his constitutional right against self-incrimination. *Id.* at 1163, 866 P.2d at 294. Federal regulations demand that federal contractors maintain a drug-free workplace. *Id.* Because of these regulations, the employer required its employees to sign this agreement. *Id.* The court held that no violation of public policy existed as a result of his subsequent termination. *Id.* at 1167, 866 P.2d at 296. The employee was an at-will employee and, therefore, the employer was justified in relying upon its right to discharge the same. *Id.* Specifically, the court stated:

> There is neither a constitutional right nor a public policy arising from such a right implicated in the Agreement O'Sullivan asked Blankenship to sign.
>
> . . .
>
> The instant case involves neither a criminal prosecution nor a threat thereof by any government entity. Rather, it involves a dismal attempt by O'Sullivan to obtain written commitments from its at-will employees not to erect barriers tending to disrupt substance abuse testing deemed warranted by an employee's involvement in either a plant accident or reasonably suspicious activities. The waiver of "any right to self incrimination" included in the Agreement thus expresses nothing more than an effort to secure an employee's pledge to cooperate with O'Sullivan's testing program.
>
> . . .
>
> In its narrowest sense, the waiver at issue purports to gain the employee's commitment not to refuse substance abuse testing on grounds that the results of the test could prove to be self-incriminating. In no event could this construction of the waiver constitute interference with the constitutional guarantee against self-incrimination even if the government were a party to the Agreement.
> In its broadest sense, the waiver provision could be construed to apply to both cooperation in testing and in truthful responses to questions concerning the circumstances involved in the use of illegal drugs or alcohol . . . even under the broader construction of the waiver, it is clear that no constitutional right is implicated because of the absence of government action and involvement.

Id. at 1164–66, 866 P.2d at 295 (internal citations omitted).

The court concluded its analysis by stating that there exists no "public policy against employers seeking to provide safe and lawful working conditions through testing programs designed to identify and eliminate the use of illicit drugs and alcohol." *Id.* at 1166, 866 P.2d at 295.

Similarly, the Supreme Court of Nevada held, in *Nevada Employment Security Department v. Holmes*, 112 Nev. 275, 914 P.2d 611 (1996), that work-related misconduct, such as failing a drug test, is sufficient grounds upon which to deny unemployment benefits. In this case, Holmes was an employee of Hotel San Remo, a private employer, when she failed a drug test and was subsequently denied benefits.

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

Pursuant to the Nevada Equal Employment Opportunities Act (the "Act"), an employer is prohibited from discharging or discriminating against an employee based on race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin. Nev. Rev. Stat. § 613.330.

A. Employers/Employees Covered

When referencing the Act, the term "employer" means any person or entity that employs 15 or more people during each workday in at least 20 calendar weeks in the current or preceding calendar year but does not include: (a) The United States or any corporation wholly owned by the United States; (b) Any Indian tribe; or (c) Any private membership club exempt from taxation pursuant to 26 U.S.C. § 501(c). Nev. Rev. Stat. § 613.310(2).

Additionally, "[t]he provisions of NRS 613.310 to 613.435, inclusive, do not apply to: (a) Any employer with respect to employment outside this state; (b) Any religious corporation, association or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of its religious activities." Nev. Rev. Stat. § 613.320(1).

B. Types of Conduct Prohibited

As described above, the Act prohibits discharging or discriminating against an employee based on his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin. *See* Nev. Rev. Stat. § 613.330. The newest category, "gender identity or expression," refers to the "gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth." Nev. Rev. Stat. § 613.310(4).

C. Administrative Requirements

Any person injured by an unlawful employment practice is permitted to file a complaint with the Nevada Equal Rights Commission ("NERC") so long as the complaint is based on discrimination as a result of race, color, sex, sexual orientation, gender identity or expression, age, disability, religion or national origin. Nev. Rev. Stat. § 613.405.

Actions brought under the Act must be filed within 180 days of the act alleged in the complaint. The statute of limitations is tolled during the pendency of any complaint before the NERC. Nev. Rev. Stat. § 613.430.

An appeal from a final judgment in an action based on age discrimination in an employment setting must be filed within six months of the date of entry of said judgment unless good cause is shown. Nev. Rev. Stat. § 613.435.

D. Remedies Available

An injured party must file a complaint with the NERC. The NERC holds an informal mediation and conducts an investigation into the alleged discrimination in an effort to assist the parties in reaching a settlement. The injured party may bring suit in court if the dispute has been with the NERC for over 180

days or if it has been closed. Relevant statutes include Nev. Rev. Stat. §§ 613.405, 613.420, 613.430 and 613.435.

XIV. STATE LEAVE LAWS

Under Nevada Revised Statute § 284.350(1), all employees of the State's Public Service are entitled to annual leave with pay which may be accumulated from year to year, not to exceed 30 working days.

A. Jury/Witness Duty

No employee may be discharged for being a witness in a trial proceeding. Nev. Rev. Stat. § 50.070.
No employee may be discharged for serving on jury duty. Nev. Rev. Stat. § 6.190.

B. Voting

It is a misdemeanor for any employer to prohibit an employee from taking time off to vote or discharge an employee for doing the same. Nev. Rev. Stat. §§ 293.463, 293.710.

C. Family/Medical Leave

Nevada has adopted, by reference, the Family Medical Leave Act of 1993. Nev. Admin Code. § 284.581. An employee who is entitled to take leave pursuant to the Family and Medical Leave Act is limited to a total of 12 weeks of such leave during a rolling 12-month period. Nev. Admin Code. § 284.5811(1). The rolling 12-month period is measured backward from an employee's most recent use of any leave, pursuant to the Family and Medical Leave Act. *Id.* An employee who is entitled to take leave, pursuant to the Family and Medical Leave Act, for the purpose of caring for a covered service member is limited to a total of 26 weeks of such leave during a single 12-month period. . Nev. Admin Code. § 284.5811(2).

D. Pregnancy/Maternity/Paternity Leave

All public service employees are entitled to both sick and disability leave with pay, earning 1.25 days for each month of service. These paid days off may be accumulated from year to year. Nev. Rev. Stat. § 284.355(1).

If an employer with 15 or more employees offers leave with pay, leave without pay, or leave without loss of seniority for employees due to sickness or disability, the employer must extend the same benefits to a female employee who is pregnant. Nev. Rev. Stat. § 613.4383. In *950 Ryland Inc. v. Daane, 108 Nev. 955, 840 P.2d 1236 (1992*), Daane's employer, Sierra Eye Associates ("Sierra"), had an unwritten policy of extending six to eight weeks of maternity leave to its employees but subsequently granted Daane four to six months. When, four months later, Daane informed Sierra that she planned to return to work at the end of the six-month period, she was told that her position was no longer available. *Id*. The Supreme Court of Nevada ultimately held that Sierra had not violated the Nevada maternity leave statute given that Daane did not establish that Sierra had extended different benefits to other employees than those it had extended to her. *Id*.

E. Day of Rest Statutes

There are no cases or statutes in Nevada discussing adverse employment actions pertaining to an employee's decision to observe a day of rest each week.

F. Military Leave

Any public employee who performs active military services in the Armed Forces of the United States is, upon application, entitled to leave of absence without pay for the period of such service plus a period not to exceed 90 days. Nev. Rev. Stat. § 284.359.

Any public officer or employee of the state, a political subdivision, or any agencies thereof, who is an active member of the United States Army Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Coast Guard Reserve, the United States Air Force Reserve, or the Nevada National Guard, must be relieved from his duties, upon his request, to serve under orders without loss of his regular compensation for a period of not more than 15 working days in any 12-month period. No such absence may be part of the employee's annual vacation provided for by law. Nev. Rev. Stat. § 281.145.

G. Sick Leave

There are no Nevada laws that require private employers to provide paid or unpaid sick leave. However, according to Section 284.355(1) of the Nevada Revised Statutes, "all employees in public service, whether in the classified or unclassified service, are entitled to sick and disability leave with pay of 1 1/4 working days for each month of service, which may be cumulative from year to year."

H. Domestic Violence Leave

An employee who has been employed for at least 90 days and the victim of an act which constitutes domestic violence, or is a family or household member of a victim of an act which constitutes domestic violence, is entitled to no more than 160 hours of leave in one 12-month period, provided said employee is not the alleged perpetrator. Nev. Rev. Stat. § 608.0198(1).

Section 608.0198(2) states that an employee may use the hours of leave pursuant to subsection 1 as follows:

(1) For the diagnosis, care or treatment of a health condition related to an act which constitutes domestic violence committed against the employee or family or household member of the employee;

(2) To obtain counseling or assistance related to an act which constitutes domestic violence committed against the employee or family or household member of the employee;

(3) To participate in any court proceedings related to an act which constitutes domestic violence committed against the employee or family or household member of the employee; or

(4) To establish a safety plan, including, without limitation, any action to increase the safety of the employee or the family or household member of the employee from a future act which constitutes domestic violence.

Nev. Rev. Stat. § 608.0198(2).

An employer shall not: (a) deny an employee the right to use hours of leave in accordance with the conditions of this section; (b) require an employee to find a replacement worker as a condition of using hours of leave; or (c) retaliate against an employee for using hours of leave. Nev. Rev. Stat. §608.0198(3).

In 2023, the Nevada state legislature passed AB 163 which expands the leave protections noted above to not just the employee, but also family members and household member of victims of sexual assault.

I. School Activities Involving Children

Employers with 50 or more employees must allow the parent, guardian, or custodian of a child who is enrolled in a public school to take leave for at least four hours during the school year to do the following:

- Attend parent teacher conferences.
- Attend school-related activities during regular school hours
- Volunteer or otherwise be involved at the school during regular school hours
- Attend school-sponsored events

Parents must use the leave time in increments of at least one hour, and the employee and employer must mutually agree on the time leave is used. Employers do not have to pay for leave used for school related activities.

J. Sick Leave

There are no Nevada laws that require private employers to provide paid or unpaid sick leave. However, the federal Family and Medical Leave Act mandates that companies with at least 50 employees provide at twelve weeks of unpaid leave.

For governmental employees, Section 284.355(1) of the Nevada Revised Statutes, “all employees in public service, whether in the classified or unclassified service, are entitled to sick and disability leave with pay of 1 1/4 working days for each month of service, which may be cumulative from year to year.”

XV. STATE WAGE AND HOUR LAWS

Sections 608.016 through 608.290 of the Nevada Revised Statutes govern compensation, wages, and hours.

A. Current Minimum Wage in Nevada

As of July 1, 2024, minimum wage in Nevada is set at $12.00. Prior to this change there have been two wage rates in which a lower rate could be paid if certain health insurance benefits were being provided by the employer. Per AB 456 (passed in the 2019 Legislative System) the two-tier system was gradually phased out and as of July 1, 2024 it is eliminated in its entirety.

According to Nevada Revised Statute § 608.260, if an employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner, "the employee may, at any time within 2 years, bring a civil action against the employer. A contract between the employer and the employee or any acceptance of a lesser wage by the employee is not a bar to the action."

B. Deductions from Pay

According to Nevada Revised Statute § 608.110(1), an employer may withhold from the wages or compensation of any employee: (1) any dues, rates, or assessments becoming due to any hospital association or to any relief, savings, or other department or association maintained by the employer or by the employees for the benefit of the employees; or (2) other deductions authorized by written order of an employee. If that occurs, Nevada Revised Statute § 608.110(2) mandates that, at the time of payment of the wages or compensation, the employer must furnish the employee with an itemized list showing the respective deductions made from the total amount of wages or compensation.

Notably, it is unlawful in Nevada to take or make a deduction in wages based upon the amount of tips or gratuities that an employee received. Nev. Rev. Stat. § 608.160(1) (stating that it is unlawful for any person to "(a) [t]ake all of part of any tips or gratuities bestowed upon the employees of that person [or] (b) apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this State any tips or gratuities bestowed upon the employees of that person.").

Per Nevada Administrative Code section 608.160, an employer is required to have the employee voluntarily authorize in writing the specific purpose, pay period, and amount of any deduction. An employer may not use a blanket authorization for deductions.

C. Overtime Rules

According to Nevada Revised Statute § 608.018(1) and (2), an employer shall pay an employee, who receives compensation for employment at a rate less than one and a half times the minimum rate, a rate equal to or greater than one and a half times said employee's regular wage whenever he or she works:

> (1) more than 40 hours in any scheduled week of work; or (2) more than eight hours in any workday unless, by mutual agreement, the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled work week (See Advisory Opinion AO 2013-04).

These overtime rules do not apply to: (a) employees who are not covered by the minimum wage provisions; (b) outside buyers; (c) employees in a retail or service business, if their regular rate is more than 1.5 times the minimum wage and more than half of their compensation for a representative period comes from

commissions on goods or services, with the representative period being, to the extent allowed pursuant to federal law, not less than 1 month; (d) employees who are employed in bona fide executive, administrative or professional capacities; (e) employees covered by collective bargaining agreements which provide alternative specifications for overtime; (f) drivers, drivers' helpers, loaders and mechanics for motor carriers subject to the Motor Carrier Act of 1935, as amended; (g) employees of a railroad; (h) employees of a carrier by air; (i) drivers or drivers' helpers who make local deliveries and are paid on a trip- rate basis or other delivery payment plan; (j) drivers of taxicabs or limousines; (k) agricultural employees; (l) employees of business enterprises having a gross sales volume of less than $250,000 per year; (m) any salesperson or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm equipment; and (n) a mechanic or worker for any hours. Nev. Rev. Stat. § 608.018(3).

D. Time for Payment upon Termination

Under Section 608.020 of the Nevada Revised Statutes, it is required that, whenever an employer discharges an employee, the employee's wages and compensation earned and unpaid at the time of such discharge become due and payable immediately. Moreover, according to Section 608.030, whenever an employee resigns or quits his or her employment, the employee's wages and compensation earned and unpaid at the time of his or her resignation or quitting must be paid no later than the day on which the employee would have regularly been paid the same or seven days after the employee resigns or quits, whichever is earlier. Nev. Rev. Stat. § 608.030. Sections 608.040 and 608.050 of the Nevada Revised Statutes provide the remedies and penalties for failure to pay a discharged or quitting employee.

E. Breaks and Meal Periods

Pursuant to Nevada Revised Statute § 608.019(1), an employer shall not permit an employee to work for a continuous period of eight or more hours without allowing said employee to have a meal period of at least one-half hour.

Furthermore, Nevada Revised Statute § 608.019(2) requires that:

> Every employer shall authorize and permit all his or her employees to take rest periods, which, insofar as practicable, shall be in the middle of each work period. The duration of the rest periods shall be based on the total hours worked daily at the rate of 10 minutes for each 4 hours or major fraction thereof. Rest periods need not be authorized however for employees whose total daily work time is less than 3 and one-half hours. Authorized rest periods shall be counted as hours worked, for which there shall be no deduction from wages.

F. Employee Scheduling Laws

A workweek is defined in Nevada Revised Statute § 608.0123 as seven consecutive 24-hour periods which may begin at any hour on any day. Likewise, a workday is defined as a period of 24 consecutive hours which starts when the employee begins work. Nev. Rev. Stat. § 608.0126.

Section 608.200 also states:

> The period of employment for all persons who are employed, occupied or engaged in work or labor of any kind or nature in underground mines or underground workings in search for or in extraction of minerals, whether base or precious, metallic or nonmetallic, or who are engaged in such underground mines or underground workings, or who are employed, engaged or occupied in other underground workings of any kind or nature for the purpose of tunneling, making excavations or to accomplish any other purpose or design, must not exceed 8 hours within any 24 hours. The 8-hour limit applies only to time actually employed in the mine and does not include time consumed for meals or travel into or out of the actual work site. It is unlawful for a person or an agent of the person to hire, contract with or cause any person to work for a period longer than the provisions of this section allow.

Nev. Rev. Stat. § 608.200.

G. Wages for Persons with Disabilities

Existing state and federal law authorize a provider of job and day training services to enter into a contract or other arrangement with an employer to provide for the employment of a person with an intellectual disability or person with a developmental disability for less than the state minimum wage under certain specified conditions (See 29 U.S.C. § 214(C)).

In 2023 the Nevada legislature passed AB 259 which prohibits a provider of jobs and day training services from entering into a contract that provides for a recipient of jobs and training services to receive a wage that is less than the state minimum wage laws on or after Jan

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in the Workplace

According to Nevada's Clean Air Act, which is codified at Nevada Revised Statute § 202.2483, smoking tobacco in any form is prohibited within indoor places of employment including, but not limited to, the following: (a) child care facilities; (b) movie theatres; (c) video arcades; (d) government buildings and public places; (e) malls and retail establishments; (f) all areas of grocery stores; and (g) all indoor areas within restaurants. Further, smoking tobacco in any form is prohibited within school buildings and on school property, without exception, in addition to: (a) areas within casinos where loitering by minors is already prohibited by state law; (b) completely enclosed areas with stand-alone bars, taverns and saloons in which patrons under 21 years of age are prohibited from entering; (c) age-restricted stand-alone bars, taverns and saloons; (d) strip clubs or brothels; (e) retail tobacco stores; (f) a convention facility being used for a meeting or trade show that is produced or organized by a business relating to tobacco or a professional association for convenience stores, if it is not open to the public and involves the display of tobacco products; (g) private residences, including private residences which may serve as an office workplace, except if used as a child care, an adult day care or a health care facility and; (h) within 25 feet of entrances, operable windows and ventilation systems of enclosed areas where smoking is prohibited, so as to prevent smoke from entering such enclosed areas.

Nevada's statutes do not require employers to create designated smoking areas or provide other accommodations for smokers in the workplace.

B. Health Benefit Mandates for Employers

There is no state law requiring employers to offer group healthcare insurance to their employees. However, if any healthcare insurance is offered, Nevada's insurance laws require policies to cover certain benefits (mandated benefits) and give employees the right to continue group coverage or convert to individual policies if group coverage is lost. According to Nevada Revised Statute § 689C.115, a health benefit plan offered must include coverage of basic medical and hospital care. Chapter 689C of the Nevada Revised Statutes governs "health insurance for small employers" while Chapter 689B governs "group and blanket health insurance."

The Silver State Health Insurance Exchange was established in Nevada in 2011 to, among other things, assist qualified small business employers in Nevada in facilitating the enrollment and purchase of coverage and small business enrollees with the application for subsidies. Nev. Rev. Stat. § 695I.200.

C. Immigration Laws

Unauthorized workers who become injured during the course and scope of their employment are entitled to the same benefits as any other injured worker under Nevada law. Nev. Rev. Stat. § 616A.105. The exception to this is that an undocumented immigrant worker cannot receive vocational rehabilitation services or a vocational award of money instead of retraining. *Tarango v. SIIS*, 117 Nev. 444, 25 P.3d 175 (2001). However, the injured worker may receive medical care and compensation benefits while they are recovering from their injuries and cannot work, in addition to a permanent partial disability award. *Id.*

D. Right to Work Laws

No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization. Nev. Rev. Stat. § 613.250. Further, the State, any subdivision thereof, or any corporation, individual or association of any kind shall not enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization. *Id.*

It is also unlawful in Nevada for any employer, labor organization, or officer, agent, or member thereof, to compel or attempt to compel any person to join any labor organization, participate in a strike against the person's will, or leave employment by any threatened or actual interference with his or her person, immediate family, or property. Nev. Rev. Stat. § 613.270.

Further, any combination or conspiracy by two or more persons to cause the discharge of any person or to cause such person to be denied employment because he or she is not a member of a labor organization, by inducing or attempting to induce any other person to refuse to work with such person, shall be illegal. Nev. Rev. Stat. § 613.280.

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

Section 613.333 of the Nevada Revised Statutes prevents employee discrimination for lawful conduct while off-duty. Specifically, the statute makes it unlawful for an employer to:

(a) Fail or refuse to hire a prospective employee; or

(b) Discharge or otherwise discriminate against an employee concerning the employee's compensation, terms, conditions or privileges of employment, because the employee engages in the lawful use in this state of any product outside the premises of the employer during the employee's nonworking hours, if that use does not adversely affect the employee's ability to perform his or her job or the safety of other employees.

Nev. Rev. Stat. § 613.333(1).

An employee, or potential employee, discharged or discriminated against in such a manner may bring a civil action against the employer and may obtain: (a) lost wages and benefits; (b) reinstatement without loss of position, seniority, or benefits; (c) a court order directing the employer to offer employment to the prospective employee; and (d) damages equal to the amount of lost wages and benefits. Nev. Rev. Stat. § 613.333(2).

Nevada's Regulation and Taxation of Marijuana Act, regarding the legalization of recreational use of the same, provides that the act does not prohibit an employer "from maintaining, enacting, and enforcing a workplace policy prohibiting or restricting actions or conduct otherwise permitted under this chapter." Nev. Rev. Stat. § 453D.100(2). In other words, Nevada's decriminalization of the recreational use of marijuana did not in any way impact Nevada employers' ability to maintain substance abuse policies. Instead, employers that maintain policies prohibiting the use or possession of marijuana in the workplace or calling for the termination of employees who test positive for marijuana or are under the influence of marijuana while on duty are free to enforce these policies and take disciplinary action against employees violating the same.

F. Gender/Transgender Expression

Refer to the discussion in Section XIII above involving the role of state anti-discrimination statutes in codifying the Nevada Equal Employment Opportunities Act. This statute prohibits an employer from discharging or discriminating against an employee based on race, color, religion, sex, sexual orientation, gender identity or expression, age, disability, or national origin. Nev. Rev. Stat. § 613.330 (2015).

Although no Nevada case law exists regarding transgender rights or expression in relation to the workplace, the United States Supreme Court has explained that gender stereotyping is direct evidence of sex discrimination as prohibited by Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). Further, the Ninth Circuit has established that "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women." *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 Fed. App'x 492, 493 (9th Cir. 2009) (citing *Hopkins*, 490 U.S. 228; *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000)).

G. Other Key State Statutes

1. No employee may be penalized for refusing to participate in an abortion on religious, ethical, or moral grounds. Nev. Rev. Stat. § 632.475.

2. No employee may be discharged for testifying in a proceeding under the state occupational and health administration laws. Nev. Rev. Stat. § 618.445.

3. No employee may be discharged for refusing to take a polygraph or lie detector examination. Nev. Rev. Stat. § 613.480.

4. It is unlawful for an employer to discharge or discipline an employee exclusively because the employer is required to withhold the employee's earnings pursuant to a writ of garnishment. Nev. Rev. Stat. § 31.298.

5. It is unlawful for an employer to use the withholding or assignment of income to collect an obligation of support as a basis for refusing to hire a potential employee, discharging the employee or taking disciplinary action against the employee. Nev. Rev. Stat. § 31A.120, 31A.290.

6. It is unlawful for an employer to make any rule or regulation prohibiting or preventing any employee from engaging in politics or becoming a candidate for any public office. Nev. Rev. Stat. § 613.040.

7. It is unlawful for an employer to discharge or otherwise discriminate against an employee for the lawful use by the employee of any product outside the premises of the employer during his non-working hours, if that use does not adversely affect his ability to perform his job or the safety of other employees. Nev. Rev. Stat. § 613.333.

8. Section 609 of the Nevada Revised Statutes regulates the employment of minors.

9. An employer must give an employee who has been employed for at least 60 days a reasonable opportunity, during regular business hours, to inspect employee records or furnish the employee a copy of the same. In addition, the employer must give the employee an opportunity to inspect the employment records within 60 days of termination. Nev. Rev. Stat. § 613.075.

10. An employer shall not permit an employee to work for a period of 8 continuous hours without allowing the employee to have a meal period of at least one-half hour. No period of less than 30 minutes interrupts a continuous period of work for the purposes of this subsection. Further, every employer shall authorize and permit all his or her employees to take rest periods which, insofar as practicable, shall be in the middle of each work period. The duration of the rest periods shall be based on the total hours worked daily at the rate of 10 minutes for each 4 hours or major fraction thereof. However, these rest periods need not be authorized for employees whose total daily work time is less than 3 and one-half hours. Authorized rest periods shall be counted as hours worked for which there shall be no deduction from wages. These rules do not apply to situations where only one person is employed at a particular place of employment or to employees included within the provisions of a collective bargaining agreement. Nev. Rev. Stat. § 608.019.