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United States

EMPLOYMENT AND LABOUR LAW

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This country-specific Q&A provides an overview of employment and labour laws and regulations applicable in United States.

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UNITED STATES
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1. Does an employer need a reason to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

In all States but Montana, the employment relationship is presumed to be at-will, meaning that either the employee or employer may terminate the relationship at any time, with or without cause or notice, so long as the termination is not prohibited by law or public policy, an individual contract requiring cause for the termination, or a collective bargaining agreement. Applicable laws include those prohibiting discrimination, as well as others protecting "whistleblowing" activity (i.e., good faith reporting of certain employer wrongdoing) or certain legal rights (e.g., jury duty, statutory leave, workers' compensation, etc.).

There may also be local laws that modify the at-will relationship, like New York City's protections for fast food workers.

2. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

The federal Worker Adjustment and Retraining Notification (WARN) Act applies to certain plant closings and mass layoffs by employers with 100 or more employees (not counting those employed for less than 6 months or working fewer than 20 hours per week). While the law does not control the employer's right to terminate employees, it imposes certain notification mandates.

The WARN Act is triggered under the following circumstances: (1) a facility closure or discontinuation of an operating unit affecting 50 or more employees at a single site of employment; (2) a layoff of 500 or more employees, or a layoff of 50-499 employees constituting at least 33% of the workforce, at a single site during a 30-day period; (4) extension of a temporary layoff that otherwise meets the criteria in the prior two provisions beyond six months; and (4) reduction of the hours of work for 50 or more workers by 50% or more for each month in any 6-month period. Losses over a 90-day period are aggregated to determine if the WARN Act applies.

If applicable, WARN requires employers to provide affected employees, governmental officials, and union representatives with a 60-day notice containing specific information about the closure. Pay and benefits must continue through the notice period.

There are three exceptions to the WARN Act's 60-day notice requirement, although notice must still be provided as soon as practicable: (1) a faltering company, where notice might preclude its ability to obtain funding or new business that would enable the employer to avoid or postpone a shutdown; (2) unforeseen business circumstances beyond the employer's control; and (3) natural disasters.

Beyond the federal WARN Act, many States have enacted their own mini-WARN laws, which may apply to smaller employers and may contain additional or different triggers and requirements.

If an employer offers an exit incentive program or other employment termination program (e.g., a severance program) that incorporates a release of claims to an employee group of any size, the Older Workers Benefit Protection Act (OWBPA) imposes certain disclosure and timing mandates. Under the OWBPA, a release of age discrimination claims will only be effective if it meets the following requirements: is in plain language; references the Age Discrimination in Employment Act (ADEA); advises the employee to consult with an attorney; and provides specific information regarding the group of employees eligible and not eligible for the severance program. Moreover, the employees must be provided with a 45-day period in which to consider the agreement

and a 7-day revocation period following execution of the agreement.

3. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

No federal law generally precludes the termination of workers in the context of a business sale, although certain statutes may apply to other aspects of the transaction. As discussed in question 2, the federal WARN Act may be triggered by a covered employment loss in connection with a transfer of ownership. In addition, the buyer of a unionized business may be bound by an existing collective bargaining agreement and required to bargain with the union over any changes in the terms and conditions of employment, including the layoff of current employees. Generally, however, buyers of a unionized business are free to establish initial terms and conditions of employment without bargaining with the union representing the employees.

There may be local laws that impose certain worker retention mandates during a change in control. Typically, these laws require the buyer to retain the seller's workers in any continuing position for a period of time (e.g., 90 days) except for a termination for cause. Federal contractors may also be subject to certain worker retention mandates.

4. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

The at-will nature of most employment relationships means that no notice is typically required before terminating the relationship. However, if there is a mass layoff or plant closing covered by the federal WARN Act, there is a 60-day notice period, while analogous State laws may require additional notice periods, as further discussed in question 2.

Many executives have individual employment agreements that contain specific notice periods for termination; however, there is no particular "typical" period. Similarly, unionized employees may be entitled to certain notice periods under their collective bargaining agreements.

5. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

Because no notice of termination is required in the at-will employment context, no payment is required in lieu of notice. If the federal WARN Act applies (see question 2), however, covered workers are entitled to pay and benefits during the 60-day notice period, although employers are not required to keep them at work during that period so long as those monies are provided. This is equally true under State mini-WARN laws. If an employment agreement exists that requires a notice period for termination, the parties may contractually agree to payment in lieu of notice.

6. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

There is no federal law that requires garden leave (which is a term that is not commonly used in the U.S.). As noted above, at-will employees are not entitled to notice of termination, and therefore the concept of garden leave is not applicable in those cases. If the federal WARN Act or State corollaries apply (see question 2), or there is an employment agreement containing a contractual notice period, an employer may pay the employee during the required notice period while requiring them to stay home and refrain from working – at least for that employer. The ability to restrict employees from working for other employers during that period would be governed by restrictive covenant principles, as further discussed in question 19.

At the State level, Massachusetts, Nevada, Oregon and Washington have passed laws that either require payment to employees during any period subject to a non-compete agreement or enable employers to enforce certain non-competes with such payment.

7. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

There is no federal or State law establishing a particular termination procedure. An individual employment contract or collective bargaining agreement may set

forth such procedures, but that is a contractual matter.

Certain informational requirements upon termination may be imposed by federal and State laws. The federal Consolidated Omnibus Budget Reconciliation Act (COBRA) requires employers to provide covered employees with notice about their rights to continuing health coverage in connection with specific qualifying events, including termination. Additionally, some States' laws require employers to provide certain information to terminated employees beyond the COBRA requirements. Moreover, there may be State-specific requirements as to the timing of the employee's final paycheck.

8. If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?

Because the only existing procedural requirements for terminations are contractual, the remedies for any breach of those requirements are likewise contractual. Failure to comply with statutory informational requirements may result in civil penalties and damages. Failure to comply with final wage payment obligations may result in liquidated damages and attorneys' fees.

9. How, if at all, are collective agreements relevant to the termination of employment?

Typically, collective bargaining agreements protect unionized employees from termination except for "just cause," and permit those employees to challenge termination through a grievance process and arbitration.

10. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

As referenced in question 2, there may be notice obligations to elected officials, State Rapid Response Dislocation Services agencies, and union representatives for mass layoffs or plant closures that trigger the federal WARN Act or State mini-WARN laws. Failure to comply with these requirements may result in damages for back pay and benefits for the requisite 60-day period (or other period under State law), attorneys' fees and civil penalties. Otherwise, terminations do not require notice to or permission from any third parties.

11. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

As noted in question 1, although at-will employees may generally be terminated for any or no reason, they may not be terminated for reasons that violate federal, State, or local laws, including those protecting against discrimination or harassment. At the federal level, these include the following statutes: Title VII (race, color, national origin, religion, and sex – which includes sexual orientation, and gender identity); Section 1981 (race in the making of contracts, including employment relationships); the Pregnancy Discrimination Act; the Age Discrimination in Employment Act (age 40 and over); the Americans with Disabilities Act (mental and physical disabilities); and the Genetic Information Non-discrimination Act. Additional antidiscrimination laws and Presidential Executive Orders apply to government contractors and subcontractors.

State and local laws may provide broader protections than federal law. These may include additional protected characteristics, such as marital status, appearance, natural or protective hairstyles (as associated with race), any age, medical marijuana use, and more. State laws may also provide for extended time periods in which to file complaints and lawsuits, and additional penalties and damages. And they may cover other individuals beyond employees, such as interns and independent contractors.

12. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

Employees who believe that they have been terminated (or have suffered other adverse employment action) in violation of federal antidiscrimination laws must first file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) before they can bring a lawsuit in federal court. If the EEOC determines that a violation has occurred, it will attempt to conciliate the matter, through which it will seek damages for the employee, including back pay, front pay, compensatory and punitive damages, as well as equitable relief, which may include reinstatement (in lieu of front pay) or other actions. Under federal antidiscrimination laws, compensatory and punitive damages are capped between $50,000 and $300,000, depending on the size

of the employer. If the EEOC fails to conciliate the matter and chooses not to sue on the employee's behalf, or if it finds no discrimination, it will then issue a "Notice of Right to Sue," which enables the employee to file suit in federal court within 90 days. If the employee prevails in court, they may obtain attorneys' fees in addition to the damages above.

Section 1981, however, is not strictly an employment discrimination law and is not enforced by the EEOC. There is no administrative filing prerequisite before filing a Section 1981 race discrimination suit in federal court, and damages are uncapped.

Employees may also pursue remedies under State law, which may include filing a complaint with State or local fair practices agencies and/or proceeding directly to State court. Compensatory or punitive damages under State and local laws, unlike federal law, may be uncapped.

13. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

Employees with fixed-term contracts are only entitled to protections from termination as set forth in the contract.

Beyond discrimination and harassment laws, there are other federal statutory protections against termination for certain groups of workers (not including the whistleblowing protections discussed in question 14). The Family and Medical Leave Act (FMLA), which applies to employers with 50 or more employees, provides eligible employees with up to 12 weeks of job-protected leave for certain specified reasons: to care for a child following birth, adoption or foster placement; for the employee's own serious health condition; to care for a covered family member with a serious health condition; and for certain family military-related reasons. Additionally, the Uniformed Services Employment and Reemployment Rights Act ensures the reemployment of employees following leave for up to five years of military service. Protected leave may also be required as a reasonable accommodation under the Americans with Disabilities Act, Pregnancy Discrimination Act, or Pregnant Workers Fairness Act.

At the State level, there are numerous laws providing for other protected leaves. In addition to State FMLA laws and closely-related paid family leave benefits laws, there are also laws regarding leave for a multitude of reasons, including, but not limited to, the following: sick and safe (i.e. domestic violence) reasons; organ donation; military service; volunteer emergency services; children's school activities; voting; and jury duty.

Employees are also protected from termination (and possibly other adverse employment action) for exercising rights under other laws, which range widely from State to State. These include, but are certainly not limited to, the following: off-duty use of recreational and/or medical marijuana; workers' compensation; wage payment; minimum wage and overtime; social media privacy; pay transparency requirements; salary history bans; limits on criminal background checks; credit history protections; and lactation accommodations. Additionally, employees may not be terminated for any reasons that violate a State's public policy, as expressed in law or regulation, or by other means that vary from State to State.

14. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

There are federal and State laws that protect employees who have engaged in whistleblowing activity from termination or other adverse employment activity. The federal Occupational Safety and Health Administration enforces the whistleblowing protections under 24 federal laws, the most significant of which are the Occupational Safety and Health Act, the False Claims Act, the Sarbanes-Oxley Act (applicable to publicly-traded companies), and the Affordable Care Act.

Most, if not all, States provide whistleblower protections for workplace safety complaints, but beyond that, the State whistleblower laws vary greatly. Many include protections for healthcare workers and State government contractors.

15. In the event of financial difficulties, can an employer lawfully terminate an employee's contract of employment and offer re-engagement on new less favourable terms?

Whether an employer may terminate a contract and negotiate another one would depend on the stated terms of the contract. Unless the contract expressly provided otherwise, an employer seeking an early termination of a contract for a specific period would likely be held in breach of the contract and liable for the full amount of

compensation under the existing contract.

16. What, if any, risks are associated with the use of artificial intelligence in an employer's recruitment or termination decisions? Have any court or tribunal claims been brought regarding an employer's use of AI or automated decision-making in the termination process?

There are concerns that Artificial Intelligence (AI) may exacerbate bias or discrimination in the recruiting or termination process. Further, an employer's use of AI could violate the American with Disabilities Act by "screening out" an individual with a disability who could perform the task with a reasonable accommodation. It could also be used to screen out employees engaged in other protected activities, such as those under the National Labor Relations Act. For these reasons, the U.S. federal workplace agencies have identified the use of AI as an issue of heightened scrutiny. Moreover, the federal Equal Employment Opportunity Commission has brought suit against employers whose use of AI selection tools have arguably resulted in disparate impact on certain protected characteristics, like age. In addition, some States have enacted laws that govern the use of AI in the workplace.

17. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

Except as provided for by an individual employment agreement or a collective bargaining agreement, severance pay is not required under federal or State law (with one exception, discussed below) in order to terminate an employment relationship.

As noted in question 2, in the case of a mass layoff or plant closure covered by the federal WARN Act, pay and benefits must be continued during a 60-day notice period prior to the termination of employment. Notably, New Jersey's mini-WARN law was amended to now require the payment to covered employees of one week of severance for each full year of employment. To date, New Jersey is the only state that has mandated such severance pay in the context of a covered mass layoff or plant closure.

Employers may – and often do – offer terminated employees a severance payment in exchange for a release of claims, as further discussed in question 18. This frequently happens in the context of a reduction in force or other termination for no cause. In a termination for cause, a severance agreement containing a release of claims may be offered if there appears to be some risk of future litigation. A typical severance calculation is one or two weeks of pay per year of service.

18. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, in what form, should the agreement be documented? Describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

It is both permissible and common for employers and employees to enter into a written severance agreement, in which the employer provides severance pay and sometimes other benefits, both monetary and non-monetary, in exchange for a signed release of any possible existing claims.

The release may not include claims that accrue in the future or any claims that may not be released as a matter of law (such as workers' compensation claims or unemployment insurance claims under some states' laws). In addition, employees may not be required to waive their right to file a charge of discrimination with the Equal Employment Opportunity Commission, although they likely may waive their right to recover damages through that process.

In order to be enforceable, the release must be knowing and voluntary, and be supported by adequate consideration. There are additional requirements for the release of age discrimination claims under the Age Discrimination in Employment Act (ADEA). The Older Workers Benefit Protection Act (OWBPA), which amended the ADEA, requires the release to comply with the following: be in plain language; reference the Age Discrimination in Employment Act (ADEA); advise the employee to consult with an attorney; and provide a 21-day period in which to consider the agreement, as well as a 7-day revocation period following execution of the agreement. If the release is offered to a group of employees (i.e. two or more) in connection with an exit incentive program, there are additional requirements for the release of age claims, as discussed in question 2.

There are certain limitations on confidentiality or non-disclosure provisions in severance agreements under federal and/or State law. The #MeToo movement gave

rise to legislation targeting sexual harassment, some of which impacted severance agreements. At the federal level, under the Tax Cuts and Jobs Act of 2017, an entity may not take tax deductions for payments made in connection with the settlement of sexual harassment or abuse claims if the settlement agreement contains a non-disclosure or confidentiality provision preventing the disclosure of the terms of the agreement. In addition, a number of States have also enacted laws that restrict the use of such provisions in sexual harassment settlement agreements.

Furthermore, several federal agencies, including the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, and the Securities and Exchange Commission, have expressed specific concerns about language in confidentiality provisions that may "chill" employees' rights to communicate with those agencies. They recommend that such provisions specifically preserve an employee's ability to file complaints with the agencies, to engage in whistleblower activities, and to receive monetary awards from a government-administered whistleblower award program.

The NLRB has further targeted confidentiality, nondisclosure and non-disparagement provisions in severance agreements as interfering with employees' rights under the National Labor Relations Act to engage in concerted activity regarding their terms and conditions of employment. According to the NLRB, such provisions prevent employees from sharing information about severance terms and benefits for their mutual aid or benefit.

19. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

At this time, restrictions on an employee's ability to work for competitors are a matter of contract, which is governed by State – not federal – law. Typically, the enforceability of non-compete agreements depends on factors such as whether the restriction protects an employer's legitimate business interest, is supported by adequate consideration, imposes an undue burden on the employee, impacts the public interest, and is reasonable in scope – both geographically and temporally.

Notably, some States have enacted laws that severely restrict or ban the use of non-competes altogether or for certain categories of workers, predominantly low-wage earners. In addition, in January 2023, the Federal Trade Commission issued a proposed rule that would ban nearly all non-compete agreements, both existing and future. The rule sparked immediate controversy, with many commentators and an FTC Commissioner questioning whether the FTC actually has the authority to issue such a rule. If and when a final rule is announced, it will undoubtedly be subject to legal challenge.

20. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Following termination, employees can be required to maintain the confidentiality of proprietary business information or trade secrets, typically through use of a contractual agreement. Such agreement should identify the information to be protected, and should be reasonably limited so as to include only information that is truly confidential.

Notably, some of the limitations on confidentiality provisions in severance agreements as discussed in question 18 also apply to more general confidential information agreements. Some of the State laws enacted in the wake of the #MeToo movement prohibit employment agreements, including confidential information agreements, that prevent employees from discussing sexual harassment in the workplace. Furthermore, federal agency concerns regarding the possible "chilling" of communications with those agencies, as well as their recommendations as to language to address such concerns, should be taken into consideration.

In addition to contractual protections, there are statutory protections at the federal and State level for information that may be deemed a trade secret (e.g., customer lists and information, computer software, highly specific scientific information, and general business information that has some degree of novelty or reasonable use in the industry, among other things). The federal Defend Trade Secrets Act (DTSA) enables companies to bring suit in federal court for the misappropriation of their trade secrets by current or former employees. The DTSA also provides certain whistleblower protections for those who disclose trade secrets in reporting a suspected violation of law. In order for employers to receive certain types of damages under the DTSA, notice of this whistleblower protection must be provided to employees in any agreements containing confidentiality or trade secret provisions.

Additionally, most States have adopted a version of the Uniform Trade Secrets Act, which protects an employer's trade secrets even in the absence of a confidential information agreement. Thus, employers also have the option of pursuing State claims for the theft of trade secrets.

21. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

There is no federal or State requirement for employers to provide references to potential new employers. In order to avoid possible defamation claims, many employers have chosen to adopt a "neutral" reference policy, under which they will provide only the employee's position and dates of employment, and may confirm the employee's rate of pay.

22. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

The U.S. is, admittedly and infamously, a litigious society. Although employers may technically terminate an at-will employee for any or no reason, the failure to identify a legitimate reason or the inconsistent treatment of employees in making termination decisions may give rise to a claim that the termination was actually for an unlawful reason. Thus, wise employers should ensure that managers and supervisors are trained on legal workplace obligations and parameters, so as to avoid inadvertently creating liability. It is also helpful to demonstrate that employees were notified of any applicable standards of conduct, typically through a handbook with a signed acknowledgement of receipt. In addition, employers must be able to articulate and support, with written documentation, a legitimate basis for any termination decision. Further, they should also ensure that they are treating employees in similar circumstances in a consistent manner. The bottom line is that, regardless of whether a termination is technically legal, juries often look to whether the termination feels fair.

23. Are any legal changes planned that are likely to impact the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

With the last change in the Presidential administration, the generally employer-friendly policies, guidance, and regulations issued under the prior administration are being replaced by more employee-oriented legal requirements across a multitude of federal agencies, including the Department of Labor's Wage and Hour Division and Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, and the National Labor Relations Board. Employers are seeing changes in a wide range of workplace issues, including stronger support for workers' rights, greater support for unions, more stringent workplace safety standards, and a greater likelihood of finding employee and employer status in the joint employer or gig economy context, among other things. It is critically important, in this time of great uncertainty and change, for employers to monitor these developments and to consult with counsel in order to ensure compliance with their legal obligations in the workplace.

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