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LABOR & EMPLOYMENT LAW…IT'S ALL WE DO.

A Summary of South Dakota Labor & Employment Law

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I. Broad Overview: South Dakota

It is well-established in South Dakota that employment is on an "at-will" basis, meaning that in the absence of a statutory prohibition or a written agreement to the contrary, either party is free to terminate the employment relationship at any time for any or no reason, with or without notice. To date, South Dakota has recognized two exceptions to the employment-at-will doctrine: (1) implied or express contracts; and (2) public policy claims. Additionally, South Dakota is a "right to work" state, meaning that employment cannot be conditioned upon membership or non-membership in a labor organization. These concepts are discussed in greater detail below.

II. Personnel Files and Employee Information

A. Record Keeping Requirements

Every employer covered by the workers' compensation law must keep a record of all injuries, fatal or otherwise, sustained by the employer's employees in the course of their employment. The record must be completed within seven (7) calendar days, excluding Sundays or holidays, after an employer has knowledge of the occurrence of an injury. The record must be on a form approved by the South Dakota Department of Labor (SD DOL), and the employer must preserve a copy for at least four (4) years. The record must be signed by the employer and a copy must be given to the employee. SDCL § 62-6-1.

In addition, employee wage records must be open for inspection for purposes of determining correctness of the wage expenditure and number of employees on the employer's payroll. SDCL § 62-6-4.

Lastly, employers must keep true and accurate work records containing information needed by the Unemployment Compensation Division, and these records must be kept for four years. SDCL § 61-3-2.

B. Access to Personnel Files

South Dakota does not have a statute granting private employees the right to access personnel files. However, career service state employees (executive branch) have the right to examine any records required or maintained by the Bureau of Personnel, including performance appraisals, that pertain to the employee. SDCL § 3-6A-31. This statute limits the right to examine employment records to current employees only.

C. Background Checks

School districts are required to conduct background checks on teachers of secondary and elementary school children. SDCL §§ 13-10-12 and 23-3-15.1. Further, persons hired for

positions at the South Dakota School for the Blind and Visually Impaired must submit to a background check. In addition, any applicant for licensure and registration as a mortgage lender or broker must submit to a state and federal criminal background check. Lastly, any applicant for admission to practice law, and each person hired by the Division of Banking must agree to submit to a background investigation. SDCL §§ 18-18-2.8, 51A-2-6, 13-49-14.13.

D. New Hire Reporting

Employers must submit a report of any newly hired employee to the South Dakota New Hire Reporting Center that includes the name, address, and social security number of the employee and the employer's name, address, and federal tax identification number. The report must be transmitted no later than twenty (20) days after the date of hire. Each report must be made on a W-4 form or an equivalent form, and may be transmitted by first class mail, magnetically, or electronically. If the employer transmits the report magnetically or electronically, the report must be transmitted in two monthly transmissions, not less than twelve days nor more than sixteen days apart. SDCL § 25-75A-3.3.

E. References

Employers who, in writing and in response to written requests from prospective employers, give information about the job performance of current or former employees are presumed to be acting in good faith and may not be held liable for the disclosure. Good faith is not presumed when employers act recklessly, knowingly, or with malicious purpose to disclose false or deliberately misleading information about the current or former employee. Further, good faith is not presumed when employers knowingly or maliciously divulge information subject to a non-disclosure agreement, or information that is confidential under state or federal law. Current and former employees are entitled to see the references that have been provided on their behalf. However, South Dakota law does not require employers to provide references. SDCL § 60-4-12.

III. South Dakota Fair Employment Law

A. South Dakota Human Rights Act

1. Traditional Protections

South Dakota's Human Rights Act makes it an unfair and discriminatory practice for any employer, because of race, color, creed, religion, sex, ancestry, disability, or national origin, to fail or refuse to hire, to discharge an employee, or to accord adverse or unequal treatment to any person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or any term or condition of employment. SDCL § 20-13-10. In addition, employers may not discriminate

against a blind person unless specific vision requirements are necessary for effective work performance. SDCL § 20-13-10.1. Further, state employees age 40 or above are also protected from discrimination on the basis of age or physical disability unless specific age or physical requirements are deemed necessary qualifications for the job. SDCL § 3-6A-15.

2. Additional Protections

South Dakota offers additional protections not directly covered under federal law and Title VII. For instance, an employer may not forbid or restrict the employment of married women if the restriction is not applicable to married men, and vice versa. SD ADC § 20:03:09:06. Also, employers are prohibited from discriminating in hiring due to pre-existing injury if the pre-existing injury does not affect the ability to perform the work for which the individual is being hired. Supervisors may be held personally liable under state law for a violation of this provision. SDCL § 62-1-17 and *Johnson v. Gateway*, Civ. 04-4186 (D.S.D. 4/24/2007).

Employers are further prohibited from discriminating on the basis of political affiliation. SDCL § 3-6A-15. Lastly, all anti-discrimination and anti-harassment policies implemented by an employer should also specifically address pregnancy as a protected category. *EEOC v. Siouxland Oral Maxi-facial Associates, LLP*., 2007 WL 776321 (D.S.D. 03/09/2007).

3. Filing a Discrimination Charge

Individuals wishing to file a discrimination charge under the South Dakota Human Rights Act must file their charge within 180 days after the alleged discriminatory or unfair practice occurred in order to preserve their rights under the Act. SDCL § 20-13-31. If the investigating official determines that probable cause exists to support the allegations of the charge, the investigating official will immediately attempt to eliminate the discriminatory or unfair practice through conference or conciliation. SDCL § 20-13-32. If the investigating official thinks that further efforts to settle a charge by conference or conciliation is futile, the official will report that finding to the Division of Human Rights. If the Division determines that the circumstances warrant further action, it will issue a written notice requiring the employer to attend a hearing and formally answer the charges. SDCL § 20-13-35. Either party has the right to transfer the matter to circuit court if they so desire, but they must make this election no later than 20 days after issuing or receiving the notice of the hearing. SDCL § 20-13-35.1.

4. Division of Human Rights

If the Division finds that the employer has engaged in discriminatory or unfair practices, the Division can issue an order requiring the employer to cease and desist from such discriminatory or unfair practice. In addition, the Division can order the employer to take affirmative action including hiring, reinstating, or upgrading employees, with or without back pay. Further, the Division can award compensation for damages incidental to the violation.

However, pain and suffering, punitive damages, consequential damages and attorney's fees cannot be awarded in employment matters. SDCL § 20-13-42. If, after hearing all of the evidence presented at the hearing, the Division finds that the employer has not engaged in discriminatory or unfair practices, the Division will render an order dismissing the employee's charge against the employer. SDCL § 20-13-43.

B. Age Discrimination in Employment Act

There are no state laws in South Dakota that provide private employees with protection from age discrimination. However, under the federal Age Discrimination in Employment Act (ADEA), employers of 20 or more workers are prohibited from discriminating in employment against individuals ages 40 years or older, unless age is a bona fide job qualification. In general, an individual must file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged unlawful practice occurred. A plaintiff may opt out of the administrative proceedings and file a civil action under the ADEA once 60 days has elapsed following the filing of the discrimination charge with the EEOC. Further, an employee must usually file suit within 90 days after receiving a right-to-sue letter from the EEOC. Potential remedies available to successful plaintiffs under the ADEA include back pay, attorney's fees, liquidated damages, front pay, and injunctive relief. Recovery for pain and suffering, emotional distress, humiliation/injury to professional reputation, and punitive damages are not available remedies under the ADEA.

C. Equal Pay Act

No employer may discriminate between employees on the basis of sex, by paying wages to an employee at a rate less than the rate at which the employer pays an employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort, and responsibility, but not to physical strength. SDCL § 60-12-15. Wage differentials which are paid pursuant to established seniority systems, job descriptive systems, merit increase systems, or executive training programs, which do not discriminate on the basis of sex, are not prohibited. An employer who violates the Equal Pay Act will be liable to the employee for the amount of the employee's unpaid wages and may also be liable for reasonable attorney's fees. SDCL § 60-12-18

D. Genetic Testing and Information

Employers may not obtain or use genetic information of an employee or job applicant to distinguish between or discriminate against employees or applicants or to restrict any right or benefits available to an employee or applicant. However, employers conducting a criminal investigation in the law enforcement field may obtain or use genetic information for the limited purpose of taking disciplinary action based on alleged misconduct. SDCL § 60-2-20.

IV. Wage and Hour Law in South Dakota

A. Definition of Wages

Wages are defined as "all remuneration paid for services, including commissions and bonuses." SDCL § 61-1-1(17).

B. Minimum Wage

South Dakota has adopted the Federal minimum wage requirements. Accordingly, effective July 24, 2008, the minimum wage is $6.55 per hour. On July 24, 2009, the minimum wage will increase to $7.25 per hour. SDCL § 60-11-3. Tipped employees may be paid $2.13 an hour if their wage plus tips equals the current minimum wage level for non-tipped employees. SDCL § 60-11-3.1.

1. Sub-Minimum Wage

The Fair Labor Standards Act (FLSA) also provides for the employment of certain individuals at wage rates below the statutory minimum. Such individuals include student-learners (vocational education students), as well as full-time students in retail or service establishments, agriculture, or institutions of higher education. Also included are individuals whose earning or productive capacity is impaired by a physical or mental disability, including those related to age or injury. Employment at less than the minimum wage is authorized to prevent curtailment of opportunities for employment. Certificates issued by the U.S. Department of Labor (DOL) Employment Standards Administration's Wage and Hour Division are required for this type of employment.

C. Payment of Wages

All South Dakota employers must pay their employees on regular agreed upon paydays, or at least once a month, whichever is more frequent. SDCL § 60-11-9. Whenever an employee is separated from the payroll, all unpaid wages or compensation are due no later than the next regular stated payday or as soon thereafter as the employee returns all property in the employee's possession that belongs to the employer. SDCL § 60-11-10. SDCL § 60-11-11. Be advised, however, that the Unites States Department of Labor takes a dim view regarding the withholding of paychecks even when an employee retains company property.

South Dakota has no state laws governing the timely payment for commissions and/or requirements for figuring commissions.

In any action for breach of an obligation to pay wages, where a private employer has been oppressive, fraudulent, or malicious in his refusal to pay wages due to the employee, the employee is entitled to double the amount of wages for which the employer is liable. *Crisman v. Determan Chiropractic, Inc.*, 687 N.W.2d 507 (S.D. 2004).

Rounding of time that an employee has worked is allowed so long as the employer does not arbitrarily fail to count an employee's fixed or regular working time. Rounding to the nearest five minutes, one-tenth or one-quarter of an hour is acceptable if, in the aggregate, the employer compensates the employees properly for all the time they have worked.

Employers may prospectively increase or decrease an at-will employee's hourly wage at any time during the employment relationship. In addition, an employer may change the manner in which the employee is compensated. For instance, an employer may switch an employee's compensation from an annual salary to an hourly wage. However, if the employee resigns as a result of the change in compensation, the employer could be forced to pay the employee unemployment benefits if the State determines that the change in compensation resulted in a substantial modification to the terms and conditions of employment. SDCL § 61-6-13.1(3). In addition, the employer should be aware that a change in employee compensation could be classified as an adverse employment action if it is shown that the change had the same effect as a demotion or pay-cut.

D. Payout of Vacation Pay/Sick Leave Upon Separation

Private Sector: South Dakota law does not require employers to provide their employees with paid vacation or sick leave. In addition, for employers who do provide vacation and/or sick leave, there are no state laws that require private employers to compensate their employees for accrued and unused vacation and/or sick pay at the termination of employment. However, employers are advised to follow the policies they currently have in place regarding payment for unused vacation and/or sick leave, as specific language in a handbook that details employee compensation and fringe benefits may be considered a contract.

Public Sector: Each state employee earns fifteen (15) working days vacation time per full year of employment. Any employee with more than fifteen years (15) of employment shall receive twenty (20) working days vacation with pay for each year of employment. Vacation hours are cumulative only to the extent of the amount of hours which may be earned in any two (2) year period of continuous employment. SDCL § 3-6-6. State government must allow employees to end their employment following the exhaustion of unused vacation time or receive a lump-sum payment for unused vacation time.

Each state employee, except temporary and emergency employees as defined by Career Service Commission rules, is entitled to fourteen (14) days leave of absence for sickness without loss of pay, exclusive of weekends and holidays, for each year the employee is employed by the state. Leave of absence days for sickness can accumulate without limit

until the employee is separated from employment with the State of South Dakota. All leaves of absence for sickness must be supported by a medical certificate if documentation is requested by the personnel commissioner. SDCL § 3-6-7. Also, state employees who have been continuously employed by the state for at least seven (7) years before retirement, voluntary resignation, layoff, termination for inability to perform job functions because of physical disability, or death are to be paid one-fourth of their unused sick time, not exceeding 480 hours. Payment for the unused sick leave is to be made in a lump sum and must be included in the employee's last paycheck.

There are no laws in South Dakota that prohibit employers from implementing "use it or lose it" policies to govern the vesting and accrual of an employee's vacation and/or sick pay. SDCL § 3-6-6.2 and 3-6-8.3; *Lau v. Behr Heat Transfer System, Inc.*, 150 F.Supp.2d 1017 (D.S.D 2001); *Meyers v. American States Ins. Co.*, 926 F.Supp. 904, 912 (D.S.D. 1996).

E. Employee Breaks and Lunch Periods

South Dakota law does not contain any specific provisions regarding employee breaks or meal periods. In addition, federal law does not require lunch or coffee breaks. However, when employers do offer short breaks (usually lasting about 5 to 20 minutes), federal law considers the breaks as compensable work hours that need to be included in the sum of hours worked during the work week. Further, compensable breaks should also be considered when determining whether the employee is entitled to overtime pay under the FLSA.

Bona fide meal periods (typically lasting at least 30 continuous, uninterrupted minutes), serve a different purpose than coffee or snack breaks and, thus, are not work time and are not compensable.

F. Wage Garnishment and Wage Deductions

The maximum part of a person's aggregate disposable earnings subject to garnishment in any given work week cannot exceed the lesser of: (1) Twenty percent (20%) of disposable earnings for that week; or (2) the amount by which earnings for that week exceed forty times the federal minimum wage in effect at the time earnings are payable. These restrictions shall not apply if (1) there is a court order for child support or alimony; or (2) there is an order of any court of bankruptcy under Title 11 of the United States Code. SDCL § 21-18-51. In addition, South Dakota employers are not prohibited from discharging an employee because the employee's wages are being garnished related to any single indebtedness.

Under restricted circumstances, the employer may deduct the reasonable cost of meals, lodging, and other facilities furnished to the employee in connection with the employment, provided, among other things, that the employer does not profit thereby. In addition,

deductions for voluntary wage assignments, i.e., for things that benefit the employee, may take an employee's wages below minimum wage, provided the employer does not profit thereby. This type of deduction includes such things as employee contributions to a health or retirement plan.

Further, repayments of loans and wage advances from the employer to the employee may take an employee below minimum wage. However, it is up to the employer to document the existence of the loan or advance, and deductions are allowed for principal only. Interest and administrative fees may not be deducted from an employee's wages. This category would include any instance in which the employer advances money to the employee to pay for something on the employee's behalf for which the employee would normally be personally responsible. This category also includes wage overpayments.

Employers should never loan money or advance wages to an employee without treating the occasion like a bank would. Accordingly, the employer should secure the employee's written agreement on a separate loan or wage advance document listing all the particulars of the transaction, such as the amount loaned or advanced, the date of the transaction, the full name and social security number of the employee, the amount and frequency of repayment installments, and what happens to an unpaid balance remaining when the employee leaves the company. In terms of employer charge accounts, employers should establish limits, require regular payment, and make certain they have a deduction authorization in the event of default. In addition, vacation pay advances are afforded the same status as loans and wage advances.

Under severely restricted circumstances, the reasonable cost of uniforms and associated cleaning costs may be deducted from wages, or the employee may be expected to purchase clothes that are consistent with a dress code, even if the deduction or cost takes the employee below minimum wage. If supplied by the employer, it must be clear that such clothes are furnished as a convenience to the employee (generic clothing suitable for off-duty use), and that those particular outfits are not a condition of employment or otherwise required for the job. See 29 C.F.R. 531.3(d)(2)(iii), 531.32(c), and 531.35; also FOH, Section 30c12 (1988). The cost of specially-branded company clothes may not take an employee below minimum wage.

Union dues that are authorized by the worker under a collective bargaining agreement may be deducted from an employee's wages even if the wage dips below minimum wage.

Finally, the employer may deduct the amount of cash shortages that are provably the result of theft or other misappropriation by the employee, even though such a deduction might take the employee below the minimum wage level. However, the employer bears the burden of proving that the employee was personally and directly responsible for the misappropriation. *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196 (5th Cir. 1972). Ordinary cash register shortages, loss of money due to ordinary negligence, and losses due to damage, destruction, or loss of equipment may not be deducted from the

wages of employees to the extent that the deductions would take employees below minimum wage.

G. Overtime Pay

There are no specific laws in South Dakota pertaining to overtime pay, but overtime wages can be claimed under South Dakota law, if they were previously agreed to by the employer and the employee. However, even in the absence of a previous agreement concerning overtime compensation, compensation for overtime can be claimed under the federal Fair Labor Standards Act (FLSA) for hours worked in excess of 40 during a given work week. *Graham v. Babinski Properties, 562 N.W.2d 395 (S.D.1997).*

Employees whose jobs are governed by the FLSA are either "exempt" or "nonexempt." Nonexempt employees are entitled to overtime pay. Exempt employees are not. Most employees covered by the FLSA are nonexempt. Employees who are paid less than $23,600 per year ($455 per week) are nonexempt. Conversely, to be exempt an employee must (a) be paid at least $23,600 per year ($455 per week); (b) be paid on a salary basis; and (c) perform exempt job duties. Exempt job duties typically include positions in which the employee performs "executive," "professional," or "administrative" duties as those terms are defined under the FLSA Regulations.

Under the FLSA, "overtime" means "time actually worked beyond a prescribed threshold." The normal FLSA "work period" is the "work week" -- 7 consecutive days -- and the normal FLSA overtime threshold is 40 hours per work week.

Time actually worked over 40 hours in a work week is "FLSA overtime." Note that some jobs may use the word "overtime" differently, as for example to describe time worked outside of the employee's normal schedule or time worked over 8 hours in a day. An employer may pay employees on any basis it wishes, provided only that actual pay does not fall below the minimum standards required by the FLSA. It is, therefore, permissible for an employer to use the word "overtime" to mean something different from the definition of "overtime" in the FLSA. That, however, does not change the meaning of the word overtime for FLSA purposes, and it is important to restrict the meaning of "overtime" to its statutory definition in determining the FLSA rights of employees. "Time worked outside of normal schedule" may not be the same as "time worked over 40 hours in a work week." Only the latter is "overtime" under the FLSA, and the FLSA only governs pay that is due for "FLSA overtime" worked.

Thus, under the FLSA overtime rules, the obligation to provide overtime pay is not triggered unless and until a nonexempt employee has actually worked more than 40 hours in a work week. Stated another way, if an employee's total hours actually worked in a work week are not more than 40, the FLSA overtime rules are not triggered at all.

Overtime pay under the FLSA consists of one and one-half the employee's "regular rate" of pay. The regular rate is defined as the hourly equivalent of all straight time compensation received by an employee for work. The FLSA formula is that an employee's regular rate is the total straight time compensation received by the employee for work, divided by the number of hours that the money is intended to compensate for. If an employee's straight time pay is a purely hourly wage, then that wage is the regular rate. However, in some employment situations, straight time pay is not simply an hourly rate. A nonexempt employee may be paid a salary, and there may be additional compensation received by an employee which the FLSA requires be included as part of the regular rate. When a nonexempt employee is paid by a salary, the amount of the salary must be converted to its hourly equivalent to determine the regular rate of pay. Once the regular rate of pay is determined, it should be multiplied by one and one-half times in order to determine the employee's FLSA overtime rate of pay. Salaried nonexempt employees are only entitled to FLSA overtime pay if they actually work more than 40 hours per week.

H. Compensatory Time Off in Lieu of Overtime Pay

For non-government employees, wages due under the FLSA must be paid in money. "Compensatory time" off in lieu of cash for FLSA overtime wages due is not permitted in private sector employment. This rule is limited to wages for FLSA overtime work. How an employer chooses to compensate employees for hours worked up through forty (40) in a work week when no FLSA overtime is worked is not really an FLSA concern (except for the minimum wage laws).

I. Physical Examinations for Employment

Any employer who asks an applicant to undergo a medical examination as a condition of employment must pay the costs of the examination. SDCL § 60-11-2.

V. Common-Law Theories--Exceptions to Employment At-Will

A. Contract and Promissory Estoppel Claims

Any employment for an unspecified term may be terminated at-will by either the employer or the employee. SDCL § 60-4-4. Further, South Dakota courts have reinforced the at-will doctrine by holding that when there is no employment contract or specified term of employment, and the employer has no established procedures for discharging employees, the employment is terminable at the will of the employer. *Hopes v. Black Hills Power and Light Co.*, 386 N.W.2d 490 (S.D. 1986).

1. Express and Implied Contracts

When an employer specifically agrees in an employee handbook to discharge employees "for cause only," and the employer fails to abide by its terms in discharging an employee, an employee has a cause of action for breach against the employer. *Butterfield v. Citibank of South Dakota*, 437 N.W.2d 857. There are two possible ways that language in an employee handbook can be construed as creating a discharge "for cause only" agreement. First, such an agreement may be found where the handbook explicitly provides, in the same or comparable language, that discharge can occur "for cause only." Second, a "for cause only" agreement may be implied where the handbook contains a detailed list of exclusive grounds for employee discipline or discharge and, a mandatory and specific procedure which the employer agrees to follow prior to any employee's termination. In short, the handbook must contain language indicating a clear intention on the employer's part to surrender its statutory power to terminate its employees at-will. *Id.* at 859.

South Dakota has also created an exception to the at-will doctrine for oral representations made by an employer to an employee regarding job security. Specifically, one court stated that if allegations that an employee accepted employment because of a specific promise that he would become president of the company were established at trial, it would not be unreasonable for the trier of fact to conclude that the parties entered into a definite term employment contract. The result would be that the discharged employee stated a cause of action for breach of an express and implied contract. *Larson v. Kreiser's, Inc.*, 427 N.W.2d 834.

2. Implied Covenants of Good Faith and Fair Dealing

South Dakota courts have repeatedly declined to adopt a new cause of action in tort for breach of the implied covenant of good faith and fair dealing in employment contracts. *Garrett v. BankWest*, 459 N.W.2d 833, 842 (S.D. 1990); *Peterson v. Glory House of Sioux Falls*, 443 N.W.2d 653, 655 (S.D. 1989).

3. Promissory Estoppel

South Dakota courts recognize the doctrine of promissory estoppel. Promissory estoppel is a legal doctrine that allows a promise of employment to be enforced if the employer making the promise should have reasonably expected the employee to rely on the promise, and the employee actually relied on the promise to his or her detriment. However, before promissory estoppel may be applied, the trial court must find that (1) the employee suffered a substantial economic detriment in reliance on the employer's promise; (2) the loss to the employee was foreseeable by the employer; and (3) the employee acted reasonably and justifiably by relying on the employer's promise as it was made. *Minor v. Sully Buttes School District #58-2*, 345 N.W.2d 48.

In *Minor*, the court found that a teacher proved all the elements of detrimental reliance upon a school district's promise of employment, and thus, was entitled to damages, where the school district's promise of employment was made in good faith, the teacher acted reasonably in relying upon the district's promise by moving to the state and obtaining an apartment, such actions were clearly foreseeable by the school district, and the detriment suffered by the teacher in reliance upon the school district was substantial in an economic sense, amounting to hundreds of dollars in expenses.

B. Public Policy Claims

While recognizing the general rule of employment at-will, an increasing number of courts have adopted a public policy exception to the at-will doctrine. The exception provides that an employer becomes subject to tort liability if its discharge of an employee contravenes some well-established public policy. South Dakota has adopted a narrow public policy exception to the at-will doctrine and has created a cause of action for wrongful discharge when an employer discharges an employee in retaliation for his refusal to commit a criminal or unlawful act. *Johnson v. Kreiser's, Inc.*, 433 N.W.2d at 223. In addition, the court stated that a contract action for wrongful discharge is more appropriate than a tort action. A contract action is predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform a criminal or unlawful act.

C. Intentional Infliction of Emotional Distress

In South Dakota, asserting a successful claim for intentional infliction of emotional distress requires the plaintiff to make a showing of the following elements: (1) an act by the defendant amounting to extreme and outrageous conduct; (2) intent on the part of the defendant to cause the plaintiff severe emotional distress; (3) the defendant's conduct was the cause in-fact of plaintiff's distress; and (4) the plaintiff suffered an extreme and disabling emotional response to the defendant's conduct. *Anderson v. First Century Federal Credit Union*, 738 N.W.2d 40 (2007).

It is for the court to initially determine whether a party's conduct may be reasonably regarded as so extreme and outrageous as to permit recovery for intentional infliction of emotional distress. For conduct to be outrageous, it must be 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 community. However, extreme and outrageous conduct does not consist of mere insults, indignities, threats, annoyances, petty oppressions or other trivialities, as everyone must expect a certain amount of rough language and occasional inconsiderate or unkind acts. *Citibank (S.D.), N.A. v. Hauff*, 668 N.W.2d 528 (2003).

VI. Protecting Intellectual Property

A. Restrictive Covenants

1. Non-Compete and Non-Solicitation Agreements

In South Dakota, an employee may agree with an employer at the time of employment, or at any time during his employment, not to engage directly or indirectly in the same business or profession as that of his employer for a period not exceeding two (2) years from the termination of the employment relationship. In addition, employees may also agree with employers not to solicit existing customers of the employer within a specified county, city, or other specified area for any period of time not exceeding two (2) years from the date of termination of the agreement, as long as the employer continues to operate in a similar business for that two (2) year period. SDCL § 53-9-11.

2. Reasonableness of Restrictive Covenants

A restrictive covenant must be deemed reasonable in order to be enforceable. A covenant is reasonable only if it (1) is not greater than is required for the protection of the employer, (2) does not impose undue hardship on the employee and (3) is not injurious to the public. If the restrictive covenant meets this reasonableness test, the test is then applied to the duration, area limitations, and range of activities mandated by the covenant. *Central Monitoring Service v. Zakinski,* 553 N.W.2d 513 (S.D. 1996). In addition, South Dakota courts have held that when an employee voluntarily quits his employment or is fired for good cause, no further showing is necessary to prove the reasonableness of the restrictive covenant as long as the non-compete or non-disclosure agreement complies with SDCL § 53-9-11, outlined above. However, if an employee is fired for no fault of his own, the court needs to go further to determine whether the restrictive covenant is reasonable. To do that, the trial court must engage in a balancing test utilizing the three factors enumerated above. Ultimately, the task of determining reasonableness requires the balancing of competing interests for which there can be no mathematical formula. Each case must be determined on a case by case analysis, as it is impossible to create a general rule.

3. Non-Disclosure Agreements

An employer and employee can enter into a non-disclosure (confidentiality) agreement as part of their employment contract in order to protect trade secrets, customer lists, and other confidential information. However, non-disclosure clauses are not enforced under South Dakota law if: (1) a trade secret or confidential relationship does not exist; or (2) the employer discloses such information to others not in a confidential relationship with the employer; or (3) such information is legitimately discovered and openly used by others. *Hot Stuff Foods, LLC v. Mean Gene's Enterprises, Inc*., 468 F.Supp.2d 1978 (D. S.D.

2006). In addition, an agreement not to disclose information or solicit, unlike a covenant not to compete, is free from a challenge as a general restraint on trade under South Dakota law. However, such covenants are strictly construed and enforced only to the extent reasonably necessary to protect the employer's interest in confidential information.

VII. South Dakota Labor Relations Law

A. Right to Work

South Dakota's constitution and statutes guarantee public and private employees the right to work without regard to membership in a labor organization or refusal to join or pay a fee to a labor organization. SD Constitution Art. VI § 2; SDCL § 60-8-3. In addition, union security arrangements are forbidden.

IX. Other Statutory Protection for Employees

A. Child Labor Law

Under the federal Fair Labor Standards Act (FLSA), youths fourteen (14) and fifteen (15) years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under certain conditions. Permissible work hours for 14 and 15-year-olds are: three (3) hours on a school day; eighteen (18) hours in a school week; eight (8) hours on a non-school day; forty (40) hours in a non-school week; and between 7:00 a.m. and 7:00 p.m., except from June 1 through Labor Day, when nighttime work hours are extended to 9:00 p.m.

The FLSA requires a minimum of not less than $4.25 per hour for employees under twenty (20) years of age during their first ninety (90) consecutive calendar days of employment with an employer. After ninety (90) days of employment, or when the worker reaches age twenty (20), whichever comes first, the worker must receive the minimum wage. Employers are prohibited from taking any action to displace employees in order to hire employees at the youth minimum wage.

The federal government does not require work permits or proof-of-age certificates for a minor to be employed.

1. Permitted Working Hours

Under South Dakota law, no minor under sixteen (16) years of age may be employed for more than four (4) hours in any school day, twenty (20) hours in any school week, eight (8) hours in any non-school day, forty (40) hours in any non-school week, or after 10:00 p.m. in any day that precedes a school day. T he previous provisions do not apply to minors

employed as actors or performers in motion pictures, theatrical, radio, or television productions. Also, the provisions do not apply to roguing or detasselling of hybrid seedcorn on any non-school day or non-school week. SDCL § 60-12-1.

2. Occupational Restrictions

Under South Dakota law, no child under fourteen (14) years of age may be employed at any time in any factory, workshop, mercantile establishment, or mine except during hours when public schools are not in session, and under no circumstances after 7:00 p.m. SDCL § 60-12-2.

Further, no child under sixteen (16) years of age may be employed at any time in any occupation dangerous to life, health, or morals, nor may any child be in any manner exploited by an employer. SDCL § 60-12-3.

3. Work Certificate

One seldom-used provision in South Dakota law states that upon investigation that the labor of a minor who would otherwise be barred from employment by law is necessary to support the minor or the minor's family, the Department of Labor may issue a permit authorizing employment within certain designated hours. SDCL § 60-12-5. Every South Dakota employer must keep a list of all persons employed under the previous provision, and the required certificates and permits must be on file and open to inspection at all times. SDCL § 60-12-6.

4. Criminal Penalties

Any employer who employs a child in violation of any of the preceding provisions will be guilty of a Class 2 misdemeanor. SDCL §§ 60-12-2, 60-12-3, and 60-12-6.

B. Adoption Leave

Adoption of a child by any state-government employee must be treated as a natural child-birth for pregnancy leave purposes. SDCL § 60-12-7.

C. Jury Duty Leave

All employees returning to work after jury duty are entitled to the same job status, pay, and seniority as they had prior to performing jury duty. However, it is the employer's discretion as to whether leave to perform jury duty will be with or without pay. SDCL § 16-13-41.2. Any employer who discharges or suspends an employee from employment for serving as a juror will be guilty of Class 2 misdemeanor. SDCL § 16-13-41.1. In addition, the South Dakota Supreme Court has made it clear that terminations in violation of public policy will

subject employers to a wrongful termination action. Accordingly, because employees can be compelled to attend court proceedings and are subject to criminal penalties if they disobey, terminating an employee for refusing to ignore a witness subpoena would likely subject the employer to liability for wrongful termination.

D. Voting Leave

South Dakota employees may be absent from work for up to two (2) consecutive hours during the time polls are open provided there are not two (2) consecutive hours of open polls when the employee isn't required to be at work. Employers may specify the hours in which the employee is granted permission to leave work in order to vote, but the employer cannot penalize or dock the employees' pay for exercising their right to vote. Any employer who violates this provision is guilty of a Class 2 misdemeanor. SDCL § 12-3-5.

E. Military Leave

State and city government employees called to active duty may be reinstated to the position they held prior to being summoned to active duty if: (1) they make a written application for reinstatement within 90 days after their release from active duty; (2) their previous job classification still exists; and (3) they are still capable of completing the necessary duties of the particular job. However, reinstatement is not available for military personnel that have been dishonorably discharged. SDCL § 3-6-19.

In addition, Reservists and Guardsmen are entitled to leave for annual training not to exceed 15 days if they present evidence of satisfactory completion of such training and are still qualified to perform their job duties upon their return to employment. Further, military members are entitled to be restored to the job position they held prior to leaving for active duty, or at the very least, a position that is substantially similar. In addition, the service member must be reinstated with the same status, pay, and seniority upon their reinstatement as they enjoyed prior to their period of military leave. The employer has discretion as to whether the period of military leave will be with or without pay. However, the military absence cannot affect the normal accrual of vacation time, sick leave, bonuses, advancement, or other advantages of employment under any circumstances. SDCL § 3-6-22.

F. Sick Leave and Maternity Leave

South Dakota law does not contain any provisions requiring employers to provide their employees with sick leave. In addition, there are no federal legal requirements for paid sick leave. However, for companies subject to the Family and Medical Leave Act (FMLA), the Act does require unpaid sick leave. The FMLA provides for up to twelve (12) weeks of unpaid leave for certain medical situations for either the employee or a member of the employee's immediate family.

South Dakota law also does not contain any provisions requiring employers to provide their employees with maternity leave. However, employees may use all, or a portion, of their twelve (12) weeks of FMLA leave if their employer is subject to the FMLA.

Employers who do provide paid maternity or sick leave are advised to follow the policies they currently have in place, as specific language in a handbook that details employee compensation and fringe benefits may be considered a binding contract.

G. Smoking

In South Dakota, no person may smoke tobacco or carry any lighted tobacco product in any public place or place of employment. The exceptions to this general rule include sleeping rooms in lodging establishments, establishments licensed to operate video lottery equipment, on-sale alcohol licensee, and any tobacco or package liquor store that is primarily used for the sale of tobacco or alcoholic beverages, or both. SDCL § 22-36-2.

In addition, it is a discriminatory or unfair employment practice for an employer to terminate an employee due to the employee's off-duty, off-premises use of tobacco products, unless such a restriction: (1) relates to a bona fide job requirement and is reasonably and rationally related to the employment activities and responsibilities of that particular employee, rather than to all employees of the employer; or (2) is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest. SDCL § 60-4-11.

X. Employee Privacy

A. Drug and Alcohol Testing

Private Sector: South Dakota law does not regulate drug and alcohol testing in the private sector. However, it is a Class 2 misdemeanor for any employer to require an employee to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of continued employment. SDCL § 60-11-2.

Public Sector: Job applicants who seek employment with the Human Services Center, the South Dakota Developmental Center, or the South Dakota State Veterans' Home, whose primary duties include patient or resident care must be screened for drug use. In addition, current employees at the facilities outlined above whose primary duties include patient or resident care may be administered drug tests based on a reasonable suspicion of illegal drug use. SDCL § 1-36A-20. Further, applicants for safety-sensitive positions in state government may be screened for drug use, and current employees in safety-sensitive positions in state government may be subjected to drug tests upon a reasonable suspicion of illegal drug use. SDCL § 23-3-65. Any printed advertisement or public announcement soliciting applications for employment in a safety-sensitive position in state government

must include a statement detailing the requirements of the drug screening program for that particular position. SDCL § 23-3-66. Individual test results and medical information collected pursuant to this chapter are confidential. Any person who knowingly or intentionally discloses or fails to protect drug test results or medical information is guilty of a Class 2 misdemeanor. SDCL §§ 23-3-67 and 23-3-68.

B. Polygraph Testing

South Dakota has no restrictions regarding an employers' use of a polygraph or similar tests.

However, the federal Employee Polygraph Protection Act prohibits most private employers from using lie detector tests either for pre-employment screening or during the course of employment. Employers are generally prohibited from requiring or requesting any employee or job applicant to take a lie detector test. Further, employers are generally prohibited from discharging, disciplining, or discriminating against an employee or prospective employee for refusing to take a test.

The Act does allow polygraph tests to be administered in the private sector, subject to restrictions, to certain prospective employees of security service firms, and pharmaceutical manufacturers, distributors and dispensers. The Act also permits polygraph testing, subject to restrictions, of certain employees of private firms who are reasonably suspected of involvement in a workplace incident, such as theft, embezzlement, etc., that resulted in an economic loss to the employer.

C. Political Activity

The South Dakota Department of Labor may not appoint or employ any person who holds or is a candidate for any elective office in a partisan election. However, there is nothing preventing an employee from being a candidate for or holding a nonpartisan office, or being a candidate for or holding a political party office. SDCL § 61-2-13. In addition, emergency management organizations in South Dakota may not participate in any form of political activity and may not be employed either directly or indirectly for political purposes. SDCL § 33-15-44.

XI. Health Insurance Continuation

South Dakota employers are not required to provide health insurance to employees. However, if the employers do provide health insurance, the following provisions will apply.

A. Extending Coverage After Termination of Employment Relationship or Insurance Plan

Employees have a right upon leaving their employment or upon the termination of insurance coverage by the insurer, other than the termination of the policy or contract itself and its replacement by similar coverage, to have coverage continue for themselves and their eligible dependents for 18 months. The employee will be responsible for paying the entire amount of the insurance premium during the 18 month period of extended coverage. SDCL § 58-18-7.5.

In addition, a beneficiary is deemed to be qualified, and therefore may continue insurance coverage for up to 36 months, if any one of the following criteria is met: (1) the beneficiary's coverage ends because of the death of the employee; (2) the beneficiary ceases to be a qualified family member under the group policy while the employee remains insured by the policy; (3) the beneficiary of a covered employee is ineligible for Medicare; (4) the person is a beneficiary of an employee who is eligible for Medicare; or (5) coverage ends because of divorce or legal separation. SDCL § 58-18-7.12.

B. Extending Coverage When Employer Ceases Operations

Employees and their dependents may continue coverage for 12 months in situations where coverage ends because the employer ceases operations. SDCL § 58-18C-1. Employees or qualified beneficiaries who have the right to convert a group policy after notice of termination can convert to an individual policy, without evidence of insurability, by applying to the company within the 180 day period of continuation coverage, and by paying the necessary premium. SDCL § 58-18-7.4.

XII. Workers' Compensation

A. Covered Injuries

The South Dakota Workers' Compensation Law covers death, personal injuries or occupational diseases that arise out of and in the course of employment. SDCL § 62-3-2. Occupational diseases are diseases unique to the occupation in which the employee was engaged in and are due to causes in excess of the ordinary hazards of employment. They include any disease attributable to exposure or contact with any radioactive material by an employee in the course of his employment. SDCL § 62-8-1.

Workers' Compensation is not allowed for any injury or death due to the employee's willful misconduct, including self-inflicted injury, intoxication, illegal drug use, or willful failure or refusal to use a safety appliance furnished by the employer. SDCL § 62-4-37.

B. Notification of Injury and Record Keeping

An injured employee must notify their employer regarding the accident as soon as practical, and written notice of the injury must be provided to the employer no later than three (3) business days following the accident in order for the employee to preserve their claim. SDCL § 62-7-10. Every employer must keep a record of all injuries, fatal or otherwise, that have been sustained by their employees in the course of their employment. In addition, a record must be completed within seven (7) calendar days, not counting Sundays and legal holidays, after an employer gains knowledge of the injury's occurrence. The employer must preserve the record for at least four (4) years from the date of the injury, and the record must be signed by the employer and a copy must be distributed to the employee. Any employer who fails to complete or maintain the required injury records will be guilty of a Class 2 misdemeanor. SDCL § 62-6-1.

An employer who has knowledge of an injury that requires medical treatment other than minor first aid, or an injury that incapacitates the employee for seven (7) or more calendar days must file a written report with the employer's insurer, or the Department of Labor if the employer is self-insured. The report must be filed within seven (7) calendar days, excluding Sundays and legal holidays, after the employer learns of the injury. Any employer who fails to file such a report is guilty of a Class 2 misdemeanor and is subject to an administrative fine of $100.00 payable to the Department of Labor. SDCL § 62-6-2.

C. Physical Examinations--Diagnosis and Validation of Employee's Injury

An employee entitled to receive workers' compensation disability payments will be required, if requested by his employer, to submit himself to an examination by a qualified doctor or surgeon selected by the employer at the employer's expense. The employee will be able to choose a time and place to be examined that is reasonably convenient for the employee. The purpose of the examination is to determine the nature, extent, and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due to the employee for disability according to the provisions of the Workers' Compensation Laws. SDCL § 62-7-1.

D. Exclusive Remedy

Workers' compensation is meant to be the exclusive remedy for all injuries that occur on the job except for those intentionally inflicted by the employer. SDCL § 62-3-2. In order to gain the protection of the Act's exclusive remedy provisions, an employer must carry workers' compensation insurance or be approved as a self-insured employer. SDCL §§ 62-5-2 and 62-5-5.

E. Employer Discrimination/Retaliation

No employer may discriminate in the hiring of any prospective employee due to a pre-existing injury if the pre-existing injury does not affect the prospective employees' ability to perform the work for which the employee is being hired. SDCL § 62-1-17. In addition, an employer is civilly liable for wrongful discharge if its terminates an employee in retaliation for filing a lawful workers' compensation claim. SDCL § 62-1-16. All workers' compensation disputes are handled through the administrative process, but any appeals stemming from administrative decisions are handled by the courts.

XIII. Unemployment Insurance

A. Filing a Claim

When an individual contacts a Claim Center to apply for Unemployment Insurance benefits, an initial claim is filed. Filing an initial claim establishes both the benefit year (the period during which the worker may be eligible to receive benefits) and the base period (the one year period for which the worker's earnings are considered in determining benefit eligibility for an initial claim. To be eligible for unemployment insurance, a worker must have earned a specified amount during the base period. SDCL § 61-6-7.

B. Eligibility Requirements

An otherwise eligible unemployed person may receive benefits if her or she has: (1) registered for work at, and has continued to report to, an employment office; (2) made a claim for benefits in accordance with the provisions of the Unemployment Compensation Laws; (3) is physically able to work and is available for work; (4) has been unemployed for a waiting period of one week; and (5) meets minimum earnings for eligibility requirements. SDCL § 61-6-2.

If the Department of Labor determines that an unemployed individual has failed to apply for available suitable work, or has refused to accept suitable work that has been offered to them, the individual's claim for unemployment benefits will be denied. SDCL § 61-6-15.

C. Individuals Ruled Ineligible

Unemployed individuals will be deemed ineligible for benefits if they: (1) voluntarily quit employment without good cause attributable to the employer; (2) were discharged because of misconduct; (3) were discharged because of conduct mandated by religious beliefs that can't be easily accommodated; (4) were discharged before completing a 90-day probationary period established between employee and employer at the time of employment; (5) earned total base period wages of less than $100.00 with one (1) employer; (6) received benefits while in approved training; (7) receive benefits for

unemployment directly caused by a major natural disaster if they are eligible for disaster unemployment assistance; or (9) performed services while incarcerated and terminated such employment because of a transfer or release from the institution. SDCL § 61-5-29.