Labour & Employment 2020

Contributing editors
Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek

LEXOLOGY®
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2006
Fifteenth edition
ISBN 978-1-83862-357-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Belgium, Ghana, Israel, Kenya, Myanmar, Netherlands, Poland, Slovenia, Turkey and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek of Morgan Lewis, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
May 2020

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LEGISLATION AND AGENCIES

Primary and secondary legislation

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 owing to medical disability in order to bond with a newborn, 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 identities and lawful rights to work in the United States; and
- the Sarbanes-Oxley Act and the Dodd-Frank Act, establishing whistle-blowing protection for employees of publicly held companies (and any subsidiaries or affiliates whose financial information is included in consolidated financial statements) who make complaints or assist in investigations regarding shareholder fraud, accounting, internal accounting controls or auditing matters.

Protected employee categories

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 governments 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 against and harassment of an individual on the basis of race, colour, gender (including, in some jurisdictions, sexual orientation), national origin, religion or pregnancy;
- the Age Discrimination in Employment Act (ADEA), prohibiting discrimination against and harassment of 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 an individual with a disability that would enable the individual to overcome the limitations created by the disability so as to enable him or her 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 prohibiting 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 (the ADAAA) came into effect on 1 January 2009. The ADAAA makes important changes to the definition of the term 'disability' under the ADA, which has the impact of broadening the coverage for individuals who seek to establish that they have disabilities within the meaning of the ADA.

On 29 January 2009, the Lilly Ledbetter Fair Pay Act of 2009 (the 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 pay cheque that has been affected by a prior discriminatory pay decision, regardless of when that initial alleged discriminatory pay decision was made. The FPA applies 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 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, family status and appearance. 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.

Enforcement agencies

3 | 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 lawsuits in 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 individuals to pursue and exhaust their remedies with the specified government agency before filing lawsuits in a federal or state court.

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

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

WORKER REPRESENTATION

Legal basis

4 | Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

No.

Powers of representatives

5 | What are their powers?

Not applicable.

BACKGROUND INFORMATION ON APPLICANTS

Background checks

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?

Federal law does not restrict background checks of applicants and employees as long as the employer conducts the check directly rather than through a third party. When an employer uses a third-party vendor to conduct the background check, however, the process is governed by the Fair Credit Reporting Act (FCRA). The FCRA does not prohibit an employer from hiring a vendor to conduct background checks or from taking employment action based upon the results of such investigations, but it does require the employer to first provide notice and obtain permission from the applicant or employee. The FCRA also requires that notice be provided to applicants and employees before any adverse employment action can be taken based upon background check information, and it requires that applicants or employees be given the opportunity to correct or explain any negative information. The FCRA further requires employers to maintain the confidentiality of background check information, and places some limits on how this information can be used. It is also important to note that a number of states, including California and New York, have their own laws governing the use of background checks and impose additional requirements and restrictions on an employer's ability to obtain and use this information.

In April 2012, the Equal Employment Opportunity Commission (EEOC) issued guidance regarding when it is appropriate for an employer to use background check information relating to an applicant's criminal history. The EEOC's guidelines state that employers should exercise caution before excluding individuals from employment on the basis of a criminal history, and asks employers to avoid blanket exclusions unless there is a close link between the requirements of the job and the type of crime committed. Similarly, certain states and municipalities across the country have enacted legislation limiting the ability to inquire as to criminal records and the use of this information during the application process and in other employment decisions.

Medical examinations

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

Yes, the Americans with Disabilities Act (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 a conditional 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, and if people with disabilities are excluded from the position on the basis of the examination, the examination must be job related and consistent with business necessity.

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

Drug and alcohol testing

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

Preference and discrimination

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. Various anti-discrimination laws 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.

Probationary period

12 | What is the maximum probationary period permitted by law?

There is no federal law 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 would be extended in the employer's discretion or only under certain circumstances. States, except Montana, do not require a probationary period.

Classification as contractor or employee

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

Control, dependence and risk of loss are among the primary factors used to distinguish between an independent contractor and an employee.

An employee is generally an individual whose time, place and manner of providing services or results are controlled by or subject to the control of the employer. Generally, the employer provides the employee with the tools and means necessary for the work to be performed, the employee is economically dependent upon the employer, and the employer bears the risk of loss if the work performed or results achieved by the employee 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. Independent contractors often market their services to more than one entity, provide the tools and other means necessary to produce the result, and bear some risk of loss in the event they fail to deliver the result in a timely manner, or deliver results that are unsatisfactory in quality or quantity to the contracting business (eg, the contractor will not be paid).

This area of US law has undergone substantial change and continues to evolve very quickly in the current regulatory and enforcement environment.

Temporary agency staffing

14 | Is there any legislation governing temporary staffing through recruitment agencies?

No.

FOREIGN WORKERS

Visas

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: H-1B and H-2B. 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, the H-1B visa has an annual numerical cap of 65,000 visas each fiscal year. The first 20,000 petitions filed on behalf of beneficiaries with a US master's degree or higher are exempt from the cap. Employers may apply for these H-1B visas from 1 April each year, 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-1B visas are valid for a maximum period of six years. Extensions past the six-year maximum are possible when the H-1B worker is at a certain stage in the process of obtaining lawful permanent residence.

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. Admission on an E-3 visa is typically granted for two years and is indefinitely extendable in two-year increments, as long as the E-3 visa holder can demonstrate an intent to live in the United States temporarily. H-1B1 visas are issued for 18 months; admission is typically granted for one year at a time. H-1B1 visas are also indefinitely renewable, as long as temporary intent can be demonstrated.

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. 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.

Spouses

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 employers 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) upon entry into the United States in L-2 or E status. The processing time for these cards is anywhere from 90 to 180 days.

General rules

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.

Resident labour market test

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 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

Working hours

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

Generally, the Fair Labor Standards Act (FLSA) does not limit or restrict the number of hours adult employees may work in a single working day or working week if the employees agree to work those hours. However, depending upon an employee's job classification, if the employee works 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 employees refuse to work in excess of such hours. Further, some states require employers to provide their employees with meal breaks and rest breaks after working a certain number of hours in a day or during certain times of the day. There may be other regulatory limitations on working hours for minors or adults in certain specific industries or positions (eg, commercial truck drivers, airline pilots).

Overtime pay

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 or applicable state wage and hour laws. If the employee is not exempt (ie, 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 rates 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 | Can employees contractually waive the right to overtime pay?

In the United States, employees cannot waive their right to receive overtime payments and generally cannot agree to settle claims arising from an employer's failure to provide such payments, absent approval by a court or the United States Department of Labor (see *Boaz v FedEx Customer Information Servs, Inc*, 725 F3d 603, 606 (Sixth Circuit 2013) recognising that 'employees may not, either prospectively or retrospectively, waive their FLSA rights to minimum wages, overtime, or liquidated damages'; and *Lynn's Food Stores, Inc v United States*, 679 F2d 1350, 1352-53 (Eleventh Circuit 1982) establishing the long-recognised exception for settlement agreements approved by a court or the Department of Labor). However, one federal circuit court of appeals has held that a union-negotiated settlement agreement may be enforceable without court or Department of Labor approval, where the agreement resolves 'claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves' (*Martin v Spring Break '83 Prods, LLC*, 688 F3d 247, 255 (Fifth Circuit 2012)).

Vacation and holidays

22 | 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.

Sick leave and sick pay

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

Medical leave

Federal law and some states' laws provide certain employees with unpaid medical leave. In particular, the federal Family and Medical Leave Act (FMLA) provides that eligible employees may take leave for up to 12 weeks during a 12-month period if the employee:

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

A number of states and localities have their own laws that parallel the FMLA. Some states have laws that provide greater rights to a medical leave than that provided by the FMLA.

Paid sick leave

Although there is no federal statute establishing the right of any employee to paid medical leave, in September 2015, President Obama issued an Executive Order requiring federal contractors to provide employees working on government contracts with seven days or more of paid sick time per year.

In the past few years, there has been an explosion of paid sick time laws enacted by states and municipalities. For example, in January 2012, Connecticut became the first state to require employers with 50 or more employees to provide up to five days of paid sick leave to their 'service worker' employees. Other states have since followed suit, passing laws that require employers to provide paid sick leave; those states include Washington, Vermont, Rhode Island, Oregon, Arizona and Maryland. This trend has grown among municipalities as well. Municipalities, such as San Francisco, California; New York, New York; Chicago, Illinois; the District of Columbia; Jersey City and Trenton, New Jersey; Philadelphia, Pennsylvania; Seattle, Washington; and Portland, Oregon have enacted similar paid sick leave laws.

For example, San Francisco requires all employers to provide paid sick leave to employees (including temporary and part-time employees) who perform work in the city. 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. Similar laws have been adopted in other California municipalities.

New York City has also passed its own paid sick leave act. Under the New York City Earned Sick Time Act, which took effect on 1 April 2014, employers with at least 20 employees 'within the City of New York' are required to provide their employees with paid sick leave. Only employees who work more than 80 hours per year, including full-time, part-time and temporary or seasonal employees, are covered by the Act. These covered employees must accrue at least one hour of sick leave for every 30 hours worked, and are entitled to 40 hours of sick leave per calendar year. Although the law states that accrued but unused sick leave shall carry over from year to year, employers may limit employee usage to a maximum of 40 hours per year. The Act provides that paid sick leave may be used for absences owing to an employee's own medical care or the care of a family member in connection with a physical or mental illness, injury or health condition, and for closures of an employee's place of business or an employee's child's school or childcare provider owing to a public health emergency.

Chicago's Paid Sick Leave Ordinance mandates that all Chicago businesses provide paid sick leave to employees. Any employee who works at least 80 hours for an employer in Chicago within any 120-day period is covered by the Ordinance and is eligible for paid sick leave. Employees begin to accrue paid sick leave on the first calendar day after they begin their employment. For every 40 hours worked, employees accrue one hour of paid sick leave.

Similarly, the District of Columbia requires employers to provide paid sick time. Under the Accrued Sick and Safe Leave Act, the amount of leave employers are obliged to provide varies depending on the size of the company – from three to seven days per calendar year. Unused leave carries over annually, but an employer is never obliged 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. These permissible uses are commonly found in paid sick time ordinances and laws enacted by other jurisdictions nationwide.

Leave of absence

24 | 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.

The FMLA establishes a right for an eligible employee to take medical leave of up to 12 weeks during a 12-month period if the employee cannot work owing 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 arising from a family member's (eg, spouse's, son's, daughter's or parent's) 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.

Passed 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, and in some cases employers can require employees to use their accrued paid time off benefits during FMLA leave.

The United States Department of Labor published final FMLA regulations in 2009 and additional regulations relating to military family leave in early 2013. Combined, these two sets of regulations mark the first major regulatory changes to the FMLA since its enactment in 1993. Among other things, these regulations have altered the notice and certification requirements of the FMLA. They have also provided 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, these regulations provide substantial 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 leaves of absence owing 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 a 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 witnesses in legal proceedings, to perform services as volunteer firefighters or emergency responders, to participate in school or day-care activities, or to seek medical services and legal recourse as victims of domestic abuse or violent crime.

Mandatory employee benefits

25 | 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, except in Texas. In general, workers' compensation insurance provides partial wage replacement payments and, if needed, medical services and treatment and vocational rehabilitation services to an employee who sustains a work-related illness or injury. Workers' compensation is a subject of state, not federal, law. Most states also require employers to contribute to state-administered unemployment and disability insurance funds for which employees may be eligible for benefits upon termination of employment or becoming disabled.

Part-time and fixed-term employees

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

No.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

Employers that meet certain criteria must file an annual EEO-1 form with the EEO-1 Joint Reporting Committee of the Equal Employment Opportunity Commission (EEOC). The EEO-1 form requires employers to submit employment data categorised by race or ethnicity, gender and job category. Employers meeting the following criteria must file an EEO-1 form:

- All private employers that are subject to Title VII of the Civil Rights Act (Title VII) with 100 or more employees excluding state and local governments, primary and secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labour organisations; or employers that are subject to Title VII that have fewer than 100 employees if the employers are owned by or affiliated with another employer, or there is centralised ownership, control or management so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees.
- All federal contractors (private employers) that are not exempt as provided for by 41 CFR section 60-1.5 have 50 or more employees, are prime contractors or first-tier subcontractors, and have a contract, subcontract or purchase order amounting to US$50,000 or more; or serve as a depository of government funds in any amount; or are financial institutions that are issuing and paying agents for US Savings Bonds and Notes.

Importantly, the content of the EEO-1 form has been the subject of litigation, including related injunctive relief. Accordingly, the full scope of information required of employers with respect to publishing information on pay and other details about employees remains in flux. In 2019, the EEOC announced that it would not collect detailed employee compensation data on its Form EEO-1 in 2020. However, the EEOC is considering a new reporting requirement by which employers would submit pay data or related information as reasonable, necessary, or appropriate for the enforcement of Title VII and the Equal Pay Act.

Only those establishments located in the District of Columbia and the 50 states are required to submit the form. Both the EEOC and the Office of Federal Contract Compliance Programs use the form to collect data from private employers and government contractors about their female and minority workforce. The two agencies also use the data from the form to support civil rights enforcement and to analyse employment patterns, such as the representation of women and minorities within companies, industries or regions.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | 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 executed in connection with the sale of a business entity or sale of all or substantially all of the assets of a business entity.

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

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

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

Post-employment payments

29 | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Generally, there is no requirement that an employer continue to pay a former employee while he or she is subject to post-employment restrictive covenants in the absence of a contractual agreement between the employer and employee to do so. In some states, however, payment during the restricted period will increase the likelihood that a court will find the covenant reasonable and enforceable.

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

30 | 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 be held liable for the harm resulting from acts and omissions of their employees occurring in the scope and course of the employees' employment.

However, the 2013 United States Supreme Court decision *Vance v Ball State University*, 570 US 421 (2013) limited the scope of employees who are considered 'supervisors' such that employers can be held liable for their conduct. In *Vance*, the Supreme Court ruled that an employee is only a supervisor for purposes of imposing liability on an employer if the supervisor has the power to take 'tangible employment actions against the victim', which include such actions as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. If a supervisor does not meet these standards, the employer cannot be held vicariously liable for the supervisor's actions.

TAXATION OF EMPLOYEES

Applicable taxes

31 | 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 government-administered unemployment programmes, such as a state disability insurance benefit programme.

EMPLOYEE-CREATED IP

Ownership rights

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

Yes, most states have laws allowing an employer to require its employees, as a condition of employment, to assign all inventions to the employer except if an invention is not developed by:

- an employee using any of the employee's working time for the employer; and
- use of any employer equipment, supplies, facilities or trade-secret information.

However, even if these two requirements are met, the 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.

Trade secrets and confidential information

33 | Is there any legislation protecting trade secrets and other confidential business information?

Various federal and state laws protect trade secrets and confidential business information. Under federal law, the Computer Fraud and Abuse Act (CFAA) prohibits accessing a protected computer without authorisation or exceeding authorisation for the purposes of obtaining information, causing damages or perpetrating a fraud. The CFAA is primarily a criminal statute, but it also provides for civil liability and has been used by employers against former employees who unlawfully accessed computer systems. Many states also have legislation to protect trade secrets and confidential business information, such as the New

Jersey Computer Related Offenses Act and the Massachusetts Taking of Trade Secrets Law. Many states also have common law causes of action that can be used by employers when employees or former employees misappropriate confidential and proprietary business information.

The federal Defend Trade Secrets Act (DTSA) was enacted in 2016. The DTSA allows employers to bring suit in federal court to pursue trade secret disputes with current and former employees. Prior to the implementation of the DTSA, such claims were only cognisable in federal court if diversity jurisdiction existed. The DTSA does not pre-empt existing remedies under state law. Notably, the DTSA contains several specific procedural mechanisms and disclosure requirements not commonly found in common law that may affect the manner in which employers seek to enforce trade secret claims as well as their available remedies.

DATA PROTECTION

Rules and obligations

34 | 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 personal 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 personal data. The Americans with Disabilities Act 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 an employer to obtain background information on an applicant or employee 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, personal, 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. Biometric privacy has developed into a new area of legislative focus.

35 | Do employers need to provide privacy notices or similar information notices to employees and candidates?

No federal law requires privacy notices to employees and candidates; however, some states have enacted laws requiring privacy notices. For example, California's Consumer Privacy Act requires employers to provides notices describing the categories of personal information to be collected and the purposes for which the categories of personal information shall be used, which may include social security numbers, employment history, financial information, medical information and emergency contacts.

36 | What data privacy rights can employees exercise against employers?

In some jurisdictions, employees can file individual or class action lawsuits against their employers after a data breach, including common law claims for negligence or breach of contract. Additionally, state and local jurisdictions have increased their regulation of employee privacy with regard to biometric privacy. As employers increasingly rely on fingerprints, handprints, retinal scans and other forms of biometrics for security, timekeeping and employee tracking purposes, courts are seeing an increase in biometric privacy litigation.

BUSINESS TRANSFERS

Employee protections

37 | 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 the lay-off is covered by the Worker Adjustment and Retraining Notification Act, the affected employees are entitled to receive 60 days' advance notice of termination.

TERMINATION OF EMPLOYMENT

Grounds for termination

38 | 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. The state of Montana does not recognise at-will employment after a six-month, or otherwise agreed to, probationary period. In that state, after the probationary period has elapsed, an employer may only terminate an employee for 'good cause', which is defined as 'reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of operations, or other legitimate business reason'.

Notice

39 | 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 owing to a mass lay-off or plant closing as those terms are specifically defined under the Worker Adjustment and Retraining Notification Act (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.

40 | 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 owing 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.

Severance pay

41 | 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 these may be required in an individual employment or a collectively bargained agreement.

Procedure

42 | Are there any procedural requirements for dismissing an employee?

No, unless the employer has contractually agreed to such procedures in an individual employment or a collectively bargained agreement. Many states require, however, that terminated employees be provided information relating to their medical insurance benefits and eligibility for unemployment compensation insurance benefits.

Employee protections

43 | 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 an employee is employed at will and typically is not protected from dismissal, various federal and state laws provide the employee 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 a claim is filed, the employee typically 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; or
- 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 and implementation of remedial measures.

Mass terminations and collective dismissals

44 | 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 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 benefits governed by the Employee Retirement Income Security Act that 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, Illinois 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.

Class and collective actions

45 | Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Yes, individual employees may assert claims on behalf of other individuals through class or collective actions, and such claims have become extremely prevalent over the past decade. In a class action, all individuals who fall within the class definition will be deemed to be part of the class unless they affirmatively 'opt out' of the class. In a collective action, on the other hand, only those individuals who affirmatively 'opt in' will be deemed to be part of the class. In class or collective actions, employers may be required to disclose to opposing counsel the names and addresses of all employees, current and former, who may be part of the class so that opposing counsel may contact them.

Mandatory retirement age

46 | 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, although there may be exceptions in certain specific industries.

DISPUTE RESOLUTION

Arbitration

47 | 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 extensively 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.

Employee waiver of rights

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

Generally, yes. However, an employee cannot prospectively 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 National Labor Relations Act, 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 Age Discrimination in Employment Act requires that a waiver of age claims under it meet 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 Equal Employment Opportunity Commission issued 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.

Similarly, on 1 April 2015 and 16 August 2016, the US Securities and Exchange Commission issued press releases reflecting its position that confidentiality agreements or provisions that potentially could chill an employee's willingness to cooperate with a government agency or make whistle-blowing reports violate securities laws.

In response to the #MeToo movement, some states have also enacted laws that prohibit employers from requiring employees to waive certain rights, prohibiting waivers such as mandatory pre-dispute arbitration agreements, class action waivers and jury trial waivers.

Limitation period

49 What are the limitation periods for bringing employment claims?

The limitation periods vary based on the statutory or common law basis for employment-related claims. In general, however, the limitation periods for most employment-related claims range 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.

UPDATE AND TRENDS

Key developments of the past year

50 Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

Greater state and local involvement in gender discrimination claims

The #MeToo movement that began in 2017 has begun to produce meaningful legislative change, producing state- and locality-specific rules and requirements that in some instances exceed requirements of Title VII of the Civil Rights Act. The primary focus of this new wave of legislation has focused on restricting the use of non-disclosure agreements in sexual harassment settlements. Practitioners should be careful to confirm that settlement and severance agreements that purport to release sexual harassment and other gender discrimination claims comport with state and local requirements concerning non-disclosure agreements to avoid having such releases voided in subsequent litigation.

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Heightened joint-employment standard

The Obama administration took several steps between 2008 and 2016 to make it easier for employees to prove joint-employment status under both the National Labor Relations Act and traditional employment statutes, such as the Fair Labor Standards Act (FLSA). The Trump administration has undertaken several efforts in a trend towards rolling back those changes and making joint-employment status harder to prove. For example, the Department of Labor rescinded the Obama-era Department of Labor Interpretive Guidance 2015-1, which functionally created a presumption that leased workers and independent contractors were jointly employed by the entity contracting for their labour. Likewise, the National Labor Relations Board (NLRB) has gone back and forth through multiple cases between the more relaxed standard announced in the 2015 *Browning-Ferris Industries* decision and the more rigorous standard articulated in the 2017 *Hy-Brand Industrial Contractors, Ltd* decision. Meanwhile, the NLRB released new authority relaxing the standard for assessing independent contractor status in the 2019 *SuperShuttle DFW, Inc* decision. Employers should expect to see increasing uncertainty as courts attempt to reconcile these decisions. Meanwhile, it appears the Trump administration will continue to seek avenues to make proving joint-employment status more difficult and make it easier for employers to defend independent contractor classifications.

Updates to FLSA classification requirements

From 1 January 2020, the salary threshold for determining whether an employee may be classified as exempt from FLSA overtime requirements now requires that employees must make at least US$35,568 per year (US$684 per week) – up from US$23,660 per year (US$455 per week) – to qualify for 'white collar' exemptions. Additionally, employees must make at least US$107,432 per year with at least US$684 per week paid on a salary basis – up from US$100,000 per year – to qualify for the 'highly compensated employee' exemption. The new updates also reaffirmed the Department of Labor's intent to update the earnings thresholds more regularly in the future.

Emergency paid sick leave for covid-19

In response to the covid-19 pandemic, Congress passed the Families First Coronavirus Response Act (FFCRA), as amended by the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act). The FFCRA and the CARES Act have two paid leave components:

- the Emergency Paid Sick Leave Act:
  - a mandate for 10 paid sick days for specific needs arising from the covid-19 public health emergency; and
  - an entitlement to paid sick leave of 80 hours for a full-time employee, or of the number of hours that he or she works, on average, over a 2-week period for a part-time employee; and
- the Emergency Family and Medical Leave Expansion Act:
  - an amendment to the Family and Medical Leave Act (FMLA) creating a right to 12 job-protected weeks (of which 10 must be paid) when an employee is caring for a child owing to a school or day care closing related to covid-19; and
  - although an amendment to the FMLA, the above requirements apply to different sets of employers and employees from the other provisions of the FMLA.

These paid leave components are written as short-term remedies to workforce issues created by the covid-19 pandemic and, unless extended, will not apply beyond 2020.

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ISBN 978-1-83862-357-9