

Employment ABC's



An Overview of Employee Rights & Responsibilities

Presented by

**The North Carolina Bar Association
Labor & Employment Section**

and



Employment Law ABC's

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These materials are presented as a public service by the Labor and Employment Section of the North Carolina Bar Association. They are intended to be overview only and not a comprehensive discussion of all employee rights and responsibilities and do not constitute legal advice. They specifically do NOT include information on Employee Benefits, HIPPA or COBRA rights, or taxation issues. If in doubt, seek the advice of a licensed North Carolina attorney who concentrates in the area of Labor and Employment or Workers' Compensation.



Employment Law ABC's

I. "Independent Contractor" versus "Employee"

1. What is an "independent contractor?"

Traditionally, most people who perform work for someone else have been and are still considered employees of that person or company. However, an alternative arrangement that is becoming more and more common in the workplace is to consider those who perform work independent contractors. If a worker is an "independent contractor," her working terms are decided by an agreement, known as a contract. The terms of the agreement may be a formal written contract or may just be created by talking. In fact, a contract might be created just by doing things the way they have always been done, without writing down the terms and without even talking about them.

2. What's the difference between being an independent contractor and an employee?

If a worker is considered a contractor, she may not have the same legal rights as an employee. Independent contractors **do not have access to EEOC laws to protect them against discrimination, federal and state laws about minimum wages and overtime wages, employer provided benefits, worker's compensation, unemployment compensation, payroll deductions for taxes, or payment by the employer of half of Social Security taxes.** Independent contractors have to pay self employment taxes. While both employees and independent contractors can sue for what they are owed, employees may have rights to additional sums, including attorney fees, if wages are unpaid.

3. Can an employer just decide that a worker is an independent contractor so that they don't have to pay taxes, wages and benefits?

No. In order for a worker to be considered an independent contractor, the relationship she has with the person or company she works for must have the characteristics of a contractor relationship. Otherwise, employers might be tempted to (and often do) exploit their employees by calling them "independent contractors" to evade the laws that specifically protect employees and to save money on taxes and worker's compensation insurance.

There is no single rule or test which determines whether you are an independent contractor vs. an employee. It is the total activity or situation that controls. However, both the IRS and the DOL have developed guidelines to help both businesses and workers choose the correct status.

4. Why does the IRS care whether a worker is an employee or an independent contractor?

The IRS wants to be sure that proper federal payroll taxes are being paid. The IRS collects taxes from employers and employees. Taxes are deducted from *employee* paychecks. The employer is required to forward to the IRS the money collected from the employee deductions. If an employer is not properly taking deductions or forwarding the taxes, the IRS may act to correct the tax violations.

If an *independent contractor* is involved, the IRS has no authority to act against the employer since there are no payroll taxes to collect, but the IRS does have authority to audit the tax payments of the independent contractor. Contractors who earn over a certain amount also have to pay what is known as a "self-employment tax," which covers their share of Social Security taxes.

5. What factors are important to the IRS in determining a worker's status?

Under IRS rules, workers are presumed to be employees. The burden is on the employer to prove that a worker is an independent contractor and not an employee. The IRS has a list of 20 factors to see if a worker is an employee or an independent contractor ("IC"). The importance of each factor depends on the particular situation. Those factors to be considered are as follows:

- o **Control.** If the employer can exercise complete control over the job or the product the worker makes, she is an employee. If the worker is an IC, she can control the way the job is performed.

- **Supervision.** An employee works under extensive supervision. An IC usually works without supervision.
- **How the work is done.** Employees must follow the instructions of the employer as to how to perform the work. IC's can set their own hours and decide how to perform the job or complete the project. The company will review the finished project.
- **Training.** The employer may hold classes, meetings or closely supervise on-the-job to train employees. IC's can perform the work as they choose.
- **Integration.** Employees work with other company employees as part of the daily operation. IC's are not an integral part of the company business, and work independent of company employees.
- **Who does the work?** Employees must do the work as assigned and cannot hire someone else to do it. IC's can hire others to perform the work.
- **Continuing relationship.** Employees have an ongoing relationship with the employer. IC's are hired for a specific job. When that job is finished, the work relationship ends.
- **Hours of work.** The company sets work hours for its employees. IC's can set their own hours.
- **Where the work is completed.** Employees usually work at the company facility or another office designated by the employer. IC's may be able to choose the location where they work, and use their own supplies, office and equipment.
- **Order of tasks.** Employees perform tasks in the order assigned by the employer. IC's decide the order of work to complete the job.
- **Pay.** Employees are paid on specific dates in regular amounts, and may be reimbursed for travel and business expenses. The contract between the company and the IC determines how payment is to be made. IC's may include expenses as part of the contract, or may pay expenses independently.
- **Work supplies.** Employers provide tools and materials to employees. IC's use their own tools and supplies.
- **Investment in facilities or equipment.** Employees do not invest in the facility and do not buy equipment. IC's must invest in their own workplace and equipment.
- **Profit or loss.** The profit or loss of the company does not change the pay that employees earn. IC's can profit or lose money based on good or bad results and time spent working on the project.
- **Working for more than one company.** Employees work for the company that issues their pay. IC's may work for several companies at the same time.
- **Availability of services to the public.** Employees generally serve one employer. IC's can provide services to the general public, advertise services, and recruit new customers--all while working for one or more other companies.
- **Termination.** An employer may usually terminate its employees, and employees may usually quit, at any time, without good cause and without notice. IC's are bound by the agreement to complete certain work, unless there is a legal reason not to.
- **Distinct business.** Employees work as part of the company business and do not offer services separately. IC's have a separately established business, and can promote those services to others.
- **Skill required.** Employees are generally trained for a specific job using specific skills. IC's often perform work requiring high levels of skill or broad experience, because the company is not supervising.
- **Beliefs of the worker and company.** If workers believe they are employees, that belief will be considered in light of the particular situation. If workers believe they are IC's, that belief will also be considered. The beliefs of company management are also considered.

The IRS, Dept of Labor and the NC Employment Security Commission (NC ESC) have all developed tests and standards for determining who is an "employee." The tests and standards are not identical but they tend to be similar. There are some notable differences because federal courts applying IRS law tend to allow something called a "safe harbor." If an industry tends to treat certain groups as independent contractor, the federal courts tend to recognize that label as true even though the facts might not agree. There is no "safe harbor" doctrine under NC ESC law. You are what you do, not what employers call you.

6. Does the worker's title affect whether she is an independent contractor ("IC")?

No. What the worker is called is not important. Employers in some cases have called their workers "freelancers" or contractors, but after a lawsuit, those workers were actually found to be employees.

7. A worker is paid a flat fee for her work. Does this mean she is an IC?

Not necessarily: the time or method of payment is not considered when deciding if a worker is an employee or a contractor. Otherwise, employers could just offer each employee a flat fee for the completion of work, or choose any particular method that might circumvent the laws.

8. If a worker is an employee, does the company have to provide health coverage?

Employers are generally not legally required to provide health coverage to their employees.

9. If a worker is paid as an IC, does that mean she has to pay more taxes?

Social Security, Medicare, and federal withholding taxes are automatically deducted from an employee's paycheck. An IC must pay her own taxes. However, an IC may also take deductions for all of her business expenses, so she could end up paying lower taxes than an employee, if there are sufficient expenses.

10. If a worker is currently treated as an IC, but thinks she should be considered an employee, how can she get her employment status changed?

She should talk to a legal advisor who can help you analyze the situation. Then, she can decide whether going to management or going to a government agency is the best way to address the concerns. Where a company is avoiding employment laws by calling large numbers of workers IC's, the DOL may act to enforce federal law. The worker may also file an SS-8 and /or file a lawsuit.

11. Can an employer fire a worker for reporting the employer to the IRS for failing to obey the law?

First, she should talk to a legal advisor who can help her analyze the IRS factors. Even though reporting IRS violations is a protected activity, she might expose herself to unlawful retaliation. If a worker wants the IRS to determine whether she is an employee, she can file an [IRS Form SS-8](#). The IRS also has a hotline (800-829-0433) where one can make a report. For more information, and/or other ways to report IRS violations, see the IRS page, [Where Do You Report Suspected Tax Fraud Activity](#)

It is a violation to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the Fair Labor Standard Act (FLSA). Willful violations may be prosecuted criminally and the violator fined up to \$10,000. A second conviction may result in imprisonment. Employers who willfully or repeatedly violate the minimum wage requirements are subject to a civil money penalty of up to \$1,000 for each such violation. The FLSA makes it illegal to ship goods in interstate commerce that were produced in violation of the minimum wage, overtime pay, child labor, or special minimum wage provisions.

To contact the Wage-Hour Division for further information and/or to report a potential FLSA independent contractor violation, call:

Toll Free: 866-4-USWAGE (866-487-9243)

TTY: (877) 889-5627

(available Monday - Friday, 8 a.m. - 6 p.m. Eastern Time)

You may also contact your local US Wage-Hour Division office. If a worker needs further information about her state's law relating to independent contractors and/or wishes to report a potential state law violation, then she may contact the North Carolina Department of Labor.

The worker may also file a form SS-8 with the Social Security Administration contesting treatment as an Independent Contractor. That form can be found on the Web at <http://www.irs.gov/pub/irs-pdf/fss8.pdf>.

*** See listings in Resource Directory Brochure.

12. What are the remedies available to a worker who is improperly classified?

If an agency or a court finds that the worker should have been treated as an employee, the company could be forced to classify her as an employee. If she lost income or benefits because she was not classified as an employee, she could be compensated for those losses.

There are several different methods under the Fair Labor Standard Act for an employee to recover unpaid wages; each method has different remedies.

- Wage-Hour may supervise payment of back wages.
- The Secretary of Labor may bring suit for back wages and an additional penalty, called "liquidated damages," which can be equal to the back pay award (essentially doubling the damages) if an employer willfully violated the statute.
- An employee may file a private lawsuit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs. An employee may not bring a lawsuit if he or she has been paid back wages under the supervision of the Wage-Hour Division or if the Secretary of Labor has already filed suit to recover the wages.
- The Secretary of Labor may obtain an injunction to restrain any person from violating the FLSA, including the unlawful withholding of proper minimum wage and overtime pay.
- The NC Wage and Hour Act provides for the unpaid wages, plus interest, plus an amount equal to the unpaid wages to be paid. Attorney fees may also be taxed against the employer.

13. How does one file a complaint/How long does one have to file?

To file a complaint for unpaid wages under the FLSA, a worker may either go to the US Wage-Hour Division, or the NC Department of Labor, which may pursue a complaint on her behalf, or file her own lawsuit in court (which may require her to hire an attorney).

Do not delay in contacting the US DOL Wage-Hour Division or NCDOL to file a claim. There are strict time limits in which charges of unpaid wages must be filed. To preserve a claim under either federal law or North Carolina law, one must file a lawsuit in court within 2 years of the violation for which she is claiming back wages, except in the case of an employer's willful violation, in which case a 3-year statute applies. However, as the worker might have other legal claims with shorter deadlines, one should not wait to file a claim. The worker may wish to consult an attorney before filing a claim, but one is not required to have an attorney to file a claim with the state and federal administrative agencies. However, filing with an agency does not stop the 2 year court filing deadline from running out.

SEE PRE-TEST Questions #1, 2, 3

II. Employment At Will: What Does It Mean?

Job applicants and new employees are often perplexed to read in a job application, employment contract, or employee handbook that they will be employed "at will." They are even more troubled when they find out exactly that this language means that an at-will employee can be fired at any time, for any reason (except for a few illegal reasons, such as discrimination). If the employer decides to let you go, that's the end of your job -- and you have very limited legal rights to fight your termination.

If you are employed "at will," your employer does not need good cause to fire you. In every state but Montana, employers are free to adopt at will employment policies, and many of them have. In fact, unless your employer gives some clear indication that it will only fire employees for good cause, the law presumes that you are employed "at will."

Are You an “At Will” Employee?

North Carolina law generally presumes that you are employed at will unless you can prove otherwise, usually through written documents relating to your employment or oral statements your employer has made. Normally you are “at will” unless there is a contract for a specific period of time or you work for a governmental employer or in a union shop where just cause is required for termination.

SEE PRE-TEST Questions # 4, 8, and 15

III. Fair Pay and Time Off

What laws govern wages and hours in the workplace?

The major federal law governing wages and hours is called the Fair Labor Standards Act (FLSA). It regulates how much workers must be paid, how many hours they can be required to work, and the special rules that apply to younger workers. The law includes provisions on:

- minimum wage – federal \$7.25 per hour (as of July 24, 2009)
- hours worked
- overtime, and
- child labor.

The FLSA applies to most employers, including the federal government, state and local governments, schools, and virtually all private employers. In addition, NC has a Wage and Hour Act that incorporates most of the Fair Labor Standards Act.

How can an employee tell if he is entitled to overtime pay?

The first thing one must check is whether the employer is covered by the FLSA and/or the NC Wage and Hour Act. Because the coverage of these laws is so broad, one can be pretty safe in assuming that the employer must comply with them. The next step is to see whether the worker is considered an "exempt" or a "non-exempt" employee under these laws. If an employee is exempt, then he is not entitled to overtime pay; if the employee is non-exempt, then he is entitled to overtime pay.

If an employee routinely exercises discretion, supervises other employees, and/or makes high-level decisions, he is probably an exempt employee who is not entitled to overtime pay. To be one of these "administrative, executive, or professional" employees exempt from overtime under the law, one must be paid on a salary basis (at least \$455 per week) and spend most of his time performing duties that require him to use discretion and independent judgment.

In addition, if an employee is one of the following types of workers or professionals, he probably is not entitled to overtime pay:

- independent contractors
- volunteer workers
- outside salespeople (that is, employees who customarily and regularly work away from the employer’s business, selling or taking orders to sell goods and services)
- certain computer specialists (such as systems analysts, programmers, and software engineers) who earn at least \$27.63 per hour
- employees of seasonal amusement or recreational businesses
- employees of organized camps or religious or nonprofit educational conference centers that operate for fewer than seven months a year
- employees of certain small newspapers
- newspaper deliverers

- workers engaged in fishing operations
- seamen
- employees who work on small farms
- certain switchboard operators
- criminal investigators, and
- casual domestic baby sitters and people who provide companionship to those who are unable to care for themselves (but this exception does not include those who provide nursing care or to personal and home care aides who perform a variety of domestic services).

If an employee does not supervise others or make important decisions for the employer, and if he does not fit into one of the professions described above, then he is probably entitled to overtime pay if he works more than 40 hours in a week.

If an employee is entitled to overtime pay, how many hours does she have to work to get it?

Federal law and North Carolina use 40 hours per week as the standard -- if a non-exempt employee works more than 40 hours in a given week, he is entitled to overtime pay (different calculation for police and firefighters). Only under certain union contracts and in certain other states is the daily overtime over 8 hours. Under federal law, the overtime premium is 50% of the employee's usual hourly wage. This means that an employee who works overtime must be paid his or her usual hourly wage plus the 50% overtime premium -- or at least one and one-half times his or her usual hourly wage (often referred to as "time and a half") -- for each overtime hour worked.

If one works more than 40 hours in a week, can he get compensatory time instead of overtime pay?

Compensatory, or "comp" time, is the practice of offering employees time off from work rather than pay for working overtime. However, that practice is generally illegal under federal law, at least for private employers (state and local governments can offer comp time, in certain circumstances). Why? Comp time policies prevent employees from collecting overtime premiums -- the time and a half during overtime. When comp time is allowed, it must be awarded at the rate of one and one-half times the overtime hours worked -- and it must be taken during the same pay period that the overtime hours were worked. However, if one is an exempt employee -- that is, not entitled to overtime pay under the FLSA -- he may legally work out a comp time arrangement with the employer.

If part of a worker's income comes from tips (for example, wait persons or bartenders), can the employer pay less than the hourly minimum wage?

It depends on how much money he makes in tips and on state law. Generally, an employer must pay all employees covered by state and federal wage and hour laws the federal minimum wage (currently \$7.25 an hour) or the NC minimum wage (\$6.15 per hour) -- whichever is higher.

The law gets a bit trickier, however, when the employee earns tips. Under NC law, an employer is allowed to pay a lower minimum wage -- only \$2.43 an hour -- if the employee routinely earns at least \$30 per month in tips and if the worker's wages plus tips add up to at least the minimum wage for each hour worked. If the worker ends up earning less than the minimum wage even when tips are figured into the bargain, the employer has to make up the difference.

What laws ensure the right to take vacations or paid sick days?

Here's a surprising legal truth: No federal or North Carolina law requires employers to provide paid days off, such as vacation days, sick days, or paid holidays. This means that if one receives paid vacation or sick days, it's because of custom, not law: The employer chooses to provide the benefits to care for its workers, to attract employees in a competitive market, or for other such reasons.

And just as vacation benefits are discretionary with each employer, so is the policy of how and when they accrue. For example, it is perfectly legal for an employer to require a certain length of employment -- six months to a year is common -- before an employee is entitled to any vacation time. It is also legal for employers to prorate vacations for part-time employees or to deny them the benefit completely. Employers are also free to set limits on how much paid time off employees may store up before it must be lost or taken. (Note, however, that while federal or NC law may not require the employer to provide paid time off in the first place, once an employer agrees to do so on its own, the employer is bound by its policy or practices related to paid time off.)

When do I get my final paycheck?

You certainly have a right to be paid for work you already did. NC has a law specifying exactly when a final paycheck must be issued to employees who resign or get fired- by the next regular payday after the termination of employment. (N.C. Gen. Stat. § 95.25.7.)

NC law says that the employer's own policies dictate whether employees are entitled to be paid -- if the employer's policy says that employees will be paid for unused vacation time, the employer must make good on the promise.

*** See NC Wage & Hour and US Department of Labor listings in the Resource Directory brochure and <http://www.nclabor.com/wh/faqs.pdf>.

SEE PRE-TEST Questions # 3, 9

IV. WORKERS' COMPENSATION

What is Workers' Compensation?

“**Workers' Compensation**” refers to a legal system that protects the rights of workers who become injured while on the job. Each state in the U.S. has its own set of **workers' compensation** laws detailing the specific benefits to which an injured person may be entitled. This set of laws details the procedures a worker must follow in order to obtain “**worker's comp**” benefits.

The NC workers' comp system takes workplace injuries out of tort or negligence law, and generally prevents employees from suing their employer directly. An injured North Carolina worker may sue his or her employer directly only if the employer intentionally engages in conduct that is substantially certain to result in serious injury or death, or intentionally injures an employee. The following refers to North Carolina law only.

Q: Who is required to provide workers' compensation coverage?

A: Generally, any employer who employs 3 or more employees. (There are some special rules, such as for some specific types of employment and for corporate officers.)

Q: What must an employee do when an injury occurs on the job?

A: Report the injury to the employer, orally and in writing, immediately and in any event within 30 days.

Q: What should be done if the employer fails or refuses to report an injury?

A: Employee should file a claim (Form 18 or 18B) with the NC Industrial Commission within two years of the accident.

Q: Who provides and directs medical treatment?

A: The employer or its insurance company, subject to any Commission orders, provides and directs medical treatment. The Commission may permit the employee to change physicians or approve a physician of

employee's selection when good grounds are shown. However, payment by the employer or carrier is not guaranteed unless written permission to change physicians is obtained from the employer, carrier, or Commission before the treatment is rendered.

Q: When can reimbursement for sick travel be collected?

A: Employees are entitled to collect for mileage for medical treatment in workers' compensation cases. The rate as of January 1, 2009 was raised to 55.0 cents per mile, provided the injured employee traveled 20 miles or more round trip. You should check for the current rate. Special consideration may be given to employees who are totally disabled.

Q: What happens if, in an emergency, the employer fails or refuses to provide medical treatment?

A: The employee may obtain the necessary treatment from a physician or hospital of his own choice, but must promptly request the Commission's approval.

Q: When does an employee become eligible for lost wage compensation?

A: No compensation is due for the first seven (7) days of lost time unless the disability exceeds 21 days. Therefore, the first check will not include payment for days 1-7. Payment for those days will be made should the disability continue beyond 21 days. Lost wage compensation is paid weekly.

Q: At what rate of pay?

A: 66 2/3% of the average weekly wage, not to exceed \$816.00* (maximum) per week for injuries occurring in 2009. The maximum weekly benefit is adjusted annually for injuries occurring in that calendar year, but the rate paid to the employee remains the same for the duration of the claim.

Q: How long is the employee eligible to receive lost-time weekly benefits?

A: Until the employee is able to return to work.

Q: What is permanent partial disability?

A: Total loss or partial loss of use of a member of the body.

Q: What happens when the employer refuses to acknowledge the claim?

A: When liability for payment of compensation is denied, the Industrial Commission, the Claimant, his or her attorney (if any), and all known providers of health care shall be promptly notified of the reason for such denial. The denial Form 61 shall not be worded in general terms, but must detail the exact reason for the denial of liability. If a claim is denied by the insurance company or self-insurer, the employee may request a hearing before the Industrial Commission by submitting a Form 33, Request for Hearing. Medical providers may bill the employee only after it has been finally determined that it is not a compensable workers' compensation claim.

WHAT WORKERS' COMP BENEFITS ARE AVAILABLE?

Medical Expenses: All reasonable and necessary medical expenses arising out of the compensable injury or occupational disease. There is no co-pay.

Wage payments- Temporary Total Disability: A weekly disability payment which is usually 2/3 of the average weekly wages at the time of the injury or occupational disease.

Permanent Total Disability: This is a weekly disability payment, if you are permanently disabled from working, based on the severity of your injury or occupational disease.

Permanent Partial Disability: Payment for total of partial loss of use of a member of the body.

Temporary Total Disability: Weekly payment when employee is unable to perform any work.

Temporary Partial Disability: Weekly payment when employee is able to work with some restrictions, but at a lower rate of pay than regular wages.

Sick Travel and Prescriptions: Mileage to and from doctors and hospitals of more than ten (10) miles one way or twenty (20) miles round-trip, and for prescriptions prescribed by approved treating physicians.

WHAT SHOULD I DO IN THE EVENT OF AN INJURY AT WORK?

Should I Report the Injury?

YES! The Workers Compensation Act requires that you report an injury within 30 days. If you sustain an injury during the course of your employment or experience physical symptoms which you feel may be related to your employment, you should immediately report the injury or symptoms to your supervisor, even if you do not think the accident is serious. Your supervisor, or the individual in charge of handling injuries at your company, should immediately complete the employer's report of the accident, Form 19. Your employer is required to give you a copy of the completed Form 19, and required to file it with the Commission for injuries involving more than \$2,000.00 in medical expenses or when more than one (1) day is missed from work. Your company may require the completion of additional internal forms.

You should also promptly file a written notice of your claim with the Commission, preferably on a Form 18. The employer's Form 19 is not an employee claim form, and clearly says so at the top of the form. You must file a written claim with the Industrial Commission within two (2) years from the date of your injury, or two (2) years from the date a doctor tells you that you have an occupational disease. You should not postpone filing your claim. You should file it immediately after becoming aware of your accident or occupational disease. Even if you believe your injury is minor, promptly and timely filing a written notice of your claim with the Commission will preserve your claim in the event that later your symptoms require medical treatment or you become disabled from work due to your injury. Failure to file your claim within two years will likely bar you from ever recovering under the Act.

Should I Request Medical Treatment?

Yes! If you are injured due to an accident at work or believe you are experiencing symptoms of an occupational disease, you should seek medical treatment from an appropriate doctor or hospital. If you have not already done so, you should notify your employer that you have been hurt and are seeking medical attention. If your employer or its insurance carrier have accepted liability for your injury, or agreed to pay benefits under the Act, they may choose the doctor you see. Refusal to comply with their recommendations for medical treatment could result in a termination of benefits or refusal to pay for additional medical treatment. If you disagree with your employer or its insurance carrier regarding the selection of a doctor or hospital or medical procedure, you may request approval from the Commission of medical treatment with the physician or hospital of your choice.

*** See Industrial Commission listing in Resource Directory Brochure and <http://www.comp.state.nc.us/ncic/pages/faq.htm>.

SEE PRE-TEST Question # 2

V. North Carolina Unemployment Benefits

An employee who is fired by an employer is presumed to be entitled to Unemployment Compensation from the North Carolina Employment Security Commission if they have wages in 2 out of the last 5 calendar quarters. There are exceptions. (1) An independent contractor is not eligible for unemployment. (2) A claimant

is disqualified if he was fired for “misconduct” or “substantial fault” of the worker, or if he quit for other than “good cause attributable to the employer.” (3) A claimant is not eligible until he or she is ready, willing, and able to seek employment, and stops being eligible if he becomes too ill to work for a period of time or stops looking for work. (4) The receipt of vacation pay delays payment of benefits until the number of weeks has elapsed which would equal the amount of pay received.

“**Misconduct**” is a serious disciplinary infraction such as stealing, insubordination, sleeping on the job, fighting, or violating some other work rule which is known to be a cause for termination or about which one has previously been warned could cause termination. Misconduct may disqualify a person from benefits for up to 2 years.

“**Substantial fault**” is a lesser act, such as repeated absenteeism or tardiness, about which the employee was warned, and could have prevented but failed to do so. Substantial fault can result in the forfeiture of 4 to 13 weeks of unemployment benefits.

“**Good cause attributable to the employer**” includes such things as the employer’s facility moving more than 50 miles, being transferred to a shift during which the employer knows one cannot get childcare, sexual harassment on the job, having one’s pay cut more than 15%, hours cut more than 20%, and other circumstances which the employer controls or could control.

A claimant should be sure to report to ESC any severance or vacation payments which are paid during the same time that would be covered by unemployment benefit payments to avoid an overpayment and repayment to ESC. For example, if a person makes \$500 a week and receives \$2000 in severance, he may not receive unemployment for the first 4 weeks after he is fired.

While neither the employer nor the employee has to have an attorney for an ESC hearing, it is a good idea to seek the advice of an attorney. The employer must provide evidence of misconduct or substantial fault. The employee is responsible for providing evidence of good cause attributable to the employer. **Your ONLY opportunity to introduce evidence is at the first appeals hearing before the Appeals Referee or Hearing Officer.**

*** See Employment Security Commission listing in Resource Directory brochure and <http://www.ncesc1.com/individual/faqs/faqMain.asp#application>.

SEE PRE-TEST Questions # 5

VI. EEO (Equal Employment Opportunity) Laws

As an employee, you have the right not to be discriminated against or harassed on the basis of a protected category. Discrimination means being treated more negatively because of your **sex, race, religion handicap, age, national origin or color**. It is not illegal for the employer to pick on an employee because of other factors such as office politics, personality, because he makes too much money, or in most states his sexual orientation. If you believe you have been wronged, here are steps you can take to assert your legal rights.

Your Equal Opportunity Rights as an Employee

The laws enforced by the **Equal Employment Opportunity Commission** (“EEOC”) provide five basic rights for job applicants and employees who work in the United States. The laws apply to applicants, employees and former employees, regardless of their citizenship or work authorization status. Full-time, part-time, seasonal, and temporary employees are protected if they work for a covered employer. All federal government agencies and most other employers with at least 15 employees are covered by our laws (20 for age discrimination). Most unions and employment agencies also are covered. If you work for one of these employers, you have the right to:

Work Free of Discrimination

You have a right to work free of discrimination. This means that your employer cannot make job decisions because of your **race, color, religion, sex (including pregnancy), national origin, disability, or age (age 40 or older)**. This right applies to all types of job decisions, including hiring, firing, promotions, training, wages and benefits.

Work Free of Harassment

You have a right to work in an environment free of harassment based on race, color, religion, sex (including pregnancy), national origin, disability, or age (age 40 or older).

Complain About Job Discrimination Without Punishment

You have a right to complain about treatment that you believe is illegal job discrimination. Your employer cannot punish you, treat you differently or harass you if you report job discrimination or help someone else report job discrimination, even if it turns out the conduct was not illegal. We call this your right to be protected from **retaliation**.

Request Workplace Changes for Your Religion or Disability

You have a right to request reasonable changes to your workplace because of your religious beliefs or medical condition. Although your employer does not have to grant every request, it should carefully consider each request and whether it would be possible.

Keep Your Medical Information Private

You have a right to keep any medical information you share with your employer private. Your employer should not discuss your medical information with others, unless they have a need to know the information. The laws enforced by EEOC also strictly limit what an employer can ask you about your health.

You may have additional workplace rights under other federal, state, or local laws or under your company's own policies. For example, other federal laws require your employer to pay you a minimum hourly wage and to provide you a safe working environment. State and local laws may offer you broader protection than the laws enforced by EEOC, especially if you work for a smaller employer or believe the unfair treatment is because of your sexual orientation, age (if under age 40), or some other reason not covered by federal law. To find out more, you should:

- Check out EEOC's page on other resources for youth workers.
- Ask your company for copies of any policies that apply to your job.
- Call the EEOC at 1-800-669-4000.

Your Responsibilities as an Employee

The laws enforced by EEOC provide three basic guidelines for you to follow as an employee:

Don't Discriminate

You should not treat your co-workers unfairly or harass them because of their race, skin color, national origin, sex (including pregnancy) religion, disability, or age (age 40 or older). For example, you should not tell sexual or racial jokes at work or tease people because they are different from you.

Report Discrimination

You should tell your company about any unfair treatment or harassment. Find out if your company has a policy on discrimination that specifies who you should contact about these issues.

Request Workplace Changes

You have a responsibility to tell your company if you need a workplace change because of your religious beliefs or medical condition. Your request does not have to be in writing, but you must provide enough information so your company can determine how to help you.

* This information was taken from EEOC youth @ work, <http://youth.eeoc.gov/index.html>

*** See EEOC contact information in Resource Directory.

Other laws which forbid negative treatment

You may not be discriminated against (fired, not promoted, demoted, or otherwise treated negatively) due to your:

- filing a worker's compensation claim,
- making a complaint under state or federal wage payment claims,
- making an OSHA complaint,
- engaging in "concerted activity,"* or
- opposing practices which are illegal under state or federal law.

You may also not be fired due to:

- being HIV positive,
- having sickle cell trait,
- smoking not on the employer's premises, or
- for taking or requesting FMLA leave if you are eligible.

* "concerted activity" is when 2 or more employees get together to discuss or complain about working conditions or pay.

If you believe you have been discriminated against on the basis of age (over 40), handicap, race, religion, or national origin or for opposing illegal discrimination, you must in most cases file with the EEOC within 180 days. If you believe you have been retaliated against for filing a Workers' Comp claim, an OSHA Complaint or complaining about illegal wage practices, you should file a complaint with the NC Department of Labor within 180 days. Retaliation for concerted activity should be reported to the National Labor Relations Board. It is the better practice to seek the advice of an attorney to find out where you should file and when.

SEE PRE-TEST Questions # 7, 10, 11, 12, 15

VII. Employment Documents

A. Arbitration Agreements with Employers

Employers are increasingly asking workers to give up their rights, so watch what you sign.

In a growing trend, employees are giving up their right to sue their employers in court over issues such as wrongful termination, breach of contract, and discrimination. How are they doing this? -- By signing documents called "arbitration agreements." When employees sign these agreements, they are promising to pursue any legal claims against their employer through arbitration, rather than through a lawsuit. Arbitration can mean giving up a lot and could even be the difference between winning or losing your case.

The Advantages of Arbitration

Arbitration does have some advantages over a court trial. Arbitrations are less formal than court trials, and this informality can make the process easier for all involved, especially employees who are not used to

litigation. Also, arbitrations can resolve much more quickly than court cases, which can take several years from start to finish.

The Disadvantages of Arbitration

You may wonder why you should care where your claims get heard, as long as they are heard somewhere, be it in arbitration or a court of law. Arbitration differs from a court case in several ways, and some of these differences tend to work against employees.

Most importantly, an arbitration hearing is heard and decided by an "arbitrator" -- a private citizen (often a lawyer or retired judge) who is paid by one or both sides to listen to the evidence and witnesses. That means you won't have a jury hear your story -- and juries are usually more sympathetic to employees than are arbitrators. In addition, the arbitration process limits the amount of information each side can get from the other. In employment cases, this generally hurts the employee, because the employer is usually the one in possession of all the documents and information relating to the employee's case.

Finally, an arbitration decision usually cannot be appealed, making arbitration awards more final than court verdicts. This means that, if the arbitrator makes a decision that you think is unfair or wrong, you won't get a second chance to argue your case before a higher court -- a second chance that you might have gotten had you gone to a court trial.

Read All Documents Carefully

Employees often sign arbitration agreements unintentionally. How can this happen? Some employers shower new employees with tons of paperwork to fill out on their first day, and some employees, in turn, sign documents without reading them. Although many employers are straightforward and present the arbitration agreement to employees openly in a separate contract, others bury arbitration agreements in other documents, such as an employment contract, a hiring letter, or an employee handbook.

When you sign a contract, letter, application for employment, handbook acknowledgment form, or any other document from your employer, you agree to all the terms of the document -- even the ones that you may not have read. This is a particular problem with handbooks, which might be hundreds of pages long. To protect yourself from unwittingly signing away your rights, don't sign any document acknowledging you've read something unless you actually have read it and understood it completely. And don't sign any document that says you agree to the terms unless you have read all of the terms and do in fact agree to them.

The Risks of Refusing to Sign

If your employer asks you to sign an arbitration agreement, you can refuse, but you may be putting your job in jeopardy if you do so. Except in very limited circumstances, an employer can rescind an employment offer if a prospective employee refuses to sign the arbitration agreement. And an employer can fire an at-will employee who refuses to sign one. Therefore, declining to sign the agreement could jeopardize your job.

Sometimes, however, employers will negotiate this point, especially if they are more excited about the employee than they are about arbitration. If you are a highly sought after prospect, or if you are a valued employee in your company, your employer may allow you to refuse to sign rather than give you up. Another option is to agree to sign -- but only if you can negotiate an agreement that is more fair to you, as described below.

Making the Agreement Fair

If your employer won't let you outright refuse to sign, it may allow you to negotiate certain terms of the agreement to make it more fair to you. Although an employer may not agree to your requests, it is not likely to

fire you for asking. Negotiating your agreement to arbitrate is no different from discussing your salary. The employer is negotiating for its best interest, and it is your duty to negotiate for your own best interest.

You may have to consult with an attorney for help in negotiating the fairest agreement possible. Here are some points to negotiate before you agree to arbitration that may create a balanced arbitration process:

- **Choice of arbitrator.** You should ask that you get as much say in choosing the arbitrator as the employer. Given the power of the arbitrator, and given the fact that you probably won't get to appeal the arbitration decision, you will want to have rights equal to those of your employer in selecting who the arbitrator will be. You and the employer should have the right to reject at least one arbitrator without having to give a reason.
- **Disclosure of information.** Ask that any potential arbitrator should have to disclose any information regarding business and personal interests to ensure she is not biased in favor of the employer. For example, the arbitrator should not be someone who is a stockholder in the company. You and the employer should have the right to reject any arbitrator who has a conflict of interest.
- **Costs of arbitration.** Because the employer is the one who wants to use arbitration -- something that must be paid for -- You may ask that the employer pay for the costs of the arbitration.
- **Remedies available.** You may ask that you receive through arbitration all of the remedies that you would have gotten if you had filed your claim in a court of law. For example, the agreement should not prohibit you from seeking punitive damages or damages for emotional distress.
- **Attorney representation.** You should ask that you should have the right to be represented by an attorney throughout the arbitration process.

You Can Still Use Government Agencies to Fight Discrimination

Even if you signed an arbitration agreement and your employer discriminates against you, you can still complain to a government agency, such as the federal Equal Employment Opportunity Commission (EEOC) or the Department of Labor-- and the agency can decide to sue the employer in court on your behalf. This is because the arbitration agreement you signed applies only to you; it doesn't apply to an agency that helps you.

B. Noncompete Agreements

QUESTION: My employer is insisting that I sign a noncompete agreement, preventing me from working for competitors for a certain period of time if I leave or am fired. Is there anything I can do to make it less onerous, or do I have to sign whatever my employer hands me?

ANSWER: You certainly aren't alone. A growing number of employers ask employees to sign noncompete agreements promising they will not work for a competitor after leaving their current job. These agreements are legal in many -- but not all -- states. (Some notable foes of the noncompete agreement are California and Colorado.)

Even states that allow such agreements impose some limits on them because the legal system puts a high value on a person's right to earn a living. Noncompete agreements will not be enforced if they are found to be unreasonable. An agreement may be held unreasonable because it:

- lasts for too long a time
- covers too wide a geographic area
- is too broad in the types of business it prohibits, or
- applies to employees who never had access to the employer's trade secrets or other valuable information in the first place (in this case, there's no compelling reason to allow the employer to prevent the employee from working for a competitor).

If you're asked to sign a noncompete agreement, your best first step may be to negotiate the finer print with your employer. Here are a few pointers for crafting your arguments.

- If your employer asks you to sign a noncompete other than when you're hired or promoted to a new position, you may ask for money to compensate you for signing. Keep in mind, though, that this will almost certainly prevent you from later claiming that the clause should not be enforced against you. Because you got something valuable for signing the agreement, you probably won't be able to get out of it later.
- If presented with a noncompete clause, ask to have it worded to take effect only if you leave the job voluntarily. Otherwise, the clause could limit your employment opportunities even if you are fired or laid off.

Ask for the prohibited competition to be clearly identified and limited. Many employers, for example, fear competition with only one or two specific companies and will readily name their names in your agreement.

When in doubt, seek legal counsel about non-competes before you sign one!

SEE PRE-TEST Questions # 14

VIII. Family and Medical Leave

Get information about all of the laws and benefits you may be entitled to before taking a leave.

The Family and Medical Leave Act, or FMLA, provides some important -- but limited -- help to those who have serious medical conditions or birth, adoption or sickness of a child. This law, passed by Congress in 1993, requires certain employers to give their workers up to 12 weeks off per year to care for a seriously ill family member, deal with their own serious illness, or take care of a newborn or new adopted or foster child. New amendments provide leave to care for an injured military family member or to assist with a family member's military deployment. When they return from leave, workers have the right to be reinstated to the same or an equivalent position. But FMLA leave is unpaid and only applies to certain employers.

Federal Law: The FMLA

An employer and employee are "covered" under FMLA if all three of the following conditions are met:

- **Number of employees.** The employer has 50 or more employees who work within a 75-mile radius. All employees on the payroll -- including part-time workers and workers out on leave -- count toward the total.
- **Length of time employed.** The employee has worked for the employer for at least 12 months.
- **Hours worked.** The employee has worked at least 1,250 hours (about 25 hours a week) during the 12 months immediately preceding the leave.

Even if you and the employer meet all three of these requirements, you can take FMLA leave only for specified reasons. Not every personal or family emergency qualifies for FMLA leave. You must be seeking leave for one of the following reasons:

- **Birth, adoption, or foster care.** If you become a new parent or a new foster parent, you may take FMLA leave within one year after the child is born or placed in your home. You can start your leave before the child arrives, if necessary, for prenatal care or preparations for the child's arrival. If both parents work for the same employer, they may be entitled to less leave.
- **The employee's serious health condition.** The idea is straightforward: You can take leave to deal with your own serious health problem. However, the law defines a "serious health condition" in a specific way. Generally, an employee who requires inpatient treatment, has a chronic serious health problem, or

is unable to perform normal activities for 3 (three) days while under the care of a doctor at least twice (within 7 and 30 days of the beginning of the leave) has a serious health condition.

- **A family member's serious health condition.** You are entitled to take leave to care for a seriously ill family member. However, again, the law defines "family member" quite narrowly. Parents, spouses, and children are included; but grandparents, domestic partners (of the same or opposite sex), in-laws, and brothers and sisters are not.
- **NEW- For a family member's military service connected injury (26 weeks) or deployment (12 weeks). For service connected injury, family member includes next of kin.**

You must notify your employer 30 days in advance of the leave where possible and as soon as you can if the leave is not foreseeable. If the Employer asks for a medical certification from your doctor or the doctor of the family member, you must provide it within 15 days.

Employers who are subject to the FMLA have certain responsibilities to employees who take FMLA leave. Employers must reinstate most employees to the same or an equivalent position as the one they held before going on leave, provide employees with continued health insurance while on leave, and allow employees to take paid time off (such as vacation and sick time) during unpaid FMLA leave under certain circumstances. Covered employers should notify any employee who they believe to fit the criteria above of their rights under FMLA.

Reinstatement to Your Position

Under the FMLA, you can take up to 12 weeks of unpaid leave in any 12-month period for the reasons listed above. When your leave ends, your employer must reinstate you to the same position you held when you went out on leave or a position equivalent in pay, benefits, and other working conditions, subject to the following:

- **You have no greater right to reinstatement than you would have had if you had not taken leave.** In other words, if your position is legitimately eliminated while you are out on leave, you don't have the right to be reinstated. However, this is true only if the elimination of your job is unrelated to your leave. For example, if you work in the accounting department and your employer decides, while you are on leave, to lay off the entire department and outsource the company's bookkeeping needs, you are not entitled to reinstatement. But your employer cannot eliminate just your position because you were out on leave -- that would be retaliation against you for taking leave.
- **Employers can refuse to reinstate certain highly paid, "key" employees.** If (1) you are among the 10% most highly paid of the employer's salaried workforce within a 75-mile radius of your workplace and (2) reinstating you would cause "substantial and grievous economic injury" to the company, your employer can refuse to give you your job back.

Continued Health Insurance

If your employer provides a group health plan, you are entitled to continued health insurance coverage while you are on leave. However, if you decide voluntarily not to return to work when your leave ends, your employer can require you to reimburse it for the health care premiums it paid on your behalf during your leave. (Your employer cannot require this if you cannot return to work after 12 weeks because the serious health condition continued or recurred or because of other circumstances beyond your control.)

Use of Paid Time Off

Although FMLA leave is unpaid, you are entitled to use your accrued paid leave during FMLA leave in certain circumstances. You can always use accrued paid leave that is characterized as vacation or personal leave. And, in certain circumstances, you may substitute accrued sick or family leave for FMLA leave. You can use this type of accrued leave only if the reasons for the leave are covered by your employer's leave policy or state

law. For example, you cannot use paid sick leave during FMLA leave to care for an ill family member unless your employer's policy or state law allows employees to take sick leave to care for others who are ill.

In addition, your employer can *require* you to use accrued vacation days during FMLA leave and accrued sick days if the reasons for the leave are covered by your employer's sick leave policy. For instance, if you take time off to care for a sick family member, your employer can force you to use your accrued sick leave if its leave policy allows you to use sick leave to care for ill family members.

Scheduling and Notice Requirements

The FMLA requires you to give 30 days' notice of the need for leave if it is foreseeable. This is most often the case if you plan to take leave for the birth or adoption of a child or to care for a family member recovering from surgery or other planned medical treatment. If your need for leave is not foreseeable, you are required to give as much notice as is both possible and practical under the circumstances. If you have a medical emergency, for example, it might not be possible for you to give any advance notice at all, but you should notify your employer as soon as you are able to do so.

Some employees may want to take leave intermittently rather than all at once. If you need physical therapy for a serious injury, for example, or you need to care for a spouse receiving periodic medical treatments such as chemotherapy, you might want to take a few hours off per week rather than the whole 12 weeks at once. You may take FMLA leave intermittently for your own serious health condition or that of your child, parent, or spouse when medically necessary. Employers are not required to allow intermittent leave for the birth or adoption of a new child, but they may agree to do so.

Employer Policies and Benefits

Lastly, some large employers are now choosing to provide family and medical leave benefits above and beyond what state and federal law requires of them. Some smaller employers that are not covered by state or federal family and medical leave laws may choose to provide unpaid, job-protected leave anyway, or employers who are required to provide only unpaid leave may choose to provide a certain amount of paid leave for their employees. Be sure not to miss out on any additional benefits your employer provides.

Do Your Homework

Because family/medical leave laws and benefit programs are so varied and complex, it's important that you get complete information about all of the laws and benefits that apply to your situation, including the following:

- **Federal law.** Find out if your employer is covered by, and if you are eligible to receive leave under, the federal Family and Medical Leave Act. For more information on the FMLA, visit the U.S. Department of Labor's website, at www.dol.gov.
- **Your employer's policies and benefits.** Find out about any benefits or policies your employer provides. Look in your employee handbook or manual, read any informational posters posted in your workplace, and/or ask your HR department for any information related to taking a family and medical leave.

SEE PRE-TEST Questions # 6, 10, 13

IX. When You Must Submit to Workplace Testing

Which Tests Are Legal

Unfortunately, there are no hard and fast rules about whether a particular test is legal -- courts usually decide these issues on a case-by-case basis, looking at all the facts and circumstances. For the most part, you can assess whether a test is unreasonable by using common sense: If it makes you very uncomfortable or seems unrelated to your employer's business interests, then you might be within your rights to cry foul. For example, an employer who inquires into your sex life or your religious or political beliefs probably crosses the line, while an employer who tests only for necessary job skills is probably on safe ground.

Regardless of whether the test would otherwise be reasonable, it will be illegal if it unfairly screens out disabled workers who could do the job with a reasonable accommodation. That would violate the federal Americans with Disabilities Act (ADA) and similar state laws that protect against disability discrimination.

Specific rules apply to the following types of tests:

Medical Examinations

Once an employee is on the job, an employer's right to conduct a medical examination is usually limited to so-called "fitness for duty" situations. If an employee exhibits objective indications that he or she is physically or mentally unfit to perform the essential functions of the job (for example, by claiming an injury which makes working impossible), an employer may request that the employee's fitness for the job be evaluated by a medical examiner. Although the medical examiner can take a full history of the employee and conduct necessary tests to evaluate the employee's fitness, the employer is not generally entitled to all of this information -- only to the examiner's conclusions about whether the employee can work. Many states also impose strict limits on the information a doctor may disclose to an employer or an insurance company without the worker's consent.

The ADA also requires certain privacy protections for the results of a medical examination. Data gathered in medical examinations must be kept in a separate personnel file available only to those with a demonstrable need to know, such as supervisors -- who may need information about the employee's work restrictions or reasonable accommodations -- and first aid and safety personnel (if the employee's disability might require emergency treatment).

Drug Tests

Although an employer can generally require job applicants to submit to drug testing, an employer's right to test current employees is less clear. No federal law specifically authorizes drug testing of employees, except for certain workers in the defense and transportation industries. Many state laws, however, *limit* the circumstances under which an employer may test for drugs and the types of tests an employer may conduct.

If your employer wants to conduct a drug test, look into your state's law, because the rules vary from state to state. (Contact your state labor department for more information.) What is acceptable in one state may not be acceptable in another. That being said, your employer is most likely to be on sure legal footing if it limits testing to:

- workers whose jobs carry a high risk of injury to themselves or others (such as a pilot or a security guard who carries a gun)
- workers who have been involved in an accident that suggests the possibility of drug use (for example, a delivery driver who causes a collision by driving erratically)
- workers who are currently in or have completed a rehabilitation program, and

- workers whom a manager or supervisor reasonably suspects are using drugs (based on, for example, obvious signs of impairment such as slurred speech or glassy eyes).

Psychological Screening

Some employers use pencil-and-paper psychological tests to attempt to predict whether an employee will steal, fight, or engage in other negative conduct in the workplace. There are two problems with such tests. First, whether these tests actually predict an employee's future conduct is heavily disputed. Second, many of the test questions are highly personal and invade the employee's privacy. If you are asked to take one of these tests, you might have a good argument that there is no legitimate business reason for the test and that the test unreasonably invades your privacy.

Lie Detector Tests

A federal law, the Employee Polygraph Protection Act (29 U.S.C. § 2001), prohibits most private employers from requiring their workers to submit to lie detector tests, with one exception: An employer may require a worker it reasonably suspects of theft or embezzlement to take a polygraph test, if certain requirements are met. Aside from this limited exception, however, an employer may not require a current employee to take a lie detector test, use the results of any such test, or discipline or fire any employee who refuses to take one.

These materials are presented as a public service by the

Labor and Employment Section

of the

North Carolina Bar Association

and



These materials are intended to be an overview only and not a comprehensive discussion of all employee rights and responsibilities and do not constitute legal advice. They specifically do NOT include information on Employee Benefits, HIPPA or COBRA rights, or taxation issues. If in doubt, seek the advice of a licensed North Carolina attorney who concentrates in the area of Labor and Employment or Workers' Compensation.

Employment Law Glossary of Terms

1099 – A form which is issued by a company or individual and is forwarded to the IRS by the end of February to indicate total payments made to individuals other than Employees for the previous calendar year. It is not necessary to issue a 1099 for less than \$600 in total annual payments.

W-2 - A form which Employers issue and forward to the IRS by the end of January to indicate total payments and withholdings to each Employee for the previous calendar year.

Accommodations - A reasonable change in work duties, hours or the workplace for religious reasons or for reason of a handicapping condition. (Such as a wheelchair ramp to enter the building, accessible water fountains or workspace, or the right to wear a religiously required article.)

Arbitration - A hearing heard and decided by an "arbitrator," a private citizen (often a lawyer or retired judge) who is paid by one or both sides to listen to the evidence and witnesses. There is typically no appeal from an arbitration.

Arbitration Agreement - A contract between two parties which binds them to arbitration and usually forbids lawsuits between them. The agreement may also set out the proportion of the costs each will pay and the manner in which the arbitrator(s) is/are selected.

Charge of Discrimination- A document filed with the EEOC (see below) which claims that the employer or former employer discriminated illegally against the employee. There are deadlines for filing such a charge.

Compensatory, or "comp" time - The practice of offering employees time off from work in another work week, rather than overtime pay. That practice is generally illegal under federal law for private employers.

Concerted Activity - When 2 or more employees gather together or communicate with each other to protest working condition, pay or benefits or to bargain with the employer regarding those items.

Contract - Any agreement, orally or in writing, as to the responsibilities of each of two or more parties. A contract can be enforced.

Discrimination – More negative treatment by an employer with a certain minimum number of employees because of the employee's race, color, religion, sex (including pregnancy), national origin, disability, or age (age 40 or older), which impacts on job decisions, such as hiring, firing, promotions, training, wages and benefits.

EEOC – see **Equal Employment Opportunity Commission**

Employee – Generally an individual who is employed by a person, corporation or partnership, is paid on a salary or hourly basis, and has taxes withheld from his or her pay.

Employment At Will – The legal doctrine that states that an at-will employee can be fired at any time, for any reason (except for a few illegal reasons, such as discrimination) or may resign at any time for any reason.

Employment Security Commission (ESC or NCEC) – The agency in North Carolina responsible for paying unemployment compensation to Employees fired other than due to misconduct and for collecting unemployment taxes from Employers.

Equal Employment Opportunity Commission (EEOC) - The federal agency charged with investigating claims of discrimination or harassment of employees on the basis of their age, handicap, race, sex,

religion, or national origin. A charging party must file an EEOC Charge of Discrimination before he/she can file a lawsuit on those claims.

Exempt employee – An employee who is not covered by overtime laws and may work more than 40 hours a week without being paid time and one half for the hours over 40, usually an "administrative, executive, or professional" employee who is paid on a salary basis at least \$455 per week, and spends most of his time performing duties that require him to use discretion and independent judgment.

Fair Labor Standards Act (FLSA) – Law which defines who is entitled to overtime pay and who is exempt.

Family and Medical Leave Act (FMLA) – Law which guarantees "covered employee" of "covered employers" continued employment after up to 12 weeks leave for serious medical conditions or care for immediate family members with serious medical conditions or military injuries.

FICA – Social Security Taxes which are paid half by the employer and half by the employee, or paid entirely by self employed persons. The rate is 6.2 % each or 12.6% total of all wages paid up to a ceiling which for 2009 is \$106,800 a year.

FLSA- See **Fair Labor Standards Act**

FMLA - See **Family and Medical Leave Act**

Form 18 or 18B – An injured worker must file this form with the Industrial Commission within 2 years of a work-related accident, if the employer has not reported the injury or agreed to payment, to collect Workers' Compensation benefits.

Form 19 - Employer's report of a work place accident.

Form 61 - Employer's or Carrier's denial of Workers' Comp liability, which specifies the exact reason for the denial.

Form SS-8 – The IRS Form which is used to ask the Social Security Administration to determine whether a worker is an "employee" or an "independent contractor."

Good cause attributable to the employer – Under Unemployment law, a reason for quitting employment which includes such things as the employer's facility moving more than 50 miles, being transferred to a shift during which the employer knows one cannot get childcare, sexual harassment on the job, and other circumstances which the employer controls or could control. If an employee quits due to good cause attributable to the employer, they are not disqualified from unemployment benefits.

Harassment – Being singled out, ridiculed, propositioned, groped or subjected to offensive language or conduct because of one's race, color, religion, sex (including pregnancy), national origin, disability, or age (age 40 or older).

Independent Contractor – Generally, an individual or corporation who provides services to others under an agreement known as a contract, which may be oral or written, and who usually does not have taxes withheld from the payments made by the entity for who services are provided.

Lawsuit – A dispute which is actually filed in state or federal court. A demand letter, an EEOC charge, or other dispute is not a lawsuit until it is filed in a court.

Mediation - A negotiation with a neutral party paid by both sides who attempts to assist the parties in resolving their dispute voluntarily.

Medicare Tax – Taxes to fund Medicare are also half paid by the employer and half by the employee, or paid entirely by self employed persons. The rate is 1.45 % each or 2.9% total of all wages paid.

Minimum wage – The minimum wage allowed to be paid to most employees for each hour worked, except for tipped employees. Federal \$7.25 per hour (as of July 24, 2009).

Misconduct – Under Unemployment law, a serious disciplinary infraction such as stealing, insubordination, sleeping on the job, fighting, or violating some other work rule which is known to be a cause for termination or about which one has previously been warned could cause termination. Misconduct may disqualify an employee from unemployment benefits for up to two years.

NC Department of Labor - The state agency which is responsible for, among other things, investigating unpaid wage claims, investigating REDA (Retaliatory Employment Discrimination ACT claims), and investigating and inspecting for OSHA (Occupational Health and Safety Act) violations.

NCESC - See **Employment Security Commission**.

NC Industrial Commission – The state agency which handles Workers' Compensation claims.

Non-Compete Agreement – An agreement by an employee not to enter into competition with his employer, either during his employment, or for a certain time after his employment ends.

Non-Exempt Employee - One who must be paid for all hours over 40 in a single work week, or over 85 in 2 weeks for certain emergency personnel, at a rate of time and a half.

Occupational Health and Safety Act (OSHA) – State and federal laws that govern workplace safety.

“Off the Clock” – It is illegal to order an hourly employee to work unrecorded and uncompensated hours or to suffer or permit them to work such hours.

Retaliation – It is illegal for an employer to fire or discipline an employee due to that employee having made any complaint about discrimination, filed a charge of discrimination, filed a worker's compensation claim, made a Wage and Hour or OSHA complaint, engaged in concerted activity, testified in an ESC hearing or EEOC investigation, or engaged in other protected activity.

Retaliatory Employment Discrimination Act (REDA) – NC law which forbids retaliation because an employee filed (or threatened to file) a worker's compensation claim, made a complaint under state wage payment law, made or threatened to make an OSHA complaint, or made a legal complaint about domestic abuse under NC General Statutes Chapter 50B.

Substantial fault – As a reason for termination under NC Unemployment law, a lesser act than “misconduct,” such as repeated absenteeism or tardiness, which the employee could have prevented but failed to do so. Substantial fault can result in the forfeiture of 4 to 13 weeks of unemployment benefits.

Sue – To sue is to file a lawsuit.

Unemployment Benefits - Benefits which are paid for a specified length of time to employees who were terminated not due to misconduct or who quit due to causes attributable to the employer if certain work requirements are met and the employee is ready willing and able to accept employment and is actively looking for employment.

Workers' Compensation or Workers' Comp- A legal system that protects the rights of workers who become injured while on the job. Each state has its own set of workers' compensation laws detailing the specific benefits to which an injured person may be entitled. This set of laws also details the procedures a worker must follow in order to obtain worker's comp benefits (medical care, pay in lieu of wages, etc.).