

The information provided here is for informational and educational purposes and current as of the date of publication. The information is not a substitute for legal advice and does not necessarily reflect the opinion or policy position of the Municipal Association of South Carolina. Consult your attorney for advice concerning specific situations.



Municipal Association of South Carolina



South Carolina Municipal Human Resources Association

Employment Law: Recent Developments and Legal Considerations

November 14, 2024
Fred A. Williams, Esq.



BETTIS LAW GROUP, LLP

3700 Forest Dr., Suite 500
Columbia, SC 29204
P. 803.799.9311
www.bettislawsc.com

South Carolina's Labor & Employment Law Firm


The Changing Legal Landscape Affecting Employment

- New FLSA Salary Basis Rule
- Recent Pregnancy Protections
- Religious Expression and Accommodations
- Remote Work
- Public Records



The Fair Labor Standards Act

- The Fair Labor Standards Act, or FLSA, was signed into law on June 25, 1938.
- According to a U.S. Department of Labor (DOL) fact sheet, the FLSA protects more than 143 million American workers.



The four main provisions of the FLSA are:

- Federal minimum wages
- Overtime pay
- Employer recordkeeping
- Child labor

The Fair Labor Standards Act

- Covered, nonexempt workers are entitled to a minimum wage of \$7.25 per hour effective July 24, 2009.
- Nonexempt workers must be paid overtime pay at a rate of not less than one and one-half times their regular rates of pay after 40 hours of work in a workweek.
- Every covered employer must keep records for each non-exempt worker that include identifying information about the employee and data about hours worked and wages earned.

EAP Exemption to the FLSA

- Employees are exempt from the Fair Labor Standards Act's minimum wage and overtime protections if they are employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Department's regulations at 29 CFR part 541.
- To fall within the EAP exemption, an employee must:
 - be paid a salary;
 - be paid at least a specified weekly salary level; and
 - primarily perform executive, administrative, or professional duties, as provided in the Department's regulations.

New Salary Basis Rule

- Employees are exempt from the Fair Labor Standards Act's minimum wage and overtime protections if they are employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Department's regulations at 29 CFR part 541.
- To fall within the EAP exemption, an employee must:
 - be paid a salary;
 - be paid at least a specified weekly salary level; and
 - primarily perform executive, administrative, or professional duties, as provided in the Department's regulations.

New Salary Basis Rule

The U.S. Department of Labor released a final rule on April 23, 2024, raising the salary threshold to qualify for the EAP exemption.

DATE	STANDARD SALARY LEVEL
Before July 1, 2024	\$684 per week (equivalent to \$35,568 per year)
July 1, 2024	\$844 per week (equivalent to \$43,888 per year)
January 1, 2025	\$1,128 per week (equivalent to \$58,656 per year)
July 1, 2027, and every 3 years thereafter	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update.

New Salary Basis Rule

- Who this does NOT apply to:
 - Teachers - the professional exemption for teachers does not have any salary basis or salary level requirement;
 - Lawyers and Physicians - exempt without regard to whether they are paid on a salary basis or receive the new minimum salary;
 - Outside Sales - salary requirements do not apply to the outside sales exemption;
 - Elected officials
 - Personal staff members of elected officials
 - Officials in a policy-making position who are selected or appointed by elected public officials
 - Advisors to those appointed officials

– excluded from the FLSA by 29 CFR § 553.11.

New Salary Basis Rule

- What now? (or really, “What four months ago?”)
 - create a list of your exempt employees who currently earn between \$35,568 and \$58,656 a year;
 - track or otherwise evaluate their actual hours worked to help you understand the potential impact of converting to non-exempt (hourly) status;
 - decide whether to raise their salary to meet the new threshold or convert them to non-exempt status;
 - provide seven days advance written notice to each employee about the specific changes to their compensation and what new responsibilities come with the changes, such as timekeeping, meal and rest breaks, and other requirements.

Recent Pregnancy Protections



(not so) Recent Pregnancy Protections

- The Pregnancy Discrimination Act of 1978, amended Title VII of the Civil Rights Act of 1964 to prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions.
- Effective March 23, 2010, the Patient Protection and Affordable Care Act amended the FLSA to require employers to provide a nursing mother reasonable break time to express breast milk after the birth of her child. The amendment also requires that employers provide a place for an employee to express breast milk.

Recent Pregnancy Protections

The South Carolina Pregnancy Accommodations Act


§ 1-13-10 to -110. Enacted on May 2018.

- extends discrimination protections and reasonable accommodations to "women affected by pregnancy, childbirth, or related medical conditions."
- covered employers must provide written notice of the right to be free from discrimination for medical needs arising from pregnancy, childbirth, or related medical conditions.
- this notice must be given to all new employees at the commencement of employment and should have been given to all existing employees as of September 14, 2018.

Recent Pregnancy Protections

- **The South Carolina Lactation Support Act**
§ 41-1-130. Effective June 25, 2020.
 - provide a room or other location (other than a toilet stall) for an employee to express milk
 - does not require an employer to provide break time if doing so would create an undue hardship
 - makes it unlawful for an employer to discriminate against an employee for choosing to express breast milk in the workplace

Recent Pregnancy Protections

- The federal government has recently passed laws similar to the two South Carolina laws just discussed:
 - **The Pregnant Workers Fairness Act (PWFA)**
 - effective June 27, 2023.
- 
- **The PUMP for Nursing Mothers Act ("PUMP") Act**
 - effective April 28, 2023.

Pregnancy Accommodations

What are Some Accommodations for Pregnant Workers?

- Being able to sit or drink water
- Being excused from strenuous activities
- Receiving appropriately sized uniforms and safety apparel
- Receiving break time to use the bathroom, eat, and rest
- Taking leave or time off to recover


Religious Expression and Accommodations

-



Religious Expression

- Joseph A. Kennedy, a football coach at a public high school, prayed at the 50-yard line immediately after games.
- Fearing potential lawsuits, the school district asked the coach to stop and eventually refused to renew his contract.
- Kennedy sued the district for violating his First Amendment rights. In a 6-3 decision, the Court ruled that the coach's conduct was protected by the First Amendment.



Religious Expression

- In *Kennedy v. Bremerton School District* (2022), the U.S. Supreme Court held that the government may not suppress an individual from engaging in personal religious observance, as doing so would violate the Free Speech and Free Exercise Clauses of the First Amendment.



Religious Accommodations

What is Religious Accommodation in the Workplace?



Religious Accommodations

- The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.
- Employer must reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause a burden that is substantial in the overall context of the employer's business taking into account all relevant factors, including the particular accommodation at issue and its practical impact in light of the nature, size, and operating cost of the employer.

Religious Accommodations

- Examples of some common religious accommodations include:
 - flexible scheduling,
 - voluntary shift substitutions or swaps,
 - job reassignments, and
 - modifications to workplace policies or practices, including dress codes.



Religious Accommodations

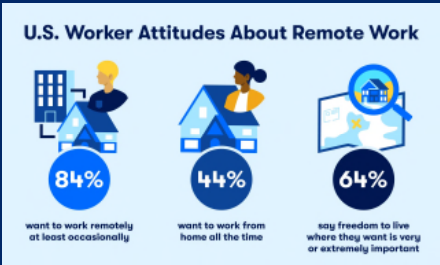
- Groff v. DeJoy, 600 U.S. 447 (2023), the U.S. Supreme Court held that an employer must demonstrate that granting an employee religious exemptions from work would incur "substantial increased costs" compared to the normal costs of business in order to deny a religious exemption.



Religious Accommodations

- Reasonable Accommodation & Undue Hardship
 - An employer does not have to accommodate an employee's religious beliefs or practices if doing so would cause undue hardship to the employer.
 - Undue hardship is shown when a burden is substantial in the overall context of an employer's business, taking into account all relevant factors in the case at hand, including the particular accommodation at issue and its practical impact in light of the nature, size and operating cost of the employer.
 - An accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to unwillingly do more than their share of potentially hazardous or burdensome work.

Remote Work



U.S. Worker Attitudes About Remote Work

Attitude	Percentage
want to work remotely at least occasionally	84%
want to work from home all the time	44%
say freedom to live where they want is very or extremely important	64%

Remote Work

Things to bear in mind if you are still permitting remote work:

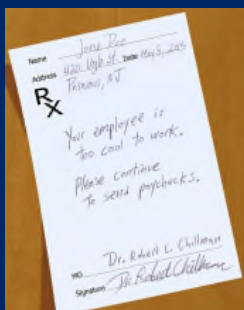
- Communication and Collaboration – avoid "out of sight, out of mind"
- Performance Management – supervisors must continue to supervise
- Set Clear Expectations – benchmarks and goals with follow-up
- Policies – have them in place and apply them evenly

Remote Work

- Employers should not automatically deny a remote work request
- In some cases, remote work may be a reasonable accommodation to disability
- Permitting an employee to work at home may be a reasonable accommodation, even if you have no telework program

Remote Work

- However, a doctor cannot "prescribe" remote work
- An accommodation should be reached through an interactive process between the employee and employer
- An employer is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective



Remote Work

When employers fail to follow proper remote work guidelines, they could end up being taken advantage of.

Overemployed II

How Overemployment is Making People Rich - 35% Of Remote Workers Work At Least 2 Full-Time Jobs At The Same Time

OVEREMPLOYED

Overemployment: Why Are People Choosing to Work Two Jobs?

Workers are finding a clever way to cheat the system, by working multiple jobs at once.

A millennial making \$350,000 a year through overemployment says he only worked 50 hours a week

ANTI-LAYOFF HACK?

Public Records



Public Records

- Public Records - all books, papers, maps, photographs, cards, tapes, recording, or other materials regardless of physical form (including emails and phone records for work cell phones and other work equipment)
- A person who unlawfully removes a public record from the office where it usually is kept or alters, defaces, mutilates, secretes, or destroys it is guilty of a misdemeanor and may be fined or imprisoned (SC Code § 30-1-30)
- The Archives and Records Management Division of the State Archives has prepared general retention and disposition schedules for municipalities
- The schedules list permanently valuable records, which should be properly protected for future use, and they also supply a timetable that will allow records custodians to regularly and legally dispose of records of non-permanent value
- The Municipal-specific retention schedule can be found here: <https://scdah.sc.gov/records-management/schedules>

Public Records

- The South Carolina Freedom of Information Act (SC Code § 30-4-10 et seq.) requires that public records and information must be made available to the public at a minimum cost or delay.
- SC Code Section 30-4-40(a) states that a "public body may but is not required to exempt" certain information from disclosure.
- For personnel files, the exception is personal information where disclosure would be an "unreasonable invasion of personal privacy."
- The courts have narrowly construed this exception while weighing the public's interest against personal privacy.
- Whether a public entity should produce personnel records in response to a FOIA request will require an individual analysis.

Public Records

- What about work emails sent on a personal computer or work-related texts sent on a personal phone, do those constitute "public records"?
- See [Does Using Personal Devices Foil FOIA?](https://scpress.org/does-using-personal-devices-foil-foia/) from the SC Press Association for a full discussion (<https://scpress.org/does-using-personal-devices-foil-foia/>)
- The safest answer until a South Carolina court weighs in is "potentially".
- Therefore, if those texts and emails are potentially FOIA-able, should you consider prohibiting employees from using personal devices for work-related purposes?



Questions?

