



BUSINESS LAW NOTES

STATUTES OF LIMITATIONS - A TREACHEROUS MINEFIELD FOR THE BUSINESS OWNER

By M. Blen Gee, Jr.

As a business owner you may be aware that the basic North Carolina statute of limitations for a breach of contract claim is three years. You may also know that you normally have three years to bring a claim for damages arising from negligence. But, three years from when? Are there other time limitations that may apply? How long do you really have before you must file suit?

In most cases you will have a number of years to bring a lawsuit on a claim that your company may have. However, in a surprisingly large number of circumstances, you may find that an unusually short time limitation may leave you standing empty handed at the courthouse door. The only safe thing to do is to consult early on with your attorney to determine exactly how much time you have to bring suit.

Sometimes time limits are amazingly short. For example, if a potential defendant dies, you only have three months from the first publication of the creditor's notice to submit a claim to the deceased person's estate. The time period for challenging many government actions can be as short as thirty days. Claims for slander and libel have a one year statute of limitations. The normal time period for bringing a claim for injury arising from negligence is three years. However, if someone is killed as a result of negligence, the wrongful death claim must be brought within two years.

The complexity of statutes of limitations is compounded by a number of other factors. For example, the statute of limitation for many claims runs from the date of "discovery." However this is subject to a "discovered or should have discovered" rule. A court could easily find that you should have discovered your damages months or years before the situation actually came to your attention.

Many claims, such as malpractice and construction claims, are also subject to a statute of repose. This means that, even if you have not discovered the grounds for the claim, eventually the passage of time will eliminate your right to bring a suit for damages.

The statute of repose for negligent construction is six years. Calculation of the statute of repose can sometimes be complicated.

To complicate issues further, you may find that a claim brought in another state may have a totally different statute of limitations. Federal law may also affect a statute of limitations.

While some statutes of limitations are surprisingly short, in other situations you may have a surprisingly long time to file suit. Partial payment may extend the statute of limitations. Many contracts and promissory notes are executed with the word "Seal" by the signature lines. This may extend the contract statute of limitations to ten years. The statutes of limitations concerning minors and persons under legal disabilities (such as insanity) usually do not begin to run until the "disability" is removed.

The standard contract statute of limitations in North Carolina is three years; however sales of "goods" under the uniform commercial code have a four year statute of limitations. Business situations that give rise to a breach of contract claim with a three year statute of limitations will frequently also give rise to an unfair or deceptive practices claim which has a four year statute of limitations.

An arbitration clause or other provision in a contract may also affect the amount of time that you have to bring your claim.

If a statute of limitations on a claim is about to run, but you would prefer not to file suit while a settlement is negotiated, your attorney may

be able to negotiate a "tolling agreement" which extends the statute of limitations for an agreed-upon period.

These are only a few of the dozens of statutes of limitations and other time limitations that may affect your right to bring your claim. Each situation is different and the only way to be confident that valuable rights are not barred by a statute of limitations, a statute of repose or some other time limitation is to present the matter to competent legal counsel – the sooner, the better.

LEGAL ISSUES IN THE PROCESS OF HIRING EMPLOYEES (Part 2)

F. Stephen Glass

Avoid Negligent Hiring ...

Many states now recognize a duty on the part of an employer to safeguard its employees, patients and visitors on the workplace premises from injury by an employee whom the employer knew or should have known could harm others.

Employers in North Carolina have a duty to make inquiries concerning a prospective employee to ensure that the employer can provide a safe and suitable work place for other employees. Under this legal theory, an employer may become liable for injury to others if, before the employee is actually hired, the employer knew or in the exercise of reasonable care or inquiry, should have known of the employee's unfitness (e.g., violence, substance abuse, etc.).

An employer is obligated to make reasonable inquiries into a job applicant's background to determine the applicant's fitness for employment. Failure to act reasonably to evaluate negative or suspicious information on an application or discovered through an interview may give rise to a valid claim of negligent hiring against the employer if the employee subsequently harms another person.

Depending on the circumstances, courts generally hold that the affirmative duty to conduct a reasonable inquiry does not include the duty to conduct a criminal investigation of the applicant.

... and Negligent Retention of Employees.

An employer has a similar duty not to retain an employee who the employer knows or should know is potentially dangerous and might be liable if the employee harms others.

Negligent retention occurs when, during

the course of employment, the employer becomes aware or should become aware of problems with an employee that indicate the employee's unfitness, and the employer fails to investigate, reassign or discharge the employee. Specific subject areas that often lead to charges of negligent retention include sexual harassment and employee violence.

EMPLOYER'S RIGHT TO TERMINATE THE "AT-WILL" EMPLOYMENT RELATIONSHIP.

F. Stephen Glass

North Carolina is an "at-will" employment state, i.e., in the absence of a contract for a specific term, either the employee or the employer may terminate the employee's employment for any reason — except that the employer may not discharge an employee for a reason that violates public policy. For instance, an employee-at-will cannot be terminated for reasons that would violate anti-discrimination laws (age, sex, race, national origin, religion, disability). Nor may an employee-at-will be terminated in retaliation for the exercise of his or her rights, including that of filing of a workers' compensation claim.

In the case of *Johnson v. Mayo Yarns, Inc.*, the employee was fired for refusal to remove a Confederate flag from his workplace tool box, which the employer deemed a violation of its harassment policy. The employee sued, contending that his right to freedoms of speech and of expression had been violated, and that the exercise of those Constitutional rights constituted a public policy exception to the "at-will" doctrine. The N.C. Court of Appeals upheld the firing, stating that the employee's conduct during his private sector employment was not protected by the Constitution.

In light of *Johnson v. Mayo Yarns, Inc.*, North Carolina private employers may have greater latitude to establish and enforce rules for their workplace regarding speech and conduct without fear of law suits by employees in which "freedom of speech and expression" claims are raised by employees.

Employers would be prudent to spell out in a *well-drafted employee handbook* some of the reasons that justify **immediate discharge**. Some of these reasons might include:

Insubordination or refusal to comply with directives or instructions;

- Excessive unexcused tardiness or absences;
- Physical violence and disorderly conduct;
- Threatening or coercing other employees, patients or visitors;
- Theft, fraud, gambling, carrying a weapon or otherwise violating the law on the premises of the employer;
- Unauthorized use of the employers business material or equipment;
- Falsification of records, including the employment application;
- Incompetence or substandard performance of employment tasks;
- Failure to respond to training;
- Violations of certain employment policy prohibitions, such as sexual harassment, and discrimination;
- Willful or repeated violations of safety rules and precautions;
- Drunkenness or substance abuse during employment;
- Engaging in activities that constitute a conflict of interest with the employer.

More on Wages and Hours Law . . .

“COMP TIME” vs. OVERTIME

F. Stephen Glass

Compensatory Time or “comp time” usually means to the lay person that when an employee works some extra hours, the employee is given some time off rather than being paid for the overtime. In the business sector this is legal only if the comp time is taken during the same workweek as it is earned. *[Different rules apply in the public sector, where compensatory time may be accumulated and used in lieu of overtime pay.]* The effect of taking comp time in the same workweek is to keep the compensable hours below the overtime threshold that week.

For instance, if an employee works 4 hours extra on Wednesday and is told to come in 4 hours late on Thursday or Friday, the employee would not be entitled to overtime for the 4 hours extra that was worked on Wednesday, assuming the workweek is defined as Monday through Friday.

If, however, if the employee works 4 hours extra on Friday and the workweek ends on Saturday, the employee cannot be told to take 4 hours off on Monday, but must be paid for the 4 hours worked extra on Friday as overtime.

Exclusions from Compensable Hours.

In calculating whether an employee is entitled to overtime pay, hours taken for vacation, sick leave and holidays do not count as compensable hours of work. Thus, if an employee works 10 hours on Monday, takes 8 hours sick leave on Wednesday, and works 8 hours each of the other days of that work week, the employee would not be entitled to overtime pay that week. The employee would have worked only 34 hours that are compensable during that workweek.

NON-COMPETITION AGREEMENTS

F. Stephen Glass

Your company may lawfully restrict the ability of an employee or co-owner to compete against your business upon termination of employment if several rules are followed. North Carolina courts show a willingness to support the enforcement of covenants not to compete in light of the modernization of the state's economy and mobility of its work force.

A noncompete covenant is enforceable **only if** it is

1. in writing and signed by the employee;
2. a part of the employment agreement, or contract of employment;
3. based on valuable consideration between the parties;
4. reasonable as to duration, geographic limitations and scope of the business activities restricted;
5. designed to protect a legitimate business interest of the employer; and
6. not contrary to public policy.

New Employees. Since these covenants must be supported by consideration, those included in employment agreements for new employees are generally enforceable if specifically addressed in the agreement. When a new restrictive covenant is sought from current employees, special care must be taken to assure that the covenant not to compete is supported by

valid and sufficient consideration.

Current Employees. To require a current employee to enter into a noncompete agreement -- with nothing given the employee in return -- would result in an agreement not supported by new consideration and thus would not be enforceable. For current employees who are required to enter a noncompete agreement, consideration could be in the form of a bonus, a promotion or a raise, or time off with pay -- anything of value to the employee to which he or she would not otherwise be entitled. Merely permitting the employee to remain employed with the company is *not sufficient consideration to make the non-compete covenant enforceable.*

Non-competition covenants must be reasonable as to scope, time and territory. The restrictions must be no greater than necessary to protect the legitimate business interests of the current employer. For example, if the covenant is based on the employee's access to confidential information, but that information loses its value after a year, then a greater time restriction would not be enforceable. Likewise, when an employee has been practicing or working only within one county, a court would not likely enforce a covenant restricting employment throughout the state.

About the authors:

M. Blen Gee, Jr., is an honors graduate of the University of North Carolina School of Law. His areas of concentration include business and corporate law, including sales of businesses; business litigation, including arbitration and mediation; franchise law; automobile dealer law; and insurance company insolvency.

F. Stephen Glass is the author of *The Legal Handbook for North Carolina Businesses, 2002*, and *Your Estate Planning Handbook, 2002*. His practice is concentrated in the areas of business, employment and corporate law, business litigation, business succession planning and estate planning. He serves on the Cary board of Capital Bank.

BUSINESS LAW NOTES

P.O. Box 1776
Raleigh, North Carolina 27602-1776



Shawn D. Mercer represents a variety of businesses with an emphasis on general automobile dealership law, litigation and manufacturer/dealer disputes. He regularly practices in state and federal courts, in arbitration and mediation proceedings, and before administrative bodies, including the Commissioner of Motor Vehicles.

JOHNSON, HEARN, VINEGAR & GEE, PLLC

Our law firm has provided exceptional legal services to clients throughout the state and the U.S. for more than 45 years. A full-service firm founded in 1955, we have built a reputation for helping clients solve difficult problems with sound counsel, sophisticated analysis and superior performance.

A hallmark of our firm is personalized client service. Recognizing that each of our clients has a unique set of issues, objectives and needs, our firm is committed to individualized attention and works as an integrated team to respond to our clients' needs. We serve diverse clients, including Fortune 500 companies, government agencies, professional associations, closely held corporations, limited liability companies, partnerships and individuals.

DISCLAIMER:

Johnson, Hearn, Vinegar & Gee, PLLC, provides this newsletter for general information only. The materials contained herein may not reflect the most current legal developments. Such material does not constitute legal advice, and no person should act or refrain from acting on the basis of any information contained in this newsletter without seeking appropriate legal or other professional advice on their particular circumstances. Johnson, Hearn, Vinegar & Gee, PLLC and all contributing authors expressly disclaim all liability to any person with respect to the contents of this newsletter, and with respect to any act or failure to act made in reliance on any material contained herein. Distribution of this newsletter does not create or constitute an attorney-client relationship between the firm and any reader or user of such information.