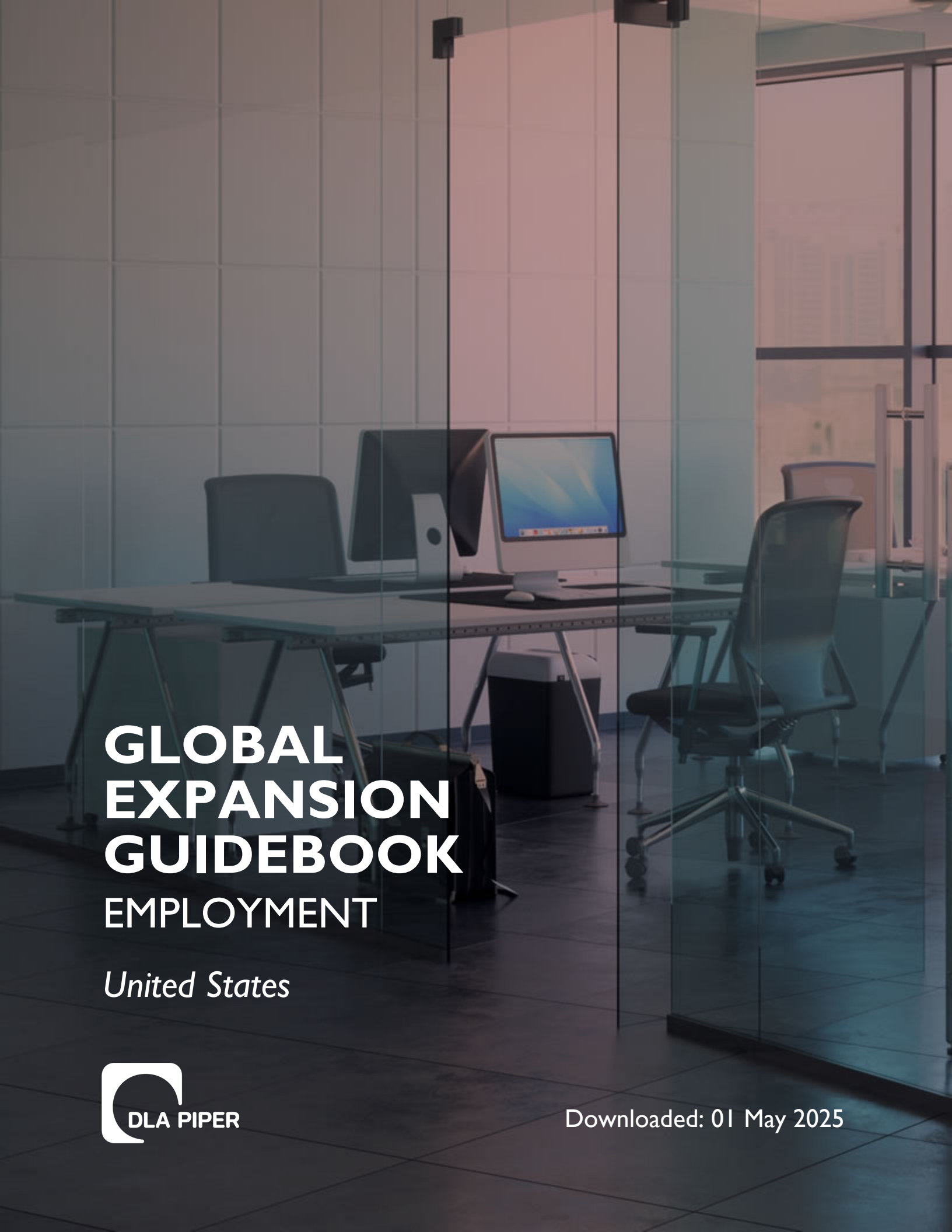

GLOBAL EXPANSION GUIDEBOOK

EMPLOYMENT

United States

DLA PIPER

INTRODUCTION

Welcome to the 2024 edition of DLA Piper's *Global Expansion Guidebook – Employment.*

GLOBAL EXPANSION GUIDEBOOK SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The *Global Expansion Guidebook* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2024 edition of our popular guide covers all of the employment and labor law basics in 63 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper's global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

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UNITED STATES

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LEGAL SYSTEM, CURRENCY, LANGUAGE

Combination of federal statutory law, state statutory and common law, and local statutory law. Regulations vary significantly from state to state. The official currency is the US dollar (USD). The official language is English.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign entity may engage employees to do business in the US, subject to certain business and tax considerations and registration, as an entity qualified to do business in any state where it has employees and/or is engaged in business. All US employers are required to obtain a federal Employer Identification Number (EIN) to pay applicable payroll taxes and withhold certain tax contributions from their employees. Employers may be required to register employees with the specific state in which they are employed – regulations vary from state to state. Certain states (*eg*, California) have requirements regarding what information must be provided to employees with their pay, including itemized deductions and reports of hours worked, among other information.

PRE-HIRE CHECKS

Required

None, except in certain regulated industries which may require fingerprinting, background checks, motor vehicle histories and/or drug or alcohol screening.

Permissible

Laws vary from state to state. Reference and education checks are common. Criminal background and credit checks generally may be performed in accordance with applicable federal, state and local law, with an increasing number of state and local jurisdictions limiting criminal history questions on applications and permitting such checks only following a conditional job offer. Medical examinations and drug and alcohol screening are generally permissible if conducted post-offer and in accordance with applicable law; however, as more states legalize recreational marijuana use, the laws are becoming more difficult to navigate. Some states and localities prohibit

employers from screening new hires for marijuana or refusing to hire applicants based on a failed pre-employment marijuana screen (with exceptions for certain positions such as safety-sensitive jobs) or require employers to take certain steps before rescinding a conditional job offer.

IMMIGRATION

All employees must be legally authorized to work in the US, whether by citizenship, permanent residence (ie, green card) status or a valid visa, which often requires sponsorship by the employer. Within 3 days of the start of employment, all employees must submit materials establishing such authorization and complete a Form I-9.

Employers operating in certain industries (eg, government contractors) and in certain states may be required to use the federal E-Verify system for work authorization confirmation, though some states prohibit or limit use of E-Verify.

HIRING OPTIONS

Employee

Employers may elect various hiring options – at-will, fixed-term, full-time or part-time, temporary or seasonal. Generally, the nature of the employment relationship is at will, meaning either the employer or the employee may terminate the relationship at any time, with or without notice and with or without cause, as long as the reason for termination is not discriminatory or retaliatory and does not otherwise violate the law. Many states recognize exceptions to the at-will employment doctrine due to public policy, implied contracts, the covenant of good faith and fraud or misrepresentation. Certain jurisdictions have either superseded the general rule of at-will employment by statute (*eg*, Montana) or have adopted a statutory severance scheme for terminations without cause (*eg*, Puerto Rico). States may also have industry-specific legislation (*eg* New York City's law prohibiting fast food employers from discharging or substantially reducing an employees' hours without "just cause" outside of a probation period).

Independent contractor

Independent contractors may be engaged directly as individuals or through an entity (*eg,* LLC or LP). Contractors must be truly independent and not be closely directed by the principal. There are multiple tests utilized that consider various factors on both the federal and state level to determine whether an individual is properly classified as an independent contractor. By way of example, if an individual is engaged through a separate business entity, is not performing work that is a part of the company's core business, performs the same or similar services for other entities and is engaged for a short-term assignment or project, the individual will likely be deemed properly classified and engaged as an independent contractor. Employers should utilize agreements with independent contractors to document the relationship.

The test for independent contractor status varies depending on the locality and forum, with different rules applied by various federal agencies such as the Department of Labor, National Labor Relations Board (NLRB) and Internal Revenue Service. In 2023, the NLRB reinstated a tougher standard is re-examining the legal test for determining whether a worker is an employee protected by federal labor law.

Some states have different or more restrictive tests for determining a worker's status. While there is no one legal test, independent contractors typically are persons who are not supervised or controlled by an employer, do not

provide services critical to an employer's operations, use their own tools and resources to complete a task, and operate in a time and manner of their choosing.

This is a rapidly evolving and active area of law, particularly when it comes to the gig economy, with significant potential exposure for misclassification.

Agency worker

Employees may provide services through an employment agency or professional employer organization (PEO). The company and the agency may be deemed "joint employers" and be held jointly liable under various federal and state employment laws. Which entity is financially responsible for any such liabilities may depend on the terms of the agreement with the employment agency or PEO.

EMPLOYMENT CONTRACTS & POLICIES

Employment contracts

Given the at-will employment concept that generally exists across the US, most employees do not have any employment agreements, written or otherwise.

However, executives and high-level managers tend to have written employment agreements that address items such as duties, compensation, restrictive covenants and any post-termination severance obligations.

Contracts are not required and, if used, are not required to have any specific terms.

Probationary periods

Permissible, but unnecessary in a typical at-will relationship, unless something about the terms or conditions of employment – such as right to accrue vacation or participate in group health benefits – will change following the expiration of the probationary period.

Policies

Policies vary from state to state. Employers are required to post notices about employee rights under various federal, state and local laws. It is highly recommended to include anti-harassment, discrimination and retaliation policies in an employee handbook which may help in the defense against related claims. Certain government contractors are required to implement affirmative action plans. Most employers have employees sign an acknowledgment of the at-will employment policy.

Third-party approval

If the workforce is represented by a union or other labor organization, changes to policies that affect terms and conditions of employment may need to be submitted to the union or other labor organization for negotiation prior to implementation.

LANGUAGE REQUIREMENTS

Certain documents and notices are required to be posted or provided in the language known to be the primary language of a certain percentage of the workforce or of specific employees, if other than English. "English-only" policies in the workplace may be subject to legal challenge as discriminatory, unless there is legitimate business purpose for the rule.

WORKING TIME, TIME OFF WORK & MINIMUM WAGE

Employees entitled to minimum employment rights

Most employers are covered by the Fair Labor Standards Act (FLSA) which guarantees minimum wage and overtime pay for non-exempt employees. The most common exemptions are for executive, administrative, professional, outside sales or computer professional employees. To qualify for an exemption, an employee must be paid a fixed salary of at least USD684 per week (USD35,568 annually) and must meet the applicable "duties" test for the exemption at issue. On April 23, 2024, the Wage and Hour Division of the Department of Labor ("DOL") issued its final rule regarding the executive, administrative and professional ("EAP"), and highly compensated employee ("HCE") exemptions under the Fair Labor Standards Act ("FLSA"). The DOL made no changes to the duties tests for these exemptions. However, the DOL substantially increased the minimum salary and compensation thresholds for the EAP and HCE exemptions.

Some states and localities impose additional wage and hour requirements above the FLSA requirements; where state or local laws are more favorable to employees, the state law requirements will apply.

Working hours

There is no federal limit on the number of hours per day or per week that an employee over the age of 16 can work, although there are overtime pay requirements, as discussed below. There are restrictions on child labor and in certain professions (*eg,* airline pilots and drivers), and hours may be limited by a collective bargaining agreement with a labor union. In some states, certain employers are required to give their workers 1 day off each week under so-called "day of rest" laws or are required to pay workers at a premium rate for such work time. In addition, some states and localities have enacted predictive scheduling laws; while these vary in scope, the laws may regulate hours, notice of work schedules and predictability pay for schedule changes and on-call shifts.

Overtime

Generally, non-exempt employees must be paid 1.5 times their regular rate of pay for all hours worked in excess of 40 hours per week under the federal FLSA. Overtime must be calculated on a weekly basis and cannot be "averaged" over a period of 2 or more weeks. In some states, such as California, additional overtime is required in certain circumstances (*eg,* more than 8 hours per day).

Wages

All non-exempt employees must be paid at least the federal minimum wage, which presently is USD7.25 per hour. Covered federal contracts are generally subject to a higher minimum wage rate established by Executive Order. Some states and cities have higher minimum wage requirements – in many cases, well above the federal minimum wage – and additional states and localities have passed or have pending legislation that will raise the minimum wage in the coming years.

Vacation

There is no federal statutory requirement for private sector employers to provide paid vacation or holiday to any employees. In practice, most employers adopt a vacation or paid time off policy. Once such a policy is adopted, many states will treat accrued vacation or paid time off as wages that cannot be withheld or taken away. A few states (*eg*, Massachusetts, Rhode Island) control hours of operation and require certain businesses to pay extra compensation on some legal holidays

Sick leave & pay

There is no federally mandated right to paid sick leave. Employers with 50 or more workers generally must provide eligible employees unpaid leave under the Family and Medical Leave Act (FMLA) for up to 12 weeks in any given year due to a serious health condition of the employee or their family members, or for a qualifying exigency arising out of the fact that a family member is a covered military member or on covered active duty, and for up to 26 weeks to care for a family member who is a covered military member. Employers also may be required to provide unpaid leave (for at least some period of time) as a reasonable accommodation to a qualified employee with a disability under the Americans with Disabilities Act (ADA). State law may provide for additional leave, with an increasing number of states offering paid leave in connection with the birth or adoption of a child, typically with such benefits paid by the state, up to a percentage of the employee's regular wages.

In the absence of national legislation providing for paid sick leave, many states, cities and counties have enacted laws requiring certain private employers to provide some form of paid sick leave to eligible employees. The result has been a patchwork of laws with different requirements.

As a result of COVID-19, federal, state and local governments also enacted legislation to create rights to

emergency sick leave benefits. While many laws have expired, others remain in effect.

New state leave laws that introduce, expand or alter coverage or entitlements will take effect in 2024 in a number of states, including California, Colorado, Illinois, Maryland, Minnesota, New York and Oregon.

Maternity/parental leave & pay

There is no federally mandated right to paid maternity or parental leave. Under the FMLA, employers with 50 or more workers generally must provide eligible employees unpaid leave for the birth or adoption of a child, or to care for a newborn or a newly placed child, for up to 12 weeks in any given year. Certain states and local jurisdictions have more generous leave requirements, and an increasing number provide paid parental leave, typically paid by the state, covering a certain portion of the worker's wages. In certain states, employees who are temporarily disabled for medical reasons, including pregnancy and childbirth, are eligible to receive partial wage replacement in the form of temporary disability insurance benefits, and employers may be required to enroll in state-provided or state-sponsored insurance plans to cover the payments (*eg*, in New York) or contributions may be deducted from employees' paychecks (*eg*, in California).

DISCRIMINATION & HARASSMENT

Federal law generally protects employees from discrimination, harassment or retaliation based on race, color, religion, sex (including transgender identities and sexual orientation), national origin – Title VII of the Civil Rights Act (Title VII), age (40 and over) – Age Discrimination in Employment Act (ADEA), disability – Americans with Disabilities Act (ADA) and genetic information – Genetic Information Nondiscrimination Act (GINA). State and

local protected categories vary and are often broader (*eg*, creed, marital status, domestic partnership status, military status, domestic violence victim status, arrest record, conviction record, alienage, citizenship status, unemployment status, political beliefs and party affiliation). In recent years, various states and localities enacted new protections related to pregnancy, breastfeeding, disabilities, and physical characteristics historically associated with race (*eg*, hair texture and hairstyles).

In June 2020, the US Supreme Court held that an employer who fires an individual merely for being gay or transgender violates Title VII's ban on employment discrimination based on sex. In the wake of the Court's decision, states continue to amend discrimination laws to include gender identity, gender expression, and sexual orientation as protected classes.

On October 2, 2023, the EEOC published a notice of Proposed Enforcement Guidance on Harassment in the Workplace. The Proposed Guidance: provides protection against harassment based on "sexual orientation and gender identity;" provides that sex-based harassment includes harassment based on pregnancy, childbirth or related medical conditions, including lactation, as well as harassment based on a woman's reproductive decisions; and expands the definition of work environment to include the virtual workspace, among other guidance.

States and localities continue to take the lead on legislation addressing workplace discrimination, harassment and retaliation in the wake of the #MeToo movement. State or local laws may:

- Adopt a lower standard for proving harassment
- Mandate sexual harassment training
- Expand the scope of existing laws to cover smaller employers or non-employees such as interns, independent contractors and freelancers
- Extend the time for an employee to file an administrative complaint or lawsuit
- Require reporting of adverse judgments and administrative rulings
- Limit or prohibit nondisclosure, non-disparagement or no-rehire provisions in certain settlements or employment agreements
- Allow for voidable "golden parachute" provisions for management employees or
- Limit or ban the use of mandatory arbitration for certain claims, although some of these laws are being challenged.

Employers are also seeing more laws restricting the use of arbitration agreements and non-disclosure agreements for harassment and discrimination claims. The federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act and Speak Out Act took effect in 2022. More recently, the NLRB held that non-disparagement and confidentiality provisions may violate federal labor law. Various states have also enacted laws limiting the use of nondisclosure provisions.

In addition, states and localities continue to enact laws to address equal pay issues. For example, laws may ban salary history inquiries, prohibit retaliation against an employee for discussing wages or compensation with another employee, require pay data reporting or mandate certain job posting and compensation disclosures.

WHISTLEBLOWING

No text yet.

BENEFITS & PENSIONS

The Affordable Care Act (ACA or Obamacare) requires certain employers to provide insurance for their employees or pay a penalty. By state law, employers generally must maintain workers' compensation insurance for on-the-job injuries and unemployment insurance to provide benefits to former employees in the event of a qualified involuntary termination of employment. No retirement benefits or pensions are required unless included in a written agreement (*eg,* a collective bargaining agreement with a labor union), but, where provided, their administration is governed by federal law.

On December 29, 2022, President Biden signed SECURE 2.0 legislation which includes nearly 100 provisions impacting retirement savings. Most of the mandatory provisions of SECURE 2.0 became effective on January 1, 2024. Plan amendments are required by December 31, 2026 (for calendar year private employer plans) for SECURE 2.0, the original SECURE Act, and the Coronavirus Aid, Relief and Economic Security ("CARES") Act. Collectively bargained plans have an additional 2 years to amend their plans.

DATA PRIVACY

Certain states restrict the use of employees' social security numbers for any identifying purposes. Medical information must be maintained separately from personnel files and kept confidential. Otherwise, employers generally are entitled to monitor or search corporate emails of their employees and internet traffic accessed by their computer systems, on the premise that employees do not have an expectation of privacy in the use of their employer's computer systems or corporate emails, especially with a policy that says so. Jurisdictions vary as to an employer's ability to search or monitor personal email addresses and websites accessed from an employer's computer or premises.

The California Privacy Rights Act (CPRA) (effective on January 1, 2023) eliminates the California Consumer Privacy Act's (CCPA) exemption for employee personal information, imposing new requirements on employers.

Some states have adopted biometric privacy laws that can include a variety of identifiers such as retina scans, fingerprints, voice recognition, and facial recognition. These laws may be implicated by various practices (*eg*, system login, facility access, clocking in and out). The Illinois Biometric Information Privacy Act (BIPA) allows for a private right of action and potentially significant damages for violations, while other state statutes authorize enforcement by the attorney general.

Other state or local laws may apply to other types of workplace surveillance (*eg*, location tracking, electronic monitoring) and are becoming more common.

State laws may provide for additional individual data rights, including data breach notifications, or obligations on businesses processing personal data.

RULES IN TRANSACTIONS/BUSINESS TRANSFERS

None, except if it results in a plant closing or mass layoff, in which case employees are generally entitled to at least 60 days' notice, if feasible (see "Mass layoff rules" below). In an asset sale, employees may be transferred through termination and rehire.

EMPLOYEE REPRESENTATION

Unions currently represent approximately 10 percent of the American workforce. Employees' rights to organize and engage in "concerted activity" regarding their terms and conditions of employment are protected under the National Labor Relations Act (NLRA), whether or not they belong to a union or work in a unionized workplace.

For FY2023, union representation petitions were up 3 percent over FY2022 (less than the jump of 54 percent from FY2021 to FY2022) while unfair labor practice charges increased 10 percent. The NLRB also continues to make changes in the law to favor unions. Effective as of December 26, 2023, the NLRB's "quickie election" rules expedite the union-election process, substantially shortening the time between election petitions being filed and elections taking place. This change also severely shortens the period that employers can campaign against unionization at their facilities. Other decisions increase the risk that employers that commit even a single unfair labor practice following a union's demand for recognition could potentially be ordered to bargain with the union; facilitate mandatory union recognition and bargaining without an election; provide for sweeping new remedies; make it more difficult to discipline employees over outbursts; and revert to a tougher standard for assessing the propriety of workplace rules.

TERMINATION

Grounds

In almost all states, absent a contract or union agreement to the contrary, an employer may terminate an employee for any non-discriminatory, non-retaliatory reason, at any time, with or without notice, and with or without cause.

Employees subject to termination laws

Generally, all employees are protected by some laws prohibiting termination for certain reasons (eg, discrimination or retaliation). Employees who are parties to a collective bargaining agreement or have a written employment agreement may have greater protections, as dictated by their contracts.

Restricted or prohibited terminations

Employers cannot terminate employees based on any protected category, in retaliation for a complaint of discrimination or harassment based on any protected category or for engaging in protected whistleblowing activity. Greater protection may be afforded by state or local laws, collective bargaining agreements or individual contracts.

Third-party approval for termination/termination documents

Not applicable for this jurisdiction.

Mass layoff rules

Under the Worker Adjustment and Retraining Notification (WARN) Act, employers with more than 100 employees generally must provide 60 days' notice to affected employees and certain government agencies of a plant closing or mass layoff that surpasses certain thresholds of employees affected. Some states have "mini-WARN" acts with more far-reaching requirements (ie, applicable to employers with fewer employees, are triggered at lower thresholds and/or provide for longer notice periods, imposing severance pay on top of notice requirements).

Notice

Generally, no advance notice is required for a termination of employment, unless otherwise required by contract or the termination involves a triggering event under the WARN Act or a state equivalent "mini-WARN" act (see above). Certain states (*eg*, Georgia) may require that the terminated employee be provided a written notice related to the separation.

Statutory right to pay in lieu of notice or garden leave

Payment in lieu of notice is permitted even if there is no contractual right to make such a payment. It is not common for an employee to be placed on garden leave.

Severance

Severance pay is often granted to employees upon termination of employment; however, other than as provided by contract or in an employer's severance plan or policy, there is generally no statutory right to severance pay under federal or state law, except in Puerto Rico. Certain states may require employers to offer severance in the event of a facility closing or mass dismissal.

POST-TERMINATION RESTRAINTS

Permissible restraints are generally governed by state law (statutory and common law) and vary significantly from state to state. In most states, post-employment restrictions that are reasonably necessary to protect employer's legitimate business interests are enforced.

Employers are monitoring federal regulatory developments. On April 23, 2024, the Federal Trade Commission (FTC) voted 3-2 along party lines to finalize a rule banning any new noncompete restrictions for workers in the US. The final rule mirrors, in significant part, the original proposed rule from January 2023, banning all new noncompetes and rendering most existing noncompetes unenforceable. Unlike the original proposal, it allows existing noncompetes applicable to a limited number of senior executives to remain in place. If it survives expected legal challenges, the FTC's final rule will invalidate most noncompetes, including almost 30 million existing noncompete agreements as well as millions of future contracts, and preempt less restrictive state laws governing noncompetes.

On May 30, 2023, NLRB GC Jennifer Abruzzo issued a memorandum asserting that certain noncompete provisions in employment-related agreements violate the National Labor Relations Act (NLRA). While GC memoranda are not binding and do not represent the views of the Board or federal appellate courts, several complaints have adopted the GC's theory.

Other federal agencies are likewise scrutinizing noncompetes as part of the Biden Administration's "whole of government" approach to promoting worker mobility.

Non-competes

Enforcement of non-competes varies from state to state, and states and localities continue to place limits on non-competes. Where they are permitted, restrictions lasting from 6 months to 1 year are generally deemed reasonable, and restrictions lasting more than 2 years are generally considered unreasonable (except in connection with the sale of a business). Some states and localities prohibit or otherwise strictly limit non-competes in the employment context by statute, except in certain circumstances (*eg*, sale of a business).

This is a rapidly developing area of law. Accordingly, companies are encouraged to monitor the landscape and consider the impact of new enforcement initiatives and laws (which may also impact transactions).

Customer non-solicits

Enforcement of customer non-solicits varies from state to state. They are generally permissible if the employee was involved with a customer and the employer aided in developing the relationship or if the employee obtained confidential information from or about the customer. Customer non-solicits are treated similarly to non-competes in most states, including that they are generally prohibited in California.

Employee non-solicits

Enforcement of employee non-solicits varies from state to state. They are generally permissible, except in California.

WAIVERS

Waivers of certain rights are generally enforceable in exchange for valuable consideration, though their enforceability and permitted scope vary from state to state. Waivers of certain statutory rights (such as federal age discrimination claims under the ADEA) are only valid if they meet specific statutory requirements (*eg,* for a waiver of ADEA claims, they must include certain acknowledgements and a specific consideration and revocation period).

There are certain claims that generally cannot be waived as a matter of law, including workers' compensation claims, unemployment claims and the right to file or participate in certain administrative claims (*eg,* a charge of discrimination filed with the EEOC). Additionally, per the US Securities and Exchange Commission (SEC), an employer cannot require an employee to waive their right to participate in a monetary recovery in connection with a whistleblower claim brought before the SEC.

State or local laws may impose additional requirements. For example, employers are seeing more laws restricting the use of arbitration agreements and non-disclosure agreements for harassment and discrimination claims. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act took effect, and President Biden signed the Speak Out Act limiting the enforceability of pre-dispute nondisclosure and non-disparagement clauses for sexual assault and sexual harassment. Various states have passed similar laws limiting the use of nondisclosure provisions.

REMEDIES

Discrimination

Damages for discrimination vary depending on statute and jurisdiction. Federal caps exist for certain claims. Other claims, including most state law claims, allow for unlimited compensatory damages, including front pay, back pay, emotional distress and attorneys' fees. Many claims allow for the recovery of punitive damages.

Unfair dismissal

Because almost all states follow the at-will employment doctrine, claims for unfair dismissal are generally disfavored, unless it constitutes a discriminatory or retaliatory dismissal or a termination in violation of public policy.

Failure to inform & consult

Similarly, because almost all states follow the at-will employment doctrine, a claim for failure to inform and consult generally does not exist, unless it constitutes a discriminatory or retaliatory dismissal, or a dismissal covered by the WARN Act or its state equivalent.

CRIMINAL SANCTIONS

Employers may be criminally liable for certain violations of federal and state employment laws such as wage and hour and health and safety laws. For example, California Division of Occupational Safety and Health (Cal/OSHA) violations can carry criminal penalties – not only against employers, but also against managers and supervisors. A California law that took effect on January 1, 2022, makes intentional wage theft punishable as grand theft. In limited circumstances, employers may be vicariously liable for the criminal acts of their employees. Employers may be liable for monetary statutory penalties (such as double or treble damages) for violations of wage and hour and other laws.

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