Foreign Employees in the US

Advancing, Promoting and Facilitating the Success of New American Businesses

By Mr. Brian Figeroux

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About the New American Chamber of Commerce

Since our founding, the Chamber has dedicated itself to providing assistance to all small businesses within New York City. We strongly believe that every business should be given the opportunity to reach their full potential. Given the current workforce and the socio-economic demands, it is critical to support these entrepreneurs in the underserved areas of New York City.
Our main priority is to expand and deepen community relations and diversify the Chamber's funding sources for small businesses. Clearly, expressing these strategic goals and direction will help to deepen trust and support for the Chamber, and build on our rich legacy of years of service to the New York City community.

We are excited to share our strategic vision, aiming to gain your participation and involvement. As such, we are committed to earning your business, trust, satisfaction and partnership. By working together we can have another successful conference, thus moving our organization, membership and sponsors forward toward prosperity and a renewed purpose.

About Our Business Services

The Law Firm of Figeroux & Associates prides itself in providing excellent customer service to its community, and has partnered with New American Chamber of Commerce and Hispanic American International Chamber of Commerce to implement Small Business Solutions Program as a source for all business owners. Whether you are planning a new business, new to importing and exporting, applying for a Minority Certification (MWBE), or applying for a U.S. work visa we are happy to assist you.

As a Chamber of Commerce member, the Law Firm of Figeroux & Associates services are offered at a great discount (40% discount versus other leading firms) and can be a valuable source for business owners. Your membership will include the following:

- Unlimited initial phone consultation during business hours
- Attorney will review your documents each month
- Initial call made on behalf of your business by Figeroux & Associates
- Initial letters written on behalf of your business
- Follow up letters are written (billed at an hourly rate)
- Initial collection letters
- One-on-one consultations for new legal matters
- Registered agent for your business in the state where you were incorporated or principle place of business

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About Mr. Brian Figeroux

The Law Offices of Figeroux & Associates, is a full-service law firm with over 15 years of legal experience that has helped more than 10,000 clients. The firm was created by Civil Rights attorney Brian Figeroux.

Initial concentration focused on Criminal Defense, Family/Divorce Law Immigration, Civil Litigation and Police Misconduct Issues. Soon the practice expanded to Personal Injury, Wills & Estate, Tax Relief and Bankruptcy Law.

Figeroux & Associates, is culturally diverse, having roots from all over the globe speaking many languages, including Spanish, Creole, French, Korean, Russian, Chinese, Punjabi and Urdu. Additionally, Figeroux & Associates founded, three not-for-profit organizations. The Immigrant's Journal Legal & Educational Fund, Inc., the New American Chamber of Commerce, and Concerned Americans for Racial Equality.

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Introduction

Cultural differences, while difficult to observe and measure, are obviously very important. Failure to appreciate and account for them can lead to embarrassing blunders, strain relationships, and drag down business performance. In some cultures, loyalty to a community/family, organization, or society is the foundation of all ethical behavior. The Japanese, for example, define business ethics in terms of loyalty to their companies, their business networks, and their nation. Americans place a higher value on liberty than on loyalty; the U.S. tradition of rights emphasizes equality, fairness, and individual freedom.

In another example, managers in Hong Kong, have a higher tolerance for some forms of bribery than their Western counterparts, but they have a much lower tolerance for the failure to acknowledge a subordinate's work. In some parts of the Far East, stealing credit from a subordinate is nearly an unpardonable sin.

This booklet can aid you with basic knowledge to begin your journey to do business in the U.S. within legalities. Even the most experienced businesses can benefit from an accurate understanding of new opportunities and the risk involved.

Overview

The United States Federal System

There are two primary sections of law in the United States: federal and state. The U.S. Constitution is the foundation for all federal law and is the supreme law of the land. Federal law is legislated and enforced by the national government through its own system of courts and administrative agencies.

In addition, the United States is made up of 50 states and various territories. Elected legislatures, assemblies, and executives govern each state and pass laws effective in their jurisdiction. Each state has its own enforcement organizations, administrative agencies and separate judicial systems.

Some areas are governed solely by one law system or the other. For example, private sector collective bargaining in the United States is legislated and enforced exclusively at the federal level. However, the manner and timing of wage payments is a state issues.

Many laws are governed by both federal and state law. Discrimination laws can be found in both federal and state statutes. Minimum wage and overtime laws are also governed by both federal and state statutes. In addition, the scope of the protections under each statute changes often.

It should be noted that there is a third section of law which may impact employment decisions: local law. Municipalities, counties, towns, and villages establish their own laws to govern local issues. While such entities do not often regulate employment directly, some localities have some control over employment issues.

U.S. Employment Laws

In the United States, employment laws can be found in federal and state constitutions, statutes, codes, administrative regulations and executive directives. The United States

has also adopted the principle of stare decisis, meaning that judges can interpret the laws passed by the federal and state legislatures and their decisions serve as precedent in disputes.

Unlike some countries, there is no general court or arbitrative body that is solely responsible for deciding all employment disputes, such as the labor courts found in many jurisdictions. Employment laws are enforced in large part by private litigation brought in federal or state court and various administrative agencies. Most employment laws provide for civil and/or equitable remedies. Several statutes, such as the National Labor Relations Act, limit enforcement exclusively to a particular administrative agency. In some cases, those agencies can act only on a complaint filed by a third party. In other instances the administrative agency can enforce a statute on its own initiative. Other statutes provide for parallel enforcement by private individuals and by the designated administrative agency.

Another defining characteristic of employment disputes in the United States is the money at risk, due to a combination of factors: the litigation process involves pre-trial discovery (e.g., requests for documents, affidavits, and testimony by parties and witnesses); the expenses of archiving, searching and producing electronic data; and the availability of jury trials in certain cases.

Employment Contracts and At-Will Employment

In the U.S. employment is commonly at-will employment. This creates a presumption that the employment relationship may be terminated at the will of either the employer or the employee. This means that either of the parties may terminate the employment relationship, for any lawful reason, at any time, without providing prior notice and without receiving some form of compensation.

At-will employment is not governed by federal law and a uniform set of rules does not exist for applying this important concept. Instead, the practice is governed by the statutes or common law of each of the states. One common feature of at-will employment, however, is that the parties are not required or even encouraged to enter into a written employment agreement. Indeed, given the presumption of at-will employment, written employment agreements are infrequently used in the United States, except for executive or other key positions, or when specifically required by law.

As indicated, the at-will presumption is vague. Employers can explicitly limit their discretion to terminate an employee by agreeing to discharge only “for cause” or only after a certain fixed period of time or notice period. The parties have the freedom to define “cause,” the length of the contract term, or the notice period in any fashion they desire as long as the provisions of the contract do not violate some other law.

Employers can unintentionally undermine the at-will relationship as well, creating an implied contract. A common means by how an employers can create an implied contract with their employees is by the language used in employee handbooks. While handbooks serve a useful purpose, they can become dangerous documents unless drafted with the objective of preserving the at-will relationship. For example, policies in a handbook that promise to terminate employees only for cause or that promise to follow a detailed discipline or termination process have been found by state courts to modify the at-will

status of those employees governed by the policies. Thus, the employer's failure to comply with the terms of these policies amounts to a breach of contract.

The at-will doctrine is not without limits. This doctrine has seen significant inroads in some states which, for example, prohibit terminations that violate public policy or are based in malice or bad faith. The doctrine also does not exempt employers from complying with statutes passed by the federal and state legislatures. The doctrine also does not apply to employees who are subject to a collective bargaining agreement since such agreements almost uniformly limit an employer's right to terminate employees at-will.

Employee Protections

Discrimination

The prohibitions on discrimination in the workplace are firm in American law. Discrimination occurs when employees are treated differently than similarly situated co-workers because they belong to a "protected category," including decisions that affect hiring, discharge, compensation, promotion, training, apprenticeship or other terms, conditions or privileges of employment. Protected categories under federal law include, for example, race, color, national origin, sex (including pregnancy status), age, disability, military status, religion and genetic information (including family medical history).

Federal anti-discrimination laws set the groundwork for workplace protections but it's not the supreme law. This means that these federal protections and constraints are applicable in all 50 states and U.S. territories, but the states and territories are free to extend even more protections to the employees within their jurisdiction and can adopt additional protected categories that are not in federal law. For example, while sexual orientation is not a protected category under federal law, it is protected under the anti-discrimination laws of 35 of the states. It is important in this instance that an employer familiarize itself with the scope of the anti-discrimination laws of each state in which it has employees.

In the U.S., discrimination is generally proved by employees under one or both of the following theories: disparate treatment or disparate impact. In a disparate treatment claim, the employee alleges that the employer engaged in discrimination. For example, the employer took action against the employee because of his or her membership in a protected category. Proof of discriminatory motive is critical in a disparate treatment case, although it may often be interpreted from the conduct of the employer. On the other hand, disparate impact cases do not require proof of discriminatory motive or intent; rather, an employer's facially neutral policy or practice may still be unlawful if it has a significant adverse impact on a protected group and is not justified by business necessity.

Disparate impact cases are often pursued as class actions, meaning that the lawsuit is filed on behalf of every employee allegedly victimized by the policy or practice at issue. In such cases, the employees allege alternative business practices are available to the employer that would achieve the same business objectives without disparately impacting those in the protected category.

Employees who successfully claim discrimination in violation of the federal discrimination statutes may be entitled to equitable relief (such as back pay), compensatory damages (such as payment for emotional distress or front pay), injunctive relief (such as

reinstatement), punitive damages, and attorney's fees. In addition, although federal law does not generally provide for individual liability under discrimination statutes, many state anti-discrimination statutes will hold an individual liable for discrimination or for aiding and abetting discrimination.

Unfortunately, the statutes that prohibit discrimination are not gathered into one readily identifiable law with equal application to all federal, state, or private employers. Discrimination laws are generally scattered through the U.S. Code, state statutes, and sometimes in municipal codes. Moreover, the extent of their protections, the employers covered by each statute, and the enforcement policies and procedures can change depending on the location/s of the employer's business or the law/s at issue.

The following summarize main federal laws regarding discrimination.

Civil Rights Act of 1866 ("Section 1981").

Applicability: All employers in the United States, regardless of the number of their employees, are generally subject to Section 1981.

Prohibitions: Section 1981 prohibits discrimination based on race or ethnic characteristics in connection with the making and enforcing of contractual relationships, including employment relationships.

Enforcement Procedures: Individuals who believe they have been the victim of discrimination violation of this statute can file a claim immediately with any state or federal court without the need to first pursue the claim with an administrative agency.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

Applicability: All employers in the United States are generally subject to USERRA.

Prohibitions: USERRA prohibits discrimination in employment, retention, promotion, or any other benefit of employment against any person who (a) is a past or present member of the Uniformed Services (i.e., the military); (b) has applied for membership in the Uniformed Services, or (c) is otherwise obligated to serve in the Uniformed Services. Uniformed Services include the U.S. Armed Forces, National Guard, and Public Health Service Commissioned Corps.

Employer Obligations: In addition, USERRA grants an eligible employee the right to be reinstated to his/her civilian job if the employee leaves that job to serve in the military. This job protection applies to employees who are absent to serve in the military for up to 5 years. Eligible employees must be restored to the job and benefits that they would have attained if they had not been absent due to military service. In some cases, eligible employees may be reinstated to a comparable position.

Enforcement Procedures: Individuals who believe they have been the victim of discrimination in violation of this statute have the option of filing a complaint with the U.S.

Department of Labor's Veterans Employment and Training Service (VETS). Individuals may also choose to bypass the VETS process and immediately bring a civil action against an employer in state or federal court.

Equal Pay Act (EPA)

Applicability: Employers engaged in commerce or in the production of goods for commerce are generally subject to the EPA, an amendment to the federal Fair Labor Standards Act (FLSA). Unlike other statutes, there is no threshold number of employees required for an employer to be covered by the FLSA. Rather, covered employers are enterprises engaged in interstate commerce; "interstate commerce" is interpreted very broadly and may include companies that handle or work on goods that have moved across state lines. In addition, covered employers must meet specified dollar volumes of business (at least $500,000 annually). Nevertheless, even companies that fail to meet the specified dollar volume can still have individual employees covered by the EPA if the employee's job takes him/her across state lines or if the employee is directly involved in producing goods for commerce, such as goods that are shipped directly out of state.

Prohibitions: The EPA prohibits discrimination on the basis of gender in the payment of compensation and benefits. In other words, it mandates that men and women in the same workplace be given equal pay for equal work. Job content (not job titles) determines whether jobs are equal.

Exceptions: Unequal pay is allowed where the differences are based on a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or any other differential that is not based on sex.

Enforcement Procedures: Individuals who believe they have been the victim of discrimination in violation of this statute can file a claim immediately with any state or federal court. Notably, double damages can be awarded if there is a willful violation.

Immigration Reform and Control Act (IRCA)

Applicability: IRCA prohibits citizenship and national origin discrimination with respect to hiring, firing, and recruitment by employers with 4 or more employees.

Prohibitions: U.S. citizens and nationals, recent permanent residents, asylees and refugees are protected from citizenship status discrimination. IRCA also prohibits the employment of illegal immigrants in the United States.

Enforcement Procedures: IRCA does not provide a remedy to individuals directly in a state or federal court; rather, IRCA is enforced by the United States Department of Justice, Office of Special Counsel for Immigration Related Unfair Employment Practices. Damages are limited to back pay, reinstatement, and certain civil penalties and attorney's fees.

Title VII of the Civil Rights Act of 1964, as amended ("Title VII")

Applicability: Title VII applies to employers with fifteen or more employees.

Prohibitions: It prohibits discrimination based on race, color, religion, sex, or national origin in employment decisions regarding hiring, discharge, compensation, promotion, training, apprenticeship, referral for employment, or other terms, conditions and privileges of employment.

Enforcement Procedures: Title VII does not permit individuals to file claims immediately with the courts. Congress created an administrative agency, the Equal Employment Opportunity Commission (EEOC), to serve as a gatekeeper. Any current or former employee who wants to sue an employer for a violation of Title VII, the Age Discrimination in Employment Act and/or the Americans With Disabilities Act, all of which are federal laws, must first file a charge of discrimination with the EEOC. The purpose of this requirement is to provide the agency with a minimum period of time to investigate the allegations and attempt to resolve the matter. If the EEOC is unsuccessful in achieving a resolution, it will issue a finding as to whether or not "probable cause" exists to believe the employer engaged in discrimination. Either way, in the vast majority of cases, once the EEOC has issued a ruling, it will provide the employee with a Right to Sue Notice, which means that the employee may now file a civil action against the employer in court.

The following subsections address each of the protected categories under Title VII with a little more specificity.

Race and Color

Race and color are separate classes under federal law. Race is defined broadly and includes any physically identifiable class of people. Indeed, it not only protects individuals who are customarily assigned to a particular race (Caucasian, Asian, or African, for example), but it has also been extended to protect broad classes such as Latinos. Color, on the other hand, can protect not only against discrimination between races (such as Caucasians and Africans), but may also protect against discrimination within the same race; such as by prohibiting an employer from choosing a light-skinned African American over a dark-skinned African American.

National Origin

National origin refers to the country from which one's family originated. Often, the line between race discrimination and national origin discrimination is unclear. Generally, employers are not permitted to favor individuals of one ancestry over individuals of a different ancestry. For example, an employer may not discriminate against someone because his or her ancestry is Irish or Scandinavian. National origin is different than one's nationality or citizenship. Citizenship refers to the country to which one pledges allegiance or to which one has citizenship duties and responsibilities. Citizenship is not protected under Title VII; it is protected under the Immigration Reform and Control Act.

Notably, the United States has entered into several treaties known as Friendship, Commerce, and Navigation treaties that have been interpreted to provide a narrow exception to the rule prohibiting discrimination on the basis of national origin. They allow foreign companies doing business in the United States to discriminate in favor of nationals

of their home country in limited circumstances. Some courts reviewing these cases have held that the company must show a "bona fide occupational qualification" (BFOQ) for the position, such as the need for linguistic or cultural skills from the home country.

Sex/Gender and Pregnancy

An employer may not discriminate against any individual because of his or her sex. At present, the term "sex" does not include sexual orientation. Title VII has not generally been held to protect homosexuals, bisexuals, transsexuals or transvestites. As explained in other sections of this Guide, however, these individuals may be protected by state or municipal law.

In certain narrow situations, an employer may be permitted to discriminate on the basis of sex if the trait is a Bona Fide Occupational Qualification that is reasonably necessary to the normal operation of the business. In order to justify a Bona Fide Occupational Qualification, there must be a direct relationship between the protected trait and the ability to perform the duties of the job, the Bona Fide Occupational Qualification must relate to the central mission of the employer's business, and there must be no less-restrictive or reasonable alternative. For example, a television station may require a female actor for a female role in a television series. Practically speaking, in most cases, this is a difficult standard to meet.

Title VII was amended by the Pregnancy Discrimination Act (PDA). It revised the definition of "sex discrimination" to include employment decisions made because of pregnancy, childbirth, or related medical conditions.

Religion

An employer may not discriminate against any individual because of his/her religious beliefs or otherwise require an employee to participate (or not participate) in a religion as a condition of employment.

Religion is not defined in Title VII. Accordingly, decisions of the federal courts govern the definition of religion under this statute. The courts have included in the definition all moral or ethical systems of belief which are held in the same fashion or respect as the beliefs held by traditional organized religions. As a result, federal law protects not only individuals who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also individuals who have other sincerely held religious, ethical or moral beliefs. Thus, even an atheist's belief may constitute a religious belief for purposes of Title VII. But, in an attempt to avoid abuse of this doctrine, the courts have distinguished between beliefs which are only convenient as opposed to those which are sincerely held.

Title VII also requires employers to take reasonable steps to accommodate religious beliefs, unless doing so would cause more than a minimal burden on the operations of the employer's business. This means that an employer may be required to make reasonable adjustments to the work environment that will allow an employee to practice his or her religion. For example, employers may be required to allow individuals to wear particular items of clothing or to be absent on certain holy days. But, if the employer can demonstrate that a requested accommodation will cause undue hardship, such as if the accommodation is costly, compromises workplace safety, decreases workplace efficiency, infringes on the

rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work, the employer is not required to offer the accommodation.

Americans with Disabilities Act (ADA)

Applicability: The ADA applies to employers with fifteen or more employees.

Prohibitions: It prohibits discrimination against a qualified person with a disability, which is defined as an individual who can perform the essential functions of the job with or without a reasonable accommodation. A disabled individual is one who has a disability, has a record of such impairment, or is regarded as having such an impairment. A disability does not include temporary injuries or illnesses, such as the flu, or personality traits, or physical characteristics (left-handedness, eye color). On January 1, 2009, the ADA Amendments Act of 2008 (ADAAA) took effect, overturning several seminal decisions of the U.S. Supreme Court and sending an unmistakable message that the concept of a disability is to be broadly construed by employers and the courts alike.

Employer Obligations: In addition to prohibiting discrimination against qualified individuals with a disability, the ADA requires employers, once they are put on notice of the existence of the disability, to extend a reasonable accommodation to the employee. Once an employee has provided the employer sufficient information to let the employer know that he/she is having difficulty performing his/her job because of a physical or mental impairment, the ADA requires the employer to begin an "interactive process" to determine if an accommodation is needed.

The outer boundary of a "reasonable" accommodation under the ADA is whether it will create an "undue hardship" for the employer. "Undue hardship" is defined as an "action requiring significant difficulty or expense" when considered in light of factors such as the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Employers are relieved of the obligation to provide an accommodation if it will cause an undue hardship. Undue hardship is determined on a case by-case basis.

Enforcement Procedures: Like Title VII, a claim under the ADA must first be filed with the EEOC. An individual can only file a claim in state or federal court under the ADA after the administrative requirement has been exhausted and the individual has received a Right to Sue Notice from the EEOC.

The Genetic Information Nondiscrimination Act (GINA)

Applicability: GINA applies to employers with 15 or more employees.

Prohibitions: The Genetic Information Nondiscrimination Act (GINA) prohibits employers from discriminating against an employee based upon genetic information. It places broad restrictions on an employer's deliberate acquisition of genetic information and mandates confidentiality for genetic information that employers lawfully collect. In addition, it strictly limits disclosure of such information and, like each of the statutes mentioned in the Discrimination section of this Guide, prohibits retaliation against employees who complain about discrimination.

Some of the more obvious violations of this law occur when an employer requires a worker to take a genetic test or fires the worker based on information about such a test. However, employers can run afoul of GINA in a number of other ways they may not anticipate because the Act broadly defines genetic information to include not only genetic test results but also any information about the manifestation of a disease or disorder in a family member, such as family medical history. Thus, for example, employers should tell health care providers who conduct post-offer, pre-employment medical examinations not to disclose to the employer the results of any family medical history or other genetic information. Violations of GINA subject employers to the same remedies as violations of Title VII of the Civil Rights Act of 1964.

Enforcement: Like Title VII, a claim under GINA must first be filed with the EEOC. An individual can only file a claim in state or federal court under GINA after the administrative requirement has been exhausted and the individual has received a Right to Sue Notice from the EEOC.

Age Discrimination in Employment Act (ADEA)

Applicability: The ADEA applies to employers with 20 or more employees.

Prohibitions: It prohibits employers from discriminating against individuals who are age 40 or older with regard to hiring, discharge, compensation, or other terms of employment. Even as between two employees who are in this protected age group, an employer may not favor the younger of the two because of his/her age. In most circumstances, the ADEA prohibits employers from imposing a mandatory retirement age on its employees. As a result, most employers in the United States cannot insist that their employees retire at a specified age.

Exceptions: The ADEA provides several exceptions to its prohibitions against age-based employment decisions. For example, employers may require certain highly paid policy-making executives to retire at age 65 as long as the employees receive at least $44,000 in annual retirement income from the employer or one of the employer's benefit plans. In addition, an employer may impose age limits where age has been shown to be a "bona fide occupational qualification" that is reasonably necessary to the normal operation of the particular business. Generally, such limits must be obvious, such as where public safety is at stake.

Enforcement: Like Title VII, a claim under the ADEA must first be filed with the EEOC. An individual can only file a claim in state or federal court under the ADEA after this administrative requirement has been exhausted and the claimant has received a Right to Sue Notice from the EEOC.

State and Municipal Discrimination Laws

The complexity of the U.S. system is aptly demonstrated in its discrimination laws. Federal discrimination laws are often the baseline for discrimination. State discrimination laws include all of the federally protected categories, such as race, color, sex, disability, and age. However, state and local laws often provide greater protections against discrimination than federal law. In other words, state statutes do not override federal discrimination laws but rather supplement them.

Accordingly, it is vital that employers understand the discrimination protections applicable to their employees in each U.S. location.

Harassment

U.S. discrimination laws also prohibit harassment in the workplace based on any protected category. Harassment is unwelcome conduct – physical, verbal or nonverbal – that is offensive to both the recipient and to a "reasonable person" and creates an intimidating, hostile, or offensive work environment. Harassment is unlawful when it is based on or directed at an individual's status as a member of a protected category, such as age, gender, religion, race or national origin.

Generally, there are two types of harassment. Economic harassment (similar to a prior concept referred to as quid pro quo harassment) occurs when a manager's harassment results in a "tangible employment action." The employment action may be either positive or negative, such as granting a promotion in exchange for accepting sexual requests or demoting an employee who refuses such requests. This form of harassment nearly always involves a manager or supervisor abusing supervisory power and an employer is strictly liable (i.e., automatically liable) for such harassment because the actions of the manager are considered actions of the employer itself.

The second type of harassment, environmental harassment, involves behavior which an employee finds offensive, even though there is no tangible employment action. The harassing conduct must interfere with the employee's work by creating an intimidating, hostile, or offensive work environment. Slurs, jokes, graffiti, suggestive remarks, stalking, threatening, or other such activity are examples of conduct that typically may constitute environmental harassment.

Under federal law, an employer is generally liable for environmental harassment if the harassment is committed by a manager or supervisor. However, employers may escape liability for harassment by one co-worker directed at another co-worker if the employer has actively attempted to prevent harassment in its workplace and the targeted employee unreasonably failed to alert the employer to the harassment. Accordingly, employers are expected to have a harassment policy with multiple avenues for complaints. An employer should also be able to show that it consistently applies and complies with its harassment policy, trains its employees and managers on the policy, and responds promptly to any complaints.

Whistleblowers and Retaliation

There is no general federal statute that protects whistleblowers from retaliation. Such provisions, if they exist at all, are contained within each federal law to which they apply. For example, federal (and state) discrimination laws prohibit retaliation against employees who file employment discrimination charges or assist others to file them, and who oppose unlawful employment practices. Employees must demonstrate that (a) they engaged in a "protected activity" (such as filing a charge of discrimination or complaining to their manager about the same); (b) a negative or adverse action by the employer was taken against them, such as a demotion or a termination; and (c) a causal relationship exists between the first two elements. Under the discrimination statutes, the negative or adverse action does not have to be an "ultimate" employment decision, such as a termination or

decrease in pay. Illegal retaliation occurs whenever the adverse conduct or harm would discourage a "reasonable employee" from making a discrimination complaint.

The discrimination statutes are not the only federal laws that prohibit retaliation. All or nearly all other federal employment statutes protect employees from retaliation for asserting their rights (or for assisting others), including, for example, the National Labor Relations Act, the Fair Labor Standards Act, the Family and Medical Leave Act and the Occupational Safety and Health Act. In addition, some statutes protect employees from retaliation for "whistleblowing" about matters that do not concern their rights as employees. For example, the Sarbanes-Oxley Act of 2002 ("SOX") protects from retaliation employees of publicly held companies who disclose (within the company or to law enforcement authorities) acts that they reasonably believe constitute violations of federal criminal statutes against mail, bank, wire or securities fraud, or any federal statute concerning fraud against shareholders.

By contrast, many states have general whistleblower statutes that protect employees from discharge or discrimination if they, in good faith, report violations of a state, federal, or local law. Given the varying protections afforded to employees under state statutes, employers should use caution before taking any action against an employee who has reported or complained of statutory or regulatory violations.

Workplace Safety

Safety is protected by the Occupational Safety Health Act, known as "OSH Act." OSH Act's primary purpose is to ensure that employers provide employees with a comfortable environment free of unsanitary conditions, mechanical dangers, excessive noise levels, toxic chemicals, excessive heat or cold, and other hazards. The Occupational Safety and Health Administration (OSHA), part of the U.S. Department of Labor, is responsible for enforcing the Act (with the partnership of authorized "state plan" agencies). OSHA implements the standard methods that employers have to use to protect their employees from hazards. OSHA provides standards for construction work, maritime operations, and general industry standards that apply to most, if not all, worksites.

Privacy

There is no general federal law that regulates privacy for employees. In addition privacy can be interpreted to mean many things. However, below are some important topics to take into consideration when establishing your company in the U.S.

Monitoring Employees in the Workplace

"Privacy in the workplace" is most easily understood in the context of monitoring an employee's work. Though an employer is free to monitor employees in public areas of the worksite (subject to certain restrictions on the method used, like video surveillance that also captures audio could create liability under federal wiretap and stored communications acts), this right diminishes in areas where an employee may have a "reasonable expectation of privacy," such as a locker room or restroom.

The developments in technology and the internet have complicated privacy. As an initial step employers should provide policies that explicitly remind employees that they have no expectation of privacy in their use of the employer's electronic resources and that the employer reserves the right to monitor the employees' use of the same. However, as this

is a complicated and evolving area of law, even after accomplishing the initial step, employers should not monitor emails or internet usage without first seeking the advice of counsel.

Employee Data

"Privacy in the workplace" is also often associated with the confidentiality of employee data. With the rise in identity theft, many states have passed data security statutes. These statutes often limit the use and disclosure of certain employee-identifying information (such as Social Security numbers) and impose notification requirements if company databases containing personal information about employees are breached. There is no general federal law that protects an employee's personal information. The closest federal law is the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which imposes national standards for electronic health care transactions. These standards mean that employers can generally receive health-related information about an employee only with the employee's consent, and they must keep such information private and confidential.

Dismissal and Severance

The obligations of an employer at the time it discharges an employee (or an employee resigns) are simpler in the United States than in many countries around the world. Generally, employers have no obligation to provide employees any notice prior to a termination or to give the employee any severance benefits, unless the employer agreed to do so in a contract. Indeed, employers are only obligated to pay, on or near the last day of employment, those wages or benefits which the employee has already accrued or earned. Notably, whether benefits are deemed earned and payable is governed by state law, as is the timeline for final payments, which can range from immediate payment to payment no later than the next regular payday or within 6 days of termination.

Employers need only give employees advance notice of the decision to terminate their employment in a limited set of circumstances. For example, advance notice is required where the termination qualifies under federal law as a mass layoff or plant closing. Under the Workers Adjustment Retraining and Notification Act (WARN), an employer with 100 or more employees is obligated to give 60 days' notice prior to a "plant closing" involving the termination of 50 or more employees at a single site (or an operating unit within a single site). It must also provide such notice if there is a "mass layoff" at a facility that will remain open. In addition, if a "plant closing" or "mass layoff" will take place, the employer must also provide advance notice to a union, if applicable, and to the local governmental authorities. Failure to provide adequate amount of notice can land the company in trouble and be subject to penalties.

In addition, most states also require employers to pay into an unemployment insurance fund.

Collective Bargaining

Collective bargaining in the United States is not as widespread as in other areas of the world. Only 7.2% of the private sector is unionized. Moreover, the United States has no statutory regulations that require the establishment of employee representative bodies

similar to the works councils in the European Union nor are there any industry-wide sectoral collective agreements. Indeed, there are no regulations in the United States that require collective representation or consultation.

Instead, the National Labor Relations Act (NLRA) governs and protects the rights of employees in the private sector who choose to organize themselves into unions to bargain collectively with their employers. Unless an employer chooses to voluntarily recognize a union as the collective bargaining representative of its employees, those interested in organizing the workforce must first petition the National Labor Relations Board (NLRB), which enforces and administers the NLRA, to conduct an election. If the union supporters win a majority of the votes cast, the union becomes the lawfully recognized agent for the employees in that workplace and it has the power to collectively bargain on behalf of the employees.

The NLRA prohibits employers from interfering with or restraining employees from exercising their statutory right to form, join, or assist labor organizations. Employers may not discriminate against employees who support unionization and they may not retaliate against employees who file charges or complain about violations of the NLRA. If employees successfully organize their workplace, employers must bargain with the union on certain "mandatory subjects of bargaining," such as wages and other conditions of employment.

Once a union has been identified and a contract reached, employers must abide by the terms of the contract, and generally must refrain from unilateral changes in terms and conditions of employment, at least without engaging in a bargaining process. Contract terms generally include wages, pay increases, promotions, benefits, leave benefits, discipline procedures, terminations limited to cause, grievance procedures, distribution of work assignments, and other such provisions. Failure to abide by these agreements, or to abide by bargaining obligations regarding decisions and/or effects of important changes (e.g., plant closings, relocations or layoffs), can lead to claims of an unlawful labor practice before the NLRB. Most collective bargaining agreements contain grievance procedures subjecting contract disputes, including disputes over employment terminations, to binding arbitration before a single, mutually selected arbitrator. Most agreements also contain enforceable "no-strike" clauses, prohibiting the union from striking the employer during the term of the agreement.

Employee Compensation and Benefits

Wages and Hours

The primary law governing wages in the United States is the federal Fair Labor Standards Act (FLSA). Covered employers include those that are engaged in interstate commerce; "interstate commerce" is interpreted broadly and may include companies that handle or work on goods that have moved across state lines. In addition, employers must meet specified dollar volumes of business (at least $500,000 annually) to be covered under the FLSA. Notably, companies that fail to meet the specified dollar volume can still have individual employees covered by the EPA if the employee's job takes him/her across state lines or if the employee is directly involved in producing goods for commerce, such as goods that are shipped directly out of state.

The FLSA sets basic minimum wage and overtime pay standards. Workers who are covered by the FLSA are entitled to a minimum wage of not less than $7.25 per hour as of July 24, 2009. Moreover, although there are no federal restrictions on the number of hours an employee may work in a week, employers must pay eligible ("nonexempt") employees an additional one-half times the individual's regular rate of pay for all hours of work in excess of 40 in a week.

Some employment positions are exempt from the FLSA's overtime requirement. The most common exemptions are the so-called "white-collar" exemptions. These positions include executives, administrative employees whose primary duty is to perform office or non-manual work directly related to the management or general business operations of the employer on matters of significance, professionals, computer professionals, and outside sales employees. Whether or not a particular position falls within one of these exemptions is highly regulated and determined by the duties actually performed by a worker and not simply by the title the employer assigns to the position.

State laws often establish additional minimum wage and overtime requirements. Federal law does not supplant these laws; rather, both laws apply and employers must investigate to ensure that they comply with the more generous of the two. State laws also regulate the timing of the payment of wages and the manner in which they must be paid.

Leaves of Absence

There are few laws that require employers to provide leaves of absence for their employees. Indeed, the leaves of absence which are mandated by federal or state law are often unpaid. Nevertheless, there are a number of relevant leave laws that an employer new to the United States should understand. The sources of these leave obligations can come from the Americans with Disabilities Act (ADA), the Family Medical Leave Act, Workers' Compensation laws, short term or long term disability plans, pregnancy disability and maternity leave statutes, handbook provisions for vacation or personal leave time, collective bargaining agreements, and state and local laws.

Vacation or Holiday Leave

Federal law does not require employers to pay employees for time not worked, such as public holidays or vacations. Indeed, the Fair Labor Standards Act does not even address vacations or paid time off. In practice, however, employers in many industries regularly provide paid vacations ranging from two to four weeks per year (with some providing more or less to certain employees). Although state and federal law do not require such a benefit, they may regulate what an employer can do with that benefit if it elects to provide it to its employees (e.g., whether accrued but unused vacation time must be carried over to the following year).

As for public holidays, the vast majority of states do not require that employers compensate employees for the time off taken from work unless the employer contracts with an employee to do so. On the other hand, if an employer requires an employee to work on a recognized public holiday, a number of states compel employers to pay employees at a premium rate.

Paid Sick Leave

U.S. law does not generally require employers to provide paid leave for illnesses, injuries, or pregnancy-related difficulties. On the other hand, many employers provide a limited paid sick leave benefit, such as three to five days per year. In addition, employers also often provide private insurance to cover long-term or shortterm disabilities. These benefits and insurance plans are generally provided in the discretion of the employer and enforced according to the terms of the plan. A few states have created disability funds to which employees can apply for compensation if they become ill and will miss work for a period of time. In some states, participation in a short-term (typically 26-week) non-work-related disability insurance plan is required by law.

Family Medical Leave Act (FMLA) – Unpaid Leave

The FMLA provides eligible employees job protected, unpaid leave for qualifying conditions or situations. The FMLA applies to private employers who employ 50 or more employees.

To be eligible for leave under the FMLA, an employee must meet certain standards. First, the employee must have worked for the employer at least 12 months, although those months need not be consecutive. Second, in the 12 months prior to the request for leave, the employee must have worked 1,250 hours for the employer. Third, there must be 50 or more employees at or within 75 miles of the employee's worksite. And, finally, the employee must request leave for a qualifying reason. Qualifying reasons for an employee to take an FMLA protected leave of absence include:

- the birth of a son or daughter to the employee;
- the placement of a son or daughter with the employee for adoption or foster care;
- to provide care for the employee's son, daughter, spouse, or parent who has a serious health condition;
- a serious health condition of the employee (as defined in the FMLA regulations) that prevents the employee from working;
- to provide care for an injured member of the armed forces or a veteran who is undergoing treatment or therapy for a serious illness incurred in the line of duty ("Military Caregiver Leave");
- for qualifying exigencies related to an employee's family member being deployed with the Armed Forces to a foreign country or being called to active duty in support of a military operation ("Qualifying Exigency Leave"). A qualifying exigency includes such things as allowing an employee to address issues related to a short-notice deployment, to attend military events, to arrange for child care, or other such issues.

With the exception of Military Caregiver Leave, an eligible employee may take up to 12 weeks unpaid leave in a single twelve month period for any of the qualifying reasons listed above. As to Military Caregiver Leave, an eligible employee is entitled to 26 workweeks of leave in a single 12-month period to care for a defined family member who is either

injured or becomes ill in the line of duty while on active duty or is a veteran who continues to suffer from an injury or illness incurred in the line of duty prior to being discharged from the military.

Notably, leave under the FMLA need not always be taken in a single lump of time. An employee may take intermittent leave or request a reduced leave schedule if the leave is medically necessary as a result of the employee's or a family member's serious health condition. The regulations impose various notice requirements and obligations for both employees and employers to follow in order to effectuate a leave. Leave under the FMLA is job-protected. In other words, if the employee returns to work within the leave period, an employer must restore an employee to the employee's same position or to an equivalent position with equivalent benefits, pay, and other conditions of employment. Nevertheless, the FMLA does not grant an employee greater rights to reinstatement or benefits than if the employee had been continuously employed during the FMLA period. Finally, employers may not interfere with, restrain, or deny employees the right to exercise or attempt to exercise their rights under the FMLA. Moreover, the FMLA prohibits retaliation against any individual who opposes a practice made unlawful by the FMLA. Several states have adopted their own laws governing family and medical leave, including, for example, California, the District of Columbia, Connecticut, New Jersey, Maine, and Minnesota. These often impose additional leave requirements, and/or apply to smaller employers. Accordingly, a company should be vigilant in obtaining information specific to its work locations and ensure that it understands both its federal and state obligations for such leaves.

The ADA, as explained in other sections of this Guide, protects qualified individuals from discrimination based on a disability. A qualified individual is one who can perform the essential (or core) functions of a position with or without a reasonable accommodation. Furthermore, the ADA obligates employers to take affirmative steps to accommodate an employee's disability. Accommodations must be reasonable and not place an undue burden on the employer.

Granting employees temporary unpaid leaves of absence to address medical or psychological issues created by a disability is a reasonable accommodation. Accordingly, even though an employee may have exceeded the amount of job-protected leave under the FMLA, the ADA, in some situations, may give that employee additional time to recover provided that granting such time does not impose an undue hardship on the employer. Notably, the ADA only protects "disabilities," which are physical or mental impairments that substantially limit one or more major life activities. However, some states and cities, such as New York State and New York City, have much broader definitions of disability, which may encompass injuries or illnesses that are temporary or that do not substantially limit major life activities. Thus, in evaluating requests for leave extensions beyond the FMLA, employers must also carefully consider their obligations under state law to accommodate a potentially wider range of conditions.

Workers' Compensation Insurance

Under state law, most employees who are injured on the job have an absolute right to medical treatment for the injury and, often, compensation for the resulting temporary or

permanent effects of the injury. This protection, known as workers' compensation, is a form of insurance that states mandate most employers provide.

Workers' compensation is administered on a state-by-state basis.

Disability Insurance

In addition to workers' compensation benefits, five states— California, Hawaii, New York, New Jersey and Rhode Island-have passed legislation requiring either the state or the employer to provide disability insurance that provides temporary benefits to individuals who suffer non-work-related injuries. In addition, the federal government's Social Security Administration provides certain disability benefits not directly linked to an individual employer, though tests of eligible status can narrow its application.

Other Leaves

In addition to those leaves listed above, each state provides its own additional leave requirements – usually unpaid – for a variety of other reasons. These can include mandatory leave and job protection for military service, jury duty, blood or bone marrow donations, voting, attendance at school events, or if the employee is a victim of crime or domestic violence.

Pensions or Retirement Benefits

Employers and employees contribute to a federal Social Security program that provides retirement benefits to employees. This program, which is the only governmental pension scheme, is funded mainly through a payroll tax on each employee's wages. The employer pays half of the payroll tax. The employer deducts the other half directly from the employee's wages.

Private employers are not required to provide additional pension or retirement benefits, although many do so as a way to attract and retain qualified and talented employees. In the past, employers provided pensions as the primary retirement benefit; nowadays, employers are providing other more portable benefits and savings vehicles.
U.S. law does not mandate any particular benefits to be provided to employees. Nevertheless, if an employer decides to provide such benefits, those benefits are governed solely by a federal statute, the Employee Retirement Income Security Act (ERISA), which ensures there is a uniform body of law with respect to benefits across the country.

ERISA regulates employee benefit plans and the entities or individuals involved in creating and maintaining those plans. ERISA is designed to protect workers from unfairly losing retirement benefits, such as if the plan is terminated without adequate funds to continue to pay benefits or there were inadequate safeguards for the plan's investments. Violations of ERISA can result in liability for lost benefits, injunctive relief, and penalties.

Compliance Issues Related to Workforce Management

Hiring

Authorized Workers Only

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits employers from knowingly employing workers who are not authorized to work in the United States. Accordingly, employers must verify the identity and employment eligibility of each new

hire. Each employee must be a citizen or have a valid visa or permanent residence card. Visas are classed into different categories which depend on the anticipated length of time in the United States, the employee's education, and job description. To ensure authorization, employers and employees must complete the Department of Homeland Security's Employment Eligibility Verification form ("Form I-9"). The I-9 form must be completed, and all required documentation provided by the employee, within three (3) business days of hire. If the employee is incapable of doing so, the employer may not continue to employ this individual. Failure to abide by these requirements can subject the company to serious penalties and fines, even criminal indictment.

Employment Applications

When it comes to recruitment, employers are restricted by federal and state laws governing permissible and impermissible pre-employment inquiries. These limitations are generally intended to ensure against illegal discrimination in hiring. Employers must beware of the information they request on their applications for employment, the questions they ask in job interviews, and the information they may solicit – wittingly or unwittingly – in accessing online sources, administering preemployment examinations, or conducting background checks. In addition, employers often want to acquire other types of information about applicants' backgrounds before making a final hiring decision. U.S. law permits background checks; but, if the employer is going to use a third party agency to perform the check, the employer must strictly comply, at a minimum, with the federal Fair Credit Reporting Act (FCRA). The FCRA requires certain consents and notices in order to conduct a background check, and especially if the employer relies on the information revealed in that investigation to make an adverse employment decision. A number of states have adopted laws that regulate background checks as well and employers hiring employees to work at facilities located in those states must comply with these additional requirements.

Finally, any questions which are designed to (or likely to) elicit information about a protected category should be removed from employment applications, interviews and such. If not, an applicant denied a position can file a lawsuit claiming that the employer's decision was based on that protected category.

Offer Letters

As noted in other sections of this Publication, U.S. employment law is based on the at-will doctrine. Accordingly, employers are strongly recommended to avoid making any guarantees of employment or employment conditions which undermine the application of the atwill employment. In the United States, other than when hiring highlevel employees, the custom is to extend an offer of employment in the form of a short letter that expressly refers to and preserves the at will nature of the employment relationship. For example, the offer letter should not be referred to as an "agreement" or "contract." It should include language that disclaims it as a contract and affirms the at-will employment. Finally, employers should avoid referring to an employee's "entitlement" to receive benefits; a better practice is to reference an employee's "eligibility" to participate in benefit plans.

Employee Handbooks

Even small employers often decide to provide employees with an employee handbook that identifies the essential policies of the company. As companies grow, the need for a handbook becomes even more compelling. Handbooks can be strong communication tools to establish the culture of the company, its expectations, and its benefits. Notably, federal and state law actually mandate that certain policies be included in a handbook (if the employers actually have a handbook). Handbooks – though useful and necessary – should be carefully constructed to avoid unintentionally creating legal obligations and liabilities.

Reporting, Posting, and Record Retention Requirements

Federal and state laws also provide a host of reporting, posting, and record retention requirements with which most employers must comply. These standards vary widely from state-to-state.

Taxation

Employment income is taxed at progressive rates, depending on various factors. These factors include the amount of the income earned, the employee's marital status, and other factors. In addition to income taxes, there are also Social Security taxes and taxes for Medicare, a publicly funded health insurance program. Employers are obligated to withhold the required percentages from the employee's wages. In addition to federal taxes, there may also be state and municipal taxation requirements. Companies should seek advice of local professionals to ensure that they are complying with all withholding, reporting, and payment requirements.

Restrictive Covenants

Intellectual Property

Employers in most industries require employees to sign an agreement that grants the employer ownership of all intellectual property rights for anything the employee creates or invents during his or her employment. Employers typically retain ownership rights of intellectual property that employees create as part of their work duties which are otherwise within the scope of their employment. These types of documents are generally referred to as "Assignment of Inventions Agreements".

Unfair Competition

Employers often expend significant resources and time to create products, marketing strategies, and customer good will that, in the wrong hands, could place them at a significant and serious disadvantage. Accordingly, U.S. law allows for certain protections against unfair competition. These restrictions are governed by state law, which varies significantly from state to state.

Restrictive covenants, such as covenants not to compete or solicit customers or employees of a former employer, are generally disfavored as a restraint of trade. State courts are willing to enforce such covenants only if the covenants are reasonable, such as in their duration and geographic area. Moreover, there must also be a particular risk that the employee will disclose a material trade secret. Finally, courts also look to ensure that there was consideration for the agreement.

Some states enforce restrictive covenants more readily than others. California, for example, is on one end of the spectrum and prohibits the use of noncompetition restrictions in the employment context. On the other hand, a handful of states, such as Florida, Ohio and Massachusetts, are receptive to the enforcement of noncompetition restrictions.