



Labour & Employment

in 43 jurisdictions worldwide

Contributing editors: Mark Dichter, Kenneth Turnbull,
Christopher Hitchins and Mark E Zelek

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United States

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

In the United States, the employment relationship is governed by federal and state laws and, sometimes, by the laws of local government within states (counties, boroughs, cities and towns).

The primary federal laws that regulate various aspects of employment include the following:

- the National Labor Relations Act (NLRA), establishing the right of employees to form, join and assist labour unions, and the right to bargain collectively with the employer;
- the Fair Labor Standards Act (FLSA), establishing minimum wages and the right to a premium wage rate for time worked in excess of 40 hours in a working week, as well as exemptions from those wage rate obligations;
- the Occupational Safety and Health Act (OSHA), establishing minimum standards for safety and health in the work environment generally and for specific industries;
- the Employee Retirement Income Security Act (ERISA), regulating the field of employee benefits such as pension and welfare plans;
- the Family and Medical Leave Act (FMLA), establishing the right of eligible employees to take time off from work due to medical disability, in order to bond with a newly born, adopted or foster care-placed child or to care for a family member who has a serious health condition or who is an ill or injured serviceman or servicewoman;
- the Immigration Reform and Control Act (IRCA), regulating immigration into the United States and providing that employers may only employ persons who can establish their identity and a lawful right to work in the United States; and
- the Sarbanes-Oxley Act, establishing whistle-blowing protection for employees of publicly held companies who make complaints or assist in investigations regarding shareholder fraud, accounting, internal accounting controls or auditing matters.

See question 2 for a discussion of the main federal anti-discrimination and anti-harassment laws. See question 36 for a discussion of the federal Worker Adjustment and Retraining Notification (WARN) Act.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Yes, in the United States, federal and state laws and, sometimes, the laws of local government within states (counties, boroughs, cities and towns) prohibit discrimination or harassment in employment as a result of certain characteristics of the applicant or employee. The main federal laws are:

- Title VII of the Civil Rights Act (Title VII), prohibiting discrimination and harassment against an individual on the basis of race, colour, sex, national origin and religion;

- the Age Discrimination in Employment Act (ADEA), prohibiting discrimination and harassment against persons who are 40 years of age or older;
- the Americans with Disabilities Act (ADA), prohibiting discrimination against qualified individuals with a physical or mental disability, those with a history or record of a disability and persons associated with individuals who have a disability. The ADA also requires employers to provide reasonable accommodation to individuals with a disability that would enable the individual to overcome the limitations created by the disability so as to enable the individual to apply for a position or perform the essential functions of a position, if such accommodation does not result in undue hardship to the employer's operations;
- the Genetic Information Nondiscrimination Act (GINA), prohibiting employers from using genetic information for decisions on hiring, firing, promotions, or job assignments, and group health plans and health insurers from basing eligibility or premium determinations on genetic information;
- the Equal Pay Act (EPA), prohibiting sex discrimination in pay; and
- other federal statutes prohibiting discrimination based on citizenship and veteran status.

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) went into effect on 1 January 2009. The ADAAA makes important changes to the definition of the term 'disability', which has the impact of broadening the coverage for individuals who seek to establish that they have a disability within the meaning of the ADA.

On 29 January 2009, the Lilly Ledbetter Fair Pay Act of 2009 (FPA) was signed into law, eliminating many statute of limitations defences to pay discrimination claims under federal employment laws such as Title VII, the ADEA and the ADA. The FPA amends Title VII by providing that an unlawful employment practice occurs each time an employer issues a paycheck that has been impacted by a prior discriminatory pay decision, regardless of when that initial alleged discriminatory pay decision was made. The FPA will apply retroactively to all claims pending on or after 28 May 2007.

Also, virtually all 50 states have their own anti-discrimination and anti-harassment laws. Some state and local laws prohibit discrimination or harassment on the same bases covered by the federal laws. Others prohibit discrimination or harassment on additional bases such as marital status, sexual orientation, gender identity, transgender status, domestic or civil union partner status, medical condition, family status, weight and height. All anti-discrimination and anti-harassment laws – federal, state and local – prohibit retaliation against employees for exercising their rights under such statutes by opposing or making complaints of discrimination or harassment, or participating in legal proceedings regarding discrimination or harassment.

3 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

There is no federal legislation that protects employee privacy or personnel data per se. Privacy protection is primarily a function of state law. However, certain provisions of some federal laws aim to protect employee privacy and personnel data. The ADA requires employers to maintain the confidentiality of information and records on an employee's health and medical condition. The Fair Credit Reporting Act (FCRA) permits employers to obtain background information on applicants and employees through a third party, but only if the applicant or employee authorises the background investigation and delivery of results to the employer. The FCRA also limits employers' use of background check information, requires employers to maintain the confidentiality of background check information and requires destruction of records containing such information by means that prevent the reconstruction of such information.

Many of the 50 states have either a state constitutional provision or statutes that protect the privacy of certain information, including medical, personnel, financial and background check information. To the extent an employer collects and maintains records of such information on applicants and employees, the employer also must comply with those laws.

4 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

Federal government agencies enforce federal employment laws; state government agencies enforce state employment laws. Most employment-related laws allow individuals to bring a lawsuit in a federal or state court to enforce the law at issue or to recover monetary damages for violation of that law. Some federal and state laws require the individual to pursue and exhaust his or her remedies with the specified government agency before filing a lawsuit in a federal or state court.

The following federal government agencies enforce the corresponding federal employment laws:

- the United States Department of Labor, through its various divisions, enforces the FLSA, the FMLA, OSHA and ERISA;
- the United States Equal Employment Opportunity Commission (EEOC) enforces Title VII, the ADEA, the ADA, the ADAAA, GINA and the EPA;
- the National Labor Relations Board (NLRB) administers the NLRA; and
- the United States Department of Justice (DoJ) enforces the non-discrimination requirements of IRCA.

Worker representation

5 Is there any legislation mandating or allowing the establishment of a works council or workers' committee in the workplace?

No.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

No federal law restricts or limits background checks of applicants and employees directly by an employer so long as employees of the employer conduct the check. However, if the employer relies on a third party to conduct the background investigation and to provide the results of that investigation to the employer, the Fair Credit Reporting Act (FCRA) would apply.

The FCRA permits employers to obtain background check information through a third party, but only if the applicant or employee

authorises the background investigation and delivery of results to the employer. The FCRA limits employers' use of background check information to employment purposes. It also requires that certain notice and opportunity be provided to applicants and employees to correct or explain background information before the employer takes adverse employment action based on such information. Finally, the FCRA requires employers to maintain the confidentiality of background check information, and to ensure that records containing such information, when destroyed, be destroyed by means that prevent the reconstruction of such information by others.

A number of states, including California and New York, have their own state law counterpart statutes to the FCRA, and impose additional requirements and restrictions on an employer's ability to obtain and use background check information.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Yes, the ADA prohibits employers from conducting medical examinations or making pre-employment inquiries to determine whether an applicant has a disability or the nature or severity of the disability. Under the ADA, however, employers may require applicants to submit to post-offer medical examinations, which may be administered after the applicant has received an offer of employment but before the applicant has commenced employment. Moreover, employers may condition offers of employment on the results of the post-offer medical examination if the following conditions are met:

- all entering employees in the same position are subjected to such examinations whether or not they have a disability;
- information obtained regarding an employee's medical condition or history is collected and maintained on separate forms and in separate medical files that are treated as confidential medical records; and
- the results of the examinations are used only in accordance with the provisions of the ADA.

State laws may also provide restrictions on pre-employment medical and physical examinations of applicants.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Generally, pre-employment drug and alcohol testing is lawful under federal and state law where:

- the testing is required by law (eg, United States Department of Transportation drug and alcohol testing requirements) or is part of a lawful pre-employment medical examination required of every applicant for the same position;
- an applicant has notice of and consents to the testing requirement;
- the testing is conducted under conditions designed to minimise the intrusiveness of the procedure (eg, an applicant is not observed while furnishing the sample); and
- no specific medical information is reported to the employer; rather, the employer is only informed of a pass or no pass result.

Drug and alcohol testing of applicants and employees is predominantly a subject of state law, which can vary widely from state to state.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

There is no legal requirement to give preference in hiring to particular people or groups of people. The anti-discrimination laws that are

discussed in question 2 prohibit discrimination against job applicants who are in protected categories.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No.

11 To what extent are fixed-term employment contracts permissible?

State, not federal, law would govern the maximum duration of any fixed-term employment contract. Although generally there is no limitation on the duration of a fixed-term employment contract, such contracts in the United States are typically for a term of one to three years.

12 What is the maximum probationary period permitted by law?

There is no law (federal, state or local) that requires any probationary period at the beginning of the employment relationship. Unless the employer agrees to a probationary period – with an individual employee or with a representative of employees such as a union – it would be the employer's choice whether to establish a probationary period and, if so, whether such probationary period may be extended in the employer's discretion or only under certain circumstances.

13 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

The validity and enforceability of employee covenants not to compete, solicit or deal are a matter of state, not federal, law. Under some states' laws, such as California law, covenants not to compete, solicit customers or deal are void as being against public policy and are unlawful, except in very limited circumstances, such as when given in connection with the sale of a business entity or sale of all or substantially all of the assets of a business entity, or unless necessary to protect the employer's trade secrets in the case of a customer non-solicitation covenant.

However, most of the 50 states recognise as valid, and will enforce, covenants not to compete, solicit or deal so long as:

- the covenant is supported by adequate consideration;
- the covenant is necessary to protect a legitimate business interest of the employer; and
- the covenant is reasonable in time, subject matter and geographic reach consistent with the employer's legitimate business interest.

Some states, such as New York, also require that the former employee's services be unique or extraordinary. In California, covenants not to solicit employees are valid and enforceable if they are not deemed an unreasonable restraint on competition.

14 What are the primary factors that distinguish an independent contractor from an employee?

Control and risk of loss are the primary factors. An employee is generally an individual whose time, place and manner of providing the services or results are controlled or subject to the control of the employer. The employer, generally not the employee, provides the tools and means necessary for the work to be performed, and the employer bears the risk of loss if the work performed or results achieved are not satisfactory to the employer (eg, the employer must still pay the employee, and can only discipline or terminate the employee if the work or result is not satisfactory).

By contrast, an independent contractor is an individual or business entity that is generally retained to deliver a specific result and, except for deadline and security of intellectual property reasons, has the right to control the time, place and manner of performing the

work necessary to provide the agreed-upon result. An independent contractor typically provides the tools and other means necessary to provide the result, and bears some risk of loss in the event that the result is not delivered in a timely manner or is not satisfactory in quality or quantity to the contracting business (eg, the contractor will not be paid).

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

In the United States, there are numerical limitations on two significant temporary visa categories, the H-1B and the H-2B visas. H-1B visas are for professional workers coming into the United States to work temporarily for a US employer in a specialty occupation. A specialty occupation is one requiring, at a minimum, a baccalaureate degree in a specific academic discipline (or the equivalent in work experience), and the foreign national worker must have that educational background or the equivalent in work experience. Under current law, there are only 65,000 H-1B visas available each fiscal year. There is a separate allotment of 20,000 H-1B visas available to foreign workers who have obtained an advanced degree from a US institution of higher education, such as a US masters degree, PhD, juris doctor or other professional degree. Employers may apply for these H-1B visas beginning 1 April, six months before the start of the fiscal year in which the H-1B visa will become active.

US institutions of higher education and affiliated not-for-profit organisations, not-for-profit research organisations and US government research institutions are not subject to the H-1B cap. This means they may apply for H-1B visas for professional workers at any time. In addition, H-1B workers extending their stay or transferring from one cap-subject employer to another are not subject to the numerical limitation.

H-2B visas are for temporary workers who will work for US employers on temporary projects with a finite end, for seasonal workers and for workers who will fill a peak-load need. For example, many hospitality companies use the H-2B category to bring to the United States seasonal resort workers, ski instructors, etc. There is a numerical limitation of 66,000 H-2B visas available each fiscal year. Half of the allotment is made available for the first half of the fiscal year and the second half is opened up in the second half of the fiscal year.

There are also work visas based on special legislation or trade treaties. The E-3 is a work visa available to nationals of Australia, and the H-1B1 is available to nationals of Chile and Singapore. These visas have requirements that are very similar to the H-1B in terms of the type of occupation and educational background required.

The L visa is available for employees transferring from a corporate entity abroad to a US parent, subsidiary, affiliate or branch of the foreign employer. In order to qualify for the L visa, the foreign worker must have worked for the related entity abroad for one of the prior three years in a managerial, executive or specialised knowledge capacity. The foreign national must be offered a position in the related US entity in a similar capacity. The L-1A visa, for managers and executives, is valid for a total of seven years. The L-1B visa, for individuals with specialised company knowledge, is valid for a total of five years.

Sometimes a company may transfer a worker to the United States on an E visa. E visas are available to nationals of countries with which the United States has certain treaties of trade, investment, navigation, friendship or commerce. The company that will employ the foreign national in the United States must be majority owned by nationals of the treaty country or publicly traded on the stock exchange of the treaty country. The employing company must represent a substantial investment in the United States, or must conduct trade, at least

50 per cent of which must be between the United States and the treaty country. The foreign national must be a citizen of the same treaty country and must be entering the United States to assume a managerial, executive or essential function. There is no requirement that the E visa applicant work with a related entity abroad for a period of time before applying for the visa. E visas are typically granted for five years at a time and are renewable in most circumstances.

There are no numerical limitations on the number of L or E visas that may be issued each year.

16 Are spouses of authorised workers entitled to work?

Work authorisation is available to spouses of L and E visa holders. The work authorisation is unrestricted as to employer but is time-limited, and may be valid for one or two years. It is renewable for as long as the principal visa holder remains in L or E status. The couple must be legally married. Work authorisation is not available to non-spouse partners. The spouse of the L or E visa holder may apply for a work authorisation card (employment authorisation document, EAD) upon entry into the United States in L-2 or E-2 status. Processing time for these cards is usually 90 days.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Every US employer must verify the identity and work eligibility of every worker hired to perform services in the United States since 6 November 1986. The verification must be completed on Form I-9 within three business days of hire and maintained during the employment of the worker and for a period of time after separation or termination. Employers who fail to undertake verification of workers' identity and employment authorisation may face serious civil fines and, increasingly, criminal penalties. The Immigration and Customs Enforcement agency of the Department of Homeland Security may conduct audits and raids of employers to determine whether verification is taking place. Foreign nationals who work without appropriate authorisation in the United States may face difficulty receiving future immigration benefits, such as permanent residence, or, in egregious cases, may be removed from the United States and barred from returning for a certain period of time. In addition, the US government offers employers the use of an electronic verification database known as E-Verify. Use of E-Verify is currently optional for most US employers except for certain federal government contractors and companies doing business in certain states.

18 Is a labour market test required as a precursor to a short or long-term visa?

A labour market test is required as a precursor for two temporary visas. It is required for the H-2B visa discussed above for seasonal or peak-load workers, as well as for the H-2A visa, for seasonal agricultural workers.

In addition, a labour market test is required as a first step for most employment-sponsored permanent residence applications. The process involves a highly structured recruitment campaign that complies with Department of Labor rules and an online attestation of recruitment activities. Employers are required by law to cover all fees and costs for such labour market tests.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Generally, the FLSA does not limit or restrict the number of hours adult employees may work in a single working day or working week if the employee agrees to work those hours. However, if employees

work in excess of a certain number of hours per working day, or per working week, the employer may be required to pay the employee at premium wage rates for the excess hours under either the FLSA or applicable state laws. In addition, some state laws prohibit employers from requiring employees to work more than a certain number of hours per working day or per working week, and protect employees against retaliation by employers if the employee refuses to work in excess of such hours. However, there may be other regulatory limitations on working hours in certain specific industries (eg, commercial truck drivers).

20 What categories of workers are entitled to overtime pay and how is it calculated?

All employment positions are presumed to be subject to the minimum and overtime wage requirements of federal and state wage and hour laws, unless the employer can prove that the employee's compensation and job duties and responsibilities qualify the employee for one of the exemptions of the FLSA. If the employee is not exempt (ie, is non-exempt), the employee is eligible for premium pay for overtime worked.

Under the FLSA, non-exempt employees are entitled to one-and-a-half times their regular rate of pay for all time worked in excess of 40 hours in one working week (defined as a recurring period of seven 24-hour periods). Regular rate of pay is calculated by taking into account the employee's hourly rate as well as any additional cash compensation entitlements, such as sales commissions, performance bonuses and certain other forms of compensation, such as meals and housing, provided by the employer.

Under some states' wage and hour laws, such as California law, a non-exempt employee's entitlement to overtime compensation is greater than that provided by the FLSA. For instance, while the FLSA requires that overtime compensation be paid at one-and-a-half times the employee's regular rate of pay for all time worked in excess of 40 hours in one working week, California law requires that overtime compensation be paid at one-and-a-half times the employee's regular rate of pay for all time worked in excess of eight hours, up to and including 12 hours, in one working day (defined as a recurring 24-hour period) or for all time worked in excess of 40 hours in one working week, and for the first eight hours worked on the seventh day the employee works in a working week. California law also provides for an overtime compensation rate equal to two times the employee's regular rate of pay for time worked in excess of 12 hours in one working day, and for time worked in excess of eight hours on the seventh day the employee works in a working week.

21 Is there any legislation establishing the right to annual vacation and holidays?

No law (federal, state or local) requires employers to provide employees with paid vacation or paid holidays. However, if an employer elects to provide its employees with such paid time-off benefits, some states' laws regulate how an employer administers such benefits.

22 Is there any legislation establishing the right to sick leave or sick pay?

No federal or state law establishes the right of any employee to paid sick leave. Local law may provide for paid sick leave benefits. For example, the city of San Francisco requires all employers to provide paid sick leave to employees (including temporary and part-time employees) who perform work in San Francisco. Under the San Francisco Paid Sick Leave Ordinance, paid sick leave begins to accrue 90 calendar days after the commencement of employment, at an accrual rate of one hour of paid sick leave for every 30 hours worked. There is a cap of 40 hours of accrued paid sick leave for employees of employers for which fewer than 10 persons (including full-time, part-time and temporary employees) work for compensation during a given week. For employees of other employers, there is a cap of

72 hours of accrued paid sick leave. An employee's accrued paid sick leave carries over from year to year. Employees are entitled to paid sick leave for their own medical care and also to aid or care for a family member or designated person.

Similarly, the District of Columbia requires employers to provide paid sick leave. Under the Accrued Sick and Safe Leave Act, the amount of leave employers are obligated to provide varies depending on the size of the company – three to seven days per calendar year. Unused leave carries over annually, but an employer is never obligated to provide more leave than the required statutory maximum. Employees may use paid leave for absences resulting from their own medical care and the care of a family member in connection with a physical or mental illness, injury or mental condition, and for absences related to obtaining social, legal or medical services for the employee or a family member who was the victim of stalking, domestic violence or sexual abuse.

Federal and some states' laws establish the right of certain employees to medical leave. Under the FMLA, an employee may be eligible for medical leave of up to 12 weeks during a 12-month period if the employer and the employee meet certain criteria:

- the employee works for an employer that has at least 100 employees in the United States;
- the employee works at a location where the employer employs at least 50 employees within a 75-mile radius;
- the employee has been employed by the employer for at least 12 months;
- the employee has provided at least 1,250 hours of service to the employer during the past 12 months;
- the employee has not already used all of his or her 12 weeks of FMLA leave during the relevant 12-month period; and
- the employee is medically certified by a healthcare provider as being disabled due to a serious health condition as defined by the FMLA.

A number of states have their own laws that parallel the FMLA. Some states, such as California and Oregon, have state laws that provide greater rights to a medical leave than the FMLA.

23 In what circumstances may an employee take a leave of absence?

What is the maximum duration of such leave and does an employee receive pay during the leave?

Various federal and state laws establish the right of employees to take a leave of absence in certain circumstances.

As discussed in question 22, the FMLA establishes a right for eligible employees to take medical leave of up to 12 weeks during a 12-month period if the employee cannot work due to a serious health condition, including temporary disability caused by pregnancy, childbirth or a related condition. Other qualifying reasons for leave under the FMLA are:

- child-bonding leave, for the employee to bond with a child under the age of 18 within one year of the child's birth, adoption or foster care placement with the employee;
- family care leave, for the employee to care for a parent, spouse or child who has a serious health condition and who needs or could benefit from the employee's care;
- exigency leave, for the employee to tend to any qualifying exigency, medical or otherwise, arising from a family member's (eg, spouse, son, daughter or parent) active duty military service or call to active duty; and
- military caregiver leave of up to 26 weeks in a single 12-month period, for the employee to care for a family member (eg, spouse, son, daughter, parent or next of kin) who is an injured serviceman or servicewoman.

Effective on 28 October 2009, amendments to the FMLA expanded the coverage of exigency leave to include family members of the

regular Armed Forces and of military caregiver leave to include family members of veterans. The employer is not required to pay employees during FMLA leave, although employees generally can use their accrued paid time-off benefits (voluntarily provided by the employer) to continue pay during such leave.

The United States Department of Labor published final regulations (final rule) under the FMLA, which took effect on 16 January 2009. The final rule marks the first major regulatory changes to the FMLA since its enactment in 1993. Among other things, the final rule alters the notice and certification requirements of the FMLA. The final rule also provides clarification as to when an employee can take FMLA leave to care for a family member, and as to the documentation that an employer can require in connection with such leave requests. Furthermore, the final rule provides guidance as to employer and employee rights and responsibilities associated with exigency leave and military caregiver leave.

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) establishes the right of employees to a leave of absence due to military service. USERRA also establishes re-employment and other benefits protections for employees returning from cumulative periods of military leave of five years or less. USERRA does not require employers to provide employees with pay during military leave, but does require that employees on military leave be permitted to use their paid time-off benefits (voluntarily provided by the employer) and to continue participating in certain of the employer's benefit plans during the military leave. Several states have enacted family military leave laws. For example, California requires employers with 25 or more employees to provide up to 10 days of unpaid leave to eligible employees who are spouses of deployed military servicemen and servicewomen, to be taken when the military spouse is on leave from deployment during a time of military conflict.

Further, under the ADA and its state or local equivalents, or both, a leave of absence may be considered a reasonable accommodation for covered qualified employees with disabilities. The reasonableness of such an accommodation, including the duration of such leave, is determined on a case-by-case basis.

In addition, some states have laws that establish the right of employees to take unpaid time off from work for certain reasons such as to vote, to serve on a jury or to appear as a witness in legal proceedings, to perform services as a volunteer firefighter or emergency responder, to participate in school or day-care activities, to participate in an alcohol or drug abuse rehabilitation programme or to seek medical services and legal recourse as a victim of domestic abuse or violent crime.

24 What employee benefits are prescribed by law?

The only benefit that employers are mandated by law to provide to their employees is workers' compensation insurance. In general, workers' compensation insurance provides partial wage replacement payments and, if needed, medical services and treatment and vocational rehabilitation services to employees who sustain a work-related illness or injury. Workers' compensation is a subject of state, not federal, law.

25 Are there any special rules relating to part-time or fixed-term employees?

No.

Liability for acts of employees

26 In which circumstances may an employer be held liable for the acts or conduct of its employees?

Generally, employees are agents of the employer and act on behalf and for the benefit of the employer when performing their jobs. Accordingly, employers can generally be held liable for the harms

resulting from acts and omissions of their employees occurring in the scope and course of the employees' employment with the employer.

Taxation of employees

27 What employment-related taxes are prescribed by law?

Employers are required by federal, state and local tax laws to withhold from employee wages the following as taxes: US social security tax, US medicare tax, US income tax and, if applicable, state income tax and local income tax. In addition, some states also require employers to withhold additional taxes from employee wages to fund certain government-sponsored and administered unemployment programmes, such as a state disability insurance benefit programme.

Employee-created IP

28 Is there any legislation addressing the parties' rights with respect to employee inventions?

Yes, most states have laws allowing employers to require their employees, as a condition of employment, to assign all inventions to the employer except if the invention:

- is not developed by the employee using any of the employee's working time for the employer; and
- is not developed by use of any employer equipment, supplies, facilities or trade-secret information.

However, even if these two requirements are met, an employer can still require the employee to assign an invention to the employer if the invention:

- at the time of conception or reduction to practice by the employee, relates to the employer's business or to the employer's actual anticipated research or development; or
- results from any work performed by the employee for the employer.

Business transfers

29 Is there any legislation to protect employees in the event of a business transfer?

There is no law (federal, state or local) that protects employees in the event of a business transfer. However, if an employer must lay off employees in connection with the business transfer and such lay-off is covered by the Worker Adjustment and Retraining Notification (WARN) Act, the affected employees are entitled to receive 60 days' advance notice of termination.

Termination of employment

30 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Unless the employer contractually agrees otherwise (either in an individual employment or a collectively bargained agreement), most employment in the United States is 'at will', meaning that it is not for any specific period of time and the employer and employee each have the legal right to terminate the employment relationship at any time, with or without advance notice or procedures and with or without any particular cause or reason. However, employers cannot terminate even 'at will' employees for a reason that is unlawful under federal, state or local law.

31 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Advance notice of dismissal or pay in lieu of such notice is not required by any federal, state or local law, unless the termination of

employment is due to a mass lay-off or plant closing as those terms are specifically defined under the WARN Act or any counterpart state law applicable to the employer. However, an employer may contractually agree to provide employees with advance notice of dismissal or pay in lieu of advance notice.

32 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Unless the employer has contractually agreed to provide its employees with advance notice of dismissal or pay in lieu of advance notice (either in an individual employment or a collectively bargained agreement), or the termination of employment is due to a mass lay-off or a plant closing under the WARN Act or any applicable state law counterpart, advance notice or pay in lieu of such notice is not required.

33 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

No federal, state or local law establishes a right to severance pay upon termination of employment. Whether to provide severance pay and, if so, in what form or amount, are determinations made by the employer or may be required in an individual employment or a collectively bargained agreement.

34 Are there any procedural requirements for dismissing an employee?

No, unless the employer has contractually agreed to such procedures in an individual employment or collectively bargained agreement.

35 In what circumstances are employees protected from dismissal?

An employee may be protected from dismissal if the employer has entered into an individual employment or a collectively bargained agreement that requires that certain reasons exist or certain procedures be followed, including due process procedures, before terminating the employment relationship.

Even if employees are employed at will and typically are not protected from dismissal, various federal and state laws provide these employees with the right to file a claim for damages with a government agency or a federal or state court if the reason for the dismissal is an unlawful reason. When such claims are filed, the employee sues the former employer for the economic damages resulting from the unlawful termination (typically, past and future earnings and value of lost benefits). Depending on the type of claim, a former employee may also sue the former employer for additional monetary damages:

- to compensate the former employee for emotional pain and suffering caused by the unlawful termination;
- to recover the attorneys' fees and costs of suit the employee incurred in prosecuting his or her claim;
- to punish the employer for its conduct; and
- to recover penalties that may be authorised by a specific statute under which a claim is brought.

Under certain claims, the former employee may request reinstatement of employment.

36 Are there special rules for mass terminations or collective dismissals?

Yes. The WARN Act generally requires an employer with 100 or more employees in the United States to provide its employees, and others, with 60 days' advance notice if the employer will conduct a mass lay-off or a plant closing, as those terms are specifically defined in the WARN Act. In addition to employees, others who are entitled to such advance notice are the employees' union, the state government

Update and trends

Sweeping changes to labour and employment whistle-blower protections have been delivered by the Securities and Exchange Commission (SEC) Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) through the expansion of award incentives and anti-retaliation safeguards.

The vigorous dialogue around the Dodd-Frank Act and its reform and enforcement of whistle-blower statutes remained strong in 2010 among US regulatory authorities, members of Congress and employers, and concluded with final rules issued by the SEC on 25 May 2011. Employer comments on the proposed whistle-blower provisions were not incorporated into the final regulations and now employers face significantly stronger whistle-blower incentives and protections enforceable by the SEC. For international companies operating and managing employees in the United States, these expanded whistle-blower protections will impact their organisations, as the expanded whistle-blower programme applies across borders to foreign entities doing business in the United States.

Background

The financial industry's role in the United States' economic recession has spurred demands for greater reform and accountability of financial institutions by the American electorate and their representatives. The Restoring American Financial Stability Act (RAFSA), passed on 19 July 2010 by the US Senate, includes significant new whistle-blower provisions, as well as important changes to the Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley or SOX). Those provisions have been incorporated as part of the Dodd-Frank Act, passed by both houses of Congress and signed by President Obama on 21 July 2010.

Most at issue with employers are the awards associated with whistle-blowers who report directly to government authorities in the SEC, skipping any compliance process or enforcement programme within an employer's own organisation. The Dodd-Frank Act now authorises the SEC to provide monetary rewards of 10 per cent to 30 per cent of the monies recovered to individuals who voluntarily provide the SEC with original information that leads to recoveries of monetary sanctions of more than US\$1 million in criminal and civil proceedings. The increased awards encourage employees to bypass potentially effective internal compliance programmes for appealing 'payouts' from the SEC's new whistle-blower programme. During the public comment period, there was an overwhelming response from employers and their counsel on the adverse impact these award incentives will have on any well-formed internal company compliance programmes.

In fact, the final rules may actually create a disincentive for employees, particularly those with access to the most sensitive company information and operations, to follow any compliance channels within their organisation. Employers now need to undertake a thorough review of their compliance programmes, assess their effectiveness and make every effort to strengthen them to encourage employees to utilise internal reporting procedures in the first instance. Employees must feel that an existing in-house reporting process is a viable first stop for reporting any compliance misconduct.

Critical elements of the whistle-blower programme for employers

With this final approval, the Dodd-Frank Act creates a new whistle-blower programme administered by the SEC that includes several critical elements affecting employers, including terms that:

- Establish that the anti-retaliation protections of Dodd-Frank do not depend on a finding of an 'actual violation' of securities law, but rather only that the whistle-blower possesses a 'reasonable belief' that the employer is violating the law.
- Require that a whistle-blower must 'voluntarily' provide information to the SEC.
- Enable whistle-blowers to bypass SOX administrative proceedings and instead file retaliation claims directly in federal court.
- Offer a six-year to 10-year statute of limitations period to bring claims, as opposed to SOX's current 90-day statute of limitations period.
- Increase monetary incentives by providing a new double-back pay remedy, as well as the opportunity for the whistle-blower to share in any government recovery where 'original information' about shareholder fraud was provided.

The Dodd-Frank Act also expands SOX to cover subsidiaries and other related entities that are consolidated on a company's financial reports and by nationally recognised statistical rating organisations. The final Dodd-Frank Act provision contains additional significant changes to SOX, and establishes two further whistle-blower programmes designed to protect employees reporting alleged violations of the Commodity Exchange Act and the various consumer financial protection laws. The False Claims Act has also been amended with respect to its whistle-blower protections.

What employers can do now

In light of the passage of the Dodd-Frank Act and its significant impact on whistle-blower protections, public company employers operating in the United States need to consider doing the following:

- Review waiver and arbitration agreements. In light of the restrictions on waivers and pre-dispute arbitration, employers need to review their employment agreements to ensure they do not run afoul of these provisions.
- Find new ways to encourage internal reporting. In response to increased financial incentives to whistle-blowers who provide original information to the government, employers need to consider how best to encourage would-be whistle-blowers to raise compliance concerns internally.
- Audit subsidiary compliance. While public companies are now well versed in the 'compliance culture' created by SOX in 2002, companies must be mindful to extend the same corporate compliance structures to subsidiaries and other related entities. Employers should also audit existing compliance structures and develop ways to extend them to umbrella organisations.

During 2011 and 2012, employers operating in the United States will have to watch and see if these new whistle-blower rules will result in an increase in credible complaints being made directly to the SEC, depriving companies of the ability to investigate and correct instances of wrongdoing.

and certain local government officials. If the employer fails to provide the required notice, employees may file a lawsuit against the employer for the pay and value of certain ERISA-governed benefits the employees would have received during the period, up to 60 days, for the number of days that advance notice should have been given. In addition, the local government may also recover a penalty of US\$500 per day for up to 60 days for the number of days that advance notice should have been, but was not, given to the local government official.

Some states, such as California and New York, also have their own laws that impose similar advance notice requirements as well as other requirements on employers in connection with lay-offs and closures affecting a certain number of employees. These state laws typically cover smaller lay-offs and closures than the WARN Act.

- 37** Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Generally, the imposition of a mandatory retirement age is not allowed, though there may be exceptions in certain specific industries.

Dispute resolution

- 38** May the parties agree to private arbitration of employment disputes?

Generally, yes. However, whether a court will enforce an employment arbitration agreement when the dispute to be arbitrated arises under a federal statute, a state statute or state common law is an issue that continues to be litigated. Moreover, litigation is often initiated over the circumstances of entering into the arbitration agreement and its terms.

In addition, because arbitration agreements constitute a waiver of the right to a jury trial, arbitration agreements are subject to state contract law as well as state statutory law. Some states, such as California, have developed specific standards that must be met if an employment arbitration agreement is to be enforced. Because state laws can differ in these respects, agreements to arbitrate employment disputes must be carefully drafted.

39 May an employee agree to waive statutory and contractual rights to potential employment claims?

Generally, yes. However, an employee cannot waive claims based on acts or omissions that have not yet occurred. Moreover, a waiver of minimum wage, overtime and certain other wage claims generally requires court or Department of Labor approval to be enforceable. Some states' laws prohibit waivers of workers' compensation insurance benefits and waivers of unemployment insurance benefits; rights under certain federal laws such as the NLRA also cannot be waived.

Under contract law of most states, a waiver is valid and enforceable if it is given knowingly and voluntarily, and in exchange for something of value to which the individual giving the waiver is not already entitled. Some statutes establish additional substantive and procedural requirements for a valid waiver of claims. For example, the ADEA requires that a waiver of age claims under the ADEA

meets certain requirements based on the context in which the waiver is being given, including but not limited to a minimum period of time for the individual to consider and sign the waiver and a seven-day period after signing within which to revoke the waiver. Under California law, a waiver of unknown claims arising from past acts or omissions is not valid unless the waiver also includes an express waiver of rights under the California Civil Code, section 1542.

On 15 July 2009, the EEOC issued new guidance (EEOC Guidance) on discrimination waivers and releases contained in employee severance agreements. The EEOC Guidance addresses all types of discrimination waiver and release requirements, and contains specific examples and numerous questions and answers that should be taken into account by employers when dealing with waiver and release issues in severance agreements.

40 What are the limitation periods for bringing employment claims?

The limitation period varies based on the statutory or common law basis for the employment-related claim. In general, however, the limitation period for most employment-related claims ranges from one to three years. Claims under some state laws typically can be brought as late as four to five years, and under other states' laws as late as 10 years, in limited circumstances, after the alleged wrongful act, omission or resulting harm.

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