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I. AT-WILL EMPLOYMENT

A. Statute

Oklahoma does not have a statute regarding at-will employment.

B. Case law

“Oklahoma has long recognized the employment-at-will doctrine. An employer can discharge an employee for ‘good cause, no cause, or even for a morally wrong cause without being liable for a legal wrong.’” *Booth v. Home Depot, USA, Inc.*, 2022 OK 16, ¶ 10 (quoting *Reynolds v. Advance Alarms, Inc.*, 2009 OK 97, ¶ 5, 232 P.3d 907, 909).

“In the absence of facts or circumstances which indicate that an employment agreement is for a specific term, an employment contract which provides for an annual rate of compensation, but makes no provision for duration of employment, is not a contract for one year, but is terminable at will by either party.” *Singh v. Cities Service Oil Co.*, 1976 OK 123, 554 P.2d 1367, 1369; see also *Tucker v. Zapata Indus., Inc.*, 1992 OK CIV APP 79, 848 P.2d 26; *Glasco v. State ex rel Dept. of Corr.*, 2008 OK 65, 188 P.3d 177.

“Pursuant to *Singh v. Cities Serv. Oil Co.*, 1976 OK 123, 554 P.2d 1367, 1369, ***absent facts and circumstances which indicate that an agreement is for a specific term***, an employment contract which only provides for an annual rate of compensation is terminable at will.” *Lane v. Floorcraft Clyde Beherens, Ltd.*, 2001 OK CIV APP 103, ¶ 6, 29 P.3d 1092, 1094 (original emphasis).

“Just as an at-will employment may be terminated at any time, an at-will employee may be demoted at any time.” *McIntyre v. State ex rel. Okla. Dept. of Mental Health & Substance Abuse Servs.*, 2022 OK CIV APP 32, ¶ 43 (quoting *Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal. App. 4th 338, 356, 112 Cal. Rptr. 3d 455, 471 (Cal. Ct. App. 2010)).

The Oklahoma Court of Civil Appeals has adopted the Second Restatement of Agency rule (Comment b to § 442) and held that a specification of a length of time may be considered with other factors to support a claim that the contract was for a specific term. *Tucker v. Zapata Indus., Inc.*, 1992 OK CIV APP 79, 848 P.2d 26, 29. Other factors include “that (1) the employment is so important that a temporary employment would be unlikely; (2) the employer has notice that the employee has moved to a new location or has otherwise significantly changed his position; [and] (3) the employer or the employee has given consideration beyond a promise to hire or a promise to serve.” *Id.* (citing *Testard v. Penn-Jersey Auto Stores, Inc.*, 154 F. Supp 160 (D.C. Pa. 1956)).

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The Oklahoma Personnel Act's mandatory performance evaluation requirements and progressive discipline steps for state employees could not be the basis for a wrongful discharge claim. *Fox v. State ex rel. Office of State Finance*, 2005 OK CIV APP 57, 120 P.3d. 1217.

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

Oklahoma recognizes implied-in-fact employment contracts. *Hinson v. Cameron*, 1987 OK 49, 742 P.2d 549. The following factors are important in evaluating whether an implied contract exists: (a) evidence of some "separate consideration" beyond an employee's services to support the implied term, (b) longevity of employment, (c) employer handbooks and policy manuals, (d) detrimental reliance on oral assurances, pre-employment interviews, company policy and past practices, and (e) promotions and recommendations. *Id.* at 554-55. No factor is dispositive. A recent promotion by itself is insufficient to find an implied contract and any detrimental reliance on oral assurances must be objectively reasonable. *Hayes v. Eateries Inc.*, 1995 OK 108, 905 P.2d 778, 784.

An implied contract may not be found where there is an express contract of a different or contrary nature. *Jones v. Univ. of Cent. Okla.*, 1995 OK 138, 910 P.2d 987, 990. Nevertheless, a stock purchase agreement may indicate an implied contract. *Bourke v. Western Business Products, Inc.*, 2005 OK CIV APP 48, 120 P.3d. 876

1. Employee Handbooks/Personnel Materials

An employee handbook may be the basis of an implied contract if four traditional contract requirements exist: (1) competent parties; (2) consent; (3) a legal object; and (4) consideration. *Gilmore v. Enogex, Inc.*, 1994 OK 76, 878 P.2d 360, 368; *see also Franco v. State ex rel. Bd. of Regents of the Univ. of Okla.*, 2020 OK CIV APP 64, ¶ 40, 482 P.3d 1, 11 (noting that adopted "applicable provision" in a faculty handbook of a university become terms of an employment contract between university and faculty). The two limitations to the scope of implied contracts by an employee handbook are: (1) the manual only alters the at-will relationship with respect to accrued benefits—it does not limit prospectively the power of either party to terminate the relationship at any time; and (2) the promises in the employee manual that may operate to restrict an employer's power to discharge must be in definite terms—not in the form of vague assurances. *Gilmore*, 878 P.2d at 368; *see also Kester v. City of Stilwell*, 1997 OK CIV APP 1, 933 P.2d 952 (holding that, while the city's personnel policies and procedures did not restrict the city's right to terminate an at-will employee, they did require the city to notify employees of specific charges or reasons for disciplinary action).

2. Provisions Regarding Fair Treatment

Oklahoma state courts have not addressed fair treatment provisions in the context of implied employment contracts.

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3. Disclaimers

An employee handbook does not create an implied contract if it states it is not intended to change an employee's status from terminable at will. *Miner v. Mid-America Door Co.*, 2003 OK CIV APP 32, ¶ 33, 68 P.3d 212, 221-22. Any disclaimer by an employer denying the intent to make the handbook a part of the employment relationship must be clear, and an employer's conduct which is inconsistent with such disclaimer may negate it. *Russell v. Bd. of Cnty. Commr's*, 1997 OK 80, ¶ 24, 952 P.2d 492, 502.

4. Implied Covenants of Good Faith and Fair Dealing

Oklahoma does not recognize an implied covenant of good faith and fair dealing that governs an employer's decision to terminate an at-will employee. See *Burk v. K-Mart*, 1989 OK 22, 770 P.2d 24, 28; *Redricks v. Indus. Vehicles Int'l, Inc.*, 2002 OK 13, ¶ 5, 45 P.3d 416, 417.

B. Public Policy Exceptions

1. General

The public policy exception to at-will employment includes a narrow class of cases in which a discharge is shown to be contrary to a clear public policy that is "articulated by constitutional, statutory, or decisional law." *Burk*, 1989 OK 22, 770 P.2d at 28; *Moore v. Okla. State Univ.*, 2011 OK CIV APP 49, ¶ 17, 255 P.3d 442, 446. "Only a specific Oklahoma court decision, state legislative or constitutional provision, or a provision in the Federal Constitution that prescribes a norm of conduct for the state can serve as a source of Oklahoma's public policy." *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 13, 176 P.3d 1204, 1212 (emphasis omitted).

A viable *Burk* claim must allege:

(1) An actual or constructive discharge (2) of an at-will employee (3) in significant part for a reason that violates an Oklahoma public policy goal (4) that is found in Oklahoma's constitutional, statutory, or decisional law or in a federal constitutional provision that prescribes a norm of conduct for Oklahoma and (5) no statutory remedy exists that is adequate to protect the Oklahoma policy goal.

Patel v. Tulsa Pain Consultants, Inc., P.C., 2022 OK 56, ¶ 11; *Kruchowski v. The Weyerhaeuser Co.*, 2008 OK 105, ¶ 24, 202 P.3d 144, 151-52; see also *Reynolds v. Advance Alarms, Inc.*, 2009 OK 97, ¶ 7, 232 P.3d 907, 909.

"[T]he same remedies must be applicable to everyone within the same class of employment discrimination. The same class of employment discrimination . . . includes race, color, religion, sex, national origin, age and handicap. Regardless of whether the remedies originate under federal statutes or state law . . . rather than looking to the adequacy of remedies, a plaintiff may pursue a state law *Burk* tort claim for wrongful discharge in violation of public policy when the same remedies are not available to the same class of employment discrimination victims." *Shirazi v. Childtime Learning Center*, 2009 OK 13, ¶ 12, 204 P.3d 75, 79. *Burk* liability is applicable to all employers, regardless of the number of employees. *Smith v. Pioneer Masonry, Inc.*, 2009 OK 82, ¶ 13, 226 P.3d 687, 689. "[I]f the employee is not an at-will employee, he is not within the class of persons who may bring a claim in tort for wrongful discharge

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based on the public policy exception to the at-will termination rule.” *Patel v. Tulsa Pain Consultants, Inc., P.C.*, 2022 OK 56, ¶ 11 (citing *McCrary v. Okla. Dept. of Pub. Safety*, 2005 OK 67, ¶ 13, 122 P.3d 473, 476).

“Oklahoma courts have held that governmental employees who made termination decisions in violation of law or policy were nevertheless acting within the scope of their employment.” *Vesper v. Indep. Sch. Dist. No. 89 of Oklahoma City*, No. CV-17-1165-G, 2018 WL 6070354, at *4 n.8 (W.D. Okla. Nov. 20, 2018) (citing *Muhammad v. Hall*, 674 Fed. Appx. 810, 815 (10th Cir. 2017); *Shephard v. CompSource Okla.*, 2009 OK 25, 209 P.3d 288, 293-94 (2009); *Wilson v. City of Tulsa*, 2004 OK CIV APP 44, 91 P.3d 673, 679 (2004)). “In such cases, the governmental employers ratified the employees’ actions, thereby establishing that the employees acted within the scope of their employment.” *Id.*

“[E]mployers have a legitimate interest in ensuring an alcohol/drug-free workplace.” *Gilmore v. Enogex, Inc.*, 878 P.3d at 364. Therefore, “where an employer’s program is reasonably designed to achieve that end,” at-will employees who refuse to submit to drug testing “have no cognizable claim for wrongful discharge” under the public policy exception. *Id.* An employee drug testing policy must, however, comply with Oklahoma statutes.

“Classified employees” of the State, as defined by the Oklahoma Personnel Act, are not employees at will, and therefore, cannot bring a cause of action for wrongful discharge under the *Burk* exception to the employment at-will rule. *McCrary v. Okla. Dept. of Public Safety*, 2005 OK 67, ¶¶ 10, 13, 122 P.3d 473, 475-76.

The Oklahoma Anti-Discrimination Act, 25 OKLA. STAT. §§ 1101-1901, abolished common law remedies, i.e., the *Burk* tort, as applied to “status-based discrimination.” Employment related discrimination claims based on race, color, religion, sex, national origin, age, disability and genetic information are limited to the rights and remedies available only by statute. See *Saint v. Data Exch., Inc.*, 2006 OK 59, ¶ 4.

Although the Oklahoma Anti-Discrimination Act abolishes the *Burk* tort remedy with respect to status-based claims, the revisions do not affect an employee’s ability to assert a *Burk* tort claim for “action-based” claims, such as wrongful terminations based upon exercising a legal right, refusing to violate the law, exposing illegal activity, and whistle blowing as discussed below.

2. Exercising a Legal Right

An employee cannot be terminated for exercising a legal right. The Court has held an employer violated public policy for terminating an employee who refused to dismiss his negligence action against a customer of the employer. *Groce v. Foster*, 1994 OK 88, 880 P.2d902, 905; cf. *Shero v. Grand Sav. Bank*, 2007 OK 24, 161 P.3d 298. In *LaRue v. Oneok, Inc.*, the court held an employer did not violate public policy when it discharged a former employee for exercising his legal right to sue the employer. 2000 OK CIV APP 74, ¶ 15, 8 P.3d 933, 936. The court held, “such an adversarial attitude between an employee and employer could be inimical to the operation of the company and that imposing any limitation upon the firing of a discontented employee would severely impact an employer’s right to discharge those whose conduct could be harmful to the employer’s business.” *Id.* The Eastern District of Oklahoma has held “that Oklahoma does recognize a public policy tort claim for wrongful discharge based upon the exercise of freedom of expression.” *Wittmer v. Thomason*, 2021 U.S. Dist. LEXIS 40297, at *32, 2021 WL 849981 (E.D. Okla. Feb. 26, 2021). However, “*Vasek* and other recent cases have continued to limit the *Burk* tort

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claim to circumstances in which a plaintiff does not have an effective federal or state remedy to redress the harm alleged in the claim.” *Id.* (citing *Underwood v. Bd. of Cnty. Comm’rs of Cnty. of Jefferson*, 611 F. Supp. 2d 1223, 1233 (W.D. Okla. 2009)).

3. Refusing to Violate the Law

“[T]he circumstances which present an actionable tort claim under Oklahoma law is where an employee is discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy.” *Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24, 29. In other words, an employee-at-will cannot be terminated for refusing to participate in an illegal activity. *Hinson v. Cameron*, 1987 OK 49, 742 P.2d 549, 552.

Further, “[a]n employer cannot condition employment upon an employee’s agreement to violate our criminal laws without being subject to a tortious claim of wrongful discharge in violation of public policy.” *Hayes v. Eateries, Inc.*, 1995 OK 108, 905 P.2d 778, 789.

Terminating an employee who refused to execute false affidavits was actionable. *McGehee v. Flora Fax Int’l, Inc.*, 1989 OK 102, 776 P.2d 852; *see also Sargent v. Cent. Nat’l Bank & Trust Co. of Enid, Oklahoma*, 1991 OK 23, 809 P.2d 1298 (actionable to discharge an employee for refusal to destroy or alter a report to a bank’s audit committee where such acts are prohibited by criminal statutes); *White v. Am. Airlines, Inc.*, 915 F.2d 1414 (10th Cir. 1990) (actionable to discharge employee who refuses to commit perjury). *But see Peuplie v. Oakwood Ret. Vill., Inc.*, 472 P.3d 213, 214 (holding terminated employee had not alleged *Burk* claim, because she had not been able to ‘articulate a specific, well established, clear and compelling Oklahoma public policy’ which applied to nursing home employees complaining on social media about ‘administration staff or a nursing crew that just don’t give a s***!!!!’ or her sadness and disappointment ‘in what I have seen and worked with lately,’ as complaints lacked any specifics about the nature of the conduct she was criticizing, whether the conduct violated a statutory or otherwise articulated duty of care, or whether conduct rose to the level of a crime or neglect).

4. Exposing Illegal Activity (Whistleblowers)

In order to support a viable common law tort claim, “whistle blowing” activity must truly impact the public rather than simply the employer’s private or proprietary interest. *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 16, 176 P.3d 1204, 1214. In *Darrow*, plaintiff’s report of record discrepancies relating to patient safety and to billing practices, including possible Medicare fraud, were held to be matters related to Oklahoma public policy. The *Darrow* court also clarified that Oklahoma law protects both internal and external reporting of whistle blowers. Purely private and proprietary interests of an employer will not establish a whistle blower common law tort. *Id.* ¶ 19, 176 P.3d at 1215; *see Hayes v. Eateries, Inc.*, 1995 OK 108, 905 P.2d 778, 789-90 (restaurant employee’s claim of wrongful discharge for reporting a co-employee’s embezzlement was not deemed a violation of public policy because the only issue involved was the employer’s private, proprietary interest, not an issue affecting the public at large).

In *Pitts v. Electrical Power Systems, Inc.*, No. 08-CV-96-GKF-PJC, 2008 WL 2364998, at *3 (N.D. Okla. June 6, 2008), a federal district court stated having knowledge of an employer’s improper conduct but not acting upon that knowledge precludes one from asserting a *Burk* tort claim. The court denied the plaintiff’s request to assume that he would eventually become a whistle blower, but left open the

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possibility that such an assumption will not always be precluded, if the employer was aware that he might become one. *See id.* at *4.

Burk, Hinson and Darrow recognize exposing wrongdoing by an employer, internally and externally, as a potential public policy exception to the at-will employment doctrine when the protection of a public interest is at stake. This protection has been extended to at-will, non-classified employees of state political subdivisions. *Vasek v. Bd. of Cnty. Com'rs of Noble Cnty.*, 2008 OK 35, 186 P.3d 928.

III. CONSTRUCTIVE DISCHARGE

To support a constructive discharge claim, a plaintiff must demonstrate that “a reasonable person in the employee’s position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.” *Large v. Acme Eng’g and Mfg. Corp.*, 1990 OK 34, 790 P.2d 1086, 1088; *see Collier v. Insignia Fin. Grp.*, 1999 OK 49, ¶ 9, 981 P.2d 321, 324. A non-exhaustive list of factors to be considered includes: (1) the frequency of the discriminatory conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or merely offensive; and (4) whether the conduct unreasonably interferes with the employee’s job performance. *Collier*, 1999 OK 49, ¶ 10, 981 P.2d at 324.

IV. WRITTEN AGREEMENTS

A. Standard “For Cause” Termination

“Termination for cause” provisions are valid. *W. Steel Erection Co. v. Gatlin*, 1957 OK 322, 319 P.2d 607. Contract employees have no claim for a discharge in violation of public policy under the *Burk* exception to the at-will doctrine because that exception applies only to at-will employees. *Wilson v. City of Tulsa*, 2004 OK CIV APP 44, ¶ 27, 91 P.3d 673, 681.

B. Status of Arbitration Clauses

Oklahoma favors arbitration agreements and adopted the Uniform Arbitration Act, 12 OKLA. STAT. §§ 1851 - 1881. By Oklahoma law, it is not the arbitrator, but the court that determines whether a person enters into a valid, enforceable agreement to arbitrate a dispute. *Carter v. Schuster*, 2009 OK 94, 227 P.3d 149.

An arbitration clause that would exclude an employee from participating in the selection of an arbitrator is unenforceable. *Ditto v. Remax Preferred Properties, Inc.*, 1993 OK CIV APP 151, 861 P.2d 1000, 1004.

V. ORAL AGREEMENTS

A. Promissory Estoppel

Generally, oral statements by an employer to an employee such as “you will be employed or “you will not be terminated as long as you perform your job satisfactorily” are insufficient to transform employment at-will into a binding contract the employee may be discharged only for just cause. *Hayes v. Eateries, Inc.*, 1995 OK 108, 905 P.2d 778, 784-785. However, employees may maintain a cause of action

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for an implied contract if they can demonstrate detrimental reliance on oral assurances. *Hinson v. Cameron*, 1987 OK 49, 742 P.2d 549, 554-55.

Oklahoma has adopted the Second Restatement of Contracts elements for enforcement of promissory estoppel:

(1) a clear unambiguous promise, (2) foreseeability by the promisor that the promisee would rely upon it, (3) reasonable reliance upon the promise to the promisee's detriment and (4) hardship or unfairness can be avoided only by the promise's enforcement.

Russell v. Bd. of Cnty. Comm'rs, Carter Cnty., 1997 OK 80, ¶ 27, 952 P.2d 492.

B. Fraud

Oklahoma state courts have not yet directly addressed fraud in the context of oral agreements for employment.

C. Statute of Frauds

An oral contract of employment not to be performed within one year is within the statute of frauds. *B.F.C. Morris Co. v. Mason*, 43 P.2d 401 (Okla. 1935); *see also* 15 OKLA. STAT. § 136. Where an oral contract of employment cannot be performed within one year, part performance does not take the contract out of statute of frauds. *St. Louis Trading Co. v. Barr*, 1934 OK 273, 32 P.2d 293, 294. For example, an oral contract of employment to continue "so long as plaintiff was able to continue actively in said work" was invalid. *Dicks v. Clarence L. Boyd Co.*, 1951 OK 328, 238 P.2d 315. However, an oral contract may be a continuing contract extending beyond a year and is not subject to the statute of frauds as long as either party can terminate it at any time. *Sosbee v. Clark*, 1922 OK 201, 207 P. 732.

In *Roxana Petroleum Co. of Okla. v. Rice*, the Oklahoma Supreme Court held an oral employment contract whose duration was dependent upon a contingency was not subject to the statute of frauds. 235 P. 502, 507 (Okla. 1924). There, the agreement stated employment was contingent for as long as the company did business in Oklahoma and Texas, which may or may not terminate within one year. The Oklahoma Supreme Court has neither reconciled nor explicitly distinguished the rulings in *Roxana* and *Dicks*, but the U.S. Court of Appeals for the Tenth Circuit has followed the ruling stated in *Roxana* as it pertains to oral employment contracts in Oklahoma. *See Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 679 (10th Cir. 1990) (interpreting Oklahoma law).

VI. DEFAMATION

A. General Rule

1. Libel

Libel is defined as:

[A] false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or

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obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends.

12 OKLA. STAT. § 1441.

2. Slander

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

1. Charges any person with crime, or with having been indicted, convicted or punished for crime
2. Imputes in him the present existence of an infectious, contagious or loathsome disease
3. Tends to directly injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit
4. Imputes to him impotence or want of chastity; or
5. Which, by natural consequences, causes actual damage.

12 OKLA. STAT. § 1442. The first four provisions of the statute constitute slander per se, whereas the fifth provision requires a showing of actual damages and thus states a slander per quod rule.

The constitutionally required fault elements underlying a defamation claim in Oklahoma are willfulness and negligence. “Anyone who publishes a defamatory falsehood concerning a private person—or a public official or figure regarding a purely private matter not affecting his official conduct, fitness, or capacity”—shall be liable if the publisher “knows the statement is false,” “acts in reckless disregard of whether such statement is false,” or “acts negligently in failing to ascertain that the statement is false.” *Anson v. Erlanger Minerals and Metals, Inc.*, 1985 OK CIV APP 24, 702 P.2d 393, 396.

B. References

An employer has a qualified privilege to communicate an employee’s termination and the reasons behind the termination to its customers and prospective employers so long as such communication was not malicious. *M.F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167, 170 (10th Cir. 1968) (interpreting Oklahoma state law).

C. Privileges

A privileged communication or publication is one made:

1. In any legislative or judicial proceeding or any other proceeding authorized by law;
2. In the proper discharge of an official duty;
3. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers,

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except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.

12 OKLA. STAT. § 1443.1.

A “privileged communication” is one made in good faith, related to any subject matter in which a party has an interest, or in reference to which he has, or honestly believes he has, a duty, and which contains matters which, without the occasion upon which it is made, would be defamatory. *See Magnolia Petroleum Co. v. Davidson*, 148 P.2d 468 (Okla. 1944). “Communication inside a corporation, between its officers, employees, and agents, is never a publication for the purposes of actions for defamation.” *Asher v. Parsons Elec., L.L.C.*, 460 P.3d 1006, 1009 (citing *Thornton v. Holdenville General Hospital*, 2001 OK CIV APP 133, ¶ 11, 36 P.3d 456; *Magnolia*, 1944 OK 182, ¶ 35).

D. Other Defenses

1. Truth

Truth is a defense to defamation claims. 12 OKLA. STAT. § 304. If the defendant can prove the truth of the alleged defamatory statement, the defense is complete and the defendant must be found not liable. *Martin v. Griffin Television, Inc.*, 1976 OK 13, 549 P.2d 85, 94.

2. No publication

The plaintiff in a libel action must prove the alleged defamation was communicated to a third party, and “it is not sufficient to show only that it was communicated to the person defamed therein.” *Young v. First State Bank, Watonga*, 1981 OK 53, 628 P.2d 707, 713.

Communications between a corporation’s officers, employees, and agents don’t need a privilege against libel and slander because such communications within the corporation do not reach the point of publication. *Thornton v. Holdenville Gen. Hosp.*, 2001 OK CIV APP 133, ¶ 11, 36 P.3d 456, 460; *see also Magnolia Petroleum Co. v. Davidson*, 1944 OK 182, 148 P.2d 468, 471. However, this privilege may be lost if the plaintiff can prove actual or express malice. *Thornton*, 36 P.3d at 461 (citing *Reininger v. Prickett*, 1943 OK 193, ¶ 17; *Park v. Security Bank & Trust Co.*, 1973 OK 72, ¶ 32, 512 P.2d 113, 119 (stating that “express malice,” for the purposes of an action for malicious prosecution, “must be actuated by ill-will or hatred, or wilfully [*sic*] done in a wanton and oppressive manner and in conscious disregard of the other’s rights”).

3. Self-Publication

In Oklahoma, distribution of alleged libelous matter to others to plaintiff’s agent at plaintiff’s request is not an actionable “publication.” *Taylor v. McDaniels*, 1929 OK 378, 281 P. 967, 973. In addition, Oklahoma does not recognize a theory of recovery based on compelled self-publication, which occurs when an individual “utters the slanderous statement to the victim . . . and the victim is compelled to repeat the slander to a third person.” *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1554-55 (10th Cir. 1995) (interpreting Oklahoma law).

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4. Invited Libel

The defense of invited libel is stated in *Taylor v. McDaniels*, 1929 OK 378, 281 P. 967:

It is generally held that the publication of a libel or slander invited or procured by the plaintiff is not sufficient to support an action for defamation. For example, the delivery of a letter of recommendation for a former employee to a person who, by his authority, requested it is not a publishing of any libel contained in it. . . . If plaintiff consented to, or authorized the publication complained of, he cannot recover for any injury sustained by reason of the publication; and the same rule applies to a publication solicited or induced by inquiry on the part of plaintiff or his agent, at least if it was procured by the fraudulent contrivance of plaintiff himself, with a view to an action.

Id. at 970 (citations omitted). See also *Patrick v. Thomas*, 1962 OK 190, ¶ 7, 376 P.2d 250, 253 (“Under the doctrine of *Taylor v. McDaniels*, *supra*, the making of an alleged defamatory remark concerning a plaintiff, to another, acting with his consent for him, in his stead, is no different, as far as publication is concerned, than making it to plaintiff himself.”).

5. Opinion

“As a general rule, statements which are opinion[] and not factual in nature, which cannot be verified as true or false, are not actionable as slander or libel under Oklahoma law.” *Metcalf v. KFOR-TV, Inc.*, 828 F. Supp. 1515, 1529 (W.D. Okla. 1992) (citing *Miskovsky v. Okla. Publ'g Co.*, 654 P.2d 587, 593-94 (Okla. 1982)).

However, if an opinion is stated as or “is in the form of a factual imperative,” or if an opinion is expressed without disclosing the underlying factual basis for the opinion, the opinion is actionable under Oklahoma law if the opinion implies or creates a reasonable inference that the opinion is justified by the existence of undisclosed defamatory and false facts. *Id.* at 1529; see *McCullough v. Cities Serv. Co.*, 1984 OK 1, 676 P.2d 833, 835.

E. Job References and Blacklisting Statutes

“No firm, corporation, or individual shall blacklist or require a letter of relinquishment, or publish, or cause to be published, or blacklisted, any employee, mechanic, or laborer, discharged from or voluntarily leaving the service of such company, corporation or individual, with intent and for the purpose of preventing such employee, mechanic or laborer, from engaging in or securing similar or other employment from any other corporation, company or individual.” 40 OKLA. STAT. § 172.

“An intent to injure by preventing future employment is the essence of the offense of blacklisting.” *State v. Dabney*, 1943 OK CR 98, 141 P.2d 303, 308. Thus, the *Dabney* court held that a letter stating the plaintiff was a “troublemaker” was sufficient to establish blacklisting. *Id.*; see also *Asher v. Parsons Elec., L.L.C.*, 460 P.3d 1006, 1008.

A former employer’s failure to verify employment requested by a potential employer does not constitute intentional misrepresentation and/or blacklisting. “The offense of blacklisting requires

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affirmative conduct, not mere silence.” *Nichols v. Pray, Walker, Jackman, Williamson & Marler, P.C.*, 2006 OK CIV APP 115, ¶ 22, 144 P.3d 907, 912.

F. Non-Disparagement Clauses

Oklahoma state courts have not yet addressed non-disparagement clauses, apart from stating that they cannot be used to control what must be released pursuant to an Oklahoma Open Records Act (ORA) request. See *Ross v. City of Owasso*, 2017 OK CIV APP 4, ¶ 1.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

Section 46 of the Restatement (Second) of Torts was adopted in Oklahoma in *Eddy v. Brown*, 1986 OK 3, 715 P.2d 74, 76. The pertinent portion of § 46 states:

One who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Eddy, 1996 OK 3, 715 P.2d at 76 (citation omitted). The trial court must initially determine “whether a defendant’s conduct may reasonably be regarded as sufficiently extreme and outrageous to meet § 46 standards.” *Id.* The liability for the tort “does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” *Id.* at 77 (citation omitted). In order to state a claim for emotional distress, the conduct must be “beyond all possible bounds of decency in the setting in which it occurred” and must be “regarded as utterly intolerable within a civilized community.” *Id.* (citation omitted). While it is natural that an employee experience some distress from being terminated, such distress is not actionable. *Smith v. Farmers Co-op Assoc. of Butler*, 1992 OK 11, 825 P.2d 1323, 1328; see also *Anderson v. Okla. Temp. Serv., Inc.*, 1996 OK CIV APP 90, 925 P.2d 574.

Although mere insults and indignities are generally not sufficient to meet the requirements for a claim of IIED, the Oklahoma Supreme Court, in reversing an order for summary judgment, held that a manager’s remark calling a minor employee a “f...ing retard” may reasonably meet the test for an IIED claim. *Durham v. McDonald’s Rest. of Okla., Inc.*, 2011 OK 45, ¶ 9, 256 P.3d 64. There, the employee, a minor, was denied several times by his manager permission to take his anti-seizure medicine before being called a “f...ing retard.” *Id.* ¶ 1, 256 P.3d at 66. The employee left work crying and never returned. While not definitively “extreme and outrageous,” it is conduct that reasonable people may view as being extreme and outrageous, and thus a question for a jury. *Id.* ¶ 9, 256 P.3d at 67.

B. Negligent Infliction of Emotional Distress

Negligent infliction of emotional distress is not an independent tort. A plaintiff must prove (1) a duty on the part of the defendant to protect plaintiff from injury; (2) breach of duty by the defendant; and (3) injury to plaintiff resulting from the breach. *Kraszewski v. Baptist Med. Ctr. of Okla., Inc.*, 1996 OK 141, 916 P.2d 241, 245. Damages may not be recovered for negligent infliction of emotional distress absent tangible physical injury. *Richardson v. J.C. Penney Co., Inc.*, 1982 OK CIV APP 35, 649 P.2d 565, 566.

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VIII. PRIVACY RIGHTS

A. Generally

“Oklahoma courts recognize the tort of invasion of privacy by intrusion upon a person's seclusion, and this tort has two elements: ‘(a) a nonconsensual intrusion (b) which was highly offensive to a reasonable person.’” *Mousavi v. John Christner Trucking, LLC*, 487 F. Supp. 3d 1194, 1203 (Sept. 16, 2020) (citing *Gilmore v. Enogex, Inc.*, 1994 OK 76, 878 P.2d 360, 366). Oklahoma follows the Restatement (Second) of Torts § 652A in recognizing four distinct categories of invasion of privacy.

- (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interest of the other.
- (2) The right of privacy is invaded by:
 - (a) unreasonable intrusion upon the seclusion of another
 - (b) appropriation of another's name or likeness
 - (c) unreasonable publicity given to another's private life
 - (d) publicity that unreasonably places another in a false light before the public

See Guilbeau v. Durant H.M.A., LLC, 2023 OK 80, ¶ 22; *McCormack v. Okla. Publ'g Co.*, 1980 OK 98, 613 P.2d 737, 739; *Grogan v. KOKH, LLC*, 2011 OK CIV APP 34, 256 P.3d 1021; *Guinn v. Church of Christ of Collinsville*, 1989 OK 8, 775 P.2d 766, 781; *Anderson v. Blake*, No. CIV-05-0729-HE, 2006 WL 314447, at *2 (W.D. Okla. Feb. 9, 2006); *Lewis v. Wal-Mart Stores, Inc.*, No. 02CV0944CVE-FHM, 2005 WL 3263377 (N.D. Okla. Dec. 1, 2005).

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Every public employer must utilize a Status Verification system operated by the federal government to verify the citizenship or immigration status of all new employees. 25 OKLA. STAT. § 1313.

Pursuant to the federal Personal Responsibility and Work Opportunity Conciliation Act of 1996, employers must report information regarding their newly-hired employees to the Oklahoma Employment Security Commission, which then reports that information to Oklahoma Child Support Services.

2. Background Checks

An employer who requests a consumer report for employment purposes must provide written notice to the person who is the subject of the consumer report. 24 OKLA. STAT. § 148. A “consumer report” under Oklahoma is defined by reference to the Fair Credit Reporting Act as “[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit rating, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . (B) employment purposes 15 U.S.C. § 1681a(d)(1).

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When an employer requests a consumer report from a background screening company, the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*, also applies. The FCRA requires, *inter alia*, that the requester disclose to the consumer (potential employee) clearly and conspicuously in writing that a consumer report may be obtained for employment purposes and that the requester obtain written authorization from the potential employee to request and receive the consumer report unless an exception applies. 15 U.S.C. § 1681b(b)(2)(A).

C. Other Specific Issues

1. Workplace Searches

Employers that are not state actors are not required to comply with an employee's Fourth Amendment right against unreasonable searches and seizures. *Gilmore v. Enogex, Inc.*, 1994 OK 76, 878 P.2d 360, 367. However, private employers who are acting as instruments of the government are subject to the constitutional prohibition against unreasonable searches and seizures. *Id.*

2. Electronic Monitoring

Oklahoma has enacted the Security of Communications Act, 13 OKLA. STAT. § 176.1, *et seq.* The acts prohibited are listed in section § 176.3:

§ 176.3. Prohibited acts--Felonies--Penalties--Venue

Except as otherwise specifically provided in this act, any person is guilty of a felony and upon conviction shall be punished by a fine of not less than Five Thousand Dollars (\$ 5,000.00), or by imprisonment of not more than five (5) years, or by both who:

1. Willfully intercepts, endeavors to intercept or procures any other person to intercept or endeavor to intercept any wire, oral or electronic communication;
2. Willfully uses, endeavors to use or procures any other person to use or endeavor to use any electronic, mechanical or other device to intercept any oral communication;
3. Willfully discloses or endeavors to disclose to any other person the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained in violation of the provisions of the Security of Communications Act;
4. Willfully uses or endeavors to use the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained in violation of the provisions of the Security of Communications Act;
5. Willfully and maliciously, without legal authority, removes, injures or obstructs any telephone or telegraph line, or any part or appurtenances or apparatus connected thereto, or severs any wires thereof;
6. Sends through the mail or sends or carries any electronic, mechanical or other device with the intention of rendering the device primarily useful for the purpose of the illegal interception of wire, oral or electronic communications in violation of the provisions of the Security of Communications Act;
7. Manufactures, assembles, possesses or sells any electronic, mechanical or other device with the intention of rendering the device primarily useful for the purpose of the illegal interception of wire, oral or electronic communications in violation of the provisions of the Security of Communications Act; or

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8. Willfully uses any communication facility in committing or in causing or facilitating the commission of any act or acts constituting one or more of the felonies enumerated in Section 176.7 of this title. Each separate use of a communication facility to cause or facilitate such a felony shall be a separate offense. Venue for any violation of this section shall lie in the same county as venue for the underlying felony enumerated in Section 176.7 of this title.

3. Social Media

Oklahoma has not directly addressed the use of social media in the workplace. It is noted that a workplace policy concerning the use of social media may implicate the provisions and rules of the NLRB.

Employers are prohibited from requiring employees or prospective employees to disclose user names and passwords for accessing a personal online social media account, and from taking any retaliatory actions for an employee's, or prospective employee's, refusal to provide such information. 40 OKLA. STAT. § 173.2.

4. Taping of Employees

See discussion of the Security of Communications Act, 13 OKLA. STAT. § 176.1, *et seq.*, in Part VIII.C.2, *supra*.

5. Release of Personal Information on Employees

Employers are prohibited from (1) publicly displaying or posting employees' social security numbers, (2) printing an employee's social security number on any card required for the employee to access information, products or services provided by the employing entity, (3) requiring an employee to transmit their social security number over the Internet, unless the connection is secure or the social security number is encrypted, (4) requiring an employee to use their social security number to access an Internet web site, unless a password or unique personal identification number or other authentication device is also required to access the Internet web site, or (5) printing the social security number of an employee on any materials that are mailed to the employee, unless state or federal law requires the social security number to be on the document to be mailed. 40 OKLA. STAT. § 173.1. These provisions do not apply to the State or subdivisions thereof.

An employer may disclose information about a current or former employee's job performance to a prospective employer of the current or former employee upon request of the prospective employer and with consent of the current or former employee, or upon request of the current or former employee. A state agency may disclose information regarding a current or former employee's job performance to another state agency which is a prospective employer of the current or former employee without the employee's consent. 40 OKLA. STAT. § 61.

6. Medical Information

Employers are allowed to require a medical examination of an employee prior to the start of any employment duties and are allowed access to the employee's employment medical records, but under the Americans with Disabilities Act the records must be separately maintained on separate forms, in separate medical files and must be treated as confidential. *Garrison v. Baker Hughes Oilfield Operations*,

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Inc., 287 F.3d 955, 962 (10th Cir. 2002) (citing 42 U.S.C. § 12112(d)(3)(B)). Exceptions apply to allow (i) supervisors and managers [to] be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel [to] be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this chapter shall be provided relevant information on request. *Id.* In addition, the court also looked to the Equal Employment Opportunity Commission for clarification, which states that employers “should not place any medical-related material in an employee’s personnel file.” *Id.* at 962 (citing Equal Employment Opportunity Technical Assistance Manual § 6.5). Steps should be taken by the employer to secure the employee’s medical information including “keeping the information in a medical file in a separate, locked cabinet, apart from the location of personnel files” and “designating a specific person or persons to have access to the medical file.” *Id.*

Furthermore, records of all drug and alcohol test results and related information maintained by the employer shall be the property of the employer and shall be made available for inspection and copying to the applicant or employee upon request. Unless permitted by 40 OKLA. STAT. § 560(B), an employer shall not release such records to any person other than the applicant, employee or the review officer. 40 OKLA. STAT. § 560(A).

IX. WORKPLACE SAFETY

A. Negligent Hiring

Employers may be held liable for negligent hiring, supervision, or retention of an employee. An employer is found liable, if the employer had reason to believe that the person would create an undue risk of harm to others. Liability is dependent upon the employer’s prior knowledge of the servant’s propensity to commit the very harm for which damages are sought. In Oklahoma, the theory of recovery is available if vicarious liability is not established. *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, ¶ 20, 998 P.2d 592, 600.

B. Negligent Supervision/Retention

See above, regarding Oklahoma law pertaining to Negligent Hiring.

C. Interplay with Worker’s Comp. Bar

Oklahoma’s Workers’ Compensation Code provides an employee’s exclusive remedy to recover against an employer for an on-the-job injury. 85A OKLA. STAT. § 5. Generally, an employee may not bring a tort action against its employer for an on-the-job injury unless the employer intentionally brought about the injury. The definition of an intentional tort under the Workers’ Compensation Code is as follows:

An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. Allegations or proof that the employer had knowledge that such injury was substantially certain to result from the employer’s conduct shall not constitute an intentional tort. The employee shall plead facts that show it is at least as likely as it is not that the employer acted with the purpose of injuring the employee. The issue of whether an act is an intentional tort shall be a question of law for the Court.

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85A OKLA. STAT. § 5(B)(2).

Pursuant to *Pryse Monument Co. v. Dist. Ct.*, 1979 OK 71, 595 P.2d 435, an individual who has two remedies for the same injury and has prosecuted one of them to conclusion is barred from resort to the other remedy. This is also applicable to workers' compensation claimants who may also press a tort remedy. *Dyke v. St. Francis Hosp.*, 1993 OK 114, 861 P.2d 295. 302; *see also Griffin v. Baker Petrolite Corp.*, 2004 OK CIV APP 87, 99 P.3d 262; *Farley v. City of Claremore*, 2020 OK 30, 465 P.3d 1213.

The exclusive remedy doctrine does not apply when an employer fails to secure the payment of workers' compensation benefits due to the employee as required by the Workers' Compensation Code. 85A OKLA. STAT. § 5(B)(1). *See also Kpiele-Poda v. Patterson-Uti Energy, Inc.*, 2023 OK 11 (holding employee could not file claim before the Workers' Compensation Commission while maintaining a lawsuit in the district court against the employer for an intentional tort).

D. Firearms in the Workplace

Employers may restrict and/or prohibit in any manner the existing rights of any person, property owner, tenant, employer, place of worship or business entity to control the possession of weapons on any property owned or controlled by the person or business entity. 21 OKLA. STAT. § 1290.22(A).

Employers, however, are not permitted to establish any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle. 21 OKLA. STAT. § 1290.22(B). An amendment effective November 1, 2021 adds "liquor stores" to the list of entities covered by Section 1290.22. *See also Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1208 (holding Occupational Safety and Health Act did not preempt 21 OKLA. STAT. § 1290.22).

E. Use of Mobile Devices

Oklahoma has not specifically addressed the use of mobile devices in the workplace. However, those employers in the transportation industry should be advised of the Oklahoma laws regarding use of mobile devices and driving. The following may be applicable to employers employing drivers:

Oklahoma has a general safe driving statute requiring every operator of a vehicle to devote their full time and attention to such driving. 47 OKLA. STAT. § 11-901b. This statute, however, can only be enforced if a law enforcement officer observes the operator to be "involved in an accident or observes the operator of the vehicle driving in such a manner that poses an articulable danger" to others on the road. *Id.*

It is unlawful for commercial operators to operate their vehicles "while using a cellular telephone or electronic communication device to write, send, or read a text-based communication while the motor vehicle is in motion or use a hand-held mobile telephone while operating a commercial vehicle. 47 OKLA. STAT. § 11-901c.

It is unlawful for any operator of a motor vehicle to manually compose, send, or read an electronic text message while the motor vehicle is in motion. 47 OKLA. STAT. § 11-901d.

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Oklahoma has a general ban on the use of handheld phones, for either texting or talking, for drivers possessing either a learner's permit or an intermediate Class D license. The Oklahoma statutes state that such licenses may be suspended or canceled at the discretion of the Department of Safety . . . for using a hand-held electronic device while operating a motor vehicle for non-life-threatening emergency purposes" 47 OKLA. STAT. § 6-105(F). For purposes of this statute, "'Using a hand-held electronic device' means engaging in any function on an electronic device." *Id.* § 6-105(J)(2).

X. TORT LIABILITY

A. Respondeat Superior Liability

An employer is responsible for an employee's tort when the tort is committed in the course of employment and within the scope of the employee's authority. "Within the scope of employment" means engaged in the work assigned, or if doing that which is proper, necessary and usual to accomplish the work assigned, or doing what which is customary within the particular trade or business. *Sheffer v. Carolina Forge, Co.*, 2013 OK 48, ¶ 18. Oklahoma also provides that punitive damages may be awarded against the principal for a servant's act under respondeat superior. *Jordan v. Cates*, 1997 OK 9, ¶ 9, 935 P.2d 289, 292.

For claims of negligent hiring, training, and retention, there can be no additional claims against the employer premised upon the employer's vicarious liability for the employee's actions when an employer stipulates that the doctrine of respondeat superior applies, as such claims do not expose the employer to additional liability. *Id.* ¶ 21, 935 P.2d at 294.

In 2018, the Oklahoma Supreme Court eliminated operation of this rule for negligent entrustment, holding that "An employer's stipulation that an accident occurred during the course and scope of employment does not, as a matter of law, bar a negligent entrustment claim." *Fox v. Mize*, 2018 OK 75, ¶ 14, 428 P.3d 314, 322, *as corrected* (Oct. 2, 2018) (original emphasis).

B. Tortious Interference with Business/Contractual Relations

"Oklahoma recognizes a tortious interference claim with a contractual or business relationship if the plaintiff can prove (1) the interference was with an existing contractual or business right; (2) such interference was malicious and wrongful; (3) the interference was neither justified, privileged nor excusable; and (4) the interference proximately caused damage." *Clark v. Hines*, 2020 Okla. Dist. LEXIS 195, at *3 (citing *Wilspec Techs., Inc. v. DunAn Holding Gry., Co.*, 2009 OK 12, ¶¶ 15-16). The tort extends to circumstances where the contract performance becomes more costly or unduly burdensome due to the interference. *Id.* A claimant may seek not only compensatory, but also punitive damages. *Navistar Int'l. v. Vernon Klein Truck*, 1994 OK CIV APP 168, 919 P.2d 443, 446; *see also Gabler v. Holder & Smith, Inc.*, 2000 OK CIV APP 107, 51.

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted

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to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer. 15 OKLA. STAT. § 219A. Under section (B), “Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable.”

A contract or contractual provision prohibiting an employee or independent contractor of a person or business from soliciting, directly or indirectly, actively or inactively, the employees or independent contractors of that person or business to become employees or independent contractors of another person or business shall not be construed as a restraint from exercising a lawful profession, trade or business of any kind. 15 OKLA. STAT. § 219B. Sections 217, 218, 219 and 219A of Title 15 of the Oklahoma Statutes shall not apply to such contracts or contractual provisions.

B. Blue Penciling

If a non-compete provision is unreasonable, judicial modification is justified if the defect can be cured by imposing reasonable limitations regarding the activities embraced, time, or geographical limitations; however, a covenant not to compete cannot be judicially modified if the essential elements of a contract must be supplied. *Berry & Berry Acquisitions, LLC v. BFN Props. LLC*, 2018 OK 27, ¶ 15; *Cardiovascular Surgical Specialists, Corp. v. Mammana*, 2002 OK 27, ¶ 14, 61 P.3d 210, 213; *Bayly, Martin & Fay, Inc. v. Pickard*, 1989 OK 122, 780 P.2d 1168, 1169, 1173.

C. Confidentiality Agreements

Oklahoma state courts have not directly addressed employer/employee confidentiality agreements, but their legality, generally, appears to be uncontested. *See, e.g., Branch v. Amerisource Grp., Inc.*, 2001 OK CIV APP 86, ¶ 3, 29 P.3d 605, 607.

The Oklahoma Court of Appeals has held that the requirements of the Open Records Act could not be overruled by any confidentiality agreement between city and city manager, and thus, the city could not refuse to release a report drafted by a private attorney commissioned by city to investigate allegations of misconduct by city manager on the grounds of any “non-disparagement” or confidentiality agreement. *Ross v. City of Owasso*, 2017 OK CIV APP 4, 389 P.3d 396.

D. Trade Secrets Statute

Oklahoma has adopted the Uniform Trade Secrets Act, codified at 78 OKLA. STAT. §§ 85-95. In 2016, the Defend Trade Secrets Act (“DTSA”) established federal question jurisdiction for trade secret misappropriation cases. The DTSA does not preempt state law, but rather gives claimants the option of pursuing federal or state claims for misappropriation.

E. Fiduciary Duty and their Considerations

Oklahoma has not addressed the issue of fiduciary duties with respect to restrictive covenants/non-compete agreements.

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XII. DRUG TESTING LAWS

Oklahoma has specific, strict guidelines for drug testing. 40 OKLA. STAT. §§ 551-562. The state law is preempted if drug and alcohol testing is “required by and conducted pursuant to federal law or regulation.” 40 OKLA. STAT. § 553(C).

Testing under the State Act may be conducted only as provided by a “written policy.” *Id.* § 555. Test results become the property of the employer and will be available only to the employee upon request, unless otherwise authorized. *Id.* § 560. Testing is allowed for applicant and transfer/reassignment testing, reasonable suspicion testing, post-accident testing, random testing, scheduled and periodic testing, and post-rehabilitation testing. *Id.* § 554. The provisions of the statute must be strictly followed to avoid liability. A 2019 amendment specified that a breath or blood specimen may be used for the confirmation test for alcohol and that a urine, saliva or blood specimen may be used for the confirmation test for drugs. 40 OKLA. STAT. § 552.

A. Public Employers

A public employer may require random testing only of employees who are police or peace officers, have drug interdiction responsibilities, are authorized to carry fire arms, are engaged in activities which directly affect the safety of others, are working for a public hospital, or work in direct contact with inmates or juvenile delinquents or children in need of supervision. 40 OKLA. STAT. § 554(4).

B. Private Employers

Private employers are not restricted regarding which employees may be required to undergo random testing as long as the statute is strictly followed.

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

An employer is covered under Oklahoma anti-discrimination statutes if “it is a legal entity, institution or organization that pays one or more individuals a salary or wages for work performance, or a legal entity, institution or organization which contracts or subcontracts with the state, a governmental entity or a state agency to furnish material or perform work.” 25 OKLA. STAT. § 1301(1). Anti-discrimination statutes do not apply to the employment of an individual by his parents, spouse, or child or to employment in the domestic service of an employer. 25 OKLA. STAT. § 1301. Indian Tribes and non-profit organizations are also excluded. *Id.*

B. Types of Conduct Prohibited

Employees are protected from discrimination based upon race, color, religion, sex, national origin, age, genetic information or disability unless such action is related to a bona fide occupational qualification reasonably necessary to the normal operation of the employer’s business or enterprise or if making an accommodation for a disability would create an undue hardship upon the business operation of the employer. *See* 25 OKLA. STAT. §§ 1101, 1302, 1308.

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Employers are prohibited from refusing to hire, discharge, or otherwise discriminate against individuals based on race, religion, color, sex, national origin, age, genetic information or disability, as well as prohibiting retaliation against an employee who opposes unlawful practices or who participates in proceedings under the Act. Employers are also prohibited from limiting, segregating, or classifying an employee or applicant in a way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee, because of race, color, religion, sex, national origin, age, genetic information or disability. 25 OKLA. STAT. § 1302.

The State is prohibited from discriminating against or favoring an employee on the basis of political or religious opinions or affiliations, race, creed, gender, color, or national origin, or by reason of physical handicap, so long as the physical handicap does not render the employee unable to do the work for which he is employed. 74 OKLA. STAT. § 840-2.9

It is a discriminatory practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published a notice or advertisement relating to employment by the employer or membership in or a classification or referral for employment by the labor organization, or relating to a classification or referral for employment by the employment agency, indicating a preference, limitation, specification, or discrimination, based on race, color, religion, sex, national origin, age, genetic information or disability, unless the employer, organization or agency can demonstrate that accommodation for the disability would impose an undue hardship on the operation of the business of such employer, organization or agency; but a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment. 25 OKLA. STAT. § 1306.

C. Administrative Requirements

To file an action for discrimination based on race, color, religion, sex, national origin, age, disability, genetic information, or retaliation, an aggrieved party must, within one hundred eighty (180) days from the last date of alleged discrimination, file a charge of discrimination with the Oklahoma Attorney General's Office of Civil Rights Enforcement or the Equal Employment Opportunity Commission alleging the basis of discrimination. Upon completion of any investigation, the Attorney General's Office of Civil Rights Enforcement may transmit the results of any administrative hearing and determination to the Equal Employment Opportunity Commission or issue the complaining party a Notice of a Right to Sue. Should a charge of discrimination be filed with the Attorney General's Office of Civil Rights Enforcement and not be resolved to the satisfaction of the charging party within one hundred eighty (180) days from the date of filing of such charge, the Attorney General's Office of Civil Rights Enforcement, upon request of any party shall issue a Notice of a Right to Sue, which must be first obtained in order to commence a civil action under this section. 25 OKLA. STAT. § 1350(B)-(C).

D. Remedies Available

If an employer has discriminated against the charging party, the court may enjoin the defendant or defendants from engaging in such unlawful employment practice and order such affirmative action as reinstatement or hiring of employees. A prevailing aggrieved party shall also be entitled to backpay and an additional amount as liquidated damages. Interim earnings or amounts earnable with reasonable diligence by the person discriminated against operate to reduce the backpay otherwise allowable. If an individual was refused employment or advancement, was suspended and/or was discharged for

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legitimate reasons other than discrimination as provided by this act, then no order of the court shall require the hiring, reinstatement or promotion of that individual as an employee, nor shall it order payment of any backpay. 25 OKLA. STAT. § 1350(G).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

It is a misdemeanor to discharge or take other adverse action against an employee for taking time off to serve on jury duty who gives reasonable notice of such obligation. 38 OKLA. STAT. § 34(A)-(C). Oklahoma statutes further prohibit employers from requiring employees to use sick leave or vacation leave during jury duty. 38 OKLA. STAT. § 34(B).

B. Voting

Employers must allow employees registered to vote two (2) hours to vote on the day of the election or on a day on which in-person absentee voting is allowed by law. Longer time will be allowed if two hours does not provide enough time for the employee to reach the location to cast a ballot. However, the employee must notify the employer orally or in writing at least three days before the election of the intent to be absent to vote (this period was extended from one day prior under a 2019 amendment). Violation shall result in a civil penalty (previously a misdemeanor) of between \$50-\$100. 26 OKLA. STAT. § 7-101. This provision does not apply to employees whose workday begins three or more hours after the polls open or whose workday ends three hours or more before the polls close. *Id.*

C. Family/Medical Leave

State employees are covered by the Federal FMLA. *See* 74 OKLA. STAT. § 840-2.22. The state also allows state employees to select one or a combination of the following to account for authorized absences: leave without pay; annual and sick leave accumulated by the employee; annual and sick leave donated by other state employees; and compensatory time for FMLA leave. *Id.*

D. Pregnancy/Maternity/Paternity Leave

Oklahoma does not have specific laws that enlarge the provisions of federal FMLA or PDA laws for all employers generally. Under 74 OKLA. STAT. § 840-2.20D, “[a]ny full-time employee of this state who has been employed by the state agency for at least two (2) years prior to the request for leave shall be entitled to six (6) weeks of paid maternity leave following the birth or adoption of the employee’s child.”

E. Day of Rest Statutes

It is a crime to perform any of the following acts on the first day of the week in Oklahoma:

1. Servile labor, except works of necessity or charity.
2. Trades, manufactures, and mechanical employment.
3. All horse racing or gaming except as authorized by the Oklahoma Horse Racing Commission pursuant to the provisions of the Oklahoma Horse Racing Act.

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4. All manner of public selling, or offering or exposing for sale publicly, of any commodities, except that meats, bread, fish, and all other foods may be sold at any time, and except that food and drink may be sold to be eaten and drank upon the premises where sold, and drugs, medicines, milk, ice, and surgical appliances and burial appliances and all other necessities may be sold at any time of the day.

21 OKLA. STAT. § 908. “It is a sufficient defense in proceedings for servile labor on the first day of the week, to show that the accused uniformly keeps another day of the week as holy time, and does not labor upon that day, and that the labor complained of was done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time.” 21 OKLA. STAT. § 909. The most recent case citing the so-called “blue law” statute was in 1972, holding that ordinance discriminating against certain retailers on basis of Section 908 was discriminatory and could only be upheld on ground that prohibition was required for the public's health and welfare. *Spartan's Indus. v. City of Okla. City*, 1972 OK 72, ¶ 1.

F. Military Leave

State officers and employees who are not members of the state military forces shall be entitled to a leave of absence from their regular employment with the State of Oklahoma or a political subdivision thereof, without loss of status or efficiency rating, when detailed as a military trial judge or when serving as an appellate military when the Military Court of Appeals is convened. 44 OKLA. STAT. § 209. They are entitled to full regular pay for the first thirty (30) days of their absence, not to exceed two hundred forty (240) hours. *Id.* After this time, the state employer or agency can elect to pay the employee the difference between his regular pay and the amount of compensation established for military trial judges or appellate military judges, as applicable. *Id.* Leave taken pursuant to this section shall be characterized as military judicial leave. *Id.*

XV. STATE WAGE AND HOUR LAWS

An employer may not discharge, penalize, or otherwise discriminate against an employee who files a complaint regarding a violation of the state wage and hour laws or law providing for workplace safety or an employee who causes an investigation or proceeding to be launched, or testifies in an investigation or proceeding pursuant to state wage and hour laws or workplace safety laws. 40 OKLA. STAT. § 199.

A. Current Minimum Wage in State

Oklahoma incorporates and adopts the federal minimum wage requirements. 40 OKLA. STAT. § 197.2. Exceptions are identified at 40 OKLA. STAT. § 197.11. The provision regarding credit for tips, gratuities, meals, and/or lodging is found at 40 OKLA. STAT. § 197.16.

B. Deductions from Pay

Employers may make deductions from an employee's wages only if authorized by legislation, court order, or written consent of the employee. Okla. Admin. Code § 380-30-1-7.

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C. Overtime rules

Oklahoma adopts the federal regulations determining compliance with payment of premium overtime pursuant to the Fair Labor Standard Act, 29 U.S.C. § 201, *et seq.* Okla. Admin. Code 380:30-1-8.

D. Time for payment upon termination

An employer must pay the employee's wages in full, less offsets and less any amount over which a bona fide disagreement exists . . . at the next regular designated payday established for the pay period in which the work was performed either through the regular pay channels or by certified mail postmarked within the deadlines herein specified if requested by the employee, unless provided otherwise by a collective bargaining agreement that covers the employee. 40 OKLA. STAT. § 165.3.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

Employers are entitled to prescribe conditions with regard to smoking while on the job and/or on the employer's premises. 40 OKLA. STAT. § 501.

B. Health Benefit Mandates for Employers

An employer shall promptly provide an injured employee with medical, surgical, hospital, optometric, podiatric, chiropractic, and nursing services, along any with medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee. The employer shall have the right to choose the treating physician or chiropractor. 85A OKLA. STAT. § 50(A).

If the employer fails or neglects to provide medical treatment within five (5) days after actual knowledge is received of an injury, the injured employee may select a physician or chiropractor to provide medical treatment at the expense of the employer; provided, however, that the injured employee, or another in the employee's behalf, may obtain emergency treatment at the expense of the employer where such emergency treatment is not provided by the employer. 85A OKLA. STAT. § 50(B).

C. Immigration Laws

Oklahoma requires the use of an "E-Verify" system operated by the federal government to verify the citizenship and immigration status of employees. 25 OKLA. STAT. § 1313. Benefits cannot not be paid on the basis of services performed by an alien unless he/she is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services or otherwise is permanently residing in the United States under color of law at the time such services were performed, including an alien who is lawfully present in the United States as a result of the application of the provisions of Section 203(a)(7) or Section 212(d)(5) of the Immigration and Nationality Act. 40 OKLA. STAT. § 2-208.

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D. Right to Work laws

Oklahoma's Right to Work laws are contained in an amendment to the Oklahoma Constitution, approved by Oklahoma voters in 2001. Okla. Const. art. XXIII, § 1A. That provision prohibits requiring an individual to:

- (1) Resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization;
- (2) Become or remain a member of a labor organization;
- (3) Pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization;
- (4) Pay to any charity or other third party, in lieu of such payments, any amount equivalent to or pro rata portion of dues, fees, assessments, or other charges regularly required of members of a labor organization; or
- (5) Be recommended, approved, referred, or cleared by or through a labor organization.

Okla. Const. art. XXIII, § 1(A)(B)(1)-(5). It also prohibits deducting compensation for labor organization charges without first receiving the employee's authorization. Okla. Const. art. XXIII, § 1A(C). Violations of this constitutional provision is a misdemeanor. Okla. Const. art. XXIII, § 1A(E).

The U.S. Court of Appeals for the Tenth Circuit has ruled, however, that several provisions of Oklahoma's Right to Work amendment are preempted by federal law. *Local 514 Transp. Workers Union of Am. v. Keating*, 359 F.3d 743 (10th Cir. 2003). The following provisions are preempted by the National Labor Relations Act and the Labor Management Relations Act: § 1A(B)(1); § 1A(B)(5); § 1A(C); and § 1A(E) (in so far as § 1A(E) applies to the other pre-empted provisions).

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

It is unlawful for an employer to discharge, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual is a nonsmoker or smokes or uses tobacco products during nonworking hours. 40 OKLA. STAT. § 500.

Oklahoma has not legalized the use of marijuana generally, but with the passing of Oklahoma Medical Marijuana and Patient Protection Act (H.B. No. 2612), the state permits medicinal use of marijuana.

Under the new act, a residential or commercial property or business owner may prohibit the consumption of medical marijuana or medical marijuana product by smoke or vaporization on the premises, within the structures of the premises or within ten (10) feet of the entryway to the premises. 63 OKLA. STAT. § 427.8. "However, a medical marijuana patient shall not be denied the right to consume or use other medical marijuana products which are otherwise legal and do not involve the smoking or vaporization of cannabis when lawfully recommended pursuant to Section 420 of Title 63 of the Oklahoma Statutes." *Id.*

Furthermore, unless otherwise required by federal law or required to obtain federal funding:

1. No employer may refuse to hire, discipline, discharge or otherwise penalize an applicant or employee solely on the basis of such applicant's or employee's status as a medical marijuana licensee; and

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2. No employer may refuse to hire, discipline, discharge or otherwise penalize an applicant or employee solely on the basis of a positive test for marijuana components or metabolites, unless:
 - a. the applicant or employee is not in possession of a valid medical marijuana license,
 - b. the licensee possesses, consumes or is under the influence of medical marijuana or medical marijuana product while at the place of employment or during the fulfillment of employment obligations, or
 - c. the position is one involving safety-sensitive job duties.

MEDICAL MARIJUANA, 2019 Okla. Sess. Law Serv. Ch. 11 (H.B. 2612) (codified at 63 OKLA. STAT. § 427.8).

The act does not require an employer to permit or accommodate the use of medical marijuana on the property or premises of any place of employment or during hours of employment. *Id.* It does not require an employer, a government medical assistance program, private health insurer, worker's compensation carrier or self-insured employer providing worker's compensation benefits to reimburse a person for costs associated with the use of medical marijuana. *Id.* Finally, it does not prevent employers from having written policies regarding drug testing and impairment in accordance with the Oklahoma Standards for Workplace Drug and Alcohol Testing Act. *Id.* Remedies for aggrieved applicants or employees, for willful violation, are the same as those provided for in the Oklahoma Standards for Workplace Drug and Alcohol Testing Act. *Id.*

“Safety-sensitive job duties” are defined as

any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task or others including, but not limited to, any of the following:

- a. the handling, packaging, processing, storage, disposal or transport of hazardous materials,
- b. the operation of a motor vehicle, other vehicle, equipment, machinery or power tools,
- c. repairing, maintaining or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage,
- d. performing firefighting duties,
- e. the operation, maintenance or oversight of critical services and infrastructure including, but not limited to, electric, gas, and water utilities, power generation or distribution,
- f. the extraction, compression, processing, manufacturing, handling, packaging, storage, disposal, treatment or transport of potentially volatile, flammable, combustible materials, elements, chemicals or any other highly regulated component,
- g. dispensing pharmaceuticals,

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h. carrying a firearm, or

i. direct patient care or direct child care

63 OKLA. STAT. § 427.8(K)(1).

F. Gender/Transgender Expression

Oklahoma has no statutes addressing gender/transgender expression.

G. Other Key State Statutes

Oklahoma's unemployment benefits laws are codified in the Employment Security Act of 1980, 40 OKLA. STAT. §§ 1-101 through 9-104. Grounds disqualifying former employees to unemployment benefits are listed at 40 OKLA. STAT. §§ 2-401 through 2-422. In particular, employees terminated for "misconduct," as defined in 40 OKLA. STAT. § 2-406, are not entitled to unemployment benefits.