ESPLANADE CENTER III • 2415 EAST CAMELBACK ROAD • SUITE 800 • PHOENIX, AZ 85016 • (602) 778-3700
3430 EAST SUNRISE DRIVE • SUITE 220 • TUCSON, AZ 85718 • (520) 544-0300 • WWW.OGLETREE.COM

The following is a brief summary of Arizona state labor and employment laws. This summary is provided for general information only and is not intended as legal advice. Employers should consult legal counsel for more specific guidance.

I. CIVIL RIGHTS—NON-DISCRIMINATION LAWS

A. Arizona Civil Rights Act

The Arizona Civil Rights Act (ACRA) prohibits discrimination based on race, color, religion, sex, disability, national origin, age, or the results of genetic testing. The ACRA's prohibitions against discrimination are consistent with federal requirements under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Genetic Information Nondiscrimination Act (GINA). A.R.S. § 41-1461 et seq.

A private employer is covered by the ACRA if it has 15 or more employees on each working day in each of 20 or more calendar weeks in the current or preceding calendar year. A.R.S. § 41-1461(6). Because the ACRA applies to employers with 15 or more employees, and the ADEA applies to employers with 20 or more employees, an individual claiming age discrimination might have a cause of action against an employer under the ACRA, but not under the ADEA. *Id.* The ACRA also specifically provides that if an allegation involves sexual harassment, an "employer" may include employers that have one or more employees in the current or preceding calendar year, rather than only those employers with 15 or more employees. *Id.*

The ACRA does not apply to religious organizations, Indian tribes, bona fide private membership clubs exempt from taxation under the Internal Revenue Code, or to "an employer with respect to the employment of aliens outside any state." A.R.S. §§ 41-1461; 41-1462. To pursue a claim under the ACRA, a plaintiff must first file his or her charge of discrimination with the Arizona Civil Rights Division (ACRD) of the Arizona Attorney General's Office within 180 days of the discriminatory act. To timely file suit, a plaintiff must file his or her ACRA claim within 90 days of: (1) receiving the Arizona Civil Right Division's "Notice of Right to Sue" letter; or (2) within one year from the date the plaintiff filed his or her charge of discrimination with the ACRD, whichever is earlier. A.R.S. § 41-1481.

If successful on an ACRA claim, a court may order the reinstatement or hiring of the employee, with or without back pay, which amount shall be reduced by the amount the employee earned or could have earned during that time, as well as attorneys' fees. A.R.S. § 41-1481(G); (J).

B. Arizona Medical Marijuana Act

In 2010, Arizona voters passed Proposition 203, legalizing the possession and use of marijuana for medical purposes in Arizona. The Arizona Medical Marijuana Act (AMMA) allows a "qualifying patient" with a "debilitating medical condition" and a "designated caregiver" to obtain (from a registered medical marijuana dispensary) and possess up to 2.5 ounces of marijuana in a 14-day period. In specific instances, the AMMA allows a "qualifying patient" and a "designated caregiver" to cultivate up to 12 marijuana plants. A.R.S. § 36-2801 et seq.

To qualify as a patient under the AMMA, a person must be diagnosed by a physician as having one of the defined medical conditions listed in the AMMA. "Debilitating medical condition" means one or more of the following:

- cancer, glaucoma, positive status for Human Immunodeficiency Virus (HIV), Acquired Immune Deficiency Syndrome (AIDS), Hepatitis C, Amyotrophic Lateral Sclerosis, Crohn's Disease, agitation of Alzheimer's Disease, or the treatment of these conditions;

- a chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis; or

- any other medical condition or its treatment added by the department pursuant to A.R.S. § 36-2801.01.

The AMMA provides specific registration requirements for qualifying patients, designated caregivers, and nonprofit medical marijuana dispensaries. A.R.S §§ 36-2804.01, 36-2804.02. A qualifying patient must register with the Arizona Department of Health Services (ADHS) by submitting a written certification from his or her physician, specifying the debilitating medical condition. A.R.S. § 36-2804.02. ADHS is responsible for regulating the use and distribution of medical marijuana. The statute also provides that the public may petition ADHS to add additional debilitating medical conditions. A.R.S. § 36-2801.01.

The AMMA prohibits discrimination based on an individual's status as a medical marijuana cardholder (or his or her designated caregivers and nonprofit medical marijuana dispensary agents). A.R.S. § 36-2813. Employers may not refuse to hire, discharge, or otherwise discipline an employee or applicant solely because of his or her cardholder status. *Id.* The AMMA also prohibits discrimination against a qualifying cardholder due to his or her positive drug test for marijuana. *Id.* This provision does not apply if the employee used, possessed, or was impaired by marijuana at or during work, or if the position is a "safety sensitive position." In other words, an employer may prohibit employees from—and discipline employees for—using or possessing marijuana, or being impaired by marijuana, while working or being on the job. A.R.S. § 36-2814. Employers should note that the AMMA's nondiscrimination provisions do not apply if employing a cardholder would cause an employer to lose monetary or licensing-related benefits under federal laws or regulations. A.R.S. § 36-2813.

The AMMA defines impairment as "symptoms that a prospective employee or employee while working may be under the influence of drugs or alcohol that may decrease or lessen the employee's performance of the duties or tasks of the employee's job position." A.R.S. § 23-493. An employer may establish a good faith belief in determining an employee's impairment by

1. observed conduct, behavior, or appearance;
2. information reported by a person believed to be reliable;
3. written, electronic, or verbal statements;
4. lawful video surveillance;
5. records of government agencies, law enforcement agencies, or courts;
6. results of a test for the use of alcohol or drugs; or
7. other information reasonably believed to be reliable or accurate.

Actions based on the employer's good faith belief that the employee used, possessed, or was impaired by marijuana while on work premises or during hours of employment may not give rise to a cause of action against the employer as long as the employer has a written policy and conforms with the Arizona drug testing statute. A.R.S. § 23-493.06.

A "safety-sensitive position" is defined as "any job designated by an employer as a safety-sensitive position or any job that includes tasks or duties that the employer in good faith believes could affect the safety or health of the employee performing the task or others." These tasks may include

1. operating a motor vehicle, other vehicle, equipment, machinery or power tools;
2. repairing, maintaining, or monitoring the operation or any equipment or machinery;
3. performing duties in the residential or commercial premises of a customer, supplier, or vendor;
4. preparing or handling food or medicine; or
5. working in any occupation regulated pursuant to Title 32. A.R.S. § 23-493.

An employer may exclude an employee from a safety-sensitive position if it has a good faith belief the employee is engaged in current drug use, if that use could cause an impairment or decrease or lessen job performance or the employee's ability to perform his or her job duties. A.R.S. § 23-493.06. Employers may look to a number of factors in evaluating the "effects" a drug may have, including drug or alcohol test results, warning labels, statements by the employee, information from a physician or pharmacist, information from reputable reference sources or any other information the employer in good faith believes to be reliable. *Id.*

C. Whistleblower Protection

The Arizona Employment Protection Act (AEPA) protects private employees from discrimination or retaliation for engaging in whistleblowing activities. Whistleblowing is protected only if: (1) the employee "blows the whistle" in a reasonable manner; (2) the employee has information or a reasonable belief about a violation of state law; and (3) the employee discloses the information about the purported illegal activity to either a managerial representative of the employer, whom the employee reasonably believes has authority to act regarding the

information, or to a public agency. A.R.S. § 23-1501. (See section II.A. on the Arizona Employment Protection Act for further details.)

D. Military and National Guard Service

Under Arizona law, an employee may not be deprived of employment or obstructed in obtaining employment in his or her occupation because of his or her membership in the National Guard or an absence due to military orders. A.R.S. § 26-167. A person found to violate this provision is guilty of a Class 2 misdemeanor. *Id.*

Additionally, an Arizona employer may not refuse to permit a member of the military or National Guard from taking a leave of absence to comply with active duty orders or to attend camps, maneuvers, formations, or armory drills. A.R.S. § 26-168(A). Military leave may not affect an employee's vacation rights, except that an employer need not consider the leave period as "time worked" when determining eligibility for vacation or vacation pay. *Id.* An employee who is a member of the military or National Guard shall not lose seniority while absent under military orders and shall be entitled to return to his or her previous position, or a higher position as seniority would entitle him or her after returning from military service. A.R.S. § 26-168(B). A request for reemployment must be made within a reasonable time after leaving active duty. Opinion of the Atty. Gen. No. 62-29. A person who violates any of these provisions will be prosecuted by the county attorney and is guilty of a Class 1 misdemeanor. A.R.S. § 26-168(E).

Public employers have additional and different military leave obligations.

E. Mental Health Civil Rights Protection and Anti-Discrimination

A.R.S. § 36-506 protects a person who has been evaluated or is being treated in an agency or at a doctor's office for a mental disorder from discrimination in seeking employment, resuming or continuing professional practice or previous occupation, obtaining or retaining housing, etc. Discrimination in this context is defined as "any denial of civil rights on the grounds of hospitalization or outpatient care and treatment unrelated to a person's present capacity to meet the standards applicable to all persons." A.R.S. § 36-506(C). Applications for positions, licensing, and housing shall contain no requests for information that encourage such discrimination. *Id.*

F. City Anti-Discrimination Policies

1. Phoenix

The City of Phoenix makes it unlawful for any employer to discriminate against any individual based on the individual's race, color, religion, sex, national origin, age, genetic information, marital status, sexual orientation, gender identity or expression, or disability. Phoenix City Code § 18-4. This provision applies to any person "doing business within the City of Phoenix" who employs one or more employees for each working day in 20 or more calendar weeks per year, with the exception of religious organizations, bona fide private membership clubs, Indian tribes, or any federal or state department or agency. *Id.*; Phoenix City Code § 18-3. The Phoenix City Code defines "gender identity or expression" as "an individual's self-identification as male, female, or something in between, and shall include the individual's appearance, mannerisms, or

other characteristics only insofar as they relate to gender, with or without regard to the individual's designated sex at birth." Phoenix City Code § 18-3.

An aggrieved person may file a complaint with the city's Equal Opportunity Department or the Phoenix Police Department within 180 days after the occurrence of the alleged unlawful discriminatory practice. Phoenix City Code § 18-5. A person convicted of violating § 18-4 is guilty of a Class 1 misdemeanor, which may include a fine of up to $2,500 per infraction. Phoenix City Code § 18-7. The antidiscrimination ordinance does not create a private right of action for an individual against an employer.

The City of Phoenix also requires that its suppliers and lessees of real property from the City adhere to a policy of equal employment opportunity and affirmative action. Phoenix City Code § 18-18 et seq.

2. Tucson

The City of Tucson prohibits discrimination in employment on the basis of race, color, sex, national origin, ancestry, disability, age, religion, marital or familial status, gender identity, or sexual orientation. Tucson City Code § 17-12. This antidiscrimination provision applies to employers of any size within the Tucson city limits where the protected class does not have any remedies available under the Arizona Revised Statutes or U.S. Code, with the exception of religious organizations, bona fide private clubs, and Indian reservation enterprises. Tucson City Code § 17-13. Where the protected class in question has remedies available under the Arizona Revised Statutes or U.S. Code, the antidiscrimination provision applies to employers that employ between 1 and 100 employees each working day for at least 20 weeks per year. Tucson City Code § 17-11(e).

The Tucson City Code defines "gender identity" as "an individual's various attributes as they are understood to be masculine and/or feminine" and is broadly interpreted to include "pre- and post-operative transsexuals, as well as other persons who are, or are perceived to be, transgendered." Tucson City Code § 17-11(h).

Violation of § 17-1 is a civil infraction with a penalty equal to fines between $300 and $2,500 per infraction for first-time offenders. Tucson City Code § 17-14. Repeat offenders are subject to fines of at least $600 or $900, with a maximum of $2,500 per infraction depending on the number of offenses. *Id.* The antidiscrimination ordinance does not create a private right of action for an individual against an employer.

3. Flagstaff

The City of Flagstaff prohibits discrimination by an employer against any person because of the person's race, color, religion, sex, age, disability, veteran's status, national origin, sexual orientation, or gender identity or expression. Flagstaff City Code § 14-02-0001-0003. This provision applies to any employer with 15 or more employees within the City of Flagstaff for each working day in each of 20 or more calendar weeks, with the exception of private clubs, social, fraternal, public educational, civic or religious organizations, Indian reservation enterprises, federal and state agencies, and the Boy Scouts of America. Flagstaff City Code §§ 14-02-001-002(E), 004. Similar to the way in which the Tucson City Code defines "gender

identity," Flagstaff's law defines "gender identity" as "an individual's various attributes as they are understood to be masculine and/or feminine" and broadly interprets the phrase to include "pre- and post-operative transsexuals, as well as other persons who are, or are perceived to be, transgendered." Flagstaff City Code § 14-02-001-002(H). The Flagstaff City Code defines "gender expression" as "the ways in which a person manifests masculinity or femininity or 'expresses' external characteristics and behaviors associated with gender." Flagstaff City Code § 14-02-001-002(G).

A violation of Flagstaff's antidiscrimination provision is a civil infraction with a penalty equal to fines not exceeding $500 per infraction for first-time offenders. Flagstaff City Code § 14-02-001-0005. Repeat offenders are subject to fines of at least $300 or $900, with a maximum of $2,500 per infraction depending on the number of offenses. *Id.* The antidiscrimination ordinance does not create a private right of action for an individual against an employer.

4. Tempe

The City of Tempe prohibits discrimination in employment against any person on the basis of race, color, gender, gender identity, sexual orientation, religion, national origin, familial status, age, disability, or U.S. military veteran status. Tempe City Code § 2-603. The antidiscrimination provision applies to any person doing business within the City of Tempe with one or more employees for each working day in 20 or more calendar weeks in the current or preceding calendar year. Tempe City Code § 2-600. The provision does not apply to religious organizations, bona fide private clubs, social clubs that meet voluntarily on a regular basis for the purpose of educational, religious, charitable or financial pursuits, and expressive associations whose employment of a person would "significantly burden the association's rights of expressive association." Tempe City Code § - 2-604.

The Tempe City Code defines "gender identity" identically to the Tucson and Flagstaff city codes and includes "gender expression, including external characteristics and behaviors that are socially defined as either masculine or feminine." Tempe City Code § 2-600.

Violations of the antidiscrimination provision can result in a fine of $1,500 for each violation. Tempe City Code § 2-606. The City of Tempe may also impose a fine not to exceed $2,500 plus applicable surcharges for each violation committed by repeat offenders. *Id.*

5. Sedona

The City of Sedona prohibits discrimination in employment against any person on the basis of race, color, gender, gender identity, sexual orientation, religion, national origin, marital status, familial status, age, disability, or veteran status. Sedona City Code § 9.30.050. This provision applies to any person doing business within the city of Sedona with one or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Sedona City Code § 9.30.020. It does not apply to federal agencies, state agencies (with the exception of any political subdivision of the state of Arizona), Indian tribes, bona fide membership clubs, and religious organizations with respect to the employment of clergy members. *Id.*

The Sedona City Code defines "gender identity" as "gender related identity, appearance, or mannerisms or other gender related characteristics of an individual, regardless of the individual's designated sex at birth." *Id.*

A violation of Sedona's antidiscrimination provision results in a fine of at least $1,500 and not more than $2,500. Sedona City Code § 9.30.090. It does not create a private right of action for an individual against an employer. *Id.*

II. LEAVE LAWS

A. Leave for Voting

Arizona Revised Statutes § 16-402 prohibits Arizona employers from reducing employees' wages or otherwise penalizing employees who are absent for voting purposes. A person entitled to vote at a primary or general election held in Arizona may, on the day of election, be absent from his or her job for the purpose of voting if there are less than three consecutive hours between the opening of the polls and the beginning of the employee's regular work shift or between the end of his or her regular work shift and the closing of the polls. Employers may, however, specify the hours during which employees may be absent. *Id.* An employer that refuses to allow the absence or penalizes an employee for the absence is guilty of a Class 2 misdemeanor and is subject to a wrongful termination claim under A.R.S. § 23-1501. *Id.* This provision has been found to protect an employee's right to vote in a special primary election and a special general election called pursuant to a governor's proclamation. Op. Atty. Gen. No. 61-12.

B. Earned Paid Sick Time

In November 2016, Arizona voters passed Proposition 206, the Fair Wages and Healthy Families Act, which created paid sick time for Arizona employees. Employees of a private or municipal employer with 15 or more employees accrue a minimum of one hour of earned paid sick time for every 30 hours worked, but cannot accrue or use more than 40 hours of earned paid sick time per year, unless their employer elects to set a higher accrual amount above and beyond the law. A.R.S. § 23-372(A). Employees of a private or municipal employer with fewer than 15 employees also accrue one hour of earned paid sick time for every 30 hours worked, but shall not accrue or use more than 24 hours of earned paid sick time per year unless their employer sets a higher limit. A.R.S. § 23-372(B). Earned paid sick time begins to accrue at the commencement of employment or on July 1, 2017, whichever is later. A.R.S. § 23-372(D)(1). Part-time and temporary workers are considered "employees" for earned paid sick time purposes. A.R.S. § 23-371(F).

Earned paid sick time may be used in a variety of situations. For example, it may be used when the employee has a mental or physical illness, needs to care for a family member who is ill, a public health emergency arises, or when the employee must address various issues related to domestic violence. A.R.S. § 23-373. When the need to use paid sick time is foreseeable, the employee must make a good faith effort to notify the employer in advance. A.R.S. § 23-375. When the need is not foreseeable, no good faith effort to notify is required. *Id.* Unused accrued sick time carries over from one year to the next, but does not need to be paid to employees whose employment is terminated for any reason. A.R.S. § 23-372.

Employees are protected from retaliation and employers cannot use paid sick time absences against them. A.R.S. § 23-374.

C. Leave for Jury Duty

Arizona employers are prohibited from requiring or requesting that an employee use annual, vacation, or sick leave for time spent responding to a summons for jury duty, participating in the jury selection process, or actually serving on a jury. A.R.S. § 21-236. Further, employers may not prohibit employees from serving on a jury or otherwise penalize employees for doing so. *Id.* However, employers are not required to compensate employees during their absence for jury duty. *Id.* A person who violates A.R.S. § 21-236 is guilty of a Class 3 misdemeanor and is subject to a wrongful termination claim under A.R.S. § 23-1501.

D. Victims' Leave

If an employer has 50 or more employees, the employer must allow its employees who have been victims of crime to leave work to exercise their rights. A.R.S. § 13-4439(A). This includes leave to attend criminal proceedings, as set forth in other Arizona victims' rights statutes, and obtaining an injunction against harassment to help ensure the health, safety, or welfare of the victim or the victim's child. *Id.*

An employer may not dismiss or otherwise discriminate against an employee subject to this statute because the employee exercises the right to leave work, but the employer does not have to pay the employee for the time away from work. A.R.S. § 13-4439(B) and (C). Instead, an employee may elect to use (or the employer may require the employee to use) accrued paid vacation, personal leave, or sick leave. A.R.S. § 13-4439(D). The employee must give the employer notice, and the employer may limit the leave if it creates an undue hardship to the employer's business. A.R.S. § 13-4439(F) and (I). An employer that violates A.R.S. § 13-4439 is subject to a wrongful termination claim under A.R.S. § 23-1501.

E. Vacation

Arizona allows a "use it or lose it" vacation time policy as long as employees have a reasonable opportunity to use the leave. AZ Atty. General Op. I80-120.

III. HIRING AND DISCHARGE RELATED LAWS

A. Arizona Employment Protection Act

The Arizona Employment Protection Act (AEPA), A.R.S. § 23-1501, deals with the termination of employment relationships, protection from retaliatory discharge, and the exclusivity of statutory remedies for employees.

The AEPA confirms the status of Arizona employees as at-will employees. In order to supersede the at-will presumption, there must be language that expresses this intent either: (1) in a written contract signed by the employer and employee; or (2) in a handbook or manual distributed by the employer that expressly states its intent to be a contract of employment.

The AEPA defines the sources of public policy that can form the basis for claims for wrongful discharge in violation of public policy. Tort claims for wrongful discharge in breach of public policy can be based only on the public policy set forth in the Arizona Constitution and Arizona statutes. Public policy tort claims do not exist independently of the provisions of a statute. If a statute provides a remedy to an employee for a violation of the statute, the remedies provided to an employee are the exclusive remedies for the violation of the statute of the public policy arising out of the statute. However, employees may bring wrongful termination in breach of public policy tort claims if a termination is in violation of the public policy of a statute that does not already provide a remedy to an employee.

The AEPA also includes protection for private employees who engage in whistleblowing activities. Whistleblowing is protected only if: (1) the employee "blows the whistle" in a reasonable manner; (2) the employee has information or a reasonable belief about a violation of state law; and (3) the employee discloses information about the illegal activity to either a managerial representative of the employer that the employee reasonably believes has authority to act regarding the information or to a public agency.

The AEPA provides that when an employment statute creates a remedy to an employee for a violation of the statute, the statute is the exclusive remedy for a violation of the statute and the public policy arising out of the statute.

Under A.R.S. § 12-541(3), an action for breach of either a written or oral employment contract must be initiated within one year after the cause of action accrues. This one-year statute of limitations applies to actions based on employee handbooks or policy manuals that do not specify a time period in which to bring an action to the extent that such claims are actionable. A.R.S. § 12-541(4) also sets forth a one-year statute of limitations for a wrongful termination claim against an employer.

B. Background Checks

Arizona's version of the Fair Credit Reporting Act, A.R.S. §§ 44-1691 et seq., requires employers to disclose to applicants if the employer relies on a report issued by a consumer reporting agency in taking adverse action (e.g., denying employment) against the applicant. An employer may be liable if it is grossly negligent or acts willfully and maliciously with intent to harm when using information from a consumer reporting agency for an employment purpose. A.R.S. § 44-1695(C). This law is preempted by federal law. *Loomis v. U.S. Bank Home Mortg.*, 912 F. Supp. 2d 848, 854-55 (D. Ariz. 2012).

Employers should also remember to carefully comply with all Fair Credit Reporting Act requirements and technicalities, including the Ninth Circuit's recent decision in *Syed v. M-I, LLC*, 2017 WL 242559 (9th Cir. 2017), which held that an employer violates the Fair Credit Reporting Act when it procures a job applicant's consumer report after including a liability waiver in the same document as a statutorily mandated disclosure.

Arizona does not have a law prohibiting an employer from asking an applicant about prior arrests or convictions. However, the Arizona Attorney General's Office has stated that, consistent with the U.S. Equal Employment Opportunity Commission's guidance on the subject, such an inquiry

must include a statement that "conviction will not be an absolute bar to employment." Employers must also have a basis for denying employment based on the applicant's prior criminal conduct that relates to the connection between the job and the job requirements.

Additionally, Arizona's fingerprinting and criminal history statute provides for the exchange of criminal justice information with any individual for any lawful purpose on submission of the subject of record's fingerprints and the prescribed fee. A.R.S. § 41-1750(G)(4).

C. Hiring Under False Pretenses

An employer is prohibited from employing an individual when it does not have sufficient assets in the county in which the labor is performed to compensate the employee for a two-week period, falsely representing that it has such assets, and not paying the individual upon termination, resignation, or five days after the wages are due. A.R.S. § 23-201(A).

If an employer is found guilty of obtaining labor under false pretenses, it must pay all wages due to the employee, as well as reasonable attorneys' fees and compensation at the same rate from the time the wages were due until judgment. A.R.S. § 23-201(B).

D. Drug and Alcohol Testing

Arizona law does not impose any restrictions on drug and alcohol testing of employees; however, if an employer's testing complies with A.R.S. § 23-493 et seq., an employer will gain "safe harbor" protection against employee lawsuits arising out of the tests or the test results.

In order to test reliably for the presence of drugs or for alcohol impairment, an employer may require samples from its current and prospective employees. A.R.S. § 23-493.01. The employer must pay (1) all actual costs for testing required of employees by the employer; (2) reasonable transportation costs to current employees if their required tests are conducted at a location other than the employee's normal work site; and (3) wages for the employee's time to take the test. A.R.S. § 23-493.02. An employer may, at its discretion, pay the costs for drug testing of prospective employees. *Id.*

In order to receive the statutory safe harbor protections, the employer must prepare and distribute a written policy before conducting any testing. A.R.S. § 23-493.04 requires that the policy contain certain specific items, including, but not limited to the following:

1. a statement of the employer's policy respecting drug and alcohol use by employees;
2. a description of which employees will be subject to testing;
3. the circumstances under which testing may be required;
4. the substances for which tests may be given;
5. a description of the testing methods and collection procedures to be used;
6. the consequences for refusal to submit to a test and the potential adverse action based on the results of the test;
7. the employer's policy regarding the confidentiality of the results; and
8. the right of the employee to obtain the test results and to explain a positive test result in a confidential setting.

Furthermore, all compensated employees, including officers, directors, and supervisors, must be uniformly included in the testing policy. *Id.*

In addition to random testing, an employer's policy may require testing for any job-related purpose consistent with business necessity. Testing may be required in connection with the investigation of a specific accident in the workplace or regularly of all employees in designated job categories for safety reasons. A.R.S. § 23-493.04(B). The statutes also allow drug testing to investigate possible individual employee impairment based on reasonable suspicion. *Id.*

An employer may take adverse employment action based on a positive drug test or alcohol impairment test. If an employee tests positive for drugs or alcohol, the employer has a broad range of options. The employer may require rehabilitation or counseling, or the employer may suspend the employee with or without pay or discharge the employee. A.R.S. § 23-493.05. If the person tested is a job applicant, the employer may refuse to hire the applicant. Employers must keep drug and alcohol testing results confidential. A.R.S. § 23-493.09.

E. Medical Exams

Covered entities, including employers, employment agencies, labor organizations or joint labor-management committees, cannot conduct a medical examination or inquire of a job applicant as to whether the applicant is disabled. A.R.S. §§ 41-1461(3), 41-1466(A). An employer may inquire as to the ability of an applicant to perform job-related functions. A.R.S. § 41-1466(B). After an offer of employment has been made and prior to the start of employment, an employer may condition the offer of employment on a medical examination if all employees are required to undergo an examination, regardless of disability. *Id.*

An employer cannot require an examination or inquire about whether one of its employees is disabled; however, an employer may make an inquiry or require an examination if it is shown to be job-related in nature. A.R.S. § 41-1466(C). An employer may conduct voluntary medical exams of its employees that are a part of an employee health program. A.R.S. § 41-1466(D). The definition of a "medical exam" excludes a test to determine the illegal use of drugs. A.R.S. § 41-1466(F).

F. E-Verify and Worker Registration

Arizona employers can have their business and operating licenses suspended or permanently revoked for intentionally or knowingly hiring unauthorized workers. A.R.S. § 23-211 et seq. Additionally, Arizona employers are required to verify the employment eligibility of a new hire employee through the E-Verify program and must maintain a record of verification for the longer of three years or the duration of the employee's employment. A.R.S. § 23-214.

G. Noncompete Agreements

Arizona courts generally disfavor noncompete agreements; however, courts apply a rule of "reasonableness" to determine whether a noncompete is enforceable. *Lassen v. Benton*, 346 P.2d 137, 138-39 (Ariz. 1959). In assessing reasonableness, courts look specifically to (1) time limits; (2) geographic restrictions; and (3) limitations on the scope of protected activity. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1284-85 (Ariz. 1999).

When seeking to enforce a noncompete in Arizona, the burden is on the employer to prove a legitimate, protectable interest. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1283 (Ariz. 1999). Arizona courts have held that an employer has a legitimate, protectable interest in customer relationships, confidential information, and trade secrets. *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 604 (Ariz. Ct. App. 1986) (customer relationships); *Lessner Dental Labs., Inc. v. Kidney*, 492 P.2d 39, 41 (Ariz. Ct. App. 1971) (trade secrets). This interest, however, is balanced against any interest the employee may have in the customer relationship. *See Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1284 (Ariz. 1999) ("Even in the commercial context, the employer's interest in its customer base is balanced with the employee's right to the customers. Where the employee took an active role and brought customers with him or her to the job, courts are more reluctant to enforce restrictive covenants."). Although employers have a protectable interest in their confidences, employers must be careful not to define confidential information too broadly such as by including public information or information learned generally through the employee's employment. *Orca Commc'ns Unlimited, LLC v. Noder*, 314 P.3d 89, 94-95 (Ariz. Ct. App. 2013) (holding confidentiality covenant overbroad and unenforceable).

Additionally, in order to be reasonable in scope, a restrictive covenant must (1) not exceed what is reasonably necessary to protect the employer's legitimate business interest; (2) not unreasonably restrict the employee's rights; and (3) be reasonable as to time and space. *Bed Mart, Inc. v. Kelley*, 45 P.3d 1219, 1221 (Ariz. Ct. App. 2002). In determining reasonable scope, the court may consider several factors, including common practices within the employer's industry, the particular specialty of the employment at issue, the employer's business location or geographic scope of the employee's work, the length of employment after the agreement is signed, the circumstances of the discharge, and the length of time required to hire and train a replacement.

Arizona courts generally enforce restraints of six months to one year. *Bed Mart, Inc. v. Kelley*, 45 P.3d 1219, 1222-23 (Ariz. Ct. App. 2002) (upholding six months); *Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 979-80 (D. Ariz. 2006) (concluding one year "is long enough for a new Portfolio manager to gain the requisite confidence of clients to entrust the manager with his investments."). Additionally, the courts may enforce restraints of up to two years where the employer experiences a higher risk of injury from the employee's departure. *Highway Techs., Inc. v. Porter*, CV-09-1305-PHX-DGC, 2009 WL 1835114, at *2 (D. Ariz. June 26, 2009). Furthermore, although there is no clearly defined rule addressing the acceptable geographic scope of a noncompete, courts will balance the employee's right to work in his or her chosen profession with the employer's business location, the type and character of the business, and the covenants in their entirety.

Arizona courts have enforced various geographic restrictions, including up to 200 miles. *Bed Mart, Inc. v. Kelley*, 45 P.3d 1219, 1222-23 (Ariz. Ct. App. 2002) (enforcing a 10-mile restriction); *Highway Techs., Inc. v. Porter*, CV-09-1305-PHX-DGC, 2009 WL 1835114, at *3 (D. Ariz. June 26, 2009) ("Given the widespread nature of pavement marking business, the 200-mile geographical restriction is also reasonable."). But employers should be very careful because five mile restrictions have been rejected. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1285 (Ariz. 1999) (affirming that "the five mile radius was unreasonable...."). Geographic restrictions of one or more states and the United States have also been rejected in Arizona. *Varsity Gold, Inc. v. Porzio*, 45 P.3d 352, 356 (Ariz. Ct. App. 2002) ("[T]he trial court's conclusion that the clause

prohibiting competition in Pennsylvania and contiguous states was unreasonable is amply supported by the evidence...."); *Liss v. Exel Transp. Servs*., CIV-04-2001-PHX-SMM, 2007 WL 891167, at *8 (D. Ariz. Mar. 20, 2007) (This case found that a U.S. geographic restriction "is unreasonably broad in terms of its geographic area and places an unreasonable hardship" on the employee).

Arizona courts will "blue pencil" restrictive covenants, meaning that they will eliminate grammatically severable, unreasonable provisions, but they will not rewrite provisions. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1285-86 (Ariz. 1999). Carefully crafted "step-down" provisions are permissible and may allow courts to sever overbroad provisions while enforcing reasonable ones. *Compass Bank v. Hartley*, 430 F. Supp. 2d 973, 981 (D. Ariz. 2006).

Continued employment or a change in the terms or conditions of employment may be sufficient consideration for a noncompete agreement. *Mattison v. Johnston*, 730 P.2d 286, 290 (Ariz. Ct. App. 1986) (finding that "the implied promise of employment and continued employment were sufficient consideration for the covenant" and holding that employment for only three months following execution of restrictive covenants was sufficient).

In addition to the use of restrictive covenants, employers may use Arizona's Uniform Trade Secrets Act (UTSA). The state UTSA prohibits the misappropriation of information that constitutes a trade secret. A.R.S. § 44-401(4) (defining trade secrets); *Enter. Leasing Co. of Phx. v. Ehmke*, 3 P.3d 1064, 1068 (Ariz. Ct. App. 1999).

H. Employee References

Arizona Revised Statutes § 23-1361(B) et seq., provides qualified immunity from civil liability for employers giving job references regarding former employees. A former employer may provide a requesting prospective employer with information concerning a person's education, training, experience, qualifications and job performance to be used for the purpose of evaluating the person for employment. A.R.S. § 23-1361(B). An employer that in good faith provides information requested by a prospective employer about the reason for termination of a former employee or about the job performance, professional conduct or evaluation of a current or former employee is immune from civil liability for the disclosure or the consequences of providing the information. A.R.S. § 23-1361(C). However, an employer may not disclose the information with actual malice or with the intent to mislead. A.R.S. § 23-1361(D). If the reference is made in writing, a copy of the communication must be mailed to the former employee's last known address. A.R.S. § 23-1361(B). There is a presumption of good faith for employers with fewer than 100 employees that provide only the information described in the statute. A.R.S. § 23-1361(C). The good faith presumption also applies to employers with at least 100 employees, provided the employer has a regular practice in Arizona of providing information requested by a prospective employer about the reason for termination or about the employee's job performance, professional conduct or evaluation of the employee. *Id.*

Special disclosure rules exist for employment communications made by or to school districts, government agencies, or certain financial institutions. A.R.S. § 23-1361(B), (E)-(G).

I. Employee Blacklisting

Arizona's blacklisting statute prohibits two or more employees from engaging in activities to prevent another from pursuing a useful occupation. A.R.S. § 23-1361(A). The statute's terms prohibit a common practice in other jurisdictions whereby companies execute agreements not to hire employees of the other party. A person who commits blacklisting is guilty of a Class 2 misdemeanor. A.R.S. § 23-1362.

J. Constructive Discharge

Arizona Revised Statutes § 23-1502 sets forth the manner in which a claim alleging constructive discharge is established in Arizona. Employees must present evidence of objectively difficult or unpleasant working conditions to the extent that a reasonable employee would feel compelled to resign. A.R.S. § 23-1502(A). An employee cannot establish a claim for constructive discharge unless he or she does the following before deciding whether to resign: (1) provides written notice to an appropriate representative of the employer that a working condition exists that the employee believes is objectively so difficult or unpleasant that the employee feels compelled to resign or intends to resign; (2) allows the employer 15 calendar days to respond in writing; and (3) reads and considers the employer's response. A.R.S. § 23-1502(B). Employers waive the right to receive notice of the conduct if they fail to provide written notice to their employees of the requirements of the statute, as set forth in subsection E of the statute. A.R.S. § 23-1502(E).

Notwithstanding the above, an employee may bring a claim based on a constructive discharge without prior written notice in the event of outrageous conduct by the employer or a managing agent of the employer including sexual assault, threats of violence directed at the employee, a continuous pattern of discriminatory harassment by the employer or by a managing agent of the employer or other conduct if the conduct would cause a reasonable employee to feel compelled to resign. A.R.S. § 23-1502(F).

K. No Injunctive Relief to Prevent Termination

Arizona Revised Statutes § 12-1808(A) expressly prohibits the issuance of a preliminary injunction or temporary restraining order to prevent the firing of an employee, unless the injunction is necessary to prevent irreparable injury to the property or to a property right of the party making the application and an adequate remedy at law does not exist for the injury.

L. Agricultural Employment Relations Act

The Agricultural Employment Relations Act (AERA) provides agricultural employees the right to organize, bargain collectively through representatives, engage in lawful concerted activities, and refrain from participating in such activities. A.R.S § 23-1383. It also provides agricultural employers the right to manage, control, and conduct their operations, as well as the right to hire, suspend, discharge, or transfer employees within their judgment. A.R.S. § 23-1384. Agricultural employers also have the right to set the standards for wages, hours, and conditions of employment, but these are subject to negotiation. *Id.* The AERA specifically recognizes that

while the right to strike is a basic right of organized labor, such right must be limited due to the seasonal nature of the agriculture industry. A.R.S. § 23-1381.

The AERA prohibits both agricultural employers and labor organizations from committing unfair labor practices. Agricultural employers are specifically prohibited from interfering with or restraining employees from participating in collective bargaining or lawful concerted activities, interfering with the formation of a labor organization, and from threatening or discharging an employee because of labor activity. A.R.S. § 23-1385. Labor organizations must not coerce or intimidate any employee in the enjoyment of his or her rights under the AERA. *Id.* Labor organizations also are prohibited from engaging in secondary boycotts, threatening or restraining a secondary employer from engaging in business with an agricultural employer involved in a labor dispute, and threatening or restraining a consumer from purchasing such agricultural products. *Id.* Labor organizations cannot call a strike unless a majority of the employees within the bargaining unit has approved the strike by secret ballot. *Id.*

The AERA also established the seven-member Agricultural Employment Relations Board. A.R.S. § 23-1386. The Board is responsible for the enforcement of the AERA. Among other things, the board reviews petitions for collective bargaining representation, directs elections by secret ballot, and certifies election results. A.R.S. § 23-1389. The Board also is responsible for preventing unfair labor practices. If the Board determines that an unfair labor practice has occurred, it may notice a hearing before an administrative law judge. A.R.S. § 23-1390. The Board also may petition the superior court for injunctive relief pending a final adjudication by the Board. Decisions of the Board are subject to judicial review. *Id.* Additionally, any person who is aggrieved by a violation of the AERA may commence a lawsuit in superior court to recover damages or seek injunctive relief. A.R.S. § 23-1393.

The AERA applies only to persons, labor organizations, or activities that are not within the jurisdiction of the National Labor Relations Act or the National Labor Relations Board. A.R.S. § 23-1394.

IV. WAGE AND HOUR LAWS

A. Minimum Wage

As of January 1, 2017, the minimum wage in Arizona is $10.00 per hour. The Arizona Industrial Commission has enforcement authority. The minimum wage will increase to $10.50 per hour on January 1, 2018; $11.00 per hour on January 1, 2019; and $12.00 per hour on January 1, 2020. A.R.S. § 23-363(A). The minimum wage shall be increased on January 1, 2021, and on January 1 of successive years in accordance with the increase in the cost of living. A.R.S. § 23-363(B). The minimum wage statutes also include a requirement to post notices regarding employee wage rights. A.R.S. § 23-364(D).

Employers cannot take adverse actions against any person asserting a claim or right under the Minimum Wage Act, assisting another person in doing so, or informing another person about their rights. Any adverse action that occurs within 90 days of a person engaging in these activities creates a rebuttable presumption that retaliation occurred. A.R.S. § 23-364(B).

Any person or organization can file a charge with the Industrial Commission alleging a violation of the Minimum Wage Act. When the Industrial Commission receives a complaint, the commission may review records regarding all employees at the employer's worksite in order to protect the identity of any employee identified in the complaint and to determine whether a pattern of violations has occurred. A.R.S. § 23-364(C).

A civil action may be instituted by a law enforcement official or private party. A.R.S. § 23-364(E). Employers that fail to pay the minimum wage will be liable for the balance of the wages owed plus an additional amount equal to twice the underpaid wages, interest, attorneys' fees, and costs. A.R.S. § 23-364(G). Civil actions under the Arizona Minimum Wage Act "may encompass all violations that occurred as part of a continuing course of employer conduct regardless of the date" as long as the action is commenced within two (or three in the case of willful violations) years after the last violation occurs. A.R.S. § 23-364(H).

Arizona Revised Statutes § 23-311 et seq. empowers the Arizona Industrial Commission to ascertain the wages of minors employed in any occupation, determine whether orders for the fair compensation of minors are being complied with, and require employers to submit full and correct written statements of wages paid to all minors. If a minor is paid less than the minimum fair wage to which he or she is entitled, he or she may recover treble damages in a civil action, plus costs, and attorneys' fees.

B. Record-Keeping Requirements Under the Arizona Minimum Wage Act

Arizona employers must maintain and preserve the payroll records of its employees in a safe and accessible location at the place of employment or at a central record-keeping office. If the records are stored at a central record-keeping office they must be made available to the Industrial Commission within 72 hours of receiving a request for inspection. A.A.C. R20-5-1209(A). Payroll records include all time and earning cards indicating the amount of time worked, all wage-rate tables or schedules, and all records in support of additions or deductions from wages paid. A.A.C. R20-5-1210(A). Payroll records should also contain information indicating an individual hourly employee's

- full name;
- home address;
- date of birth;
- occupation;
- time of day and day of the week the employee's workweek begins;
- regular hourly rate and explanation of basis of pay, including commissions or any other basis of pay;
- hours worked each workday and workweek;
- total daily or weekly straight-time wages due for hours worked during the workday or week, exclusive of overtime compensation;
- total overtime pay and calculation of overtime pay;
- total additions to or deductions from wages paid each pay period;
- total wages paid each pay period; and
- date of payment and pay period covered by payment.

A.A.C. R20-5-1210(B).

An employee or his or her designated representative may inspect any payroll records pertaining to him or her. A.R.S. § 23-364(D).

Salaried employees, employees on a fixed schedule, and employees that customarily and regularly receive tips are subject to slightly varying reporting requirements from those above under Arizona Administrative Code R20-5-1210(C)-(E). Specifically, the payroll records of a salaried employee must contain sufficient detail to permit a determination that the salary received exceeds the minimum wage. A.A.C. R20-5-1210(C).

C. Declaration of Independent Business Status

Arizona employers can confirm their relationships with independent contractors under Arizona law by having the contractors sign declarations that create a rebuttable presumption that the relationship is an independent contractor relationship, and not an employment relationship. A.R.S. § 23-1601(B) provides a declaration form that outlines six factors that an independent contractor must declare to confirm its independent contractor relationship and establish the rebuttable presumption.

Using a declaration of independent business status (DIBS) is optional. Failing to use a DIBS declaration does not raise a presumption that an independent contractor relationship does not exist. A.R.S. § 23-1601(A) and (D). Furthermore, any supervision or control exercised by the contracting party to enforce a contractor's compliance with any statute, rule, code, licensing requirement, or professional or ethical standards may not be considered for the purposes of determining independent contractor or employment status. A.R.S. § 23-1602.

D. Meal and Break Periods

Arizona does not have any specific laws regulating meal and break requirements. However, Arizona employers are still subject to federal regulations mandating meal and break periods.

E. Paydays

Arizona employers must designate two or more days in each month, not more than 16 days apart, as fixed paydays for the payment of wages to employees. A.R.S. § 23-351(A). Payment of the wages must be within five of the employer's working days after the pay period ends. Employers whose principal place of business is located outside of Arizona and whose payroll system is centralized outside of Arizona may designate one or more days in each month as fixed paydays for payment of wages to (1) professional, administrative or executive employees or employees employed in the capacity of an outside salesman as those terms are defined under the Fair Labor Standards Act; and (2) employees employed in a supervisory capacity as defined under the National Labor Relations Act. A.R.S. § 23-351(B).

F. Arizona Equal Pay Act

The Arizona Equal Pay Act (A.R.S. §§ 23-340 & 23-341) prohibits discrimination based on sex for equal work. Differences based on seniority, ability, skill, length of service, duties or services

performed, shift or time of day worked, hours of work, or other factors other than sex are acceptable. A.R.S. § 23-341(A). The act applies to private employers, the state, and any political subdivision of the state that receives tax monies. A.R.S. § 23-340. Any civil action brought under the act must be filed within six months after the alleged violation. A.R.S. § 23-340(F). Under the act, an employer is not liable for any pay due more than 30 days prior to the receipt by the employer of written notice of the claim. *Id.*

G. Electronic Payment of Wages

With written employee consent, an employer may electronically deposit an employee's pay on payday at an employee's chosen financial institution that is a member of the Federal Deposit Insurance Corporation (or any other comparable federal or state agency). A.R.S. § 23-351(D)(4). An employer's wage deposit plan must entitle the employees to one withdrawal for each deposit free of any service charge and the employees must be provided a written or electronics statement of the employees' earnings and withholdings. A.R.S. §§ 23-351(E) and (F).

Amendments to Arizona's wage payment statutes went into effect on July 20, 2011, providing employers the option of paying wages using a "payroll card account" to employees who decline to authorize payment by direct deposit to their bank or financial institution. A.R.S. § 23-351(D)(5). The amendments define a "payroll card account" as an account that is "directly or indirectly established through an employer and to which electronic fund transfers of an employee's wages are made on a recurring basis whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution or any other person." A.R.S. § 23-350. The amendments also list some basic requirements for employers that choose to make wage payments using this new option. Specifically, the amendments require that employees who are paid by deposit to a payroll card account also receive the following: (1) a written or electronic statement of their earnings and withholdings; (2) at least one free withdrawal for each deposit of wages per pay period, but not more frequently than once per week; and (3) a list of all fees associated with the payroll card account. A.R.S. §§ 23-351-(F).

H. Withholding

Employers may not withhold or divert any portion of an employee's wages unless (1) the employer is required or empowered to do so by state or federal law; (2) the employer has prior written authorization from the employee; or (3) there is a reasonable good faith dispute as to the amount of wages due, including the amount of any counterclaim or any claim of debt, reimbursement, recoupment or set-off asserted by the employer against the employee. A.R.S. § 23-352.

I. Payment Upon Termination or Voluntary Quit

When an employee is discharged, the employee must be paid wages due him or her within seven working days or the end of the next regular pay period, whichever is sooner. A.R.S. § 23-353(A). When an employee quits voluntarily, he must be paid in the usual manner all wages due him no later than the regular payday for the pay period during which the termination occurred. If requested by the employee, wages must be paid by mail. A.R.S. § 23-353(B).

Wages include all non-discretionary compensation due to an employee in return for labor or services rendered by the employee for which the employee has a reasonable expectation to be paid (regardless of whether the payment is determined by a time, task, piece, commission, or other method of calculation). A.R.S. § 23-350(6).

J. Damages for Failure to Pay

Arizona Revised Statutes § 23-355 allows employees to recover treble damages in a civil action brought for unpaid wages if an employer is found to have been in violation of the wage statutes. This is a discretionary penalty determined by the court. *D'Amico v. Structural I Co.*, 229 Ariz. 262, 274 P.3d 532 (Ariz. Ct. App. 2012).

Employees who receive less than the wages to which they are entitled may sue the employer within one year after the cause of action accrues. *Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 218 Ariz. 293, 298-300, 183 P.3d 544, 549-51 (Ariz. Ct. App. 2008). In an action to recover unpaid wages, the employee may recover an amount that is treble the amount of unpaid wages, unless a reasonable, good faith dispute exists as to the basis for payment. A.R.S. § 23-355(A).

K. Wage Payment Upon Death

Employers must pay out a deceased employee's ("decedent") wages, salary, and other compensation, including obligations or stock, to the decedent's surviving spouse pursuant to a written and notarized affidavit, provided the amount of compensation does not exceed $5,000. A.R.S. § 14-3971(A). Additionally, when the estate is less than $75,000, an employer must pay the decedent's wages, salary, and other compensation to any surviving spouse, heir or devisee claiming to be the decedent's successor pursuant to written affidavit, irrespective of amount. A.R.S. § 14-3971(B). So long as the affidavit contains the requisite information pursuant to A.R.S. § 14-3971(E), an employer is not required to "see to the application of personal property or evidence thereof or inquire into the truth of any statement in the affidavit" to fulfill its obligation under the statute. A.R.S. § 14-3972(A). An employee cannot override distribution pursuant to A.R.S. § 14-3971 by designating a person whom he or she would like to receive his or her last paycheck.

L. Unemployment Compensation

An unemployed individual is eligible to receive benefits with respect to any week of unemployment so long as the employee (1) has registered to work at and thereafter has continued to report at an employment office in accordance with the Arizona Department of Economic Security regulations; (2) has made a claim for benefits; (3) is able to work; (4) has engaged in a systematic and sustained effort to obtain work during at least four days of the week; and (5) has made at least one job contact per day on four different days of the week. A.R.S. § 23-771. An unemployed individual is entitled to receive a total amount of benefits equal to 26 times his or her weekly benefit amount, but cannot receive more than one third of his or her base period earnings in a benefit year. A.R.S. § 23-780. Once the benefit year has expired, an unemployed individual is not entitled to a subsequent benefit year unless that person has earned an amount equal to or greater than eight times the unemployment benefit amount received during the initial

benefit year. A.R.S. § 23-771. The maximum amount of benefits available to an unemployed individual is $240 per week. A.R.S. § 23-779.

An employee who has been discharged for willful or negligent misconduct connected with employment is disqualified from receiving benefits. A.R.S. § 23-775. This misconduct must constitute a material or substantial breach of the employee's duties or obligations and must adversely affect a material or substantial interest of the employer. A.R.S. § 23-619.01(A). The statute provides several examples of disqualifying behavior including dishonesty, falsification of time records, refusal or knowing failure to perform reasonable and proper job duties, and failure to pass or refusal to take a lawful drug test. A.R.S. § 23-619.01(B). The employer has the burden of proof to show that an employee was discharged for disqualifying reasons. A.A.C. § R6-3-51190.

M. Payroll Record Review

Arizona Revised Statutes § 23-926 permits the Arizona Industrial Commission to review an employer's books, records, and payrolls reflecting wage expenditures by the employer. An employer that refuses to submit its books for inspection is liable for a penalty of $500 for each offense, payable to the state general fund and the Commission's attorneys' fees. A.R.S. § 23-926(B).

N. Arizona Unemployment Insurance Integrity

The Arizona Industrial Commission will not relieve an Arizona employer's unemployment insurance account of charges relating to an erroneous benefit payment if: (1) the erroneous benefit payment was made because the employer or an agent of the employer failed to timely or adequately respond to a written request from the commission for information relating to a claim for unemployment compensation; and (2) the employer or the employer's agent has established a "pattern of failing" to timely or adequately respond to requests. A.R.S. § 23-727(K).

A "pattern of failing" means the repeated, documented failure of an employer or its agent to make timely and adequate responses to the commission with consideration of the number of instances of failure in relation to the total number of requests. A.R.S. § 23-727(L). A pattern is established by reviewing the most immediate 12 months prior and determining whether the employer or its agent has five or more failures or failures in more than 5 percent of the number of requests, whichever is greater. *Id.* When an agent represents the employer, the five or more failures or failures in more than five percent of the number of requests is specific to the individual employer's account. *Id.*

O. Garnishment

A judgment creditor in Arizona may apply to the clerk of court, justice of the peace, or city or town magistrate to obtain a writ of garnishment of the judgment debtor's earnings. A.R.S. §§ 12-1598.01 - 03. Once a judgment creditor has obtained a writ of garnishment, it must serve on the employer-garnishee two copies of the writ of garnishment and summons, the underlying judgment, and other documents, including a "nonexempt earnings statement." A.R.S. § 12-1598.04(C). The nonexempt earnings statement is to be used by the judgment creditor to

calculate the amount of earnings the employer-garnishee can withhold from the judgment debtor's paycheck and transmit to the judgment creditor. A.R.S. § 12-1598.16. Arizona has not placed limits beyond what federal law requires in terms of the amount of earnings allowed to be garnished. Creditors can garnish only the lowest of (1) 25 percent of non-exempt weekly earnings; or (2) the amount of non-exempt weekly earnings that exceeds 30 times the federal minimum wage. *Id.*

The employer-garnishee has 10 days, after being served, to answer and declare whether the judgment debtor is employed by the employer-garnishee, whether the judgment debtor will be owed any wages within the next 60 days, and when the judgment debtor's next two paydays will be and the respective pay periods covered. A.R.S. § 12-1598.06 and § 12-1598.08. If the judgment debtor is an employee or the employer-garnishee owed earnings to the judgment debtor when the writ was served, the court shall order, on application by the judgment creditor, that nonexempt earnings be withheld by the employer-garnishee and transferred to the judgment creditor. A.R.S. § 12-1598.10. That order shall serve as a continuing lien against the judgment debtor's nonexempt earnings until the writ is no longer in force. *Id.*

While the lien is in effect, the employer-garnishee must, for each pay period, complete a nonexempt earnings statement, deliver that statement to the judgment debtor with his or her exempt earnings for that pay period, and deliver a copy of the statement to the judgment creditor. A.R.S. § 12-1598.11. It is the judgment creditor's obligation to take reasonable action to assure that the employer-garnishee does not withhold more nonexempt earnings of the judgment debtor than is necessary to satisfy the underlying judgment. A.R.S. § 12-1598.12(D). The judgment creditor must inform the employer-garnishee if the balance due on the judgment is less than double the amount of nonexempt earnings received in the prior two pay periods and must instruct the employer-garnishee to cease withholding earnings after the full amount of the judgment has been paid to the judgment creditor. *Id.*

V. EMPLOYEE SAFETY AND WELFARE

A. Arizona Occupational Safety and Health

The Arizona Division of Occupational Safety and Health (ADOSH) operates under an approved plan with the U.S. Department of Labor to retain jurisdiction over occupational safety and health issues within Arizona, excluding mining operations, Indian reservations, and federal employees. Therefore, the State of Arizona retains jurisdiction to investigate Arizona employers' alleged or suspected violations. A.R.S. § 23-401 et seq. Employers are required to furnish a place of employment free from recognized health hazards that are likely to cause death or serious physical harm to employees. A.R.S. § 23-403. Employers may not discharge or discriminate against any employee because he or she filed a complaint with ADOSH or participated in any such proceeding. An employee who believes that he or she has been discriminated against in violation of this provision may, within 30 days after the violation, file a complaint with the Arizona Industrial Commission. The commission may investigate and bring a complaint in superior court, if appropriate. A.R.S. § 23-408(J).

B. Arizona Workers' Compensation Act

The Arizona Workers' Compensation Act, A.R.S. § 23-901 et seq., states the conditions under which employers and professional employer organizations are liable for compensating employees for accidental injuries arising out of, and in the course of, employment. Employers cannot require an employee to opt out of workers' compensation coverage but employees can voluntarily do so. A.R.S. § 23-906. Employers must have a form available at the place at which the employee is hired on which the employee can opt-out of workers' compensation prior to sustaining a work-related injury. *Id.* If an employer fails to make such form available, employee shall not be deemed to have accepted workers' compensation provisions during the time the forms were unavailable, meaning employees may pursue civil actions against the employer instead of accepting workers' compensation if injuries occur. *Id.*

C. Gun Storage and Possession

Employers shall not establish policies that prohibit a person from lawfully transporting or lawfully storing a firearm that is in the person's locked and privately owned vehicle or motorcycle and not visible from the outside of the vehicle or motorcycle. A.R.S. § 12-781(A). Employers that provide a parking lot, parking garage, or other area that: (1) is secured by a fence or other physical barrier; (2) limits access by a guard or other security measure; and (3) provides temporary and secure firearm storage that is readily accessible on entry of the premises and allows immediate retrieval of the firearm on exit from the premises are exempt from this prohibition. A.R.S. § 12-781(C).

Additionally, the prohibition does not apply if possession of the firearm is prohibited by federal or state law, the vehicle is owned or leased by the employer and is used by an employee in the course of employment, or the employees are defense contractors located on military bases. *Id.*

D. Genetic Testing

Arizona Revised Statutes § 20-448.02 prohibits genetic testing of an individual without first receiving the individual's written, informed consent. The results of a genetic test are privileged and confidential and may not be released without first obtaining the tested individual's express consent. *Id.*

E. Smoke-Free Arizona Act

Arizona Revised Statutes § 36-601.01 prohibits smoking in all public places and all places of employment. "Places of employment" is defined as an enclosed area under the control of a public or private employer that employees normally frequent during the course of employment, including office buildings, work areas, auditoriums, employee lounges, restrooms, conference rooms, meeting rooms, classrooms, cafeterias, hallways, stairs, elevators, health care facilities, private offices, and vehicles owned and operated by the employer during working hours when the vehicle is occupied by more than one person. A.R.S. § 36-601.01(A).

The Smoke-Free Arizona Act creates affirmative duties for employers, including providing notification of the prohibition to all existing employees and to prospective employees at the time of their application. A.R.S. § 36-601.01(C). Employers should include a notice of the prohibition

in their employment applications. Every public place and place of employment where smoking is prohibited by this section shall have posted at every entrance a conspicuous sign clearly stating that smoking is prohibited. A.R.S. § 36-601.01(E). An owner, manager, operator, or employee who witnesses smoking in violation of the statute must "inform any person who is smoking in violation of this law that smoking is illegal and request that the smoking stop immediately." A.R.S. § 36-601.01(I).

Employers may not discharge or retaliate against an employee who exercises any rights provided by the Smoke-Free Arizona Act, for example making a complaint to the Arizona Department of Health Services or reporting or attempting to report or prosecute a violation of the act. A.R.S. § 36-601.01(F).

VI. MISCELLANEOUS

A. Right to Work

Arizona is a right-to-work state and employers cannot penalize employees (including by denying employment) because of nonmembership in a labor union. A.R.S. § 23-1302. It is also unlawful for an employee, labor organization, or officer, agent or member thereof, to threaten or interfere with a person, his or her immediate family, or property to compel or attempt to compel the person to join a labor organization, strike, or leave his or her employment. A.R.S. § 23-1304.

B. Picketing and Secondary Boycotts

Arizona Revised Statutes § 23-1322 provides that it is unlawful for a labor organization to picket any establishment: (a) unless there is a bona fide dispute regarding wages and working conditions; or (b) for the purpose of inducing an employer to join or contribute to a labor organization. However, this statute and its enforcement provisions, which are not described here, have been found to be preempted by federal law and unconstitutional. *United Food & Comm. Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167 (D. Ariz. 2013).

C. Right to Join a Union

An Arizona employer may not employ someone based on his or her promise or agreement to (1) become or remain a member of a labor organization, or (2) resign from employment in the event he or she joins or remains a member of a labor organization. A.R.S. § 23-1341.

D. Political Activities and Voting

Employers may not make threats, express or implied, intended or calculated to influence the political opinions, views, or actions of their employees. A.R.S. § 16-1012(A). Employers cannot indicate that they will close or that wages will be reduced if any particular ticket or candidate is elected or defeated. An employer that does so, whether acting in his individual capacity or as an officer or agent of a corporation, is guilty of a Class 1 misdemeanor. A.R.S. § 16-1012(B).

E. Anti-Kickback Statute

Arizona Revised Statutes § 23-202 prohibits extortion of fees or gratuities as a condition of employment. It is unlawful for a person charged or entrusted by another with the employment or continuance in employment of any workmen or laborers to demand or receive, either directly or indirectly, from a workman or laborer employed or continued in employment through his or her agency or under his direction or control, a fee, commission, or gratuity of any kind as the price or condition of the employment of the workman or laborer or as the price or condition of his continuance in such employment. Violation of this statute is a Class 2 misdemeanor.

F. Buying from a Particular Person

A person who knowingly compels or in any manner seeks to coerce any employee or any person to purchase goods or supplies from any particular person is guilty of a Class 2 misdemeanor. A.R.S. § 23-203.

G. Confidentiality of Personal Identifying Information

Arizona Revised Statutes § 44-1373 prohibits (1) the intentional communication of an individual's Social Security number to the general public; (2) printing an individual's Social Security number (or sequences of five or more numbers identifiable as part of a Social Security number) on any card required for the individual to receive products or services; (3) requiring transmission of a Social Security number over the Internet unless encrypted or secured; and (4) requiring a Social Security number to access an Internet website unless a password or other authentication is also used. It is also a violation to print an individual's Social Security number on materials that are to be mailed unless state or federal law requires the Social Security number on the document or other limited exceptions apply. *Id.* A knowing and intentional violation of this statute is punishable by a $100 civil penalty per violation. A.R.S. § 44-1373.03.

H. Injunctions Against Workplace Harassment

Employers may obtain injunctions against workplace harassment pursuant to A.R.S. § 12-1810. An injunction will be granted if a court of competent jurisdiction finds reasonable evidence of workplace harassment by the defendant or that good cause exists to believe that great or irreparable harm would result to the employer or other person who enters the employer's property or who performs official work duties. A.R.S. § 12-1810(E). An employer is immune from civil liability for seeking or failing to seek an injunction unless the employer is seeking an injunction primarily to accomplish a purpose for which the injunction was not designed. A.R.S. § 12-1810(Q).

I. Arizona Arbitration Act

Arizona Revised Statutes § 12-1501 states that a "written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." However, Arizona statutory law states that the Arizona Arbitration Act "shall have no application to arbitration agreements between employers and employees or their respective representatives."

A.R.S. § 12-1517. In a unique case, *North Valley Emergency Specialists, LLC v. Santana*, 208 Ariz. 301 (2004), the Arizona Supreme Court held that this statute rendered unenforceable a compulsory arbitration agreement between an employer and its employees. The case is limited in its effect, however, because the parties procedurally waived an argument that the Federal Arbitration Act preempted Arizona's Arbitration Act. The Federal Arbitration Act does not exempt from its reach most arbitration agreements between employers and employees. As a practical matter, most arbitration agreements are governed by the Federal Arbitration Act and are not prohibited based on the Arizona Supreme Court's narrow decision in *North Valley Emergency Specialists*.

J. Professional Employer Organization Act

Arizona Revised Statutes § 23-561 et seq. states the requirements for professional employer agreements, for example, the division of rights and responsibilities between a professional employer organization (PEO) and its client and the limitations on the liability of PEOs. The statute requires each PEO to register with the Arizona Secretary of State. A.R.S. § 23-563. The registration requirement imposes on the PEO, among other duties, the obligation to provide a statement of ownership, including the name and business experience of every person who owns or controls 25 percent or more of the equity interest of the PEO and a financial statement setting forth the financial conditions of the PEO prepared according to generally accepted accounting principles. *Id.*

K. Religious Employer Contraceptive Coverage

Under A.R.S. § 20-2329, if an accountable health plan provides coverage for prescription drugs and outpatient health care service, it shall also provide coverage for any prescribed drug or device that is approved by the Food and Drug Administration (FDA) for use as a contraceptive and for outpatient contraceptive services. A religiously affiliated employer whose religious tenets prohibit the use of prescribed contraceptive methods may require that the accountable health plan provide coverage that excludes all FDA approved contraceptive methods for the purpose of preventing unintended pregnancies, if the employer submits an affidavit to the accountable health plan organization stating that it is a religiously affiliated employer. A.R.S. § 20-2329(B). The religiously affiliated employer is not permitted to obtain an employee's protected health information or violate the Health Insurance Portability and Accountability Act. A.R.S. § 20-2329(D). A.R.S. § 20-2329 also does not limit or eliminate federal or state law protections from employment discrimination.

L. HIV Testing

Employers may not test employees for HIV without first obtaining the informed consent of the subject employees. A.R.S. § 36-663.

M. Vexatious Litigants

Under A.R.S. § 12-3201, a defendant may, at any time prior to final judgment, move for an order designating that a person is a "vexatious litigant." A person found to be a "vexatious litigant" may not file another lawsuit or motion for requested relief without prior leave of the court's

presiding judge. A.R.S. § 12-3201(B). Specifically, a court may find that a person is a vexatious litigant if that person

1. has filed at least five lawsuits pro per in the preceding seven years that were found adversely against him or her or unjustifiably permitted to remain pending for over two years without a trial or hearing;

2. has attempted to relitigate pro per and against the same defendant the validity of an adverse final determination or any issue, claim, or fact arising from that determination;

3. has repeatedly filed unmeritorious motions or pleadings, has conducted unnecessary discovery or has engaged in other tactics that are frivolous or solely intended to cause unnecessary delay; or

4. has been declared a vexatious litigant in any other federal or state court in any action arising from a substantially similar set of facts, transaction, or occurrence.

VII. SUMMARY OF ARIZONA POSTING REQUIREMENTS

A. E-Verify

Since Arizona is an E-Verify state, employers must display an E-Verify poster and a right-to-work poster at hiring sites in such a way that they are clearly visible to potential employees. These posters indicate that the employer participates in E-Verify and describes employees' rights under the program. The posters, available at the E-Verify website, must be displayed in both English and Spanish.

B. Employee Safety and Health Protection

Arizona employers must post a bilingual employee safety and health protection poster. It must be printed on legal size paper, 8.5" x 14". The poster is available at http://www.ica.state.az.us/ADOSH/Forms/ADOSH_Poster_WorkplaceSafetyBilingual.pdf.

C. Workers' Compensation

Arizona employers must post a bilingual notice to employees regarding the workers' compensation act including its opt-out provisions. The notice is available at http://www.ica.state.az.us/Claims/Forms/Claims_Poster_WorkersCompLawBilingual.pdf. A.R.S. § 23-1502.

D. Work Exposure to MRSA, Spinal Meningitis, or Tuberculosis

All Arizona employers whose employees may receive significant exposure to Methicillin resistant *Staphylococcus aureus* (MRSA), spinal meningitis or tuberculosis in the regular course of their employment are required to display a poster regarding employees' exposure. Examples of employees who would meet this standard are law enforcement officers, firefighters, and corrections officers. The posting must be posted adjacent to the Arizona workers' compensation

poster and is available on the website of the Industrial Commission of Arizona at: http://www.ica.state.az.us/Claims/Forms/Claims_Poster_WorkExpToMRSA_SpMen_TB.pdf. A.R.S. § 23-1043.04.

E. Work Exposure to Bodily Fluids

Arizona employers are required to display a poster regarding employee's exposure to bodily fluids adjacent to the Arizona workers' compensation poster. The "Work Exposure to Bodily Fluids" poster is available on the website of the Industrial Commission of Arizona at http://www.ica.state.az.us/Claims/Forms/Claims_Poster_WorkExpToBodilyFluids_HIV_AIDS_HepC.pdf. A.R.S. § 23-1043.02.

F. Nondiscrimination

Employers must post a notice prepared or approved by the Arizona Civil Rights Division in conspicuous places on the employer's premises where notices to employees and applicants are customarily posted. A.R.S. § 41-1483 and Ariz. Admin. Code § R10-3-107.

G. Nondiscrimination—State Contractors

Unless exempt under state or federal law (e.g., Indian Tribes), state contractors must post notices containing provisions of the nondiscrimination clause contained in their contracts provided by the contracting officer of the applicable state agency and must post them in conspicuous places accessible to employees and applicants. Ariz. E.O. 2009-9, which superseded E.O. 99-4 and which was signed on October 20, 2009.

H. Unemployment Benefits Posting

Employers must post an unemployment benefits poster under A.R.S. § 23-772(D). The poster is available at https://des.az.gov/sites/default/files/legacy/dl/POU-003.pdf.

I. Arizona Minimum Wage

The Arizona minimum wage poster must be conspicuously posted in a place that is accessible to all employees. The posters are available in English and Spanish on the website of the Industrial Commission of Arizona at https://www.azica.gov/posters-employers-must-display.

J. Constructive Discharge Notice

A notice containing the statutory constructive discharge language specifying the actions an employee must take if he or she believes that working conditions have become intolerable must be conspicuously posted. A.R.S. § 23-1502(E).

K. Smoke-Free Arizona Act, A.R.S. § 36-601.01

Compliant "No Smoking" signs are available at http://www.smokefreearizona.org/info-downloads.asp. Signs must be clearly and conspicuously displayed so that they can be read from five feet away and must contain: (1) the no-smoking symbol or the words "No Smoking"; (2) the

number and website designated by the Arizona Department of Health Services for registering a complaint; and (3) a citation to A.R.S. § 36-601.01. Employers may also need to post signs on work vehicles if the vehicles are to be occupied by more than one person.

L. The Fair Wages and Healthy Families Act (Paid Sick Time)

The Industrial Commission of Arizona's "AZ Earned Paid Sick Time Poster 2017" is available in English at https://www.azica.gov/posters-employers-must-display.

(Revised February 3, 2017)