ALFA International
THE GLOBAL LEGAL NETWORK

PENNSYLVANIA

I. AT-WILL EMPLOYMENT

A. Statute

Pennsylvania has not codified the common law at-will employment doctrine.

B. Case Law

The at-will employment doctrine holds that an employer may terminate an employee for a good reason, bad reason or no reason at all, unless restrained by contract or a clear public policy violation. Accordingly, there is an "extremely strong" presumption that a non-contractual employment relationship is at-will. *Carlson v. Cmty. Ambulance Services, Inc.*, 824 A.2d 1228, 1232 (Pa. Super. Ct. 2003) (noting that only in the most limited circumstances, where a termination violates a clear mandate of public policy, will an employee be entitled to bring a cause of action for a termination of the at-will employment relationship) (citing *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 286 (Pa. 2000). An at-will employment relationship exists where the employee is one whose employment is not governed by a written contract for a specific term and who is terminable at the will of either the employer or the employee.

Where the parties do not specify the duration of a contract, a court will not imply a reasonable duration. As a result, the contract is terminable at-will. In the case of "lifetime" employment contracts, courts may refuse to enforce them, even when the parties' intentions are clear. In the case of an oral "lifetime" contract, courts may refuse to consider the surrounding circumstances. *See Greene v. Oliver Realty, Inc.*, 526 A.2d 1192, 1995 (Pa. Super. Ct. 1987) (Clear evidence is required to rebut the employment at-will presumption). The court in *Pinizzotto v. Parsons Brinkerhoff Quade & Douglas, Inc.*, 697 F. Supp. 886, 888 (E.D. Pa. 1988), held that under Pennsylvania law, a preponderance of evidence is all that is required to rebut the presumption of employment at-will. *Accord Robertson v. Atl. Richfield Petroleum*, 371 Pa. Super. 49, 60,537 A.2d 814, 820 (Pa. Super. Ct. 1987), *appeal denied*, 520 Pa. 590, 551 A.2d 216 (Pa. 1988).

To overcome the at-will employment presumption, a plaintiff must demonstrate either an express contract between the parties, an implied-in-fact contract plus additional consideration passing from employee to employer, or an applicable recognized public policy exception. *Walsh v. Alarm Sec. Group, Inc.*, 230 F. Supp. 2d 623, 627 (E.D. Pa. 2002). In *Walsh*, the plaintiff moved from California to Philadelphia, Pennsylvania, pursuant to an offer letter, signed by plaintiff and setting forth his approximate start date and guaranteed salary. Eventually, plaintiff was told that the prospective employer would not be opening the Philadelphia office, and thus plaintiff had no job. Plaintiff filed suit alleging breach of contract, fraud, negligent employment, and promissory estoppel. The court granted

summary judgment against plaintiff's claim for express contract but denied defendant's motion for summary judgment as to plaintiff's breach of an implied-in-fact employment contract, noting that a jury could conceivably find that plaintiff giving up his previous job's year-end bonus, moving his family to Philadelphia, and cashing out on his prior stock options to be sufficient additional consideration to support an implied-in-fact employment contract.

An employee can defeat the employment at-will presumption by establishing that he or she gave the employer additional consideration, other than the services for which he or she was hired. *Donahue v. Fed. Express Corp.*, 753 A.2d 238 (Pa. Super. Ct. 2000). The *Donahue* court distinguished between sufficient additional consideration, such as the employee giving up a stable position in another state and selling his home to relocate to a new city, from insufficient consideration, such as the employee suffering hardships in the course of his employment that are regularly suffered by those in a particular profession. Specifically, in *Donahue*, a general allegation of superior work performance was insufficient to establish additional consideration to defeat the at-will presumption.

In *Walsh*, the court noted that the prospective employer's alleged oral representation as to the predicted length of time of employment was not sufficiently definite or specific to overcome the employment at-will presumption. *Walsh v. Alarm Sec. Group, Inc.*, 230 F. Supp. 2d at 628. *See also Scully v. US WATS, Inc.*, 238 F.3d 497, 505 (3d Cir. 2001) (The employment at-will doctrine is a mere presumption, and courts must be careful to protect a plaintiff's right to prove that the parties intended a specific period of employment). In order to overcome the presumption, a party must demonstrate clear and convincing evidence of an oral employment contract for a definite term. The evidence of a subjective expectation of a guaranteed employment period, based on the employer's practices or vague promises, is insufficient *Id*. *See also Kane v. Platinum Health Care LLC*, 2011 WL 248494, No. 10-4390 (W.D.Pa. Jan. 25, 2011) (employee failed to allege facts to rebut presumption of at-will employment).

The court in *Walden v. Saint Gobain Corp.*, 323 F.Supp.2d 637, 647 (E.D. Pa. 2004), declined to extend *Walsh* where the terms of the employment contract defined the employment relationship as at-will. The court explained that the "additional consideration" theory of recovery, under which an employee defeats the at-will presumption by giving either a substantial benefit to the employer or undergoing a substantial hardship, is a mechanism for discerning the intentions of the parties to establish that they intended that the relationship not be terminable at-will. *Id*. at 646. Therefore, when the parties' intentions are clearly stated in an agreement, no conduct or statements can be considered as evidence of an intent to modify the at-will presumption. *Id*. at 646-47.

Under Pennsylvania law, government employees are precluded from being employed as anything other than at-will employees, "unless explicit enabling legislation to the contrary is passed by the Pennsylvania General Assembly as to that position." *Elmore v. Cleary*, 399 F.3d 279 (3d Cir. 2005).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

Generally, an employment handbook may constitute an enforceable implied contract if a reasonable person in the employee's position would understand the handbook's provisions as demonstrating the employer's intent to overcome the at-will presumption and be legally bound by the

handbook's representations. *Diehl Elec. Data Sys. Corp.*, 2008 U.S. Dist. LEXIS 53757 (M.D. Pa. July 10, 2008); *Bauer v. Poltsville Area Emergency Med. Services*, 758 A.2d 1265, 1269 (Pa. Super. Ct. 2000). Courts may not presume an employer's intent to be bound legally where the employer merely distributes an employee's handbook or where the employee understands the handbook to be legally binding. *Caucci v. Prison Health Servs., Inc.*, 153 F.Supp.2d 605, 611 (E.D. Pa. 2001). *See also Kennelly v. Pa. Turnpike Comm'n*, 208 F.Supp.2d 504, 519 (E.D. Pa. 2002) (Absent a clear indication of employer intent, an employee handbook does not create a contract).

In *Janis v. AMP, Inc.*, 2004 Pa. Super. 301, 856 A.2d 140 (Pa. Super. Ct. 2004), the appellate court affirmed the jury's finding that the parties created a sufficient agreement to overcome the presumption of employment at-will. *But see Preobrazhenskaya v. Mercy Hall Infirmary*, 71 Fed. Appx. 936, 940 (3d Cir. 2003), in which the employee had no express contract, and the court held that an oral promise that she could remain working as long as her performance was satisfactory was too vague to create employment for a definite term.

2. Provisions Regarding Fair Treatment

Pennsylvania has no relevant case law on this specific subtopic.

3. Disclaimers

An employee handbook containing an explicit disclaimer of contract formation will preclude a breach of contract claim. For example, in *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super. Ct. 2011), the court held that a handbook establishing rest breaks and off-the-clock meal breaks was a unilateral employment contract which, with inclusion of an express disclaimer, could be rescinded. *See also Landmesser v. United Airlines, Inc.*, 102 F. Supp.2d 273, 280 (E.D. Pa. 2000). In *Hartman v. Sterling, Inc.,* 2003 WL 22358548 (E.D. Pa. Sept. 10, 2003), the court held that a disclaimer may preclude a breach of contract claim even if the disclaimer has not used the words "at-will" and has not been set apart, put in different font or bolded.

In *Phillips v. Babcock & Wilcox*, 349 Pa. Super. 351, 503 A.2d 36 (Pa. Super. Ct. 1986), the court held that an employee covered by a collective bargaining agreement, which contains a provision limiting the employer's right to discharge except for just cause, was not an at-will employee and could not maintain a wrongful discharge claim. In that instance, the employee's remedies were limited to those contained in the contract. *Id*. (citing *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (case in which Pennsylvania Supreme Court carved out narrow "at-will" exception, where there is no contract, an employee can only maintain an action for wrongful discharge where termination is clear violation of public policy; Court's purpose in *Geary* was to provide remedy for employees with no other recourse against wrongful discharge). In *McKnight v. Sch. Dist. of Philadelphia*, 105 F. Supp. 2d 438 (E.D. Pa. 2000), the court held that a teacher whose employment with the school district was covered by a collective bargaining agreement was not an at-will employee under Pennsylvania law, and thus could not sue for wrongful discharge, but could only recover under a breach of contract theory.

4. Implied Covenant of Good Faith and Fair Dealing

Although holding that an implied covenant of good faith and fair dealing is not recognized in Pennsylvania as an exception to the at-will employment doctrine, the court in *Fraser v. Nationwide Mut. Ins. Co.*, 135 F. Supp. 2d 623, 645 (E.D. Pa. 2001) aff'd in part, vacated in part, and remanded by 352 F.3d

107 (3d Cir. 2003) (no evidence company breached implied covenant of good faith and fair dealing), noted that an employee may maintain a separate cause of action for a breach of implied covenant of good faith if the employer fails to fulfill some contractual obligation that the employer assumed beyond the at-will employment relationship.

C. Public Policy Exceptions

1. General

In order to rebut the presumption of at-will employment, a party must establish one of the following: (1) an agreement for a definite duration; (2) an agreement specifying that the employee will be discharged for just cause only; (3) sufficient additional consideration; or (4) an applicable recognized public policy exception. *Falls v. State Mut. Auto Ins. Co.*, 744 F.Supp. 2d 705 (M.D.Pa. 2011). *See also Consolmagno v. Home Depot*, 2006 WL 3524455 (W.D. Pa. Dec. 6, 2006) (citing *Luteran v. Floral Fairchild Corp.*, 688 A.2d 211 (Pa. Super. Ct. 1997)). For example, Pennsylvania law requires that certain public employees may not be discharged without just cause. 71 PA. STAT. § 741.807.

Moreover, the public policy exception to the at-will employment doctrine has been narrowly crafted by the Pennsylvania courts. For example, in *Donaldson v. Informatica Corp.*, 792 F.Supp. 2d 850(W.D. Pa. 2011), the court held that the public policy exception to at-will employment does not extend to an employee's wrongful discharge where the employee alleged that he was terminated in retaliation for filing a prior lawsuit under Pennsylvania's Wage Payment and Collection Law (WPCL). The court stressed that the public policy exception is extremely narrow. *See also Greishaw v. Base Mfg.*, 2008 U.S. Dist. LEXIS 13066 (W.D. Pa. Feb. 21, 2008) (declining to expand a public policy exception to the at-will doctrine where employee claimed he was terminated for complaining about his employer's failure to comply with Pennsylvania's Wage Payment and Collection Law); *McNichols v. Commonwealth, Dep't of Transp.*, 804 A.2d 1264, 1267 (Pa. Commw. Ct. 2002).

Even when an important public policy is involved, an employer may discharge an at-will employee if the employer has a separate and legitimate reason for discharging the employee. *Ayers v. Osram Sylvania, Inc.*, 2008 U.S. Dist. LEXIS 72644 (M.D. Pa. Sept. 24, 2008); *Davenport v. Reed*, 785 A.2d 1058 (Pa. Commw. Ct. 2001). The *Davenport* court noted that the general rule allows an employer to discharge an at-will employee, unless the employee demonstrates a clear public policy violation as articulated in the constitution, statutes, regulations, or judicial decisions directly applicable to the facts in the case. A mere allegation of unfairness of the employer's action toward the employee is insufficient. For example, in the case *McLaughlin v. Gastrointestinal Specialists. Inc.*, 561 Pa. 307, 750 A.2d 283 (Pa. 2000), an employee complained that a toxic substance was stored in violation of OSHA standards and was making her ill. The *McLaughlin* court held that a bald reference to a violation of a federal regulation, like OSHA, was insufficient to overcome the strong presumption in favor of the at-will employment relation. *McLaughlin*, 561 Pa. at 321. Additionally, the court said the administrative regulations were merely safety recommendations and, therefore, not enough to create a public policy exception to at-will employment. *Id*.

The Third Circuit reiterated the general rule in *Kelly v. Ret. Pension Plan for Certain Home Office,* 73 Fed. Appx. 543, 545 (3d Cir. 2003), holding that an employee, who was allegedly discharged based on his criticism of the employer's marketing policy, could not recover for retaliatory discharge, absent evidence that the employer's policy was illegal or violated Pennsylvania's public policy.

A "clear mandate" of public policy must be of a type that "strikes at the heart of a citizen's social right, duties and responsibilities." *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 899 (3rd Cir. 1983).

Pennsylvania courts have found a clear mandate of public policy sufficient to overcome the presumption of at-will employment in only six circumstances discussed below. In each of the six defined instances, the discharges in question allegedly threatened a clear mandate of public policy contained in a statute or in the Pennsylvania Constitution. In *Krajsa v. Keypunch, Inc.*, 424 Pa. Super. 230, 622 A.2d 355 (Pa. Super. Ct. 1993), the Superior Court rejected the assertion that a wrongful discharge claim could rest on a cause of action or legal theory rooted in the common law of Pennsylvania. The presumption of at-will employment will only be overcome under these six factual circumstances where Pennsylvania courts have found a violation of a clear mandate of public policy.

(1) Under Pennsylvania law, a person is statutorily required to serve when called for jury duty for the purpose of having citizens available for trial. A discharge for fulfilling this statutory duty is against public policy. *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (Pa. Super. Ct. 1978).

(2) A local transit authority refused to hire an applicant for failure to disclose a prior conviction for which the applicant had received a pardon. The court cited the Pennsylvania Constitution and the public policy in favor of rehabilitation of criminals to determine that a failure to hire on the basis of a conviction unrelated to the applicant's ability to perform the duties in question gave rise to a cause of action. *Hunter v. Port Auth. of Allegheny Co.*, 277 Pa. Super. 4, 419 A.2d 631 (Pa. Super. Ct. 1980).

(3) The Superior Court recognized a cause of action for wrongful discharge where the employer retaliated against employees for an employee's reports to proper authorities of unlawful activity. *Field v. Philadelphia Elec. Co.*, 388 Pa. Super. 400, 565 A.2d 1170 (Pa. Super. Ct. 1989). Pennsylvania courts have clarified that the "whistle blowing" exception to at-will employment may apply even in absence of a specific legal duty to report. *McGuire v. Palmerton Hosp.*, No. 3:12-CV-1762, 2012 WL 5494924 (M.D. Pa. 2012).

(4) A security guard was constructively discharged after refusing to take a polygraph examination. Citing the Pennsylvania statute which makes it a misdemeanor for an employer to require an employee to undergo a lie detector test, except in limited circumstances, the court held that a clear statutory mandate had been violated and the public policy exception was supported. *Kroen v. Bedwav Sec. Agency, Inc.*, 403 Pa. Super. 83, 633 A.2d 628 (Pa. Super. Ct. 1993).

(5) An employee may establish a public policy violation where the employer allegedly discharges the employee for filing for unemployment compensation benefits. *Highhouse v. Avery Transp.*, 443 Pa. Super. 120, 660 A.2d 1374 (Pa. Super. Ct. 1995).

(6) The Workers' Compensation Act provides that termination of an at-will employee for filing a Workers' Compensation claim violates public policy. In order for the goals of the Act to be realized, the employee must be able to exercise his right to bring a claim without being subject to reprisal. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. *Shick v. Shirey* 552 Pa. 590, 603, 716 A.2d 1231, 1237 (Pa. 1998); *see also Kennelly v. Pa. Turnpike Comm'n*, 208 F.Supp. 2d 504, 517 (E.D. Pa. 2002).

There are additional statutory protections against discharge of at-will employees, including the Worker & Community Right-to-Know Act which prohibits an employer from discharging an employee for filing a complaint or otherwise participating in the complaint process dealing with toxic substances. 35 PA. CONS. STAT. § 7313. Further, under Pennsylvania law, an employee may not be discharged for his/her participation in a state Minimum Wage Act proceeding. 43 PA. STAT. § 333.112.

While the Pennsylvania state courts have traditionally recognized few public policy exceptions to the at-will employment doctrine, federal courts, interpreting Pennsylvania law, have expanded the exceptions. For example, in *Borse v. Piece Goods Shop, Inc*., 963 F.2d 611 (3d Cir. 1992), the court held that discharge for refusing to consent to urinalysis testing if testing tortuously invaded an employee's privacy. In *Woodson v. AMF Leisureland Ctr.*, Inc., 842 F.2d 699 (3d Cir. 1988), the court ruled that termination of barmaid for refusal to serve liquor to visibly intoxicated person established a wrongful discharge claim. In *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983), the court also recognized wrongful discharge where the employer discharged the employee for refusing to lobby for legislation desired by the employer. *See also Altopiedi v. Memorex Telex Corp.*, 834 F. Supp. 800, 803 (E.D. Pa. 1993) (exception to employment at-will doctrine for wrongful discharge with specific intent to harm).

In *Geary v. U.S. Steel Corp.*, 456 Pa. 171, 176-179, 319 A.2d 174, 177-178 (Pa. 1974), the Pennsylvania Supreme Court has not resolved whether wrongful discharge can be based on violation of the public policy under the common law invasion of privacy tort. Drug testing may violate employees' privacy rights in certain circumstances. In *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 622 (3rd Cir. 1992), the third circuit predicted that the Pennsylvania Supreme Court would allow a wrongful discharge cause of action for invasion of privacy. However, in *Hershberger v. Jersey Shore Steel Co.*, 394 Pa. Super. 363, 575 A.2d 944 (Pa. Super. Ct. 1990), the Pennsylvania Superior Court noted that public policy does not require the employer to rehire the employee where subsequent screening proved that the original drug test results were erroneous. *Borse* was the first case in which the court recognized a wrongful discharge claim in the context of drug testing.

2. Exercising a Legal Right

In *Rothrock v. Rothrock Motor Sales Inc.*, 584 Pa. 297, 883 A.2d 511 (Pa. 2005), the Supreme Court of Pennsylvania affirmed the opinion of the Superior Court, which held that a cause of action for wrongful discharge in violation of public policy existed based on the employee's termination for refusing to dissuade a subordinate employee from pursuing a workers' compensation claim. The Superior Court's reasoning was based on precedent in *Shick v. Shirey*, (Pa. 1998), *supra*. The court emphasized that, even though public policy exceptions to the at-will doctrine are rare and confined to narrow factual circumstances, an employer violates public policy when discharging an employee in retaliation for filing a workers' compensation claim. *Rothrock*, 810 A.2d at 117-18. Similarly, the court in *Nazar Clark v. Clark Distrib. Svs.*, 46 Pa. D. & C. 4th 28 (Pa. Com. Pl. 2000), refused to dismiss a plaintiff's claim for wrongful discharge where the defendant employer allegedly terminated the plaintiff in retaliation for filing a disability discrimination complaint with the Pennsylvania Human Relations Commission.

However, the courts have issued conflicting opinions as to whether alleged violations of Pennsylvania's Wage Payment and Collection Law constitute cause of retaliatory discharge. *See Fialla-Bertani v. Pennvsaver Publ'ns of Pa., Inc.*, 45 Pa. D. & C. 4th 122 (Pa. Com. Pl. 2000). *Contra Greishaw v. Base Mfg.*, 2008 U.S. Dist. LEXIS 13066 (W.D. Pa. Feb. 21, 2008) (refusing to recognize wrongful discharge claim based upon employee's complaint that his employer failed to comply with Pennsylvania's Wage Payment and Collection Law). In *Fialla-Bertani*, the employee was discharged after filing an action to

resolve her Wage Payment and Collection Law claim. The court reasoned that, if the plaintiff's allegations were true, she was fired for exercising her right to have her dispute resolved in a court of law. *Id*. The court agreed with the plaintiff that allowing the plaintiff to resolve a wage claim through a legal action would create a chilling effect on those who seek to protect their rights to collect wages. *Id*. The court also reasoned that the claim pursuant to the WPCL is substantially similar to a workers' compensation claim because both provide a statutory remedy for an employee to seek redress from the employer.
In *Donaldson v. Informatica Corp.*, 792 F.Supp. 2d 850 (W.D. Pa. 2011), the court held that the public policy exception to at-will employment does not extend to the employee's wrongful discharge claim against the employer where the employee had been discharged after filing a lawsuit under Pennsylvania's Wage Payment and Collection Law (WPCL). The court stressed the narrow reach of the public policy exception.

Finally, an at-will employee could not state a claim for wrongful discharge under the public policy exception based solely upon alleged retaliatory termination in violation of the Occupational Safety and Health Act. *McLaughlin v. Gastrointestinal Specialists, Inc.*, 561 Pa. 307, 317-20, 750 A.2d 283, 289-90 (Pa. 2000).

3. Refusing to Violate the Law

A bartender's termination based on a refusal to serve liquor to a visibly intoxicated customer, in violation of Pennsylvania law, established a claim for wrongful discharge. *Woodson v. AMF Leisureland Ctr., Inc.*, 842 F.2d 699 (3d Cir. 1988).

4. Exposing Illegal Activity (Whistleblowers)

A public or quasi-public employer may not retaliate against an employee for making a good faith report of the employer's wrongdoing or waste. *See* 43 PA. CONS. STAT. §§ 1421, et seq. The Superior Court of Pennsylvania recognized a cause of action for wrongful discharge where the employer retaliated against employees for an employee's reports to proper authorities of unlawful activity. *Field v. Philadelphia Elec*. Co., 565 A.2d 1170 (Pa. Super Ct. 1989). *See also* Compendium Section 11.8.1. Pennsylvania courts have clarified that the "whistle blowing" exception to at-will employment may apply even in absence of a specific legal duty to report. *McGuire v. Palmerton Hosp*., No. 3:12-CV-1762, 2012 WL 5494924 (M.D. Pa. 2012).

The courts distinguish between internal reporting and reporting to the appropriate external government agency. In *Edwards v. A.H. Cornell & Son, Inc*., 610 F.3d 217 (3d Cir. 2010), the Third Circuit upheld the court's order granting the employer's motion to dismiss, based on the employee's claim that she was terminated in violation of Section 510 of Employee Retirement Income Security Act (ERISA), and state common law, after complaining to management about alleged ERISA violations. *Id*. The Third Circuit held, as a matter of first impression, that the antiretaliation provision of Section 510 of ERISA, which makes it unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to ERISA, does not protect an employee's unsolicited internal complaints to management. *Id*.

III. CONSTRUCTIVE DISCHARGE

"Constructive discharge of an at-will employee may serve as a basis for tort recovery if the employer has made working conditions so intolerable that an employee has been forced to

resign." *Helpin v. Trustees of University of Pennsylvania*, 969 A.2d 601, 614 (Pa.Super. Ct. 2009). Furthermore, "[u]nder Pennsylvania law, to prevail in a breach of contract claim based upon constructive discharge, a plaintiff must not only establish that constructive discharge occurred, but also demonstrate damages." *Giannetti v. Consolidated Graphics, Inc.*, 2007 U.S. Dist. LEXIS 2267 (E.D. Pa. Jan. 10, 2007). In *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163 (3d Cir. 2001), the court held that although an employee's working conditions were stressful – in that the employee's department was short staffed, the employee was excluded from committees, hiring decisions and staff meetings, she was the only supervisor to receive weekly report cards and was she subjected to disparaging comments about her age – she nonetheless received satisfactory job evaluations and regular raises throughout her employment, and ultimately her working conditions were not so unbearable that a reasonable person would be compelled to resign, *Id*. at 169-71. The court also pointed out that a single, non-trivial incident of discrimination may be sufficiently egregious to force a reasonable person to resign, but a stressful working environment does not amount to constructive discharge for purposes of an employment discrimination claim, *Id*. at 168-69. However, in *Allen v. Verizon Pa., Inc.*, 2005 WL 2035858 (M.D. Pa. Aug. 23, 2005), the court distinguished Duffy and noted that a continuous pattern of harassment is not always required to support a constructive discharge claim.

The test to determine whether constructive discharge occurred is an objective one. When examining constructive discharge claims under Title VII, the court determines whether a reasonable jury could conclude that the defendant's action made work so difficult that a reasonable person would have felt compelled to resign. *Collins v. TRL, Inc.*, 263 F. Supp. 2d 913 (M.D. Pa. 2003).

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

"Just cause" for terminating an employee must be related to the misconduct, inefficiency, or delinquency of that employee. "Even a single [occurrence] of misconduct or an error [in] judgment can constitute just cause if it adversely reflects on the fitness of [an employee] for his [or her] duties." *Davis v. Civil Serv. Comm'n of the City of Philadelphia*, 820 A2d 874, 878 (Pa. Commw. Ct. 2003) (citing *Williams v. Civil Serv. Comm'n*, 457 Pa. 470, 327 A.2d 70 (1974)). Whether employee's conduct or behavior constitutes just cause for demotion or termination is a question of law. *City of Philadelphia v. Civil Service Commission*, 965 A.2d 389, 393-94 (Pa. Commw. Ct. 2009).

B. Status of Arbitration Clauses

The Third Circuit Court of Appeals has held that an employment contract providing for arbitration in employment discrimination cases was "enforceable" under the Federal Arbitration Act. *See Great W. Mortgage Co. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997). Where a court deems an arbitration clause to be valid and enforceable, the court must refer questions regarding the enforceability of the terms of the underlying contract to an arbitrator, in accordance with Section 4 of the Federal Arbitration Act. *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 179 (3d Cir. 1999) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 395 (1967)). Harris also stood for the proposition that an arbitration clause is not unconscionable, even if it allows one party a choice to litigate or arbitrate but requires the other party to arbitrate all disputes. The Third Circuit court noted that "unequal bargaining power is not alone enough to make an agreement to arbitrate a contract of adhesion." *See also Brennan v. CIGNA Corp.*, 282 Fed. Appx. 132 (3d Cir. 2008) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)).

An agreement to arbitrate arises out of a broader contract. However, if no broader contract exists, there can be no arbitration clause. A court must determine first whether an agreement to arbitrate exists before it can order arbitration. *See Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 (3d Cir. 2000). Recent Supreme Court decisions also indicate that employers wishing to avoid class action arbitration should require the employees to sign explicit class action waivers in the employment agreement. *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2310 (2013). It is important to note that a class action waiver is ineffective against statutory rights to a class action proceeding. *Id*.

V. ORAL AGREEMENTS

A. Promissory Estoppel

In Pennsylvania, there is generally no exception to the at-will employment doctrine based on a theory that the employee detrimentally relied on any promises of the employer. The Pennsylvania Supreme Court has determined that the employee's reliance is not relevant to determining whether the employee could be discharged. *See Woods v. Era Med LLC*, 677 F.Supp. 2d 806 (E.D. Pa. 2010) (citing *Stump v. Stroudsburg Mun. Authority*, 540 Pa. 391, 658 A.2d 333 (Pa. 1995); *Paul v. Lankenau Hosp*, 524 Ps. 90, 569 A.2d 346 (Pa. 1990)). "Pennsylvania law simply does not recognize promissory or equitable estoppel as an exception to the at-will employment doctrine*." Paul v. Lankenau Hosp.*, 524 Pa. 90, 95, 569 A.2d 346, 348 (Pa. 1990). See also *Clinkscales v. Children's Hosp. of Philadelphia*, 2007 U.S. Dist. LEXIS 83930, *29 (E.D. Pa. 2007) (noting that "at-will presumption also precludes relief for claims of detrimental reliance or promissory estoppel in the employment context").

Still in 2013 the US District Court for the Eastern District of Pennsylvania denied a law firm's motion to dismiss a claim by an associate for promissory estoppel detrimental realized. The associate was barred from her practice in Chicago to the Defendant's Philadelphia office with the promise of mentoring, training and direction by a specific partner. Plaintiff was terminated within eight months. The court determined that a jury could differ on whether the hardship Plaintiff suffered could overcome the at-will presumption. *Jones v. Flaster/Greenberg, P.C.*, 2013 Lexis 181007 (E.D. Pa. Dec. 30, 2013).

"Allowing a cause of action for promissory estoppel for reliance on employment offers but not for reliance on continued employment itself would lead to untenable consequences." *Chand v. Merck & Co.,* 2019 U.S. Dist. LEXIS 125867 (E.D. Pa. 2019).

B. Fraud

To establish a claim for fraudulent misrepresentation under Pennsylvania law, a plaintiff must prove by clear and convincing evidence that at the time the misrepresentation was made: (1) the representation was a material one of fact, (2) which was false, (3) the maker was aware of its falsity or was reckless as to whether it was true or false, (4) the statement was made with the intent of misleading another into relying on it, (5) there existed a justifiable reliance on the misrepresentation, and (6) the resulting injury was proximately caused by the reliance. *Gibbs v. Ernst*, 538 Pa. 193, 208, 647 A.2d 882, 889 (Pa. 1994) (citing Prosser & Keaton on the Law of Torts, § 105 (5th ed. 1984); RESTATEMENT (SECOND) TORTS § 525 (1977)). *See* also *Walsh v. Alarm Sec. Group, Inc*., 230 F.Supp.2d 623, 629 (E.D. Pa. 2002), order vacated in part by, 95 Fed. Appx.399 (3d Cir. March 24, 2004). Statements by job interviewers regarding job security did not constitute statements of present fact or intention required to support employee's fraudulent misrepresentation claim under Pennsylvania law; casual remarks prefaced with phrases such as "you don't have to worry," or qualified by phrases like "the chances are remote" are

understood to be expressions of opinion and not assurances of fact, particularly in formal discussions such as prehire interviews and other contract negotiations. *Berda v. CBS Inc.*, 800 F. Supp. 1272 (W.D.Pa. 1992).

C. Statutes of Fraud

Pennsylvania's statute of frauds dealing with the sale of securities is not applicable to employment contracts. *Hillerv. Franklin Mint, Inc.*, 485 F.2d 48, 51 (3d Cir. 1973).

VI. DEFAMATION

A. General Rule

A one-year statute of limitations applies to actions for invasion of privacy, libel and slander. *See* 42 PA. CONS. STAT. § 5523.

1. Libel

The requirements for a defamation claim in Pennsylvania are as follows:

(1) defamatory character of communication;
(2) its publication by defendant;
(3) its application to plaintiff;
(4) the understanding by the recipient of its defamatory meaning;
(5) the understanding by the recipient of it as intended to be applied to plaintiff;
(6) special harm resulting to plaintiff from its publication; and
(7) abuse of a conditionally privileged occasion.

Okocci v. Klein, 270 F. Supp. 2d 603, 615 (E.D.Pa. 2003). The *Okocci* court also held that a statement is defamatory if it tends to harm the reputation of another as to lower him or her in the estimation of the community or to deter third parties from associating with him or her. In order to recover damages in defamation cases, including punitive damages, a public figure plaintiff has to prove by clear and convincing evidence that the defendant acted with actual malice, while a private figure plaintiff need only demonstrate simple fault on the part of defendant. *Medure v. Vindicator Printing Co.*, 273 F. Supp. 2d 588, 590 (W.D. Pa. 2002). To prove actual malice, a public figure must demonstrate that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. *Id*. at 596 (citing *N.Y. Times Co. v. Sullivan*, 84 S.Ct. 710, 725-26, 376 U.S. 254, 279-80(1964)).

A plaintiff cannot maintain a cause of action for defamation based solely upon the nature and circumstances of her termination. *Holewinski v. Children's Hosp. of Pittsburgh*, 437 Pa. Super. 174, 180, 649 A.2d 712, 716 (Pa. Super. Ct. 1994). A trial court noted that where a defamation claim was based on plaintiff's deposition statements that she believed co-workers and future employers would think she was dishonest because she was discharged, such a claim must fail because under Pennsylvania law, "a complaint for defamation must, on its face, identify exactly to whom the allegedly defamatory statements were made." For example, in *Carol Marlev v. Bd. of Pension of the Presbyterian Church*, No. 2382, 1997 WL 1433735, *1 (Pa. Com. Pl. 1997), the court dismissed a defamation claim against the employer where the complaint alleged that the employer engaged in "innuendo" actions and conduct.

2. Slander

Six categories of words constitute slander per se, including words imputing a criminal offense, loathsome disease, business misconduct, serious sexual misconduct, charges of communism, or insolvency/unworthiness of credit/financial embarrassment/business failure. *See*, *e.g.*, *Pennoyer v. Marriott Hotel Services, Inc.*, 324 F. Supp. 2d 614, 618 (E.D. Pa. 2004) (discussing slander *per se* slander *per quod*).

In *Pro Golf Mfg, Inc. v. Tribune Review Newspaper Co.*, 570 Pa. 242, 809 A.2d 243 (Pa. 2002), a golf equipment manufacturer brought an action for commercial disparagement against a newspaper publisher. The court held that the action based on commercial disparagement was subject to the same one-year statute of limitations for slander, not the two-year statute for intentional or negligent injury to persons or property, because slander is not limited to slander against the person. The court explained that regardless of the label, a plaintiff has a cause of action based on the publication of a disparaging statement concerning his or her business where: (1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that the publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity.

In *Keim v. County of Bucks*, 275 F. Supp. 2d 628 (E.D. Pa. 2003), the court held that to prove special harm, the plaintiff must demonstrate a specific monetary or out-of pocket loss as a result of the defamation, unless the defamatory statement is such that it constitutes slander per se. In Keim, county corrections officers' complaint based on discipline for improper use of force against an inmate failed to state a claim for defamation against supervisors who allegedly made defamatory statements because there was no claim that the employers or supervisors themselves made any slanderous or defamatory statements about the officers. On the contrary, the statements made by the actual manager to the effect that the plaintiffs were "criminals" and would soon themselves be "inmates" were sufficient to state a cause of action for defamation against the manager because if proven, the statements would constitute slander per se.

In *Wawa, Inc. v. Alexander J. Litwornia & Assoc.*, 2003 Pa. Super. 55, 817 A.2d 543 (Pa. Super. Ct. 2003), a prospective convenience store owner stated an actionable claim for commercial disparagement against a competing store owner based on the competitor's malicious dissemination of videotapes to zoning officials and citizen groups containing false data that zoning applications were delayed and that the prospective owner suffered pecuniary losses over $430,000.00. The court held that the disparaging communications, including false statements that the competitor's proposals to operate new convenience stores in the community would cause traffic congestion, safety hazards and fatalities, were not the type of speech protected by the First Amendment.

In *Stephens v. Meaut*, 264 F. Supp. 2d 226, 234 (E.D. Pa. 2003), the court held that the false and malicious representation of the title and quality of another's interest in goods or property constitutes the intentional tort of slander of title. *Id*. (citing *Pro Golf Mfg, Inc., supra*.).

B. References

Letters written by external referees, who were academics at other institutions asked by the university to evaluate an associate professor in connection with his application for promotion to full

professor, were "letters of reference," not "performance evaluations" within the meaning of the statute governing state employee access to personnel files, thus precluding the university professor's access to letters, since external referees were not under direction or control of the university and were not compelled or required by any authority to evaluate the professor. *Univ. of Pittsburgh of Com. Sys. of Higher Educ. v. Dep't of Labor & Indus.*, 896 A.2d 683 (Pa. Commw. Ct. 2006).

C. Privileges

The defendant has the burden of proving, when the issue is properly raised as a defense, the privileged character of the occasion for publishing an alleged defamatory statement. *See* 42 PA. CONS. STAT. § 8343(b)(2).

A conditional privilege arises when an alleged defamatory statement involves recognized interest of either the publisher, a person to whom the matter is published, some other third person, or the public. *Am. Future Sys., Inc. v. BBB*, 2005 Pa. Super. 103, 872 A.2d 1202 (Pa. Super. Ct. 2005); *Beckman v. Dunn*, 419 A.2d 583 (Pa. Super. Ct. 1980). An employer has an absolute privilege to publish defamatory matter to an employee in notices of employee termination, but where that privilege is abused by the employer's publication of the defamatory material to unauthorized parties, the employer is no longer immune from liability. *Yetter v. Ward Trucking Corp.*, 401 Pa. Super. 467, 469, 585 A.2d 1022, 1024 (Pa. Super. Ct. 1991); *Agriss v. Roadway Express, Inc.*, 334 Pa. Super. 295, 483 A.2d 456 (Pa. Super. Ct. 1984). Where an absolute privilege does not exist, a conditional privilege may. "An occasion is conditionally privileged when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that facts exist which another sharing such a common interest is entitled to know." *Miketic v. Baron, M.D.*, 450 Pa. Super. 91, 102, 675 A.2d 324, 330 (Pa. Super. Ct. 1996). There are three occasions which give rise to a conditional privilege, "(1) some interest of the person who publishes defamatory matter is involved; (2) some interest of the person to whom the matter is published or some other third person is involved; or (3) a recognized interest of the public is involved." *Id*. Thus, where a matter is conditionally privileged, a plaintiff must prove that the privilege was abused by the defendant. *Id*. "Abuse of a conditional privilege is indicated when the publication is actuated by malice or negligence, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege, or includes a defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose." *Id*. at 102, 675 A.2d at 329 (quoting *Beckman v. Dunn*, 276 Pa. Super. 527, 536, 419 A.2d 583, 588 (Pa. Super. Ct. 1980). The Superior Court noted in *Miketic*, that the "conditional privilege applies to private communications among employers regarding discharge and discipline." *Id*. (quoting *Daywalt v. Montgomery Hosp.*, 393 Pa. Super. 118, 122, 573 A.2d 1116, 1118 (Pa. Super. Ct. 1990)). In *Daywalt*, the Superior Court upheld summary judgment in favor of a supervisor and hospital, holding that the supervisor's communications to the personnel director and payroll department regarding her suspicions that the plaintiff altered some timecards were conditionally privileged. *Id*. Importantly, the court concluded that the plaintiff failed to show any abuse of the conditional privilege; the only indication was a vague statement in the complaint that the supervisor "wickedly intended" to cause the plaintiff harm; however the court noted there was no suggestion of "spite, malice, or improper purpose." *Daywalt*, at 124, 573 A.2d at 119.

D. Other Defenses

1. Truth

In cases not involving public figures or matters of public concern, the defendant has the burden of proving truth as a defense. *See* 42 PA. CONS. STAT. § 8343(b)(1). Pennsylvania requires a showing of at least negligence on the part of the publisher, regardless of whether the defamatory statement involved a matter of public or private concern. 42 PA. CONS. STAT. § 8344; *see also Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404 (E.D. Pa. 1983).

2. No Publication

A plaintiff has the burden of proving publication by the defendant of the alleged defamatory statement. 42 PA. CONS. STAT. § 8343(a).

3. Self-Publication

Where the defamation action rests on the publication of an employee termination letter by the employer to the employee only, the requirement that the defamatory matter be published by the defendant is not met through proof of compelled self-publication. *Yetter v. Ward Trucking Corp*., 401 Pa. Super. 467, 472, 585 A.2d 1022, 1025 (Pa. Super. Ct. 1991).

4. Invited Libel

A letter articulating the reasons for an employee's termination which is published only to the employee may not be made the subject of an action for libel, regardless of whether the allegations of cause for termination are true or false, and regardless of the employer's actual motive behind the dismissal. *Agriss v. Roadway Express, Inc*., 334 Pa. Super. 295, 310, 483 A.2d 456, 464 (Pa. Super. Ct. 1984).

5. Opinion

The term "harassment," as used in a letter from a condominium association owner warning the resident-plaintiff that harassment of another unit owner would not be tolerated, was not capable of defamatory meaning because statements that are merely an expression of opinion are not defamatory. *Feldman v. Lafayette Green Condo. Assoc*, 806 A.2d 497, 501 (Pa. Commw. Ct. 2002). The court discussed Section 566 of the RESTATEMENT (SECOND) OF TORTS to determine whether a statement is strictly opinion and noted the distinction between non-actionable "pure" opinion and potentially actionable "mixed" opinion, as follows:

> A simple expression of opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed and the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.

Feldman, 806 A.2d at 501. Thus, the court ultimately explained that the key to determining defamatory meaning is the effect the statement would produce on its intended audience, and if the court concludes that a communication is incapable of defamatory meaning, the case will properly be dismissed. To determine whether a communication in question is defamatory, courts must consider the effect likely to be produced by the communication and the likely impression it would naturally cause in the minds of average people among whom it is intended to circulate. *Franklin Prescriptions v. N.Y. Times*, 267 F. Supp. 2d 425, 434 (E.D. Pa. 2003). When both an innocent interpretation and an alternative defamatory meaning exist from a communication, the issue of whether such communication constitutes defamation must proceed to the jury. In addition, if a defendant implies a defamatory connection by juxtaposing a series of facts or otherwise creates a defamatory implication, the plaintiff may also have a cause of action for defamation. *Id*.

6. Actual Harm to Reputation Recognized

"Actual harm includes 'impairment of reputation and standing in the community, . . . personal humiliation, and mental anguish and suffering." Restat 2d of Torts, § 569. Plaintiff failed to establish actual harm resulted from publication of two articles which revealed a federal investigation into defendant's business dealings. In spite of Plaintiff's own testimony, the Supreme Court of Pennsylvania reversed a Superior Court decision on the basis that the Plaintiff failed to show evidence of actual harm. *Joseph v. Scranton Times*, 634 Pa. 146, 129 A.3d 404 (2015).

E. Job References and Blacklisting Statutes

Pennsylvania has no relevant case or statutory law on this specific sub-topic.

F. Non-Disparagement Clauses

Generally, where the parties freely bargain for a "non-disparagement" clause as part of a separation agreement, courts enforce such clauses. *See*, *e.g., Gatto v. Verizon Pennsylvania, Inc*., No. 08-858, 2009 WL 3062316, *1 (W.D. Pa. 2009).

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

Pennsylvania courts recognize a cause of action for intentional infliction of emotional distress ("IIED") only where the conduct is so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. *Capresecco v. Jenkintown Borough*, 261 F.Supp. 2d 319, 323 (E.D. Pa. 2003) (citing *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1988)). In *Capresecco*, a former police officer alleged that he was wrongfully terminated in violation of his constitutional right to due process, and the court held that defendants' alleged termination of the officer, knowing it would effectively deprive him of medical care during his serious illness, was not extreme or outrageous as required to support a claim based on IIED. The court reiterated the Third Circuit's notion that "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for [IIED]." *Id*. at 323 (quoting *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1988)). The court also pointed out that although loss of employment is unfortunate and certainly causes hardship, it is not a proper basis for recovery for IIED, and that even when an employer deceives an employee into foregoing

other employment, or forces an employee to resign, there is still no actionable claim for IIED. *Id*. Similarly, in *McComb v. Morgan Stanley & Co.*, 2007 U.S. Dist. LEXIS 85362, *24 (W.D. Pa. 2007), the court dismissed a negligent infliction of emotional distress claim where the employer allegedly distributed employee's personal medical information to other employees. Thus, the standard for establishing an IIED claim in the employment context remains high, and only where an employer has engaged in both sexual harassment and other retaliatory behavior against an employee have courts in Pennsylvania found conduct sufficiently outrageous to constitute IIED. *Capresecco*, 61 F. Supp. 2d at 323. In *Shaner v. Synthes*, 204 F.3d 494, 507508 (3d Cir. 2000), the court conceded that conduct which was intended to cause a worsening of a disabled person's physical symptoms may qualify as extreme or clearly outrageous. However, the *Shaner* court held that the manipulation of the office thermostat by the plaintiff's co-workers was insufficient to support a claim of IIED because there was no evidence that the employees intended to cause plaintiff harm or aggravate his existing condition.

To state an IIED claim under Pennsylvania law, the plaintiffs must show that physical harm accompanied the emotional distress, including, for example, ongoing mental and emotional harm. *McClease v. R.R. Donnelley & Sons Co.,* 226 F. Supp. 2d 695, 702 (E.D. Pa. 2002). In *McClease*, the court refused to dismiss an African-American employee's claim for IIED based on racial epithets and harassment, where the complaint specifically alleged both continuous malicious conduct, as well as a special relationship between the parties. The district court was hesitant to predict that the Pennsylvania Supreme Court would hold that such conduct could never be the basis of an IIED claim under Pennsylvania law, because that court has never examined the question, and only the case of *Dawson v. Zayre Dep't Stores*, 346 Pa. Super. 357, 499 A.2d 648 (Pa. Super. Ct. 1985), considered whether racial slurs constituted extreme and outrageous conduct. In Dawson, the Superior Court concluded that the brevity of the encounter and the relationship between the parties did not rise to a sufficient level of extreme and outrageous conduct. The court in *McClease* noted that Dawson was distinguishable, where the instant matter involved continuous malicious conduct and a special relationship between the parties. If the defendant knows that the plaintiff is unusually vulnerable due to a mental condition or peculiar sensitivity, the defendant's actions may become sufficiently outrageous to state a claim. *Polito v. AOL Time Warner, Inc.*, No. Civ.A.03CV3218, 2004 WL 3768897, *30 (Ct. Com. Pl. 2004).

B. Negligent Infliction of Emotional Distress

Pennsylvania law recognizes recovery based on negligent infliction of emotional distress in the following situations: (1) the victim is physically impacted by the Defendant; (2) a "bystander" case in which the plaintiff actually observes the defendant cause the injury; and (3) where the victim was in close proximity to the injury. Recovery under this theory is also possible in situations in which the defendant owes a plaintiff a pre-existing duty of care, either through a contract or a fiduciary duty. *Piper v. Am. Nat'l Life Ins. Co. of Tx.*, 228 F.Supp.2d 553, 564 (M.D. Pa. 2002). In *Leidv v. Borough of Glenolden*, 277 F. Supp. 2d 547, 568 (E.D. Pa. 2003), the court clarified that, although negligent infliction of emotional distress provides a remedy to the close relatives of victims, there must be an underlying tort. In addition, a claim for negligent infliction of emotional distress requires proof of physical injury. *Robinson v. May Dep't Stores Co.*, 246 F. Supp. 2d 440, 445 (E.D. Pa. 2003).

The Pennsylvania Supreme Court specifically acknowledged a cause of action for negligent infliction of emotional distress where there is a special relationship breached by negligence in a contractual or fiduciary relationship. *Toney v. Chester Co. Hospital*, 2011 WL 6413, 848 (Pa. 2011). However, in 2012, the Pa. Superior Court said "[s]ince the court was evenly divided, the Supreme Court's opinion in Toney is not precedential." *Weiley v. Albert Einstein Med. Ctr.*, 2012 PA Super 106, 51 A.3d 202,

217 n. 16 (Pa. Super. Ct. 2012) (citing *Commonwealth v. Dorman*, 377 Pa. Super. 419, 547 A.2d 757, 761 (Pa. Super. Ct. 1988)). "Thus, the Supreme Court has not yet ruled on the viability of a NIED lawsuit based on the breach of a special relationship." *Davis v. Corizon Health, Inc.*, 2015 U.S. Dist. LEXIS 15083 (E.D. Pa. 2015).

Claims for negligent infliction of emotional distress that arise out of an employment relationship are barred by the Pennsylvania Workers' Compensation Act ("PWCA"), 77 PA. STAT. ANN. § 411. *Imboden v. Chowns Communications*, 182 F. Supp. 2d 453, 456 (E.D. Pa. 2002) (quoting *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 940 (3d Cir. 1997) ("exclusivity provision of PWCA bars claims for intentional and/or negligent infliction of emotional distress arising out of employment relationship. Although there may be an exception, rooted in the language of § 411, for claims of intentional infliction of emotional distress . . . cases interpreting Pennsylvania law are split on the propriety of allowing IIED claims for sexual harassment on the job.") (Internal citations omitted).

However, there is an exception to this bar where the conduct directed against the employee was the product of "personal animus." *Atchinson v. Sears*, 2009 WL 2518440, No. 08-3257 (E.D. Pa. 2009). "The conduct in question must have been personally motivated intentional conduct of third persons or co-workers that is unrelated to plaintiff's status as an employee." *Id*. at *5 (quoting, *Capriotti v. Chivukula*, No. 04-2754, 2005 WL 83253, *3 (E.D. Pa. 2005) (citing *Price v. Phila. Elec. Co*., 790 F.Supp. 97, 99-100 (E.D. Pa. 1992)). The employee in *Atchinson* was prohibited from amending her complaint to add a cause of action for NED based on her allegations that she was terminated for taking leave under the Family Medical Leave Act (FMLA), as there was nothing indicative of personal animus in the allegations. *Id*.

VIII. PRIVACY RIGHTS

A. Generally

As commonly understood, the right to privacy encompasses both the right to be free from unreasonable intrusions upon one's seclusion and the right to be free from unreasonable publicity concerning one's private life. *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999). A plaintiff may state a cause of action for invasion of privacy where a major misrepresentation of his or her character, history, activities, or beliefs is published that could be reasonably expected to cause serious offense to a reasonable person. The plaintiff must prove publicity, given to private facts, which would be highly offensive to a reasonable person and which are not of legitimate concern to the public. *Keim v. County of Bucks*, 275 F. Supp. 2d 628, 637 (E.D. Pa. 2003).

Pennsylvania law provides a number of specific statutory entitlements with regard to invasion of privacy claims, including:

(1) 75 PA. CONS. STAT. § 1824, provides civil immunity for libel or invasion of privacy for the filing of a report or other information, in good faith and without malice, to the state's vehicle insurance claims data base.

(2) 18 PA. CONS. STAT. § 7321, provides that a person is guilty of a misdemeanor of the second degree if they make a polygraph test or any form of a mechanical or electrical lie detector test a condition for employment or continuation of employment for an employee. This section does not apply to employees in public law enforcement, however, or those who dispense or have access to narcotics or dangerous drugs. *Id*.

(3) 42 PA. CONS. STAT. § 5523, provides a one-year statute of limitations for actions for invasion of privacy and libel and slander.

(4) 42 PA. CONS. STAT. § 8341 ("Uniform Single Publication Act"), provides that a person shall not have more than one cause of action for damages for libel or slander or invasion of privacy if based on a single publication and that any recovery shall include damages for torts suffered by the plaintiff in all jurisdictions.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

Pennsylvania complies with the federal Immigration Reform and Control Act which requires employers to verify the prospective employee's immigration status and attest to the employee's authorization to work. 8 U.S.C. §§ 1324 et seq. Prospective employees may evidence employment authorization by a showing of a U.S. passport, permanent residence card, or driver's license and social security card. *Id*. The verification requirement does not extend to independent contractors. *Id*. *See also* Section XV C, *infra*.

Pennsylvania Child Labor Law prohibits employers from employing minors, or individuals below the age of 14, in occupations other than farming or domestic service. 43 P.S. § 40.8. Minors between the ages of 14 and 16 may work if they obtain a work permit and a written statement by the minor's parent or legal guardian acknowledging the duties and hours of employment and granting the minor a permission to work. *Id*. Minors between the ages of 16 and 18 may work if they obtain a work permit. *Id*.

2. Background Checks

It is against public policy in Pennsylvania for an employer to summarily reject an individual for employment based on the applicant's prior criminal record, unless the employer proves that doing so would further a legitimate public objective. *El v. S.E. Pa. Transp. Auth*., 297 F.Supp. 2d 758, 761 (E.D. Pa. 2003).

Pennsylvania law requires that an employer considers an applicant's prior felony and misdemeanor convictions only to the extent that they relate to the applicant's suitability for the job in question. 18 PA. CONS. STAT. § 9125.

Philadelphia and Pittsburgh both have "ban the box" laws in place. Philadelphia law applies to the city and private employers and Pittsburgh's law applies to the city employees and contractors within the city.

C. Specific Issues

1. Workplace Searches

A search of an employee's workplace, which is done in such a way as to reveal matters unrelated to the workplace, may constitute tortious invasion of the employee's privacy. *Doe v. Kohn. Mast & Graf, P.C*., 862 F. Supp. 1310, 1326 (E.D. Pa. 1994) (citing *Borse v. Pierce Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992) (noting that a program monitoring the collection of urine samples comes within definition

of "intrusion upon seclusion" as it involved the use of one's senses to oversee the private activities of another).

2. Electronic Monitoring

The Labor Management Relations Act did not totally preempt allegations by employees that their employers violated the Pennsylvania Wiretapping and Electronic Surveillance Act. 18 PA. CONS. STAT. § 5724. In *Audenreid v. Circuit City Stores*, Inc. 97 F.Supp. 2d 660, 662-63 (E.D. Pa. 2000), the employer's use of video surveillance in office did not violate Pennsylvania's Wire Tapping Act or federal law because it did not record sound or "human voice at any point between and including the point of origin and point of reception." An employer violates the Pennsylvania Wiretapping and Electronic Surveillance Control Act where it "intentionally intercepts, endeavors to intercept or procures any other person to intercept or endeavor to intercept any wire, electronic, or oral communication" by using any electronic or mechanical device, i.e., "bugs," without employee consent. 18 PA. CONS. STAT. §§ 5701 et seq. Moreover, the Act prohibits employers from disclosing the information the employers know or should know was unlawfully intercepted. The Act provides a limited exception allowing for the use of wiretapping devices for employers engaged in communications, public utilities, or construction or where prior authorization has been granted by the Superior Court of Pennsylvania and law enforcement. *Id*.

Under 18 Pa. C.S.A. § 5761, a court of common pleas may issue an order to install and use a tracking device. 18 Pa. C.S.A. § 5761. However, an employer cannot monitor movement within an area protected by a reasonable expectation of privacy unless there are exigent circumstances supported by probable cause that criminal activity has been or will be committed in the protected area, and that the use of a mobile tracking device in the protected area will yield information relevant to the investigation of the criminal activity. 18 Pa. C.S.A. § 5761(a), (g).

3. Social Media

Pennsylvania has no employment law regarding employee's social media passwords that would replace or supplement the federal Electronic Communications Privacy Act.

4. Taping of Employees

The Pennsylvania Supreme Court explained that the legislature intended that only that conduct punishable by criminal penalty can subject someone to civil liability under the Pennsylvania Wiretapping and Electronic Surveillance Act. *Marks v. Bell Tel- Co. of Pa*., 460 Pa. 73, 331 A.2d 424 (Pa. 1975); *see also* 18 PA. CONS. STAT. § 5703 (defining criminal violations of Act). To establish a prima facie case under the Wiretapping and Electronic Surveillance Control Act for interception of oral communication, a claimant must demonstrate: (1) that he engaged in a communication; (2) that he possessed an expectation that the communication would not be intercepted; (3) that his expectation was justifiable under circumstances; and (4) that the defendant attempted to, or successfully intercepted the communication, or encouraged another to do so. *Agnew v. Dupler*, 553 Pa. 33, 717 A.2d 519 (Pa. 1998). The Pennsylvania Courts have repeatedly held that where a recorded conversation was not replayed, there was no violation of the Act, or common-law invasion of privacy. *See Marks*, 460 Pa. 73, 331 A.2d 424 (decided under former statute). Where an employee taped a conversation without the knowledge of his supervisor when the employee was being terminated, employer could not recover for invasion of privacy as there was no reasonable expectation a conversation about an employee's termination would

remain private. *Barr v. Arco Chem. Corp*., 529 F. Supp. 1277, 1281 (D.C. Tex. 1982) (applying Pennsylvania law).

A district court held an award of $10,000 to each of seven hospital employees' statutory damages against the hospital and its director of facilities management in which they alleged that their private conversations were recorded in violation of Title III of Omnibus Crime Control & Safe Street Acts and Pennsylvania's Wiretapping and Electronic Surveillance Control Act, was warranted and would not be reduced. The employees were repeatedly guaranteed confidentiality and actively participated in a meeting based on hospital's assurances, and the court stated that reducing damages would discourage similar plaintiffs from alleging violations. *Care v. Reading Hosp.*, 448 F. Supp. 2d 657, 663 (E.D. Pa. 2006). Note that where an employee consents to the recording, there will be no liability on the part of the employer. For example, in *Consolidated Rail Corp v. Colville*, 19 Pa. D. & C. 545 (Pa. Com. PI. 1981), the employer's monitoring activities were lawful under Wiretapping Act where the employees received telephone calls from the employer with assignments and instructions, such calls were taped for record keeping purposes, and the employees had notice and were reminded during call by beeping tone.

5. Release of Personal Information on Employees

The Pennsylvania Personnel Files Act permits the employers to release portions of employment records to the employees, but not to the general public unless the employee consents to disclosure. 43 P.S. §§ 1321 et seq. In *Thomas Jefferson Univ. Hospital v. PA Dept. of Labor and Industry*, *162 A.3d 384 (Pa. 2017)*. B" on grounds that former employees, who are not laid off with re-employment rights or on a leave of absence, have no right to access their personnel files pursuant to the Personnel Files Act, regardless of how quickly following termination they request to do so.

In *Bangor Area Educ. Ass'n v. Angle*, 720 A.2d 198, 202 (Pa. Commw. Ct. 1998), the Commonwealth Court stressed that Pennsylvania recognizes an employee's privacy interest in the employment record. The court refused a school board member's access to evaluations of a terminated teacher reasoning that the school board member was not an "employee" within the meaning of the Act.

6. Medical Information

The Third Circuit held that, as a matter of law, where a team doctor disclosed a professional football player would be retiring because of a blood clot condition, such a statement was not defamatory and the court would not reverse on this court for a new trial. *Chuy v. Philadelphia Eagles Club*, 595 F.2d 1265, 1281 (3d. Cir. 1979). The court said it was not a loathsome disease and therefore not defamatory per se. The court noted that under Pennsylvania law, whether publication is capable of defamatory meaning – something that tends to harm the reputation of another as to lower him in estimation of the community, or to deter third persons from associating or dealing with him – is a matter of law. An employer is prohibited from requiring an employee or applicant to pay for a medical examination or for the cost of furnishing any medical records to the employer if the examination or records are required by the employer as a condition of employment. 43 PA. STAT. ANN. §§ 1001-1003.

7. Restrictions on Requesting Salary History

Pennsylvania does not have restrictions on requesting salary history. The inspection of personnel records law allows employees to request the opportunity to inspect records at mutually agreeable time. Employees are not entitled to a copy of the records, but they may take notes. The law has recently been

clarified as to define "employee" narrowly. And does not include recently separated employees. *Thomas Jefferson Univ. Hospital v. PA Dept. of Labor and Industry*, 162 A.3d 384 (Pa. 2017).

Philadelphia has a local ordinance that prohibits employers from asking applicants about their salary history or require them to disclose their salary history. Phila. Reg. No. 7, § 7.4(a).

IX. WORKPLACE SAFETY

A. Negligent Hiring/Supervision/Retention

Pennsylvania recognizes the torts of negligent hiring and negligent supervision. *See, e.g., Yee v. Roberts*, 2005 Pa. Super. 240, 878 A.2d 906 (Pa. Super. Ct. 2005); *IRPC, Inc. v. Hudson United Bancorp*, 2002 WL 372945 (Pa. Com. PI. Jan. 18, 2002) (addressing negligent supervision); *Heller v. Patwil Homes, Inc.*, 713 A.2d 105 (Pa. Super. Ct. 1998) (addressing both negligent supervision and negligent hiring). However, while an employer may be held "liable for the conduct of its agents or employees, as well as any negligence attendant on their training, supervision, or the decision to hire or retain them, [an employer] cannot be liable for the actions, training, supervision or hiring of its subagents." *Smith v. John Hancock Ins. Co.,* 2008 U.S. Dist. LEXIS 66912, *21-22 (E.D. Pa. Sept. 2, 2008).

"[A]n action for negligent hiring provides a remedy to injured third parties who would otherwise be foreclosed from recovery under the master-servant doctrine because the wrongful acts of employees in [those] cases are likely to be outside the scope of employment or not in furtherance of the master's business." *Heller*, 713 A.2d at 107 (citation omitted). Pennsylvania looks to the RESTATEMENT (SECOND) OF AGENCY and the RESTATEMENT (SECOND) OF TORTS for guidance in this area. Accordingly, in a negligent hiring claim, the inquiry focuses on what the employer knew and whether the employer exercised ordinary care in discovering that information. *See Id*. (citing RESTATEMENT (SECOND) OF AGENCY § 213 and RESTATEMENT (SECOND) OF TORTS § 317).

Similarly, "Pennsylvania law allows a claim against an employer for negligent supervision of an employee where the employer fails to exercise ordinary care to prevent an intentional harm to a third-party which (1) is committed on the employer's premises by an employee acting outside the scope of his employment and (2) is reasonably foreseeable." *Mullen v. Topper's Salon & Health Spa, Inc*., 99 F. Supp. 2d 553, 556 (E.D. Pa. 2000) (citations omitted). A total absence of supervision by the employer over the employee can, in certain cases, serve as the basis for a negligent supervision claim. *See Heller*, 713 A.2d 105.

B. Interplay with Worker's Compensation Bar

The Workers Compensation Act is the sole and exclusive remedy for all injuries an employee incurs in the course of employment. 77 P.S. §§ 431 et seq. The Act is strictly construed to limit the employer's tort liability and provide a single source of remedy to injured employees. *Snyder v. Pocono Med. Ctr*., 440 Pa. Super. 606, 656 A.2d 534 (Pa. Super. Ct. 1995), *affirmed* 547 Pa. 415, 690 A.2d 1152 (1997). *See also Peck v. Del. County Bd. of Prison Inspectors*, 572 Pa. 249, 254, 814 A.2d 185, 188 (2002) (stating same).

However, Pennsylvania law recognizes the "dual capacity" doctrine under which an employer may be liable to the employee outside the Workers Compensation Act. The doctrine applies in limited circumstances when the employer "has a second identity so completely independent and unrelated to its

status as an employer that the law would recognize the employer in its second capacity as a separate legal person." *Soto v. Nabisco, Inc*., 2011 Pa. Super. 249, 32 A. 787, 792 (Pa. Super. Ct. 2011). For example, the Pennsylvania Supreme Court has held that a hospital was liable outside the Workers Compensation Act for injuries for a hospital employee who became ill while at work, went to the emergency room and fell of an x-ray table after the foot stand broke loose. *Tatrai v. Presbyterian Univ. Hosp.*, 497 Pa. 247, 439 A.2d 1162 (Pa. 1982). In contrast, in *Soto*, an employee was severely injured while operating a cutting machine and lost his arm as a result. *Soto v. Nabisco, Inc*., 32 A. at 789. The employee had no recourse against the employer outside the Workers Compensation Act because there was "no dispute that the accident occurred within the course and scope" of employment. *Id*.

C. Firearms in the Workplace

Although the Pennsylvania Uniform Firearms Act does not address the legality of carrying a firearm at a workplace, carrying a firearm at a workplace may be a cause for discharge under the employer's policy. 18 Pa. C.S.A. § 6106. Moreover, a license is required to carry a concealed firearm outside one's place of abode or fixed place of business, and to carry firearms in vehicles. 18 Pa. C.S.A. § 6106.

D. Use of Mobile Devices

Pennsylvania has no statutes addressing the use of mobile devices in the workplace.

X. TORT LIABILITY

A. Respondeat Superior Liability

Pennsylvania recognizes the doctrine of respondeat superior, or vicarious liability. *Valles v. Albert Einsten Med. Ctr.*, 2000 Pa. Super. 243, 758 A.2d 1238 (Pa. Super. Ct. 2000). Under the doctrine, an employer is vicariously liable for the negligent acts that the employee commits during the course and within the scope of employment. *Costa v. Roxborough Memorial Hosp.,* 708 A.2d 490. 493 (Pa. Super. Ct. 1998). In some instances, an employer may be liable for criminal actions committed by the employee. *Valles v. Albert Einstein Med. Ctr*., 758 A.2d at 1242.

The doctrine of vicarious liability extends only between the employer and the employee, and not between the employer and an independent contractor. *Id*. An employee is a person subject to the alleged employer's control over performance of services. *Id*. at 1243. The employer controls the result of the work and the manner in which the employee performs the work. In contrast, an independent contractor retains exclusive control over the manner in which the work is performed. *Id*. To distinguish between an employee and an independent contractor, the courts consider whether the employer 1) provides training; 2) supplies tools; 3) holds regular meetings with employees; 4) compensates the employees on a production basis rather than fixed hourly wage; 5) withholds payment taxes from the employee's pay; and 6) exercises direct day-to-day supervision. *Venango Newspapers v. UCBR*, 631 A.2d 1384, 1387088 (Pa. Commw. Ct. 1993). The courts also inquire whether the employee has an obligation to accept all assignments from the employer. *Id*. None of these factors is dispositive. *Id*. For example, in *Valles*, the Commonwealth Court has held that a hospital was not an employer of a doctor, who had been sued for malpractice, because the hospital did not exercise a supervisory role over the doctor's work. *Valles v. Albert Einstein Med. Ctr*., 758 A.2d at 1244.

Pennsylvania holds employers liable only for the acts of employees that have been committed within the scope of employment. *Cesare v. Cole*, 210 A.2d 491, 493 (Pa. 1965). An act is within the scope of employment when the act 1) is of a kind and nature that the employee is employed to perform; 2) occurs substantially within the authorized time and space limits of the employment; and 3) is performed to serve the employer. *Costa v. Roxborough Mem'l Hosp.*, 708 A.2d 490, 493 (Pa. Super. Ct. 1998). Although lower Pennsylvania courts have held the employers liable for various acts of assault and battery committed by the employees, the Superior Court has emphasized that an employer cannot be vicariously liable where "the employee commits an act encompassing the use of force which is excessive and so dangerous as to be totally without responsibility or reason." *Id*. For example, in *Dee v. Marriott Int., Inc.*, No. 99-2459, 1999 WL 975125 (E.D. Pa. 1999), the court has held that Marriott was not vicariously liable for a sexual assault and the resulting injuries that Marriott's supervisor committed against another Marriott employee. *Id*.

B. Tortuous Interference with Business/Contractual Relations

Pennsylvania recognizes a cause of action for tortuous interference with existing contractual relations and prospective contractual relations. *See York Group, Inc. v. Yorktowne Caskets, Inc.*, 2007 Pa. Super. 114 (Pa. Super. Ct. 2007); *B. T. Z., Inc. v. Grove*, 803 F. Supp. 1019, 1023 (M.D. Pa. 1992); *Kelly-Springfield Tire Co. v. D'Ambro*, 480 Pa. Super. 301, 308, 596 A.2d 867, 871 (Pa. Super. Ct. 1991); *Field v. Phila. Elec. Co.*, 565 A.2d 1170, 1178 (Pa. Super. Ct. 1989).

The elements of a cause of action for intentional interference with existing or prospective contractual relations are: (1) the existence of a contractual or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct. *Al Hamilton Contracting Co. v. Cowder*, 434 Pa. Super. 491, 497, 644 A.2d 188, 191 (Pa. Super. Ct. 1994); *Strickland v. Univ. of Scranton*, 700 A.2d 979, 985 (Pa. Super. Ct. 1997).

A plaintiff is not required to specifically identify the prospective relationship to state a claim for tortuous interference with such a relationship. It is sufficient to allege that one is barred from doing business at all in a specified territory. *See Kelly Springfield Tire Co. v. D'Ambro*, 408 Pa. Super. 301, 308, 596 A.2d 867, 871 (Pa. Super. Ct. 1991) The *D'Ambro* court noted that "[p]rospective contractual relations are, by definition, not as susceptible of definite, exacting identification as is the case with an existing contract with a specific person." *Id*. In addition to identifying the prospective relationship in some fashion, a plaintiff must also show that the defendant acted purposefully to interfere with the prospective relationship and intended to do so. *See BTZ Inc.*, 803 F. Supp. at 1023; *Field*, 565 A.2d at 1178. The plaintiff must show actual pecuniary loss, not just emotional distress or harm to reputation. *Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998). A defendant's conduct is improper in the absence of a privilege. *Cloverleaf Dev., Inc. v. Horizon Fin.*, 347 Pa. Super. 75, 500 A.2d 163, 167 (Pa. Super. Ct. 1985). In determining whether an actor's conduct is intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties. RESTATEMENT (SECOND) TORTS § 767 (1979).

However, because Pennsylvania is an "at-will" employment state, an at-will employee may not maintain an action against a third-party for intentional or tortuous interference with a presently existing at-will employment contract. According to the Superior Court, "an action for intentional interference with performance of a contract in the employment context applies only to interference with a prospective employment relationship whether at-will or not, not a presently existing at-will employment relationship." *Haun v. Community Health Systems, Inc.*, 14 A.3d 120, 124 (Pa. Super. Ct. 2011) (noting that no Pennsylvania court has permitted an at will employee to maintain a cause of action under this theory). The court explained that the interference must be of the sort to induce or cause a third party not to enter into the *prospective* relationship. *Id*.

XI. RESTRICTIVE COVENANTS/NON-COMPETITION AGREEMENTS

A. General Rule

Restrictive covenants have traditionally been disfavored in Pennsylvania, viewed as a restraint on trade that prevents employees from earning a living. Courts today scrutinize restrictive covenants, concentrating on the temporal and geographic limitation to determine whether the burden on the employee is unreasonable. *See Victaulic Co. v. Tieman*, 499 F.3d 227 (3d Cir. 2007). At a minimum, the covenants must be reasonably related to the protection of a legitimate business interest. For example, in *Capozzi v. Latsha & Capozzi. P.C.*, 2002 Pa. Super. 102, 797 A.2d 314, 321 (Pa. Super. Ct. 2002), the court held that a non-competition agreement that bars competition in general business without limiting the time period and geographic extent is void on its face as an unreasonable restraint of trade. In *Mrozek v. Eiter*, 2002 Pa. Super. 245, 805 A.2d 535, 539 (Pa. Super. Ct. 2002), the court noted that overbroad covenants are unenforceable, and a court of equity may enforce only those limited portions of the restrictions reasonably necessary to protect the employer.

Non-disclosure and non-competition covenants are the most frequently utilized restrictive covenants. *Hess v. Gebhard & Co.*, 570 Pa. 148, 157, 808 A.2d 912, 917 (Pa. 2002). Nondisclosure covenants limit the dissemination of proprietary information by a former employee, while noncompetition covenants bar the former employee from competing with his prior employer for a specific period of time and within a precise geographic area. Pennsylvania courts will enforce restrictive covenants if they are: (1) incident to an employment relationship between the parties; (2) the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and (3) the restrictions imposed are reasonably limited in duration and geographic extent. In *Shepard v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233, 1244 (Pa. Super. Ct. 2011), the court held that "presence of a legitimate, protectable business interest of the employer is a threshold requirement for an enforceable non-competition covenant."

The issue of whether a non-competition covenant is reasonable is fact specific, and must be determined on a case-by-case basis. *WellSpan Health v. Bayliss*, 2005 Pa. Super. 76, 869 A.2d 990, 997 (Pa. Super. Ct. 2005). A restrictive covenant need not appear in an initial employment contract to be valid. *Fisher BioServices, Inc. v. Bilcare, Inc.*, 2006 WL 1517382, *1 (E.D. Pa. 2006) (citing *Modern Laundry & Dry Cleaning Co. v. Farrer*, 370 Pa. Super. 288, 291, 536 A.2d 409, 411 (Pa. Super. Ct. 1988). However, Pennsylvania courts enforce non-competition covenants only if such covenants are supported by valid consideration. *Id*. Where a non-competition covenant appears in the initial employment agreement or an offer letter signed prior to the employee's first day of work, the courts regard the new job as consideration sufficient to enforce the restriction. *Pulse Tech. Inc. v. Notaro*, 614 Pa. 318, 36 A.3d 1096

(Pa. 2012). However, where an employer adds a noncompetition agreement after the employee has begun working, the agreement is unenforceable unless an employer offers additional consideration (*e.g*. a special bonus, severance benefits). *Id*.

In 2020, the PA Supreme Court held that "[a] restrictive covenant executed on the first day of work may, in some circumstances, be unenforceable if the parties had previously reached a binding oral employment contract that did not subsume the restriction." *Rullex Co., LLC v. Tel-Stream, Inc*., 232 A.3d 620, 626 (Pa. 2020).

B. Blue Penciling

In Pennsylvania, the courts will "blue pencil," or redraft overbroad covenants to make them enforceable. *See Wellspan Health v. Bayliss, supra*. Non-competition covenants will be enforced by courts only to the extent that they are reasonably necessary for the protection of the employer. *Sidco Paper Co. v. Aaron*, 465 Pa. 586, 351 A.2d 250 (Pa. 1976). In *Sidco Paper Co*., the Court utilized the "blue pencil" method, and granted partial enforcement of territorial restrictions by adding new language not originally contained in the covenant. *See also Bell Fuel Corp. v. Cattolico*, 375 Pa. Super. 238, 255, 544 A.2d 450, 459 (Pa. Super. Ct. 1988).

C. Confidentiality Agreements

Employers can use restrictive covenants to protect a specific interest, including trade secrets, confidential information, and unique or extraordinary skills, but generally courts will prohibit such covenants if used merely to eliminate competition or to gain an economic advantage. *Hess v. Gebhard & Co*., 570 Pa. 148, 162-64, 808 A.2d 912, 920-21 (Pa. 2002). An employer is entitled to protect its confidential information, but the matter sought to be protected must be the employer's own secret, particularly important to the employer's business conduct, as opposed to a general trade secret. *Siemens Med. Solutions Health Servs. Corp. v. Carmelengo*, 167 F. Supp. 2d 752, 762 (ED. Pa. 2001). Employers may protect information through a confidentiality agreement even if it is not considered a trade secret. *Iron Age Corp. v. Dvorak*, 2005 Pa. Super. 270, 880 A.2d 657 (Pa. Super. Ct. 2005); *Bimbo Bakeries USA, Inc. v. Boticella*, 613 F.3d 102 (3d Cir. 2010).

D. Trade Secret Statute

Pennsylvania law defines a trade secret as "[t]he whole or any portion or phase of any scientific or technical information, design, process, procedure, formula or improvement which is of value and has been specifically identified by the owner as of a confidential character, and which has not been published or otherwise become a matter of general public knowledge." 18 PA. CONS. STAT. § 3930. Pursuant to the trade secrets statutes, the theft of trade secrets is a felony. Specifically, a person is guilty of a felony of the second degree if he (1) takes by force, or by threat of force, a trade secret; (2) willfully and maliciously enters a building with the intent to obtain unlawful possession of a trade secret; or (3) willfully and maliciously accesses any computer, network, or system, whether in person or electronically, with the intent to obtain unlawful possession or access to a trade secret. In addition, a person is guilty of a felony of the third degree if he, with intent to wrongfully deprive of, or withhold from the owner, the control of a trade secret, or with intent to wrongfully appropriate a trade secret for his use, or for the use of another: (1) unlawfully obtains possession of a trade secret; or (2) having unlawfully obtained possession of a trade secret, converts such article to his own use or that of another. *See id.*

Pennsylvania law specifically provides for civil remedies for the misappropriation of trade secrets. 12 PA. CONS. STAT. § 5308. The Pennsylvania Uniform Trade Secret Act "creates a statutory cause of action for injunctive relief, compensatory damages and exemplary damages for the actual loss caused by misappropriation of trade secrets and the unjust enrichment caused by such misappropriation." *Youtie v. Macy's Retail Holding, Inc.,* 626 F.Supp. 2d 511, 522 (E.D. Pa. 2009). In Pennsylvania, in accordance with the "dominant view" of courts in states that have also adopted the Uniform Trade Secrets Act, a defendant's counterclaims based on the same conduct that is said to constitute misappropriation of trade secrets are preempted. *Id*. The court in *Youtie* held that the parties had not provided sufficient facts to determine whether the counterclaims were preempted where the claims concerned the "misappropriation of trade secrets and/or confidential and proprietary information, breach of fiduciary duty and duty of loyalty, unjust enrichment and unfair competition regarding the plaintiffs' conduct in requesting and disclosing "first cost" data. *Id*.

E. Fiduciary Duty and Their Considerations

1. Injunctive Relief

In *Siemens Med. Solutions Health Services Corp. v. Carmelengo*, 167 F.Supp. 2d 752, 762 (E.D. Pa. 2001), the court held that prior to granting a preliminary injunction, a district court must weigh: (1) whether the movant has demonstrated a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured if request for relief is not granted; (3) whether granting preliminary relief will result in even greater harm to the non-movant; and (4) public interest. *Id*. at 757. In this case, the preliminary injunction was granted to the extent of enjoining the employee from contacting or dealing with any of his former employer's customers. The injunction could not extend so far as to prohibit the employee from ever being employed by any person or entity engaged in the same or similar business as his former employer. The court explained that trial courts have broad powers to modify the restrictions imposed on an employee via a covenant, so that a court can limit the covenant to include only those limitations reasonably necessary to protect the employer.

A plaintiff must prove three elements to support a preliminary injunction: (1) a clear right to relief; (2) an immediate need for relief; and (3) an irreparable injury unless the court grants the injunction. *Rohm & Haas Co. v. Lin*, 992 A.2d 132, 145-46 (Pa. Super. Ct. 2010). In *Rohm*, the Superior Court upheld the trial court's entry of a permanent injunction against the former employee in the employer's suit against regarding, *inter alia*, misappropriation of trade secrets. *Id*.

2. Forum Selection Clauses

Forum selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under circumstances. *Barbuto v. Medicine Shoppe Int'l. Inc.*, 166 F. Supp. 2d 341, 346 (W.D. Pa. 2001). A forum selection clause is unreasonable if either the forum selected is so inconvenient that the opposing party would be effectively deprived of his day in court, or the clause was procured fraudulently or through overreaching. *Id*.

3. Enforcement by Successors and Assigns

Restrictive covenants in employment agreements are not assignable to successor employers, except as explicitly permitted by the agreement or unless the affected employee consented to the assignment. *Siemens Med. Solutions*, 167 F.Supp. 2d at 757-58 (citing *All-Pak, Inc. v. Johnston*, 694 A.2d

347, 351-52 (Pa. Super. Ct. 1997)). The Pennsylvania Supreme Court held, as a matter of first impression, that a covenant not to compete, contained in an employment agreement and included in the sale of the business assets, is not assignable to a purchasing business entity, absent a specific assignability provision in the covenant, because the employee could not be said to have consented to the assignment. *Hess v. Gebhard & Co*., 808 A.2d 912, 920- 24 (Pa. 2002).

XII. DRUG TESTING LAWS

A. Public Employer

Collection and analysis of a urine sample to test for drug use constitutes a search subject to the restrictions of the Constitution's Fourth Amendment. *Kerns v. Chalfont- New Britain Tp. Joint Sewage Auth*., 263 F.3d 61, 65 (3d Cir. 2001) (citing *Skinner v. Rv. Labor Executives' Assoc*., 489 U.S. 602, 617 (1989)).

B. Private Employers

In Pennsylvania, an employer may be held liable under a common law invasion of privacy theory if the employer's drug testing policy constitutes an unreasonable intrusion into a person's private affairs or seclusion. *See Borse v. Pierce Goods Shop, Inc*., 963 F.2d 611, 621 (3d Cir. 1992) (citing *Skinner v. Ry. Labor Exec Assoc*, 489 U.S. 602 (1989). To date, Pennsylvania has not enacted specific private-sector drug-testing laws. The Americans with Disabilities Act extensively regulates the area of pre-hire medical examinations. *See* 42 U.S.C. § 12112(d). The Pennsylvania Human Relations Act ("PHRA") contains similar, but less detailed requirements. Under the PHRA, "prior to an offer of employment, an employer may not inquire as to whether an individual has a handicap or disability or as to the severity of such handicap or disability." 43 P.S. § 955(b)(1). Under the ADA, drug tests are not considered to be medical examinations and may be required prior to an offer of employment. 42 U.S.C. § 12114(d). However, tests to determine whether and/or how much alcohol an individual has consumed are considered medical examinations and are subject to all of the ADA's requirements. A pre-employment drug screening program must be uniformly applied to all similarly situated applicants. This does not mean, however, that all or none of those who apply must be tested. Employers may require testing only for certain types of positions, such as those dealing with cash, sensitive information, heavy equipment, etc. However, employers must treat all applicants for those positions equally. Employers which desire to implement a pre-employment drug testing policy should be encouraged to incorporate a statement of consent in their application process. *See* generally, 11 PA FORMS § 1.17.

Although there is no statutory regulation of private sector drug testing in Pennsylvania, such an employer should be cautious of how the testing is performed. In *Borse v. Piece Goods Shop*, 963 F.2d 611 (3d. Cir. 1992), the Third Circuit, applying Pennsylvania law, held that an employee subject to random drug tests by an employer, may have a cause of action against the employer for the privacy-based tort of "intrusion upon seclusion." This tort is defined by the Restatement as "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Id*. at 620 (citing RESTATEMENT (SECOND) OF TORTS § 652(B)). In *Borse*, the Third Circuit noted that there are at least two ways in which an employer's urinalysis program might intrude upon an employee's seclusion, thereby invading the employee's privacy. First, the manner in which the program is conducted may constitute a tortious intrusion upon seclusion. Many employer programs require that the act of providing the sample be monitored to guard against adulteration or substitution.

The court explained that monitoring of the collection of a urine sample "appeared to fall within the definition of an intrusion upon seclusion because it involves the use of one's senses to oversee the private activities of another." The court concluded that "if the method used to collect the urine fails to give due regard to the employee's privacy, it could constitute a substantial and highly offensive intrusion upon seclusion." *Id*. at 621. The court recognized that the Pennsylvania Supreme Court had not reached this issue, and that very few courts nationally had considered whether private employer urinalysis programs invaded on employees' privacy rights. The court cited precedent out of the First Circuit which held that direct observation of urination invaded the common-law right of privacy under state law.

A second way an employer's urinalysis program might invade an employee's privacy is by potentially revealing a host of private medical facts about an employee, including whether the employee is epileptic, pregnant or diabetic, according to *Borse*. The court explained that liability may arise under "intrusion upon seclusion" because a reasonable person might conclude that submitting urine samples designed to ascertain this type of information is a substantial and highly offensive intrusion upon seclusion. The Third Circuit predicted that if confronted with this issue, the Pennsylvania Supreme Court would use a balancing test to determine whether a drug testing program invades an employee's privacy, weighing the employee's interest in privacy against the employer's interest in maintaining a drug-free workplace to determine whether a reasonable person would find the program highly offensive. The court listed other facts to be considered when applying this balancing test including whether the employer had an individualized suspicion of drug usage by the employee, and whether the employee performed a safety-sensitive job. The Third Circuit held in *Borse* that it did not believe Pennsylvania law would limit private sector employers from using a urinalysis program to detect drug use where there was a reasonable suspicion of such use or to implement it for those employees performing safety-sensitive jobs. In 1991, the Pennsylvania Human Relations Act was amended so that the definition of "handicap or disability" expressly provided that the term would not include "current, illegal use of or addiction to a controlled substance." 1991 Pa. Laws 51, § 4(p)(3).

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

Federal and state courts consider Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and the Pennsylvania Human Relations Act (PHRA), 43 PA. CONS. STAT. §§ 951 et seq., as embodying identical substantive standards. *Phillips v. Heydt*, 197 F. Supp. 2d 207 (E.D. Pa. 2002).

In *Phillips*, the court applied the following test to determine if the employee established a claim for hostile work environment discrimination based upon race under Title VII and the PHRA: (1) plaintiff suffered intentional discrimination because of race; (2) the discrimination was "pervasive and regular;" (3) employee was adversely affected by the discrimination; (4) the discrimination would adversely affect a reasonable person of the same race; and (5) respondeat superior liability applies. *Id*. at 208. Employers/Employees Covered Employers with four or more employees are subject to the PHRA. 43 PA. STAT. § 954(b). Covered employers may take the form of a partnership, association, organization, or corporation. *Id*. The PHRA applies to religious, charitable, and sectarian corporations receiving government appropriations. *Id*. If such an employer does not receive government appropriations, then it is exempt from the PHRA's provisions prohibiting religious discrimination. *Id*.

B. Types of Conduct Prohibited

The employment provisions of the PHRA parallel the provisions of various federal antidiscrimination laws including Title VII of the Civil Rights Act, the Americans With Disabilities Act of 1990, and the Age Discrimination in Employment Act. The PHRA prohibits discrimination on the basis of race, color, religious creed, ancestry, non-job-related physical handicap or disability, age, sex, national origin, the use of guide or support animals because of blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals. 43 PA. STAT. § 952. These groups are known as "protected classes." The PHRA provides that an employer may discriminate on the basis of protected class status only if it can establish that such discrimination is necessary because of a "bona fide occupational qualification" (BFOQ). See generally the PHRA, 43 PA. STAT. §§ 951 et. seq. The BFOQ exception is narrowly construed and an employer asserting a BFOQ has the burden of proving a factual basis exists for believing that all or substantially all of the protected class members discriminated against would be unable to satisfactorily perform the duties of the job. See Leechburg Area Sch. Dist. v. Commonwealth, 19 Pa. Comwlth. 614, 339 A.2d 850 (Pa. Commw. Ct. 1975). To establish a BFOQ, an employer must demonstrate: (1) that the BFOQ it invokes is reasonably necessary to the essence of its business, and (2) that the employer has a factual basis for believing all persons within the class would be unable to perform the job safely and efficiently. Montour Sch. Dist. v. Commonwealth, 109 Pa. Comwlth. 1, 530 A.2d 957 (Pa. Commw. Ct. 1987). The Pennsylvania Human Relations Commission (PHRC) has established regulations regarding BFOQ that clearly indicate the BFOQ exception will not apply where it is based upon but not limited to the following circumstances: (1) Assumptions of the comparative general employment characteristics of persons of a particular race, color, religious creed, ancestry, age, sex or national origin, such as their turnover rate; (2) Stereotyped characteristics of the aforementioned classes, such as their mechanical ability or aggressiveness; (3) Customer, client, co-worker or employer preference, or historical usage, tradition or custom; (4) The necessity of providing separate facilities of a personal nature, such as restrooms or dressing rooms. See 16 PA. CODE § 41.71.

C. Administrative Requirements

The PHRC administers and enforces the PHRA. *See* 16 PA. CODE §§ 42.3 et seq. The PHRC is comprised of 11 commissioners, each of whom is appointed by the governor to serve staggered five-year terms.

PHRA actions are commenced by filing a formal complaint. The complaint must be filed within 180 days of the alleged act of discrimination. 16 PA. CODE § 42.14. The PHRC serves the complaint on the named respondents. *Id*. § 42.31. Each respondent must file a written, verified answer within thirty (30) days of service. *Id*. A respondent may request an additional thirty (30) days to respond, Id. The answer must be filed with the PHRC and a copy of the answer is served on the complainant. *Id*. Complaints are investigated by a PHRC factfinder. A factfinder assigned to a complaint will gather evidence for the Commission to determine whether probable cause exists for crediting the allegations of the complaint. As part of the investigation, the factfinder may schedule a fact-finding conference, attendance is voluntary at this conference.

If no probable cause is found, then the complaint is dismissed and the complainant must be informed by the Commission within ten (10) days. Within ten (10) days after receiving notice of dismissal, the complainant must file a written request for a preliminary hearing so the Commission may reconsider whether probable cause exists. 16 PA. CODE § 42.62. The Commission need not hold a preliminary hearing before affirming its dismissal or entering a finding of probable cause. *Id*. The Commission must provide written notice to the complainant if it has not acted on the complaint within one year. Within two

(2) years of the Commission's notice, the complainant may commence a lawsuit in the Court of Common Pleas.

If upon completion of the investigation the Commission concludes that probable cause exists, then the respondent must be notified. A hearing will be held before either the Commission or a permanent hearing examiner, designated by the Commission, at which the parties may appear with or without counsel.

D. Remedies Available

The Commission has broad discretion to order remedies as it deems appropriate in order to effectuate the policies of the PHRA. *Murphy v. Commonwealth*, 77 Pa. Comwlth. 291, 465 A.2d 740 (Pa. Commw. Ct. 1983), *affd*, 486 A.2d 388 (Pa. 1985). The PHRC may award a "cease and desist order," hiring, reinstatement or promotion, back pay, or other reasonable accommodations. The Commission may assess a civil penalty against respondents not to exceed $50,000.00. Moreover, the prevailing party may be awarded costs and attorney's fees subject to the limitation that a respondent may only be granted such an award where the complaint is brought in bad faith.

The Commission, complainant, or Attorney General may seek enforcement of a Commission order in state court. The complainant must first exhaust administrative remedies through the PHRA before seeking judicial claims. *Clay v. Advanced Computer Applications, Inc*., 522 Pa. 86, 559 A.2d 917 (1989). Under the PHRA, a plaintiff is entitled to a jury. *Welcker v. Smith Kline Beecham*, 746 F. Supp. 576 (E.D. Pa. 1990). The PHRA provides the exclusive remedy under state law when used, however, the exclusive remedy provision will not preclude a Title VII suit in federal court where the PHRA claim has been dual-complaint filed with the Equal Employment Opportunity Commission (EEOC).

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

Employers may not deprive an employee of his employment, seniority, or benefits merely because the employee (1) receives and/or responds to a summons to serve on a jury; (2) serves as a juror; or (3) attends court for prospective jury duty. With respect to jury duty, retail employers with less than 15 employees and manufacturing employers with less than 40 employees are exempt from these requirements and, accordingly, employees who work for exempt employers may request exemption from jury duty. 42 PA. CONS. STAT. § 4563. Covered employers are subject to criminal and civil liability for violations of the law. Section 4563 requires employers of employees serving on a jury to pay the employees their regular compensation, as if they were on paid or sick leave, and the employer may not deduct the days that the employee spends on jury duty from the annual or sick time accrued by the employee. 42 PA. CONS. STAT. § 4563.

B. Voting

An employer may neither influence an employee's vote nor prevent an employee from voting. 25 PA. STAT. § 3547(c).

C. Family/Medical Leave

As a result of the decision in *Obergerfell v. Hodges*, employers that offer benefits to employees with opposite-sex spouses are required to offer those same benefits to same-sex spouses.

D. Pregnancy/Maternity/Paternity Leave

Pennsylvania does not have statutes mandating pregnancy, maternity or paternity leave and follows the federal Pregnancy Discrimination Act and Family and Medical Leave Act. 29 U.S.C.A. §§ 2601 et seq. However, under the Pennsylvania Human Relations Act, discrimination against pregnant women is prohibited. 43 P.S. § 955.

E. Day of Rest Statutes

The "Sunday Trading Laws" (18 PA. CONS. STAT. § 7361-7364), which were intended to provide Pennsylvanians with a uniform day of rest and recreation, were declared unconstitutional in 1978 by the Pennsylvania Supreme Court. *Kroger Co. v. O'Hara Tp.*, 392 A.2d 266, 481 Pa. 101 (Pa. 1978). In the following year, the legislature re-enacted a portion of the statute which prohibits the sale of motor vehicles on Sunday. *See* 18 PA. CONS. STAT § 7365 (violation of statute is summary offense, punishable with up to $200 fine).

F. Military Leave

Employers are prohibited from discriminating against any employee or prospective employee on the basis of his/her membership in any reserve component of the United States armed forces. Specifically, employees called to active duty must be granted a military leave of absence. An employee returning from military duty must be restored to his/her pre-leave position or a comparable position at the time of or prior to the expiration of the leave of absence. 51 PA. CONS. STAT. § 7309.

G. Sick Leave

Pennsylvania has no State Law that requires employers to provide sick leave to their employees. Philadelphia has enacted a local ordinance regarding sick leave. Phila. Pa. Code, ch. 9-4100 (Bill No. 141026). Employees accrue 1 hour of sick leave for every 40 hours worked. Sick leave must be paid if the employer has 10+ employees. Employers with 1-9 employees must provide sick leave, but it may be unpaid. *Id*.

Pittsburgh also has enacted a local sick leave ordinance. Pittsburgh Code, Tit. VI, Art. 1, § 626. Full-time and part-time employees accrue 1 hour of sick leave for every 35 hours worked. Employers with 15+ employees must provide paid sick leave. Employers with 1-14 employees must provide unpaid sick leave during the first year of the Act (Mar. 15, 2020) and paid sick leave thereafter. *Id.*

H. Domestic Violence Leave

Philadelphia has enacted the "Entitlement to Leave Due to Domestic or Sexual Violence" act. §9-3202 of the act holds that an employee who is a victim of domestic violence, or has a family/household member who is a victim of domestic violence may take unpaid leave from work to address the issue. Employers with 50 or more employees must provide up to 8 workweeks of leave during any 12-month

period. Employers with less than 50 employees must provide 4 workweeks of leave during any 12-month period. (Bill No. 090660-A).

I. Other Leave Laws

Pennsylvania does not require any leave to be provided to employees at any time. Most employers do offer some form of leave to full time employees.

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

Pennsylvania Wage and Hour laws are codified in Chapter 8 of the Pennsylvania Labor Code. *See, e.g.*, 43 PA. STAT. § 260.1 et seq. (Wage Payment and Collection law); 43 PA. STAT. § 333.102 et seq. (Minimum Wage Act of 1968); 43 PA. STAT. §§ 336.1, et seq. (Equal Pay Act).

Effective July 24, 2009, the minimum wage rate in Pennsylvania is $7.25 per hour. The Pennsylvania Minimum Wage Act, 43 P.S. §§ 333.104 et seq. Tipped employees who make $30.00 per month in tips may be paid a minimum wage of $2.83 per hour provided that the employer makes up the difference if the total compensation per hour does not meet the standard Pennsylvania minimum wage. *Id*.

Moreover, the Pennsylvania Equal Pay Act (EPA), 43 PA. CONS. STAT. §§ 336.1, et seq. applies to all employers within Pennsylvania. However, this state Act only covers employees encompassed under Section 6 of the Fair Labor Standards Act. The EPA prohibits employers from paying employees on the basis of sex. *See* 43 PA. CONS. STAT. §§ 336.1, et seq. Note that the EPA does not prohibit wage differentials attributed to factors other than sex, including: (1) merit; (2) seniority; (3) a system which measures pay by quantity and/or quality of work; or (4) a differential based on any factor other than sex. 43 PA. CONS. STAT. §§ 336.3. Where an employer is found to have violated the EPA, it may not reduce the wages of male employees to comply with the Act. EPA claims may be initiated by either the employee or Secretary of Labor. Courts may award back pay, damages, attorney fees, and costs. Moreover, an employer who willfully and knowingly violates the EPA is liable to the employee for liquidated damages in the amount of unpaid wages and is subject to fines of up to $200.00 and may be imprisoned for no less than thirty (30) days or more than sixty (60) days for each day that a violation persists. The EPA requires employers to maintain records of wages and other terms and conditions of employment for employees. Failure to furnish the Secretary of Labor with these records, upon request, may result in fines and/or imprisonment.

B. Deductions from Pay

Deductions from the wages of an employee may be made for the convenience of the employee pursuant to the Wage Payment and Collection Law. 42 P.S. § 260.3. Generally, deductions must be for employee's benefit and with his signed authorization. The employers may deduct from wages: 1) contributions to recovery of overpayments under employee welfare and pension plans; 2) Social Security, federal and local tax deductions; 3) contributions authorized by the employees in writing or under a collective bargaining agreement including payments to group insurance plans certified by the Pennsylvania Insurance Department; 4) deductions authorized in writing for the recovery of overpayments to employee welfare and pension plans; 5) labor organization dues and fees. 34 Pa. Code §

9.1. If authorized by the employee in writing or under the collective bargaining agreement, the employer may also deduct payments to company operated thrift plans, stock option and investment plans, personal savings accounts or credit unions, contributions for the purchase of United States Government bonds, charitable contributions and contributions to local area development activities. *Id*.

Deduction from employee's wages under earnings participation plan which placed employee's salary on a sliding scale varying as a function of the employer's profit or loss ratio required both the written authorizations of the employee and an authorization by the Department of Labor and Industry that the plan conforms to the intent and purpose of The Wage Payment and Collection Law. *Ressler v. Jones Motor Co., Inc.*, 337 Pa. Super. 602, 487 A.2d 424 (Pa. Super. Ct. 1985).

C. Overtime Rules

Employees working over 80 hours in any consecutive fourteen-day period, and those working substantially irregular hours, performing two or more kinds of work for which different hourly or piece rates apply, certain retail and service employees and those paid piece rates are subject to overtime rate. 43 P.S. § 333.104(c), *amended* Act 109 of 2012, H.R. 1820 (Pa. 2011). Executives, administrators and professionals earning at least $ 455 per week, as well as external salesmen and independent contractors, do not have to be paid overtime. Pennsylvania's overtime minimum wage is $10.88 per hour. *Id*. Pennsylvania does not have a daily overtime limit.

D. Time for Payment upon Termination

Pennsylvania Wage Collection Law, 43 P.S. § 260.1, et seq. provides that employees who are separated from employment are entitled to payment on the next regularly scheduled payday. Employers may maintain any portion of alleged wages due where there is a good faith dispute about whether the wage was earned. Employers who fail to make appropriate payment may be liable to employees for the amount of wages due plus liquidated damages of 25% or $500.00, whichever is greater. The Wage Payment Collection Law does not allow an employer to maintain an employee's paycheck until the employee returns employer's items, such as cell phones, keys, etc. Whenever an employer separates an employee from the payroll or whenever an employee quits or resigns, the wages or compensation earned become due and payable not later than the next regular payday of the employer on which such wages would otherwise be due and payable. 43 P.S. § 260.5. The employee may request that the employer makes the payment via certified mail. *Id*. Wages payable to the separated employee include all earnings, fringe benefits or wage supplements and all monetary payments that the employer would otherwise provide to pay for employee benefits, including vacation, holiday, guaranteed pay, reimbursements, union dues, and any other amounts agreed to in the employment agreement. 43 P.S. § 260.5.

Although Pennsylvania statutes mandate payment of "earned" wages, the statutes do not specify when the wage is considered to have been "earned." *Stebok v. American General Life and Acc. Ins. Co*., 715 F. Supp. 711 (W.D. Pa. 1989), judgment aff'd, 888 F.2d 1382(3d Cir. 1989). For example, an employer and a sales employee may agree that, instead of receiving commissions, the employee will receive regular weekly payments computed on the basis of "pools" consisting of the employee's sales. The balance of the "pool" would not be considered "earned" and would not be due to the employee upon termination. *Id*. Additionally, an employee is not entitled to wages that would have been earned had an employment contract not been breached. *See e.g., Hirsch v. B&B Co*., 1991 WL 102890 (E.D. Pa. 1991).

Penalties for violation of the Wage Payment and Collection Law include mandatory attorney's fees and costs, liquidated damages and imprisonment. 43 P.S. § 260.9-260.11(1). *See also Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super. Ct. 2011).

E. Breaks and Meal Periods

Pennsylvania requires employers to provide seasonal farm workers a break of at least thirty (30) minutes after five (5) hours of work. The employee must be completely relieved of all duties during this timeframe. The break can be unpaid. Pennsylvania also requires that employers provide a break of at least thirty (30) minutes to minors between the ages of 14 and 17 who work five (5) or more consecutive hours. Employers are not required to provide breaks for employees who are 18 years of age and over.

F. Employee Scheduling Laws

Pennsylvania has no employee scheduling laws.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

Under the Clean Indoor Air Act, Pennsylvania prohibits smoking in indoor areas of all workplaces except lodging establishments, tobacco sellers and manufacturers, long-term care facilities, private clubs and drinking establishments. 35 P.S. §§ 637.3 et seq. The Act also permits an owner of property to prohibit smoking on the entire property, including indoor and outdoor spaces. *Id*. Moreover, designated smoking areas must be marked with appropriate signs. 35 P.S. § 637.4.

The Pennsylvania Clean Indoor Air Act does not contain minimum criteria to ensure compliance with its requirements that employers develop, implement and post written policies to regulate smoking in the workplace. The law does, however, require employers to provide copies of its policies to employees upon request. In addition, the Act does not affect any contractual rights established between the employer and its employees, i.e., a collective bargaining agreement. 35 PA. CONS. STAT. § 1230.1. Violators of the Act may be fined from $250 to $1000 per offense absent good faith efforts to prohibit smoking. 35 P.S. § 637.6.

B. Health Benefit Mandates for Employers

Under the federal Patient Protection and Affordable Care Act and effective in 2015, Pennsylvania employers with over 50 full-time employees or equivalent workers are required to offer "affordable" medical coverage to the employees and their children below the age of 26. 42 U.S.C. §§18001 et seq.

C. Immigration Laws

Under the Prohibition of Illegal Alien Labor on Assisted Projects Act, Pennsylvania makes it unlawful to knowingly employ or knowingly permit labor services of an illegal alien on any project. 43 P.S. § 166.3. The Act bars recipients of state grants or loans from knowingly employing unauthorized aliens. *Id*. Violators loose eligibility for state loans or grants for two years and may be subject to repayment of the grant or loan and sentencing under federal law. *Id*.

Additionally, local municipalities may enact ordinances related to immigration. *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968 (2011). For example, in *Lozano v. City of Hazleton*, 620 F.3d 170 (2010), *vacated* 131 S.Ct. 2958 (2011), the City of Hazelton enacted an ordinance which made it illegal to employ unauthorized aliens. *Id*. at 177. An employer working with unauthorized aliens had to either terminate the unlawful workers or lose its business license. *Id*. at 178. The United States Supreme Court vacated the Third Circuit's opinion which would have enjoined enforcement of the city's ordinance on federal preemption grounds. *City of Hazleton v. Lozano*, 131 S. Ct. 2958 (2011).

D. Right to Work Laws

Pennsylvania currently does not have a Right to Work statute.

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

Per 35 P.S. § 10231.2103(b), employers may not discharge, refuse to hire, retaliate. or discriminate against an employee based solely on the employee's authorized use of medical marijuana. However, employers are not required to accommodate medical marijuana use at work and can discipline employees for being under the influence of medical marijuana at work. (35 P.S. § 10231.510).

If an employer's drug policy permits the usage of legally obtained prescription medications, then medical marijuana users who are terminated after a positive marijuana test may be eligible for unemployment benefits. *Pittsburgh Water & Sewer Auth. v. Unemployment Compensation Bd. of Review*, 2020 WL 6750475 (Pa. Cmwlth. 2020).

F. Gender/Transgender Expression

On August 2, 2018, Pennsylvania adopted guidelines interpreting sex discrimination to include discrimination based on gender identity and sexual orientation. The Pennsylvania Human Relations Act (PHRA) is the primary state law prohibiting discriminating against employees based on the same covered classes as Title XII of the Civil Rights Act of 1964 (as amended). The PHRA also prohibits disability discrimination.

Pennsylvania allows gay marriage, and the practice has been legal since May 20, 2014. The Pennsylvania Human Relations Act is the state's premier anti-discrimination statute. It does not cover gender/transgender expression.

1. Public Employees

Pennsylvania was the first state to ban discrimination based on sexual orientation, doing so in 1975.

2. Private Employees

Private employees are not protected by any specific law applying to sexual orientation. Because of the PHRC's prohibition against gender discrimination and familial status, employees may find some success in claims based on gender stereotypes.

G. Other Key Statutes

1. Lie Detector Tests

An employer is prohibited from requiring an individual to submit to a lie detector test as a condition of employment. This protection applies to both job applicants and existing employees. The law provides an exception for the field of public law enforcement and employees who have access to narcotics. Violation of this law is a misdemeanor in the second degree. 35 Pa.C.S.A. 7423.

An employer is guilty of a misdemeanor in the second degree where it uses any device to measure voice waves to judge the truth of oral statements made by an employee without that employee's consent. *Id*.

2. Volunteer Activities and Reports

An employee who fails to report to work on time because the employee is a volunteer fireman, police or volunteer member of an ambulance service and where tardiness was caused by response to an emergency call, may not be disciplined by an employer under Pennsylvania law. The employee is not entitled to compensation for lost time due to the volunteer activity. However, the law requires that if an employee is injured while performing emergency services, then the employer must treat such injuries as if they occurred during the course of employment. An employer may require an employee to provide written confirmation regarding the time of the volunteer activity. An employee terminated or disciplined in violation of this law may commence a lawsuit in state court seeking lost wages, back pay, and reasonable attorney fees. 43 PA. CONS. STAT. §1201 et seq.

3. Medical Examinations and Reports

An employer is prohibited from requiring any employee or applicant to pay for a medical examination or for the cost of furnishing any medical records to the employer if the examination or records are required by the employer as a condition of employment. The requirements of this law do not apply to medical examinations which are required as a condition of employment by law. 43 PA. CONS. STAT. § 1001 et seq.

4. Commission Sales Representatives

Sections 1471 through 1478 of Title 43 of the Pennsylvania Statutes ("An Act providing for agreements between sales representatives and their principle") governs commission sales representatives who solicit wholesale orders from retailers. 43 PA. CONS. STAT. §§ 1471-1478. However, in *Palmer Lucas v. Martin's Herend Imports, Inc*., 827 F. Supp. 345 (W.D. Pa. 1993), the court held that this law violates the Commerce Clause of the U.S. Constitution and is therefore unconstitutional. This Act has never been expressly overruled by a Pennsylvania appellate court or the legislature.

5. Commercial Motor Vehicle Operators

Pennsylvania law prohibits an employer from discriminating against an employee if (1) the employee refuses to operate a commercial motor vehicle which is not in compliance with existing safety laws; (2) the employee has initiated, has testified or may testify in a proceeding relating to a violation of a commercial motor vehicle safety rule; and (3) the employee refuses to operate a vehicle because either such operation would constitute a violation of federal rules applicable to commercial vehicle safety or a

reasonable apprehension of serious injury exists due to the unsafe condition of the vehicle. 43 PA. CONS. STAT. § 1431 et seq.

6. Pennsylvania Labor Relations Act (PLRA)

Where it is not preempted by the National Labor Relations Act, the PLRA prohibits discrimination regarding hire, tenure or any term or condition of employment, or to encourage or discourage membership in any labor organization. 43 PA. CONS. STAT. §211.1 et seq.

7. Abortion

Under Pennsylvania law, an employer may not require an employee to participate in an abortion if that employee has religious, moral, or professional objections. 43 PA. STAT. ANN. § 955.2. (This does not apply to a health care facility operated exclusively for performance of abortion/sterilization and the like).

8. Local Ordinances

In addition to state and federal law proscribing employment discrimination against certain classes of individuals, local ordinances may also provide protection. *See, e.g*. Philadelphia Fair Practices Ordinance, Philadelphia Code, Chapter 9; Harrisburg Human Relations Ordinance, Codified Ordinances, Article 715; Pittsburgh Human Relations Ordinances, Pittsburgh City Code, Chapters 651 et seq. *See* also Philadelphia Plant Closing Ordinance, Philadelphia Code, Chapter 9.