DISCOVER (OR RE-DISCOVER) U.S. EMPLOYMENT LAW

YOUR QUESTIONS, OUR ANSWERS

Dechert LLP

Introduction

Companies doing business in the U.S. invariably encounter a legal system and employee relations laws that differ in many significant respects from those in other countries. The sources of U.S. law come from the U.S. federal government as well as the laws of each of the 50 states. They are sometimes overlapping, sometimes conflicting and often complicated. U.S. law generally grants employers greater freedom to deal with employees than the laws of many other countries (particularly Europe), and the benefit laws are significantly less generous to employees as well. These laws are constantly changing, however, and there is pressure in the U.S., often at the state and local level, to afford employees greater rights and benefits.

It is important for any company beginning operations in the United States to become familiar with the many laws that impact the employment relationship. This guide, put together by a dedicated team of Labor and Employment lawyers in the United States, is designed to do just that – help you become familiar with the many laws that govern the workplace in a simple, easy to understand framework.

We hope you find it informative and interesting.

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1. Introduction to the employment laws of the United States

1.1 What are the main sources of employment law?

To understand the sources of law in the United States, it is important to understand that the United States uses a federal system of government. This means that not only are there federal legislatures, courts and administrative agencies, but there are also state and local legislatures, courts and administrative agencies within each of the 50 U.S. states. The laws that govern the employment relationship therefore come from: a) statutes, at both the federal and state level; b) constitutions at the federal and state level; and c) the common law at the federal and state level. Finally, many terms, conditions and privileges of employment are matters of contract between an employer and employee. As a consequence, employers must be mindful of their legal obligations under overlapping federal, state and local laws when making any employment-related decisions.

1.2 What is the nature of the employment relationship?

In the U.S., a large number of employees are considered to be "at-will." Under this doctrine, both employees and employers may terminate the employment relationship at any time and for any reason, with or without cause or notice. The only restrictions on this principle are those imposed by federal, state and local statutes (like the non-discrimination statutes discussed below), various common-law legal theories such as wrongful discharge, an individually negotiated employment contract with termination provisions, or a collective bargaining agreement in the union setting. The at-will nature of most employment is a bedrock principle of U.S. employment law. It exists in virtually every state, and it affords employers significant freedom in setting or changing terms and conditions of employment or ending the employment relationship.

2. Hiring the workforce

2.1 Are there any restrictions on advertising or recruiting for open positions?

Generally, no standard procedure applies to advertising for open positions. However, employers must comply with any applicable affirmative action plans, collective bargaining agreements, and/or recruiting policies. Of course, the non-discrimination obligations apply to recruiting, and advertisements cannot express a bias against or a preference for a protected characteristic (unless it is based on good-faith occupational qualifications). A statement that the company is an "Equal Opportunity Employer" should be contained within any advertisement.

2.2 Are there restrictions on the types of questions employers can ask in written applications or during job interviews?

Yes, U.S. employers are restricted by federal and state laws governing permissible and impermissible pre-employment inquiries. These limitations are intended to prevent illegal discrimination and ensure that employment decisions are based on neutral, job related criteria. Employers may not request information regarding sex, age, race, national origin, religion, disability, pregnancy, genetic information, or any other protected characteristic. Nor may an employer ask for information correlated with (or likely to elicit information regarding) one of these protected characteristics. There are also legal restrictions regarding criminal history and credit history information which are discussed below. The rules governing pre-employment inquiries are constantly evolving, and employers should ensure that application forms are current and interviewers are trained to avoid unlawful questions.

2.3 Can employers conduct background checks on prospective employees?

U.S. law generally permits background checks. However, employers who use third-party vendors to conduct background checks must comply with the strict procedural requirements of the federal Fair Credit Reporting Act ("FCRA") and similar state laws. These laws require employers to provide notice and obtain consent before procuring a background check report. Additional notices are required when an employer makes adverse employment decisions based on information revealed in a background check report.

2.4 Are there any restrictions on seeking criminal history or credit history information during the hiring process?

Recent years have seen a proliferation of state and local laws restricting employers' use of criminal history information. While some laws merely regulate the timing of criminal history inquiries (known as "ban-the-box" laws), others prohibit employers from seeking information regarding arrests or specific types of convictions or otherwise preclude employers from considering criminal history information unless there is a nexus between the crime and the position sought. Credit checks have likewise been the subject of recent legislation with at least eleven states currently regulating their use in the hiring process.

Although there is no federal law expressly precluding the use of criminal history or credit information in the hiring process, the Equal Employment Opportunity Commission ("EEOC") (the federal administrative agency charged with enforcing the non-discrimination laws) has emphasized not only that the use of such information may be discriminatory on the basis of race, but also that a blanket policy excluding applicants with a criminal record is inherently discriminatory.

2.5 May employers require drug or other medical tests for applicants?

Medical exams for employment purposes are governed by the federal Americans with Disabilities Act (“ADA”) and similar state laws. Under the law, an employer may not ask disability-related questions or conduct medical examinations until after it makes a conditional job offer. At that time, the employer may make disability-related inquiries and require medical examinations provided that it does so for all entering employees in the same job category. Once the applicant is employed, however, disability-related inquiries and medical examinations must be “job-related and consistent with business necessity.” This means that the employer must have a reasonable belief that the employee is unable to perform the essential functions of the job or poses a direct threat due to a medical condition.

In the private sector, U.S. employers are generally permitted to require applicants to submit to drug tests. Blood and urine tests to determine the current use of illegal drugs are not considered medical examinations subject to the ADA. Nevertheless, employers should not conduct drug tests prior to making a conditional offer of employment due to the possibility that the applicant may test positive for lawful, prescription medication. Unlike tests for illegal drugs, tests for prescription medications and alcohol are medical examinations subject to ADA requirements. Post-offer pre-employment medical exams do not have to be job related. But, if an individual is screened out because of a disability, the employer must be able to show that the exclusionary criteria is job-related and consistent with business necessity. Some state laws are more restrictive than the federal law regarding drug testing, and therefore, state law must always be considered before pre-employment testing is conducted.

3. Terms and conditions of employment

3.1 Must an employer provide a written employment contract?

No, employers are not required to provide written employment contracts, and these are unusual for any but executives and higher level managerial employees. Lower-level employees customarily receive only a written offer of employment, called an "offer letter." The offer letter typically sets forth basic terms and conditions of the proposed employment relationship while including language affirming the at-will nature of the relationship. Some states require that new hires receive written notification of wage information, so employers must ensure that their offer letters comport with these and any other state/local notification laws. Typically, offer letters also detail any required pre-employment conditions, such as providing proof of authorization to work in the U.S. (federal I-9 form), passing a background check for criminal and/or credit history, and signing confidentiality and restrictive covenant agreements.

3.2 Are any minimum terms and conditions of employment imposed by law?

Yes, there are wage and hour laws on the federal and state levels, which require the payment of a minimum wage and overtime pay. There are also laws regarding benefits and a growing number of state and local paid sick time laws. As explained more fully below, there are no laws which require an employer to provide vacation or holiday pay in the private sector.

Minimum wage

The federal Fair Labor Standards Act ("FLSA") is the primary wage and hour law in the country. The statute applies to virtually all employers and sets a minimum hourly wage rate (currently $7.25 per hour, although various states have higher minimum wage requirements) and requires covered employers to pay overtime pay at the rate of time and a half for all hours worked over 40 in a work week.

There are several limited exemptions to the FLSA's minimum wage and overtime obligations. The most common exemptions apply to so-called "white collar" employees. These include employees defined as Executive, Administrative, Professional, Computer Professionals and Outside Sales. Each term is statutorily defined, but generally, these exempt employees must: (a) be paid on a salary basis; and (b) primarily perform the duties specifically enumerated in the statute and applicable regulations.

Various states have more stringent requirements than set forth under the FLSA, and compliance with the laws of the state(s) where a company's workforce is located is not always an easy exercise. For example, effective in 2019, the minimum wage is $11.10 in New York State and $12 in California (for employers with 26 or more employees) – with both scheduled to increase to $15 over the next five or so years. As is obvious from even this limited discussion, wage and hour law is one of the most complicated areas in U.S. employment law and compliance is crucial.

Maximum hours, overtime, meal and rest breaks

The federal FLSA does not set a maximum number of hours that an employee may work either per day or per week. Instead, the statute requires only that employees receive overtime pay for hours worked in excess of 40 per workweek. The federal law likewise does not require employers to provide meal or rest breaks. The only restrictions on working hours at the federal level are those governing child labor; that is, individuals under age 18. The Act limits the number of hours and the types of occupations/industries in which a child may work depending on that child's age.

State law differs from the federal law in many significant respects. Some states limit the number of days or hours worked in a week and some states, most notably California, require overtime pay for any hours worked over 8 in a workday, in addition to weekly overtime. Many states, again including California, have also enacted legislation requiring mandatory meal and rest periods. Whether employees must be paid during these breaks depends on a variety of factors, including the applicable state law, the length of the break, and whether the employee is required to perform work or remain on call during the break.

Health and welfare benefits

Employers are required to fund certain benefits for their employees. At the federal level, these include Medicare (health benefits for retired or active workers who are disabled or 65 years of age or older), Social Security (benefits for retired workers), and unemployment compensation benefits. State benefit requirements vary and may provide greater coverage. In addition to requiring unemployment and workers' compensation insurance, some states require employers to provide disability insurance to employees to protect them against off-the-job injuries or illnesses.

The issue of employer-sponsored group health insurance has received significant attention in recent years following the passage of the controversial Affordable Care Act (a/k/a Obamacare) in 2010. Under the Affordable Care Act's so-called "employer mandate," employers with 50 or more full time equivalent employees are now obliged to offer health insurance that is "affordable" and provides "minimum value" to their full-time employees and dependents up to age 26. Although providing the group coverage is not technically legally mandated, employers who fail to provide coverage that meets the Act's requirements may be required to make "shared responsibility" payments to the Internal Revenue Service, the federal tax authority. Following the 2016 U.S. election and change in administration, repeated efforts have been made to repeal Obamacare, significantly narrow its scope or have it declared unconstitutional. In fact, in December 2018, a federal district court in Texas ruled that the law was unconstitutional. As of now, however, the law remains in effect, pending an appeal of the ruling.

Private employers generally are not required to provide additional benefits, such as life insurance, dental or vision coverage, or pension and other retirement benefits. However, most do as a means to attract talented employees. The costs of funding these plans are often shared by the employer and the employee. All voluntary health and welfare benefits are governed by the federal Employee Retirement Income Security Act ("ERISA"), a complex statute which sets minimum standards for private health and welfare plans to protect plan participants.

Paid sick leave

At present, no federal law requires an employer to provide paid sick leave. The federal Family and Medical Leave Act, which provides for unpaid leave, is discussed below. Despite the absence of federal legislation, most employers offer a certain amount of paid sick time as well as private insurance to cover short term and long term disabilities. In recent years, there has been a growing push at the state and local level to require employers to provide paid sick time to employees to cover absences attributable to their own or their family members' injuries or illnesses. At least ten states and a growing number of cities throughout the country now require employers to provide this benefit to eligible employees. The details of the laws vary considerably from one jurisdiction to the next in areas such as: the number of hours that must be provided; the allowable reasons for leave; the accrual rates; the ability to request supporting documentation; and more. This patchwork of overlapping laws is proving particularly challenging for multi-state or multi-city employers.

Additionally, a handful of states have created special disability and family leave funds to which employees can apply for partial compensation if they miss work due to their own or a family member's illness or injury. Absences attributable to work-related injuries or illnesses are covered by state workers' compensation programs.

3.3 What are the collective bargaining rights of employees?

Collecting bargaining is not as widespread in the United States as in Europe and other areas of the world. In 2017, less than 7% of the private sector workforce was unionized. Section 7 of the National Labor Relations Act (“NLRA”) guarantees most private employees the right to form, join or assist labor unions, bargain collectively with employers through representatives of their own choosing, and engage in other concerted activities to address or improve wages or other working conditions. Under Section 8 of the Act, it is an “unfair labor practice” for an employer to interfere with, restrain, or coerce employees in the exercise of these guaranteed rights. Thus, any restriction on an employee’s right to organize and discuss working conditions is unlawful. This prohibition applies with equal force to employers with or without unionized workforces.

In recent years, the National Labor Relations Board (“NLRB”), the federal agency charged with enforcing the NLRA, has aggressively targeted employee handbooks and other policies that have a purported chilling effect on employees’ rights to organize and discuss working conditions. Rules governing such topics as confidentiality, social media, employee misconduct, and conflicts of interest are now subject to heightened scrutiny. Employers must, therefore, carefully consider their policy language to avoid running afoul of the NLRA.

3.4 What are the rules regarding employment of foreign nationals?

The federal Immigration Reform and Control Act of 1986 (“IRCA”) makes it unlawful for an employer to hire any person who is not legally authorized to work in the United States. Authorized individuals include U.S. citizens, noncitizen nationals of the U.S., lawful permanent residents, and aliens who have received visas authorizing them to work. Employers are required to verify the identity and employment eligibility of all new employees by completing an Employment Eligibility Verification Form (federal I-9 Form). Employers cannot hire applicants who fail to provide proper documentation.

Foreign nationals who want to work in the U.S. must obtain visas. There are several categories of available visas depending on the anticipated length of employment, the duties to be performed, and the individual’s qualifications. Employers who wish to assist foreign nationals in applying for visas should consult with a qualified immigration attorney.

4. Leaves of absences and time off – vacations, holidays, parental leave, military leave and other

4.1. Do employees have the right to vacation or holiday pay?

Unlike in many other countries, U.S. federal law does not require employers to pay employees for time not worked, whether it be for vacations or holidays. In practice, however, employers typically offer such paid time off in accordance with industry standards and an employee's length of service. Again, state law is somewhat different. A number of states regulate vacation pay voluntarily offered by employers. In other words, the states will not require employers to offer paid vacation, but if they do, vacation time will be considered compensation that is earned when accrued. Policies requiring employees to "use it or lose it" may be unlawful and employers may be required to pay accrued vacation upon termination of employment.

4.2 What rights do employees otherwise have if they need to miss work for family or medical reasons?

The Family and Medical Leave Act ("FMLA") requires employers with 50 or more employees to provide eligible employees with unpaid, job protected leave for certain qualifying reasons. Twelve weeks of leave are available during a 12-month period due to:

- the birth of a newborn child or the placement with the employee of a child for adoption or foster care;
- the employee's need to care for a spouse, son, daughter, or parent who has a serious health condition;
- a serious health condition that makes the employee unable to perform the functions of his or her job; and
- any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty.

Eligible employees are also entitled to take up to 26 workweeks of FMLA leave in a single 12-month period to care for a covered service member with a serious injury or illness. Notably, leave under the FMLA need not always be taken in a single block of time, but may be taken intermittently or on a reduced schedule basis in some circumstances.

To be eligible for FMLA leave, an employee must: (a) have been employed for at least twelve months; (b) have at least 1,250 hours of service for the employer in the prior 12 months, and (c) work at a location where at least 50 employees are employed by the employer within 75 miles. While FMLA leave is unpaid (unless the employee elects or is required to use accrued paid time off), employers are required to maintain an employee's group health insurance coverage during the leave under the same terms and conditions as active employees. Upon return from leave, the employee must be restored to his or her original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment. The FMLA prohibits employers from retaliating against employees who invoke their FMLA rights or from otherwise interfering with the exercise of such rights.

The United States Department of Labor has promulgated detailed and complex regulations that elaborate on employers' and employees' obligations under the FMLA. Employers must consult those regulations and be mindful of state family and medical leave statutes, which may offer greater benefits and protection than the federal statute. Employers should also note that unpaid leave may be required by the Americans with Disabilities Act and similar state statutes as a reasonable accommodation for an employee's own disability.

4.3 Is there a separate maternity or paternity leave statute?

No, unlike the law in many developed nations, there is no federal law, separate from the FMLA, which requires an employer to provide a maternity leave to a new mother. An eligible employee who is pregnant is entitled to a total of 12 workweeks of FMLA leave which will cover any needed time off before delivery as well as the time post-delivery. This time is unpaid, although the new mom can seek monies under disability insurance plans or state disability funds to cover some of the lost income for the recovery time after birth. The FMLA affords leave rights to both parents and to those who adopt or provide foster care. Several states have passed supplementary family leave laws to afford new parents additional time off for the arrival of a new baby and/or income replacement for parental leave. Moreover, an increasing number of employers are offering paid maternity and paternity leave beyond that required by law.

4.4 Do employees have the right to take leave to perform military duties?

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") affords employees who take leave to perform military service up to five-years of job protection. Generally, the law entitles an employee to reemployment after an absence due to military service, provided the employee gave the employer advance notice of the service and returns to work or applies for reemployment in a timely fashion. Reemployment must be to the job that the employee would have attained had he or she not been absent for military service with the same seniority, status and pay. If the employee is not qualified to hold this position, the employer is required to make "reasonable efforts" to qualify the employee. USERRA also regulates employee benefits, including health and pension plan coverage, during periods of military leave and return therefrom.

4.5 Do employees have any other legal rights to take time off from work?

In addition to those identified above, there are myriad state and local laws that require employers to provide leave for prescribed reasons, such as voting, jury duty, attendance at school functions, and domestic violence. Time off may also be required for religious observances under Title VII of the Civil Rights Act or any similar state statute.

5. Discrimination and harassment

5.1 Are employees protected from discrimination and harassment?

Yes, and there are anti-discrimination statutes at the federal, state and local levels. These statutes act as a limitation on the employment "at-will" principle discussed above and they protect both applicants and employees. On the federal level, anti-discrimination law is comprised of several different statutes, the most common being:

(a) Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits employment discrimination on the basis of race, color, religion, sex, national origin, and pregnancy (including childbirth and related medical conditions);

(b) Age Discrimination in Employment Act of 1967 ("ADEA"), which prohibits employment discrimination based on age (40 and over);

(c) Americans with Disabilities Act ("ADA"), which prohibits discrimination against an applicant or employee because that individual is actually, perceived to be or has a record of a disability. The ADA also requires an employer to provide reasonable accommodation to an otherwise qualified disabled individual to enable that individual to satisfy the job's essential functions and to enjoy the terms, conditions and privileges of employment;

(d) Genetic Non-Discrimination Act of 2008 ("GINA"), which prohibits genetic information discrimination;

(e) Equal Pay Act ("EPA"), which requires employers to provide men and women in the same workplace equal pay for equal work. Equal work means that the jobs require substantially equal skill, effort and responsibility and are performed under similar working conditions.

Generally speaking, these laws prohibit employers from taking an individual's membership in a protected category into consideration in almost every employment-related situation. Harassment based on any of the protected classes noted above is considered a form of discrimination and is also prohibited. In order to be unlawful, harassing conduct must be sufficiently severe or pervasive so as to affect the terms and conditions of employment.

5.2 Who is covered by the discrimination laws and what is protected?

Federal employment discrimination laws protect all types of employees – those who have individual employment contracts, those who are employed "at-will," and even those covered by collective bargaining agreements. Title VII, the ADEA, the ADA, and GINA prohibit discrimination in regard to all terms and conditions of employment – from the time of hire to the time of the employee's termination, and everything in between (including promotions, demotion, training, wages, and benefits). These laws also prohibit employers from retaliating against a worker or applicant because that individual complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. These federal statutes apply to all but the smallest employers, as only companies with fewer than 15 employees in the United States (20 under the ADEA) are generally exempt from these laws. With only minor exceptions, Title VII, the ADEA, the ADA, and GINA also apply to foreign-based employers operating in the United States on the same terms as domestic companies.

In addition, most of the fifty states have employment discrimination prohibitions that mirror or exceed the protections afforded by federal law. For example state laws often include the additional protected classes of marital or familial status, sexual orientation and gender identity. These state laws may also apply to smaller employers (with fewer than 15 or 20 employees) who are otherwise exempt from federal employment discrimination laws. In addition, many local governments have ordinances prohibiting discrimination. Therefore, in major metropolitan areas in the United States, it is not uncommon for three sets of laws – federal, state, and local – to prohibit employment discrimination.

5.3 What remedies may be imposed for a violation of the discrimination laws?

The remedies available to a prevailing employee include back pay, reinstatement or front pay, compensatory and punitive damages, injunctive or affirmative relief, and attorneys' fees. Back pay, which is the most common remedy in a discrimination claim, includes all of the wages, salary, bonuses, and any other benefits lost due to an employer's wrongful conduct, less any amount that the employee earned or could have earned subject to the "duty to mitigate." Compensatory damages (which compensate plaintiffs for out of pocket expenses and emotional harm) and punitive damages (which may be awarded to punish an employer for malicious or reckless acts) are also widely available remedies. However, these remedies may be subject to statutory limits based on the size of the employer, such as under Title VII.

5.4 How do employees seek relief under the discrimination laws?

Under the federal laws, employees initially must file a claim before the EEOC, the administrative agency charged with enforcement responsibility. The EEOC will investigate and attempt to resolve any discrimination claims brought before it. If the Commission finds the claim meritorious, it must conciliate, meaning that it must attempt to reach a settlement with the employer. If no resolution can be achieved, the Commission may institute a lawsuit against the employer or issue a "Notice of Right to Sue," which allows the employee to pursue the claim individually in the federal courts. Importantly, whether or not the EEOC finds the claim meritorious, the employee always retains the right to pursue the charges in federal court and any administrative findings will not be binding in a subsequent court proceeding.

Many of the states have their own Commissions which, like the EEOC, are charged with the responsibility to investigate and attempt resolution of the state discrimination claims. To avoid duplication of effort, the EEOC has entered work-sharing agreements with many of the state agencies so that only one agency, be it state or federal, will take responsibility for the claim.

6. Termination

6.1 Must an employer have grounds for termination?

No, although it is advisable to always have legitimate and supportable reasons for a termination. As described above, because most employees are employed "at will," they have relatively limited rights to contest a termination. However, the "at-will" rule is subject to a number of exceptions, the most important of which are the above-described non-discrimination statutes, and, many states have recognized additional exceptions through the "common law." These include prohibitions against terminations in violation of public policy (for serving jury duty, for bringing a worker's compensation claim, for certain types of whistle-blowing).

Therefore, while an employer is not legally obligated to articulate a specific reason for termination of an at-will employee, it is always advisable to do so to help prevent a discrimination or other legal claim and to defend any legal challenge. Thus, an employer can terminate for what is typically considered cause (poor performance, misconduct, violations of attendance policies, violation of drug and alcohol policies and the like) or for economic reasons.

6.2 Are employees protected if they are whistle-blowers?

Yes, in many cases, there are special statutes protecting employees who have "blown the whistle" for some alleged corporate wrongdoing. Legal protections for employees who report illegal misconduct by their employers have grown dramatically. Approximately 20 federal statutes now afford whistleblower protections for individuals who report violations of various workplace safety and health, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, and securities laws. Among these statutes is the Sarbanes-Oxley Act, known as SOX, which established civil protections for employees who report concerns about alleged fraud upon shareholders, and the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which provides whistleblower protections for individuals employed in the financial services industry.

In general, claims for relief under these statutes follow a similar pattern. Complaints are typically filed with the Secretary of Labor, and an investigation is conducted. Following the investigation, an order is issued by the Secretary, and a party aggrieved by the order is generally permitted to appeal the Secretary's order to a federal court. However, because 20 different statutes are involved in prescribing whistleblower protections, some notable differences exist including to whom complaints are filed, how the preliminary order becomes final and the remedies afforded.

There are a number of state statutes which also protect whistleblowers and afford a full panoply of remedies to aggrieved employees including reinstatement, back pay, compensatory damages, and attorneys' fees.

6.3 Must an employer provide a period of notice before termination?

Outside the context of plant closings and certain mass layoffs, there are no legal requirements to provide any notice of termination. The Worker Adjustment Retraining and Notification Act ("WARN"), which applies to employers of 100 or more employees, requires private sector employers to provide 60 days advance written notice before a statutorily-defined plant closing or mass layoff. Notice must be provided to the affected employees, their representatives and appropriate local government officials.

In the sale-of-business context, the seller of a business is the entity responsible for notifying its employees of a plant closing or mass layoff until the effective date of the sale. Immediately after that date, the buyer becomes the entity responsible for the notice and all personnel in the transferee business unit are deemed the buyers' workers.

The Act also specifies the information that must be included in the statutory notice. Should an employer be unwilling or unable to provide notice, the statute allows an employer to satisfy its WARN obligations by providing 60 days' pay and benefits to employees in lieu of giving the mandated notice. The WARN Act, however, does not require the type of redundancy or severance pay mandated by the laws in other countries.

Many states have enacted laws similar to WARN that may apply to smaller employers and layoffs of fewer employees, and these laws must always be considered in the event of a plant closing or mass layoff.

6.4 Must an employer provide severance pay after dismissal?

There are no federal or state laws mandating the payment of severance pay following dismissal. Instead, all of the states provide unemployment compensation benefits to eligible employees. Every employer must pay unemployment insurance on each employee in its organization, and these payments are then placed into the state fund. When workers become unemployed through no fault of their own, they can apply to receive benefits from the state unemployment compensation fund until they find other work or they have received the maximum benefit, usually 26 weeks.

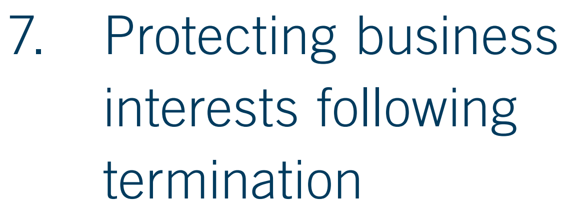
An employee's voluntary quit or termination for willful misconduct makes it difficult for a worker to make a claim for benefits, and employers are entitled to and often do challenge claims for unemployment when they believe the claims to be invalid.

6.5 Must an employer provide benefits after dismissal?

No law requires an employer to pay for benefit continuation after termination. However, the federal Consolidated Omnibus Budget Reconciliation Act, known as COBRA, provides that employers with 20 or more employees are required to offer continued group health insurance to employees and their family members who lose their coverage for certain reasons, including employment termination. This is an unpaid benefit, and an employee must pay the insurance premiums to continue group health benefits. Under federal law, group health plans must provide notice to employees and their covered family members about their COBRA rights, and when a triggering event occurs, the group health plan is obligated to provide the employee and family members with a notice to elect COBRA coverage. In order to afford coverage to employees of small employers, some states have enacted their own versions of COBRA, called mini-COBRA statutes, to cover those not subject to the federal law. Although most employers sponsoring group health plans outsource COBRA administration to third parties, the legal obligation to comply with COBRA cannot be shifted to these administrators. Therefore, employers need to be aware of the basic COBRA requirements, including the individuals who qualify for COBRA coverage, the events that qualify for COBRA continuation rights, the duration of COBRA coverage, and the COBRA notice and election procedures.

6.6 What protections do employees have upon dismissal?

Generally, absent a collective bargaining agreement or an individual employment contract, an employer is free to discharge an employee at any time with or without cause or notice. This is the central premise of employment at-will. However, in addition to the statutory prohibitions on discrimination, which restrict an employer's right to terminate for "any reason," most states have created some additional limited exceptions to this doctrine. Some state courts have held that employees may not be discharged in violation of public policy. The public policy must be found in state constitutions, statutes or regulations. For example, an employer may not terminate an employee for serving on a jury, for filing a workers' compensation claim or reporting the employer's violation of safety regulations. Some states have also held that an employee handbook may create an employment contract between the employer and employee, although these states often allow an employer to insert language in the handbook conspicuously disclaiming any contractual intent.



7. Protecting business interests following termination

7.1 What types of restrictive covenants may an employer obtain from its employees?

Common restrictive covenants include: non-competition agreements; non-solicitation agreements; and confidentiality agreements.

7.2 When are non-compete agreements enforceable?

Non-competition agreements (the most restrictive of the covenants) prohibit the departing employee from engaging in, or performing services for, any other competing businesses (often defined by product type, geography and/or market) for a certain specified period of time. Although generally enforceable in most (but not all) jurisdictions, non-competes are disfavored by the courts for imposing restraints on trade and thwarting employee mobility. The more the covenant is seen as preventing the departing employees from earning a livelihood within their field of expertise, the less likely it is to be enforced.

The enforceability of a non-compete depends on how it is worded and in what state it is being applied. Courts in some states enforce non-competes broadly, whereas a growing number of others require non-competes to be more narrowly tailored. A handful of states, most notably California, will not enforce non-competes in most cases. While state laws vary widely, there are some generally applicable principles.

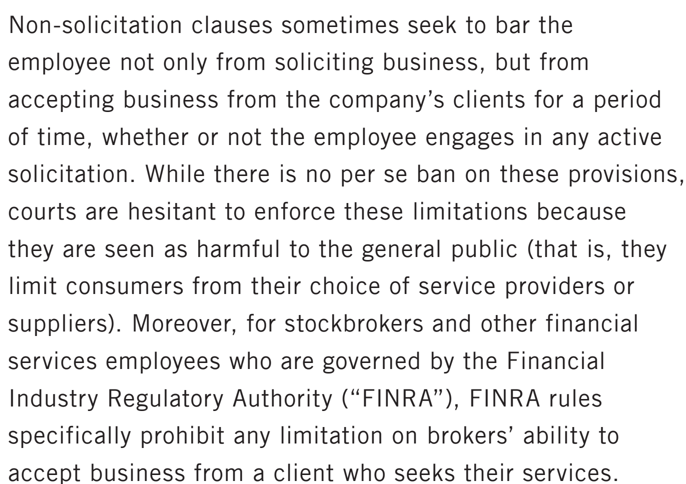
In order to be considered valid, a non-competition agreement must satisfy the following three criteria: be supported by adequate consideration at the time it is signed; protect a legitimate business interest of the employer such as goodwill or confidential business information; and be reasonable in scope, geography, and time.

Unlike some countries, an employer need not pay financial compensation to ensure the enforceability of a non-compete agreement, although affording such compensation may make enforcement easier.

If a court finds that a non-competition agreement is overbroad, it may narrow the scope and duration of the agreement and enforce it as modified, or it may refuse to enforce the agreement entirely. Again the states differ on whether and how the courts may modify overbroad clauses.

7.3 When are non-solicitation agreements enforceable?

Less restrictive than non-competes are non-solicitation provisions which provide the employer with direct protection for the goodwill developed with the employer's clients. Courts generally, although not always, are more receptive to non-solicitation covenants than non-compete agreements because they do not impede the future employment of the departing employee, but only limit their activities for a period of time. Many courts will not enforce non-solicitation agreements with respect to mere "prospective" clients, absent evidence of the employee's involvement in a specific pitch for business to that prospect or an exchange of confidential information.



Non-solicitation clauses sometimes seek to bar the employee not only from soliciting business, but from accepting business from the company's clients for a period of time, whether or not the employee engages in any active solicitation. While there is no per se ban on these provisions, courts are hesitant to enforce these limitations because they are seen as harmful to the general public (that is, they limit consumers from their choice of service providers or suppliers). Moreover, for stockbrokers and other financial services employees who are governed by the Financial Industry Regulatory Authority ("FINRA"), FINRA rules specifically prohibit any limitation on brokers' ability to accept business from a client who seeks their services.

Non-solicitation provisions are commonly coupled with non-compete restrictions as a less restrictive alternative that will still provide the company with significant protections in the event the non-compete clause is deemed unenforceable. To ensure enforcement, these agreements should contain severability provisions, specifically stating that if one clause is found to be unenforceable, it does not affect the enforceability of the remaining provisions.

Also commonly included in restrictive covenants or employment agreements are prohibitions against soliciting the company's employees. These provisions are routinely enforced to protect the company's investment in the training and development of its personnel, even in those jurisdictions which are otherwise hostile to restrictive covenants.

7.4 How is confidential business information protected?

Many employers require their employees at all levels to sign some form of a confidentiality or proprietary rights agreement. Throughout the U.S., documents and information which rise to the level of "trade secrets" are generally protected under state common law or, in a vast majority of states, by a version of the Uniform Trade Secrets Act ("UTSA"), and by the federal Defend Trade Secrets Act of 2016 ("DTSA"). A trade secret is confidential, commercially valuable information that provides a company with a competitive advantage, such as customer lists, methods of production, marketing strategies, pricing information, and chemical formulae.

The DTSA gives trade secret owners a federal cause of action for injunctive relief and monetary damages for the misappropriation of trade secrets, while also providing employee protections. It does not preempt state law, but rather provides an additional federal cause of action for trade secret misappropriation.

Confidentiality agreements allow employers to provide for additional protection of information which may in fact be confidential and important to the employer's business, but which may not qualify as a trade secret under the applicable law. Confidentiality agreements are generally enforceable throughout the U.S., even in those jurisdictions which restrict the enforcement of non-competition and non-solicitation agreements.

7.5 Can an employer require a departing employee to serve a period of "garden leave"?

Similar in impact to pure non-competes, garden leave provisions are a relatively recent import to the U.S. from the UK and other European countries. Most commonly included in a written employment agreement, garden leave provisions require the departing employees to provide mandatory notice of resignation (typically between three and six months). The employees remain employed throughout the notice period, and receive full salary and other benefits, but after giving notice, are not required to perform any further (or only very limited) services for the company. Because the employees remain employed by the company, they continue to owe a duty of loyalty to the employer and are not free to work for anyone else.

While garden leave provisions are becoming increasingly common in the U.S. (especially in the financial services industry), there is relatively little case law testing their enforceability (perhaps because they are infrequently challenged, and honored by many new employers).

8. Dispute Resolution

8.1 In what courts are employment disputes decided?

Unlike many other countries, in the U.S., employment disputes are decided in the court system, the same court system that handles general civil and criminal cases. The U.S. court system is comprised of both a federal court system and a parallel state court system, each with its own structures and procedures. As most employment disputes arise under federal laws, employment litigation typically (although not exclusively) takes place in the federal court system.

8.2 What power do administrative agencies have to investigate or resolve workplace disputes?

There are a number of administrative agencies that have the power to investigate and resolve employment disputes at both the federal and state level in the first instance. Examples of such agencies include the U.S. Department of Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), and the Occupational Safety and Health Administration ("OSHA"). Many of these agencies have the power to initiate investigations on their own without receiving an employee complaint, while others cannot act unless a charge or complaint of unlawful conduct is filed. Investigations are often informal and involve only document requests and unsworn witness interviews, but some agencies may proceed to conduct formal hearings before administrative law judges, make findings of fact, and issue remedial orders. Others, like the EEOC, have the power to recommend and negotiate a resolution in an employment dispute, but must refer the matter for litigation in federal court if such conciliation is unsuccessful. The decisions of the administrative agencies are ultimately reviewable by the federal courts.

8.3 What remedies are available to employees in employment disputes?

As explained in Section 5.3, the remedies available to a prevailing employee in an employment dispute depend on the nature of the claim, but may include back pay, reinstatement or front pay, compensatory and punitive damages, injunctive or affirmative relief, and attorneys' fees.

8.4 Can employers and employees agree to resolve their disputes through arbitration?

An increasing number of employers have implemented arbitration procedures that must be used to resolve employment disputes. Employers generally prefer arbitration because the process tends to be less costly and more expeditious than litigating in court, and arbitration eliminates the inherent bias of most jurors against employers.

Arbitration is strictly a creature of contract. A typical arbitration agreement contains a description of the claims to be arbitrated, the procedure for selecting the arbitrator, and the proper allocation of the arbitrator's fees. The Federal Arbitration Act ("FAA") provides the legislative framework for the enforcement of arbitration agreements and arbitral awards. An arbitration agreement will generally be enforced unless it is determined to be unconscionable, i.e., so one-sided that it cannot be enforced. To determine enforceability, courts look at both the circumstances under which the contract was formed and the specific terms of the contract. Under the FAA, courts have limited grounds for review of an arbitrator's decision.

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