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LexMundi Pro Bono Foundation

SOUTH CAROLINA EMPLOYMENT LAW

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1. Overview

It is critical that social sector organizations familiarize themselves with relevant employment laws that affect their employees and their organization. Often social sector organizations begin with like-minded persons informally coming together for the purpose of addressing a challenging social problem. However, regardless of the ties that bind those who work together on a social mission, the social sector organization must comply with applicable employment laws and implement relevant policies and procedures.

The following provides an overview of South Carolina employment laws that could apply to social sector organizations and their employees located in South Carolina. This overview does not provide a complete and comprehensive analysis of all potentially applicable employment laws in South Carolina and the U.S., and it should not be acted upon without specific legal advice based on a particular situation. Employment laws can differ greatly by state; if your organization and employees are located in another state, you should consult the employment law pages of LawForChange™ for that state.

2. General Issues

a. At Will Employment

The conventional relationship between an employer and an employee hired for an indefinite period of time is called "employment at will." Under this arrangement and setting aside the potential applicability of a number of special laws, either the employer or the employee may terminate the employment relationship at any time, with or without cause, and with or without advance notice. In the absence of a written contract or other evidence indicating that an employee may be terminated only "for cause," employment is generally presumed to be at will.

Please refer to Section 3, Employment Policies and Employee Handbooks, regarding the safe harbor established under South Carolina law to ensure that handbooks and other written policies are not employment contracts.

It is important to remember, however, that there are a number of special laws, both federal and state, that limit an employer's unfettered right to terminate traditional at will employees. These laws, some of which are identified and discussed below, prevent employers from firing any employee, whether at will or not, for illegal reasons (*e.g.*, discriminatory reasons, whistleblowing, or engaging in certain activities protected by law).

b. Temporary Employment and Consulting Relationships

In addition to traditional at will employees or contract employees, many employers may use the services of temporary employees, independent contractors, or consultants (and employees of independent contractors or consultants).

When an employer hires an employee for a temporary period or for a season, the temporary employee is still an at will employee of the employer, and the relationship is governed by the same laws as those applicable to at will employees. As with regular employees, legally mandated benefits, such as workers' compensation insurance and unemployment insurance, must be offered to temporary employees. Optional benefits, such as 401(k) plans, need not be offered to temporary employees.

An independent contractor or consultant is not considered an employee of the employer. Instead, an individual independent contractor is self-employed, and payments made to the independent contractor are considered contract payments rather than wages. The U.S. Internal Revenue Service ("IRS") and other governmental agencies have a variety of tests for determining whether a worker is an employee or an independent contractor, which, despite variations among the tests, tend to share the same primary factors. Essentially, workers who are performing the same job and performing under the same supervision as

regular employees are usually deemed to be employees. Additional factors shared by the various tests include: the degree of control the employer exercises over the worker's hours and manner of performance; whether the employer provides the worker's tools and/or employee benefits (e.g., medical insurance, vacation pay); the length of service; and the method of payment (e.g., is the worker paid hourly or on a project basis).

The consequences of incorrectly classifying an employee as an independent contractor can be far-reaching and expensive (e.g., liability for unpaid payroll taxes and penalties, administrative claims for benefits provided to regular employees, liability for unpaid unemployment insurance and workers' compensation premiums, increased exposure to governmental audits, and potential exposure to employment-related civil suits and administrative claims).

c. Employment Agreements

While it is not required or necessary to enter into an employment agreement with any employee, social sector organizations may wish to enter into written employment agreements with one or more key leaders. If an organization chooses to enter into an employment agreement with a particular employee, such agreements typically spell out the term of employment (even if it is "at will"), duties, compensation and circumstances under which the agreement may be terminated by either party. In addition, such agreements often contain provisions requiring key employees to keep information confidential even after they leave employment and barring them from becoming employed by certain competing organizations for a limited period of time following termination. The provisions of these agreements and whether any such agreement should be used should be discussed with an employment attorney before they are presented to an employee or prospective employee.

d. Government Contractors

A number of laws impose specific requirements on employers who contract with the government or a government-funded agency and on employers who receive grants or other funding from the government. These laws include special equal opportunity laws, affirmative action laws, prevailing wage laws, and drug-free workplace laws. The application of the laws depends on the value of the contract or funding and/or the number of employees in the company.

e. Employee Records

(1) South Carolina Law

Under South Carolina employment laws, an employer is either required to or should maintain the following records on each employee:

5 years – All employers subject to the South Carolina Department of Employment and Workforce must retain the following records for 5 years:

- the beginning and ending dates of each pay period and the largest number of workers employed during each calendar week of each pay period;
- for each employee, full name, social security number, number of hours worked each week if less than full-time, amount of money wages paid, reasonable cash value of remuneration paid in a form other than cash, dates of hire, re-hire, or return to work after temporary layoff, and date and reason for separation from employment.
- for an employee who may be eligible for partial benefits, the wages earned by weeks, whether any week was less than full-time and time lost due to the employee's unavailability for work.

2 years – records of all injuries suffered by an employee in the course of employment. Forms are supplied by the South Carolina Workers' Compensation Commission.

(2) Federal Law

In general, under federal laws, an employer is either required to or should maintain the following records on each employee:

1 year – documents related to hiring, accommodations, promotions, discipline, and discharge, including: job applications, resumes, or any other form of employment inquiry whenever submitted in response to an advertisement or notice of job opening, including records pertaining to failure or refusal to hire any individual; records relating to promotion, demotion, transfer, selection for training or apprenticeship, layoff, recall, or discharge of any employee; job orders submitted to an employment agency or labor organization for recruitment of personnel; test papers completed by applicants or candidates for any position; results of any physical examination if such is considered in connection with a personnel action; advertisements or notices relating to job openings, promotions, training, or opportunities for overtime work; requests for reasonable accommodation for disability or religious observance and what accommodation, if any, was granted. This will cover the limitations period of claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA") (see Section 8 below for summaries of these and other federal laws).

3 years – Payroll records listing employee's full name, home address, date of birth, sex (for Equal Pay Act purposes), occupation/job title, time of day and day of week on which workweek begins, regular rate of pay, the basis for determining regular rate of pay (including any payments excluded from the regular rate of pay), straight-time

earnings, overtime premium earnings, additions/subtractions from wages for each pay period, total wages for each pay period, and date of payment and pay period covered by each payment. This is for claims under the ADEA and Fair Labor Standards Act ("FLSA").

2 years – Supplementary payroll records such as basic time sheets or production records that contain the daily starting and stopping times of individual employees and/or amount produced that day, wage rate tables for computing piece rates or other rates used in computing straight-time earnings, wages, salary, or overtime, and any records needed to explain the wage rate differential based on sex within the establishment (e.g., production, seniority, or other bona fide business criteria). Such information may be necessary in responding to claims under the FLSA, including the Equal Pay Act.

1 year after plan terminates – Employee benefit plan records including: pension plans, insurance plans, seniority systems, merit systems. This includes benefit plans covered by ERISA as well as set plans for advancement, layoff, or reinstatement based on seniority, merit, or some other formula which will be pertinent to either an issue under a collective bargaining agreement or claims of age or other discrimination.

3 years – Records related to qualified family and medical leave including: basic payroll and employee data (used to determine qualification for protection under the Family and Medical Leave Act ("FMLA")), dates and hours FMLA leave is taken, hours worked in 12 months prior to start of leave, copies of employee notices furnished to employer, copies of notices provided to employee of rights and responsibilities under FMLA, employer policies applicable to use of family and medical leave, documents verifying premium payments of employee benefits (both employer paid and employee portion of premium), and records of any disputes with employees over use of FMLA leave. These documents will assist in supporting compliance with FMLA.

30 years – Records of employee exposure to toxic substances. Such records are required by the Occupational Safety and Health Act ("OSHA").

Duration of employment plus 30 years – Employee medical records, including medical histories, examinations and test results, medical opinions and diagnoses, description of treatment and prescriptions, and employee complaints (required by OSHA).

5 years – Occupational illness or injury records. These records, required by OSHA, should be kept for 5 years after the year in which the injury was sustained or treatment ended, whichever is longer.

3 years or 1 year after termination – I-9 Employment Eligibility Verification Form. These forms must be kept for a minimum of 3 years or 1 year after the employee's employment ends, whichever is longer.

4 years – Tax records related to income tax withholdings. This is required by the Federal Insurance Contribution Act and the Federal Unemployment Tax Act.

At a minimum, social sector organizations should maintain one or more personnel files for each employee, containing any offer letters and agreements signed by the employee, required wage and hour records (and some terms of employment relating to compensation are required to be in writing or posted), records regarding promotion, additional compensation, termination, disciplinary action, and any documents used to determine the employee's qualifications for employment. Medical records, immigration information, and other confidential documents, such as reference checks and investigative files for harassment claims, should be kept separately from an employee's regular personnel file and should be kept confidential.

3. Employment Policies and Employee Handbooks

Most employers have written employment policies. Written policies can serve to clarify expectations, reduce risk and, in some cases, comply with statutory requirements such as those in the Family and Medical Leave Act (FMLA).

For many years, South Carolina courts have struggled with whether promises or ambiguities in an employee handbook or other written policies could be deemed to give rise to contractual obligations and further erode the concept of at will employment. The South Carolina Legislature addressed this problem in part by promulgating S.C. Code Ann. § 41-1-110. This statute affirms the at will nature of employment relationships in South Carolina and provides a specific safe harbor for ensuring that a handbook is not an employment contract:

> *"It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law."*

In addition, both state and federal law require that certain notices be posted in an area accessible to all employees. There are several services that provide updated posters

containing these notices. The state of South Carolina requires employers to post the following:

Agency: South Carolina Department of Labor:
- "Safety & Health Protection on the Job" (OSHA)
- "Payment of Wages Act, Child Labor, Right-to-Work, and Immigrant Worker"

Agency: S.C. Department of Employment and Workforce:
- "Workers Pay No Part of the Cost for Job Insurance" (UCI 104)
- "If You Become Unemployed" (UCI 105)

Agency: S.C. Workers' Compensation Commission
- "Workers' Comp Works for You"

Agency: S.C. Human Affairs Commission
- "Equal Opportunity is the Law"

The six posters are currently available as one poster, "South Carolina Workplace Laws," by contacting one of three state agencies: S.C. Department of Employment and Workforce, (803)737-3075, Option #2 (www.dew.sc.gov); S.C. Human Affairs Commission, (803) 737-7800 or 1-800-521-0725 (www.state.sc.us/schac); or S.C. Workers' Compensation Commission, (803) 737-5700, (www.wcc.sc.gov).

The federal government also requires employers to post notices. Visit http://www.dol.gov/compliance/topics/posters.htm for an up-to-date list of required notices.

Policies for any employment manual or handbook should include:

a. Nondiscrimination

Under federal law, employers are prohibited from discriminating on the basis of race, color, religion, sex, national origin, veteran status, pregnancy, age, genetic information, or disability. The discrimination laws prohibit an employer from making employment-related decisions, such as hiring, firing, promotions, pay increases, or conditioning other terms and conditions of employment, on a person's protected status. Some local communities may have ordinances that provide for even greater protections, so it is important to check those local laws for any additional requirements.

Failing to comply with discrimination laws can result in expensive lawsuits or administrative investigations. In general, these laws require that all employees be treated equally without regard to their protected status. In addition, employers may not retaliate against employees who seek to further or enforce employment discrimination laws. Employers also should be aware of their obligations to make reasonable accommodations for employees where the employees' disabilities or religious beliefs conflict with

employment requirements. These obligations, which exist under both federal and state law, are unlike other equal employment opportunity laws in that treating all employees equally will not satisfy the obligations. Instead, employers must take positive steps to reasonably accommodate employees with disabilities and specific religious practices.

See federal laws regarding discrimination in the “Federal Law” section below. See South Carolina laws regarding discrimination in the “Other State Specific Considerations” section below.

b. Harassment

Both federal and South Carolina laws also prohibit harassment in the workplace against any of the classes of employees protected under federal and state discrimination law. Two types of conduct constitute “harassment in the workplace.” The most obvious occurs when a supervisor makes a job promotion or benefit dependent on the receipt of sexual favors (often called “quid pro quo” harassment). The other type occurs when an employee has to endure comments, physical contact, physical gestures, or other behavior that creates an offensive atmosphere for that employee (often called “hostile environment” harassment). While sexual harassment is most often thought of, harassment on the basis of race, disability, age, etc. is also prohibited.

An employer is required to take all reasonable steps necessary to prevent the occurrence of either type of harassment, which includes having an appropriate and comprehensive policy against harassment. For this reason, a harassment policy that both expressly prohibits harassment and provides avenues for employees to report harassing behavior is a must in any workplace. Employees should be encouraged to report any harassing behavior to their supervisor and/or a human resources person or senior manager. A member of management should be designated to investigate such claims. Reasonable steps to prevent harassment would also include periodic dissemination of the harassment policy, harassment training (particularly for supervisors), investigations of any complaints, and, when harassment occurs, prompt and effective remedial action. As with discrimination, employers cannot retaliate against an employee who complains about harassment.

c. OSHA Injury and Illness Prevention

The Occupational Safety and Health Act ("OSHA") regulates work place safety for employers in businesses which affect commerce. Under OSHA, employers are required to furnish their employees with a place of employment free from recognized hazards that are causing, or are likely to cause, them death or serious physical harm. Employers must also comply with occupational safety and health standards which are issued under OSHA. "Right to know" regulations issued under OSHA require that employees in certain

industries be warned about hazardous materials and chemicals to which they may be exposed. OSHA sets forth a detailed procedure for adopting safety and health standards and provides for inspection, investigation and enforcement. Citations issued for noncompliance can result in civil and criminal penalties, including fines and, for violations causing the death of an employee, imprisonment. States are allowed to develop and enforce their own plans setting and enforcing occupational safety and health standards. Some industries have specific statutes which regulate employee safety and health.

d. Workplace Violence

Employers should take steps to prevent violence in the workplace. This may include policies against bringing weapons into the workplace (but see the Law Abiding Citizens Self-Defense Act of 1996 in "Other State Specific Considerations" section below), taking prompt and appropriate action against any acts or threats of violence, and creating an environment that will reduce the likelihood of violence in the workplace.

4. Hiring Process

The hiring process involves receiving and reviewing applications, interviewing potential candidates, and selecting the employee. Several federal and South Carolina laws limit what employers can ask during the process.

a. Applications, Interviewing, Reference Checks and Background Checks

The application process generally includes publishing the open position and accepting applications. Every help-wanted advertisement should contain an equal employment opportunity statement. Discrimination laws prohibit certain questions on the application, particularly those that elicit information about a person's protected status and are not job related.

The interviewing process generally involves interviews and reference checks. Federal and South Carolina discrimination laws prohibit employers from asking certain questions during the hiring process. For example, questions regarding a person's age, disability, child bearing decisions or plans, or other questions related to a person's protected status that are not directly related to the qualifications for the job are prohibited. Every person who interviews candidates and conducts reference checks should have a working knowledge of the laws that govern employment interviews.

Employers who use outside organizations to conduct background checks must comply with federal credit-reporting law under the Fair Credit Reporting Act, which requires certain disclosures and reports to be made available to applicants**.**

Federal and South Carolina disability laws impose certain affirmative obligations on employers to ensure that disabled persons have a fair opportunity to participate in the hiring process. If any pre-employment testing is administered, then reasonable accommodations must be made to those applicants who require them. Further, the use of testing or other criteria not related to the essential functions of the position being filled should not be used as they may tend to have a discriminatory impact on disabled applicants.

If an employer is going to administer a drug test, then it should have a set policy and make sure it is applied across the board. Applicants may be required to disclose the use of prescription drugs to the test administrator, and that information should be kept confidential and only used to determine if the applicant passed or failed the drug test. Such information is not provided to the employer.

b. Immigration

All employers are required to verify that every new hire is either a U.S. citizen or authorized to work in the U.S. All employees must complete Section 1 of the Employment Eligibility Verification (I-9) Form no later than the first day of employment and produce required documentation within three business days of their hire date. Failure to follow the I-9 process can result in penalties and an audit by the Immigration and Customs Enforcement (ICE).

Employers cannot discriminate against employees based on their immigration status. Thus, once an employee has satisfied the employer that he or she is eligible to work in the U.S, the employee's immigration status should not be used in any other employment decisions.

The South Carolina Illegal Immigration and Reform Act, as amended, requires all employers to verify the legal status of new employees and prohibits employment of any employee not legally in the U.S. and authorized to work. All South Carolina employers are required to enroll in the Department of Homeland Security's E-Verify program. Employers must verify the status of new employees through E-Verify within three business days of the hire date. Failure to enroll in and use E-Verify to verify employees' status will result in the employer's probation or suspension/revocation of the employer's business licenses.

5. Compensation and Benefits

Several different federal and South Carolina laws regulate various forms of compensation and benefits. Each social sector organization should adopt a compensation scheme that is compatible with the organization's mission and furthers its human resources goals.

a. Wages

Most employers — regardless of size — are governed by both federal and state wage and hour laws. Federal and state wage and hour laws differ slightly, and employers must follow both. On July 24, 2009, the federal minimum wage was increased to $ 7.25/hr. South Carolina has no state minimum wage law so the minimum wage established by Federal law prevails. Wages and payment terms are generally required to be provided to employees (written or posted).

b. Taxes

Employers are required to withhold federal and state income tax and social security tax from taxable wages paid to employees.

Most employers, including non-profit organizations that are not 501(c)(3) organizations, must also file an Employer's Annual Federal Unemployment (FUTA) Tax Return (IRS Form 940) and pay any balance due on or before January 31 of each year. Details may be found in IRS Circular E, available at http://www.irs.gov/pub/irs-pdf/p15.pdf. Employers who are 501(c)(3) organizations, however, are not required to file a FUTA Tax Return. If payment of tax is required, any balance is due on or before January 31 of each year. Details may be found in IRS Circular E, available at the above link, and in Publication 15A available at http://www.irs.gov/pub/irs-pdf/p15a.pdf.

c. Mandatory Benefits

i) Workers' Compensation

All employers with three or more employees must provide workers' compensation insurance for their employees. There are some limited exemptions from this requirement, but the workers' compensation benefits are the only benefits available for an employee injured in an "on the job accident." What this means for employers is that an employee who is injured while performing work for the employer cannot sue the employer for his/her injury, but is compensated through workers' compensation.

ii) Unemployment Insurance

Employers must contribute to an unemployment compensation fund. When an employee is granted unemployment compensation benefits, whether those payments are counted against the employer's account depends on several factors, one of which is how long the employee worked for the employer.

iii) Federally Mandated Benefits

See summaries of ERISA, COBRA and HIPAA in the "Federal Law" discussion below. If applicable, these federal laws mandate certain specified benefits.

d. Voluntary Benefits

The benefits listed below are not required by law. However, many employers choose to provide employees with such benefits in order to attract and retain the most qualified workers.

An employer is not required to provide employees with vacation pay. If an employer elects to provide such benefits, however, they should be uniformly applied in conformity with a written policy. This will provide protection against claims of discrimination and may be necessary to ensure the employer complies with the pay provisions of the Fair Labor Standards Act ("FLSA") as it relates to "exempt" employees.

Although it is not uncommon to do so, employers are not required to give employees paid holidays. Indeed, except in cases where accommodation of religious holidays might be required, employers are not even required to give employees time off during holidays.

Under South Carolina law, there may be limitations on which commercial enterprises can be open before 1:30 p.m. on Sundays, and there are statutes that protect employees' rights to attend church or synagogue and also to not work on Sundays.

Employers are not required to offer paid sick leave to employees. Traditional sick leave is often limited to time off for dealing with the employee's own illness or possibly to care for a sick child or spouse. Upon termination, the employer has no legal obligation to pay out unused sick leave, which means the employer's written policy will control.

Some employers choose to combine vacation, sick leave, personal days, and floating holidays into a single "paid time off" or "PTO" policy. This makes it easier to administer employee time off and a single policy for accumulating and using PTO will often suffice.

Paid leaves of absence, such as paid maternity or paternity leave, are not required by law.

6. Termination of Employment

Absent an employment contract that provides otherwise, an employee of a social sector organization may ordinarily be terminated with or without cause provided there is no violation of law. Prior to termination, social sector organizations should thoroughly review all records concerning the employee or employees in question and carefully assess the risks of litigation. In most cases, employment counsel should be consulted before terminating one or more employees.

a. Pay

South Carolina law provides that all wages earned and unpaid at the time of discharge are due and payable upon the termination of employment and must be paid within 48 hours of the time of separation or at the next regular pay date, which may not exceed 30 days.

b. Severance Agreements / Releases

Generally, employers are not required to provide severance pay, unless they have agreed to do so. If the employer wants to offer severance to an employee, the employer may ask the employee to sign a release in exchange for the severance, in which the employee waives all legal claims the employee may have against the employer. If an employer seeks a release, the employee must be provided severance or other consideration in addition to any payments the employee was already entitled to receive. Federal law contains specific statutory requirements for waivers of age discrimination claims and prohibits the waiver of certain wage claims.

c. Unemployment Insurance / Compensation

The purpose of unemployment compensation is to provide benefits to those who are unemployed through no fault of their own. Unemployment benefits come from taxes paid by employers on wages of their workers. These taxes are put in a special trust fund that is used solely to pay unemployment benefits to workers who lose their jobs through no fault of their own. The benefits are intended to be temporary to help people with basic needs while seeking new employment.

South Carolina employers pay contributions under the experience rating provisions of the law; rates range from 0.095 to 7.855% of their total payroll. The employer's contribution rate depends on its individual benefit ratio (benefits charged to its account for a certain period divided by its total payroll for the same period) as well as the level of funding of the Unemployment Compensation Fund.

d. Health Care Continuation (COBRA) Requirements

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") requires employers who provide employee health and medical benefits to provide notification to employees of their COBRA rights at the time of a "qualifying event" such as a resignation or an involuntary termination of employment. COBRA applies to employers with more than 20 employees. See "Federal Law" section below.

Under South Carolina law, covered employers must provide coverage to eligible employees for the fractional policy month remaining at termination plus six additional

policy months. This provision does not apply if federal law requires longer continued coverage.

Written notice of COBRA rights must be given both when initial coverage begins and when the "qualifying event" occurs. The employee will then have 60 days from the date coverage is lost or the date notice was provided to choose to receive continuation coverage.

7. Immigration

With globalization and the increasing benefits of a diverse workforce, social sector employers located in the U.S. often seek to employ foreign personnel. This is particularly true with social sector organizations that are already working and addressing problems not just in the U.S. but around the world. A variety of permanent and temporary visas are available depending on various factors such as the job proposed for the alien, the alien's qualifications, and the relationship between the U.S. employer and the foreign employer. Permanent residents are authorized to work where and for whom they wish. Temporary visa holders have authorization to remain in the U.S. for a temporary time and often the employment authorization is limited to specific employers, jobs, and even specific work sites.

When planning to bring foreign personnel to the U.S., U.S. employers should allow several months for processing by the United States Citizenship and Immigration Services ("USCIS"), as well as the Department of State and Department of Labor. Furthermore, employers should be aware that certain corporate changes, including stock or asset sales, job position restructuring, change of job sites, and changes in job duties, may dramatically affect (if not invalidate) the employment authorization of foreign employees.

a. Permanent Residency (the "green card")

Permanent residency is commonly based on either family relationships, such as marriage to a U.S. citizen, or an offer of employment. Permanent residence gained through employment often involves a time-consuming process that can take several years. Therefore, employers considering the permanent residence avenue for an alien employee should ascertain the requirements for that immigration filing prior to bringing the employee to the U.S.

b. Temporary Visas

The following are the most commonly used temporary visas:

i) B-1 Business Visitors and B-2 Visitors for Pleasure

These visas are commonly utilized for brief visits to the U.S. of six months or less. Neither visa authorizes employment in the U.S. B-1 business visitors are often sent by their overseas employers to negotiate contracts, to attend business conferences or board meetings, or to fill contractual obligations such as repairing equipment for brief periods in the U.S. B-1 or B-2 visitors cannot be on the U.S. payroll or receive U.S.-source remuneration.

ii) F-1 Academic Student Visas Including Practical Training

Often foreign students come to the U.S. in F-1 status for academic training or M-1 status for vocational training. Students in F-1 status can often engage, within certain constraints, in on-campus employment and/or off-campus curricular or optional practical training for limited periods of time. Vocational students cannot obtain curricular work authorization but may receive some post-completion practical training in limited instances.

iii) J-1 Exchange Visitor Visas

These visas are for academic students, scholars, researchers, and teachers traveling to the U.S. to participate in an approved exchange program. Training, not employment, is authorized. Potential employers should note that some J-1 exchange visitors and their dependents are subject to a two-year foreign residence requirement abroad before being allowed to change status and remain or return to the U.S.

iv) TN Professionals

Under the North American Free Trade Agreement, certain Canadians and Mexicans who qualify and fill specific defined professional positions can qualify for TN status. Such professions include some medical/allied health professionals, engineers, computer systems analysts, and management consultants. TN holders are granted one-year stays for specific employers, and other employment is not allowed without prior USCIS approval. Particularly with regard to Canadians, paperwork required for filing these requests is minimal.

v) E-1 Treaty Trader and E-2 Treaty Investor Visas

These are temporary visas for persons in managerial, executive or essential skills capacities who individually qualify for or are employed by companies that engage in substantial trade with or investment in the U.S. E visas are commonly used to transfer managers, executives or engineers with specialized knowledge about the proprietary processes or practices of a foreign company to assist the company at its U.S. operations. Generally, E visa holders receive a five-year visa stamp but only two-year entries at any time.

vi) E-3 Treaty Alien in a Specialty Occupation Visas for Australian Citizens

E-3 visas are for Australian citizens who will be employed in the U.S. in specialty occupations that require at least a bachelor's degree. Like H-1B visas, the U.S. employer must pay the E-3 worker the higher of the actual wage paid by such employer to U.S. workers or the prevailing wage paid to U.S. workers in local commuting area as determined by Department of Labor online wage library or other valid salary survey. These temporary visas are granted for a period of 2 years and are renewable indefinitely.

vii) H-1B Specialty Occupation Visas

H-1B visas are for persons in specialty occupations that require at least a bachelor's degree. Examples of such professionals are computer programmers, engineers, architects, accountants, and, on occasion, business persons. Initially, H-1B temporary workers are given three-year temporary stays with possible extensions of up to an aggregate of six years. H-1B visas are employer- and job-specific. A U.S. employer must pay H-1B workers the higher of actual wage paid by such employer to U.S. workers or the prevailing wage paid to U.S. workers in local commuting area as determined by Department of Labor online wage library or other valid salary survey.

viii) L-1 Intra-company Transferee Visas

Most often utilized in the transfer of executives, managers or persons with specialized knowledge from international companies to U.S.-related companies, L-1 visas provide employer-specific work authorization for an initial three-year period with possible extensions of up to seven years in certain categories. L-1A visas are designed for the transfer of executives and managers while L-1B visas are for specialized knowledge persons. As in the case of certain E visa capacities, some L managers or executives may qualify for a shortcut in any permanent residence filings.

ix) O-1 and O-2 Visas for Extraordinary Ability Persons

O-1 and O-2 visas are for persons who have extraordinary abilities in the sciences, arts, education, business or athletics and sustained national or international acclaim. Also included in this category are those persons who assist in such O-1 artistic or athletic performances.

x) P-1 Athletes/Group Entertainers and P-2 Reciprocal Exchange Visitor Visas

These temporary visas allow certain athletes who compete at internationally recognized levels or entertainment groups who have been internationally recognized as outstanding for a substantial period of time to come to the U.S. and work. Essential support personnel can also be included in this category.

xi) Others

There are a number of other non-immigrant visas categories that may apply to specific desired entries.

c. Immigration and Nationality Act ("INA")

The Immigration and Nationality Act ("INA") includes provisions addressing employment eligibility, employment verification and nondiscrimination. Employers may hire only persons who may legally work in the U.S. (i.e., citizens and nationals of the U.S.) and aliens authorized to work in the U.S. The employer must verify the identity and employment eligibility of anyone to be hired, which includes completing Employment Eligibility Verification Form (I-9). Employers must keep each I-9 on file for at least three years, or one year after employment ends, whichever is longer.

d. Immigration Reform and Control Act ("IRCA")

The Immigration Reform and Control Act ("IRCA") requires that employers, regardless of size, inspect and verify documentation establishing the identity and eligibility to work in the U.S. of every newly hired employee, and makes it unlawful to hire an alien who is ineligible for work in the U.S. Employers are subject to significant fines and penalties for failure to comply with documentation requirements under the IRCA, as well as for hiring unauthorized workers. IRCA also prohibits employers of four or more workers from discriminating against lawfully admitted aliens.

Please refer to Section 4b., Hiring Process/Immigration, regarding the requirements of the South Carolina Illegal Immigration and Reform Act, including employers' use of E-Verify.

8. Federal Law

Described below are some of the more significant federal laws and regulations, not including immigration, affecting the employment relationship.

a. Title VII of the Civil Rights Act of 1964 ("Title VII")

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination based on race, sex, color, national origin, or religion. Title VII applies to all employers with 15 or more employees and prohibits discrimination in areas of advertising, recruiting, hiring, promotion, compensation, benefits administration, and termination. Title VII also prohibits harassment based on an individual's protected characteristics, as well as retaliation for engaging in conduct protected by Title VII. To recover damages, any individual who has suffered such discrimination must file a complaint with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged discrimination. If an employee files a charge with the state fair-employment agency, however, this time period is extended to 300 days from the alleged

discrimination. Once the EEOC investigates the allegations and makes a determination regarding the sufficiency of the evidence to prove the alleged discrimination, the EEOC will notify the employee in writing of his or her right to bring a civil action. Regardless of the EEOC's determination, the employee may, within 90 days of receipt of the notice, bring a legal action based on his or her allegations. An individual's possible remedies under Title VII include compensatory and punitive damages, back pay and front pay, reinstatement, and attorneys' fees.

b. Age Discrimination in Employment Act ("ADEA")

The Age Discrimination in Employment Act ("ADEA") makes it unlawful for employers to fail or refuse to hire, to discharge, limit, segregate or classify protected employees, or otherwise discriminate against them with respect to their compensation, terms, conditions or privileges of employment because of their age. The ADEA protects employees who are at least 40 years old and applies to all employers with 20 or more employees employed in an industry affecting commerce. There are limited exceptions to the ADEA where age is a "bona fide occupational qualification" necessary to the particular business, or where the differentiation is based on reasonable factors other than age. Employees may file charges of discrimination with the EEOC, which enforces the ADEA. The employee or the EEOC may then sue in federal court for damages and other relief. Remedies under the ADEA include reinstatement or front pay, back pay, liquidated damages, and attorneys' fees.

c. Americans with Disabilities Act ("ADA")

The Americans with Disabilities Act ("ADA") makes it unlawful for employers to discriminate against a qualified individual with a disability based on the existence of a disability, a record of a disability, or on the employer's perception that an employee is disabled. The ADA requires that employers take reasonable steps to accommodate disabled individuals in the workplace unless such measures would constitute an undue hardship on the employer. The ADA applies to employers engaged in interstate commerce that have 15 or more employees. The procedures for pursuing a claim under the ADA, as well as the available remedies, are similar to those provided by Title VII.

The ADA Amendments Act, which became effective January 1, 2009, expands the meaning of terms included in the definition of "disability" and significantly widens the number of individuals covered by the ADA.

d. The Pregnancy Discrimination Act of 1978 ("PDA")

The Pregnancy Discrimination Act of 1978 ("PDA") explicitly prohibits discrimination based on pregnancy and its related conditions.

e. Employee Polygraph Protection Act ("EPPA")

Employee Polygraph Protection Act ("EPPA") generally prohibits the use of polygraph machines by an employer in determining whether to hire, promote or terminate an individual. Some private employers, including those within the security field, those involved in the protection of the public, those involved in operations impacting national security, and those authorized to manufacture, distribute, or dispense any controlled substance, are exempt from the EPPA. The EPPA also permits the use of a lie detector by any employer when the employer sustains an economic loss, the employee to be tested had access to the property that is the subject of the investigation, the employer has a reasonable suspicion that the employee was involved in the incident being investigated, and the employer obtains a statement from the employee authorizing the test. Even in these limited situations where use of a lie detector is permissible, an employee being tested can terminate the examination at any time. Either the Secretary of Labor or an aggrieved employee can bring an action against an employer for violating the EPPA. Remedies include reinstatement, promotion, back pay, and attorneys' fees. The Department of Labor may also impose a fine up to $10,000.

f. The Equal Pay Act of 1963 ("EPA")

The Equal Pay Act of 1963 requires employers to pay men and women equal wages for equal work. Equal pay is required for any jobs "the performance of which require equal skill, effort and responsibility and which are performed under similar working conditions." There are exceptions for seniority systems, merit systems, pay systems based on quantity or quality of production, or other pay differentials based on factors other than sex. The Equal Pay Act applies to employers who have two or more employees engaged in interstate commerce, in the production of goods for interstate commerce, or in handling or working with goods and materials in interstate commerce. An employee who believes his or her employer has violated the EPA may bring an action in federal court or file a charge with the EEOC. The employee need not first bring the claim before the EEOC in order to sue. Remedies include back pay, attorneys' fees, and court costs.

g. The Federal Fair Labor Standards Act ("FLSA")

The Federal Fair Labor Standards Act ("FLSA") regulates wages and hours of certain covered employees. Employers must keep accurate records of hours worked by covered employees, and those employees must receive a regular rate of pay for each hour they work up to 40 hours in a workweek. The regular rate must be at least equal to the required "minimum wage," which was increased to $7.25 on July 24, 2009. All hours over 40 in a workweek are considered "overtime." Generally, an employer must provide compensation to any covered (i.e., non-exempt) employee who works in excess of 40 hours in a workweek at an amount not less than one and a half times the worker's regular

rate of pay for each hour of overtime. These protections may not be eliminated by individual agreement or by union contract. While appearing simple, the FLSA is subject to many regulations, exceptions, interpretations and exemptions and is not capable of short summary. For example, professional, executive and administrative employees, as defined by regulations, are exempt from both the minimum wage and overtime pay requirements, and some occupations and industries have special minimum wage provisions. Employers who violate the FLSA are subject to civil penalties, including fines, and prevailing employees may recover unpaid wages, unpaid overtime compensation, liquidated damages, and attorneys' fees.

h. The Family and Medical Leave Act ("FMLA")

The Family and Medical Leave Act ("FMLA") requires that eligible employees working for organizations with 50 or more employees be allowed to take up to 12 weeks of unpaid leave per year for the birth or adoption of a child, for the serious health condition of the employee or spouse, parent or child of the employee, or for a qualifying exigency arising out of the fact that a spouse, child or parent of the employee is a covered servicemember with the regular Armed Forces deployed to a foreign country or is a covered servicemember with the National Guard or Reserves and is on call or order to covered active duty with the Armed Forces in a foreign country. An eligible employee may also be eligible for 26 weeks of unpaid leave per year to care for a covered servicemember, including, in certain circumstances, veterans, with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember. A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities. To be eligible for FMLA leave, the employee must have worked 12 months or longer, performed at least 1,250 hours of service for the employer in the 12 months prior to the date of leave, and must work at a site within 75 miles of which the employer has 50 or more employees. If the employee's need for leave is foreseeable, the employee must provide his or her employer with 30 days notice before taking leave. When the need for leave is unforeseeable, the employee is required to provide notice as soon as practicable.

An individual who believes his or her FMLA rights have been violated is entitled to file a lawsuit. Remedies include lost compensation, liquidated damages, other out of pocket expenses, equitable relief, and attorneys' fees.

i. The Federal Employee Retirement Income Security Act of 1974 ("ERISA")

The Federal Employee Retirement Income Security Act of 1974 ("ERISA") regulates employee benefit plans maintained by employers engaged in commerce or in an industry or activity affecting commerce. ERISA contains specific requirements governing the creation, modification, maintenance and reporting of employer pension and retirement plans as well as other plans relating to employee health and welfare benefits. Welfare plans include, for example, plans providing medical, hospital, death or other insurance benefits, vacation and severance benefits. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, providing exemptions for religious institutions, and setting forth fiduciary obligations and, in most types of retirement plans, coverage, vesting and funding requirements. ERISA does not prescribe any particular level of severance, insurance, pension or welfare benefits, nor does it require that they be provided at all. This is a matter to be decided by the employer and, if the employer is unionized, to be bargained between the employer and the union. However, if benefits are offered, they must comply with regulations prohibiting discrimination and must be administered fairly under the terms of the benefit plan. ERISA generally preempts state laws governing employee plans and arrangements.

j. The Consolidated Omnibus Budget Reform Act ("COBRA")

The Consolidated Omnibus Budget Reform Act ("COBRA") requires employers with more than 20 employees who provide health and medical benefits to offer continuation of those benefits to former employees and their covered dependents (“qualified beneficiaries”) upon the occurrence of certain “qualifying events.” COBRA generally provides a maximum continuation period of 18 months. In certain circumstances where a qualified beneficiary is disabled at any time during the first 60 days of COBRA coverage, the period can be extended to 29 months. Also, if certain qualifying events occur during the original 18 months of COBRA coverage, qualified beneficiaries become entitled to receive 36 months of continuation coverage. Employers may require electing qualified beneficiaries to pay the entire premium for COBRA coverage plus a 2% administrative charge. COBRA contains very specific procedures for notifying qualified beneficiaries of their COBRA rights. COBRA applies whether employees leave voluntarily or involuntarily.

k. Health Insurance Portability and Accountability Act (“HIPAA”)

The Health Insurance Portability and Accountability Act (“HIPAA”) establishes limitations on the use of preexisting condition exclusions (so-called “portability” rules). HIPAA prevents group health plans or health insurance issuers from imposing a preexisting condition exclusion of more than 12 months (18 months for late enrollees) for coverage of any condition that was present during the six-month period ending on the

individual's enrollment date. In addition to various other provisions, HIPAA mandates that preexisting condition limitations generally may not be imposed upon newborns or adopted children under age 18, and may not apply to pregnancy. The preexisting condition exclusion period must be reduced by periods of “creditable coverage”, generally defined as periods of continuous coverage the individual has under other health plans. HIPAA also imposes various other requirements on employers and group health plan providers and insurers, such as nondiscrimination and disclosure requirements, special enrollment rights, and special notice obligations. The HIPAA privacy rules extend privacy protection to all types of “protected health information” held by “covered entities”. Covered entities include health plans, health care clearinghouses, and health care providers. The HIPAA security rules impose requirements with respect to safeguarding and protecting the confidentiality, integrity and availability of electronic protected health information.

l. The Occupational Safety and Health Act ("OSHA")

The Occupational Safety and Health Act ("OSHA") regulates work place safety for employers in businesses which affect commerce. Under OSHA, employers are required to furnish their employees with a place of employment free from recognized hazards that are causing, or are likely to cause, death or serious physical harm. Employers must also comply with occupational safety and health standards which are issued under the Act. "Right to know" regulations issued under OSHA require that employees in certain industries be warned about hazardous materials and chemicals to which they may be exposed. OSHA sets forth a detailed procedure for adopting safety and health standards and provides for inspection, investigation and enforcement. Citations issued for noncompliance can result in civil and criminal penalties, including fines and, for violations causing the death of an employee, imprisonment. States are allowed to develop and enforce their own plans setting and enforcing occupational safety and health standards. Some industries have specific statutes which regulate employee safety and health.

m. The Fair Credit Reporting Act (“FCRA”)

The Fair Credit Reporting Act (“FCRA”) prescribes the extent to, and manner in which, employers may use credit information in making employment decisions, including hiring and termination. The FRCA imposes strict guidelines requiring employers to use such credit reports only for a permissible purpose, after disclosure to employment applicants or employees of the intent to seek and use credit information, and after obtaining the written consent of the employee/applicant. The disclosure/consent may not be made a part of the employer’s application form. Additionally, employees/applicants must be

notified of any adverse decision based in whole or in part upon credit information. Additional requirements apply to investigative consumer reports.

n. The Uniformed Services Employment and Reemployment Rights Act ("USERRA")

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

o. Genetic Information Nondiscrimination Act ("GINA")

The Genetic Information Nondiscrimination Act ("GINA") prohibits an employer from discriminating against an individual in hiring, firing, compensation, terms, or privileges of employment on the basis of genetic information of the individual or family member of the individual. The law defines genetic information as (1) an individual's genetic tests; (2) an individual's family member's genetic tests; or (3) the manifestation of a disease or disorder in the individual's family member. Subject to a number of narrowly defined exceptions, GINA prohibits an employer from requesting, requiring, or purchasing genetic information of the individual or family member. An employer may engage in genetic monitoring of biological effects of toxic substances in the workplace but only in certain narrowly defined situations. Employees may sue in a court of competent jurisdiction for relief from violations of GINA and obtain back pay, front pay, compensatory and punitive damages and attorney's fees.

9. Other State Specific Considerations

a. South Carolina Human Affairs Law

The South Carolina Human Affairs Law prohibits discrimination on the basis of race, color, religion, sex, national origin, age, or disability. It is applied much like Title VII of the Civil Rights Act of 1964. Claims of discrimination under the Act must be filed with the South Carolina Human Affairs Commission (or the EEOC for "dual filing") within 180 days of the alleged discrimination. The statute mirrors many of the federal protections but is explicitly provided not to augment the federal protections.

b. Guns in the Workplace

South Carolina's Law Abiding Citizens Self-Defense Act of 1996 allows South Carolinians who qualify for a permit to carry concealed handguns under certain conditions. The Act also expressly upholds the right of employers to prohibit persons licensed under the Act from carrying concealed weapons on the employer's premises.

c. Drug Testing and Prevention in the Workplace

South Carolina law allows for the establishment of a drug prevention program in private sector workplaces, random drug testing, and confidentiality of test results and related information. The law contains provisions regarding evidentiary admissibility of such information and reduced premiums for workers' compensation insurance for employers who establish a conforming drug testing policy. The Drug-Free Workplace Act requires all employers who do substantial business with the State of South Carolina to implement a drug-free workplace environment.

d. Employment References

Employers who give written responses to written requests concerning an employee or former employee are immune from civil liability for disclosure of the following information to which the employee or former employee may have access:

i) Written employee evaluations;
ii) Official personnel notices that formally record the reasons for separation;
iii) Whether the employee was voluntarily or involuntarily released from service and the reason for the separation; and
iv) Information about job performance.

This immunity is waived if the employer knowingly or recklessly releases or discloses false information**.**

e. "Right to Work" Act

South Carolina is a "right-to-work" state that guarantees the right to work without regard to membership or nonmembership in a union. Statutory authority prohibits closed shop, union shop, and maintenance of membership contracts. South Carolina's Right to Work Law Enhancement provides that employers may post a notice entitled "Your Rights as a Worker in South Carolina" informing employees of state laws guaranteeing that a person's right to work must not be denied because of membership, or non-membership, in a labor union. This notice is not required but can be obtained at

http://www.llr.state.sc.us/AboutUs/MediaCenter/pidocs/WorkplacePosters/Right-to-Work%20Poster%20-%202012.pdf.

f. Payment of Wages

South Carolina law sets forth requirements for payment of wages, including initial written notice to employees, notices regarding deductions, and record keeping, and provides for penalties for non-compliance along with a right to treble damages and attorneys' fees for failure to pay wages due**.**

g. Payment of Commissions

Terminated salespersons due commissions can recover actual and punitive damages (not to exceed three times actual damages) with attorneys' fees for failure to pay**.**

h. New Hire Reporting Program

The Office of Child Support Enforcement of the Department of Social Services for the State of South Carolina, in compliance with State and Federal law, has developed the Employer New Hire Reporting Program. Through this program, employers must report all newly hired and rehired employees. This information will be used to ensure that noncustodial parents live up to their financial responsibilities to their children**.** This reporting is separate from, and in addition to, E-verify reporting and must be completed within 20 days of the hire date. Information and forms are available at http://www.scnewhire.com/.

i. Military Duty

South Carolina protects employees who are called to active duty and/or who serve in the South Carolina State Guard or South Carolina National Guard. Employers generally must provide reemployment for them when they return from duty.

j. Garnishment

Although the property of a debtor (against whom a judgment has been obtained) can often be attached and ordered by a judge to be applied to the satisfaction of the debt, South Carolina law provides generally that "the earnings of the debtor for his personal services cannot be so applied." The withholding of wages pursuant to garnishment proceedings in other states is also prohibited unless certain conditions are satisfied, and an employer should consult with counsel before complying with any garnishment order from another state.

An important exception is in the area of child support and alimony. An employer is required to withhold the wages of an employee who voluntarily requests and authorizes such action to meet child support and spousal maintenance obligations. After receiving notice from the Clerk of Court, an employer is also required to withhold support payments, pay them to the Clerk of Court, and inform the court if the employee changes jobs.

k. Retaliatory Discharge or Demotion on Account of Jury Service

It is unlawful to discharge or demote employees for complying with a valid subpoena or serving on a jury. Employees alleging such discrimination may file a civil action for damages.

l. Political Opinions

It is unlawful for an employer to discharge or intimidate an employee due to political opinions or the employee's exercise of constitutionally guaranteed political rights and privileges. An employer violating this law can be fined up to $1,000 or imprisoned for no more than two years, or both.

m. Use of Tobacco Products

An employee's use of tobacco products outside the workplace cannot be the basis of a personnel action regarding hiring, termination, demotion, or promotion. There is no stated procedure or remedy for addressing violations of this statute.

n. Sundays

There may be limitations on which commercial enterprises can be open before 1:30 p.m. on Sundays, and there are statutes that protect employees' rights to attend church or synagogue and also to not work on Sundays. Employees can recover treble damages costs and attorneys' fees for a violation of these rights. No lessor or franchisor can require a proprietor to be open on Sunday.

o. South Carolina Illegal Immigration and Reform Act

The South Carolina Illegal Immigration and Reform Act, as amended, requires all employers to verify the legal status of new employees and prohibits employment of any employee not legally in the U.S. and authorized to work. All South Carolina employers are required to enroll in the Department of Homeland Security's E-Verify program. Employers must verify the status of new employees through E-Verify within three business days of the hire date. Failure to enroll in and use E-Verify to verify employees'

status will result in the employer's probation or suspension/revocation of the employer's business licenses.

10. Employment Law Resources

a. Federal

i) Agencies

- US Dept. of Labor, http://www.dol.gov
- National Labor Relations Board (NLRB), http://www.nlrb.gov
- U.S. Equal Employment Opportunity Commission (EEOC), http://www.eeoc.gov
- Dept. of Justice Civil Rights Division, http://www.usdoj.gov/crt
- U.S. Citizenship and Immigration Services (USCIS), http://www.uscis.gov/portal/site/uscis

ii) Websites

- Code of Federal Regulations, http://www.gpo.gov/fdsys/browse/collection.Cfr.action?collectioncode+CFR
- United States Code, http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE
- Department of Labor Employment Law Guide, http://www.dol.gov/compliance/guide/
- Family and Medical Leave Act Compliance Guide, http://www.dol.gov/whd/regs/compliance/1421.htm

iii) Additional Materials

- HR Hero, http://www.hrhero.com
- Society for Human Resources Management, http://www.shrm.org/Pages/default.aspx
- Bureau of National Affairs (BNA) publications on employment
- Publications by the American Bar Association Section on Labor and Employment

b. State

i) Agencies

- South Carolina Department of Labor, Licensing and Regulation, http://www.llr.state.sc.us/
- South Carolina Human Affairs Commission, http://www.state.sc.us/schac/
- South Carolina Workers Compensation Commission, http://www.wcc.state.sc.us/

- South Carolina Department of Employment and Workforce, http://dew.sc.gov/

ii) Websites

- South Carolina Statutes, http://www.scstatehouse.gov/code/statmast.php
- South Carolina Code of Regulations, http://www.scstatehouse.gov/coderegs/statmast.php