

## PRIMERUS LABOR AND EMPLOYMENT LAW PRACTICE GROUP – COMPENDIUM

**Introduction:** Tulsa Employment Attorney Shannon Davis recently submitted the following Employment Law Survey; providing a general overview of Oklahoma's labor and employment law.

The full compendium can be viewed at:

<https://www.primerus.com/files/Labor%20&%20Employment%20Compendium%2010.21.19.pdf>.

### **Employment Law Survey – Oklahoma**

1. Is Oklahoma generally an employment-at-will state?

Yes.

"Where an employee has no written contract,<sup>1</sup> and employment is for an indefinite term, it is terminable at will by either party at any time with or without cause." *Corder v. Okla. Med. Research Found.*, 1999 OK CIV APP 33, ¶ 6, 980 P.2d 1122, 1124-25.

"Oklahoma adheres to the so-called American employment-at-will doctrine. Employers are free to discharge at-will employees in good or bad faith, with or without cause. At-will employees do not have a cognizable cause of action for wrongful discharge unless the claim falls within the narrow class of complaints in which the discharge may be characterized as contrary to a clear mandate of public policy and violates some law articulated in state constitutional, statutory or decisional sources." *See, Darrow v. Integris Health, Inc.*, 2008 OK 1, 176 P.3d 1204, 1210.

2. Are there any statutory exceptions to the employment-at-will doctrine in Oklahoma? Summarize (include code citations if statutory)

Yes.

- a. Protection of Labor. *Okla. Stat. tit. 40, § 199* generally provides that it is unlawful for an employer to discharge (or penalize or discriminate) against an employee who files a complaint with the employer or the Commissioner of Labor, or institutes a proceeding or investigation, under §§ 71 through 198.2 of title 40. Those sections

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<sup>1</sup> "[A]n employee handbook may form the basis of an implied contract between an employer and its employees if four traditional contract requirements exist: (1) competent parties, (2) consent, (3) a legal object and (4) consideration." *Russell v. Bd. of Cty. Comm'rs*, 1997 OK 80, ¶ 23, 952 P.2d 492, 501-02. Moreover, an employer may impose duties upon itself, as related to its employees, by adopting policies and procedures for the termination of employees. *Breshears v. Moore*, 1990 OK CIV APP 8, ¶ 15, 792 P.2d 91, 93-94. *See*, item 5, below.

involve Employment of Children, Boiler and Pressure Vessels, The Alternative Fuels Technician Certification Act, Protection of Labor, Track Motor Cars, Contracts Involving State Funds, and Minimum Wages. Under § 199 it is unlawful for an Oklahoma employer to discharge an employee who testifies or is about to testify in any investigation or proceeding under title 40 (Labor).

b. Worker's Compensation. *Okla. Stat. tit. 85A, § 7* prohibits an employer from retaliating against an employee who has in good faith: (1) filed a worker's compensation claim; (2) retained a lawyer for representation regarding a worker's compensation claim; (3) Instituted or caused to be instituted any proceeding under the provisions of the worker's compensation act; or, (4) testified or is about to testify in any proceeding under the provisions of the worker's compensation act.

c. Medical Marijuana. *Okla. Stat. tit. 63, § 425(B)* prohibits an employer from discriminating against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon the person's status as a medical marijuana license holder, or the results of a drug test showing positive for marijuana or its components, unless a failure to do so would cause an employer the potential to lose a monetary or licensing-related benefit under federal law or regulations.

An employer may take action against a holder of a medical marijuana license if the holder uses or possesses marijuana while in his or her place of employment or during the hours of employment.

3. Are there any public policy exceptions to the employment-at-will doctrine? If yes, cite code or primary case citations, summarize rights, discuss remedies and damages, attorney's fees and whether jury trial is available.

Yes, Oklahoma recognizes a public policy exception to the employment-at-will doctrine. The public policy exception was introduced in *Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24. Oklahoma courts have discussed the exception since and further explained the exception in *Darrow v. Integris Health, Inc.*, 2008 OK 1, 176 P.3d 1204. The court stated at 1210,

This exception was introduced into Oklahoma's legal system by Burk's singular modification of the common-law employment-at-will doctrine. The exception's application should be tightly circumscribed. Circumstances in which this actionable "Burk tort" is said to arise are where an employee is discharged for (1) refusing to violate an established and well-defined public policy or (2) performing some act consistent with a clear and compelling public policy. The implication of a sufficiently discernible public

policy presents a question of law to be resolved either at nisi prius or ultimately by an appellate court.

*See also, Hinson v. Cameron*, 1987 OK 49, 742 P.2d 549; *Griffin v. Mullinix*, 1997 OK 120, 947 P.2d 177, 179 (federal OSHA statute not a statement of Oklahoma public policy), "that a federal statute cannot serve as an articulation of Oklahoma public policy, absent [support in] a specific Oklahoma decision, [state] statute or [state] constitutional provision."

4. Is there any law related to the hiring process? If yes, cite code or primary case citations, summarize rights, discuss remedies and damages, attorney's fees and whether jury trial is available. (only discuss if law exists).

**(Examples:**

- a. Immigration
- b. Recruitment/Advertisement
- c. Applications
- d. Background
- e. Credit history
- f. Medical history
- g. Employment history
- h. Notification to unsuccessful applicants
- i. Offers of employment

a. **Immigration** - HB 1804 (effective November 1, 2007), known as The Oklahoma Taxpayer and Citizen Protection Act of 2007, requires public employers, contractors and subcontractors to participate in a federal electronic employment verification system (E-Verify) and requires income tax withholding for independent contractors who do not have valid Social Security numbers. *See, State Actions Regarding E-Verify.*

b. **Recruitment/Advertisement** - The Oklahoma Anti-Discrimination Act codified at *Okla. Stat. tit. 25, § 1101, et seq.*, prohibits employers from printing or publishing or causing to be printed or published, a notice or advertisement relating to employment that indicates a preference, limitation, specification, or discrimination based on race, color, religion, sex, national origin, age, genetic information or disability unless the employer can demonstrate that accommodation for the disability imposes an undue hardship on the operation of the business. Notice or advertisement may indicate a preference, limitation, specification or discrimination based on religion, sex, or national origin when it is a bona fide occupational qualification for employment.

The Act abolishes any common law remedies for employment-based discrimination and makes its remedies exclusive. Employees have 180 days from the last date of alleged

discrimination to file with the Oklahoma Attorney General's Office of Civil Rights Enforcement or may file with the EEOC.

*Okla. Stat. tit. 40, § 199.3* provides that if an employer recruits workers during a strike or lockout, that all job advertisements specifically state that a strike or lockout is in progress and that the job available was formerly held by an employee involved in the strike or lockout.

*Okla. Stat. tit. 40, § 167 - False Statements as to Conditions of Employment*, makes it unlawful for an employer to "induce, influence, persuade or engage workmen to change from one place to another in the state, or to bring workmen of any class or calling into this state to work in any of the departments of labor, through or by means of false or deceptive representations, false advertising or false pretenses concerning the kind and character of the work to be done, or amount and character of the compensation to be paid for such work or the sanitary or other conditions of employment or as to the existence or nonexistence of a strike or other trouble pending between employer and employees, at the time of or prior to such engagement. Failure to state in an advertisement, proposal or contract for the employment of workmen that there is a strike, lockout or other labor trouble at the place of the proposed employment, when in fact such strike, lockout or other labor troubles then actually exist at such place, shall be deemed a false advertisement and misrepresentation for the purposes of this section." Employers or their agents, attorneys or servants found guilty of violating any part of § 167 "shall be fined" \$500.00 to \$2,000.00, or confined in county jail for one (1) month to one (1) year or both. Further, § 170 provides that workmen who suffer damages shall have an action for recovery of damages sustained plus attorney's fees.

c. **Applications** - No discussion.

d. **Background** - *Okla. Stat. tit. 40, § 61* titled *Employer's Disclosure of Information about Current or Former Employee's Job Performance* generally provides that an employer or former employer can disclose to a prospective employer, job performance information on current or former employees upon the prospective employer's request and with consent of the current or former employee, or upon request of the current or former employee. The current or former employer is immune from civil liability unless bad faith is shown by a preponderance of the evidence by showing the disclosed information was provided with knowledge of its falsity or the employer/former employer acted with malice or reckless disregard for the truth.

e. **Credit history** - *Okla. Stat. tit. 24, § 148* provides that before an employer can request a consumer report on a person, it must provide written notice to that person. The notice must inform the consumer that the report will be used and the notice must contain a box that the consumer can check to receive a free copy of the consumer

report when the user of the report receives its copy from the credit reporting agency. There is no liability for violations if it can be shown by a preponderance of the evidence that, at the time of the alleged violation, the person maintained reasonable procedures to assure compliance.

f. **Medical history** - No discussion.

g. **Employment history** - See, Background above.

h. **Notification to unsuccessful applicants** - No discussion.

i. **Offers of employment**- No discussion

5. Does the state recognize implied employment contracts under employment handbooks, policies or practices? Summarize (include code citation if statutory)

Yes.

a. Employee Handbooks. Oklahoma courts recognize implied employment contracts. Employee handbooks may form the basis of an implied employment contract. Four (4) contract requirements must exist; competent parties, consent, a legal object and consideration. To create an implied contract the promises must be definite. See, *Russell v. Board of County Com'rs, Carter County*, 1997 OK 80, 952 P.2d 492, *Hayes v. Eateries, Inc.*, 1995 OK 108, 905 P.2d 778, 783. See also, *Bourke v. Western Business Products, Inc.*, 2005 OK CIV APP 48, 120 P.3d 876, where the court found an implied employment contract. In its discussion, the court, quoting *Dixon v. Bhuiyan*, 2000 OK 56, ¶ 10, 10 P.3d 888, 891, stated at 887:

When determining whether an implied contract exists, the Court will consider (a) the parties' acts, conduct and statements as a whole, (b) whether there was a meeting of the minds on the agreement's essential elements, (c) the parties' intent to enter into a contract upon defined terms, and (d) whether one of the parties has relied in good faith upon the alleged contract.

b. Policies and Procedures. An employer may impose duties upon itself, as related to its employees, by adopting policies and procedures for the termination of employees. *Breshears v. Moore*, 1990 OK CIV APP 8, ¶ 15, 792 P.2d 91, 93-94.

The Oklahoma Supreme Court discussed the issue as follows:

"Employers may be accountable for the promises they make, and the policies they adopt, when those promises and policies induce employee reliance or form part of a contract. This is a delicate and evolving area; therefore, the process of judicial interpretation must be sensitive, yet realistic. It must distinguish between carefully developed employer representations upon which an employee may justifiably rely, and general platitudes, vague assurances, praise, and indefinite promises of permanent continued employment. If employers have offered assurances upon which employees may justifiably rely, the employee may have a basis for recovering damages without regard to the characterization of the claim under classical contract or tort theories."

*Hinson v. Cameron*, 1987 OK 49, ¶ 7, 742 P.2d 549, 560

6. Does the state have a right to work law or other labor / management laws? Summarize (include code citations if statutory)  
Oklahoma is a right to work state. Right to work was added to the Oklahoma Constitution in 2001.

Okla. Const. art. XXIII, Section 1A prohibits requiring a worker to participate in a labor organization as a condition of employment. Prohibited acts include, but are not limited to, requiring membership in a labor organization; prohibiting membership or voluntary affiliation in a labor union; prohibiting voluntary financial support of a labor union; requiring payment of dues, fees, charges, etc., to a labor organization; requiring payment to any charity or other third party; prohibiting being required to be recommended, approved, referred, or cleared by or through a labor organization. It is unlawful, without prior employee authorization, to deduct from the employee's wages, earnings, or compensation, any union dues, fees, assessments, or other charges for benefit of a labor organization. Direct or indirect violations are a misdemeanor.

7. What tort claims are recognized in the employment context? If yes, cite code or primary case citations, summarize rights, discuss remedies and damages, attorney's fees and whether jury trial is available.

**(Examples:**

- a. Intentional Infliction of Emotional Distress
- b. Negligent Infliction of Emotional Distress
- c. Harassment/Assault/Battery
- d. Invasion of Privacy
- e. Fraud

**only discuss if law exists).**

Oklahoma recognizes several tort claims in the employment context. However, "[w]here a statutory remedy exists that is sufficient to protect the Oklahoma public policy goal, an employee has an adequate remedy that precludes resort to a tort cause of action to redress a termination in violation of the public policy." *Shephard v. CompSource Okla.*, 2009 OK 25, ¶ 12, 209 P.3d 288, 293.

- a. **Intentional Infliction of Emotional Distress** - In *Eddy v. Brown*, 1986 OK 3, 715 P.2d 74, 76, the court, in an employment case, stated:

Oklahoma recognizes intentional infliction of emotional distress as an independent tort. The new delict, also known as the tort of outrage, is governed by the narrow standards of § 46 Restatement of Torts (Second) [1977]. This section provides in pertinent part:

"(1) One who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

However, it appears the standard is nearly impossible to meet. *See, Hibben v. Oklahoma ex rel. Department of Veterans Affairs*, No. 16-cv-111-TLW, 2017 WL 1239146, \*10-\*11 (N.D. Okla. March 31, 2017), wherein the court pointed out that to succeed on a claim of intentional infliction of emotional distress:

plaintiff must show: "(1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct caused the plaintiff to suffer emotional distress; and (4) the plaintiff's emotional distress was severe." Kiefner, 2014 WL 2197812, at \*13 (citing *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1387 (10th Cir. 1986)). However, "[c]onduct which, though unreasonable, is neither 'beyond all possible bounds of decency' in the setting in which it occurred, nor is one that can be 'regarded as utterly intolerable in a civilized community' falls short of having actionable quality." *Brock v. Thompson*, 1997 OK 127, ¶35, 948 P.2d 279, 294 (Okla. 1998) (quoting Restatement (Second) of Torts § 46 (Am. Law Inst. 1977)). Further, [Oklahoma] appellate courts have consistently found employment related facts ... do not meet the [intentional infliction of emotional distress] criteria.

In *Miner v. Mid-America Door Co.*, 2003 OK CIV APP 32, 68 P.3d 212, 221, the court stated:

In recent years, Oklahoma courts have examined a variety of conduct claimed to be outrageous. To borrow a phrase from the Court of Civil Appeals' recent decision in *Gabler v. Holder & Smith, Inc.*, 2000 OK CIV APP 107, ¶ 64, 11 P.3d 1269, 1280, however, "[o]ur appellate courts have consistently found employment related facts similar to those here do not meet the [Restatement's] § 46 criteria." *Id.* Examples of conduct that was not sufficiently outrageous to meet the standard include: *Eddy v. Brown*, 1986 OK 3, 715 P.2d 74, involving a supervisor and foreman ridiculing the plaintiff in the workplace; *Anderson v. Oklahoma Temporary Services, Inc.*, 1996 OK CIV APP 90, 925 P.2d 574, involving six events over a two-year period that included a supervisor making lewd remarks about the plaintiff and embarrassing her by discussing her faults with co-workers; and *Mirzaie v. Smith Cogeneration, Inc.*, 1998 OK CIV APP 123, 962 P.2d 678, involving conduct that included an employer calling the plaintiff in the middle of the night and browbeating him for hours, requiring him to do unnecessary work, and making derogatory sexual comments about the plaintiff's fiancée. In all these cases, the reviewing court determined the conduct was not sufficiently outrageous to hold the defendants liable under the tort.

- b. **Negligent Infliction of Emotional Distress** - Oklahoma recognizes the tort of negligence which encompasses negligent infliction of emotional distress. *See, Chenoweth v. City of Miami*, 2010 OK CIV APP 91, 240 P.3d 1080, where the court explained:

However, "unlike a cause of action for intentional infliction of emotional distress, negligent infliction of emotional distress is not an independent tort." *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.*, 1996 OK 141, ¶ 1, 916 P.2d 241, 243, fn. 1. (Citation omitted.) That is to say, "[u]nder Oklahoma's jurisprudence the negligent causing of emotional distress is not an independent tort, but is in effect the tort of negligence." *Lockhart v. Loosen*, 1997 OK 103, ¶ 16, 943 P.2d 1074, 1081, 1083.

Consequently, "before damages for mental suffering may be collected, the plaintiff must establish: a duty on the part of the defendant to protect the plaintiff from injury; a failure of the defendant to perform the duty; and an injury to the plaintiff resulting from the failure." *Kraszewski*, 1996 OK 141, ¶ 1, 916 P.2d at 243, fn. 1.

- c. **Harassment/Assault/Battery** - In *Miner v. Mid-America Door Co.*, 2003 OK CIV APP 32, 68 P.3d 212, 222, 223, the court, discussing *Rodebush v. Oklahoma Nursing Homes, Ltd.*, 1993 OK 160, 867 P.2d 1241, as it pertains to assault and battery, stated:

As noted by the trial court, *Rodebush* sets forth guidance as to an employer's liability under the doctrine of *respondet superior* for the intentional torts of an employee.<sup>7</sup> Although, generally, an employer may be held vicariously liable for the actions of an employee acting in the scope of his employment, it also is the general rule that "it is not within the scope of an employee's employment to commit an assault upon a third person." *Id.* at ¶ 12, 867 P.2d at 1245. However, the latter rule will not apply if the assault was committed while the employee was engaged in the employer's business, and was committed " 'with a view to further the [employer's] interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the [employer's] business.' " *Id.* (quoting *Russell-Locke Super. Serv., Inc.*, 1935 OK 90, 170 Okla. 377, 40 P.2d 1090).

d. **Invasion of Privacy** - Oklahoma recognizes all four categories of invasion of privacy as set forth in *Restatement (Second) of Torts* § 652A. They are:

- (a) unreasonable intrusion upon the seclusion of another.
- (b) appropriation of the other's name or likeness.
- (c) unreasonable publicity given to the other's private life.
- (d) publicity that unreasonably places the other in a false light before the public.

*See, McCormack v. Oklahoma Publ. Co.*, 1980 OK 98, 613 P.2d 737, 739-740.

e. **Fraud** - In, *Stehm v. Nordam Group, Inc*, 2007 OK CIV APP 94, 170 P.3d 546, 549, the court recognized a duty owed by employer to not fraudulently induce acceptance of an offer of employment by withholding relevant information. The court stated:

We adopt Berger's reasoning and holding and extend the duty to an Oklahoma employer to assure the information disclosed to a prospective employee during the pre-hiring/recruitment process is not false or misleading. This duty is not vitiated by Appellant's at-will employment status because Appellant did not challenge his termination from employment. Instead, Appellant alleged he was induced to leave his secure job with Gardner Denver by Employer's misrepresentation during hiring.

"An employer's right to terminate an at-will employee without cause does not protect the employer from liability for fraud in inducing the employee to accept employment." Berger, 795 P.2d at 1384.

*Okla. Stat. tit. 40, § 167* titled *False Statements as to Conditions of Employment*, set forth more fully above, also prohibits the use of fraud to induce acceptance of employment by prospective employees.

8. Is there a common law or statutory prohibition against discrimination / hostile work environment? If yes, cite code or primary case citations, summarize rights, discuss remedies and damages, attorney's fees and whether jury trial is available.

**(Examples:**

- a. Race and Color - The Oklahoma Anti-Discrimination Act
- b. Ethnic/National Origin - The Oklahoma Anti-Discrimination Act
- c. Gender - The Oklahoma Anti-Discrimination Act
- d. Age - The Oklahoma Anti-Discrimination Act
- e. Religion - The Oklahoma Anti-Discrimination Act
- f. Veteran / military status - Okla. Stat. tit. 44, (Militia) § 208 & 208.1
- g. Disability - The Oklahoma Anti-Discrimination Act
- h. Genetic Information - The Oklahoma Anti-Discrimination Act
- i. Sexual Orientation -
- j. Sexual identity -
- k. Other – List

**(only discuss if law exists).**

The following discussion covers a - h above. The Oklahoma Anti-Discrimination Act found at *Okla. Stat. tit. 25, § 1101, et seq.* prohibits discriminatory workplace practices involving race, color, national origin, gender, age, religion, disability and genetic information. *Okla. Stat. tit. 44, (Militia) §§ 208 & 208.1* prohibits an employer from discharging an employee for being a member of the military and adopts, as Oklahoma law, The Servicemembers Civil Relief Act of 2003. *Okla. Stat. tit. 72, § 1* is the Soldier and Sailor Act. Pertinent provisions discussed below generally provide that a private employer must restore a service person's position or employment upon the expiration of active duty and grants service members a leave of absence from employment during military service without loss of status or seniority.

*Okla. Stat. tit. 25, § 1302* states in part:

It is a discriminatory practice for an employer:

1. To fail or refuse to hire, to discharge, or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, privileges or responsibilities of employment, because of race, color, religion, sex, national origin, age, genetic information or disability, unless the employer can demonstrate that accommodation for the disability would impose an undue hardship on the operation of the

business of such employer; or

2. To limit, segregate, or classify an employee or applicant for employment in a way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee, because of race, color, religion, sex, national origin, age, genetic information or disability, unless the employer can demonstrate that accommodation for the disability would impose an undue hardship on the operation of the business of such employer.

*Okla. Stat. tit. 25, § 1303* basically applies the same standards to employment agencies. *Okla. Stat. tit. 25, § 1304* basically applies the same standards to labor organizations. *Okla. Stat. tit. 25, § 1305* basically applies the same standards to an "employer, labor organization, or joint labor-management committee controlling apprenticeship, on-the-job, or other training or retraining" programs.

*Okla. Stat. tit. 25, § 1350* abolishes all common law remedies and makes its remedies exclusive. To have standing to allege employment related discrimination against an employer based on race, color, religion, sex, national origin, age, disability, genetic information with respect to the employee, or retaliation, an aggrieved party must, within one hundred eighty (180) days from the last date of alleged discrimination, file a charge of discrimination in employment with the Attorney General's Office of Civil Rights Enforcement ("CRE") or the EEOC alleging the basis of discrimination believed to have been perpetrated. Upon completion of any investigation, the CRE may transmit the results of any administrative hearing and determination to the EEOC or issue the complaining party a Notice of a Right to Sue.

If a charge of discrimination is filed with the CRE and remains unresolved for 180 days from date of filing, the CRE must issue a Notice of a Right to Sue upon any parties' request. The Notice is required before commencing a civil action and it must be brought within 90 days after receiving the Notice of a Right to Sue. The action must be brought in the district court where the unlawful employment practice is alleged to have been committed. Either party is entitled to a jury trial of any facts in dispute.

The defending party may allege any defense that is available under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Pregnancy Discrimination Act, the Rehabilitation Act, the Americans with Disabilities Act, or the Genetic Information Nondiscrimination Act.

If it is determined discrimination occurred, the court may enjoin the defendant(s)

from engaging in the unlawful employment practice and order such affirmative action as reinstatement or hiring of employees. A prevailing aggrieved party is entitled to backpay and an additional amount as liquidated damages. Interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce the backpay otherwise allowable. If an individual was refused employment or advancement, was suspended and/or was discharged for legitimate reasons other than discrimination then no order of the court shall require the hiring, reinstatement or promotion of that individual as an employee, nor shall it order payment of any back pay. The court may allow a prevailing plaintiff or defendant a reasonable attorney fee.

**Veteran / military status** - *Okla. Stat. tit. 44* is titled Militia. *Okla. Stat. tit. 44, § 208* is a miscellaneous provision that prohibits an employer from discharging "any person from employment because of being an officer, warrant officer or enlisted member of the military forces of the state, or hinder or prevent him or her from performing any military service he or she may be called upon to perform by proper authority, in respect to his or her employment, trade or business. Any person violating any of the provisions of this section, shall be punished by a fine of not to exceed One Hundred Dollars (\$100.00), or by imprisonment in the county jail for a period of not to exceed thirty (30) days, or by both such fine and imprisonment." Federal law, The Uniformed Services Employment and Reemployment Rights Act (USERRA) preempts Oklahoma's law if it is less protective of service members. *Okla. Stat. tit. 44, § 208.1* is a miscellaneous provision that specifically adopts The Servicemembers Civil Relief Act of 2003 (SCRA), codified at 50 U.S.C. App., § 501 *et seq.*, which updates, renames, and replaces the Soldiers' and Sailors' Civil Relief Act of 1940; and The Uniformed Services Employment and Reemployment Rights Act, §§ 4301 through 4333 of Title 38 of the United States Code, as Oklahoma state law and applies it to members of the Oklahoma National Guard when they are ordered to state active duty or full-time National Guard duty under §§ 501 through 507 of Title 32 of the United States Code.

*Okla. Stat. tit. 72, § 1* is the Soldier and Sailor Act. *Okla. Stat. tit. 72, § 47* generally provides a private employer must restore a service person's position or employment upon the expiration of active duty. Section 48 gives similar rights to service members employed by the state or a political subdivision. Section 48.1 protects service members by granting them "a leave of absence from such private civilian employment for the period of such service without loss of status or seniority." During the leave, the employer "may elect to pay the officer or employee an amount equal to the difference between his full regular pay from the employer in the private sector and his military pay" and can't be less than that provided by federal law.

If any employer in the private sector fails to comply with the provisions of this

section, the officer or employee may bring an action in district court for actual and compensatory damages for such noncompliance and may be granted such relief as is just and proper under the circumstances.

9. Is there a common law or statutory prohibition of retaliation? If yes, cite code or primary case citations, summarize rights, discuss remedies and damages, attorney's fees and whether jury trial is available.

(Examples:

- a. Discrimination Claims
- b. Workers' Compensation Claims
- c. Military Service
- d. Political Activities
- e. Medical Leaves
- f. Maternity/Paternity Leaves
- g. Whistle Blowing
- h. Safety Complaints
- i. Voting
- j. Jury Duty/Court Attendance
- k. Public Conduct Not Associated with Employment
- l. Private Conduct Not Associated with Employment
- m. Other

**only discuss if law exists).**

- a. Discrimination Claims - yes, see discussion above on The Oklahoma Anti-Discrimination Act codified at *Okla. Stat. tit. 25, § 1101, et seq.*, that prohibits employer discrimination based on race, color, religion, sex, national origin, age, genetic information or disability.
- b. Workers' Compensation Claims - *Okla. Stat. tit. 85A, § 1, et seq.* contains Oklahoma's Workers' Compensation Act. Section 7 of the act contains prohibitions against discrimination or retaliation against an employee, who acting in good faith under the act, files for benefits; retains a lawyer; institutes a proceeding; or testifies or is about to testify in any proceeding.

The Commission has exclusive jurisdiction to hear and decide claims based on these actions. If the Commission determines that the defendant violated committed the prohibited acts, it may award the employee back pay up to a maximum of \$100,000.00, reduced by amounts earnable with reasonable diligence. The prevailing party is entitled to costs and attorney's fees. The employee is also protected from discharge during a period of temporary total disability for simply for being absent from work or to avoid paying the

employee's temporary total disability benefits.

The employer isn't required to rehire or retain an employee who, after temporary total disability has been exhausted, is determined by a physician to be physically unable to perform his or her assigned duties, or whose position is no longer available. Also, these requirements are not to be construed as establishing an exception to the employment at will doctrine.

The above remedies are exclusive for claims arising out of the conduct described above.

- c. Military Service - yes, see 12 below for additional information. Basically, *Okla. Stat. tit. 44, § 208* prohibits an employer from discharging a person from employment for being a member of the military. Violations are punishable a fine of not to exceed \$100.00, or by imprisonment in the county jail for a period of not to exceed thirty (30) days, or by both. Federal law, The Uniformed Services Employment and Reemployment Rights Act (USERRA) preempts Oklahoma's law if it is less protective of service members.
- d. Political Activities.
- e. Medical Leaves.
- f. Maternity/Paternity Leaves.
- g. Whistle Blowing - *Okla. Stat. tit. 74, § 840.2.5* is the Whistle Blowing Act and protects government employees against whistle blowing. Relief can include reinstatement, back pay and benefits, and expungement of the adverse action from the employee's personnel records. *Okla. Admin. Code § 455:10-9-2(f)(1)(B)*. A prevailing employee can be awarded attorney fees and costs if the employee demonstrates by a preponderance of the evidence that the position of the non-prevailing party was without reasonable basis or was frivolous. *Okla. Admin. Code § 455:10-15-1*.

In cases where a plaintiff's conduct, like whistleblowing, is alleged to trigger a discharge in violation of Oklahoma public policy, the court must determine whether available remedies are sufficient to protect Oklahoma's public policy goals. If adequate remedies are available, the or if a clear public policy is not violated, the tort claim is not available. See generally, *Shephard v. CompSource Oklahoma*, 2009 OK 25, 209 P.3d 288, where a tort claim for whistleblowing was not allowed due to adequate remedies.

- h. Safety Complaints- In, *Vasek v. Board of County Com'rs of Noble County*, 2008 OK 35, 186 P.3d 928 the court reversed a summary judgment entered against the plaintiff wherein she claimed public policy exception to the employee at will doctrine.

Plaintiff alleged she was discharged in retaliation for reporting unhealthy conditions in a public building that affected employees and the public. OOHSSA provides that "[e]ach employer shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees, commensurate with [this Act]."

*Vasek*, 186 P.3rd at 933.

The court further stated at 933, "It is difficult to imagine a statement of public policy more specific or more applicable to the conduct Plaintiff alleged." Since the plaintiff established she was an at-will employee allegedly discharged in contravention a statutorily stated Oklahoma public policy goal to protect whistleblowers who report unsafe or unhealthy conditions in public buildings and established there was no adequate statutory remedy to protect Oklahoma's public policy goal, she could bring her action as a recognized exception to the at will doctrine.

- i. Voting.
- j. Jury Duty/Court Attendance - See 12 below. *Okla. Stat. tit. 38, § 35* generally provides that an employer who discharges or takes adverse action against an employee for being called for jury service, is civilly liable for actual and exemplary damages. Damages include "all pecuniary losses suffered including, but not limited to, lost earnings, both past and future, the value of lost leave, mental anguish and all reasonable damages incurred in obtaining other suitable employment." In, *Brown v. MFC Fin. Co. of Oklahoma*, 1992 OK CIV APP 54, 838 P.2d 524, the plaintiff establish a prima facie case of wrongful discharge under *Okla. Stat. tit. 38, § 35* and recovered \$175,000 in actual and \$175,000 in punitive damages.
- k. Public Conduct Not Associated with Employment.
- l. Private Conduct Not Associated with Employment.
- m. Other.

10. Is the state a deferral state for charges filed with the EEOC?

Oklahoma is a deferral state for charges filed with the Equal Employment Opportunity Commission ("EEOC"), meaning the EEOC will defer to, or let the state agency, *i.e.*, the Oklahoma Human Rights Commission ("OHRC"), handle the case. Discrimination claims may be filed with the OHRC, the EEOC, or both (dual or cross-file). The OHRC and the EEOC have a "work-sharing agreement," meaning the agencies cooperate processing claims. OHRC complaints must be filed within 180 days of the date one believes the discrimination occurred.

11. Are there any state laws related to compensation, including wage and hour, paid time off, mandatory breaks, fringe benefits, allowable deductions, prevailing wage rates for public contracts, etc.? If yes, summarize, including code or primary case citations, damages available, including attorney's fees, and whether jury trial is available.

Yes.

Oklahoma defines an "employer" as having ten or more full-time workers in one place or more than \$100,000 of business a year. *See, Okla. Stat. tit. 40, § 197.4 (d)*. If you do not meet this definition of an employer, generally you are exempt from Oklahoma minimum wage requirements.

Oklahoma follows the Federal minimum wage laws. *Okla. Stat. tit. 40, § 197.2*.

Currently Oklahoma minimum wage is \$7.25 per hour. Paid time off, sick leave, holiday leave, etc., paid or unpaid, is not required. Meals and breaks are not required for employees over the age of 16. *Okla. Stat. tit. 40, § 75*. Generally, employees must be paid at least two (2) times per calendar month and the times must be designated in advance. *Okla. Stat. tit.40, § 5-165.2*. Deductions from wages are not allowed unless authorized by state or federal law or if the employee agrees to the deduction in writing and signed by the employer and employee. Then it is only allowed for loan or advance repayment, payroll overpayment, employee purchases, uniforms, insurance premiums, retirement or investment plans, breakage, shortages (inventory and cash and employee must be solely responsible). *Okla. Admin. Code § 380:30-1-7. 197.6 - Posting of Notice*.

*Okla. Stat. tit. 40, § 197.6* requires that an employer post a minimum wage notice in such form as may be prescribed and furnished by the Commissioner of Labor. The notices are available at no charge from the Commissioner of Labor.

Vacation Leave -

Oklahoma employers are not required to provide vacation benefits, paid or unpaid. If an employer chooses to provide vacation benefits, then the employer must comply with the terms of its established policy or employment contract. *Okla. Stat. tit. 40, § 5-*

165.1(4); *Okla. Admin. Code* § 380:30-1-8.

An employer may lawfully establish a policy or enter into a contract denying employees payment for accrued vacation leave upon separation from employment. *Okla. Admin. Code* § 380:30-1-5.

An employer may also lawfully establish a policy or enter into a contract disqualifying employees from payment of accrued vacation upon separation from employment if they fail to comply with specific requirements, such as giving two weeks notice or being employed as of a specific date of the year. *Okla. Admin. Code* § 380:30-1-5.

An employer is required to pay accrued vacation to an employee upon separation from employment if its policy or contract requires it. *Okla. Admin. Code* § 380:30-1-5.

An employer is not required to pay accrued vacation leave upon separation from employment if the employer's established policy or employment contract is silent on the matter. *Okla. Admin. Code* § 380:30-1-5.

An employer may lawfully cap the vacation leave an employee can accrued over time, so long as the employer has properly notified its employees of the vacation policy. *Okla. Admin. Code* § 380:30-1-5.

An employer may lawfully implement a "use-it-or-lose-it" policy requiring employees to use their leave by a set date or lose it, so long as the employer has properly notified its employees of the vacation policy. *Okla. Admin. Code* § 380:30-1-5.

Oklahoma had a prevailing wage law titled the Oklahoma Minimum Wages on Public Works Act, found at *Okla. Stat. tit. 40, § 196.1, et seq.* It was held unconstitutional in *City of Oklahoma City v. State ex rel. Oklahoma Dept. of Labor*, 1995 OK 107, 918 P.2d 26. In 2015, statutes comprising the Act were officially repealed.

*Okla. Stat. tit. 40, § 165.9* authorizes attorney's fees and costs or "fees of any nature" in actions to recover unpaid wages and liquidated damages.

Other statutory penalties and damages include:

*Okla. Stat. tit. 40, §§ 165.2a & 165.8* address violations of 165.1 through 165.11 of Title 40. These sections address, Semimonthly Payment of Wages on Regular Paydays - Payment in Money - Itemized Termination of Employee - Payment - Failure to Pay Statement of Deductions - Prohibited Payments; Wages and Benefits upon Employee's Death; Bona Fide Disagreements; Private Agreements; Contractors as Employers; Enforcement and Administration - Administrative Proceedings - Orders - Appeals -

Actions; and Actions to Recover Unpaid Wages and Damages - Parties - Costs and Attorney's Fees. When an employer operating in Oklahoma is found to have violated any of the above sections on two or more occasions within any six-month period, the Commissioner of Labor is authorized to assess a \$500.00 administrative fine and Okla. Stat. tit. 40, § 165.8 makes each violation a misdemeanor.

*Okla. Stat. tit. 40, § 165.3* generally provides that upon employee termination, the employer must pay the employee's wages in full, (less offsets and amounts over which a bona fide disagreement exists), on the next regular designated payday unless provided otherwise by a collective bargaining agreement that covers the employee. Failure to pay subjects the employer to additional liability to the employee for liquidated damages consisting of two percent of the unpaid wages per day until paid, not to exceed the amount of the unpaid wages.

*Okla. Stat. tit. 40, § 165.11* makes each occurrence a misdemeanor, in addition to any other penalty or punishment prescribed by law, for an employer to willfully fail, neglect or refuse to pay or provide benefits or wage supplements (including reimbursement for expenses, health, welfare and retirement benefits, vacation and separation or holiday pay) to employees or to a third party or fund for the benefit of employees, within thirty days after such payments are required to be made by law or by agreement. When the employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions are each guilty of a misdemeanor.

*Okla. Stat. tit. 40, § 88* makes it a misdemeanor for willful violations of § 71, *et seq.* (child labor) and it carries a fine not to exceed \$500.00 for each offense and/or imprisonment for 10 - 30 days.

*Okla. Stat. tit. 40, § 197.13* provides that it's a misdemeanor punishable by a fine up to \$500.00, or by imprisonment in the county jail for up to six (6) months, or both, for an employer, officer or agent of any corporation to pay or agree to pay an employee less than minimum wage.

12. Is there a state statute governing paid or unpaid leaves? If yes, cite code or primary case citations, summarize rights, discuss remedies and damages, attorney's fees and whether jury trial is available.

Possible examples:

- i. Medical
  - ii. Maternity / paternity
  - iii. Military
  - iv. Voting
  - v. Jury duty
- i. **Medical** - Oklahoma has no separate law that requires employers to provide

employees any paid or unpaid sick leave benefits, but an employer may choose to voluntarily provide such benefits in which case it must follow the terms of its policy.

- ii. **Maternity / paternity-** Oklahoma has no separate maternity/paternity law. Employers and Employees must look to the Family and Medical Leave Act of 1993.
- iii. **Military -** *Okla. Stat. tit. 44, § 208* prohibits an employer from discharging "any person from employment because of being an officer, warrant officer or enlisted member of the military forces of the state, or hinder or prevent him or her from performing any military service he or she may be called upon to perform by proper authority, in respect to his or her employment, trade or business. Any person violating any of the provisions of this section, shall be punished by a fine of not to exceed One Hundred Dollars (\$100.00), or by imprisonment in the county jail for a period of not to exceed thirty (30) days, or by both such fine and imprisonment." Federal law, The Uniformed Services Employment and Reemployment Rights Act (USERRA) preempts Oklahoma's law if it is less protective of service members.

*Okla. Stat. tit. 44, § 208.1* specifically adopts The Servicemembers Civil Relief Act of 2003 (SCRA), codified at 50 U.S.C. App., § 501, *et seq.*, which updates, renames, and replaces the Soldiers' and Sailors' Civil Relief Act of 1940; and The Uniformed Services Employment and Reemployment Rights Act, §§ 4301 through 4333 of Title 38 of the United States Code, as Oklahoma state law and applies it to members of the Oklahoma National Guard when they are ordered to state active duty or full-time National Guard duty under §§ 501 through 507 of Title 32 of the United States Code.

*Okla. Stat. tit. 72, § 47* generally provides a private employer must restore a service person's position or employment upon the expiration of active duty.

*Okla. Stat. tit. 72, § 48* gives similar rights to service members employed by the state or a political subdivision.

*Okla. Stat. tit. 72, § 48.1* protects service members by granting them "a leave of absence from such private civilian employment for the period of such service without loss of status or seniority." During the leave, the employer "may elect to pay the officer or employee an amount equal to the difference between his full regular pay from the employer in the private sector and his military pay" and can't be less than that provided by federal law.

If any employer in the private sector fails to comply with the provisions of this section, the officer or employee may bring an action in district court for actual and compensatory damages for such noncompliance and may be granted such relief as is just and proper under the circumstances.

- iv. **Voting** - The employer must give an employee 2 hours off to vote if the employee doesn't have three (3) hours to vote while the polls are open before her shift begins or ends. "Upon proof of voting, such employee shall not be subject to any loss of compensation or other penalty for such absence." *Okla. Stat. tit. 26, § 7-101.*
- v. **Jury duty** - Jury Duty/Court Attendance - *Okla. Stat. tit. 38, § 34* generally provides that an employer doesn't have to pay an employee while serving as a juror, and an employee can't be terminated or be subject to any adverse employment action for serving as a juror. The employee can't be required, or requested, to use vacation pay, sick leave, etc., (but can if they choose) for time spent responding to a jury duty summons or for time spent serving. If an employer doesn't already provide vacation, sick leave, etc., they aren't required to provide it for employees on jury duty.

An employer who discharges or takes adverse action against an employee, including making them use vacation or sick leave, as a result of them being required to serve on any jury duty, "is guilty of a misdemeanor and, upon conviction, shall be punishable by a fine not to exceed Five Thousand Dollars (\$5,000.00)."

*Okla. Stat. tit. 38, § 35* provides that an employer who discharges or takes adverse action against an employee or requires an employee to use sick, annual or vacation leave because they are called for jury service, is civilly liable to the employee for actual and exemplary damages. Damages include "all pecuniary losses suffered including, but not limited to, lost earnings, both past and future, the value of lost leave, mental anguish and all reasonable damages incurred in obtaining other suitable employment."

A court must automatically postpone and reschedule jury duty for an employee working for an employer with five or fewer full-time employees if another of the employees has previously been summoned during the same period.

- 13. Is there a state law governing drug-testing? If yes, summarize (include general code citation)

Yes, the Standards for Workplace Drug and Alcohol Testing Act is found at *Okla. Stat. tit.*

40, § 551, *et seq.*

*Okla. Stat. tit. 40, § 554* provides that employers may conduct drug and alcohol testing in accordance with the Act. Employers who choose to conduct drug or alcohol testing may only request or require an applicant or employee to undergo testing under the following circumstances:

1. Applicant and transfer/reassignment testing;
2. For-cause testing including drugs or alcohol on or about the employee's person, conduct that suggests impairment or influence of drugs or alcohol, a report of drug or alcohol use at work or on duty, information that an employee has tampered with drug or alcohol testing, negative performance patterns, or excessive or unexplained absenteeism or tardiness
3. Post-accident testing; Employee is not eligible for workers' compensation if they test positive for alcohol, illegal drugs, or illegally used chemicals, or refuses to take a drug or alcohol test required by the employer;
4. Random testing;
5. Scheduled, fitness-for-duty, return from leave and other periodic testing; and
6. Post-rehabilitation testing:

*Okla. Stat. tit. 40, § 555* requires that the employer adopt and distribute a written drug or alcohol testing policy before testing and tells what the policy may include, *i.e.*, a statement of the employer's policy respecting drug or alcohol use by employees; which applicants and employees are subject to testing; circumstances under which testing may be requested or required; consequences of refusing to undergo testing; potential adverse personnel action which may be taken as a result of a positive test result; the ability of an applicant and employee to explain, in confidence, the test results; confidentiality requirements; the available appeal procedures, etc.

The employer implementing or changing a testing policy must provide 10 days' notice to employees and must provide a copy of its policy to each applicant in the manner set forth in the act.

*Okla. Stat. tit. 40, § 556* is titled *Time of employer testing - Payment of costs.*

Drug or alcohol testing is deemed work time for purposes of compensation and benefits for current employees and the employer must pay all costs of required testing unless a confirmation test to challenge the results of a positive test is requested within 24 hours of receiving notice of a positive test. The applicant or employee must pay for the confirmation test. If the results are reversed, the employee is reimbursed.

**A testing facility, or any agent, representative or designee of the facility, or any review**

**officer, shall not disclose to any employer, based on the analysis of a sample collected from an applicant or employee for the purpose of testing for the presence of drugs or alcohol, any information relating to the general health, pregnancy or other physical or mental condition of the applicant or employee.**

*Okla. Stat. tit. 40, § 562* is titled *Disciplinary actions*. It provides that an employer's policy state disciplinary actions that the employer may take upon a refusal to undergo a drug or alcohol test or for a positive test. Disciplinary action may include discharge of an employee who refuses to undergo properly conducted drug or alcohol testing.

*Okla. Stat. tit. 40, § 563* is titled *Willful violation of act - Civil actions - Remedies*. It provides that any person aggrieved may institute a civil action within one (1) year of the alleged willful violation. The aggrieved must prove by a preponderance of the evidence that the employer had a specific intent to violate the act. A prevailing party may be awarded lost wages and an additional equal amount as liquidated damages. Interim amounts earned or earnable with reasonable diligence reduce the lost wages award. Reasonable costs and attorney fees can be awarded to the prevailing party, whether plaintiff or defendant.

14. Is there a medical marijuana statute? If so, cite statute, discuss extent use is allowed.

Yes.

*Okla. Stat. tit. 63, § 425(B)* prohibits an employer from discriminating against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon the person's status as a medical marijuana license holder, or the results of a drug test showing positive for marijuana or its components, unless a failure to do so would cause an employer the potential to lose a monetary or licensing-related benefit under federal law or regulations. It allows an employer to take action against a holder of a medical marijuana license if the holder uses or possesses marijuana while in his or her place of employment or during the hours of employment.

15. Is there trade secret / confidential information protection for employers? If yes, summarize (include code or primary case citations)

Yes. *Okla. Stat. tit. 78, § 85* titled the *Uniform Trade Secrets Act*.

The Act generally displaces any conflicting Oklahoma laws that provide civil remedies. It protects against actual or threatened misappropriation and may be enforced through injunctive relief and in exceptional circumstances, "an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for

which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of a misappropriation that renders a prohibitive injunction inequitable.

An action must be brought within three (3) years after the misappropriation is, or with reasonable diligence, should have been discovered.

16. Is there any law related to employee's privacy rights? If yes, cite code or primary case citations, summarize rights, discuss remedies and damages, attorney's fees and whether jury trial is available.

Possible Examples:

- i. social media
  - ii. polygraph tests
  - iii. confidential / identity information
  - iv. access to employee communications, including telephone, e-mail
- i. social media -  
*Okla. Stat. tit. 40, § 173.2 - Limitations on Employer Access to Online Social Media Accounts of Employees - Remedies for Violations.*

An employer can't require an employee or prospective employee to disclose their user name and password or other means of authentication for accessing a personal online social media account or to access their personal online social media account in employer's presence or where the employer can observe the contents of the accounts unless the account's contents are available to the general public.

An employer can't take retaliatory personnel action against an employee that materially and negatively affects the terms and conditions of employment solely for refusing to give the employer the user name or password to the employee's personal online social media account; or  
refuse to hire a prospective employee solely for refusing to give the employer the user name and password to their personal online social media account.

Employers can request or require employee disclosure of any user name and password for accessing the employer's computer system, network or electronic communications device provided or subsidized by the employer; or accounts or services provided by the employer or by virtue of the employee's employment relationship with the employer or that the employee uses for business purposes.

Employers are allowed to conduct investigations to ensure compliance with applicable laws, regulatory requirements or prohibitions against work-related

employee misconduct based on the receipt of specific information about activity on a personal online social media account or personal online social media service by an employee or other source, or of an employee's actions based on the receipt of specific information about the unauthorized transfer of an employer's proprietary information, confidential information or financial data to a personal online social media account or personal online social media service by an employee or other source;

Nothing in this section shall be construed to prohibit an employer from accessing its computer system or information technology network, including electronic communications devices owned by the employer. Neither this section nor any other Oklahoma law shall prohibit an employer from reviewing or accessing personal online social media accounts that an employee may choose to use while utilizing an employer's computer system, information technology network or an employer's electronic communication device.

An employee or prospective employee may bring a civil action against an employer who violates this section in a court located in the county in which the alleged violation occurred. Such action shall be brought within six (6) months after the alleged violation occurred. The employee or prospective employee may seek injunctive relief to restrain the employer from continuing to act in violation of this section, but must show by clear and convincing evidence that the employer violated this act. The only damages recoverable for a violation of this act are Five Hundred Dollars (\$500.00) per violation. No punitive or emotional damages are recoverable, and this section may not be utilized for the basis of a public policy tort.

- iii. confidential / identity information -  
*Okla. Stat. tit. 40, § 173.1* - Employees' Social Security Numbers, provide that an employing entity shall not, publicly post or display the social security number of an employee, print the social security number on any card required for the employee to access the employer's information, products or services, require an employee to transmit their social security number over the Internet, unless the connection is secure or the social security number is encrypted, require an employee to use their social security number to access an Internet web site, unless a password or unique personal identification number or other authentication device is also required to access the Internet web site, or print the social security number of an employee on any materials that are mailed to the employee, unless state or federal law requires the social security number to be on the document to be mailed. Notwithstanding this paragraph, social security numbers may be included in applications and forms sent by mail, including documents sent as part of an application or enrollment process, or to

establish, amend or terminate an account, contract or policy, or to confirm the accuracy of the social security number.

Oklahoma has a statute that makes it a felony punishable by a minimum \$5,000.00 fine or by imprisonment of not more than five (5) years, or by both, to of wiretapping basically anyone. Employees are not excluded. See *Okla. Stat. tit. 13, § 176.1* titled the *Security of Communications Act*. Prohibited acts include to willfully intercept or try to intercept, or use any wire, oral or electronic communication; to willfully use any electronic, mechanical or other device to intercept any oral communication; to willfully disclose to any other person the contents of any wire, oral or electronic communication, knowing it or having reason to know that it was obtained contrary to the act. The above acts are not improper if the person committing the acts is a party to the communication or if one of the parties to the communication has given prior consent to such interception.

- iv. access to employee communications, including telephone, e-mail - See i. above, *Okla. Stat. tit. 40, § 173.2* - Limitations on Employer Access to Online Social Media Accounts of Employees - Remedies for Violations. "Personal online social media account" is defined as including email.

17. Is there any law restricting arbitration in the employment context? Summarize (include code citation)

*Okla. Stat. tit. 12, § 1851, et seq.* is Oklahoma's Uniform Arbitration Act. Arbitration is applicable to employment contracts and does not violate Oklahoma's constitutional right to trial. In, *B.A.P., L.L.P. v. Pearman*, 2011 OK CIV APP 30, 250 P.3d 332, 336 the court stated:

"Courts generally favor arbitration ... because [it] provide[s] substantial justice by an immediate and speedy resolution with a minimum of court interference." *Voss v. City of Oklahoma City*, 1980 OK 148, ¶ 6, 618 P.2d 925, 928. The role of the court is to determine whether there is a valid binding arbitration clause, and if so, whether "the arbitration clause is broad enough to include the alleged dispute...." *Id.* If the court answers both these questions in the affirmative, "arbitration must be ordered." *Id.* The question of whether parties have an agreement to submit a dispute to arbitration is a question of law to be decided applying state contract law. *Rogers v. Dell Computer Corp.*, 2005 OK 51, ¶ 19, 138 P.3d 826, 831 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–44, 115 S.Ct. 1920, 131 L.Ed.2d 985

(1995)).

18. Is there any law governing weapons in the employment context? Summarize (include code citation).

Yes.

The Oklahoma Self-Defense Act ("Act") that addresses open and conceal carry of firearms is found at *Okla. Stat. tit. 21, § 1289.1, et seq.* sets forth business owner's rights in § 1290.22. Generally, the Act is not to be construed to limit the employers right to control the possession of weapons on property owned or controlled by the employer. But, the employer can't establish any policy/rule that in effect, prohibits anyone other than a convicted felon, from transporting and storing firearms in a locked vehicle on property set aside for vehicles.

*Okla. Stat. tit. 21, § 1277(A)* generally makes it unlawful for any person to carry a handgun into any government building, school, publicly owned or operated arena, unless allowed by the event holder, or place of gambling, unless allowed by the property owner.

*Okla. Stat. tit. 21, § 1277(C)* allows a person who is licensed pursuant to the Oklahoma Self-Defense Act to carry a concealed or unconcealed weapon onto private school property or in any school bus or vehicle used by any private school for transportation of students or teachers if the governing entity of the private school adopts a policy approving same. This statute also provides the governing entity of a private school that adopts the policy immunity from liability for any injuries arising from the adoption of the policy, except for acts of gross negligence or willful or wanton misconduct. The provisions of this subsection does not apply to worker's compensation claims.

*Okla. Stat. tit. 21, § 1290.22(B)and (C)* allow property owners, tenants, employers and others to prohibit any person from carrying a concealed or unconcealed firearm on the property. However, they may not establish any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle. If the employer prohibits the carrying of concealed or unconcealed firearms on its property, it must post signs stating the prohibition if it's open to the public.

*Okla. Stat. tit. 21, § 1290.22(F)* grants Employers that allow employees (except convicted felons) to carry a weapon on its property are immune from liability arising from that decision, except for acts of gross negligence or willful or wanton misconduct. The immunity doesn't include Workers' Compensation claims.

It's not considered part of an employee's job description or within the employee's scope

of employment when they are allowed to carry or discharge a weapon.

Employers, employees or persons who suffer a loss resulting from the discharge of a weapon may seek redress or damages from the person who discharged or used the weapon outside the provisions of the Act.

19. Miscellaneous employment or labor laws not discussed above? Summarize.

### **Non-Compete Agreements.**

Oklahoma views any non-compete agreement as a restraint of trade, and starts with the premise that any contract that restrains one from the free exercise of trade is unlawful. Restraints of trade are so disfavored, that our Legislature "limits that freedom and prevents parties from "agreeing" to restraints of trade except under limited circumstances." *Favell v. Favell*, 1998 OK CIV APP 22, ¶ 13, 957 P.2d 556, 561. This "legislatively expressed public policy" begins with *Okla. Stat. tit. 15, § 217*, which provides:

Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by Sections 218 and 219 of this title, or otherwise than as provided by Section [219A] of this act, is to that extent void.

*Okla. Stat. tit. 15, § 217* is intended to foster "ordinary fair competition." *Loewen Grp. Acquisition Corp. v. Matthews*, 2000 OK CIV APP 109, ¶ 20, 12 P.3d 977, 982

The "limited circumstances" under which an employer and employee can enter an agreement that restrains trade are found in *Okla. Stat. tit. 15, § 219A*, which provides:

A. A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.

B. Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable.

The Oklahoma Supreme Court discussed *Okla. Stat. tit. 15, § 219A*, as follows:

"Title 15 O.S.2001 § 219A is the Legislature's pronouncement on Oklahoma's public policy regarding covenants not to compete.

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Subsection A utilizes the mandatory term, "shall," in association with the employee's right to engage in the same or similar business as that of the employer while subsection B provides that "any" provision in a contract between the employer and employee conflicting with those terms "shall be void and unenforceable." The term "any" is all-embracing and means nothing less than "every" and "all."<sup>38</sup> The plain, clear, unmistakable, unambiguous, and unequivocal language of 15 O.S.2001 § 219A prohibits employers from binding employees to agreements which bar their ability to find gainful employment in the same business or industry as that of the employer. The only exception allowed by the statutory provision is that the employee may be barred from soliciting goods or services from the employer's **established customers.**"

*Howard v. Nitro-Lift Techs., L.L.C.*, 2011 OK 98, ¶¶ 20-21, 273 P.3d 20, 28 (reversed on other grounds, *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012)) (emphasis in original).<sup>2</sup>

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<sup>2</sup>*Nitro-Lift* was reversed on grounds unrelated to the merits of the dispute and, "the Oklahoma Supreme Court's decision in *Howard* remains the best pronouncement of that Court's instruction on the proper analysis of such non-solicitation agreements." *Autry v. Acosta, Inc.*, 2018 OK CIV APP 8, ¶ 28, 410 P.3d 1017, 1023.