



# **SOUTH DAKOTA QUICK AND EASY GUIDE TO LABOR & EMPLOYMENT LAW**

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## **At-Will Employment**

South Dakota is an at-will employment state, which means that without a written employee contract or a specified term of employment, employees can be terminated for any reason and at any time, provided that the reason is not discriminatory and that the employer is not retaliating against the employee for the exercise of a protected right. S.D. Codified Laws § 60-4-4; *Reynolds v. Ethicon Endo-Surgery, Inc.*, 454 F.3d 868, 874 (8th Cir. 2006).

## **Discrimination Against Employees for Off-Duty Use of Tobacco**

Employers in South Dakota may not fire an employee for the use of tobacco products off the worksite during nonworking hours. Exceptions may be made only if a non-smoking requirement is important to an individual employee or group of employees' job activities rather than to all employees of the employer, or if a smoking prohibition is necessary to avoid a conflict of interest with any responsibilities to the employer. S.D. Codified Laws § 60-4-11; *Wood v. S. Dakota Cement Plant*, 1999 S.D. 8, ¶ 16, 588 N.W.2d 227, 230.

## **Immigration Verification**

The State of South Dakota places no additional employment verification procedures on employers beyond Federal I-9 compliance. There is no requirement to use E-Verify under South Dakota state laws.

## **Drug Testing**

South Dakota has no general drug-testing law for private employers.

However, any non-profit facility that is certified by the South Dakota Department of Human Services to provide pre-vocational or vocational training, residential training, and other supports and services to people with developmental disabilities must have a drug-screening policy in place for all applicants and employees. S.D. Codified Laws § 27B-1-19.

Information about drug testing as it relates to medical and recreational marijuana is below.

## **Jury Duty Leave**

It is unlawful for an employer in the State of South Dakota to discharge or suspend an employee as a result of jury service if the employee provides reasonable notice of their absence. Any employee serving on a jury is entitled to the same job status, pay, and seniority upon their return to work as they had prior to performing jury duty. S.D. Codified Laws § 16-13-41.1-2.

It is also unlawful for an employer to require or request an employee to use annual, vacation, or sick leave for time spent responding to a summons for jury duty. Leave for jury duty may be with or without pay at the discretion of the employer.

## **Voting Leave**

South Dakota law requires an employer to provide an employee with two consecutive hours of leave to vote if the employee does not have two consecutive hours of off-duty time before their shift begins or after their shift ends in which to vote while polls are open. Employers must not subject the employee to any penalty or deduct any wages for an absence related to voting but may specify the hours during which the employee may be absent to vote. S.D. Codified Laws § 12-3-5.

## **Other Leave**

The State of South Dakota does not require private employers to offer its employees either paid or unpaid vacation, bereavement, holiday, or sick leave. However, employers are subject to the federal Family and Medical Leave Act and its requirements.

The Family and Medical Leave Act requires covered employers that employ 50 or more employees to grant qualifying employees up to 12 weeks of unpaid leave in a 12-month period for:

- Birth and care of the employee's child, or placement for adoption or foster care of a child with the employee;
- Care of an immediate family member (spouse, child, parent) who has a serious health condition;
- Care of the employee's own serious health condition; and
- Any qualifying exigency from the fact that the employee's immediate family member is a covered military member on "covered active duty."

### **Meal Breaks**

The State of South Dakota has no law regulating meal breaks or rest periods, and federal law does not require employers to provide meal or rest breaks. <https://www.dol.gov/general/topic/workhours/breaks>.

### **Minimum Wage, Overtime, and Wage Record Keeping**

Effective January 1, 2024, the minimum wage in South Dakota is \$11.20 per hour. Employers must still comply with federal wage laws and regulations. S.D. Codified Laws §§ 60-11-3 and 60-11-3.2.

Employers must pay tipped employees a cash wage of no less than \$5.60 per hour, which is no less than 50 percent of the state minimum wage. If an employee's tips combined with the cash wage do not equal the minimum wage, the employer shall make up the difference as additional wages for each regular pay period of the employer. S.D. Codified Laws § 60-11-3.1.

There are no state laws governing the payment of overtime, so federal law applies. Generally, if an employee works more than 40 hours, they must be compensated at a rate of one and one-half times the regular rate of pay at which they are employed. This does not apply to agricultural employees. Fair Labor Standards Act § 207 (a)(1).

Employers must pay employees at least once a month or on regular agreed-upon paydays that the employer specifies in advance. Employers may pay wages by check, cash, or direct deposit to the employee's bank account unless an employer and employee agree to another form of payment. SD Codified Laws § 60-11-9. South Dakota does not require wage statements.

In addition, the State of South Dakota requires every employer with more than 25 employees to make, keep, and maintain the records of the wage and wage rates, job classifications, and other terms and conditions of employment of the persons employed by them, and to preserve the records for a reasonable period of time. S.D. Codified Laws § 60-12-17.

### **Final Payments**

In the State of South Dakota, whenever an employer separates an employee from the payroll, or an employee not having a written contract for a definite period quits or resigns that employment, the unpaid wages or compensation of such an employee are due and payable not later than the next regular stated payday for which those hours would have normally been paid, or as soon thereafter as the employee returns to the employer all property of the employer in the employee's possession. S.D. Codified Laws § 60-11-10.

### **Reemployment Assistance (formerly Unemployment Insurance)**

Reemployment Assistance (RA) provides temporary financial assistance to individuals who have lost work through no fault of their own. RA is intended to partially offset the loss of wages while an unemployed worker searches for suitable work or until an employer can recall the employee to work. South Dakota's RA program is financed by employers through payroll taxes; workers do not contribute to this plan. Additional information regarding South Dakota's reemployment assistance program may be found under South Dakota Codified Law Title 61 (subsections 1-7).

## **Workers' Compensation**

There is no law in South Dakota requiring any employer to carry workers' compensation insurance. An uninsured employer may be sued in civil court by an injured worker. Additional information regarding the scope of workers' compensation in South Dakota may be found under South Dakota Codified Law Title 62.

The South Dakota Workers' Compensation program for those employers who choose to have coverage is an insurance program that pays medical and disability benefits for work-related injuries and diseases.

If an employer denies coverage of a claim for any reason under this Title, such injury is presumed to be nonwork-related for other insurance purposes. If coverage is denied by insurer, the insurer must provide a full explanation on the inapplicable basis under the insurance policy. Without a full explanation, the Division of Insurance director may determine such denial to be an unfair practice. S.D. Codified Laws § 62-1-1.3.

## **Child Labor**

In South Dakota, no unemancipated child under 16 years of age may be employed:

- In any occupation dangerous to life, health, or morals;
- For more than four hours per school day or 20 hours per school week;
- For more than eight hours per non-school day or 40 hours per non-school week; or
- Later than 10:00 p.m. on a school night. S.D. Codified Laws §§ 60-12-1.

Exceptions apply for children employed as actors or performers in motion pictures, theatrical, radio, or television productions. Further exceptions apply to roguing or detasselling of hybrid seed corn during any non-school day or non-school week.

Furthermore, children younger than 14 years of age may not be employed:

- In any factory, workshop, or mine;
- In any mercantile establishment, except when the child's own school or other educational program is not in session;
- During school hours; or
- Later than 7:00 p.m. S.D. Codified Laws § 60-12-2.

If a child under 16 years of age is employed pursuant to a permit issued by the SD Department of Labor and Regulation that is granted because employment is necessary to support the child or their family, the employer must keep the required permit on file and available for inspection by any interested person or public official. SD Codified Laws § 60-12-6.

## **Gun Laws**

The State of South Dakota generally recognizes the right to bear arms in accordance with state and federal laws and afforded by the Second Amendment of the United States Constitution and Article VI, Section 24 of the South Dakota Constitution.

## **Additional Laws and Regulations**

### **Equal pay**

No employer in the state of South Dakota may discriminate between employees on the basis of sex by paying wages to any employee in any occupation in the state at a rate less than the rate at which the employer pays any employee of the opposite sex for comparable work on jobs that have comparable requirements relating to skill, effort, and responsibility, but not to physical strength. S.D. Codified Laws § 60-12-15.

Employers who violate this provision will be liable to the employee affected in the amount of the employee's unpaid wages. A court may, in its discretion, allow reasonable attorney's fees and costs to be paid by the defendant.



## Human Rights

It is an unfair or discriminatory practice for any person, because of race, color, creed, religion, sex, ancestry, disability, or national origin, to fail or refuse to hire, discharge an employee, or accord adverse or unequal treatment to any person, employee, or intern with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or any term or condition of employment. S.D. Codified Laws § 20-13-10.

Furthermore, an employer may not refuse to hire a person, discharge an employee, or treat unfairly any person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or any term or condition of employment because of their blindness or partial blindness, **unless** specific vision requirements constitute demonstrated a bona fide occupational qualification necessary for effective work performance. Nothing requires an employer to provide any more than a reasonable accommodation for a person's blindness or partial blindness. S.D. Codified Laws § 20-13-10.1.

## Disability and Reasonable Accommodation

Employers must not fail or refuse to hire, discharge, or accord adverse or unequal treatment to individuals on the basis of their having a physical or mental impairment, a record of having such impairment, or being regarded as having such an impairment. S.D. Codified Laws § 20-13-10. Employers must make good faith efforts to reasonably accommodate disabled individuals unless the accommodation would impose an undue hardship. S.D. Codified Laws § 20-13-23.7.

## Genetic Information

It is an unlawful employment practice in South Dakota for an employer to seek to obtain, obtain, or use genetic information of an employee or a prospective employee to distinguish between or discriminate against employees or prospective employees or restrict any right or benefit otherwise due or available to an employee or a prospective employee. S.D. Codified Laws § 60-2-20. Genetic information is information about genes, gene products, and inherited characteristics that may derive from the individual or family member. This includes information regarding carrier status and information derived from laboratory tests that identify mutations in specific genes or chromosomes, physical medical examinations, family histories, and direct analysis of genes or chromosomes.

However, it is not an unlawful employment practice for an employer to seek to obtain, to obtain, or to use genetic information if:

- The employer is a law enforcement agency conducting a criminal investigation; or
- The employer relies on the test results from genetic information obtained by law enforcement through a criminal investigation, legally acquires the test results, keeps the test results confidential except as otherwise required by law, and uses the test results for the limited purpose of taking disciplinary action against the employee based only on the alleged misconduct.

## Background Checks

South Dakota does not restrict employers from conducting background checks with respect to applicants or employees or from using those background checks in hiring decisions.

South Dakota requires mandatory criminal background checks in certain professions and industries, including:

- Principal officers, board members, agents, volunteers, and employees of a medical cannabis establishment (S.D. Codified Laws § 34-20G-61);
- Board members, officers, and key employees of trust companies (S.D. Codified Laws § 51A-6A-17);
- School personnel (S.D. Codified Laws §§ 13-10-12 and 13-49-14.13);
- Children's homes and welfare agencies (S.D. Codified Laws § 26-6-23.2);
- Unregistered family daycare centers (S.D. Codified Laws § 26-6-14.9); and
- Certain employees of the Sisseton-Wahpeton Sioux Tribe (S.D. Codified Laws § 23-3-15.2).

## **Medical and Recreational Marijuana**

South Dakota authorizes the use of medical marijuana by qualifying patients with specified debilitating medical conditions. S.D. Codified Laws §§ 34-20G-1 to 34-20G-95. The law, however, does not require employers to:

- Allow employees to ingest, possess, transfer, display, or transport cannabis in the workplace;
- Allow employees to work under the influence of cannabis;
- Prohibit employers from establishing and enforcing a drug-free workplace policy, including a drug testing program that complies with state and federal law; or
- Impact an employer's ability to restrict marijuana use by employees or discipline them for the same.

Any registered, qualifying patient who uses marijuana as prescribed is entitled to the same rights under state law as a person prescribed any other pharmaceutical medication as it pertains to:

- Interaction with a person's employer;
- Drug testing by a person's employer; and
- Drug testing required by any state or local law, agency, or government official.

With regard to safety-sensitive jobs, an employer is permitted to refuse to hire a person or take adverse employment action against an employee based solely on a positive test for cannabis metabolites.

## **Holiday Benefit Eligibility for State Employees**

Holidays, other than Sundays, are a benefit for permanent state employees including those who are not scheduled to work the day on which a holiday falls. A state employee shall receive holiday pay if the employee works at least one shift or is on approved paid leave during the calendar week in which the holiday falls.

Part-time state employees shall receive prorated holiday pay. For payroll and leave purposes, a holiday on which an employee does not work is no more than eight hours long. When an hourly employee must work on the date a holiday is observed, the holiday pay is the greater of either eight hours or the total hours worked. Holiday pay for an hourly, permanent, part-time employee who must work on the date a holiday is observed, is the greater of either the prorated amount or total hours worked. S.D. Codified Laws § 3-6C-20.