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EMPLOYMENT LAW & BENEFIT UPDATE

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Employee Fair Classification Act ("EFCA")

- Employee classification refers to whether persons are treated as employees or independent contractors
- Unlike with independent contractors, employers pay employees overtime, pay into funds for unemployment and Social Security benefits, withhold taxes on employee compensation, and provide workers compensation insurance coverage
- The Departments of Labor (State and Federal), Division of Employment Security, Departments of Revenue (State and Federal), and Industrial Commission all administer laws that apply to employees, but not independent contractors
- Definition of "employee" differs somewhat for purposes of the pertinent laws

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EFCA (cont.)

- Previously, an audit and finding of violation by one agency did not necessarily lead to or involve any of the other agencies
- EFCA changes that by formally creating the Employee Classification Section within Industrial Commission (initially created by executive order from then Governor McCrory, December 18, 2015)
- Law approved August 11, 2017, will be effective December 31, 2017
- Classification Section includes employees from the Department of Revenue, the Department of Labor, the Industrial Commission, and Division of Employment Security

Classification Section, responsible for

- Creating a "publicly available notice that includes a definition of employee misclassification"
- Receiving and investigating reports of misclassification
- Disclosing reports and investigations to all relevant State agencies
- Coordinating prosecutions
- Sharing information with federal agencies (discretionary)

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EFCA (cont.)

- "Employee Misclassification" –Avoiding tax liabilities and other obligations imposed by General Statutes Chapters 95 (wage & hour), 96 (unemployment benefits), 97 (workers compensation), 105 (taxation), and 143 (occupational licensing boards) by misclassifying an employee as an independent contractor
- 95-25.2(4): "Employee" includes any individual employed by an employer
- 97-2(2): "every person engaged in an employment", but not employment that is both casual and not in the course of the business of the employer . . .
- 96-1(b)(10) and 105-163.1(4) both refer to sections that have been repealed, but presumably mean as defined in IRS code

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EFCA (cont.)

- Applicants to licensing boards, including renewals must
  - Certify that applicant has read and understood the public notice statement
  - Disclose any investigations for employee misclassification and results of investigations
  - Licensing Board shall deny license of any applicant who fails to comply with certification and disclosure requirements

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EFCA (cont.)

- As a practical matter, distinction will probably follow usual analysis ("quack like, walk like, look like . . ."
- Economic reality? Employer control over time and methods? Other employers? Own tools? Compensation for given task?

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EFCA (cont.)

- Poster by December 17, 2017:
  - Worker (as defined by the statutes) shall be treated as an employee unless the individual is an independent contractor
  - Employees may report belief of misclassification to Employee Classification Section
  - Location, mailing address, telephone number and e-mail address for Employee Classification Section

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EFCA (cont.)

- Take away – misclassification will be MUCH more expensive in the future

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ASSESSMENTS FOR FAILURE TO MAINTAIN WORKERS COMPENSATION INSURANCE COVERAGE

- NC Workers' Compensation Act requires persons or entities employing 3 or more persons to maintain workers' compensation insurance or qualify as self-insurers.
- Some exceptions, listed Industrial Commission ("IC") website (http://www.ic.nc.gov/wcinsrqmt.html), like casual employees, not in usual course and scope of business; domestic workers employed directly by household; farm laborers if fewer than full time non-seasonal

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ASSESSMENTS (cont.)

- Statute requires employers to file proof of coverage with IC
- Employers who fail to maintain coverage are liable to injured employees for benefits which would have been provided by workers' compensation insurance
- Failure to secure payment or obtain coverage is a Class 1 misdemeanor; Willful failure to secure payment or obtain coverage is a class H felony
- Additionally, failure to maintain coverage subjects employer to a penalty of not less than $50 and not more than $100 for each day during which employer did not maintain coverage
- IC takes position based on case law that no statute of limitations

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ASSESSMENTS (cont.)

- Previously failure to maintain coverage usually became an issue only when an employee was injured.
- However, recently the IC has begun using a new database known as Noncompliant Employer Tracking System ("NETS"), which combines data from multiple agencies (like Quarterly Tax and Wage reports and coverage filings with the IC) to identify employers with 3 or more employees and no coverage

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ASSESSMENTS (cont.)

- When IC issues notices of penalty assessments, employers have 30 days to request a hearing
- IC has discretion to lessen penalty or accept installment payments, provided employer obtains coverage and pays any compensation due to injured employees

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ASSESSMENTS (cont.)

- Requests to lessen penalty are considered on a case by case basis
- Any request based on financial hardship must be accompanied by tax and banking records
- No set formulas –IC considers premium that employer saved by not having coverage and ability to pay
- IC has become more and more strict in providing relief

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NEW I-9 FORM

- As of September 18, 2017, all employers must use the updated Form I-9, with revision date of 07/01/2017.
- Form is available on US Citizenship and Immigration Services website: https://www.uscis.gov/i-9
- Detailed handbook for Employers: https://www.uscis.gov/i-9-central/handbook-employers-m-274

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EMPLOYMENT SECURITY HEARING OFFICER INTERPRETATION OF "MISCONDUCT"

- Statutory definition:
- (b) Misconduct.--Misconduct connected with the work is either of the following:
- (1) Conduct evincing a willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee.
- (2) Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

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MISCONDUCT (cont.)

- Examples:
  - Drug related offenses
  - Violence
  - Hostile work environment (due to federally protected category)
  - Theft
  - Falsification of employment documents
  - "Violation of an employer's written absenteeism policy"
  - "Refusal to perform reasonably assigned work tasks or failure to adequately perform employment duties as evidenced by no fewer than three reprimands in the 12 months immediately preceding the employee's termination"

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RECURRING FMLA AND ADA LEAVE ISSUES

- Family Medical Leave Act ("FMLA") – applies to employers with 50 or more employees
- Provides 12 weeks unpaid leave to eligible employees (employed at least one year and worked 1250 hours during the preceding year)
- Americans with Disabilities Act ("ADA") – applies to employers with 15 or more employees
- Requires reasonable accommodation for qualified employees with disabilities (must be able to perform the essential functions of the job, with or without reasonable accommodation)

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FMLA/ADA (cont.)

- FMLA – best practice is to designate any leave in excess of three days as FMLA leave
- Under FMLA, not a violation to terminate an employee if the employee does not return to work after expiration of the leave
- However, even if permissible to terminate under FMLA, may be a violation of ADA to do so.

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FMLA/ADA (cont.)

- Prior to personnel action, ADA requires interactive discussion with employee on what if any accommodation would allow the employee to perform the essential functions of the job
- Not reasonable if create an "undue hardship" or "direct threat"
- Reasonableness of accommodation varies cases to case

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FMLA/ADA (cont.)

- Even if employee not able to return at end of 12 weeks, additional leave may be reasonable depending on circumstances and when employee can return and what if any restrictions
- Regardless of the decision, essential to be able to demonstrate went through the process

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MEDICAL PLAN OPTIONS FOR SMALL COMPANIES

- Trends
- Traditional group insurance alternatives
- High deductible health plans/health savings accounts
- Health FSAs
- Qualified Small Employer Health Reimbursement Arrangement (QSEHRA)

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TRENDS

- Group health insurance rates have increased 5%/yr on average last 5 years.
  - Radical differences in individual experiences.
  - C&R rates increased 9%, 14%, 4%, 5%, 0% last 5 years (36% increase).
  - Unlike individual plans on Obamacare exchange, rate of group plan premium increases has decreased last few years.

TRENDS

- Relatively low rate of increases partly due to increases in deductibles/co-pay/co-insurance requirements and switch to high deductible health plans with HSAs.
  - Average single deductible went from $991 to $1,478 over 5 years.
  - HSA/high deductible plans went from 17% of covered workers to 30%.
- Small employers (10-49 employees) sponsorship of group plans dropped from 74% to 66%.
  - Large employers (50 or more FTE) are required to offer group coverage under Obamacare or pay penalty.

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TRADITIONAL GROUP PLAN ALTERNATIVES

- Preferred provider group plans
- Professional employer organization (PEO)/private exchanges
- Trade association plans (MEWAs)
- Self-funded plans with stop loss coverage
- High deductible health plans (HDHP) with health savings accounts (HSA)
- For many, costs are becoming prohibitive, resulting in trend toward consumer-driven health care (passing larger share of cost to employee)

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HDHP/HSA PLANS

- A "high deductible health plan" must meet 3 basic requirements:
  - Minimum annual deductible – for 2018, $1,350 for self-only coverage and $2,700 for family coverage.
  - Maximum annual out-of-pocket limit – for 2018, $6,650 for self-only coverage and $13,300 for family coverage.
  - Other than preventive care, must meet annual deductible before receiving insurance benefits.
    - No co-pays for prescription drugs
    - No co-pays for office visits for illness/injury

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HDHP/HSA PLANS

- Health savings accounts are only available to participants who:
  - Are covered by HDHP
  - Have no other medical coverage (including health FSAs)
  - Are not enrolled in Medicare
  - Are not claimed as dependents
- Established at banks or other qualifying financial institutions.

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HDHP/HSA PLANS

- HSAs are super-charged IRAs for paying uncovered medical costs.
  - Pre-tax or tax deductible contributions by employee; non-taxable contributions by employer.
  - Tax-free accumulation of earnings inside account.
  - Tax-free distributions for qualified medical expenses.

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HDHP/HSA PLANS

- For 2018, total employee/employer contributions limited to $3,450 for self-only coverage or $6,900 for family coverage.
  - Employees 55 or over get additional $1,000 catch up contribution.
- Unused contributions and earnings rollover year-to-year – no “use it or lose it” rule.
- Portable – available for future medical expenses even if join new group insurance plan or no longer have group plan.

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HDHP/HSA PLANS

- Disadvantages of HSAs:
  - Another layer of administration for employer.
  - Healthy employees may feel like they have no insurance under HDHP due to deductible requirements and lack of co-pays.
  - Possible reluctance to seek healthcare.
  - Distributions for other than qualifying medical expenses prior to age 65 subject to income tax and 20% penalty tax.
    - Distributions after 65 subject to income tax only.
  - Can’t be used for health insurance premiums except:
    - COBRA
    - Medicare premiums

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OPTIONS FOR SMALL EMPLOYERS WITHOUT HEALTH PLANS

- Two options for tax advantaged assistance with healthcare for employees:
  - Health FSA
  - Health Reimbursement Arrangement under 21st Century Cures Act (enacted late 2016)

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HEALTH FSA

- Health flexible spending account is not dependent on existence of HDHP.
- Typically created as part of Section 125 cafeteria plan, but may be fully employer funded instead.
- Contributions are pre-tax and payments for qualifying health expenses are tax-free.
- For 2018, employee contributions limited to $2,650.
- Employer contributions limited to greater of (a) 2 times employee's contribution, or (b) employee's contribution plus $500 (see IRS Notice 2013-54).
- Unlike HSAs, accounts are employer-owned - journal account administered by employer or servicing company.

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HEALTH FSA

- Monthly employee deferrals can't be changed except under special circumstances.
- Subject to "use it or lose it".
- Subject to forfeiture upon employment termination.
- Withdrawals not allowed for other than qualifying health expenses.
- Can't be used to pay insurance premiums.
- Participation in health FSA renders employee ineligible for HSA (if any).
- Self-employed persons ineligible for FSA.

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QUALIFIED SMALL EMPLOYER HEALTH REIMBURSEMENT ARRANGEMENTS

- Background:
  - Rev. Rul. 61-146 recognized "employee payment plans" and "health reimbursement arrangements" under which employer paid or reimbursed employees for individual health insurance premiums.
    - Such payments are deductible by employer and excludable by employee under Sec. 106.
  - In IRS Notice 2013-54, IRS stated that such plans would be group plans, non-compliant with the ACA.
  - IRS Notice 2015-17 provided penalty relief until July 1, 2015.

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QUALIFIED SMALL EMPLOYER HEALTH REIMBURSEMENT ARRANGEMENTS

- 21st Century Cures Act (12/13/16) extended relief to 12/31/16 and enacted new QSEHRA effective 1/1/17.
- IRS Notice 2017-67 (released 11/17) provides extensive guidance on QSEHRAs.
- Executive Order 13813 (10/17/17) instructed IRS and HHS to consider revising guidance to increase usability of HRAs, expand their availability, and allow them to be used with non-group coverage.
- Regardless of what happens with ACA, many small employers will be headed in this direction.

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REQUIREMENTS FOR QSMHRA

- Employer has fewer than 50 full-time employees.
- Employer does not maintain group health plan.
- Funded solely by employer contributions (i.e., no salary reduction contributions).
- Employee must provide proof of coverage under ACA-compliant policy.
- Plan may pay or reimburse medical expenses of employee or family member, including insurance premiums.
- Payments limited to $4,950/yr self-only coverage or $10,050/yr family coverage ($5,050/$10,250 for 2018).
- Plan must be provided on same terms to all employees, with exceptions.

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ELIGIBLE EMPLOYER

- Fewer than 50 full-time employees (including full-time equivalents).
- Cannot offer group health plan, including HSA or FSA.
- Controlled and affiliated service groups under Sec. 414 treated as 1 employer.
- Employer that reaches 50 full-time employees in year is ineligible starting 1st day of next year.

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ELIGIBLE EMPLOYEE

- Every employee age 25 or more who has at least 90 days of service must be eligible except part-time or seasonal employees.
- "Part-time" = less than 35 hrs per week if others work substantially more (25 hr/wk safe harbor).
- "Seasonal" = 9 months or less per year if others work substantially more (7 mo/yr safe harbor).
- Employee switching to full-time must have immediate eligibility.

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SAME TERMS REQUIREMENT

- Generally, each employee must be eligible for same dollar amount of reimbursement.
- But, reimbursement amount may vary based on age or number of family members covered in accordance with price of insurance policy in relevant market (more guidance needed).
- Ex. QSEHRA provides $4,950 self-only benefit and $10,050 family benefit for 2017.
  - Curly buys self-only policy with annual premium of $3,450 and is reimbursed $3,450.
  - Larry buys family policy with premium of $9,000 and is reimbursed $9,000.
  - Moe buys self-only policy with $6,000 premium and is reimbursed $4,950.
  - Arrangement qualifies (Notice 2017-67, Q&A 12).

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SAME TERMS REQUIREMENT

- Plan design may provide single dollar limit of reimbursement regardless of whether employee elects self-only or family coverage.
- Plan may limit reimbursement to policy premiums and not reimburse other medical expenses, or may pay both.
- Plan may allow unused benefit at year-end to carry over but total benefit (including carry over) in next year cannot exceed statutory limit.
- Reimbursement amount for new employee starting mid-year must be prorated.
- OK if employee terminates mid-year after being reimbursed more than pro rata share.

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REIMBURSABLE EXPENSES

- Expenses for medical care (including health insurance premiums) as defined in Sec. 213(d) are reimbursable to extent allowed by plan.
- Plan may reimburse health insurance premiums for a family member's policy, including a spouse's group policy.
  - Payments are taxable to extent spouse's premium payment was pre-tax.
- Plan may reimburse ratably month-by-month, rather than anytime.
- Plan may include post-year run out period for expenses incurred in year.

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WRITTEN NOTICE REQUIREMENT

- Employer must give QSEHRA notice to employees at least 90 days before each plan year.
  - New employees must get notice on first day of participation.
- Transition rule: For 2017 and 2018, must give notice by later of Feb 19, 2018 or 90 days before first plan year.
- Notice must contain:
  - Existence of plan and amount of benefit (including how proration works for new participants).
  - Statement that benefits may affect ACA premium tax credit and that employee must notify ACA marketplace if requesting advance payments.
  - Statement that benefit will be taxed if employee lets ACA coverage lapse.
  - Sample notice contained in Notice 2017-67, Q&A 38.

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OTHER REQUIREMENTS

- Employee must provide proof of ACA-compliant policy annually prior to any reimbursements (see Notice 2017-67, Q&A 41).
- Employee must attest that he/she continues to have ACA-compliant policy at time of each reimbursement request.
- Employee must substantiate that medical expenses qualify at time of each reimbursement request in accordance with FSA rules.
  - Employer/employee have until March 15 of following year to correct improper disbursements either by supplying substantiation or repaying non-qualifying expense.
- Employers must report QSEHRA reimbursements on W-2's.

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QSEHRA CONCLUSIONS

- More and more employers will be looking to convert to HRAs for employee health insurance premiums in the future.
- Executive Order 13813 promotes HRAs and encourages their expansion.
- Repeal of ACA arguably would revive other Rev. Rul. 61-146 HRA structures and make many QSEHRA requirements moot.
- Repeal should not invalidate QSEHRAs and plan document could be easily modified to reflect post-repeal rules.

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2017 North Carolina Laws S.L. 2017-203 (S.B. 407)

NORTH CAROLINA 2017 SESSION LAWS

2017 GENERAL ASSEMBLY FIRST SESSION

Additions are indicated by **Text**; deletions by ~~Text~~.
Vetoes are indicated by **~~Text~~**;
stricken material by **~~Text~~**.

S.L. 2017–203
S.B. No. 407
EMPLOYEE FAIR CLASSIFICATION ACT

AN ACT TO ENACT THE EMPLOYEE FAIR CLASSIFICATION ACT, TO REQUIRE THE INDUSTRIAL COMMISSION TO IMPLEMENT RULES RELATED TO OPIOIDS AND PAIN MANAGEMENT, TO REMOVE THE REQUIREMENT THAT THE INDUSTRIAL COMMISSION STUDY CAUSES OF INJURY AND RECOMMEND WAYS TO PREVENT INJURIES, AND TO DELAY THE EFFECTIVE DATE FOR A REQUIREMENT THAT EMPLOYERS RESPOND TO UNEMPLOYMENT INSURANCE CLAIMS IN TEN DAYS.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 143 of the General Statutes is amended by adding a new Article to read:

Ch. 143 Art. 82 pr. § 143–761

Article 82.

Employee Fair Classification Act.

<< NC ST § 143–761 >>

§ 143–761. Title
This Article shall be known and may be cited as the "Employee Fair Classification Act."

<< NC ST § 143–762 >>

§ 143–762. Definitions; scope
(a) The following definitions apply in this Article:
(1) Chairman.—The Chairman of the Industrial Commission.

(2) Employ.—As defined by G.S. 95–25.2(3). For the purposes of this Article, an entity or individual shall not be

deemed to be an employer of an individual hired or otherwise engaged by or through the entity or individual's independent contractor.

(3) Employee.—Any individual that is defined as an employee by either G.S. 95–25.2(4), 96–1(b)(10), 97–2(2), or 105–163.1(4). The term does not mean an individual who is an independent contractor.

(4) Employee Classification Section or Section.—The Employee Classification Section within the Industrial Commission.

(5) Employee misclassification.—Avoiding tax liabilities and other obligations imposed by Chapter 95, 96, 97, 105, or 143 of the General Statutes by misclassifying an employee as an independent contractor.

(6) Employer.—Any individual or entity that employs one or more employees as defined by G.S. 97–2(3).

(7) Public notice statement.—Notice as set forth in G.S. 143–764(a)(5).

(b) Nothing in this Article shall be construed or is intended to change the definition of "employer" or "employee" under any other provision of law.

<< NC ST § 143–763 >>

§ 143–763. Establishment of Employee Classification Section

(a) The Employee Classification Section is established within the Industrial Commission.

(b) The Chairman shall appoint a director of the Section to serve at the Chairman's pleasure with such authority as the Chairman deems necessary to direct and oversee the Section in carrying out the purposes of this Article.

(c) The Chairman may employ clerical staff, investigators, and other staff within the Section as is necessary for the Section to perform its duties under this Article.

(d) The Office of the State Chief Information Officer shall ensure that the Section is provided with all necessary access to the Government Data Analytics Center and all other information technology services.

(e) The Secretary of Revenue, the Commissioner of Labor, the Chairman, and the Assistant Secretary of Commerce for the Division of Employment Security shall each designate an employee of their respective agencies to serve as liaisons to the Section.

<< NC ST § 143–764 >>

§ 143–764. Section powers and duties

(a) The Section shall have the following duties:

(1) Be available during business hours to receive reports of employee misclassification by telephonic, written, or electronic communication.

(2) Investigate reports of employee misclassification and coordinate with and assist all relevant State agencies in recovering any back taxes, wages, benefits, penalties, or other monies owed as a result of an employer engaging in employee misclassification.

(3) Coordinate with relevant State agencies and district attorneys' offices in the prosecution of employers and individuals who fail to pay civil assessments or penalties assessed as a result of the employer's or individual's involvement in employee misclassification.

(4) Provide all relevant information pertaining to each instance of reported employee misclassification to the North Carolina Department of Labor, the Division of Employment Security within the North Carolina Department of Commerce, the North Carolina Department of Revenue, and the North Carolina Industrial Commission to facilitate investigation of potential violations of Chapter 95, 96, 97, 105, or 143 of the General Statutes.

(5) Create a publicly available notice that includes the definition of employee misclassification.

(6) Develop methods and strategies for information sharing between State agencies in order to proactively identify possible instances of employee misclassification.

(7) Develop methods and strategies to educate employers, employees, and the public about proper classification of employees and the prevention of employee misclassification.

(b) No later than October 1 of each year, the Section shall publish annually to the Office of the Governor and to the Joint Legislative Commission on Governmental Operations a report of the administration of this Article, together with any recommendations as the Section deems advisable. This report shall include, at a minimum, the number of reports of employee misclassification received, the number and amount of back taxes, wages, benefits, penalties, or other monies assessed, the amount of back taxes, wages, benefits, penalties, or other monies collected, and the number of cases referred to each State agency.

(c) The Section may adopt rules in accordance with Article 2A of Chapter 150B of the General Statutes for the purpose of carrying out the provisions of this Article and establishing the processes and procedures to be used under this Article.

<< NC ST § 143–765 >>

§ 143–765. Occupational licensing boards and commissions; notice requirement; applicant certification and disclosure
(a) Every State occupational licensing board or commission that is authorized to issue any license, permit, or certification shall include on every application for licensure, permit, or certification, or application for renewal of the same, the following:
(1) Certification by the applicant that the applicant has read and understands the public notice statement.

(2) Disclosure by the applicant of any investigations for employee misclassification and the result of the investigations for a time period determined by the occupational licensing board or commission.

(b) An occupational licensing board or commission shall deny the license, permit, or certification application of any applicant who fails to comply with the certification and disclosure requirements of this section.

<< NC ST § 143–766 >>

§ 143–766. Confidentiality; access to records
(a) The records of the Section are not public records under G.S. 132–1.

(b) The Section shall exchange information as required by this Article.

(c) The Section may share information with other State and federal agencies as permitted or required by law.

<< NC ST § 143–767 >>

§ 143–767. Exchange of information among coordinating agencies

The North Carolina Department of Revenue, the North Carolina Department of Labor, the Division of Employment Security within the North Carolina Department of Commerce, and the North Carolina Industrial Commission shall disclose all reports and investigations of employee misclassification to the Section. The Section shall distribute the information to the other agencies to allow each agency to conduct an investigation.

SECTION 2. G.S. 105–259(b) is amended by adding a new subdivision to read:

<< NC ST § 105–259 >>

(53) To furnish to the North Carolina Department of Labor, the Division of Employment Security within the North Carolina Department of Commerce, the North Carolina Industrial Commission, and the Employee Classification Section within the Industrial Commission employee misclassification information pursuant to Article 82 of Chapter 143 of the General Statutes.

SECTION 3. G.S. 95–25.15(c) reads as rewritten:

<< NC ST § 95–25.15 >>

(c) A poster summarizing the major provisions of this Article shall be displayed in every establishment subject to this Article. **This poster shall also include notice indicating the following in plain language:**

(1) Any worker who is defined as an employee by either G.S. 95–25.2(4), 143–762(a)(3), 96–1(b)(10), 97–2(2), or 105–163.1(4) shall be treated as an employee unless the individual is an independent contractor.

(2) Any employee who believes that the employee has been misclassified as an independent contractor by the employee's employer may report the suspected misclassification to the Employee Classification Section within the Industrial Commission.

(3) The physical location, mailing address, telephone number, and e-mail address where alleged incidents of employee misclassification occurred may be reported to the Employee Classification Section within the Industrial Commission.

SECTION 4.(a) The Industrial Commission shall adopt rules and guidelines, consistent with G.S. 97–25.4, for the utilization of opioids, related prescriptions, and pain management treatment.

SECTION 4.(b) The Industrial Commission is exempt from the fiscal note requirement of G.S. 150B–21.4 in developing and implementing the rules and guidelines for opioids, related prescriptions, and pain management treatment.

<< NC ST § 97–81 >>

SECTION 5. G.S. 97–81(c) is repealed.

SECTION 6. Section 3.2(b) of S.L. 2017–8 reads as rewritten:

SECTION 3.2.(b) This section becomes effective ~~October 1, 2017,~~ **July 1, 2018,** applies to claims for benefits filed on or after that date, and applies to tax calculations on or after that date.

SECTION 7. Sections 1, 2, and 3 of this act become effective December 31, 2017. The remainder of this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 3rd day of August, 2017.

Approved 2:20 p.m. this 11th day of August, 2017

End of Document

West's North Carolina General Statutes Annotated
Chapter 96. Employment Security (Refs & Annos)
Article 2c. Benefits Payable for Unemployment Compensation

N.C.G.S.A. § 96-14.6

§ 96-14.6. Disqualification for misconduct

Effective: July 1, 2013

Currentness

(a) Disqualification.--An individual who the Division determines is unemployed for misconduct connected with the work is disqualified for benefits. The period of disqualification begins with the first day of the first week the individual files a claim for benefits after the misconduct occurs.

(b) Misconduct.--Misconduct connected with the work is either of the following:

(1) Conduct evincing a willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee.

(2) Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

(c) Examples.--The following examples are prima facie evidence of misconduct that may be rebutted by the individual making a claim for benefits:

(1) Violation of the employer's written alcohol or illegal drug policy.

(2) Reporting to work significantly impaired by alcohol or illegal drugs.

(3) Consumption of alcohol or illegal drugs on the employer's premises.

(4) Conviction by a court of competent jurisdiction for manufacturing, selling, or distributing a controlled substance

punishable under G.S. 90-95(a)(1) or G.S. 90-95(a)(2) if the offense is related to or connected with an employee's work for the employer or is in violation of a reasonable work rule or policy.

(5) Termination or suspension from employment after arrest or conviction for an offense involving violence, sex crimes, or illegal drugs if the offense is related to or connected with the employee's work for an employer or is in violation of a reasonable work rule or policy.

(6) Any physical violence whatsoever related to the employee's work for an employer, including physical violence directed at supervisors, subordinates, coworkers, vendors, customers, or the general public.

(7) Inappropriate comments or behavior toward supervisors, subordinates, coworkers, vendors, customers, or to the general public relating to any federally protected characteristic that creates a hostile work environment.

(8) Theft in connection with the employment.

(9) Forging or falsifying any document or data related to employment, including a previously submitted application for employment.

(10) Violation of an employer's written absenteeism policy.

(11) Refusal to perform reasonably assigned work tasks or failure to adequately perform employment duties as evidenced by no fewer than three written reprimands in the 12 months immediately preceding the employee's termination.

Credits

Added by S.L. 2013-2, § 5, eff. July 1, 2013.

Independent Contractor vs. Employee +

Independent Contractor vs. Employee

This fact sheet provides general information concerning the meaning of "employment relationship" and the significance of that determination in applying provisions of the Fair Labor Standards Act and Wage and Hour Act.

Characteristics:

An employment relationship under the FLSA/WHA must be distinguished from a strictly contractual one. Such a relationship must exist for any provision of the FLSA/WHA to apply to any person engaged in work which may otherwise be subject to the FLSA/WHA. In the application of the FLSA/WHA, an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he/she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant.

The U. S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.

- The amount of the alleged contractor's investment in facilities and equipment.
- The nature and degree of control by the principal.
- The alleged contractor's opportunities for profit and loss.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- The degree of independent business organization and operation.

There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.

If you believe that you are being missclassfied, please contact the Office of Employee Classification, via email: emp.classification@ic.nc.gov (mailto:emp.classification@ic.nc.gov), telephone: 919-807-2582 or fax: 919-715-0282.

Requirements:

When it has been determined that an employer-employee relationship does exist, and the employee is engaged in work that is subject to the FLSA/WHA, it is required that the employee be paid at least the minimum wage, which is currently $7.25 an hour, and time and one-half his/her regular rate of pay for all

hours worked in excess of 40 per week. The Act also has child labor provisions which regulate the employment of minors under the age of eighteen (youth employment under the WHA), as well as record keeping requirements. The WHA also has wage payment provisions.

Typical Problems:

- One of the most common problems is in the construction industry where contractors hire so-called independent contractors, who in reality should be considered employees because they do not meet the tests for independence, as stated above.
- Franchise arrangements can pose problems in this area as well. Depending on the level of control the franchisor has over the franchisee, employees of the latter may be considered to be employed by the franchisor.
- A situation involving a person volunteering his or her services for another may also result in an employment relationship. For example, a person who is an employee cannot "volunteer" his/her services to the employer to perform the same type service performed as an employee. Of course, individuals may volunteer or donate their services to religious, public service, and non-profit organizations, without contemplation of pay, and not be considered employees of such organization.
- Trainees or students may also be employees, depending on the circumstances of their activities for the employer.
- People who perform work at their own home are often improperly considered as independent contractors. The Act covers such homeworkers as employees and they are entitled to all benefits of the law.