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North Carolina Legislation Removes LGBT Protections and Possible Wrongful Termination Claims

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The North Carolina General Assembly's "Single-Sex Multiple Occupancy" Act (also known as "HB-2"), which prevents cities and counties from passing their own anti-discrimination rules, is attracting nationwide attention due to its adverse treatment of transgender persons in public accommodations. However, the Act also amended the North Carolina Equal Employment Practices Act (NCEEPA), calling into question the viability of wrongful discharge in violation of public policy claims premised upon NCEEPA. Finally, the Act amended North Carolina's wage and hour act by specifically limiting local governmental entities' ability to require wages and benefits more favorable than state or federal law.

This article addresses best practices for employers in responding to the legislation, as well as additional thoughts on wrongful discharge claims and the legislation's effect on wage and hour issues.

Legislation Overturns Local Government Ordinances Protecting LGBT Employees and Mandates Restroom Usage based on Biological Sex

North Carolina legislators reined in local governments by approving a bill that prevents cities and counties from passing their own anti-discrimination rules. Governor Pat McCrory signed the legislation after the General Assembly took action on March 23, 2016, to require local public agencies and school boards to designate multiple occupancy bathrooms and changing facilities to be used only by persons based on their biological sex.

In addition, Part III of the legislation declares that the "regulation of discriminatory practices in employment" is a "state wide concern...and supersedes and preempts" any local ordinances "pertaining to the regulation of discriminatory practices in employment." This legislation was passed primarily in response to the Charlotte city leaders' approval of a broad anti-discrimination measure in February that allowed transgender people to use the restroom aligned with their gender identity.

Unless the North Carolina legislation is successfully challenged (a lawsuit challenging HB-2 was filed on March 28), North Carolina employers could find themselves in a precarious position if they follow HB-2 and prevent transgender employees from using the restroom that corresponds with their gender presentation, for their decision may be seen to conflict with various federal laws and regulations promulgated by the U.S. Equal Employment Opportunity Commission, Title IX, President Obama's Executive Order 11246, Occupational Safety and Health Administration's "A Guide to Restroom

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Order 11246, Occupational Safety and Health Administration's "A Guide to Restroom Access for Transgendered Workers," Department of Labor, and other federal agencies.

Legislation's Effects on Wrongful Discharge in Violation of Public Policy Claims

North Carolina adheres to the at-will employment doctrine, which states that "in the absence of a contractual agreement...establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Kurtzman v. Applied Analytical Industries, Inc.,* 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997), *reh'g denied,* 347 N.C. 586, 502 S.E.2d 594 (1998).

North Carolina courts have created an exception to the "at will" rule that allows plaintiffs to allege claims for wrongful termination in violation of public policy. *See, e.g., Brackett v. SGL Carbon Corp.,* 158 N.C.App. 252, 259, 580 S.E.2d 757, 761 (2003). To state a claim of wrongful discharge in violation of North Carolina public policy, a plaintiff must plausibly identify and rely on a specific North Carolina statute or North Carolina constitutional provision as stating North Carolina public policy. *See, e.g., Whitings v. Wolfson Casing Corp.,* 173 N.C.App. 218, 222, 618 S.E.2d 750, 753 (2005).

NCEEPA often has been cited as the basis of the public policy to support a wrongful discharge claim. N.C. Gen. Stat. § 143-422.1 *et seq.* It was enacted into law in 1977 and declared that the public policy of North Carolina was to "protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees."

Thus, NCEEPA mirrors Title VII, the principal employment-related federal non-discrimination statute. Unlike Title VII, however, NCEEPA does not create an independent cause of action (meaning, an individual could not use this statute as a basis to bring a claim). Instead, until now, perhaps, litigants who believed their employer had discriminated against them on a characteristic enumerated in NCEEPA could bring a state common law claim for wrongful discharge in violation of public policy and cite NCEEPA as the source of the public policy to support their claim. Indeed, individuals who missed their 180-day deadline to file an EEOC charge could rely upon this wrongful discharge claim to vindicate similar rights.

The passage of the Single-Sex Multiple Occupancy Act calls into question whether litigants can continue to rely upon NCEEPA as a statement of North Carolina's public policy to support a wrongful discharge claim. The Act amends NCEEPA by providing that NCEEPA "does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein." Thus, with this statutory change, prospective plaintiffs may no longer be able to point to NCEEPA as a basis for the state's public policy to support a wrongful termination claim.

While the North Carolina Constitution still may be cited as evidence of the state's public policy, the Constitution is of little benefit to individuals who have been discharged from employment by private employers. Long-standing precedent has established that the North Carolina Constitution can be used only to vindicate deprivation of rights by the government or state officials being sued in their official capacity. *See Corum v. University of North Carolina,* 330 N.C. 761, 788, 413 S.E.2d 276, 293 (1992). Because any claim asserting the deprivation of a North Carolina constitutional right can be enforced only against the government or state officials, individuals employed by private companies cannot use the state Constitution as the public policy to support a wrongful discharge claim. Thus, without NCEEPA, prospective plaintiffs seemingly lack a suitable alternative source of public policy to rely upon in bringing state law wrongful discharge cases based upon membership in traditional protected classes.

While these changes to NCEEPA at first blush appear to be broad in scope, it remains to be seen how North Carolina courts will treat future wrongful discharge in violation of public policy claims that rely on NCEEPA. Savvy plaintiffs and their counsel likely will hedge their bets by taking the steps necessary to pursue discrimination claims under federal law, rather than taking their chances in state court.

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From a practical standpoint, individuals who miss their 180-day deadline to file a Charge of Discrimination with the EEOC may be hard-pressed to bring discrimination claims in state court by alleging a claim for wrongful discharge in violation of public policy as such claims may be dismissed based upon the recent amendments. Until the courts interpret the amendments or the legislature amends the statute, this area of the law will be unsettled.

Legislation's Effects on Wage and Hour Issues

In addition, the legislation amends the North Carolina Wage and Hour Act by preventing local governments and other political subdivisions from imposing obligations upon employers that are more onerous than those established in the Wage and Hour Act. The legislation provides that the Wage and Hour Act supersedes and preempts "any ordinance, regulation, resolution, or policy adopted by or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirements upon an employer pertaining to compensation of employees, such as the wage levels of employees, hours of labor, payment of earned wages, benefits, leave, or well-being of minors in the workforce."

Across the nation, many municipalities or local governmental entities have enacted ordinances or other laws establishing a minimum wage in excess of that required by state or federal law. Other local governmental entities have mandated paid sick leave. Indeed, in North Carolina, some municipalities have considered adoption of living wage ordinances that would require payment of wages in excess of the statutorily required minimum wage. A "living wage" is the minimum amount that an employee must earn in order to afford his or her basic necessities without reliance or public or private assistance, as determined by the local legislature enacting the law. Such local legislation now is impermissible in North Carolina.

HB-2 prevents any local governmental entity from adopting an ordinance or resolution that would mandate wages, hours of work, benefits, or leave in excess of those required by state or federal law. Under the legislation, local governmental entities still are free to adopt rules that govern their own employees. However, they cannot mandate that other employers in their jurisdictions comply with obligations in excess of those required by the Wage and Hour Act.

While the legislation helps to maintain consistency by having only one statewide Wage and Hour law, the legislation restricts local governmental discretionary powers.

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North Carolina employers and multi-state employers must remain vigilant, monitor new and pending state statutes and gain a greater understanding of potential conflicts. As a best practice, employers, especially multi-state employers, should strive to prevent misgendering (the intentional misuse of personal pronouns) and take care to avoid violations of anti-harassment policies and core values. Moreover, human resources professionals and in-house counsel must work with transgender employees on creating a gender transition plan that addresses the "go live" date, restroom and locker room usage, Family and Medical Leave Act rights and training. Sensitivity training on all forms of harassment and discrimination, including LGBT discrimination, for managers and staff, to promote a diverse and safe workplace culture, also should be conducted.

Please consult with the Jackson Lewis attorney with whom you regularly work to ensure compliance with all federal, state, and local employment laws.

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