

WHAT CLERKS NEED TO KNOW ABOUT PUBLIC EMPLOYMENT LAW

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EMPLOYMENT AT WILL

A. **The Rule:** Absent a statute or ordinance or employment contract that confers some sort of right to continued employment on an employee, all employment in North Carolina is “employment at will.”

- The term “employment at will” is a shorthand way of saying that employment is terminable at the will of either party – employer or employee. An employer can fire an employee for any reason or for no reason at all and an employee can quit for any reason or for no reason at all.
- This is what is called a “common law” rule, i.e., law developed in the courts, as opposed to laws found in statutes passed by legislatures or rules promulgated by agencies.
- The at-will doctrine also applies to sanctions and disciplinary actions that fall short of termination. An employer who can fire employees at will can demote, suspend, transfer or refuse to hire them, set the terms of their work, and raise and lower their pay, all at will.

B. **Exceptions:** A public employee under the traditional employment-at-will rule may be fired for any reason or no reason, except where the U.S. Congress, the North Carolina Legislature, or local government ordinance has created an exception to the rule. Examples include where:

- termination is the result of unlawful discrimination on the basis of race, color, creed, sex, religion or national origin (Title VII), age (ADEA), or disability (ADA)
- an employee is terminated for speaking freely as a citizen on a matter of public concern.
- dismissal is for a reason that the North Carolina General Statutes expressly prohibit -- retaliatory dismissal for filing a workers comp claim.
- termination is against public policy. Examples of terminations against public policy include: firing a truck driver who refused to drive his vehicle for a longer time than permitted by state and federal DOT regulations.

THE BIG EXCEPTION TO EMPLOYMENT AT WILL: THE PROPERTY INTEREST IN EMPLOYMENT

If an employee has a property right in employment, s/he is not an at-will employee.

- A. **Definition:** An employee has a property interest in his or her employment when the employee has a limited right to continued, indefinite employment (they may only be dismissed for just cause) pursuant to a state statute (the State Personnel Act), local government personnel *ordinance*, or employment contract.
- B. **The Fourteenth Amendment:** Because the Fourteenth Amendment guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law," if a public employee has a property right in employment, the employee cannot be dismissed without due process.
- C. **Personnel policies do not create property interests:** Where personnel policies are only set forth in a personnel manual or policy enacted by resolution of a governing board, no property interest is created and the public employee is still an employee at will.
- No implied contract of employment is created by public or private employer's adoption of a personnel policy manual or handbook.
 - The only exception to this rule is that where a handbook or manual has promised employees certain benefits, the promise is enforceable and the employer must provide the benefits promised.
- D. **Due process requirements.** Due process requires that:
- (1) A public employee with a property interest in employment be given notice of any charges against him or her that are giving rise to a disciplinary action. Notice must permit the employee to know in writing the specific basis for the proposed disciplinary action, as well as the evidence on which the employer is relying in taking the action, **AND**

- (2) The employee be given an opportunity to respond to those charges before being disciplined or dismissed, although the pre-disciplinary or pre-dismissal hearing need not be formal; **AND**
- (3) The decision of whether to uphold the charges be made by an impartial decision maker.

The review *may* be conducted by someone with involvement in the matter, but that person must have an open mind in conducting the hearing. The reviewing official(s) may not have a disqualifying personal bias.

LEGAL BASIS FOR MUNICIPAL HUMAN RESOURCES ADMINISTRATION

A. Personnel Authority of the City Council.

- The council may create, change, abolish, and consolidate offices, positions, departments, boards, commissions, and agencies of the city government and generally organize and reorganize the city government in order to promote orderly and efficient administration, subject to the following limitations:
 - council may not abolish any office or agency established and required by law.
 - council may not combine offices when forbidden by law.
 - council may not discontinue or assign elsewhere any functions assigned by law to a particular office. See General Statutes § 160A-146.
- The council shall fix the schedule of pay, expense allowances, and other compensation, and life or health insurance benefits, for all city employees. See General Statutes § 160A-162.
- The council may adopt position classification plans. See General Statutes § 160A-162.
- The council may provide for enrolling city employees in LGERS or any qualified retirement plan. The city may provide health insurance for retired employees. See General Statutes § 160A-163.
- The council may adopt rules concerning but not limited to annual leave, sick leave, special leave with full pay or with partial pay supplementing worker's compensation payments for employees injured in accidents arising out of and in the course of employment, hours of employment, holidays, working conditions, service award and incentive award programs, other personnel policies, and any other measures that promote the hiring and retention of capable, diligent, and honest career employees. See General Statutes § 160A-164.

B. Hiring and Firing Authority.

1. Mayor-Council Municipalities:

- The council in mayor-council cities shall appoint, suspend and remove the heads of all city departments, and all other city employees; provided, the council may delegate to any administrative official or department head the power to appoint,

suspend, and remove city employees assigned to his department. See General Statutes § 160A-155.

- Neither the mayor nor any member of the council shall be eligible for appointment as head of any city department or as acting or interim head of a department in cities of 5,000 population and over. See General Statutes § 160A-158.

2. Council-Manager Municipalities:

- The city manager shall appoint, suspend or remove all city officers and employees not elected by the people or whose appointment or removal is not otherwise provided for by law, except the city attorney, in accordance with such personnel rules as the council may adopt. See General Statutes § 160A-148(1).

C. Personnel Authority of the City Manager.

- The manager shall be responsible for preparing position classification and pay plans for submission to the council, and after any such plans have been adopted by the council, shall administer them. See General Statutes § 160A-162(a).

D. Personnel Authority of the Personnel Officer.

- In mayor-council cities, the council shall appoint a personnel officer (or confer the duties of personnel officer on some city administrative officer); the personnel officer shall then be responsible for administering the pay plan and any position classification plan in accordance with general policies and directives adopted by the council.
See General Statutes § 160A-162(a).

E. Who Appoints the City Clerk?

Compare:

- **G.S. § 160A-171:** “There shall be a city clerk who shall give notice of meetings of the council, keep a journal of the proceedings of the council, be the custodian of all city records, and shall perform any other duties that may be required by law or the council.
- **G.S. § 160A-172:** “The council may provide for a deputy city clerk who shall have full authority to exercise and perform any of the powers and duties of the city clerk that may be specified by the council.
- **G.S. § 160A-173:** “The council shall appoint a city attorney to serve at its pleasure and to be its legal adviser.

- **G.S. § 153A-111:** “The board of commissioners shall appoint or designate a clerk to the board. The board may designate the register of deeds or any other county officer or employee as clerk. The clerk shall perform any duties that may be required by law or the board of commissioners. The clerk shall serve as such at the pleasure of the board.

LEGAL BASIS FOR COUNTY HUMAN RESOURCES ADMINISTRATION

A. Personnel Authority of the Board of County Commissioners:

- The Board of Commissioners may create, change, abolish, and consolidate offices, positions, departments, boards, commissions, and agencies of county government, may impose ex officio the duties of more than one office on a single officer, may change the composition and manner of selection of boards, commissions, and agencies, and may generally organize and reorganize the county government in order to promote orderly and efficient administration of county affairs, subject to the limitations set forth in this section. See General Statutes § 153A-76.
- The board may adopt personnel rules and policies that promote the hiring and retention of capable, diligent, and honest career employees. See General Statutes § 153A-94.
- The board may establish and maintain a personnel system for all employees subject to the State Personnel Act which is "substantially equivalent" to standards established by the Act. See General Statutes § 126-11(a).

B. Hiring and Firing Authority.

- In counties not having a county manager, the board of commissioners shall appoint, suspend, and remove all county officers, employees, and agents except those who are elected by the people or whose appointment is otherwise provided for by law.
See General Statutes § 153A-87.
- Counties may adopt manager plan, with manager to serve at the pleasure of the board of commissioners. See General Statutes § 153A-81.
- Manager shall appoint with the approval of the board of commissioners and suspend or remove all county officers, employees, and agents except those who are elected by the people or whose appointment is otherwise provided for by law. The board may by resolution permit the manager to appoint officers, employees, and agents without first securing the board's approval. See General Statutes § 153A-82.
- Officers whose appointment and dismissal is required by law to be made by the Board of Commissioners.

- **Clerk to the board, who serves at the pleasure of the board**
See General Statutes § 153A-111.
- County attorney, who serves at the pleasure of the board
See General Statutes § 153A-114.
- Tax collector, to serve for a term to be determined by the board. Removal for good cause after written notice and opportunity for hearing at public session, except no hearing required if removal for failing to properly deliver tax receipts.
See General Statutes § 105-349(a).
- Deputy tax collector, to serve for a term to be determined by the board.
See General Statutes § 105-349(f).
- County assessor, to serve a term of not less than two nor more than four years. Within two years of appointment, must achieve passing score in courses of instruction approved by Department of Revenue. Removal only for good cause after notice and opportunity for hearing at public session.
See General Statutes § 105-294.

C. Personnel Authority of the County Manager:

- The manager is responsible for the administration of all departments of county government under the board's general control and has the powers and duties to appoint and remove employees, direct and supervise all departments, attend meetings of the board, faithfully execute board policies, prepare and submit an annual budget, submit a financial report annually, make other necessary reports, and perform other duties required by the board. See General Statutes § 153A-82.

D. Hiring and Firing of Other County Employees:

1. Board of Elections Employees:

- There are tree county board of elections members, appointed by State Board of Elections for two year terms. The board's clerks, assistant clerks, and other employees are appointed and dismissed by the county board of elections. See General Statutes § 163-33(10).

2. Officers Elected by the People:

- a. **Sheriff.** Art. VII, § 2 N.C. Constitution.

- Each sheriff has the exclusive right to hire, discharge, and supervise the employees in his office, except that the board of commissioners must approve the appointment of a sheriff's relative or of a person convicted of a crime involving moral turpitude. Each sheriff is entitled to at least two deputies who shall be reasonably compensated by the county. Deputies serve at pleasure of sheriff. See General Statutes § 153A-103.
- b. **Register of Deeds**, to serve four year term. See **General Statutes §§ 161-1 and 161-2.**
 - Each register of deeds has the exclusive right to hire, discharge, and supervise the employees in his office, except board of commissioners must approve the appointment of register of deed's relative or of a person convicted of a crime involving moral turpitude. Each register of deeds is entitled to at least two deputies, provided that the register of deeds justifies to the board the necessity of the second deputy. Deputies to register of deeds serve at the pleasure of the register of deeds. See General Statutes § 153A-103.

3. **County Employees Governed by the State Personnel Act.**

a. **Health Department Employees.**

- County board of health is composed of 11 members, appointed by the board of commissioners, to serve three-year terms. The county board of health appoints the local health director, after consultation with board of commissioners. The local health director may be dismissed in accordance with Ch. 126. Local health department employees are appointed and dismissed by the local health director in accordance with Ch. 126.

b. **Social Services Department Employees.**

- The county board of social services is composed of 3 or 5 members, appointed for three year terms. The county director of social services is appointed by board according to the merit system rules of the State Personnel Commission. Dismissal must also be in accordance with Ch. 126. County social service employees are appointed and dismissed by county director of social services in accordance with Ch. 126.

c. **Consolidated Human Services Agencies**

- Counties may choose to consolidate their health and social services agencies into one county department of human services. See General Statutes § 153-77.

- Managed by a single human services director, who is appointed and supervised by the county manager with the advice and consent of a human services board appointed by the county commissioners. The human services director then appoints all human services agency employees subject to the approval of the county manager. See General Statutes § 153-77(b)(1), (e).
 - When a county consolidates its human services agencies pursuant to GS § 153-77, employees of the consolidated agency lose the protections of the State Human Resources Act and become subject to county personnel policies. To the extent that federal funds administered by consolidated human services agencies require the use of so-called competitive recruitment and selection procedures, the board of commissioners will have to adopt such policies for human services employees, if not for all county employees.
- d. Mental Health, Developmental Disabilities, and Substance Abuse Authority Employees.**
- A county shall provide mental health, mental retardation, and substance abuse services through an area authority. An area authority is a local political subdivision of the State except that a single county area authority is considered a department of the county in which it is located for purposes of Ch. 159 (Local Government Finance). An area authority governing unit is the area board, composed of 15-25 members, appointed by board(s) of county commissioners. The area director is appointed by and serves at the pleasure of the area board and is an employee of the area authority, not of the county. Employees under the direct supervision of the area authority are employees of the area authority. Appointed and dismissed in accordance with Ch. 126.
- e. Emergency Management Employees.**
- The governing body of each county is responsible for emergency management within the county and is authorized to establish and maintain an emergency management agency. The governing body of each county which establishes an emergency management agency will appoint a coordinator who will have a direct responsibility for the organization, administration and operation of the county program and will be subject to the direction and guidance of such governing body. No provision on dismissal. Employees appointed and dismissed in accordance with Ch. 126.

THE FAIR LABOR STANDARDS ACT (FLSA) 29 U.S.C. §§ 201-219

A. Overview. The Fair Labor Standards Act (FLSA) is a federal law that sets minimum wage, overtime pay, equal pay, record keeping, and child labor standards for employers. It is administered by the Wage and Hour Division of the U.S. Department of Labor (www.dol.gov/esa/whd).

- Minimum wage and overtime requirements apply to all *non-exempt* state and local government employees.
- **Overtime:** Employers must pay overtime or one-and-one-half the employee's regular rate of pay for each hour worked over forty (40).

Local Government Exceptions:

Law enforcement:	O/T only for hours over 171 in a 28-day cycle
Firefighters:	O/T only for hours over 212 in a 28-day cycle

Note: Governments with fewer than five (5) law enforcement officers or fewer than 5 firefighters are exempt from paying overtime to law enforcement officers or firefighter, as the case may be.

- **Comp time:** Local governments may give their employees compensatory time-off at the rate of one-and-one-half hours for every hour worked over 40 in lieu of cash overtime up to a total of two-hundred forty (240) hours. Public safety may receive comp time up to a total of four-hundred eighty (480) hours.
 - Employers may require employees to use any accrued comp time before using accrued sick or vacation leave.
 - Employers may not adopt a “use it or lose it” policy with respect to comp time. Comp time is the equivalent of cash wages. It never goes away. If an employee separates from service with accrued comp time, the comp time must be cashed out.

B. Exempt or Non-exempt?

Everyone is non-exempt unless they can be shown to fit into one of three exceptions:

- They are salaried: (“salaried” means no change from pay period to pay period based on variations in quality or quantity of work)
and
- they are executive, administrative or professional employees within the meaning of those terms as set forth in United States Department of Labor regulations.

Executive employees:

- Regularly direct the work of at least two employees, and
- Have a primary duty of management, and
- Have hiring or firing authority or significant influence over hiring or firing decisions.

Administrative employees:

- Have a primary duty of office or nonmanual work directly related to management policies or general business operations of the employer, **and**
- Perform work requiring the exercise of discretion and independent judgment.

Professional employees:

- Perform work requiring advanced knowledge in a field of science or learning.

Note: The FLSA does not cover the following persons who may perform work for a state or local government:

- elected officials and their personal staff
- policymaking appointees
- volunteers
- independent contractors
- certain trainees

C. SALARY BASIS TEST EXCEPTIONS

Employers may dock the pay of exempt employees for absences when there is no accrued sick or vacation leave or when employee has taken leave without approval (this exception is limited to the public sector). This may be done in less than full-day increments without destroying exempt status.

Other reasons for which employers may dock the pay of exempt employees:

- Unpaid FMLA leave taken on an intermittent basis or for less than a full work week
- Part-week initial and final weeks
- Penalties for infractions of safety rules of **major** significance
- Full-day disciplinary suspensions for workplace **misconduct**
 - May be taken for major misconduct only and never for performance-based reasons.

Examples:

Sexual harassment

Workplace violence

Drug/Alcohol use

Violation of law

- In order to use the full-day disciplinary suspension exception, an employer must have a written policy applicable to all employees.

D. Recordkeeping. Employers must keep the following records for employees covered by the minimum wage and overtime provisions of the FLSA:

1. Name in full, as used for social security recordkeeping purposes and, on the same record, the employee's identifying number or symbol, if such a number or symbol is used in place
of the name on any payroll records.
2. Home address and zip code
3. Date of birth
4. Gender and occupation
5. Time of day and day of week on which the employee's workweek begins. For police officers and firefighters using something other than a 7-day workweek, the starting time
and length of each employee's work period is required.
6. Regular hourly rate of pay
7. Hours worked each day and total hours worked each workweek
8. Total daily or weekly straight-time earnings or wages due for hours worked during the work day or workweek
9. Total premium pay for overtime hours

10. Total additions to, or deductions from, wages paid each pay period

11. Total wages paid each pay period

12. Dates of payment and pay period covered by payment.

With the exceptions of nos. 6-10 above, employers must keep the same information for exempt employees.

E. Enforcement Procedures and Penalties for Violations of the FLSA:

- Investigation by US DOL: If DOL finds that an employer has violated the FLSA, it may bring a lawsuit on the employee's behalf and seek either back wages and liquidated damages (defined by statute as the amount of back wages; hence the recovery is of double back pay), or back wages and an injunction prohibiting the employer from further violating the statute.
- DOL can also seek civil money penalties.
- The employee may bring a private suit to recover double back pay and attorneys' fees.
- The US Department of Justice may prosecute persons for willful violation of the FLSA. The Penalty for a first offense is a fine of no more than \$10,000; second offenses are punishable by fines of no more than \$10,000 **and/or** up to six months imprisonment.