

TENNESSEE

Law and Practice

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1. Current Socio-Economic, Political, and Legal Climate; Context Matters

1.1 The Impact of COVID-19 on the Workplace

It is not clear whether the COVID-19 pandemic will have any lasting effect on the workplace once the risks presented by the pandemic no longer exist. Temporarily, there have been many changes, including most notably a dramatic increase in remote work. Either in reaction to the virus, or because the virus provided an opportunity that had not existed earlier, many other changes have been brought to bear on the workplace of almost every employee in Tennessee.

The changes have come from all levels of government, federal, state and municipal. The US Congress has enacted several pieces of emergency legislation intended to blunt the negative impact of the virus on the economy, including paid leave for employees who must miss work for reasons related to COVID-19. Federal agencies, in applying both new and pre-existing legislation, have issued and then modified regulatory and interpretive guidance.

State and Local Measures

On the state level, Tennessee was one of the first states to begin reopening in late April after Governor Bill Lee previously issued a safer-at-home order that resulted in the closing of many businesses. Governor Lee has since maintained that he will resist shutting down the economy again.

On a local level, certain municipalities, such as Nashville and Memphis, have issued edicts that address issues such as:

- the mandatory wearing of masks;
- limits on the number of persons that may assemble in both private and public places; and
- the temporary mandatory closure of certain types of businesses.

The specific restrictions imposed vary from municipality to municipality, requiring employers to be cognizant of a variety of local restrictions.

1.2 “Black Lives Matter,” “Me Too,” and Other Movements

There is nothing specific about Tennessee law that makes the “Me Too” movement more or less relevant in Tennessee than in other states. Likewise, the “Black Lives Matter” movement is not impacted one way or another by specific Tennessee laws. That being said, Tennessee employers are wise to pay extra attention to their workplace equal employment opportunity policies and focus on diversity in the recruitment, hiring and retention of qualified minority employees.

Tennessee’s general anti-discrimination statute, the Tennessee Human Rights Act (Tennessee Code Annotated (TCA) Sections 4-21-401, et seq), prohibits discrimination based upon race and sex and thus provides the basis for claims of racial and sexual harassment. Further, there are various common law causes of action that can be asserted in Tennessee by victims of racial or sexual harassment, including intentional infliction of emotional distress, negligent infliction of emotional distress, negligent hiring, negligent supervision, negligent retention and assault and battery.

1.3 “Gig” Economy and Other Technological Advances

Before the COVID-19 pandemic began negatively impacting the work and business environment in the state, Tennessee was generally considered a business-friendly state. A return to such an environment in relatively short order is anticipated. There is no state income tax and, as discussed later in this guide, it is also a “right to work” state.

Politically, on both federal and state levels, Tennessee is a majority conservative state. However, there are large pockets that are more liberal, especially in Nashville and Memphis. These municipalities reacted differently to the pandemic than did many other areas in Tennessee, imposing more restrictions on individuals and businesses.

Sometimes the conflicting philosophies between the state and the two largest municipalities in Tennessee create friction between the state government and those municipal governments. In the past, these have generally been worked out in a manner that protects the historically positive business environment in Tennessee. It is expected that this will continue, and that current conflicts will be worked out as the impact of the pandemic lessens.

Impact of the Pandemic

One positive that is being highlighted during the pandemic is Tennessee’s relatively large technology-based business sector, especially the automotive and healthcare industries. Technological advancements and the prevalence of social media have also positively impacted individual Tennesseans. The growth of technology-based service businesses has led to an influx of new residents as the endemic population has not been able to fully support the increased need for technologically savvy employees.

Also, more employees were already working from home before the pandemic hit. To a large extent, this meant that many employers were better able to react to the temporary restrictions and burdens the pandemic gave rise to in the state.

1.4 Decline in Union Membership?

Tennessee is a right-to-work state, meaning that an employee does not have to be a union member or join a union in order to obtain or retain employment. The shutdown of many companies during the COVID-19 pandemic certainly would have stunted any active union organizing campaigns given the stay at home orders across the state.

Tennessee continues to be employer-friendly and a pro-business state. Unions have not traditionally been able to establish a strong hold in southern states such as Tennessee. Particularly, despite repeated efforts unions have not been able to gain a strong foothold in Tennessee's robust automotive sector. While there are various union entities and members in existence in Tennessee, most notably in certain construction trades and service groups, union membership in Tennessee is below the national average of 6.4% in the private sector.

1.5 National Labor Relations Board

Tennessee does not have any state labor laws (other than being a right to work state) that parallel the National Labor Relations Act. The dynamics of the National Labor Relations Board, and thus the interpretation/application of the National Labor Relations Act, continue to swing as federal government administrations change and make their respective political appointments to the National Labor Relations Board. Tennessee is part of Region 10 with a local office in Nashville.

The current Board continues to issue employer-friendly decisions and recently issued several Board Advice opinions finding alleged concerted activity under the National Labor Relations Act not to be protected activity, in upholding employer disciplinary actions against employees expressing workplace concerns or union support. The impact of COVID-19 has not had a noticeable impact in Tennessee from a labor law/union perspective, but two of the Board Advice opinions noted above involved employee complaints about safety issues in working during the pandemic

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

The basic tenets of an employment relationship in Tennessee have not changed because of COVID-19. Workers generally may be classified as employees or independent contractors. Because the classification of workers impacts how they are treated under Tennessee common law and employment statutes, Tennessee employers must clearly define and understand the nature of their relationship with the individuals who work for them.

Employee Protections

Employers, of course, will need to comply with the existing and new federal laws when it comes to handling COVID-19 issues. These include the protections provided by the Family and Medical Leave Act (along with the related Families First Coronavirus Response Act) and the Americans with Disabilities Act. These laws generally apply to employees but not to independent contractors, increasing the importance of properly classifying workers who provide services to a business.

Employer Protections

Tennessee has also taken steps through the recent passage of legislation to provide employers with protections from lawsuits by employees and others for certain COVID-19 related claims. Governor Bill Lee signed the law into effect on August 17, 2020. The law is intended to protect businesses, schools and nursing homes against COVID-19 lawsuits.

Employees v Independent Contractors

The distinction between employees and independent contractors is critical because it dictates how individuals must be compensated, whether they are protected from certain employment practices or issues in the workplace (eg, discrimination, harassment, retaliation, etc) and whether they must receive certain employment benefits (eg, protected leave, mandatory meal breaks and workers' compensation benefits). Independent contractors are not protected by such laws.

An employment relationship typically exists if the employer controls the nature of the individual's work, ie, how, when and where the individual's work is performed. If an employer lacks control over the nature of an individual's work, that individual may be an independent contractor. In addition to control, key questions to consider when determining whether an employment relationship exists include:

- Is the individual engaged in a distinct occupation?
- Is the work usually done under direction or by an unsupervised specialist?
- Is the work part of the alleged employer's regular business and/or necessary to it?
- Can the individual work for other entities or for himself or herself?
- Will the individual represent on federal tax forms that he or she is an independent contractor?
- How long is the individual anticipated to work?
- Is the individual compensated by the hour or by the job?
- Does the individual set and cover his own costs?
- Does the individual exercise independent control over his or her work, free of corporate direction?
- Does the individual set his or her own schedule/hours?

- Is the individual working according to his or her own training, background and experience?
- Is the alleged employer training the individual?
- Has the individual bought and/or used his or her own supplies/tools?
- Must the individual seek approval from the alleged employer for orders of equipment or supplies?
- Does the alleged employer provide the place of performance for the work?
- Does the alleged employer provide any minimum guaranteed income, sick leave, paid leave or employee benefits?

2.2 Immigration and Related Foreign Workers

Because immigration law and policy are generally set by the federal government, this question should not be particularly specific to Tennessee. The potentially differing philosophies held by the municipal governments in Nashville and Memphis as compared to the state government sometimes create friction between the state and local governments in those cities, but this typically does not involve immigration policy, to the extent state and local governments have any authority in such areas.

Although COVID-19 is currently having tremendous impacts on travel, which affects an employer's ability to send workers to other countries and hire workers from other countries, we do not expect this to have a long-term impact.

TLEA

The Tennessee Lawful Employment Act (TLEA) requires all employers in Tennessee to demonstrate that they are hiring and maintaining a workforce comprised solely of employees legally authorized to work in the United States. Private employers with 50 or more employees under the same FEIN are required to use the federal E-Verify employment verification process. This applies to employees working in or outside the state of Tennessee. Private employers with fewer than 50 employees may choose to use E-Verify for newly hired employees or, alternatively, they may choose to request and maintain documents under the TLEA's list of authorized identity and employment eligibility documents.

The TLEA covers not only employees but also "non-employees". Non-employees are defined as individuals who, while not employed directly, are paid directly by the employer for labor or services. Companies in Tennessee are required to request and maintain copies of certain identity and work authorization documents for non-employees, unless an exception applies (eg, the workers are employed by a separate company).

2.3 Collective Bargaining Relationship or Union Organizational Campaign

While union membership is still on the decline, it is not due to a lack of effort in certain industries, especially the automotive industry. Tennessee is home to numerous automotive manufacturers and suppliers and several have been the target of union organizing campaigns. The Volkswagen workers at its Chattanooga, Tennessee plant have voted twice to reject unionization. In recent years, union organizing efforts at the Nissan automotive manufacturing plant in Smyrna, Tennessee have also been unsuccessful.

The impact of COVID-19 is an unknown in union organizing. Certainly, face to face contact would be at a minimum with union representatives and employee supporters. Most employers have carefully followed the CDC guidelines and OSHA communications on maintaining a safe workplace protecting their employees from the virus. Certain industries have seen outbreaks of the virus, like poultry plants and nursing homes, but those came early on in the pandemic before most employers and organizations fully understood what they were dealing with.

Employers in Tennessee that have avoided or defeated unionization efforts have argued that they provide competitive wages, strong benefit programs, employee training and fair treatment without the need for union representation.

3. Interviewing Process

3.1 Legal and Practical Constraints

The Tennessee Human Rights Act (TCA Section 4-21-101 et seq) prohibits discrimination in employment based upon race, creed, color, religion, sex, age or national origin. The Tennessee Disability Act (TCA Section 8-50-103 et seq) prohibits discrimination in employment based upon disability. Each of these statutes protects applicants for employment as well as employees from discrimination.

In the interview process, employers should avoid questions that elicit information regarding an applicant's status in a protected category. For example, employers should avoid questions that might elicit information regarding whether an applicant is an individual with a physical or mental disability. Employers may, however, ask if an applicant can perform the essential functions of the position sought, with or without reasonable accommodation.

Tennessee does not regulate an employer's use of pre-employment tests or background reports. Tennessee employers should follow the requirements of federal law in these areas. Similarly, Tennessee does not have any state laws regulating pre-employ-

ment questions about an applicant's salary or criminal history, so Tennessee employers should follow any federal law requirements in these areas.

Remote Working

COVID-19 has resulted in many more employees working remotely than ever before. As a result, it may be more difficult in the future for employers to argue that remote work is not a reasonable accommodation. In the hiring process, employers should be careful not to disqualify automatically applicants who state that they will need to work remotely.

4. Terms of the Relationship

4.1 Restrictive Covenants

Tennessee does not have a statute of general applicability governing employee restrictive covenants. As a general rule, restrictive covenants in employment contracts will be enforced under Tennessee law if they are reasonable under the particular circumstances (*Central Adjustment Bureau, Inc v Ingram*, 678 S.W.2d 28, 32 (Tenn. 1984)). Regarding covenants not to compete, the scope of activity restricted must be reasonable under the circumstances and "the time and territorial limits involved must be no greater than is necessary to protect the business interests of the employer" (*Allright Auto Parks, Inc v Berry*, 409 S.W. 2d 361, 363 (Tenn. 1966)).

At-Will Employment

An offer of at-will employment is sufficient consideration for a covenant not to compete under Tennessee law (*Ramsey v Mutual Supply Co*, 427 S.W.2d 849, 850 (Tenn. App. 1968)). Further, continued employment may be sufficient consideration for a covenant not to compete that was not signed until after the employment had begun, depending upon the facts and circumstances of the situation. Employment for only a short period of time after the covenant is signed may not be sufficient consideration, especially if the employment relationship is terminated by the employer. However, continued employment for more than a nominal amount of time can provide sufficient consideration for a covenant not to compete signed after the employment relationship has begun (*Central Adjustment Bureau*, 678 S.W.2d at 35).

Restrictive Covenants

Tennessee law allows courts to modify restrictive covenants deemed to be unreasonable, including by changing the language of such covenants to render them reasonable. Tennessee law does not follow the "blue pencil rule" in which unreasonable provisions in covenants may not be changed, but only deleted (*Central Adjustment Bureau*, 678 S.W.2d at 36). Although Tennessee does not have a statute of general applicability governing

employee restrictive covenants, it does have a statute governing the enforceability of covenants not to compete with respect to healthcare providers (see TCA Section 63-1-148). Generally, covenants not to compete contained in employment contracts with healthcare providers will be deemed reasonable only if the duration of the restriction is two years or less and, with respect to the geographic territory covered by the restriction, the territory is either:

- within a 10-mile radius from the primary practice site of the healthcare provider; or
- the county in which the primary practice site of the healthcare provider was located.

Alternatively, a covenant not to compete contained in an employment contract with a healthcare provider will be deemed reasonable if the duration is two years or less and there is no geographic restriction, but the healthcare provider is restricted from practicing his or her profession at any facility at which the employing entity provided services while the healthcare provider was employed with the employing entity.

The above statute does not apply to physicians who specialize in the practice of emergency medicine. Also, it does not apply to restrictive covenants entered into in conjunction with the purchase or sale of a healthcare provider's practice.

4.2 Privacy Issues

A business may require employees to sign nondisclosure agreements to protect company information, including proprietary information, trade secrets and other confidential information. The Tennessee Uniform Trade Secrets Act (TUTSA) governs the protection of trade secrets. The statute's available remedies include damages and injunctive relief. In some circumstances, the protections of TUTSA are available even in the absence of a written nondisclosure agreement.

Although there is no explicit statutory right to privacy in the workplace, common law applies to protect an individual's right to privacy. Therefore, if an employer wants to monitor employee activity, search an employee's work area, search an employee's person or search the employee's property the employer must be reasonable in its actions. An employee's reasonable expectation of privacy is protected. An employee's knowledge that monitoring or searching activities will occur and the employee's consent to that monitoring or searching activity are an employer's best protection from lawsuits for alleged violations of employee privacy. Policies should be implemented and published requiring that employees consent to employer monitoring and/or searching as a condition of employment.

The increasing prevalence of remote work during the COVID-19 pandemic has resulted in an increasing amount of confidential information being maintained at employees' homes, and perhaps transmitted to equipment not owned by employers. Employers should ensure that their policies are sufficient to protect the confidentiality of information no matter where it is stored and accessed. Employers also should take steps to ensure the safety of their property that may be maintained by employees (at least temporarily) at home.

4.3 Discrimination, Harassment, and Retaliation Issues

Title VII Claims

Tennessee has its own version of Title VII called the Tennessee Human Rights Act (THRA). It applies to employers having at least eight employees and it prohibits discrimination based on race, creed, color, religion, sex, age or national origin (TCA 4-21-401(a)). There is generally no individual liability for THRA violations, although individual liability exists for "aiding and abetting" certain violations. The THRA is generally interpreted consistently with Title VII. The one notable exception is that claimants do not have to exhaust administrative remedies before bringing THRA claims in court. A one-year statute of limitations applies. Because Tennessee is a "deferral" state, ie, it has its own anti-discrimination law, the statutory period for filing an EEOC charge alleging discrimination is extended from 180 days to 300 days.

Other Claims

Outside of Title VII, Tennessee has a state-specific version of the Americans with Disabilities Act (ADA) called the Tennessee Disability Act (TDA), but with significant differences. There is presently no reasonable accommodation requirement under the TDA. The TDA prohibits employers from terminating employees on the basis of their disability unless the disability "to some degree" prevents or impairs the performance of the work involved. As with the THRA, there is no exhaustion of administrative remedies requirement and a one-year statute of limitations applies.

Additional potential retaliation claims can be brought under the Tennessee Public Protection Act, which is a whistle-blower protection act. Further, employees may bring a claim of retaliatory discharge for filing a workers' compensation claim. Both types of claims have a one-year statute of limitation with no administrative exhaustion requirement.

Claims involving "implicit bias" may include, for example, claims that a promotion decision based on performance evaluations is discriminatory because the performance evaluations themselves were tainted by discrimination, in that minority

employees received lower scores in certain areas because of implicit bias.

4.4 Workplace Safety

An employer is generally obligated to provide a reasonably safe workplace for employees. The obligation comes from both common law and from the applicability of the Occupational Safety and Health Act of 1970 (OSH Act). The federally required standards of the Occupational Safety and Health Administration (OSHA) are generally applicable to employees throughout the United States.

Tennessee operates an OSHA-approved state program to enforce the OSH Act and additional Tennessee standards. State plans are OSHA-approved job safety and health programs operated by individual states instead of the federal OSHA. The OSH Act encourages states to develop and operate their own job safety and health programs and precludes state enforcement of OSHA standards unless the state has an approved program. OSHA approves and monitors Tennessee's program, typically referred to as "TOSHA".

COVID-19

In terms of reporting COVID-19 cases involving employees, employers are only responsible for recording cases of COVID-19 if all of the following are true:

- the case is a confirmed case of COVID-19;
- the case is work-related, as reasonably determined by the employer based on an investigation and available evidence; and
- the case involves one or more "recording criteria" established by OSHA, such as medical treatment beyond first aid or days away from work.

Employer Liability

For the most part, an employer's risk of loss for injuries occurring in the workplace is limited by the exclusive nature of Tennessee's Workers' Compensation Law (TCA Section 50-6-101, et seq). That is, if the Workers' Compensation Law applies, an employer is generally not subject to a suit in tort for workplace injuries to employees. Rather, the employee must look to the statute for compensation. Generally, the Workers' Compensation Law applies to any business with at least five employees. Employers with fewer than five employees may elect coverage, but are not required to do so.

Child Labor

In addition to the restrictions and requirements of the federal child labor law, Tennessee has its own child labor law protections. The Tennessee restrictions do not exactly mirror those

of the federal law. These should be reviewed by any business considering the employment of anyone under 18 years of age.

4.5 Compensation and Benefits

Employment Benefit Plans

Although employee benefit plans sponsored by private sector employers are generally subject to federal law and regulations that pre-empt applicable state law, Tennessee state law may, in certain situations, apply to such employer-sponsored benefit plans. An important example of the applicability of state law in this context is with respect to health plans and Tennessee's "mini-COBRA" law. Employers with fewer than 20 employees who sponsor health insurance coverage are not subject to federal COBRA continuation coverage rules (described below) but must provide three months of health insurance coverage under state law to covered terminated employees following the policy month in which the end of coverage occurs (other periods of continuation coverage may apply in cases of health insurance coverage ending on account of an employee's divorce or in the case of an end of coverage that involves pregnancy).

By contrast, group health plans sponsored by private sector employers with 20 or more employees are generally subject to federal COBRA continuation coverage rules, which generally require that post-termination coverage be offered at the former employee's expense for a period of 18 months (with numerous exceptions and possible extensions of coverage). The federal Employee Retirement Income Security Act (ERISA) also imposes certain requirements on the maintenance and operation of employee benefit plans. ERISA requires that employee benefit plans be set forth in a written plan document and that the significant terms of the plan be described in plain language in a summary plan description (SPD) that must be distributed to every plan participant. Numerous other annual participant notice requirements under ERISA and related laws may apply to employee benefit plans.

Employee handbooks are not subject to ERISA and typically should not be used to communicate the terms of benefit plans, including the terms of eligibility and coverage. Such communications should instead be reserved to plan SPDs that are required to be distributed to plan participants. Any statement summarizing benefits or coverage in an employee handbook should always be accompanied by a statement deferring to the plan document.

Retirement Plans

In addition to these requirements, employer-sponsored retirement plans (including 401(k), profit sharing and defined benefit pension plans) are subject to an array of regulatory requirements under the Internal Revenue Code and corresponding Treasury Regulations. These requirements include a require-

ment that such plans not discriminate with respect to eligibility and benefits in favor of highly compensated employees.

COVID-19

There have been numerous changes in the federal law applicable to employer-sponsored benefit plans in response to the COVID-19 crisis, some of which are optional and some that must be implemented by plan sponsors. Among these changes are:

- additional flexibility in participant elections to receive (and some relief from the taxation of) distributions from qualified retirement plans (including hardship distributions);
- temporary flexibility with respect to participant mid-year election changes as to coverage under cafeteria plans; and
- the expansion of leave-sharing programs.

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

Tennessee is an at-will employment state. Absent an agreement to the contrary, employment may be terminated at any time by either party, with or without notice and with or without cause unless the reason for termination is prohibited by law.

Under Tennessee law, employers must pay final wages to departing employees (whether the termination is initiated by the employee or by the employer) within 21 days of the last day of employment or by the next regular payday after the last day of employment, whichever is later. Vacation pay must be included in the final wages of an employee who quits or is discharged if it is owed under an employment agreement or company policy. Company policy may provide that employees are not entitled to pay for accrued, unused vacations upon termination.

Mini-WARN Law

Tennessee has a state "mini-WARN" law that applies to employers with at least 50 but no more than 99 employees (see TCA Section 50-1-601 et seq). This law only applies to reductions in operations that affect 50 or more employees. Tennessee employers with between 50 and 99 employees that have a reduction in operations affecting the employment status of at least 50 employees must notify the Dislocated Worker Unit of the Tennessee Department of Labor and Workforce Development.

Severance and Release Agreements

Tennessee does not have a state statute governing severance and release agreements. Employers must follow the requirements of federal law with respect to such agreements. To release a claim for workers' compensation benefits, though, the settlement agreement must be approved by a specialist from the Bureau of

Workers' Compensation of the Tennessee Department of Labor and Workforce Development.

COVID-19

Terminations during the COVID-19 pandemic have taxed state unemployment compensation systems, resulting in substantial delays in the processing of unemployment claims. Employers discharging employees who have been impacted by COVID-19 also need to consider whether any laws affect the ability to terminate such employees lawfully. These laws may include the Americans with Disabilities Act, the Tennessee Disability Act, the Family and Medical Leave Act (including the Families First Coronavirus Relief Act), and others. Further, employers who are discharging employees as part of a large-scale reduction in force should remember to analyze whether WARN or Tennessee's mini-WARN are implicated.

6. Employment Disputes: Claims, Dispute Resolution Forums, Relief

6.1 Contractual Claims

Employment contracts may be oral or written under Tennessee law. Claims for breach of contract have a six-year statute of limitations in Tennessee.

There is no implied covenant of good faith and fair dealing in an employment-at-will contract under Tennessee law (*Randolph v Dominion Bank of Middle Tennessee*, 826 S.W.2d 477, 479 (Tenn. App. 1991)).

The general rule in Tennessee is that a contract for employment for an indefinite term is a contract at-will, which can be terminated by either party at any time, with or without cause. Employee handbooks will not overcome the presumption of at-will employment if they include language making clear that they are not intended to create a contract of employment for any specific duration (see *Rose v Tipton County Public Works Dept.*, 953 S.W.2d 690, 694 (Tenn. App. 1997)).

COVID-19 generally does not affect the interpretation or enforcement of employment contracts, but employers should consider whether any failure to act (by either the employer or the employee) pursuant to an employment contract might be excused by issues related to COVID-19.

6.2 Discrimination, Harassment, and Retaliation Claims

In addition to federal causes of action, Tennessee law allows for state-specific claims for discrimination, retaliation and hostile work environment actions under the Tennessee Human Rights Act. Potential remedies for these claims include back pay,

reinstatement, front pay, non-economic damages for embarrassment and humiliation, attorneys' fees and costs. Punitive damages are not available. Non-economic damages are capped based on the size of the employer, with the maximum amount recoverable capped at USD300,000 for the largest employers.

No new Tennessee-specific employment laws have been passed in response to the Black Lives Matter and Me Too movements. Allegations of race or sex discrimination may continue to be made under existing laws, and it is possible that these movements could spur additional claims to be filed, including claims of class-wide discrimination based upon race or gender.

Persons affected by COVID-19 could assert discrimination claims based upon a disability or an allegation that their employer regarded them as disabled. Also, if persons affected by COVID-19 believe their employer treats other similarly-affected persons of a different race, gender, etc, better, they could assert discrimination claims based upon that differentiating characteristic.

6.3 Wage and Hour Claims

The Tennessee Wage Regulation Act regulates the administration and timing of employee wage payments, but Tennessee has no specific minimum wage or overtime statute. As such, an employer's obligations are found primarily in the applicable federal wage laws, including the Fair Labor Standards Act (FLSA), the Davis-Bacon Act and the Service Contract Act. The most widely applicable of these acts is the FLSA.

The FLSA has three primary requirements for an employer:

- pay employees at least a certain minimum wage for each hour worked (currently USD7.25 per hour);
- pay employees overtime at a premium rate of at least one and one-half times an employee's "regular rate" of pay for any work in excess of 40 hours in a work week; and
- keep accurate records of time worked and wages paid to employees.

However, if an employer desires, it can avoid these requirements for certain employees due to what are referred to as "exemptions."

Exemptions

While there are various exemptions under the FLSA, the ones most often thought of when discussing the FLSA are known as the "white collar" exemptions. An employee may be considered exempt from the minimum wage and overtime requirements of the FLSA if they fall within any of the three white collar exemptions, ie, the employee is a bona fide executive, administrative or professional employee. An employee is not

considered exempt under these exemptions merely because of a certain title or because he or she is paid a “salary”; rather, he or she must be paid a guaranteed minimum at a certain threshold (currently USD455 per week) and he or she must also meet the other myriad requirements, including the duties tests, applicable to the exemption.

The Wage and Hour Division of the United States Department of Labor administers and enforces the FLSA with respect to private employment. However, there is also the possibility of private lawsuits that may be brought pursuant to the statute by an aggrieved employee. A successful wage-and-hour plaintiff can recover back pay, liquidated damages in an amount equal to back pay and attorneys’ fees and costs.

Remote Working

With the prevalence of remote work during the COVID-19 pandemic, it becomes more difficult for employers to monitor the hours worked by nonexempt employees. Thus, it is possible that the pandemic will spawn unpaid overtime claims by employees who claim they were not paid for all hours worked at home.

6.4 Whistle-Blower/Retaliation Claims

Tennessee state law recognizes both a statutory and common law claim for retaliation providing that it is unlawful for a Tennessee employer to fire an employee for reporting illegal, or what the employee believed to be illegal, activity or for refusing to participate in such activity. These are commonly referred to as whistle-blower claims. Furthermore, certain statutes prohibit retaliation against an employee for exercising legal rights; for example, pursuing a claim for workers’ compensation benefits or complaining about alleged discrimination or harassment in the workplace. These claims are typically brought in state courts, seeking back pay, front pay, reinstatement and attorneys’ fees. Retaliation claims based on violations of an employee’s federal law rights are brought in federal court with similar damages provisions.

An employee does not have to complain about alleged unlawful treatment directly affecting him or her to be protected from retaliation under certain laws. Thus, an employee complaining about the alleged race or sex discrimination of other persons, or classes of persons, could assert a claim of retaliation if the employee suffers an adverse employment action. Similarly, an employee who suffers an adverse employment action after requesting time off due to COVID-19, or a reasonable accommodation due to a medical condition impacted by COVID-19, may be able to assert a retaliation claim.

6.5 Special Training and Resolution Approaches

Typically, federal courts and state courts have jurisdiction over claims brought under federal or state law, respectively. In Ten-

nessee there are three sections of federal court jurisdiction – the Eastern District based in Knoxville, the Middle District in Nashville and the Western District in Memphis, with other regional sites within the various districts. State courts consist of circuit and chancery courts set up throughout the state by county.

Alternative dispute resolution exists by way of private mediation or court-ordered mediation, including federal court settlement conferences. Many of the federal courts have mandatory mediation as part of the litigation process, while it is generally voluntary at state court level.

Charges filed under federal anti-discrimination laws are initially processed by the Equal Employment Opportunity Commission (EEOC), which offers voluntary mediation.

Mediation

Employers may consider early-stage mediation for internal complaints of race or sex discrimination, particularly complaints that involve a number of employees making the same or substantially similar allegations. Traditionally, mediations are conducted by lawyers, judges, or retired judges. Employers and employees may consider non-traditional mediators, with other expertise and backgrounds, for such complaints.

Likewise, equal employment opportunity and diversity training is often conducted by lawyers. Employers may wish to engage trainers with a different background to address diversity and implicit bias issues in the age of “Black Lives Matter” and “Me Too”.

6.6 Class or Collective Actions

Both class and collective actions are available for use by plaintiffs in employment lawsuits. Generally speaking, a “class action” is a procedural device that permits one or more plaintiffs to bring a lawsuit on behalf of a larger group of allegedly injured persons. A “collective action” is a specific form of class action that allows one or more employees to bring certain lawsuits on behalf of other “similarly situated” employees, typically, but not always, involving FLSA claims.

Those class actions brought in a Tennessee state court that do not involve an FLSA collective-style enforcement mechanism are governed by Rule 23.02 of the Tennessee Rules of Civil Procedure. Those non-collective-style class actions brought in federal court are generally governed by Rule 23 of the Federal Rules of Civil Procedure. Each rule contains certain specific prerequisites that must be met before the lawsuit can be certified as a class.

An important difference between a class action and a collective action is that with the former, once certified, all allegedly

impacted individuals are part of the represented class unless an individual takes affirmative action to opt-out of the class. Any person not opting-out will be bound by any judgment or relief in the case. With regard to a collective action, to be represented as part of the collective an individual must affirmatively opt-in. Only those opting into the collective have a stake in the lawsuit.

As in other states, Tennessee has seen an increase in the use of “class action waivers” in employment agreements, especially within arbitration agreements. As part of such an agreement, an employee typically agrees to resolve any and all employment disputes on an “individual” rather than class or collective basis. The practice will likely continue to increase since the United States Supreme Court’s decision in *Epic Systems Corp. v Lewis*, 138 S.Ct. 1612 (2018), which once again upheld the enforceability of class-action waivers in arbitration agreements with employees.

6.7 Possible Relief

In the employment or employment-related context, global entities may encounter disputes including, but not limited to, claims of discrimination based on a protected class, retaliation for engaging in a protected activity, denial of workers’ compensation benefits, interference with protected leave, violation of wage-and-hour laws, violation of state occupational safety and health laws, violation of child labor laws and common law claims such as negligent hiring, negligent supervision, negligent retention and infliction of emotional distress.

Specific Tennessee statutes that employers should be aware of include:

- Tennessee Human Rights Act (THRA) (TCA Section 4-21-401, et seq)
- Tennessee Public Protection Act (TCA Section 50-1-304)
- Tennessee Disability Act (TCA Section 8-50-103)
- Tennessee Family and Medical Leave Act (TCA Section 4-21-408)
- Tennessee Wage Regulation Act (TWRA) (TCA Section 50-2-101, et seq)
- Tennessee Occupational Safety and Health Act (TOSHA) (TCA Section 50-3-101, et seq)
- Tennessee Worker Adjustment and Retraining Notification (WARN) Act (TCA Section 50-1-601, et seq)

- Child Labor Act (TCA Section 50-5-101, et seq, TCA Section 50-6-418)
- Tennessee Employee Online Privacy Act of 2014 (TCA Section 50-1-1001, et seq)

Individual Filing

An individual may file a discrimination claim with the Tennessee Human Rights Commission (THRC); a wage-and-hour claim with the Tennessee Department of Labor and Workforce Development, Division of Labor Standards; and a safety/health complaint with the Tennessee Department of Labor and Workforce Development, Division of Occupational Safety and Health. Employers may attempt to resolve such claims with the complainant and/or the administrative agency investigating the claim prior to litigation.

Employment Litigation

In the event that an employer is involved in employment litigation, depending upon the nature of the claim a plaintiff may recover compensatory damages (ie, back pay, reinstatement and front pay), non-economic damages (eg, pain, suffering, humiliation or embarrassment), punitive damages and attorneys’ fees. While there are caps on non-economic damages in discrimination claims, compensatory damages are not limited by statute. For claims in which punitive damages are available, the plaintiff must prove by clear and convincing evidence that the employer acted maliciously, intentionally, fraudulently or recklessly to recover such damages.

Wage Regulation

If an employer violates the Tennessee Wage Regulation Act, it may be subject to criminal and civil penalties. Any employer who misrepresents wages to any employee in a new employment contract commits a Class C misdemeanor, punishable by up to 30 days in jail and a fine of up to USD50. For failing to pay wages to employees in private employment as required, in addition to a Class B misdemeanor punishable by up to six months in jail and a fine of up to USD500, a civil penalty of USD500 to USD1,000 can be assessed for each separate offense (at the discretion of the Department of Labor and Workforce Development commissioner or the commissioner’s designated representative).

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Bradley Arant Boult Cummings LLP is a national law firm with a global perspective. The firm has more than 500 attorneys serving established regional, national and international companies, emerging businesses, and individuals. The firm's offices – strategically located in Alabama, Florida, Mississippi, North Carolina, Tennessee, Texas and the District of Columbia – provide an extensive geographic base from which to best accommodate clients. The key areas of practice are labor and employment, litigation – class, collective, multidistrict, and

single-plaintiff, advice and pre-emptive counsel – and immigration matters. The firm's attorneys serve as national, regional, and statewide counsel for clients across many industries. Clients rely on the firm for innovative legal services that reflect a deep understanding of their business objectives. Bradley's labor and employment practice group provides public and private employers with the comprehensive legal counsel needed to help maximize the competitiveness, productivity, and efficiency of their modern workforces.

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His practice focuses especially on the design and administration of employee pension and welfare benefit plans. With significant experience in drafting both qualified and non-qualified retirement plans. Andrew assists with submitting plans to the Internal Revenue Service for the issuance of favorable determination letters and complying with ERISA reporting and other fiduciary requirements.

TENNESSEE LAW AND PRACTICE

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