UNITED STATES EMPLOYMENT LAWS

What Non-U.S. Based Businesses Need To Know

Employment laws in the United States are complex and ever-changing. Any foreign business considering operating and hiring employees in the United States must be aware of and know its responsibilities under these laws. It is of critical importance that all employers with United States employees consult with experienced legal counsel in this area to avoid costly lawsuits and other business disruptions.

Employment laws passed by the United States Congress apply throughout all 50 states and are referred to as "federal law."

Each of the 50 states has employment laws covering the employees in those states. Cities and counties also pass employment laws. We refer to this mosaic as "state laws." In addition, judges can rule on issues such as breach of contract and other employment torts. This judge-made law is referred to as the "common law." An overview of these employment laws is provided below.

"AT-WILL" EMPLOYMENT

Most employees in the United States are employed "at-will." Many countries outside the U.S. treat the employment relationship differently. Generally, under the United States employment "at-will" doctrine, the employment relationship is presumed to be freely terminable at the will of either the employer or the employee for any lawful reason, or for no reason; and the employer and employee are presumed to be free to negotiate the terms and conditions of their relationship. The "at-will" presumption, however, is overcome if a city, state, or federal governmental body passes a law or regulation limiting an employer's right to terminate employment. There are quite a few exemptions to employment "at-will," some based on state law, federal law or as a result of contractual provisions between an employer and employee.

FEDERAL LAWS

Anti-discrimination law is a frequently litigated area of employment law in the United States and an important area of law for foreign-based employers to understand.

Title VII

Title VII of the Civil Rights Act of 1964 is a federal law and prohibits discrimination in employment decisions, compensation, terms of employment, or promotion based on race, color, religion, sex, or national origin. The Pregnancy Discrimination Act, which was made part of Title VII in 1978, prohibits discrimination based on pregnancy. Under Title VII, damages can include back pay, front pay, punitive and compensatory damages, and attorney's fees. Most states and many cities and counties have similar laws.

Equal Pay Act

The Equal Pay Act of 1963 is a federal law and requires equal wages for men and women employees in the same establishment who have positions that require equal skill, effort, and responsibility

For more information, please contact:

Timo Rehbock
Partner
timo.rehbock@btlaw.com
312-214-4592

David B. Ritter
Partner
david.ritter@btlaw.com
312-214-4862

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under similar working conditions. Damages can include back pay, liquidated damages, attorney's fees, and court costs.

Age Discrimination Employment Act

The Age Discrimination in Employment Act (ADEA) of 1967 is a federal law and prohibits adverse employment actions based on age against employees who are 40 years old or older. Damages under the ADEA can include back pay, front pay, liquidated damages (available for willful violations), prejudgment interest, and attorney's fees. Many states have similar laws.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) of 1990 is a federal law and prohibits employment discrimination against qualified individuals with disabilities. The ADA also requires employers to make reasonable accommodations where necessary to allow qualified individuals to perform essential job functions. An accommodation is not required if it poses an undue hardship on the employer. The employment provisions of the ADA are enforced in the same manner as Title VII, and damages include compensatory and punitive damages, attorney's fees and costs, as well as injunctive and equitable relief. Many states have similar laws.

Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994 is a federal law and governs the re-employment rights of military veterans and prohibits the employer from taking an adverse employment action based on an employee's past, present, or future military obligations. USERRA requires employers to reinstate employees who return from a tour of military duty to their former position, and includes provisions for the maintenance of health insurance benefits. Courts are authorized under USERRA to provide full and complete relief, including liquidated damages and fees and costs.

Genetic Information Non-Discrimination Act

The Genetic Information Non-Discrimination Act (GINA) of 2008 is a federal law and prohibits employers from discriminating against employees on the basis of genetic information. It prohibits employers from seeking or acquiring genetic information from employees, or using such information to make employment-related decisions.

Administrative Process

All of the federal anti-discrimination laws (except the Uniformed Services Employment and Reemployment Rights Act) are administered by the United States Equal Employment Opportunity Commission (EEOC). Prior to filing a lawsuit in federal district court, an employee must first file an administrative charge of discrimination with the EEOC. The EEOC will investigate the charge and either take action on its own to prosecute the complaint or issue a "right to sue" letter permitting the employee to file suit. Most states and some local governmental bodies have an administrative process to investigate charges of discrimination under their similar state and local laws.

THEORIES OF LIABILITY

> "It is important for non-U.S. employers to learn U.S. employment law early on to avoid making costly mistakes." – David Ritter

There are several general theories of liability under these anti-discrimination laws.

Disparate Treatment

Under the "disparate treatment" theory, an employee claims that he or she has been treated differently than other employees because of a protected characteristic such as race, sex, age, disability, etc. Employers often defend such actions by arguing the hiring, firing, promotion, or other employment action being challenged was made based on legitimate non-discriminatory factors and without regard to the protected characteristics of the employee. An employee can prevail if he or she shows that the employer's legitimate, non-discriminatory reason is false.

Disparate Impact

Under the "disparate impact" theory, a facially neutral employment policy, such as a height requirement for a job, may be unlawful if it has a disparate impact on a particular group, such as women or older workers. In response, employers typically argue that the policy at issue serves a legitimate business or job-related purpose.

Retaliation

The federal anti-discrimination laws discussed above prohibit retaliation by an employer against an employee for filing a charge of discrimination, participating in a proceeding related to a complaint of discrimination, or otherwise opposing discrimination.

Harassment

The federal discrimination laws also generally prohibit harassment based on gender, race, ethnicity, religion, or age, among other protected characteristics. Most frequently litigated are sexual harassment claims, which take the form of either "hostile environment" or "quid pro quo" claims. Hostile environment harassment occurs when an employee is subjected to unwelcome conduct that is sufficiently severe and pervasive to alter the terms or conditions of employment. Sexual harassment litigation often focuses on issues of whether the offensive conduct is sufficiently severe and pervasive to sustain a claim or the extent to which sexualized conduct was welcome or unwelcome. "Quid pro quo" harassment occurs when a supervisor takes a tangible adverse employment action against an employee because of the employee's rejection of unwelcome sexual conduct.

All employers should consider implementing an anti-harassment policy as well as discrimination policies, train their employees with respect to avoiding workplace harassment and discrimination, and promptly investigate any claims of harassment and discrimination.

WAGE AND HOUR LAWS

The Fair Labor Standards Act (FLSA) is the federal law that establishes the national minimum wage, limitations on child labor, and the requirement that all workers be paid overtime of 150 percent of the employee's regular hourly rate for all hours worked in excess of 40 hours per work week, unless the employee falls within one of the "exemptions" to minimum wage, overtime or both. The FLSA is enforced by the Wage and Hour Division of the U.S. Department of Labor, which has the authority to investigate and audit employers, as well as commence enforcement litigation on behalf of employees. In addition, employees themselves may commence private actions individually or as collective actions on behalf of groups of similarly situated employees.

All states have similar laws. These laws often vary from the federal laws in important respects and grant employees in those states greater rights.

Wage-based collective and class actions brought on behalf of a group of employees (or former employees) have increased dramatically in recent years at both the federal and state court levels, affecting employers of every size and in every industry, sometimes resulting in large payouts to employees and their attorneys. Defending these types of suits are particularly time-consuming and costly.

Leaves

Federal law generally does not require employers to give employees paid leave. Under the Family and Medical Leave Act (FMLA) of 1993, however, covered employers are required to provide unpaid leave up to 12 weeks within a 12-month period for birth or adoption of a child; care for a seriously ill child, spouse, or parent; the employee's own serious health condition that causes the employee to be unable to work; or for any qualifying event arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on covered active duty. Employers also are required to provide up to 26 workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member's spouse, son, daughter, parent, or next of kin (military caregiver leave).

Many states have enacted similar laws, however, the provisions of those laws vary from the FMLA.

Vacation

There is no requirement that an employer provide paid vacations. However, if an employer provides a vacation (and virtually all do), the employer must be aware of the different state laws governing the administration of vacation policies, as well as judicial interpretation of those laws.

Rest breaks are not mandated by federal law. Many states, however, have laws requiring either paid or unpaid breaks, as well as days of rest.

EMPLOYEE BENEFITS

Under federal law, employers are required to contribute to the United States Social Security and Medicare system, which provides retirement, disability, survivor and health care benefits. Retirement benefits are based upon an employee's earnings and age, with reduced benefits available beginning at age 62 and full retirement benefits available at age 67 (and younger ages for those born before 1960). Health care benefits under Medicare are available at age 65.

In addition to the federal benefits, states generally require that employers provide workers' compensation benefits to employees who are injured on the job. Some states also require that employers contribute to a state-run disability program, which provides benefits to disabled employees, regardless of whether the disability was incurred while the employee was working.

> "U.S. employment laws are always changing and it's important to stay on top with current and knowledgeable counsel." – Timo Rehbock

Except for these programs, employers are not generally required to provide their employees with retirement, health, disability, life insurance and similar type benefits, although many employers choose to do so. Once an employer chooses to provide benefits, employers must provide these benefits pursuant to the rules set forth in the Employee Retirement Income Security Act of 1974 (ERISA). ERISA extensively regulates retirement benefits provided by employers, and, to a lesser extent, also regulates life, health and similar benefits provided by employers.

Retirement Benefits

If an employer chooses to provide retirement benefits to its employees, the employer must do so in accordance with the requirements of ERISA, and, to receive tax benefits, the United States Internal Revenue Code. To comply with the tax code requirements (enforced primarily by the Internal Revenue Service), retirement plans generally must provide roughly comparable benefits to a broad range of employees. ERISA, enforced primarily by the United States Department of Labor, is a complex statute establishing detailed minimum standards for the administration and management of pension and other retirement plans, including standards for participation, vesting, benefit accrual, and funding. ERISA also provides retirement plan participants with a right to sue for imprudent investment of plan assets or other breaches of fiduciary duty in connection with an employer's administration of the retirement plan.

Employer-sponsored retirement plans provide tax advantages for both employers and employees. An employer who contributes to a tax-qualified retirement plan for the benefit of its employees can generally take current deductions for such contributions, while employees are not taxed until they receive distributions in retirement. Employees also often have the opportunity to elect to defer receipt of a portion of their compensation until retirement, which serves to defer the taxes associated with such compensation.

Health Care Benefits

An employer is not required to provide health care benefits to its employees, although many employers choose to do so. As a result of landmark legislation, beginning in 2015, employers generally will be subject to a federal tax based on the number of its full-time employees (generally those who work 30 hours or more per week) if the employer does not provide minimum health care benefits at an affordable cost. Employers with fewer than 50 full-time employees are exempt from the tax (for 2015 only, employers with fewer than 100 full-time employees are exempt from the tax).

Employers who provide health care benefits to employees must comply with certain federal rules, including a requirement (described below) that terminated employees be offered the right to continue coverage at the employee's cost. There are tax advantages for employer-provided health care. Employees are generally not taxed on employer contributions towards health care costs, and employees may avoid tax on amounts deducted from an employee's pay for such coverage, if certain requirements are met.

Post-termination Health Benefit Plan Coverage

The Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 is a federal law and requires covered employers to offer employees who lose health benefit plan coverage as a result of their termination or separation the opportunity to continue their coverage, for a period of generally up to 18 months. Under COBRA, an employer may generally require eligible participants to cover the entire cost of the premiums for such continued coverage. Continuation coverage is also available under other circumstances, including to a spouse, upon an employee's death or a divorce.

Severance

Unless part of an employment contract or pursuant to policy, employers do not have to offer severance payments to employees who are terminated. However, if an employee is involuntarily terminated, it is common for an employer to offer severance in exchange for an employee's general release of claims against the employer. Employers seeking a release of age-discrimination related claims are obligated to comply with the requirements for such releases set forth by the Older Worker Benefit Protection Act.

Executive Benefits

Employers often choose to provide deferred compensation to their executives. This deferred compensation can take a number of forms, including the grant of stock options, restricted stock and other deferred compensation benefits. Subject to certain exceptions, deferred compensation benefits must comply with detailed rules that limit when benefits may be paid and generally prohibit changing the date and form of payment once the arrangement is in place. Violation of these rules can result in significant taxes and penalties being imposed on the executive. The types of arrangements that are subject to these rules are surprisingly broad, which mandates careful review of any employment agreement or deferred compensation plans to ensure compliance.

EMPLOYMENT TAXES

Employers are required to withhold income taxes from employee wages and to submit those withheld amounts to the Internal Revenue Service (IRS) and equivalent state agency, if the applicable state imposes an individual income tax. Under the Federal Insurance Contributions Act (FICA), employers also must withhold Social Security and Medicare taxes from wages and make additional contributions with respect to each employee to the IRS.

Social Security is a program administered by the federal government with a primary purpose of providing retirement benefits. The amount of benefits payable to a retiree depends in part on the amount of FICA taxes withheld on his behalf. Payments generally begin at an individual's normal retirement age (age 67, for those born in 1960 and later), but reduced benefits are payable as early as age 62.

WHISTLEBLOWER LAWS

While there is no general federal law available to an employee who has suffered retaliation by an employer because the employee "blew the whistle" on the employer's unlawful conduct, most federal employment laws protect employees from adverse employment actions for disclosing information concerning their employers compliance with respect to those specific laws.

For example, the federal anti-discrimination laws discussed above prohibit employers from taking adverse action against employees for complaining about conduct that they reasonably believe is discriminatory. The FLSA and ERISA similarly contain provisions prohibiting retaliation against employees for asserting claims under those statutes.

The Sarbanes-Oxley Act of 2002 (SOX) is a federal law and provides a cause of action for an employee of a company whose stock is publicly traded who alleges that he or she was retaliated against for disclosing conduct that he or she reasonably believes violates federal law relating to shareholder fraud. SOX also makes it unlawful for any employer (whether publicly traded or not) to retaliate against an employee for providing to a law

enforcement officer truthful information relating to the commission or possible commission of a federal offense.

Whistleblower litigation usually centers on three issues: whether the employees claimed belief that unlawful activity was occurring was reasonable; whether the employee in fact took action to oppose the activity; and whether any adverse action against the employee was in retaliation for the alleged whistleblowing. Employers often defend against such claims by establishing that: the employee did not reasonably believe that unlawful activity was occurring; that adverse employment action, if any, would have been taken even in the absence of the alleged whistleblowing; or that the adverse employment action was too remote in time to be retaliatory.

UNION-MANAGEMENT RELATIONS

Union-management relations or labor law is distinct from general employment law. Labor law refers to issues concerning the rights of workers to form, join, or support labor unions and the right to collectively bargain, as set forth in the National Labor Relations Act (NLRA). The NLRA is a federal law and also requires that employers and unions bargain in good faith over terms and conditions of employment. It also sets forth certain unfair labor practices by employers and unions. The steadily diminishing presence of unionized labor in private-sector employment over the last few decades, and its over-representation in some industries and virtual absence in others, makes labor law a highly specialized field.

The NLRA is administered and enforced by the National Labor Relations Board.

PLANT CLOSING LAWS

The Worker Adjustment and Retraining Notification Act (WARN) is a federal law and requires employers to provide advance notice of mass layoffs or plant closings to employees, their representatives, and appropriate local and state government officials. Many states have enacted similar laws, but impose different thresholds for issuing notice.

WORKPLACE SAFETY

The Occupational Safety and Health Act (OSHA) of 1970 is a federal law and requires employers to provide a safe and healthful workplace by setting forth minimum health and safety standards in private employment. OSHA also requires employers to maintain records and reports relating to occupational injuries. In addition to the OSHA standards, employers must also comply with the General Duty Clause of OSHA, which requires employers to keep their workplace free of serious recognized hazards. Employees do not have a private right to sue their employer under OSHA. All standards are administered and enforced by the Occupational Safety and Health Administration.

State workers' compensation laws provide mechanisms to compensate and medically treat employees who suffer from work-related injuries or illnesses. Each state law is unique and imposes different obligations on employers and employees. Workers' compensation is the exclusive remedy for employees who suffer from on-the-job injuries or illnesses.

RESTRICTIVE COVENANTS

It has become common for employers to have employees sign agreements that impose post-employment restrictions on employees to protect proprietary and business interests. In these agreements, an employee may promise not to use or disclose confidential information, work for a competitor, or solicit customers or other employees if they leave their current employment. Although a few states have statutes governing restrictive covenants, this area is governed primarily by state common law. Most judges construe restrictive covenants narrowly and it is important that they are drafted and applied narrowly. A few states (including California) prohibit restrictions against competition. This has become an increasing area of litigation.