

Employment: North America 2021



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Lexology Getting The Deal Through is delighted to publish the second edition of *Employment: North America*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise.



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United States – Alabama

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STATE SNAPSHOT

Key considerations

1 | Which issues would you most highlight to someone new to your state?

In general, Alabama is an employer-friendly state and the default is that employment is at will. It is a right-to-work state and unions have not been able to gain much ground outside the coal mining and steel industries and the Mobile area. Restrictive covenants are generally enforceable (as governed by statute). Workers' compensation is handled in litigation, rather than in an administrative process. Alabama has no state equal employment opportunity agency and no state equal employment opportunity laws, apart from the following:

- an age discrimination in employment act that follows the federal Age Discrimination in Employment Act; and
- an equal pay statute that prohibits employers from paying any worker at a wage rate less than that paid to employees of another race or sex for equal work (largely tracking the federal Equal Pay Act) and provides that employers may not refuse to interview, hire, promote, or employ an applicant and may not otherwise retaliate against an applicant for refusing to provide wage history information during the application or interview process.

2 | What do you consider unique to those doing business in your state?

Restrictive covenants are governed by statute (Ala. Code 8-1-190, and following), and the courts regularly enforce reasonable restrictions—both non-compete and non-solicitation. There is a statute prohibiting retaliation for filing a workers' compensation claim. For employers with commissioned sales representatives, a statute governing the payment of commissions provides for treble damages and attorneys' fees. The plaintiffs' employment bar in Alabama is generally experienced and creative.

3 | Is there any general advice you would give in the labor/employment area?

In state courts it is difficult to obtain summary judgment in most jurisdictions. State judges are elected, and local knowledge is typically helpful.

Emerging issues

4 | What are the emerging trends in employment law in your state, including the interplay with other areas of law, such as firearms legislation, legalization of marijuana and privacy?

Alabama recently legalized medical marijuana, but only after a doctor has verified that the individual has a qualifying medical condition and

that conventional medical treatment or therapy has failed to help the symptoms. Employers do not have to allow or accommodate the use of medical marijuana, and Alabama has no law protecting legal off-duty conduct. Because of the various regulatory structures that need to be created, medical marijuana will probably not be available for purchase in Alabama until late 2022.

In the privacy arena, Alabama's Data Breach Notification Act, Ala. Code 8-38-1, et seq., requires covered entities (which includes employers who acquire or use sensitive personally identifying information (PII)) to implement reasonable security measures to protect sensitive PII against a breach and give notices of a breach to affected individuals. If the number of individuals affected by the breach exceeds 1,000, the covered entity has additional reporting obligations to the Attorney General and consumer reporting agencies.

Proposals for reform

5 | Are there any noteworthy proposals for reform in your state?

Alabama has a statute permitting employees to keep firearms in their cars on company property, under certain conditions. Specifically, an employee with a proper permit can store a weapon in a locked vehicle, and employers may not retaliate against employees who do so. With regards to privacy, Alabama follows the federal wiretapping statute—which stipulates that you only need the consent of one party to a conversation to record it. Under the Data Breach Notification Act, Ala. Code 8-38-1, et seq., employers who acquire or use sensitive personally identifying information (PII) have obligations to implement and maintain reasonable security measures to protect sensitive PII against a breach and notification obligations if a breach occurs. Alabama has an immigration statute, only some of which survived judicial scrutiny.

EMPLOYMENT RELATIONSHIP

State-specific laws

6 | What state-specific laws govern the employment relationship?

Age discrimination in employment is prohibited (under Ala. Code 25-1-20, and following). The statute follows the federal Age Discrimination in Employment Act coverage (an employer must have 20 or more employees, and it protects persons aged 40 and older).

The Workers' Compensation Act (Ala. Code 25-5-1 and following) applies to anyone who employs a person to perform a service for hire and pays wages directly to that person. Employers must maintain insurance but can be self-insured. Claims can only be settled with court approval.

Full-time employees serving on juries have job protection (under Ala. Code 12-16-8, 8.1). Employers must pay those full-time employees their regular wages during jury service.

The Alabama Restrictive Covenants Act (Ala. Code 8-1-190 and following) regulates non-competes and non-solicitation agreements.

Alabama has a statute which provides that all commissions due at the time of termination of a contract between a sales representative and a principal must be paid within 30 days from the termination. Any commissions that become due after the termination date must be paid within 30 days from becoming due. Failure to pay as required makes the principal liable for three times the damages, plus reasonable attorneys' fees and court costs (Ala. Code 8-24-1, 2, and 3).

The City of Birmingham passed a non-discrimination ordinance prohibiting discrimination based on "real or perceived race, color, religion, national origin, sex, sexual orientation, gender identity, disability, or family status." This ordinance applies to any person employing one or more employees in the City of Birmingham. This is a criminal ordinance and the municipal court can levy fines for violations which cannot exceed \$500. The mayor signed the ordinance but has yet to appoint the Human Rights Commission that is to receive complaints.

The Clarke-Figures Equal Pay Act (CFEPA) prohibits employers from paying any worker at a wage rate less than that paid to employees of another race or sex for equal work where the jobs require equal skill, effort, education, experience, and responsibility under similar working conditions. There is 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 on any factor other than race or sex. The CFEPA also provides that employers may not refuse to interview, hire, promote, or employ an applicant and may not otherwise retaliate against an applicant for refusing to provide wage history information during the application or interview process. A successful plaintiff can recover an amount equal to the wages that were lost because of the violation—plus interest—and must file a lawsuit within two years of the alleged discrimination.

7 | Who do these cover, including categories of workers?

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Misclassification

8 | Are there state-specific rules regarding employee/contractor misclassification?

No.

Contracts

9 | Must an employment contract be in writing?

No, oral contracts are enforceable (subject to the statute of frauds).

10 | Are any terms implied into employment contracts?

No, but in the absence of a specific term, employment is assumed to be at will.

11 | Are mandatory arbitration agreements enforceable?

Yes.

12 | How can employers make changes to existing employment agreements?

Courts can enforce the terms of a written agreement and amendment provisions. As a general matter, continued employment is sufficient consideration for an alteration to a term of employment. In the absence of a written agreement, employees are employed at will. Employers should consider new or additional considerations to bolster the enforcement of significant changes to employment terms.

HIRING

Advertising

13 | What are the requirements relating to advertising open positions?

There are no requirements for private employers.

Background checks

14 | (a) Criminal records and arrests

There are no restrictions separate from the federal restrictions (the Fair Credit Reporting Act).

15 | (b) Medical history

There are no restrictions, subject to federal restrictions (the Americans with Disabilities Act).

16 | (c) Drug screening

Drug screening is authorized. There is a drug-free workplace law that is helpful in defending workers' compensation claims, but there is no specific regulation of drug testing in the workplace. Although Alabama recently passed a law legalizing medical marijuana, the law did not prohibit employers from excluding workers who test positive for marijuana, even with a medical authorization.

17 | (d) Credit checks

There are no restrictions on credit checks, subject to federal restrictions (the Fair Credit Reporting Act).

18 | (e) Immigration status

The Beason-Hammon Alabama Taxpayer and Citizen Protection Act requires employers to use E-Verify.

19 | (f) Social media

There are no state restrictions.

20 | (g) Other

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WAGE AND HOUR**Pay****21 | What are the main sources of wage and hour laws in your state?**

Alabama does not have a state wage and hour statute that governs private employers generally. Alabama does have statutory requirements for the employment of minors, including hours worked, breaks required, and hazardous duty restrictions. The Alabama Department of Labor has enforcement responsibility for this law (Ala. Code 25-8-32 and following). Employers must post the child labor poster. Covered employers are subject to the Fair Labor Standards Act.

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22 | What is the minimum hourly wage?

Alabama does not have a statutory minimum wage for private employers. Covered employers are subject to the Fair Labor Standards Act.

23 | What are the rules applicable to final pay and deductions from wages?

Alabama does not have state laws regarding final paychecks or wage deductions. Alabama does have a little-used statutory provision that provides: "All assignments made by any person of salaries or wages, to be earned in the future, shall be absolutely void" (Ala. Code 8-5-21). Covered employers are subject to the Fair Labor Standards Act.

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Hours and overtime**24 | What are the requirements for meal and rest breaks?**

Alabama does not have any state laws regarding meals and rest breaks for private employers, except as provided in the child labor law. Covered employers are subject to the Fair Labor Standards Act.

25 | What are the maximum hour rules?

Alabama does not have a maximum hour rule for private employers, except as provided in the child labor law. Covered employers are subject to the Fair Labor Standards Act.

26 | How should overtime be calculated?

Alabama law does not dictate how overtime should be calculated. Covered employers are subject to the Fair Labor Standards Act.

27 | What exemptions are there from overtime?

Alabama law does not provide for overtime or overtime exemptions. Covered employers are subject to the Fair Labor Standards Act.

Record keeping**28 | What payroll and payment records must be maintained?**

As part of the child labor laws, employers must keep a complete employee information form, proof of age, and an electronic or photocopy of time records on the premises where minors are employed going back to 60 days before the last day each minor employee worked showing the hours worked each day, starting and ending times, and break times. Employers are encouraged to develop a document retention policy and must follow applicable federal requirements for recordkeeping.

DISCRIMINATION, HARASSMENT AND FAMILY LEAVE**What is the state law in relation to:****PRIVACY IN THE WORKPLACE****Privacy and monitoring**

29 | What are employees' rights with regard to privacy and monitoring?

On the privacy front, Alabama follows the federal wiretapping statute which stipulates that the consent of only one party to a conversation is required to record it. However, the Alabama tort of invasion of privacy or intentional infliction of emotional distress may apply to egregious violations of privacy, and employers are advised to inform employees in writing regarding their lack of privacy in relation to workspaces or property, including the use of company computers or servers.

30 | Are there state rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?

No.

Bring your own device

31 | What is the latest position in relation to bring your own device?

Alabama does not have a law governing bring your own device.

Off-duty

32 | To what extent can employers regulate off-duty conduct?

Employees are presumed to be at will in the absence of an employment agreement stating to the contrary, and thus employers may, subject to federal law and the few state laws referenced above, discipline or terminate employees for off-duty conduct. Employers may test employees for drugs or other substances and may prohibit the use of tobacco or other substances. Although Alabama recently legalized medical marijuana, the law does not prevent an employer from terminating an employee for a positive drug test for marijuana.

Gun rights

33 | Are there state rules protecting gun rights in the employment context?

Alabama has a statute permitting employees to keep firearms in their cars, even on company property, under certain conditions.

TRADE SECRETS AND RESTRICTIVE COVENANTS**Intellectual Property**

34 | Who owns IP rights created by employees during the course of their employment?

The employer may claim these rights if a contract is in place to this effect with the employee or if the IP work of the employee was done in the course of the employee's employment with the employer.

Restrictive covenants

35 | What types of restrictive covenants are recognized and enforceable?

Non-disclosure agreements, non-compete agreements, non-solicitation agreements, and no-poaching agreements all are enforceable to some degree in Alabama (the relevant statutory section is Ala. Code 8-1-190 and following).

Non-compete

36 | Are there any special rules on non-competes for particular classes of employee?

The Alabama statute exempts professionals such as doctors and lawyers. Professionals cannot be subject to a non-compete agreement. Also, non-compete agreements must be signed, in the employment context, with an employee and not an applicant.

LABOR RELATIONS**Right to work**

37 | Is the state a "right to work" state?

Yes.

Unions and layoffs

38 | Is the state (or a particular area) known to be heavily unionized?

No, not generally. There are areas, including traditional industrial, mining, and transportation employers that are more unionized than other areas. The Mobile area is more unionized than the rest of the state.

39 | What rules apply to layoffs? Are there particular rules for plant closures/mass layoffs?

Alabama has no little Worker Adjustment and Retraining Notification Act or similar law.

DISCIPLINE AND TERMINATION**State procedures**

40 | Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

Not in the private sector.

At-will or notice

41 | At-will status and/or notice period?

Alabama is a pure at-will state.

42 | What restrictions apply to the above?

Typical contractual and fair employment concerns apply. Alabama has a workers' compensation retaliatory discharge statute (Ala. Code 25-5-11.1) and a statute prohibiting age discrimination in employment (Ala. Code 25-1-20 and following). The City of Birmingham also has an ordinance making discrimination based on certain factors a misdemeanor criminal offense.

Final paychecks

43 | Are there state-specific rules on when final paychecks are due after termination?

No. However, the timing of the payment of sales commissions at termination are governed by statute (Ala. Code 8-24-1, 2, and 3).

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