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Chapter 51

USA


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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The Department of Labor administers and enforces over 180 federal employment laws, including the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the Employee Retirement Income Security Act (ERISA), the Occupational Safety and Health Act (OSHA), and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The Equal Employment Opportunity Commission enforces federal laws that make it illegal to discriminate against job applicants or employees, including Title VII of the Civil Rights Act of 1964 (Title VII), the Pregnancy Discrimination Act (PDA), the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act of 1967 (ADEA), the Equal Pay Act of 1963 (EPA), and the Genetic Information Nondiscrimination Act of 2008 (GINA).

The National Labor Relations Board (NLRB) enforces the National Labor Relations Act (NLRA).

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

In order to be covered by federal employment laws, an employer must employ a certain number of employees (depending on the type of employer and the discrimination being alleged). State and local laws cover smaller employers that lack the number of employees required under federal laws.

Employees are distinguished by the existence of an employment contract (or collective bargaining agreement) or employment-at-will. At-will employment can be freely terminated by either the employer or employee, for any or no reason, with or without notice, so long as a federal, state, or local law is not violated. Typically, employees are presumed to be at-will unless a contract creating a different relationship exists. Where employment is established by contract, the employer-employee relationship is governed by the terms and conditions of the agreement. Employment is also distinguished by: whether the employee works in the public or private sector; whether the worker is considered an employee or an independent contractor; and/or whether the employee is exempt or non-exempt from overtime. Exempt employees are not protected by the Fair Labor Standards Act (FLSA) and are thus not entitled to overtime pay, whereas non-exempt employees are entitled to overtime pay.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

No, written contracts of employment are not required. Federal employment laws do not require employers to provide employees with specific information; however, state and local employment laws may require particular information to be in writing.

1.4 Are any terms implied into contracts of employment?

Contract law allows the parties to lay out the terms of the employer-employee relationship. Employers are under a duty of good faith and fair dealings when an employment contract exists. Depending on the applicable state and local laws, other terms may be implied into an express or implied contract.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes, minimum employment terms and conditions are set down by federal, state, and local laws. Under the Fair Labor Standards Act (FLSA), employers are required to pay covered employees the federal minimum wage and overtime pay for hours worked in excess of 40 hours per week. Additionally, many states and localities enact laws regarding minimum wage, overtime, and mandatory breaks.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective bargaining agreements are governed by the National Labor Relations Act (NLRA), which sets out the requirements for bargaining. The number of employment agreements covered by collective bargaining has decreased over the years; however, they are more prevalent in certain regions of the United States and particular employment sectors.

Typically, bargaining occurs at a company level, between the employer and employees (or employee representatives). In some industries, bargaining occurs at a regional or industry level, between employers and unions.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Under the National Labor Relations Act (NLRA), employers are forbidden from interfering with, restraining, or coercing covered private sector employees from exercising their rights to organise, form, join, or assist a trade union. Employees are free to elect a union to represent them.

2.2 What rights do trade unions have?

Employers and unions are required to meet at reasonable times and bargain in good faith regarding wages, hours, vacation time, insurance, safety practices, and other mandatory subjects. Parties must bargain in good faith for successor contracts. It is considered an unfair labour practice for a party to refuse to bargain collectively, but parties are not obligated to reach an agreement or make concessions.

2.3 Are there any rules governing a trade union's right to take industrial action?

Yes, NLRA protects employee rights to strike and engage in picket lines in a lawful manner. The purpose, timing, and conduct during the strike and picket lines are considered when assessing the lawfulness of employee conduct. Strikes and picket lines must address an economic or an unfair labour practice issue to be found lawful.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

No, trade unions represent employees in work-related negotiations.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable under United States employment and labour law.

2.6 How do the rights of trade unions and works councils interact?

This is not applicable under United States employment and labour law.

2.7 Are employees entitled to representation at board level?

No, employees are not entitled to representation at board level.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes, various federal, state, and local laws protect employees from employment discrimination. Federal employment laws prohibit employers from discriminating against employees and job applicants on the bases of race, colour, sex, pregnancy, religion, national origin, disability, genetic information, or age. Under federal laws, employees are also protected from workplace harassment and retaliation for reporting violations or exercising a legal right.

Many of the state and local laws mirror the federal protections, but some states and localities have extended protections to categories not covered by federal employment laws, such as ancestry, marital status, gender identity or expression, sexual orientation, credit and salary history, and domestic or sexual violence status.

3.2 What types of discrimination are unlawful and in what circumstances?

Discrimination is prohibited in all aspects of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, benefits, and any other term or condition of employment. It is also unlawful to harass employees based on their membership in a protected class. Unlawful harassment comes in two forms: hostile work environment; and *quid pro quo* harassment. Hostile work environment harassment occurs when an employee is subjected to unwelcome conduct based on his or her protected class that is severe or pervasive enough that it creates an intimidating, hostile, or offensive work environment. *Quid pro quo* harassment generally results in a tangible employment action based upon the employee's acceptance or rejection of unwelcome sexual advances or requests for sexual favours, but can also result from unwelcome conduct based on protected classes other than sex. *Quid pro quo* harassment is generally committed by someone who can make or recommend employment decisions (such as termination, promotion, demotion) that will affect the victim, whereas a hostile work environment can result from the conduct of supervisors, co-workers, clients, customers, or anyone else with whom the victim interacts at work.

3.3 Are there any defences to a discrimination claim?

Yes, if an employer can establish that the action in question was taken for a legitimate, non-discriminatory reason, they will not be held liable. Under certain circumstances, employers are allowed to hire employees based on qualities that would generally be considered discrimination. Employers must establish that the *bona fide* occupational qualification is reasonably necessary for the business operations.

Some states and localities provide additional affirmative defences.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees that believe their rights have been violated can file a claim with the appropriate federal agency and/or bring a civil lawsuit against the accused employer. However, most allegations of

discrimination require the employee to first file a charge with the appropriate federal agency before a lawsuit can commence.

Employers are free to settle employment discrimination claims before or after they are initiated.

3.5 What remedies are available to employees in successful discrimination claims?

The purpose of employment law is to place the victim of discrimination in the same position as though the discrimination never occurred. Available relief depends on the type of discrimination. Remedies for an employee who successfully asserts employment discrimination could include, but are not limited to, reinstatement and back pay, compensatory and punitive damages, attorneys' fees, court costs, and/or front pay.

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

No, "atypical" workers do not have any additional protection.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Currently, there is not a national law mandating paid maternity leave. Under the Family and Medical Leave Act (FMLA), eligible employees are provided up to 12 weeks of unpaid, job-protected leave per year. The FMLA also requires the employee's group health benefits be maintained during the leave. Eligible employees are those who have worked for their employer for a minimum of 12 months, have worked at least 1,250 hours over the past 12 months, and work for an employer who employs 50 or more employees.

Some states have enacted laws providing leave similar to the FMLA, while some have expanded employee rights to include paid maternity and paternity leave.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Under the FMLA, a gender-neutral statute, eligible employees of covered employers are entitled to take up to 12 weeks of unpaid, job-protected leave per year with continuation of their group healthcare benefits.

Some state laws provide leave benefits to employees not eligible under the FMLA and/or extend the length of leave permitted.

4.3 What rights does a woman have upon her return to work from maternity leave?

The employer must reinstate the employee to the same or equivalent position held prior to the leave. An equivalent position under the FMLA is one that is virtually identical in pay, benefits, duties, and working conditions. Employers are also prohibited from retaliating against employees for requesting FMLA leave, exercising their FMLA rights, or otherwise interfering with the rights afforded by the FMLA.

4.4 Do fathers have the right to take paternity leave?

The FMLA is a gender-neutral statute that allows for fathers and mothers to request and take leave. Fathers are afforded the same rights as mothers under the FMLA.

4.5 Are there any other parental leave rights that employers have to observe?

Under the FMLA, eligible employees may take up to 12 weeks of leave for the care of an adopted or foster child within one year of placement, for the care of an employee's spouse, child, or parent with a serious health condition, or to recover from a serious health condition that prohibits an employee from performing essential job duties. Eligible employees may also take leave for any qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a covered military member on a covered active duty.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

Yes. Under the intermittent leave or reduced leave provisions of the FMLA, eligible employees are allowed to take leave in separate blocks of time due to a single qualifying reason, or reduce their working hours per workweek or workday.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Generally, the employment relationship ends when a business is sold; new owners have no duty to retain former employees. However, depending on the nature of the sale of shares, the employer-employee relationship may not be affected since the employing entity remains the same. Different rules (e.g., obligation to recognise and bargain with unions representing a predecessor's employees) apply to labour law "successor employers", which generally are employers that hire a majority of its predecessor's employees.

Employers covered by the Worker Adjustment and Retraining Notification Act (WARN) are required to give employees notice. Some states have also enacted laws requiring notice be given.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

Typically, sellers and buyers enjoy the freedom to negotiate the terms and conditions of a sale, and the successor owner may set new initial terms. Yet, a successor owner may have collective bargaining obligations if: (a) the successor owner retains all or some employees, the employee's work is largely unchanged, and the employing entity's nature of business is essentially the same; (b) the successor unionised owner hires a majority of its predecessor's employees, etc.; (c) the successor employer, either expressly or implicitly, demonstrates an intent to recognise agreements; or (d)

the National Labor Relations Board (NLRB) determines the successor employer intended to continue with the existing bargaining unit without indicating new terms and conditions of employment.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

No, an employee does not have rights to information unless the employer is covered by the Worker Adjustment and Retraining Notification Act (WARN). Under WARN, employees must be given at least 60 days' written notice if the employment site will be shut down or there is to be a mass layoff.

5.4 Can employees be dismissed in connection with a business sale?

Yes, the seller and buyer are free to negotiate the terms of the sale, and the successor employer can decide whether to continue or terminate the *status quo* employment relationship.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Employers are free to change the terms and conditions of an at-will employment relationship at any time. Additionally, upon the sale of a business, the successor employer may establish new terms and conditions of employment that the employee must accept prior to continuing employment.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Generally, at-will employees do not need to be given notice of termination. If the employer is covered by WARN, covered employees must be given at least 60 days' written notice of termination. WARN is applicable when the employer has 100 or more employees and will shut down an employment site or conduct a mass layoff. An employment site closing occurs when employment for 50 or more employees is terminated during any 30-day period. A mass layoff occurs when 500 or more employees lose employment during any 30-day period, or 50–499 employees lose employment and they make up 33% or more of the business's active workforce.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Generally, at-will employment allows employers or employees to end employment at any time. Garden leave is a fairly new concept in the United States and not as prevalent as it is in Europe. Thus, the courts have reached inconsistent conclusions when deciding the enforceability of garden leave clauses. The enforceability of a garden leave clause depends on the terms of the agreement, the nature of the employment relationship, whether it is supported by a legitimate business reason, and the jurisdiction in which enforcement is sought. Courts generally enforce a garden leave clause when the employer establishes a willingness to continue paying an employee's wages during the restricted period. However, garden leave agreements that extend too long or are geographically overbroad have been found unenforceable – regardless of the fact that the employer continues paying the employee.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Employment is presumed to be at-will and can be ended at any time, with or without notice, by either party. Termination may be found unlawful if: (a) based on the circumstances, the employer and employee established an implied contract; (b) termination of employment violates public policy (i.e. firing an employee because of jury duty, military service, or refusing to engage in illegal conduct); (c) termination of employment violates federal, state, or local laws prohibiting discrimination; or (d) termination of employment amounts to retaliation.

Dismissal happens through termination or layoffs. Termination of employment is final and primarily based on an employee's performance or behaviour, whereas a layoff may be temporary and based on business reasons.

The consent of a third party is not required, unless a collective bargaining agreement or employment contract requiring consent exists.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

Employees are protected by federal laws (as well as applicable state and local laws) from dismissal that is discriminatory, retaliatory, or in violation of public policy. For example, it is also unlawful to discriminate against an employee seeking or taking protected leave, or exercising other protected rights, including but not limited to certain whistleblowing activities.

If applicable, employees may be protected by collective bargaining agreements or other employment contracts.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

An employer can dismiss an employee for individual or business reasons, so long as: those reasons are not discriminatory or retaliatory in nature; they do not violate federal, state, or local laws; no contract or agreement to the contrary exists; and/or the dismissal is not against public policy.

Upon dismissal, employees are entitled to receive their final pay. Eligible employees have the right to continue healthcare coverage for a limited period of time and receive unemployment benefits from the state government. Employees may also be entitled to severance pay pursuant to state laws or if it is found that the employer led the employee to believe they would be paid severance.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

No, unless a collective bargaining agreement or other employment contract requires specific procedures. Employee hand books or other procedures that employers put in place may provide for specific procedures regarding certain types of individual dismissals.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

The claims a dismissed employee can plead depend on the jurisdiction in which the claims are brought and under what laws the employee asserts his/her rights were violated (federal, state, and/or local). Potential claims include: unlawful discrimination; retaliation for exercising a legal right; wrongful termination; breach of an express or implied contract or agreement; and breach of covenant of good faith and fair dealings.

Remedies for a successful claim may include: back pay; front pay; lost benefits; out-of-pocket losses; attorney's fees and costs; injunctive relief; equitable relief; liquidated damages; and compensatory and punitive damages. Available remedies vary depending on the governing jurisdiction and claims.

6.8 Can employers settle claims before or after they are initiated?

Yes, employees can settle claims before or after they are brought. Depending on the claims asserted, approval by the court or United States Department of Labor (DOL) may be required.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

If a covered employer dismisses a significant number of employees or closes an employment site, the employer must give adequate notice under WARN or other applicable state laws.

The Older Workers Benefit Protection Act (OWBPA) also imposes obligations on an employer if it is dismissing more than one employee at the same time. The OWBPA, which requires employment agreements releasing Age Discrimination in Employment Act (ADEA) claims to be knowing and voluntary, requires that when two or more employees are being terminated, the release provides 45 days (instead of 21 days) to consider the agreement before signing and an additional seven days to revoke. In addition, the OWBPA requires that employers provide specific information to employees who are 40 years of age or older and asked to execute a release of claims in connection with a group termination, including the ages and job titles of employees who were and were not selected for termination.

Furthermore, an employer may have additional obligations if a collective bargaining agreement exists.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

WARN, and equivalent state laws, are enforced by the courts. Employees may bring either an individual or class action civil lawsuit in the appropriate court. Employers who violate the WARN provision by closing an employment site or ordering mass layoffs without providing adequate notice are liable for back pay and benefits to each aggrieved employee. Employers who fail to provide the required notice to the local government are subject to civil penalties not to exceed $500 for each day of violation.

To enforce other employment law violations, employees may file either an individual or class action claim with the appropriate court and/or employment agency. Consequences depend on the violations found.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The enforceability of restrictive covenants varies depending on the jurisdiction in which a party seeks to enforce it and is determined on a case-by-case basis. Types of restrictive covenants include non-competition agreements, garden leave provisions, non-solicitation of customers, non-solicitation of employees, and confidentiality agreements.

7.2 When are restrictive covenants enforceable and for what period?

Laws governing restrictive covenants vary significantly from state to state. However, in determining the enforceability of restrictive covenants, courts will assess, among other things, whether the covenant: protects a legitimate business interest; is reasonable in scope, time period, and geographic restriction; and is reasonable under the circumstances.

7.3 Do employees have to be provided with financial compensation in return for covenants?

Employment is a contractual relationship governed by contract law, thus restrictive covenants require adequate consideration to be enforceable. Since employment is presumed to be at-will, absent an agreement to the contrary, many states find adequate consideration through the continued employment of at-will employees. However, what constitutes adequate consideration varies from state to state. No other compensation is required.

7.4 How are restrictive covenants enforced?

To enforce a restrictive covenant, employers must file a civil lawsuit against the accused breaching employee, seeking injunctive relief and/or damages caused by the breach.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

In the United States, there are numerous federal and state laws and regulations that regulate the collection, use, and transfer of personal data of current, former, and prospective employees, as well as independent contractors and non-employees. The primary federal laws that govern data protection are: the Fair Credit Reporting Act (FCRA), which applies to those who obtain consumer reports; the

Federal Trade Commission Act (FTCA), which prohibits unfair or deceptive practices; the Genetic Information Nondiscrimination Act (GINA), which applies to genetic information with respect to health insurance and employment; and the Health Insurance Portability and Accountability Act (HIPAA), which regulates medical and health information. Most states have enacted some form of privacy legislation, while nearly all have implemented laws requiring notification of personal information security breaches.

Although there are no federal laws specifically governing the cross-border transfer of employee data, employers must ensure they are abiding by applicable state and local laws before transferring employee data.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

There are no federal laws requiring employers to provide employees access to their personal information, however, some states do have such laws. State laws often address who has access to the information, how often the information can be accessed, whether copies can be made, what records can be kept, and whether third-party disclosure is allowed.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Yes, employers are permitted to conduct pre-employment checks on prospective employees. However, employers must comply with federal laws that protect applicants from unlawful discrimination and the Fair Credit Reporting Act (FCRA) when compiling background information.

Many states have laws governing how prospective employees' criminal and credit history can be used when making employment decisions.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Generally, an employer has the right to monitor its own property. Therefore, employers are entitled to monitor computers, servers, and other electronic devices that the employer owns. Furthermore, under the Electronic Communications Privacy Act of 1986 (ECPA), employers are allowed to monitor employee communications if there is a legitimate business purpose or if the employer has obtained consent. Employers are governed by different restrictions depending on the form of monitoring.

States have also enacted regulations governing the monitoring of employee activity.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Although an employer may generally limit an employee's use of social media during working hours and the way in which it is used regarding the employer's business, an employer's control is limited by the National Labor Relations Act (NLRA) and applicable state laws. Employers should steer away from implementing broad, blanket policies prohibiting the use of social media. The NLRA protects employees' rights to engage in "protected concerted activity", which includes social media postings and discussions. Some states have implemented laws limiting how and under what circumstances an employer may control an employee's use of social media.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Federal courts have jurisdiction to adjudicate two types of employment-related cases: (1) those arising out of federal employment law (federal question jurisdiction); and (2) employment cases where the amount in controversy exceeds $75,000 and there is complete diversity between the parties, meaning no plaintiff shares a state of citizenship with any defendant (diversity jurisdiction). Federal courts are divided geographically across the country in 12 judicial circuits.

State courts have broad jurisdiction and may hear cases arising out of state or federal law claims. Each state has a court system comprising of trial courts, appellate courts, and a court of last resort (generally, the state supreme court).

Federal agencies such as the Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), and the National Labor Relations Board (NLRB) have the power to hear employment-related claims arising out of federal laws.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The procedures to bring an employment-related claim depend on the forum in which it is brought. The procedures to bring a claim in federal court are governed by the Federal Rules of Civil Procedure (CPLR) and the judge's local rules. The procedures for claims in state court are governed by the state's rules of civil procedure and the judge's local rules. Likewise, each federal agency has its own rules and procedures for bringing a claim.

Conciliation is a voluntary process that parties can choose to partake in before proceeding with a complaint. However, the Equal Employment Opportunity Commission (EEOC) is required by federal statute to attempt to resolve findings of discrimination through conciliation.

If a civil lawsuit is brought, applicable fees and court costs will apply, but typically there is no fee for filing a claim with an administrative agency.

9.3 How long do employment-related complaints typically take to be decided?

The length of time an employment-related claim takes to be resolved depends on the claims, parties involved, complexity of the issues, and the court.

9.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Yes, decisions can be appealed. Typically, there must be a final ruling before a decision can be appealed, but interlocutory appeals are allowed in some cases. The length of time an appeal takes depends on the decision being appealed, the claims, and the parties involved.

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