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EMPLOYMENT LAW OVERVIEW

USA 2019-2020

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I. GENERAL OVERVIEW

1. INTRODUCTION

The employment relationship in the United States is subject to markedly less regulation than in other countries. With the exception of some protections on wage and hours and a prohibition on discrimination, the parties to an employment relationship in the United States are generally free to negotiate and set the terms and conditions of their relationship. Moreover, the default position is that private-sector employment relationships are at-will: either the employer or the employee may terminate the employment relationship at any time, for any (non-discriminatory or non-retaliatory) reason with or without notice.

2. KEY POINTS

- The laws governing employment relationships in the U.S. come from federal, state and local statutes, agency regulations, and case law.
- Under United States law, there are no minimum requirements for an employment contract.
- Except in certain mass dismissals or as provided for in an employment contract or a collective bargaining agreement, U.S. law does not impose a formal "notice period" to terminate an individual employment relationship.
- Employees employed on an "at-will" basis may be terminated, with or without cause or grounds, provided it is not for an illegal reason, notably discrimination on grounds of a category protected by law or protected "whistleblowing" activity (reporting certain employer activity where the employee reasonably believes that the information he or she provided relates to potential violations of specific laws).
- Under U.S. labor law, if a majority of the employees in the bargaining unit who cast their vote had voted in favor of union representation, the union obtains the right of "exclusive" representation of all the employees in the bargaining unit (not only the employees who voted in favor of the union).

3. LEGAL FRAMEWORK

As a common law and federal nation, with fifty (50) states and countless municipal governments, the United States does not have a single set of codified labor and employment laws applicable to all employers. Rather, the laws governing employment relationships are derived from a variety of sources. Federal statutes: United States federal laws apply to all employers who engage in interstate commerce and set forth the minimum employment standards and protections governing employment relationships. The federal statutes address such issues as wage and hours, medical leaves of absence, discrimination, trade unions and bargaining with trade unions, mass layoffs and plant closings. In addition, immigration and work permits are regulated by federal law and apply to all employers regardless of the size or the nature of the business.

State statutes: Each state's laws are enforceable only within its own borders. State laws often provide rights not articulated in federal protections or mirror federal statutes while extending the federally provided protections to individuals not covered or protected or expanding the scope of protections afforded to employees. Further, state laws regulate unemployment insurance benefits and workers' compensation (for work-related illness and injuries).

Local statutes: Cities and municipalities often enact employment laws that can provide greater protection to employees than those provided by state or federal statutes. For example, although federal law does not prohibit discrimination based on gender identity in the private sector, the laws of numerous state and local governments outlaw such discrimination. (Employees who work for the U.S. federal government are also protected against discrimination on grounds of sexual identity under the Civil Services Reform Act of 1978.)

Federal, state and agency regulations: Rules promulgated by federal, state and local Employment Opportunities Commission ("EEOC"), the Internal Revenue Services, or the Department of Homeland Security set forth procedures for implementing federal, state or local statutes.

Court decisions: Through their decisions, United States courts interpret federal, state, and local statutes and regulations and apply them to facts presented in each particular case. Past decisions of the appellate courts serve as binding precedent on the lower courts.

4. NEW DEVELOPMENTS

A. SEX DISCRIMINATION

On October 4, 2017, Attorney General Jeff Sessions reversed the Department of Justice's position that gender identity is protected as part of Title VII of the Civil Rights Act's prohibition against sex discrimination. The Department's position is contrary to the current guidance from the EEOC, which has stated definitively that it interprets, and will enforce accordingly, Title VII's prohibition on sex discrimination as encompassing employment discrimination based on gender identity and sexual orientation.

The Occupational Safety and Health Administration, as well as the EEOC, mandates that employers allow transgender employees to use the bathroom that corresponds to that employee's gender identity. Employers may choose to offer a single-stall, separate bathroom facility to all employees, including those individuals who identify as transgender or are in the process of transitioning. However, employers may not mandate that transgender employees use separate bathroom facilities.

Additionally, gender identity is included as a protected class under 19 state and several hundred local anti-discrimination laws. The Department of Justice's position leaves these laws unchanged.

B. CLASS ACTIONS

The U.S. Supreme Court recently ruled that class action waivers in employment arbitration agreements do not violate the National Labor Relations Act (NLRA). Epic Systems Corp. v. Lewis, No. 16-285; Ernst & Young LLP et al. v. Morris et al., No. 16-300; National Labor Relations Board v. Murphy Oil USA, Inc., et al., No. 16-307 (May 21, 2018). The Court explained that Section 7 of the NLRA is focused on employees' rights to unionize and engage in collective bargaining and that Section 7 does not extend to protecting an employee's right to participate in a class or collective action. Section 7 provides that employees have the right to form, join, or assist unions, and to engage in other concerted activities for their mutual aid and protection. The Court held that class action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act.

II. PRE-EMPLOYMENT CONSIDERATIONS

1. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

As a matter of tax, state corporate law, and other regulatory requirements, it may be necessary to either establish a local entity or register a foreign entity locally, depending on the nature and scope of the business activity associated with the hiring. This needs to be investigated with tax and corporate law advisors on a case-by-case basis. Independent of these requirements, the foreign employer may be subject to federal and state income tax withholding obligations as well as payment of social security, disability, unemployment and other payroll contributions with respect to employment of individuals within the US.

2. LIMITATIONS ON BACKGROUND CHECKS

It is illegal in certain U.S. states (and cities) to ask about an applicant's criminal history on an employment application. Such laws typically make exceptions for certain positions for which criminal history information may be required by law. The best practice under U.S. law is generally to avoid asking about arrests and/or convictions on the job application and, instead, wait until the employer has made a conditional offer of employment. In the case of a conviction revealed later in the application process, the best practice is to conduct an individualized assessment of the job-relatedness of the conviction to the job to which the candidate applied.

Another consideration in the application process is compliance with the federal Fair Credit Reporting Act ("FCRA"), which governs the collection, assembly and use of information about consumers by consumer reporting agencies, including credit information, criminal background, motor vehicle reports, and other public record information. Though FCRA applies only to "consumer reports," employers must ensure they comply with any relevant requirements if they seek to obtain such information. Certain states and cities also prohibit the use of credit-related information when making employment decisions.

3. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

In general, federal prohibitions on employment discrimination (see Section V below) also apply to hiring decisions. In other words, just as you cannot terminate an employee because he or she belongs to a protected category, you cannot refuse to hire an applicant on account of his or her protected status. For this reason, employers should avoid asking questions on a job application or in an interview, which are likely to reveal the applicant's membership in a protected group. Similarly, to comply with background check laws mentioned above, employers should avoid asking about arrests and/or convictions on the job application or during an interview.

III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

Under the laws of the United States, there are no minimum requirements for an employment contract. Also, in most states, no written memorialization of any terms is required. An employment relationship in the United States is presumed to be "at-will," i.e., terminable by either party, with or without cause or notice. Indeed, a majority of employees in the United State are employed on an "at-will" basis, without a written employment contract, and only with a written offer of employment that outlines the basic terms and conditions of their employment. There are no requirements as to the minimum contents of an offer letter. In some states, such as New York, employers must by law notify employees in writing of some of the terms of employment (but not as extensive as is required under the law of EU Member countries). Under New York law, employers must notify employees in writing at the time of hiring of their regular rate of pay, pay day and overtime rate, if applicable, as well as the method of payment (i.e., whether employees will be paid by the hour, shift, day, week, salary, piece or commission) and any allowances that will be claimed as part of the minimum wage (for tips, meals or lodging), among other requirements.

Highly-skilled and compensated employees (e.g., high-level executives) are traditionally employed pursuant to written employment contracts. These contracts specify the basic terms and conditions of employment, such as position, job responsibilities, salary, compensation, incentive pay, and stock options. These also define what conduct will justify termination for cause and provide for severance pay in case of termination without cause.

Whether the employment relationship is "at-will" or pursuant to a written employment contract, parties are free to negotiate and set the terms and conditions of their relationship, so long as none of the provisions violate any federal, state or local law, rules or regulations governing the employment relationship (e.g., the pay practices established in the Fair Labor Standards Act, the prohibition of discrimination under the federal Civil Rights Act of 1964, and the like).

2. FIXED-TERM/OPEN-ENDED CONTRACTS

No legal provision governs fixed or unlimited term contracts. Unlike many other countries, American law does not limit the duration of a fixed-term employment contract or the circumstances under which the parties may enter into a fixed-term employment contract. In the absence of an employment contract, employment relationships are presumed to be "at-will," terminable by either party at any time, with or without cause.

3. TRIAL PERIOD

No legal provision governs a formal "trial period." However, many employers have an internal policy on trial periods, often referred to as "introductory periods" or "probationary periods." These internal policies are crafted based on the needs of a particular employer. They generally provide for a formal performance evaluation after an initial stated period of employment (often ninety (90) days). Employers generally condition an employee's participation in their individually established employee benefits programs on a successful completion of the "probationary" or "introductory"

period. If the employees are represented by a labor union, the provisions of the collective bargaining agreement protecting the employees against discharge without cause frequently do not apply to employees during their probation period of employment.

4. NOTICE PERIOD

Except in certain mass dismissals or as provided for in an employment contract or a collective bargaining agreement, U.S. law does not impose a formal "notice period" to terminate an individual employment relationship. Most employees are employed "at-will" and either party can terminate the employment relationship without notice. In some states, where payout of unused vacation time is not required by law, employers frequently will pay an employee for unused vacation days, provided the employee gave some advanced notice of resignation.

Under the Worker Adjustment and Retraining Notification Act ("WARN Act"), employers must give 60 days' advance notice to affected employees in advance of plant closings or covered mass layoffs. A further discussion of the requirements of the WARN Act can be found below.

IV. WORKING CONDITIONS

1. MINIMUM WORKING CONDITIONS

The federal Fair Labor Standards Act ("FLSA"), regulates wages, working hours and overtime pay for covered employees. Certain employees employed in "executive, administrative or professional" positions are not covered under the FLSA and are deemed "exempt" from its requirements. Other categories of employees are also "exempt" under the FLSA. These include, among others, outside sales employees, certain skilled computer professionals, employees of certain seasonal amusement and recreational businesses, causal babysitters and persons employed as companions to the elderly or infirm. Other categories of employees are exempt from the FLSA's overtime pay requirements only.

2. SALARY

The FLSA sets forth a (national) minimum wage for all non-exempt employees of $7.25 per hour. As directed by former President Barack Obama in Executive Order 13658, the U.S Department of Labor ("DOL") released a Notice of Proposed Rulemaking in June 2014 to increase the minimum wage for all workers on new federal contracts. Effective January 1, 2018, the minimum wage for federal contractors working on or in connection with contracts covered by Executive Order 13658 will be $10.35 per hour.

States are free to legislate a higher minimum wage. The majority of U.S. states have minimum wage rates above the federal standard. Some cities impose higher minimum wage rates for employees that work for employers in the municipal areas of those cities. For example, in San Francisco, the minimum wage is $15 per hour as of July 2018.

3. MAXIMUM WORKING WEEK

American workplace law does not impose maximum working hours. However, many state statutes mandate daily rest periods as well as a one-day rest period each week. For example, a number of states (including California, Colorado, Kentucky, Nevada, Oregon and Washington) generally require that employees who work more than four hours per day receive a break of at least 10 minutes for every hour worked. Also, many states require an unpaid meal break of at least 30 minutes after employees worked a set number of hours per day (which threshold working hours generally ranging from five to eight, depending on the specific state law). Furthermore, several states (including California, Illinois, Massachusetts and New York) mandate that employee receive at least one day off in each seven-day period.

4. OVERTIME

Under the FLSA, non-exempt employees must receive one-and-one-half times (1.5X) their regular rate of pay for all hours worked in excess of 40 hours per week. Generally, non-working time, including leaves of absence, rest periods, holidays and vacation time, is not counted toward the 40-hour-a-week overtime threshold.

5. HEALTH AND SAFETY IN THE WORKPLACE

A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The Occupational Safety and Health Act ("OSHA") requires employers to provide employees with a safe and healthy place of employment, which is free from recognized hazards (death or serious physical harm). The OSHA regulations govern a wide variety of workplace conditions, and require employers: a) to remedy known workplace hazards; b) to limit the amount of hazardous chemicals workers can be exposed to; c) to use certain safe practices and equipment; and d) to monitor hazards and keep records of workplace injuries and illnesses.

B. INVESTIGATIVE PROCEDURES

There are several ways that the Occupational Safety and Health Administration, the government agency responsible for enforcing the OSH Act, may initiate an inspection of an employer's facility or worksite:

- **Imminent Danger:** These inspections are initiated upon OSHA learning of a hazard that could potentially cause death or serious bodily harm at a worksite.
- **Fatalities or Catastrophes:** These types of inspections will be initiated following an employer report of a work-related fatality or in-patient hospitalization of one or more employees.
- **Complaints:** Complaint inspections are initiated as a result of employees contacting the agency to raise safety and health concerns. Complaint inspections are increasingly common. Employees are offered anonymity for these complaints and can now make them with the click of a button over the internet.
- **Referrals:** Referral inspections are similar to complaint inspections, except the safety and health concerns come from other agencies or individuals outside of the company.
- **Programmed Inspections:** These inspections are aimed at specific high-hazard industries or workplaces that have exhibited high rates of injuries or illnesses.

C. PROTECTION FROM RETALIATION

Any employee who believes that he or she has been discharged or retaliated against as a result of engaging in protected activity, such as reporting potentially unsafe working conditions, may file a whistleblower complaint with the Occupational Safety and Health Administration. The complaint does not have to be filed in writing or be particularly detailed or specific in nature. The complaint must be filed, however, within 30 days of the discharge or other retaliatory conduct. Thus, in addition to ensuring overall compliance with OSHA safety and health standards, employers need to ensure that they have strong internal programs to encourage employees to voice safety and health complaints and do so without fear of retaliation.

V. ANTI-DISCRIMINATION LAWS

1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

It is illegal under U.S. federal law to discriminate against an employee, either intentionally or through a disparate impact, on account of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to harass an employee on account of these protected characteristics or to retaliate against an employee because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. Most employers with at least 15 employees are covered by this body of federal law, as are most labor unions and employment agencies.

2. EXTENT OF PROTECTION

Title VII and Title II of the Civil Rights Act of 1964: Title VII prohibits discrimination against employees and applicants on the basis of race, color, sex (including pregnancy), national origin, and religion. Title VII and other federal discrimination laws also protect employees from retaliation for complaining of discrimination, filing a charge, or assisting in an investigation of discrimination.

Age Discrimination in Employment Act ("ADEA"): The ADEA prohibits employment discrimination against people 40 years of age and older.

Americans with Disabilities Act ("ADA"): The ADA is a federal law prohibiting discrimination against individuals (employees, applicants, and guests) with a disability and requires the provision of a reasonable accommodation to someone who is legally disabled. The ADA Amendments Act of 2008, which expressly overturned several landmark Supreme Court decisions narrowly interpreting the definition of "disability," significantly expanded the protections afforded to disabled individuals. As a result, many more health conditions are now considered "disabilities" under the ADA, for which reasonable accommodation may be required.

Equal Pay Act ("EPA"): The Equal Pay Act is an amendment to the Fair Labor Standards Act that prohibits paying different wages to employees of different sexes who perform equal work under similar conditions.

Pregnancy Discrimination Act ("PDA"): The PDA is an amendment to Title VII that prohibits discrimination against an employee because of pregnancy.

Genetic Information Non-Discrimination Act ("GINA"): GINA prohibits employers from discriminating against employees because of an employee's "genetic information." The law also prohibits employers from requesting, requiring or purchasing genetic information of an employee, subject to a small number of limited exceptions. Under GINA, "genetic information" means information about the "genetic tests" of an individual or his family members, and information about the manifestation of a disease or disorder in family members of such individual. Medical tests such as blood counts, cholesterol screenings, or liver function tests are not "genetic tests."

State Laws: State laws only apply to the states in which they are enacted. Many states have passed laws that prohibit discrimination. Often these laws mirror federal statutes. However, in some cases these laws provide additional or increased protections not required by federal laws, such as prohibiting discrimination based on marital status or sexual orientation. In states with more

expansive employee protections, state law will often predominate as a basis for employment law claims.

3. PROTECTIONS AGAINST HARASSMENT

The prohibitions on discrimination under Title VII, the ADEA and the ADA discussed above include harassment, which is unwelcome conduct, based on one of these protected characteristics, that a "reasonable person" would consider " intimidating, hostile, or abusive" (EEOC website). It is also illegal to harass individuals in retaliation for engaging in protected conduct, such as filing a discrimination charge or participating in an investigation of alleged discriminatory conduct. In general, the person engaging in harassing conduct does not need to be the victim's supervisor and can be any agent of the employer, a co-worker, or a non-employee. However, the employer will only be liable for harassment by a non-supervisory employee or non-employee if it has control over the harasser and it knew, or should have known, about the harassment and failed to take prompt and appropriate corrective action.

4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

The ADA defines "discrimination" as including the failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. Undue hardship means that the accommodation would be too difficult or too expensive to provide, in light of an employer's size, financial resources, and the needs of the business. If more than one accommodation is effective, the employer may choose which one to provide and need not provide the accommodation requested by the employee.

Some examples of a reasonable accommodation include part-time or modified work schedules and job restructuring. The EEOC's Enforcement Guidance also provides that unpaid leave is a form of reasonable accommodation when necessitated by an employee's disability. Because an employer's reasonable accommodation obligations continue as long as an employee is disabled, the obligation to provide job-protected leave under the ADA may require that employers provide job-protected leave for periods beyond that required by other federal or applicable state law.

The EEOC has also taken the position that employers must accommodate an employee's reasonable request for modification of dress and uniform policies on sincerely held religious beliefs unless there is an undue hardship. For this purpose, undue burden is easier for employers to prove than under the ADA, though still substantial.

5. REMEDIES

U.S. employees who believe they have been unfairly discriminated against may seek redress in various federal, state and local administrative agencies, and the U.S. federal and state courts. Individuals who assert federal discrimination claims (and some state claims) must first file a charge of discrimination with the federal EEOC or the relevant local agency before bringing a lawsuit against the employer in court. In the federal system, the agency will then investigate and determine whether or not there is reasonable cause to believe that discrimination occurred. If the agency finds that there is reasonable cause, it will attempt to reach a voluntary settlement with the employer. In some cases, the agency will file a lawsuit in federal court on the employee's behalf. The employee can only sue the employer in court if the agency does not find reasonable cause or cannot obtain recovery for the individual.

In the U.S., if the court finds that a termination was the result of unlawful discrimination, the employee may be entitled to reinstatement (rarely granted), monetary damages and attorneys' fees. Monetary damages include compensation for wages and benefits lost as a result of the termination, and, in some cases, for emotional or physical distress suffered as a result of the employer's actions. In cases involving an egregious violation of the law,

the employer may be liable for punitive damages. Federal law imposes caps on compensatory and punitive damages; many states do not.

6. OTHER REQUIREMENTS

In general, federal and state anti-discrimination laws prohibit racially-motivated employment decisions, even if the employer's goal is to promote diversity. However, in extraordinary limited instances where neutral measures have failed, the Supreme Court and EEOC have authorized race/gender-conscious programs and employment selection decisions—provided such actions are taken pursuant to a compliant Voluntary Affirmative Action Plan.

Some exceptions also exist with respect to companies that do business with the U.S. federal government. Specifically, government contractors must comply with additional equal employment opportunity rules and regulations, including: (1) Executive Order 11246, which applies to minorities and women; (2) Section 503 of the Vocational Rehabilitation Act of 1973, which applies to individuals with disabilities; and (3) The Vietnam Era Veterans' Readjustment Assistance Act of 1974, which applies to certain groups of protected veterans, including veterans with disabilities and recently separated veterans. These obligations are enforced by the Department of Labor's Office of Federal Contract Compliance Programs.

VI. SOCIAL MEDIA AND DATA PRIVACY

1. RESTRICTIONS IN THE WORKPLACE

While there is no specific rule prohibiting employers from restricting employees' social media use during working hours, there are certain laws, discussed below, that employers should consider, particularly with respect to any type of monitoring of employees' social media use.

A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

The Stored Communications Act ("SCA") generally prohibits accessing the online account of another without that individual's consent. Similarly, simply asking employees for the passwords to access their social media or online account generally is impermissible in a number of states. In addition, employees have common law "privacy rights" which are enforced through tort claims based on invasion of privacy theories.

Further, the National Labor Relations Board ("NLRB") has ruled employees have a right to use their employers' email systems for nonbusiness purposes, including communicating about union organizing. Specifically, the NLRB held "employee use of email for statutorily protected communications on nonworking time must presumptively be permitted," Purple Communications, Inc., 361 NLRB No. 126 (Dec. 11, 2014) (emphasis added).

Recently, the NLRB asked for briefs on whether it should modify or overrule its rule in Purple Communications. Rio All-Suites Hotel and Casino, No. 28-CA-060841 (Aug. 1, 2018). The Board also asked whether its standard should apply to computer resources beyond email systems, such as instant messages, text messages, and postings on social media.

While different employers can reach different conclusions about whether to monitor employees' social media use, in all cases, employers should avoid efforts to gain unauthorized access to an employee's social media account information and should carefully consider any employment decisions it intends to implement on account of information obtained through social media.

2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Employers must tread carefully in situations where an employee disparages the employer or divulges confidential information using social media.

First, the employee may be protected under a federal or state whistleblower law, which generally protects employees who complain about certain company activities or conditions affecting public health and safety or violating public policy standards, as well as employees who report potential securities fraud violations. For example, the Sarbanes-Oxley Act of 2002 ("SOX") prohibits employers from terminating employees for "provid[ing] information, caus[ing] information to be provided, or otherwise assist[ing] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of … any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders."

The investigation, however, must be conducted by, among others, a person with supervisory authority over the employee. An employee who reports alleged securities fraud on a company blog monitored by management to detect improper activities within the workplace could be protected, for example, under SOX.

Second, the National Labor Relations Act ("NLRA") affords employees (even those who are not unionized) the right to engage in "concerted activity," including the right to discuss the terms and conditions of their employment—and even to criticize their employers—with co-workers and outsiders. Not all concerted activities are protected by the NLRA; only those activities that are engaged in for the purpose of collective bargaining or other mutual aid or protection are covered. In general, employee's concerted activity will be protected under Section 7 of the NLRA where, for example, the employee's statements implicate the employee's working conditions, regardless of how those statements are communicated. Another example of protected activity under Section 7 occurs when the employee protests supervisory actions. However, these protections can be lost where the employee's outbursts about a supervisor are too "opprobrious" to maintain protection under Section 7. Protection also could be lost where the communication is disloyal or has the tendency to damage an employer's business and are made with reckless disregard of the truth or are maliciously untrue. What exactly constitutes protected concerted activity requires further examination and analysis of the facts at issue on a case-by-case basis.

In 2012, the NLRB Acting General Counsel issued a report finding certain policy language regarding employee social media use to be problematic, including the following:

- Prohibiting posts discussing the employer's non-public information, confidential information, and legal matters (without further clarification of the meaning of these terms);
- Prohibiting employees from harming the image and integrity of the company, making statements that are detrimental, disparaging or defamatory to the employer, and prohibiting employees from discussing workplace dissatisfaction; and
- Prohibiting posts that are inaccurate or misleading or that contain offensive, demeaning or inappropriate remarks, and instructing employees to use a friendly tone and not engage in inflammatory discussions.

On the other hand, the Acting General Counsel found a social media policy that prevented "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct" to be lawful "since it prohibit[ed] plainly egregious conduct, such as discrimination and threats of violence." Additionally, the Acting General Counsel determined that an employer's social media policy preventing the dissemination of trade secrets and confidential information was lawful where the policy provided numerous examples of what specifically should not be disseminated, such as system development information, processes and internal reports. Though the NLRB is unlikely to rescind the 2012 memorandum, NLRB interpretations may be more favorable to employers now that there is a Republican majority on the Board.

VII. AUTHORISATIONS FOR FOREIGN EMPLOYEES

REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Foreign nationals without permanent resident status or a work visa are not permitted to work in the United States. An employer seeking to hire a foreign national may file, on behalf of its prospective employee, a petition with the United States Department of Homeland Security/ United States Citizenship and Immigration Services ("USCIS") for an employment visa. If the petition is approved, the prospective employee must obtain a "visa stamp" from a United States embassy or consulate. Canadian citizens are exempt from this requirement.

Alternatively, an employer may sponsor a potential employee's application for permanent resident status, referred to as a "green card," if they are able to establish that the potential employee is a multinational executive/manager transferee, has unique skills, or is being offered a job in the United States for which the employer has been unable to recruit a U.S. worker who meets the minimum requirements of the position. In most of the immigrant visa categories, the processing delays make it impractical to use an immigrant visa as the vehicle for entering the United States for an initial assignment. The normal procedure is to obtain a short-term work visa initially and seek an immigrant visa after the employee has started working in the United States. All employers are obligated to verify that all individuals they employ are authorized to work in the United States. To do so, employers are required to complete a USCIS Form I-9 for each newly hired employee. Employers have the option of participating in the on-line E-Verify program, under which USCIS confirms whether or not an employee is in fact authorized to work in the United States.

Rather than hiring workers one by one, U.S. companies may engage outsourcing and staffing firms that obtain H-1B visas and hire groups of high-skilled foreign workers who then are placed with the U.S. company as needed. As part of its effort to protect the U.S. workforce and prevent the abuse of immigration programs as outlined in the "Buy American, Hire American" Executive Order, the Trump Administration has targeted outsourcing and staffing firms that use H-1B visas. The Administration said abuses of the H-1B program, such as not paying the required wage or having workers do "non-specialty occupation" work, harm the U.S. workforce and are more likely to occur at third-party worksites.

VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

Generally, employees employed on an "at-will" basis may be terminated, with or without cause or grounds, provided it is not for an illegal reason, notably discrimination on grounds of a category protected by law or protected "whistleblowing" activity (reporting certain employer activity where the employee reasonably believes that the information he or she provided relates to potential violations of specific laws). The employment contracts of executives and other highly-skilled individual often incorporate a "just cause termination" clause, mandating that the employee may only be terminated for "cause" and lists the permissible grounds. In such cases, the grounds for a "just cause" termination are negotiated by the parties on a case-by-case basis.

2. COLLECTIVE DISMISSALS

There are no restrictions on an employer's ability to collectively dismiss its employees. However, the WARN Act requires covered employers to provide 60 days' notice in advance of covered plant closings and mass layoffs to: 1) the affected workers or their representatives (e.g., a labor union); 2) the dislocated worker unit in the state where the layoff or plant closing will occur; and 3) to the local government.

In general, employers are covered by the WARN Act if they have 100 or more employees, excluding employees who have worked fewer than six months in the last 12 months and not counting employees who work an average of fewer than 20 hours a week. A covered plant closing is defined under the WARN Act as the shutdown of an employment site (or one or more facilities or operating units within an employment site) that will result in an employment loss (as defined) for 50 or more employees during any 30-day period. This does not count employees who have worked fewer than six months in the last 12 months or employees who work an average of fewer than 20 hours a week for that employer. These latter groups, however, are entitled to notice.

A covered mass layoff is defined as a layoff that does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's active workforce. As defined in the WARN Act, "employment loss" means: (1) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding six months; or (3) a reduction in an employee's hours of work of more than 50% in each month of any six-month period.

Even if a single mass layoff or plant closing does not trigger the WARN Act's collective dismissal requirements, an employer also must give the 60-day WARN Act notice if the number of employment losses for two or more groups of workers, each of which is fewer than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period, of either a plant closing or mass layoff.

In addition to the federal WARN Act, many states have implemented their own collective dismissal notification statutes, known as "mini-WARN" laws. The state mini-WARN laws often mirror the federal statute, but often lower the minimum thresholds for providing notice.

3. INDIVIDUAL DISMISSALS

Except as otherwise provided in an employment contract or collective bargaining agreement, no law requires employers to follow a formal procedure when discharging individual employees. However, employees are protected from unfair dismissal in violation of federal, state and local discrimination or anti-retaliation laws.

A. IS SEVERANCE PAY REQUIRED?

Except as otherwise provided in an employment contract or collective bargaining agreement, employers need not make severance payments to terminated employees. However, employers often offer severance payments to bind an agreement made between the employer and employee at the time of termination to waive any potential claims arising out of the employment relationship.

4. SEPARATION AGREEMENTS

A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

Separation agreements are not required under U.S. law. In certain situations, the employee may agree to a contractual waiver of statutory rights, such as those under federal and state anti-bias laws.

B. WHAT ARE THE STANDARD REQUIREMENTS OF A SEPARATION AGREEMENT?

Such agreements must generally meet a number of requirements to be enforceable, including the following: (1) the waiver must be knowingly and voluntarily executed by the employee; (2) the process for obtaining the waiver must be free of employer fraud, undue influence, or other improper conduct; and (3) the agreement must be supported by consideration over and above any benefits to which the employee is entitled as a matter of policy or past practice (e.g., severance pay or a severance plan, extended or continued insurance coverage, outplacement services, pro rata incentive compensation, or forbearance on employee loans).

C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

Specific criteria must be satisfied for a waiver of federal age discrimination claims to be considered "knowing and voluntary" under the Older Workers Benefit Protection Act ("OWBPA"). The waiver must be written in easily understandable terms, must refer specifically to rights and claims existing under the Age Discrimination in Employment Act, must provide a minimum time period for consideration and revocation, and cannot extend to rights or claims that may arise after the date the release is executed. Additionally, it must advise the individual in writing to consult an attorney before executing the agreement.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

Additional disclosure requirements apply when waivers are requested from a group or class of employees, as in a mass layoff or reduction in force.

5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

Although individuals employed on an "at-will" basis can be dismissed with or without cause, they are protected from discriminatory adverse employment actions, including dismissal, under the federal, state and local civil rights laws, as well as various anti-retaliation provisions discussed elsewhere in the memo.

In addition to the civil rights statutes, employees are protected from dismissal in retaliation for engaging in various "protected activities," including: 1) making reports or complaints regarding potential violations of federal securities law; 2) making reports or complaints of dangers to the public health or safety; and 3) reporting conduct that is

against the public welfare or public policy. Some states have broader whistleblowing laws protecting complaints of possible fraudulent or criminal conduct.

Employees found to have been unfairly terminated in violation of the civil rights statutes or anti-retaliation provisions can resort to the various administrative agencies and the court systems. If an employee is found to have been terminated in violation of any applicable statute, the employee may be entitled to some or all of the following remedies: 1) reinstatement to former position; 2) monetary damages for wages and benefits lost as a result of the termination; 3) monetary damages for any emotional or physical distress suffered as a result of the employer's actions; 4) punitive damages intended to punish an employer for egregious violations of the law; and 5) attorneys' fees.

6. WHISTLEBLOWER LAWS

Two major whistleblower laws in the U.S. are the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Act of 2010. There are also a number of OSHA whistleblower statutes that prohibit retaliation, or "adverse action," against workers who report injuries, safety concerns, or other protected activity. Further, there are a number of whistleblower laws at the state and local levels which generally prohibit retaliation against employees who report misconduct. In some states (e.g. New Jersey under the very broad Conscientious Employee Protection Act), it is very important for the employer to consider potential whistleblowing exposure whenever disciplining or terminating an employee. The Sarbanes-Oxley Act includes provisions prohibiting discrimination against corporate whistleblowers who have revealed financial and other wrongdoing within a publicly traded company. SOX includes a broad range of corporate accountability and transparency measures, including a requirement that corporate boards establish internal independent audit committees. These audit committees must establish complaint procedures and accept anonymous complaints. SOX also includes provisions for enhanced financial disclosures, as well as provisions addressing auditor independence and certification of financial statements by corporate officers.

Sarbanes-Oxley's whistleblower provisions create broad protection for employees of publicly held companies (and their contractors, subcontractors, and agents) who have a reasonable belief that fraud or other wrongdoing has occurred in violation of U.S. securities laws. A range of conduct is protected, including internal complaints, communications with Congress, contacts with government agencies, and participation in investigations of securities law violations. Employees who suffer reprisals for engaging in protected conduct may file administrative complaints with the U.S. Department of Labor's Occupational Safety & Health Administration ("OSHA") within 180 days of the alleged discrimination. Complainants may name the company as well as specific individuals in such complaints. OSHA is required to determine whether there is reasonable cause to believe that the complaint has merit within 60 days of the filing of the complaint. If OSHA believes the complaint has merit, it can order relief, including preliminary reinstatement.

The Dodd-Frank Act allows for the award of monetary incentives to individuals who voluntarily provide original information relating to a violation of the securities laws, which results in the collection of monetary sanctions exceeding $1 million dollars. The bounty can range from 10 to 30 percent of the aggregate amount of sanctions collected, to be set at the discretion of the Commission (a number of factors are considered). The anti-retaliation provision prohibits an employer from retaliating against a whistleblower who makes one of three types of disclosures: i) those required by the Sarbanes-Oxley Act of 2002 (SOX); ii) those required by the Securities Exchange Act of 1934; and iii) those required by any other law, rule, or regulation subject to the SEC's jurisdiction.

IX. RESTRICTIVE COVENANTS

1. DEFINITION OF RESTRICTIVE COVENANTS

Restrictive covenants are contracts entered into between the employer and employee to protect the employer's business interests, such as trade secrets and other confidential information, investments in employee training, and customer goodwill.

2. TYPES OF RESTRICTIVE COVENANTS

A. NON-COMPETE CLAUSES

Non-compete clauses generally prohibit an employee from working for competitors or otherwise engaging in competitive business activities during the period of and for some set period after employment. Some common elements of a non-compete clause include:

- Tolling provision: Time for non-solicit / non-compete is tolled during the period of any breach.
- Provision clarifying that the agreement supplements, rather than replaces, statutory and common law obligations (e.g., employee duty of loyalty or applicable trade secret statute)
- Provision permitting employee and / or employer to show agreement to potential subsequent employers
- Provisions allowing the court to "blue pencil" overly broad restrictions and enforce the remainder of the covenant.

B. NON-SOLICITATION OF CUSTOMERS

These provisions typically try to protect customer goodwill by preventing employees from attempting to take away the employer's customers post-employment.

C. NON-SOLICITATION OF EMPLOYEES

These provisions typically try to protect the employer's investment in training and development of its workforce by preventing employees from attempting to take away the employer's employees post-employment.

3. ENFORCEMENT OF RESTRICTIVE COVENANTS—PROCESS AND REMEDIES

The enforceability of restrictive covenants in the U.S. is determined by state law. Generally, courts in states that enforce non-compete agreements hold that a covenant restricting the activities of an employee upon the termination of his or her employment with the employer will be enforced if it protects a legitimate business interest, is reasonably limited in scope, time and place, and is supported by consideration, and is reasonable. In other words, it should afford only a fair protection to the employer's interest and not be so broad in its operation as to interfere with the interests of the public or prevent an employee from engaging in his or her livelihood.

The reasonableness of a restrictive employment covenant often is considered using the following six factors:

- Length of time the restriction operates;
- Geographical area covered;
- Scope of business covered;
- Fairness of and business need for the protection accorded to the employer;
- Extent of the restraint on the employee's opportunity to pursue his occupation; and
- Extent of interference with the public's interests.

Some common remedies included in restrictive covenant agreements are:

- Irreparable Harm: Acknowledges that breach will cause and entitle employer to seek and obtain injunctive relief.
- Attorneys' Fees: Beware of generic "prevailing party" language (some courts interpret this as a requirement for success on the merits).
- Arbitration: Particularly if confidentiality is a real concern (including right to expedited discovery and relief).
- Forfeiture: Conditions the receipt of certain benefits / compensation on the promise of non-competition.

4. USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is a period during which a departing employee provides notice to the employer and is given his or her salary for a set period of time, but is not permitted to work. The underlying rationale for garden leave is to prevent the employee from competing in some way with the employer or taking confidential information during this period of time. Like restrictive covenants more generally, there is no clear federal law regarding garden leave and each situation will be examined independently. Unlike in many countries, however, it should not be assumed that garden leave would be valid in the U.S. if it does not satisfy restrictive covenant requirements.

X. TRANSFER OF UNDERTAKINGS

1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

No statute governs the employment relationship when a business transfers to new ownership. As most employees are employed "at-will," a "new employer" is free to offer employment to the employees of the seller/transferor employer or alter the terms and conditions of employment at the employment site. If a transfer of undertaking will result in a plant closing or mass layoff, as defined under the WARN Act, employees are entitled to 60 days' advance notice by the seller/old employer. If a union represents the employees of the seller, the new employer may be under a duty to bargain with the labor union and cannot change any terms and conditions of employment without first bargaining with the labor union.

2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

There is no obligation for a party acquiring a business (an asset sale) to retain any of the seller's employees. However, if the new employer reorganizes the workforce after the transfer, which results in a covered plant closing or mass layoff, the new employer or "take over party" must provide the employees with 60 days' advance notice. In addition, an employer who acquires a workforce consisting of unionized employees is required to bargain with the union in good faith regarding the effect of the layoff on unionized employees and, in certain situations, may be required to honor the terms and conditions of employment articulated in an existing collective bargaining agreement.

XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Trade unions constitute the largest and most influential employee organizations in the United States. A majority of trade unions are organized under two umbrella organizations: the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the Change-to-Win Federation.

The largest employer organization in the United States is the United States Chamber of Commerce, an organization dedicated to representing employer interests by engaging in lobbying campaigns. In certain heavily unionized sectors (e.g., healthcare), employers can and do create multi-employer bargaining organizations to collectively negotiate the terms of collective bargaining agreements with employee-elected unions.

2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

Due to the United States Constitution's guarantee of a freedom of association, employees are free to form and join trade unions. Approximately 15 million workers, or 10.7% of the workforce, are members of a trade union. Public-sector employees are unionized at a much higher rate than private-sector employees. Only about 6.5% of private industry employees are unionized. Private-sectors industries with the highest rates of unionization are utilities (23 percent), transportation and warehousing (17.3 percent), telecommunications (16.1 percent) and construction (14 percent). (Among occupational groups, education, training, and library occupations (33.5%) and protective service (34.7% each) had the highest unionization rates in 2015. While only a small portion of the U.S. workforce is unionized, trade unions wield significant lobbying power.

3. TYPES OF REPRESENTATION

Generally, most employers' first exposure to unionization comes in one of two ways: they notice union organizing activity going on in their organization or they are confronted with a request by a union to be recognized as the exclusive representative of their employees. If an employer declines voluntary recognition, the union may file a petition for an election with the National Labor Relations Board ("NLRB"), the federal agency charged with enforcing the National Labor Relation Act ("NLRA"). The petition must describe the unit of employees it seeks to represent and the union must demonstrate to the NLRB by way of signed authorization cards that it has the support of at least 30% of the employees in that bargaining unit. If the union shows the required level of support, a representation election is held.

The election is conducted by way of a secret ballot that is supervised by an NLRB agent. No member of management or the union is allowed in the voting area and no electioneering can be conducted there, but both the employer and union may appoint observers to be present during the balloting process.

If a majority of the employees in the bargaining unit who cast their vote had voted in favor of union representation, the union gets the right of

"exclusive" representation of all the employees in the bargaining unit (not only the employees who voted in favor of the union).

4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

The NLRA's stated purpose is "...to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

In furtherance of that purpose, the NLRA provides that employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. In addition, it protects the right of employees to refrain from any or all such activities.

5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

Once certified by the NLRB as the exclusive bargaining representative of the employees in the bargaining unit, the employer must begin bargaining for a collective bargaining agreement in good faith with the union as the employee's exclusive bargaining agent.

6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Outside of the representation by a union, or as otherwise provided by a negotiated collective bargaining agreement, employees do not have an independent right to management or board representation. American law does not recognize work councils or other forms of employee representation.

XII. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

United States law provides for retirement benefits and subsidized health insurance under federal Social Security and Medicare programs.

Employers are required to contribute 6.2% of each employee's salary (in 2018, on the first $128,400 of an employee's gross wages) to Social Security, as well as 1.45% of each employee's salary (without any limit on the wage base) to Medicare. Equal contributions are deducted from each employee's wages and act as an "employee contribution." These federal programs provide benefits for retirees, the disabled, and children of deceased workers. Social Security benefits include old-age, survivors, and disability insurance. Medicare provides hospital insurance benefits.

2. HEALTHCARE AND INSURANCES

Under the Patient Protection and Affordable Care Act, certain large employers who do not offer affordable health insurance that provides minimum value to their full-time employees may be subject to significant penalties. Specifically, covered employers will be subject to an annualized employer "shared responsibility" penalty of $2,000 (indexed) per full-time employee (less the first 30 full-time employees in 2016) if the employers do not offer health insurance to at least 95% of their full-time employees and their dependents. Employers may also be required to provide employees with health insurance benefits pursuant to a negotiated collective bargaining agreement or employment contract.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

Although the United States government recognizes several "national holidays," no federal law requires employers to provide employees with time off for a holiday. However, it is customary for employers to provide employees with paid time-off to observe nationally and locally recognized holidays. For example, the public holidays widely observed by employers in private industry are: New Year's Day, Memorial Day (in late May), Independence Day (July 4th), Labor Day (early September), Thanksgiving Day (third Thursday in November), and Christmas Day. Some states require that employees working on enumerated holidays be paid at a higher rate of pay.

Similarly, no federal law requires employers to provide employees with paid vacation time. In practice, all employers provide employees with paid vacation time. It may range from one week per year during the first few years to three weeks or more for long-serving employees. Employees who are represented by a labor union may receive more generous vacation time.

B. MATERNITY / PATERNITY / PARENTAL LEAVE

The Family and Medical Leave Act ("FMLA") requires employers with fifty (50) or more employees within a seventy-five (75) mile radius to provide covered employees with twelve (12) weeks' unpaid leave in a 12-month period for the birth or placement of a child. Some state laws provide for maternity leave for employees who are not covered under the FMLA. In addition, several states provide workers with partial pay during parental leave. Whether the trend toward state paid family leave laws will continue remains to be seen.

C. SICKNESS LEAVE

Employees may be entitled to unpaid sick leave under the FMLA, which allows eligible employees to take up to twelve (12) weeks' unpaid medical leave in a 12-month period for a serious health condition that prevents the employee from performing the functions of his or her job. A serious health condition covers a range of illnesses, though colds, headaches, and routine medical care is typically not covered.

Though there is no national law guaranteeing paid sick leave, a number of states, counties, and cities require employers doing business within their boundaries to offer paid sick leave. The laws vary considerably in such details as defining who is a covered employer, who qualifies as an eligible employee, how much sick leave is available, how it is accrued and when it can be taken.

Further, employers must offer paid sick leave to employees working on certain federal contracts. Executive Order 13706, signed by President Barack Obama in 2015, imposes a sick leave mandate on a broad range of contracts entered with the federal government based on solicitations issued on or after the first day of 2017.

D. DISABILITY LEAVE

A disabled employee may be entitled to unpaid leave under the FMLA as discussed above. In addition, workers' compensation insurance administered at the state level may provide for paid leave. Finally, while the Americans with Disabilities Act ("ADA") does not expressly provide for disability leave, employers are required to make reasonable accommodations for qualified employees with disabilities, which could include leave, so long as doing so does not pose an undue burden on the employer.

4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Unless otherwise provided for pursuant to a collective bargaining agreement or and employment contract, employers are not required to provide employee pensions or any retirement benefits. Many American employers do provide some retirement benefit to their employees, increasingly in the form of a retirement savings plan, which is a defined contribution plan and commonly named after the applicable section of the Internal Revenues Code as a "401k" plan.

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