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# EMPLOYMENT LAW OVERVIEW USA 2021-2022

Jackson Lewis P.C. / Proud Member of L&E GLOBAL

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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.

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## 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. labour 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 labour 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

In June 2020, the U.S. Supreme held that LGBTQ+ employees are protected from workplace discrimination under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on a number of grounds including sex. Before this decision, discrimination on the basis of sexual orientation or gender identity was a matter of state law, meaning that there were inconsistent standards depending on the state where the employee worked. Now employees throughout the U.S. are protected from such discrimination.

In addition, Illinois and New York are among several states expanding employment protections against harassment and discrimination in 2020. Effective August 2020, in New York, the statute of limitations for filing a sexual harassment complaint will expand from one year to three years. In Illinois, effective January 2020, there will be several new

requirements for employers including restrictions on the use of nondisclosure agreements in discrimination and harassment cases, and expanded protections for contract workers.

Also of note, the EEOC recently rescinded its position that mandatory arbitration agreements, which cover employment discrimination claims, undermine the enforcement of U.S. anti-discrimination laws. This policy change is consistent with recent U.S. Supreme Court decisions that have endorsed the use of arbitration agreements, including in the employment context.

### B. CLASS ACTIONS

In 2018, the U.S. Supreme Court ruled that class action waivers in employment arbitration agreements do not violate the National Labour Relations Act (NLRA). *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP et al. v. Morris et al.*, No. 16-300; *National Labour 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 unionise 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.

Again, in April 2019, the U.S. Supreme Court weighed in on class action arbitration. Class action arbitration is such a departure from ordinary, bilateral arbitration of individual disputes that courts may compel class action arbitration only where the parties expressly declare their intention to be bound by such actions in their arbitration agreement. Following the Supreme Court's decision, arbitration agreements must clearly and unmistakably state that the parties agree to resolve class and collective actions through arbitration. Without such a clear agreement, a party cannot be compelled to class arbitration.

# II. HIRING PRACTICES

## 1. 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. On 19 March 2020, due to precautions implemented by employers and employees associated with

COVID-19, DHS announced that it would exercise prosecutorial discretion to defer the physical presence requirements associated with completion of Form I-9. This policy only applies to employers and workplaces that are operating remotely. If there are employees physically present at a work location, no exceptions are being implemented at this time for in-person verification of identity and employment eligibility documentation for Form I-9. This virtual verification option is scheduled to expire on 19 November 2020, but may be extended due to continued precautions related to COVID-19.

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.

## 2. 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 U.S.

### **3. 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 individualised 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.

### **4. 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 memorialisation 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 also no U.S. federal requirements as to the minimum contents of an offer letter. In some states, such as New York, 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 Labour 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, some employers prefer from a business perspective, to have an internal policy on trial periods, often referred to as “introductory periods” or “probationary periods”, which generally provide for a formal performance evaluation after an initial stated period of employment (ninety 90 days). Employers often condition an employee’s participation in their individually established employee benefits programs on a successful completion of the “probationary” or “introductory” period. From a legal perspective, there is no real advantage to having a trial or probationary period; but there is a potential downside to it, if it causes confusion regarding the employee’s at-will status.

If a probationary period is applied, care must be taken in the drafting of the relevant offer letter, agreement or policy, so that no negative implication is created, wherein it is required to show “cause” if employment is terminated after the period expires. If the employees are represented by a labour 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 Labour 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, casual 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 Labour (“DOL”) released a Notice of Proposed Rulemaking in June 2014 to increase the minimum wage for all workers on new federal contracts. Effective 1 January 2020, the minimum wage for federal contractors working on or in connection with contracts covered by *Executive Order 13658* will be \$10.60 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. As of January 2020, 29 states and the District of Columbia have a minimum wage higher than the national minimum. For example, California’s minimum wage for non-exempt employees is \$13.00 per hour as of January

2020. 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 \$16.07 per hour as of July 2020.

## 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 recognised 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.

Regarding the COVID-19 pandemic, the U.S. Center for Disease Control (CDC) has issued new *Guidance* with detailed instructions on cleaning and disinfecting public spaces, workplaces, businesses, schools, and homes. The Guidance includes a Cleaning and Disinfection Decision Tool that distills the advice into a flow chart with different recommendations depending on whether the area is indoors, outdoors, frequently used, and the type of surface involved.

### B. COMPLAINT 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 hospitalisation 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, sexual orientation and gender identity), 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 investigation or lawsuit concerning employment discrimination. Most employers with at least 15 employees are covered by this body of federal law, as are most labour 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, sexual orientation and gender identity), 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 Labour 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

Harassment is included in the prohibitions on discrimination under Title VII, the ADEA and the ADA. Harassment is described as unwelcome conduct that, based on one or more of these protected characteristics, 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. Also, 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.

During the COVID-19 pandemic, if an employee provides notice that they are unable to come to work because they fall in a vulnerable population category, the employer may be obligated to provide a reasonable accommodation, particularly if the request is due to a medical condition or is pregnancy-based. Employers should consider whether these employees can work remotely and/or whether another accommodation is available. These employees may be eligible for paid sick leave under various laws, including the FFCRA. Importantly, an employer may not compel an employee to stay home simply because he or she falls into a “vulnerable population” category; doing so may result in a violation of the Age Discrimination Employment Act (ADEA), ADA and/or Pregnancy Discrimination Act (PDA). The EEOC’s Technical Guidance provides that an employer is not allowed to exclude an employee from the workplace “solely” because the employee has a disability that the CDC identifies as potentially placing him at ‘higher risk for severe illness’ if he gets COVID-19.

### 5. REMEDIES

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 extraordinarily 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 Labour's Office of Federal Contract Compliance Programs.

# VI. PAY EQUITY LAWS

## 1. EXTENT OF PROTECTION

The U.S. has pay equity laws and regulations on both the federal and state level.

### A. FEDERAL LAW

#### Equal Pay Act of 1963

The EPA prohibits employers from paying employees less for equal work, because of gender. Specifically, an employer cannot discriminate between employees of the same establishment on the basis of sex, “paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs, the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions”. Wages can include not only hourly or annual pay, but also bonuses, company cars, expense accounts, insurance and other elements of compensation. Further, an employer cannot lower the wages of some employees to make wages equal. The statute of limitations for filing an EPA claim is within two years of the alleged unlawful compensation practice or, in the case of a willful violation, within three years.

#### Title VII of the Civil Rights Act of 1964

An employee may also file a pay or benefits discrimination claim under Title VII, which prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin. Unlike the EPA, Title VII does not require the jobs being compared to be substantially equal. Furthermore, in January of 2009, as the first piece of legislation of his administration, President Barak Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 (“the Ledbetter Act”), amending Title VII. The Ledbetter Act overturned Supreme Court precedent severely restricting the time period for filing unfair pay complaints, establishing that

such complaints can be filed within 180 days of a discriminatory paycheck, a period which resets each time a paycheck is issued. Employer practices subject to challenge include managerial decisions about base pay or wages, job classifications, career ladder or other noncompetitive promotion denials, tenure denials and failure to respond to requests for raises.

### B. STATE LAW

Nearly all states also have their own “equal pay acts” mirroring the language of the federal EPA. Since 2016, many states have sought to broaden the pool of comparators to those performing “substantially similar work” or “comparable” work. For example:

- California, Illinois and New Jersey prohibit disparities among employees performing “substantially similar work” (the same standard is in bills pending in Colorado and Hawaii).
- Massachusetts prohibits disparities among employees performing “comparable” work.
- Oregon and Maryland prohibit disparities among employees performing “work of a comparable character”.
- Washington prohibits pay disparities among employees who are “similarly employed”.

Further, many of the state laws do not restrict comparison to the same establishment or geographic location. For example, California’s fair pay law allows comparison to employees in other locations or establishments.

In addition, several states specifically prohibit sex-based wage discrimination in their general employment discrimination laws, including for example, Wisconsin and Louisiana, while several other states prohibit wage discrimination based on protected class status in their general employment discrimination laws, including for example, Texas and Utah.

## C. ADDITIONAL STATE EFFORTS TO END THE PAY GAP

### Prohibitions on Prior Salary Information

Many cities and states (such as California, Delaware, Hawaii, Massachusetts, New Jersey, Oregon, Puerto Rico, Vermont, New York City, Philadelphia, and San Francisco) have passed laws restricting the collection of prior salary information during the hiring process based on concerns that setting the starting pay rate on the basis of prior salary, may have the effect of perpetuating pay discrimination. For employers, it means there may be a need to revisit long-standing practices around pay-setting decisions, complicated by differing requirements among the state laws. For instance, in some jurisdictions employers cannot ask applicants for prior salary information, but they can use information that is provided voluntarily. In other jurisdictions, employers can ask the question for legitimate purposes such as screening applicants, but cannot rely on the information when setting pay rates.

### Pay Transparency Laws

Nearly half of the states have also enacted pay transparency laws that prohibit employers from discharging, or taking any other retaliatory action against an employee, for discussing wages or compensation with another employee. Most recently, such a law was enacted in Virginia, effective 1 July 2020.

## 2. REMEDIES

An employer who violates the Equal Pay Act is liable to the affected employee, for the amount of wages the employee was underpaid, for liquidated damages equal to 100% of the underpaid wages, as well as for reasonable attorneys' fees and costs. Further, if the employer has retaliated against an employee for filing a complaint under the EPA, the employee is entitled to equitable relief which may include reinstatement, promotion and the payment of wages lost, as well as an additional equal amount as liquidated damages. The employer must also pay the reasonable attorneys' fees and costs of the action. However, compensatory and punitive damages are not available.

Under Title VII pay discrimination claims, in addition to the remedies available under the EPA, an employee can also recover compensatory and punitive damages. There are limits however, on the amount of compensatory and punitive damages a person can recover. These limits vary depending on the size of the employer:

- For employers with 15-100 employees, the limit is \$50,000.
- For employers with 101-200 employees, the limit is \$100,000.
- For employers with 201-500 employees, the limit is \$200,000.
- For employers with more than 500 employees, the limit is \$300,000.

Similar remedies exist under state law.

## 3. ENFORCEMENT/ LITIGATION

New state and local pay equity laws and the increased attention afforded to equal pay issues, pose significant challenges and unprecedented risks to employers. In addition, the Office of Federal Contract Compliance Program (OFCCP) facilitates enforcement of pay equity violations for federal contractors. Recent litigation and settlements demonstrate the significant exposure in defending these claims:

- July 2017: a global technology giant paid \$19.5 million to settle claims that the company discriminated against female employees by denying them equal pay and job opportunities as their male counterparts.
- October 2017: an investment management company paid \$5 million to settle Labour Department allegations that the company discriminated against more than 300 female executives, by paying them less than male colleagues.
- May 2018: a large state university settled with the EEOC agreeing to pay \$2.66 million to seven female law professors, who alleged gender-based pay discrimination.
- September 2019: a large technology company settled with the OFCCP for nearly \$7 million for pay bias claims for a class of approximately 5,500 workers. This comes on the heels of a \$2.9 million settlement for pay bias claims in 2018.

- September 2019: a well-known investment banking firm paid nearly \$10 million in a settlement with the OFCCP for pay discrimination claims, for a class of approximately 600 workers.
- March 2020: OFCCP continued to prioritise pay equity during the COVID-19 pandemic. A global network infrastructure company agreed to pay \$2 million in lost wages and \$2.75 million in pay wage adjustments.

## 4. OTHER REQUIREMENTS

### A. FEDERAL CONTRACTOR AUDIT REQUIREMENTS

All federal contractors who are covered under (federal) affirmative action regulations, must, annually, perform an evaluation of their compensation practices to ensure minorities and women are being fairly treated, locating any pay disparities and determining whether such disparities can be explained by a non-discriminatory reason.

The OFCCP does not dictate a particular method of analysis for meeting this regulatory requirement, but cohort analysis, multiple-regression analysis, and anecdotal comparisons are among the methods typically used, dependent on the size of the company and job type under review. Directive 2018-05 issued by the OFCCP, provides the most up-to-date guidance on how the agency will review compensation practices.

### B. EEOC PAY DATA REPORTS

The EEOC requires employers with at least 100 employees to submit annual reports (EEO-1) that include W-2 pay and hours worked data for their entire workforces nationwide. Armed with the data, the EEOC investigates in detail, the pay practices of those employers whose data suggests indefensible pay disparities. The EEOC will not collect employer EEO-1 data in 2020, due to the COVID-19 pandemic and has provided employers a one-year extension for filing the 2019 EEO-1 data report.

### C. STATE AUDIT REQUIREMENTS

Some states, such as Massachusetts and Oregon, stipulate that voluntary self-audits can be an affirmative defense to a pay discrimination claim under their equal pay laws. Under the Massachusetts Equal Pay Act, if an employer can demonstrate that it 1) “completed a self-evaluation of its pay practices in good faith” and 2) “can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work.” The audit must be reasonable in detail and scope, in accordance with the employer’s size. It is worth noting, that even if a state does not explicitly include a “self-audit” provision as a viable affirmative defense, such an audit can be helpful in defending a pay discrimination claim, regardless of state.



# VII. 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. In the context of monitoring, accessing or reviewing the employee's electronic communications, the SCA has been interpreted to allow employers to access employee communications stored on their own electronic communications services (e.g. a company provided email service), as long as access is authorised under the employer's policies, and the employer has a valid business purpose for doing so. Employee notice of the company's monitoring policies is critical.

Regarding private email accounts (e.g. gmail, yahoo, etc.) on a company provided device, generally courts have held that an employer cannot access an employee's private email account. That said, some courts have concluded that an employer can monitor an employee's private email account, if the employee is using a company provided device or network and has provided written consent to an employer's policy authorising broad monitoring practices on company provided devices/networks.

When organisations decide to engage in any level of search or surveillance of their employees, they should consider what their employees' expectations are concerning privacy. In general, it is best practice to communicate to employees a well-drafted acceptable use and electronic communication policy that informs employees on what they can expect when using the organisation's systems, whether in the workplace or when working remotely. This includes addressing employees' expectations of privacy, as well as making clear the information systems and activities that are subject to the policy.

On 1 January 2020, the California Consumer Privacy Act (CCPA) took effect, with some data privacy requirements paralleling the EU's General Data Protection Regulation (GDPR), as applied to consumer information. While employees' personal information is excluded from most of the CCPA's requirements, employees of covered businesses are entitled to a privacy notice. Under the privacy notice provision, covered businesses are required to inform employees, as described above, with respect to the categories of personal information they collect and the purposes for which the information will be used. In addition, employees are permitted to commence a private right of action, if affected by a data breach caused by a failure of the employer to maintain reasonable safeguards.

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

Employers may prohibit the employee's use of social media to disparage the employer or divulge confidential information, and may discipline employees for violating such a prohibition, but must tread carefully for two main reasons:

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 Labour Relations Act ("NLRA") affords employees (even those who are not unionised) the right to engage in "concerted activity," including the right to discuss the terms and conditions of their employment - and even to criticise 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, an 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 has been 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.

Reference should be made to the guidance issued by the NLRB, which considers in great detail, common types of policies and handbook language limiting employees' social media. In general, employers should carefully review social media policies to ensure protection of the company's reputation, without impermissibly limiting employees' rights to discuss work conditions amongst themselves.

# 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 labour 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 with some variations, such as lower minimum thresholds for providing notice. For example, New Jersey recently amended its “mini-WARN” law to include coverage for part-time, remote and out-of-state employees, expansion of

the definition of employer and 90 days' written notice. Likewise, Illinois, Iowa, New Hampshire, New York and Wisconsin also have "mini-WARN" acts that apply to layoffs of as few as 25 employees.

### 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

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:

- reinstatement to former position (rarely granted);
- monetary damages for wages and benefits lost as a result of the termination;
- monetary damages for any emotional or physical distress suffered as a result of the employer's actions;
- punitive damages intended to punish an employer for egregious violations of the law; and
- 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 Labour'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.

Some states have their own whistleblower laws, prohibiting termination or other adverse employment actions, in retaliation for good-faith reports made by employees about company activities that allegedly violate laws or regulations, or are fraudulent or criminal.

# 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.

### 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 provisions included in restrictive covenant agreements are:

- Tolling provision: duration of non-solicit / non-compete is tolled (extended) 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.
- Irreparable Harm: acknowledgement by the employee that breach will cause and entitle employer to seek and obtain injunctive relief.
- Attorneys’ Fees: awarding attorneys’ fees to the “prevailing party” in any dispute over the restrictive covenant.
- Forfeiture: conditioning the receipt of certain benefits / compensation on the promise of non-competition.

## 4. USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave – a period during which a departing employee is paid his or her salary, but is not permitted to work – is not a typical concept in the U.S., to the surprise of some foreign employers. As the effect of garden leave is not only to prevent the employee from competing with the employer or taking confidential information, but also to carry out work of any kind for any other employer, U.S. courts may question whether there is a valid business interest in such a broad restraint, even if it is fully compensated. As it is not a common arrangement in the U.S., the federal and state laws regarding garden leave are nominal and each situation will be examined independently. Unlike in many countries, however, it should not be assumed that an extended garden leave (beyond a period reasonable for normal transition) 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 labour union and cannot change any terms and conditions of employment without first bargaining with the labour 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 reorganises 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 unionised employees is required to bargain with the union in good faith regarding the effect of the layoff on unionised 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 organisations in the United States. A majority of trade unions are organised under two umbrella organisations: the American Federation of Labour and Congress of Industrial Organisations (“AFL-CIO”) and the Change-to-Win Federation.

The U.S. Chamber of Commerce, an organisation dedicated to representing employers’ interests by engaging in lobbying campaigns, is the largest employers’ organisation in the United States. In certain heavily unionised sectors (e.g., healthcare), employers can and do create multi-employer bargaining organisations 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. As of late 2019, 14.6 million workers, or 10.3% of the workforce, are members of a trade union. Public-sector employees are unionised at a much higher rate (33.6%), than private-sector employees. Only about 6.2% of private industry employees are unionised.

Private-sectors industries with the highest rates of unionisation are utilities (23.4%), transportation and warehousing (16.1%), telecommunications (14.1%) and construction (13.6%). Among occupational groups, education, training, and library occupations (33.1%) and protective service (33.8% each) had the highest unionisation rates in 2019. While only a small portion of the U.S. workforce is unionised, trade unions wield significant lobbying power.

## 3. TYPES OF REPRESENTATION

Generally, most employers’ first exposure to unionisation comes in one of two ways: they notice signs of union organising activity taking place in their establishment or they are confronted with a request by a union to be recognised 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 Labour Relations Board (“NLRB”), the federal agency charged with enforcing the National Labour 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 authorisation 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 labour organisations whose activities affect commerce, to define and proscribe practices on the part of labour and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labour disputes affecting commerce.”

In furtherance of that purpose, the NLRA provides that employees shall have the right to self-organisation, to form, join or assist labour organisations, 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. U.S. law does not recognise works councils or other forms of employee representation.

# XII. EMPLOYEE BENEFITS

## 1. SOCIAL SECURITY

United States law provides for retirement benefits and subsidised health insurance under federal Social Security and Medicare programs. Employers are required to contribute 6.2% of each employee's salary (in 2020, on the first \$137,700 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 annualised employer "shared responsibility" penalty of \$2,570 (indexed) per full-time employee (less the first 30 full-time employees in 2020) 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 recognises 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 recognised 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 (4th of July), Labour 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 labour union may receive more generous vacation time.

### B. MATERNITY AND 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 and in general, it seems there is a trend toward state family leave laws.

### 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.

In addition, on 18 March 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA) into law, requiring certain employers to provide their employees with paid sick leave and expanded family and medical leave, for specified reasons related to COVID-19. The FFCRA creates two new emergency paid leave requirements in response to the COVID-19 global pandemic, that will remain in effect from 1 April 2020 through 31 December 2020. “The Emergency Paid Sick Leave Act” (EPSLA) entitles certain employees to take up to two weeks of paid sick leave. “The Emergency Family and Medical Leave Expansion Act” (EFMLEA) amends the FMLA and permits certain employees to take up to twelve weeks of expanded family and medical leave, ten of which are paid, for specified reasons related to COVID-19. States have also created paid sick leave programs for certain employers in response to the COVID-19 pandemic.

#### 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 an 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.

## 5. ANY OTHER REQUIRED OR TYPICALLY PROVIDED BENEFITS

Depending on the size and industry of the employer, additional benefits, while not required, are typically provided. Popular employee benefits in the U.S. include: long term/short term disability insurance, health insurance, life insurance, dental insurance, vision insurance, paid parental leave, commuting/travel assistance and gym/wellness benefits.

John Sander  
Principal, **Jackson Lewis P.C.**  
John.Sander@jacksonlewis.com  
+1 212 545 4050



Maya Kaplan Atrakchi  
Knowledge Management Attorney,  
**Jackson Lewis P.C.**  
Maya.KaplanAtrakchi@jacksonlewis.com  
+1 212 545 4000



# JACKSON LEWIS P.C.

## UNITED STATES OF AMERICA

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*This memorandum has been provided by:*

Jackson Lewis P.C.  
666 Third Avenue  
29th Floor  
New York, NY 10017  
+1 212 545 4000  
[www.jacksonlewis.com](http://www.jacksonlewis.com)

### CONTACT US

For more information about L&E Global, or an initial consultation, please contact one of our member firms or our corporate office. We look forward to speaking with you.

L&E Global  
Avenue Louise 221  
B-1050, Brussels  
Belgium  
+32 2 64 32 633  
[www.leglobal.org](http://www.leglobal.org)



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