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US Regional Employment 2021

Alabama: Law & Practice

John Hargrove, Anne Yuengert,
Chuck Stewart and Anne Knox Averitt
Bradley Arant Boult Cummings LLP

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ALABAMA

Law and Practice

Contributed by:

John Hargrove, Anne Yuengert,

Chuck Stewart and Anne Knox Averitt

Bradley Arant Boult Cummings LLP see p.12



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1. CURRENT SOCIO-ECONOMIC, POLITICAL, AND LEGAL CLIMATE: CONTEXT MATTERS

1.1 The Impact of COVID-19 on the Workplace

The pandemic has awakened both employers and employees to the ideas of federally-mandated paid leave and remote work. Following the paid leave under the Families First Coronavirus Response Act – even though that has phased out – employers must continue managing employee expectations that they are entitled to be paid if they are off work for something beyond their control and that they should be enabled to work from home, even if the employer’s workforce has returned to the office. One upside for employers could be the realization that for some positions, they can seek talent from other geographic locations and employ some people remotely. If an employer is considering having remote workers moving forward (either employee or employer-initiated), it needs to ensure its policies apply to a remote work setting and that there are sufficient cybersecurity protections in place. Employers also need to stay up to speed on the latest applicable vaccine requirements. Federal contractors and subcontractors are facing new vaccine mandates and other required COVID safety protocols that they need to be ready to implement. Private employers also must navigate applicable regulations on mandatory vaccines or routine testing.

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

These movements have made employees more likely to report concerns of unfair treatment or misconduct to management. Employers should have clear reporting procedures already in place and follow those procedures if and when complaints arise. These movements have also heightened employee interest in what their co-workers are being paid. Employers should keep an eye

on pay equity within the organization and identify and address any potential problems before employees (or their lawyers) identify them.

The increased discussion of race and inequity following the resurgence of the Black Lives Matter movement is bound to cause some dissension within a workforce. Having policies that require employees to be respectful, even when they disagree, may help. Additionally, employers should review their discrimination and harassment policies to be sure they are in good shape to handle complaints from all sides of this discussion.

1.3 “Gig” Economy and Other Technological Advances

Certain segments of the “gig” economy took a hit at the height of the pandemic lockdown, particularly the travel industry, but appear to have bounced back. Others, however, such as grocery delivery, have continued to thrive. Entities seeking to establish themselves in the USA during the pandemic should ensure that their independent contractors are properly classified, as the difficult economic times and change in presidential administration has caused an increase in further review of independent contractor classification to determine whether they are in fact employees (and thus due the benefits and compensation employers are legally required to provide their employees).

1.4 Decline in Union Membership?

It is unclear how much it resulted from COVID-19, but there has been an increased interest in unionization over the last year, starting with the Amazon vote in Bessemer, Alabama.

1.5 National Labor Relations Board

It is too early to tell as to the impact of COVID-19 on Board activity, but our experience in these last few months is that charge-filing activity is down in our area.

2. NATURE AND IMPORT OF THE RELATIONSHIP

2.1 Defining and Understanding the Relationship

Alabama is an at-will employment state and, absent an agreement to the contrary, all employment may be terminated by either party, with or without notice and for any reason not prohibited by law. See **2.2 Immigration and Related Foreign Workers**.

2.2 Immigration and Related Foreign Workers

Employers must comply with the federal immigration laws and complete Form I-9 on all employees. Employers may not discriminate against applicants or employees based on their immigration status but must check to be sure the individual is authorized to work in the USA. The Beason-Hammon Alabama Taxpayer and Citizen Protection Act requires Alabama employers to use E-Verify.

2.3 Collective Bargaining Relationship or Union Organizational Campaign

It is too early to tell as to the impact of COVID-19 on unionization, but certainly employee perception of unfair working conditions, work schedules, or layoffs typically increase interest in unions. Companies with collective bargaining agreements expiring during COVID-19 often have received requests for current CBAs to be extended as written for a year, while companies are requesting reductions of contractual requirements.

3. INTERVIEWING PROCESS

3.1 Legal and Practical Constraints

In the interview process, the employer should avoid any questions that touch upon an appli-

cant's status as protected under federal law (eg, race, sex, pregnancy, age, disability, religion, sexual orientation, gender identity).

At this point in time, an employer should also be careful asking about COVID-19 vaccination status. While private employers can inquire about whether an employee or applicant has been vaccinated, once the individual answers, the employer should avoid asking follow-up questions (ie, "why?" or "why not?"). The follow-up questions are where employers can obtain medical information that can result in additional exposure under Title VII or the ADA. With that said, a private employer can require employees or applicants for employment to be vaccinated as long as it considers reasonable accommodation requests for disabilities or sincerely held religious beliefs. Alabama law SB267, the State Vaccine Passport Law, prohibits requiring proof of a COVID-19 vaccine for entry into a public building. Although the law does not specifically mention employment conditions, it is yet to be seen how or if it will impact public employers.

Alabama has a law prohibiting age discrimination in employment but otherwise has no state law addressing protected status. Consistent with the federal law, employers should not ask about whether an applicant has a disability, although they may ask if a candidate can perform the essential functions of a position with or without a reasonable accommodation. Alabama does not regulate the use of pre-employment tests (eg, personality, medical, drug) so employers must consider federal guidelines.

While not prohibiting questions about wage history during the interview process, Alabama's Clarke-Figures Equal Pay Act, Act 2019-519 (CFEPA), prohibits an employer from refusing to interview, hire, promote, or employ an applicant or otherwise retaliate against an applicant for refusing to provide wage history information dur-

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ing the interview process. In seeking information about a candidate's background (ie, credit history, criminal history, etc), employers must comply with the Fair Credit Reporting Act (FCRA).

With the COVID-19 pandemic, there has been an increase in requests for reasonable accommodations in the form of remote work assignments. Employers should engage in the interactive process on these requests as they would for any other position. Employers should keep in mind, however, that employees or candidates may be more likely to expect that remote work assignments are reasonable after employers had to adjust for some period of time and make do with remote work arrangements in 2020. A remote work assignment may or may not be reasonable for a given position, but employers need to be ready to manage those expectations.

4. TERMS OF THE RELATIONSHIP

4.1 Restrictive Covenants

Alabama permits restrictive covenants, both non-competition and non-solicitation, as set forth in Alabama Code Section 8-1-190. Restrictive covenants are not enforceable with professionals (eg, doctors, lawyers, architects) but are otherwise generally enforced by the written terms. Non-competes are presumed reasonable for up to two years and non-solicitation agreements are presumed reasonable for up to 18 months.

Courts generally enforce agreements that comply with the statute and will reform ("blue pencil") agreements to eliminate noncompliant provisions. An agreement is only enforceable if entered into after the employment relationship begins, so the agreement should be signed no earlier than the first day of employment. Employ-

ment or continued employment is sufficient consideration for a restrictive covenant.

4.2 Privacy Issues

Organizations may require employees to sign agreements to keep company information – including proprietary information, trade secrets or other confidential information – confidential. The Alabama Trade Secrets Act, Alabama Code Section 8-27-1, et seq, governs the protection of trade secrets. In Alabama you may record a conversation as long as one party to the conversation consents.

Alabama has no laws governing an employee's medical information, so employers must comply with federal laws such as the Americans with Disabilities Act and the Genetic Information Non-discrimination Act in collecting and maintaining confidential employee information.

Employers with remote work arrangements, which have become more prevalent during the pandemic, need to ensure they have adequate cybersecurity protections in place.

4.3 Discrimination, Harassment, and Retaliation Issues

Both the "Me Too" and "Black Lives Matter" movements, particularly "Black Lives Matter", have prompted employers to make diversity and inclusion a top priority. Employees more than ever expect formal and informal initiatives and dialogue on employers' efforts to recruit and retain women and people of color. It is no longer enough to have equal employment and anti-harassment policies – employees are looking for these issues to be identified and discussed.

Given the recent discussions about bias, many employers are reviewing hiring and promotion practices to eliminate barriers to diverse candidates' success. Private employers must be careful not to make decisions based on race (or any

protected classification), even if the goal is to increase the diversity of the workforce.

Alabama has no specific requirements that employers train employees, but best practice is regularly to train supervisors and employees on equal employment and harassment policies and how to make a complaint.

4.4 Workplace Safety

In June of 2021, OSHA issued an emergency rule setting workplace safety parameters for COVID-19. While the guidance is targeted toward protecting healthcare workers from exposure, it contains some voluntary guidelines for employers outside the healthcare industry to protect unvaccinated workers with a special emphasis on the manufacturing, meat and poultry processing, high-volume retail and grocery, and seafood processing industries.

Healthcare Industry Specifics

The ETS requires employers in the healthcare sector (ie, hospitals, nursing homes, assisted living facilities, emergency responders, home healthcare workers, ambulatory care settings) to conduct a hazard assessment and have a written plan to mitigate the spread of COVID-19 for workers who are at a heightened risk of contracting the virus, as they provide essential healthcare services to the public. Additionally, covered employers must maintain social distancing protocols or implement barriers, make sure that patients are properly screened for virus symptoms, and give workers paid time off to get vaccinated and to recover from vaccine side-effects.

The ETS includes a carve-out for certain workplaces where all workers are fully vaccinated and people who may have COVID-19 are not permitted to enter. The ETS exempts fully vaccinated workers from wearing a mask and social distancing when in areas where there is no reason-

able expectation that a person with COVID-19 will be present. OSHA has indicated it will use discretion to avoid penalizing employers who are making a good-faith effort to comply.

Non-healthcare-Specific Guidelines

OSHA also issued voluntary guidelines for employers that operate outside of the healthcare context to protect unvaccinated workers who are at a higher risk of being exposed because their work involves close contact (eg, healthcare workers). In these higher-risk workplaces where there are unvaccinated or otherwise at-risk workers, OSHA advises employers to:

- suggest masks for unvaccinated (or unknown status) employees, customers and other visitors;
- suggest masks for vaccinated employees in public indoor settings in areas of substantial or high transmission or following an exposure to someone who tested positive for COVID-19 (or be tested three to five days following the exposure);
- provide visual cues (eg, floor markings, signs) as a reminder to maintain physical distancing;
- stagger break times or provide temporary break areas and restrooms to avoid groups of unvaccinated or otherwise at-risk workers congregating during breaks;
- implement strategies (tailored to your workplace) to improve ventilation that protects workers as outlined in the CDC's guidance on "ventilation in buildings";
- continue to perform routine cleaning and disinfection;
- record and report COVID-19 infections and deaths;
- implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards.

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The DOL and OSHA will continue to update the guidance over time with the goal of keeping up with developments in science and best practices. The guidance makes clear that all employers, regardless of industry, should be encouraging employees to get vaccinated and must continue separating from the workplace all infected people, all people experiencing COVID-19 symptoms, and any unvaccinated people who have had close contact with someone with COVID-19.

4.5 Compensation and Benefits

Alabama's Clarke-Figures Equal Pay Act, Act 2019-519, prohibits an employer from paying any worker at a wage rate less than that paid to employees of another race or sex for work where the jobs require equal skill, effort, education, experience and responsibility under similar working conditions. The CFEPA provides an exception for payments made pursuant to a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or a differential based upon any factor other than race or sex. The CFEPA also requires employers (without regard to number of employees) to comply with the federal Department of Labor record-keeping requirements.

Alabama does not require employers to have handbooks. If an employer has a handbook, it should contain a disclaimer that the handbook does not abridge the at-will employment relationship, does not create a contract of employment, and the policies can be changed at any time. An employer's failure to follow its own policies will be used as evidence of bad faith or pretext in litigation or could lead to a breach of contract claim.

Employers with at least 20 employees are covered by the Comprehensive Omnibus Budget Reconciliation Act (COBRA) and must provide notice of a change in insurance coverage to

employees or beneficiaries as provided in the law.

Alabama requires employers to post notices regarding the child labor laws, workers' compensation coverage and unemployment compensation coverage. The Alabama Department of Labor provides all of those posters free of charge on its website, www.labor.alabama.gov. Upon termination of employment, employers must provide the terminated employee with information regarding the availability of unemployment benefits.

5. TERMINATION OF THE RELATIONSHIP

5.1 Addressing Issues of Possible Termination of the Relationship

Alabama is an at-will employment state and, absent an agreement to the contrary, all employment may be terminated by either party, with or without notice and for any reason not prohibited by law. Employers must give terminated employees a notice regarding the availability of unemployment benefits. Alabama has no law regarding the final payment of wages to employees upon termination, although best practice is for employers to pay a final check pursuant to the normal payroll schedule.

With commissioned sales representatives, an employer must pay all commissions that are due at the time of termination within 30 days after the termination. Any commissions to a sales representative that become due after the termination date must be paid within 30 days of when the commission becomes due. Failure to pay commissions as required makes the employer liable for treble damages plus reasonable attorney's fees and court costs (Alabama Code Section 8-24-1, et seq).

Layoffs and Severance

Alabama does not have a state law governing layoffs or reductions in force. Covered employers must provide notice as required by the federal Worker Adjustment and Retraining Notification (WARN) Act. In general, under WARN, if an employer with at least 100 employees is going to close down or have a reduction in force that will affect at least 50 employees at a single site, it must provide 60 calendar days' notice to employees and government agencies.

In severance agreements or releases of claims from employees, employers should provide the employee with a reasonable amount of time to consider the offer. Best practice is to recommend to the employee that they consult an attorney. If the employer seeks a release of age discrimination claims from a single employee who is at least 40 years old, it should comply with the Older Workers Benefits Protection Act (OWBPA) and, among other things, allow the employee at least 21 days to consider the offer and seven days to revoke any acceptance.

If the employer is seeking age discrimination releases from two or more employees, to comply with the OWBPA the severance agreement must provide a 45-day consideration period, a seven-day revocation period, and provide information regarding the employees (by job title and ages) in the decisional unit.

Compensation Claims

To release a claim for workers' compensation benefits, the agreement must be approved by a court. An employee may, however, release a claim for retaliation under the Alabama workers' compensation law, but the release must explicitly reference that law.

Employers may require employees to pursue any claims through arbitration.

If a workforce is represented by a union, the terms of the collective bargaining agreement control the terms and conditions of employment and its termination.

Alabama has relaxed its eligibility requirements for unemployment compensation during the COVID-19 pandemic. Those have continually shifted and should be reviewed for the latest requirements.

6. EMPLOYMENT DISPUTES: CLAIMS, DISPUTE RESOLUTION FORUMS, AND RELIEF

6.1 Contractual Claims

Other than claims under a collective bargaining agreement, breach of contract claims are brought in state court.

Employees may also assert a variety of tort claims, including interference with a business opportunity, fraudulent inducement in the entering of a contract, and defamation. Claims often raised in connection with sexual harassment claims include assault and battery, invasion of privacy, intentional infliction of emotional distress, and negligent hiring, training and supervision.

6.2 Discrimination, Harassment, and Retaliation Claims

An employee claiming race or sex discrimination in pay under Alabama's Clarke-Figures Equal Pay Act, Act 2019-519, can file a lawsuit in Alabama court to recover lost wages plus interest. The CFEPa has a two-year statute of limitations.

Filing Discrimination Charges

An employee claiming discrimination based on a status protected under the federal anti-discrimination laws (eg, race, religion, national

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origin, sex, sexual orientation, gender identity, pregnancy, disability, genetic information) or for retaliation for protected activity generally must file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discrimination. The EEOC typically offers the opportunity to mediate the case with a mediator provided by the Commission. If mediation is not pursued or is unsuccessful, the EEOC will investigate the charge.

At the end of that process, the EEOC may issue a determination that the evidence indicates the employer violated the applicable statute, that the evidence does not indicate a violation of the statute, or simply that it is closing its investigation. Regardless of what the EEOC concludes, it will issue the employee a “right to sue” letter, after which the employee has 90 days to file a complaint in court. Successful plaintiffs can recover lost back pay, compensatory and punitive damages (capped based on the size of the employer), and attorney’s fees and costs.

The court can also reinstate an employee or award front pay. Following the “Black Lives Matter” and “Me Too” movements, charging parties are likely to file more claims regarding race and sex discrimination and harassment and those charges may raise claims regarding terms and conditions of employment that may not have had a clear economic impact or involve a clear employment decision. Additionally, employees may raise claims regarding discrimination based on two or more protected classifications – for example, “I was discriminated against because I am an African-American female” rather than simply based on either race or sex.

Age Discrimination

To pursue a claim for age discrimination, the employee must file a charge of discrimination with the EEOC within 180 days of the alleged

discrimination, receive a right to sue letter and pursue a lawsuit. A successful age discrimination plaintiff can recover lost back pay, liquidated damages in an amount equal to back pay, and attorney’s fees and costs. The court can also reinstate an employee or award front pay.

Race Discrimination

To pursue a claim for race discrimination under 42 U.S.C. Section 1981, an employee does not need to file an EEOC charge but can go directly to court. A plaintiff must file a claim in court within four years of the alleged discrimination. Successful plaintiffs can recover lost back pay, compensatory and punitive damages (uncapped), and attorney’s fees and costs. The court can also reinstate an employee or award front pay.

Denied Leave

To pursue a claim for denied leave or retaliation for taking leave under the Family and Medical Leave Act (FMLA), an employee files a complaint in court within two years (three years for a willful violation) of the alleged adverse action. A successful FMLA plaintiff can recover lost back pay, liquidated damages in an amount equal to back pay, and attorney’s fees and costs. The court can also reinstate an employee or award front pay.

Equal Pay

To pursue a claim that she was paid disparate wages based on her sex under the Equal Pay Act (EPA), an employee files a complaint in court within two years (three years for a willful violation) of the alleged adverse action. A successful EPA plaintiff can recover lost back pay, liquidated damages in an amount equal to back pay, and attorney’s fees and costs. The court can also reinstate an employee or award front pay.

6.3 Wage and Hour Claims

Employees can bring claims of unpaid wages (including for misclassification or unpaid over-

time) under the Fair Labor Standards Act to the federal Department of Labor or file directly in court. To be timely, an employee must institute the action within two years (three years for a willful violation) of the alleged violation. Employees often seek collective status, having the court issue notice to all potential employees and former employees who might have a similar claim.

A successful wage and hour plaintiff can recover lost back pay, liquidated damages in an amount equal to back pay and attorney's fees and costs.

6.4 Whistle-Blower/Retaliation Claims Protected Activity

All federal employment statutes (eg, Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, the Age Discrimination in Employment Act, 42 U.S.C. Section 1981, EPA, FMLA, FLSA) prohibit retaliation against anyone who engages in protected activity. Protected activity includes opposing any practice made an unlawful employment practice by the law (ie, complaining about discrimination) or making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding or hearing about an alleged unlawful employment practice. A retaliation plaintiff does not have to prove the underlying discrimination claim to succeed on a retaliation claim. A successful retaliation plaintiff can recover the same damages provided by the applicable statute for the underlying discrimination.

Various federal laws also prohibit retaliation against employees for whistle-blowing (eg, Sarbanes-Oxley).

Compensation and Wage

The Alabama Workers' Compensation Act (Alabama Code Section 25-5-11.1) prohibits discharge – but not other adverse action – solely because an employee filed a claim for workers' compensation benefits.

A person claiming that they were retaliated against for refusing to provide wage history information during the interview process can file a lawsuit in Alabama state court under the Clarke-Figures Equal Pay Act, Act 2019-519, and recover lost wages plus interest.

Sick Leave

Paid leave under the FFCRA is now optional through September 30, 2021, but whether or not an employer has continued to provide FFCRA paid leave, the FFCRA prohibits an employer from discharging, disciplining, or otherwise discriminating against any employee who has taken paid leave under the FFCRA and files a complaint or institutes a proceeding related to the FFCRA. Employers found to have violated the Emergency Paid Sick Leave provisions or the unlawful termination provisions of the FFCRA are subject to penalties and enforcement under the FLSA (29 U.S.C. 216, 217). For violations of the ten weeks of Emergency Family and Medical Leave, employers are subject to enforcement under the FMLA.

6.5 Special Training and Resolution Approaches

Alabama has no specific training requirements for discrimination or harassment. Best practice is a well-publicized policy (including periodic distribution) and periodic training of supervisors and employees. Employees can take claims to the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs (OFCCP, for federal contractors), or the Department of Labor (DOL). Each of these administrative agencies can negotiate resolutions of complaints. The EEOC has a formal mediation process available free of charge. The OFCCP can bar a federal contractor from future contracts. The EEOC and DOL cannot impose any sanctions but can bring a lawsuit based on the complaint.

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Both federal and state courts encourage parties to mediate cases.

Parties can have arbitration agreements and dictate the forum.

Alabama Courts

There are three federal district courts in Alabama that have federal jurisdiction over all claims brought under federal law and diversity jurisdiction over some state law claims if the parties are completely diverse (with regard to state of residence) and meet certain monetary thresholds. Appeals are taken to the Eleventh Circuit Court of Appeals.

Each county in Alabama has a court. Appeals are taken to the Alabama Supreme Court or, for certain claims, to the intermediate court of appeals.

6.6 Class or Collective Actions

Class or collective actions may be brought in Alabama under many different federal statutes, such as Title VII or the Fair Labor Standards Act. Class action waivers and their enforceability are governed by federal law. Typically, class action waivers are challenged but are enforceable under recent Supreme Court decisions unless basic contract formation problems exist for the contracts in which the waivers are contained.

6.7 Possible Relief

Depending on the type of claim, plaintiff employees may seek monetary damages in the form of back pay, front pay, compensatory damages, punitive damages, liquidated damages and attorneys' fees. Employees may also seek equitable remedies including reinstatement.

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Bradley Arant Boult Cummings LLP*

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.

AUTHORS



John Hargrove is a partner and chair of the labor and employment practice group. He regularly represents public and private companies in mining, construction, manufacturing,

medical, communications and warehousing industries, among others. He also represents municipal and quasi-public organizations such as police and fire departments, and school boards. John also has represented several non-profit agencies, ranging from national sports organizations to small local charities. He is a member of numerous professional bodies, including the American College of Labor Lawyers, the Fellows of the American Bar Foundation, the American Bar Association, the Alabama Bar Association, the Defense Research Institute, the Alabama Defense Lawyers Association and the Society for Human Resources Management.



Anne Yuengert is a partner whose main areas of practice are labor and employment. She works with clients to manage their employees, including conducting workplace

investigations of harassment or theft, training employees and supervisors, consulting on reductions in force and severance agreements, drafting employment agreements and handbooks, assessing reasonable accommodations for disabilities, and working through issues surrounding FMLA and USERRA leave. Anne handles EEOC charges, OFCCP and DOL complaints and investigations, and has handled cases before arbitrators, administrative law judges and federal and state court judges. She is a member of numerous professional bodies, including the American and Alabama Bar Associations, the Defense Research Institute and the Society for Human Resources Management.

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*Contributed by: John Hargrove, Anne Yuengert, Chuck Stewart and Anne Knox Averitt,
Bradley Arant Boulton Cummings LLP*



Chuck Stewart is a partner whose main areas of practice include labor and employment. Licensed in Alabama and Tennessee, Chuck's extensive litigation experience is national

in scope, and his employment experience includes claims for breach of employment contracts, wrongful termination, and race, gender, disability, pregnancy, FMLA, FLSA, and age discrimination cases. These matters have involved single, multiple and class-action plaintiff cases. He is a member of numerous professional bodies, including the American Board of Trial Advocates (ABOTA), the American Bar Association, the Defense Research Institute, the Federation of Defense and Corporate Counsel, the Alabama Defense Lawyers Association and the American Inns of Court, and the Federal Bar Association.



Anne Knox Averitt has extensive experience in labor and employment matters and commercial litigation. She represents clients of all sizes, from Fortune 500 companies to

family-owned businesses, in a number of industries, including retail, automotive, natural resources, manufacturing, healthcare, non-profit, communications, construction, and financial services. She also handles cases before arbitrators, administrative law judges, and federal and state court judges. She is a member of numerous professional bodies, including the Defense Research Institute, the Alabama Bar Institute, the Birmingham Bar Association and the Momentum Upward Women's Leadership Program.

Bradley Arant Boulton Cummings LLP

1819 5th Ave N
Birmingham AL 35242
USA

Tel: +1 (205) 521 8000
Fax: +1 (205) 521 8800
Email: ayuengert@bradley.com
Web: www.Bradley.com

