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The Global Employer: United States 2021

The Global Employer

The United States Guide 2021

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**Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law*

About the guide

This guide is intended to provide employers and human resources professionals with a comprehensive overview of the key aspects of US labor and employment law. It covers the entire life cycle of the employment relationship from hiring through to termination, with information on working terms and conditions, family rights, personnel policies, workplace safety and discrimination. The guide links to our global handbooks, which include information for the US on immigration and data privacy. The guide also contains information on the employment implications of share and asset sales.

Except where otherwise indicated, law and practice are stated in this guide as at October 2021.

IMPORTANT DISCLAIMER: The material in this guide is of the nature of general comment only. It is not offered as legal advice on any specific issue or matter and should not be taken as such. Readers should refrain from acting based on any discussion contained in this guide without obtaining specific legal advice on the particular facts and circumstances at issue. While the authors have made every effort to provide accurate and up-to-date information on laws and regulations, these matters are continuously subject to change. Furthermore, the application of these laws depends on the particular facts and circumstances of each situation, and therefore readers should consult their attorney before taking any action.

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1 Overview

1.1 General overview

Federal, state and local municipal laws and regulations regulate the employment relationship in the US. Under the federal system in the US, state and municipal employment laws and regulations may provide better benefits or protections to employees, but they can never be less protective than the benefits granted by federal law. This can be particularly daunting for companies new to the US that try to familiarize themselves with applicable employment laws. The goal of this guide is to provide an overview of US labor and employment laws for global employers operating in the US.

In stark contrast to many other countries and jurisdictions, most employees in the US are engaged "at will." This means that either party to the employment relationship (employee or employer) may end the employment relationship at any time, with or without prior notice, for any lawful reason or no reason at all. If employment is at will, a US employer may also unilaterally change the terms and conditions of employment, subject to contractual or collective union agreements and the minimum federal, state and local statutory employment standards. The minimum statutory employment standards, including the nondiscrimination and non-retaliation prohibitions under federal, state and local law, provide the basic framework for employment relationships in the US.

1.2 General legal framework

1.2.1 Sources of law

US labor and employment laws derive from a variety of legal sources, including constitutional law, statutory law, administrative regulations and common law (which includes unwritten customs, principles, rules and case law). Therefore, rules governing labor and employment can be found in the federal and state constitutions, federal and state statutes, federal and state agency administrative regulations, and federal and state court case law. In many instances, there are municipal laws as well. This presents a challenging array of legal requirements and obligations that do not always align. In the case of a conflict between federal and state law, unless otherwise explicitly stated, the law providing the most benefit to the employee generally prevails. This principle applies throughout the various levels and sources of law.

For instance, to determine minimum wage requirements for its US workforce, a company should not only familiarize itself with US federal wage and hour laws, regulations and court decisions, but also with the laws of the state and municipality in which it operates. This is just one example of the unexpected complexities of managing workforces in the US.

At the federal US statutory level, the number of employees triggers the application of numerous state and federal laws, as shown below. As a company grows, it should be aware of these federal triggers to plan for additional compliance requirements:

Number of employees	US law
1	Immigration Reform and Control Act (IRCA): I-9 US Department of Labor (DOL) Fair Labor Standards Act (FLSA) Occupational Safety and Health Act (OSHA): Injury and Illness Prevention Plan; nondiscrimination of individuals making complaints of workplace safety OSHA: dissemination of information of hazardous substances

Number of employees	US law
	Whistleblower claims Contract claims and torts Employee Retirement Income Security Act (ERISA): benefit plans; severance plans; executive compensation Uniformed Services Employment and Reemployment Rights Act (USERRA): reemployment and other rights for members of the military and uniformed services Equal Pay Act (EPA) Section 1981 of the Civil Rights Act of 1866 National Labor Relations Act (NLRA) Defend Trade Secrets Act (DTSA)
4	The IRCA: Four to 14 employees for national origin discrimination claims
15	Americans with Disabilities Act (ADA) (mental and physical disabilities): job descriptions Title VII: nondiscrimination on the basis of race, sex, national origin, religion, creed or color Genetic Information Nondiscrimination Act (GINA): prohibits discrimination based on genetic information
20	Age Discrimination in Employment Act (ADEA) Consolidated Omnibus Benefits Retention Act (COBRA)
50	Family and Medical Leave Act (FMLA)
100	Worker Adjustment and Retraining Notification Act (“**WARN Act**”)

1.2.2 Collective agreements

In the US, labor unions are not mandatory. The NLRA establishes a process for most private sector employees to engage in collective bargaining, whereby the employees select a labor union of their choice to negotiate with the employer. In 2020, unionized employees represented only 6.3% of the US private sector workforce, down slightly from 7% in 2018.

Once a workplace is unionized, the employer must bargain in good faith with the union to reach a collective bargaining agreement (CBA) and it cannot make changes to most terms and conditions of employment (including wages, hours and working conditions) without negotiating with the union. Once the CBA is in place, the company must abide by the CBA until its conclusion and thereafter until either new terms are negotiated or an impasse is reached. Many US CBAs contain evergreen clauses that automatically extend the agreements for a one-year period unless one side provides timely notice of termination.

All employees in the US have the right to act in concert, even in the absence of a union. This means employees can walk off the job, petition the employer, the courts or the labor authorities, or join a union with near impunity, as long as they act in concert. In addition, employers are prohibited from "interfering" with employees' rights to act in concert by: (i) questioning employees about their union activities; (ii) promising or implementing wage increases to discourage union activity or support, or collective action in general; (iii) threatening to close a plant or lay off employees to discourage union activity or engaging in collective action; (iv) threatening employees with loss of benefits to discourage union activity or support; (v) discharging, disciplining or taking any action against an employee because of their support for a union or for engaging in collective action; and/or (vi) restricting employees from talking or communicating with each other about their terms and conditions of employment.

1.2.3 Court framework

Employment and labor litigation in the US occurs in administrative agencies, federal and state courts, or private arbitration. Government agents or administrative law judges typically administer claims before certain governmental agencies. In court, an assigned trial judge typically adjudicates legal issues and a jury adjudicates factual matters. An arbitrator adjudicates legal and factual matters in arbitration. Either or both parties may appeal a final judgment or final order by a judge to a court of appeals for the particular jurisdiction.

1.2.4 Litigation considerations

Employees in the US are often called litigious and there is truth to this. As a result, "wrongful termination" litigation and challenges to employer policies and practices have become a normal aspect of corporate life in the US. Court litigation is usually the most costly and time-consuming form of dispute resolution in the US because of its formality, available pre-trial procedures and potential duration. Class claims (referred to as "class actions") are permissible in the US, allowing an applicant or employee to seek remedies on behalf of a large group of employees affected by the same policy or with sufficiently similar work conditions, such that a resolution of the claims of one or more individuals applies to the entire group. Juries in the US tend to be unpredictable and multimillion-dollar judgments are fairly common.

Due to the cost and unpredictability of litigation, employers often seek alternative ways to resolve employee disputes, including internal dispute resolution, mediation or private arbitration. Arbitration occurs only when the employee and employer have contractually agreed to arbitrate their disputes and to waive a jury trial. Binding arbitration is meant to be quick and more efficient than the court process, although more recently arbitration (including class arbitration) can be as expensive and lengthy as court proceedings. Arbitrator awards are typically not subject to appeal and they are binding on the parties.

All forums that adjudicate employee disputes require the parties to preserve evidence and the sanctions for a company's loss — even if inadvertent — or destruction of evidence can be severe. Therefore, it is crucial that an employer implement a so-called "litigation hold" as soon as a company learns of a potential US employee claim, whether the claim arises internally or more formally by litigation. This litigation hold is sent to company employees or departments that may possess potential evidence and requires the company to preserve all data (hard copies and electronically stored information) related to the claim(s) or defense.

1.3 Types of working relationship

Workers in the US broadly fall into the following main groups: (i) employees; (ii) temporary employees; (iii) leased workers; and (iv) independent contractors. The status of a worker is important because it determines the legal requirements that apply to the relationship, including, but not limited to, benefits

eligibility, payroll tax withholding and other statutory obligations. The table below provides more information on these groups.

Types of workers	
Employees	Most individuals who work for a company are broadly classified as “employees.” The federal, state and local employment laws incorporate various factors to determine whether a worker is a “covered employee.” The tests vary by state, but most consider the level of control the company has over the worker’s method and means of completing the work, and the economic dependence of the worker on the company such that the worker cannot be considered self-employed. Employees can be full-time (estimated 40 hours per week or more) or part-time (less than 40 hours per workweek). Employees are entitled to the benefits and protections of federal, state and local employment laws, as well as company employee policies and practices.
Temporary employees	Temporary employees are hired for a short or fixed period or for a particular project. Temporary workers can be “employees” of the company if the relationship falls within this same broad standard as described above. Temporary employees are entitled to most of the same benefits and protections of federal, state and local employment laws as regular employees. Companies, however, often exclude such employees from many employer-offered benefits.
Leased workers	A third-party staffing agency, vendor or subcontractor provides “leased workers” to companies, typically in an outsourcing situation. “Leased workers” are technically classified as “employees” of the third party, with the third party responsible for employment law compliance obligations. However, “joint employer” relationships are common in outsourcing and other scenarios, whereby the leased worker could be deemed an employee of both the company and the staffing agency or subcontractor. As a joint employer, a company can be held liable for employment law obligations to a subcontractor’s or staffing agency’s employees. To decrease the likelihood of a joint employer relationship finding with a leased worker, a company should minimize its role in selecting or terminating the services of the leased worker. For example, a company could provide a job description to the staffing company but the staffing company is ultimately responsible for supplying workers as needed. Additionally, a written agreement should be negotiated with the staffing company providing that the staffing company is responsible for: (i) recruitment, interviewing, hiring and firing; (ii) paying wages and overtime, making the appropriate tax deductions, maintaining payroll records and providing workers’ compensation coverage; and (iii) indemnifying the contracting company for any claims made by the staffing company’s employees.
Independent contractors	Workers who are properly classified as independent contractors are not entitled to the benefits and protections of federal, state and local employment laws or subject to payroll tax withholdings. A company’s designation of a worker as an independent contractor does not automatically make the worker an independent contractor for legal purposes and in some states all workers are presumed employees unless the company shows otherwise. Tests vary by state and the analysis is fact-intensive. Typically, the analysis includes considering the degree of control a company exercises over the worker and

Types of workers	
	the nature of the work performed for the company. While the legal tests vary, key issues to evaluate are whether the company exercises significant control over the method and manner of the contractor's day-to-day performance of the job and whether the contractor has any risk of financial loss. There should always be a written agreement between the company and the independent contractor to evidence the type of relationship. Nonetheless, companies should understand that the parties' characterization of the relationship in an agreement is not determinative.

1.4 On the horizon

The transition of the Biden Administration into the White House has signaled several changes in the US employment and labor law landscape. In his early days in office, President Biden issued Executive Orders (EOs) focusing on equality. The EOs reinforced the prohibition of discrimination on the basis of sexual orientation and gender identity in the federal government; reversed the prior administration's EO prohibiting federal contractors from certain workplace diversity training; required federal agencies to conduct an equity assessment; and established an Equitable Data Working Group to gather federal datasets (from federal agencies) by race, ethnicity, gender, disability, income, veteran status and other key demographic variables to allow the government to measure and advance equity.

President Biden's campaign promises and several measures during his presidency have been pro-employee. President Biden supports certain provisions of the Protecting the Right to Organize Act of 2019 (PRO Act), sweeping labor legislation with a checkered past (it passed in the House in early 2020, but stalled in the then Republican-controlled Senate). The PRO Act was reintroduced in Congress after the president took office and, if passed, would strengthen the rights of employees and unions. In addition, President Biden's EO on Promoting Competition in the American Economy has signaled support for severely limiting post-employment noncompete restrictions, with an assertion that the banning or limiting of noncompetes will allow employees to change jobs more easily — a move likely to provide encouragement to the increasing number of states passing laws to limit the use of post-employment noncompetes. Continued pro-employee measures can be expected.

At the outset of the pandemic, many employees were working from home. Now, with more and more individuals being vaccinated, more employers are requiring employees to return to the workplace and many (where not otherwise restricted by state and local law) are mandating vaccinations for their workforce (with exceptions for those employees with disabilities or sincerely held religious beliefs). Traditional employment models are being transformed, with many US and multinational organizations moving away from the typical 9-5 office work existence in favor of contingent, temporary, remote, platform-based and crowdworking models, or a hybrid approach. This trend in increased agility and flexibility is likely to continue as employers traverse a still evolving pandemic.

COVID-19 related employment litigation continues to rise as employers navigate the pandemic. COVID-19 related employee lawsuits against employers include accommodation- and leave-related claims (based on allegations that an employer wrongfully denied an employee COVID-related leave or an accommodation such as extended working from home), and claims alleging unsafe working conditions (and related whistleblower, wrongful termination and retaliation claims).

Contracting arrangements are likely to remain a hotbed for litigation and government audit, and companies will need to continue auditing their independent contractor classifications and reviewing agreements to help mitigate risks related to wages and hours, joint employment, etc. Pay equity and diversity and inclusion programs will also continue to capture the attention of executive leadership and

corporate boards, and employers will need to navigate new laws such as California's mandate for female directors, shareholder proposals demanding that companies address board diversity and increase pay transparency, and Nasdaq's Board Diversity Rule (requiring companies listed on Nasdaq's US exchange to publicly disclose board-level diversity statistics and have or explain why they do not have at least two diverse directors). Employers will also have to confront a host of new state-specific laws on topics including pay data reporting requirements, sick and family leave, noncompete agreements, medical marijuana, data privacy, coronavirus emergency response legislation and more.

On the tax side, the Internal Revenue Service continues to issue guidance implementing the US tax reform legislation enacted in late 2017, and this guidance will affect the tax deductions available for executive compensation and certain fringe benefits.

From an immigration perspective, the pandemic continues to make entry into the US more difficult for international travelers. While travelers may qualify for exceptions, those who have been physically present in or recently traveled to the following countries are prohibited from entering the US: Austria, Belgium, Brazil, China, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Iran, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland and the United Kingdom. COVID-19 related cross-border travel restrictions between Canada, Mexico and the US also continue to be extended. The pandemic-related travel restrictions remain in place until lifted by the president. Given the potential spread of COVID variants, the prospect of eased pandemic-related restrictions remains uncertain.

The outlook on sponsoring visas for workers in the US may be more promising. The Biden Administration immediately set forth its plans to focus on key immigration reforms and rescinded policies implemented under the Trump Administration that led to a higher likelihood of petition denials and lengthier USCIS processing times. Still, the impacts of the more restrictive immigration policies and the pandemic are likely to continue in 2021. Together they have had the combined effect of essentially closing the US border and grinding adjudications to a halt. It will take time for the flow of foreign national talent into the United States to return to pre-pandemic levels.

2 Hiring employees

2.1 Key hiring considerations

Implementing standardized hiring procedures is highly recommended for employers in the US. By using a standardized procedure, employers can provide evidence to help refute an allegation that the employer considered improper criteria in the hiring process. Utilizing an employment agency during the recruitment process will not limit an employer's liability, as the agency is considered an agent of the employer.

2.2 Avoiding the pitfalls

Most US federal, state and municipal employment laws protect both applicants and employees, particularly with respect to nondiscrimination principles. Due to the risk of claims by applicants, employers should be vigilant during the pre-hire stage. We outline below best practices for a US company when working through the hiring and application process to ensure employment law compliance and to minimize the risks of successful claims by applicants.

2.3 Procedural steps and key documents in recruitment

2.3.1 Identifying the vacancy

When identifying a vacancy, a company should consider the type of worker relationship needed, meaning whether the job requires a full-time or part-time employee and/or is for a short period or particular project; whether the company needs to control the worker or if the worker can be engaged as an independent contractor; or whether the function should be outsourced or performed by a vendor or subcontractor. Where a different worker previously performed the positions or tasks, the company should be sure it is not replacing the worker for prohibited discriminatory reasons.

2.3.2 Preparing a job description and person specification for the position

Before advertising a vacancy for an employment position, the employer should prepare a written job description. Doing so helps the employer carefully consider its needs. If drawn up carefully and objectively, a job description can show that discriminatory considerations did not influence job requirements and can support classifications for the worker. A typical job description includes the job title, job summary, location, part-time or full-time, salary, overtime exempt or nonexempt, reporting structure, licenses, the desired or required skills and experience, essential and nonessential duties of the job, physical or mental requirements, travel requirements and a general description of the work environment.

Employers who are filling vacancies with independent contractors or leased workers, or outsourcing the work to a vendor or subcontractor, may have varying considerations for determining how to describe the tasks or skills desired.

2.3.3 Advertising the job

For most employers in the US, there is no statutory obligation or process for advertising a vacancy. Exceptions are for positions subject to a union CBA, government positions and government contractors. An employer must not discriminate in its arrangements for advertising jobs or by not advertising a job. The employer should aim to reach as wide a pool of potential candidates as possible so as not to disadvantage or discriminate against particular applicants. All recruitment or employment agencies an employer uses should comply with nondiscrimination requirements.

An employer must also be careful not to discriminate through the actual content of the job advertisement. Inappropriate wording could give rise to a discrimination claim. For example, if the employer uses words such as “youthful” or “young” in the advertisement, the inference from this could be that the employer prefers younger (as opposed to older) workers, which could support an age discrimination claim. An employer should also use gender-neutral terms such as “police officer” as opposed to “policeman” to help avoid a discrimination claim. The advertisement should include an “Equal Employment Opportunity” statement that the company complies with federal and state anti-discrimination laws and indicate essential job functions.

Certain federal contractors have obligations to annually analyze and audit their employment policies, practices and procedures (such as those involving hiring, promotion, termination and compensation) to ensure there are no barriers to equal opportunity employment on the basis of race, sex, veteran status, disability status and other protected classes. Some federal contractors may have to take additional affirmative action steps to assure equal employment opportunities (such as furthering recruiting efforts, revising employment policies and providing fair compensation as necessary).

Employment application forms are a common way for companies to solicit uniform information about applicants and select the best candidates for interviewing or hiring, but they are not legally required. When an employer uses or requires a completed job application form, the questions must be lawful, job-related and non-discriminatory. The form should seek only information that is necessary to determine if a person has the skills and is qualified for a particular job. Different jobs may require

different applications or different questions, but they should be used uniformly for the same position for all applicants.

The following should be included in a job application: (i) a statement that the application is not an employment offer or a contract; (ii) a statement that employment is “at will” (in at will employment jurisdictions); (iii) a statement that all questions must be truthfully answered and any false answers will result in the applicant not being hired or possibly terminated; and (iv) a statement that any offer of employment will be subject to the company’s internal dispute resolution or arbitration policy, if applicable.

Federal, state and local laws prescribe grounds of discrimination protections for applicants. Such legislation varies depending on the jurisdiction, but generally includes such categories as previous salary, criminal history, union affiliation, sex, gender or gender identity, sexual orientation, age, religion, national origin, race, color, genetic information, marital status, height or weight, disability, current or past physical or mental conditions, or financial status (“protected categories”). At least one state (Montana) has passed legislation making COVID-19 vaccination status a protected category, prohibiting employers from refusing employment; discriminating in relation to compensation or a term, condition or privilege of employment; or denying educational opportunities based on the person’s vaccination status or whether the person has an immunity passport. Questions that might reveal protected categories should not be included in a job application.

Applications may require:

- general information such as name, address, telephone number, confirmation of being of legal minimum working age (usually over age 16-18) and the job sought
- a statement regarding proof that the applicant will be legally authorized to work in the US when employment commences (which must be confirmed within three days of the employee commencing work by completion of a form referred to as I-9)
- information about prior work experience, including names of previous employers and supervisors, job titles and descriptions, and the reason for leaving
- details of educational background, including high school and colleges attended (but not the dates due to age discrimination concerns), any degrees and/or licenses obtained
- military experience relevant to the position sought
- other information relevant to the position sought, including necessary licenses or certificates, languages, computer skills and experience

In addition, certain federal contractors are required to ask job applicants to voluntarily self-identify as an individual with a disability. Applicants for companies that are federal contractors or subcontractors are urged, but not required, to self-identify as an individual with a disability (among other protected classes) at both the pre-offer and post-offer stage of employment.

Most importantly, all questions on an employment application should be job-related. Any non-job-related questions in an application or employment interview could form the basis of a lawsuit if they elicit improper information.

Applicants should be required to sign the application and attest to the truth of the information provided.

Employers should also make the application format accessible for visually impaired and mobility impaired individuals, such as by offering individuals to assist in physically completing the applications as needed.

Employment applications are extremely important documents and they are often crucial in employment-related lawsuits. Therefore, employers should follow the guidelines above, review applications periodically to ensure that all questions in an application are lawful and collect job-related information.

2.3.4 Shortlisting and interviewing

Most companies conduct in-person interviews with the best applicants after the hiring manager and/or human resources screens applications or CVs.

The same nondiscrimination concepts for employee applications apply equally for job interviews. Employers should train all persons involved in the interview process to avoid asking any questions that might elicit information related to an applicant's protected categories (see **2.3.3** above). By providing all persons in the interview process with an accurate job description of the position, as well as objective qualifications and other screening criteria, an employer can avoid unintentional discrimination.

Even before the COVID-19 pandemic led to widespread reliance on remote capabilities for hiring, there were an increasing number of services available to employers allowing the utilization of artificial intelligence (AI) to help employers make hiring decisions. Employers who use AI to assess candidates' fitness for a position should check state and local laws to ensure compliance with any restrictions. For instance, Illinois' Artificial Intelligence Video Interview Act (AIVIA) applies to all employers that use an AI tool to analyze video interviews of applicants for positions based in Illinois. The AIVIA requires employers to provide notice to candidates before their video interview that AI may be used to analyze the video and consider their fitness for the position, and to obtain their consent before using the AI system to review the video. Employers must also refrain from sharing applicant videos (except with persons whose expertise or technology is necessary in order to evaluate an applicant's fitness for a position) and must delete the applicant's video within 30 days of the applicant's request.

2.3.5 Making an offer of employment, subject to conditions where appropriate

Unlike in most jurisdictions outside the US, a written employment contract (see **5.1**) is not required. Nevertheless, employers in the US should memorialize the preconditions for, and initial terms of, employment for their employees in writing. For most employees in the US, a simple offer letter setting out the basic terms suffices. In fact, it is common practice for US employers to use a simple offer letter rather than a formal employment contract like what is typically used outside the US, especially for employees below executive level. Once the conditions are met, in the absence of a subsequent contract contemplated by the parties at the time of the conditional offer letter, the terms of the offer letter will typically apply to the employment relationship.

Generally, such offer letters are one to two pages in length and should include the following:

- reiteration of the individual's employment being "at will" (in at will jurisdictions) and the employer's right to alter any terms or conditions of employment unilaterally during employment
- any preconditions to employment, such as a successful background check or medical exam (where permitted), authorization to work in the US and any licensing or certifications
- job title, start date, exempt or nonexempt classification, full-time or part-time, initial base compensation and bonuses or other incentive payments (including commissions and equity awards)

Some states, however, may have more specific requirements or notice requirements for new hires that should be included in the offer letter.

3 Carrying out pre-hire checks

3.1 Background checks

Pre-hire background checks are generally permitted for any occupation and they are mandatory in certain industries/jobs. Employers who use third parties to conduct background checks or obtain consumer reports must comply with the federal Fair Credit Reporting Act and must: (i) make a clear and conspicuous written disclosure to the individual before obtaining the report; (ii) obtain written consent from the individual authorizing the employer to request the report; and (iii) if taking an adverse employment action that is based at least in part on information contained in a report, tell the applicant why it takes the adverse action, provide a copy of the consumer report, and let the applicant know the name and number of the reporting agency that supplied the information. State and local laws provide other statutory prohibitions and processes for conducting background checks. For example, some states and cities have passed “ban-the-box” laws, which typically prohibit employers from requesting conviction or arrest information before extending conditional offers of employment. The Fair Chance to Compete for Jobs Act of 2019 (effective 20 December 2021), the first federal “ban-the-box” law, prohibits many federal contractors and federal agencies from requesting conviction or arrest information before extending conditional offers of employment. Other state and local laws prohibit or limit credit checks. Additionally, federal law and many states prohibit employers from conducting polygraph tests on most employees and applicants.

3.2 Reference checks

Potential employers who wish to obtain references from former or current employers should include in their application form an authorization whereby the applicant permits the potential employer to check references. This statement should include language releasing the potential employer from any liability from obtaining, using, or later disclosing the former or current employer reference. Such a release, however, is not necessarily effective. Negative references can lead to defamation or discrimination claims. To decrease the risk of such claims, many US employers only seek and/or provide an employee’s previous job title and employment dates.

3.3 Medical checks

Federal law permits pre-employment drug testing for all occupations and requires alcohol and drug testing for certain specified driver positions and other safety-sensitive positions covered by federal regulations. It is important to note that certain states and localities may have laws that further restrict pre-employment drug testing.

Under the ADA, it is unlawful to ask an applicant whether they are disabled or about the nature or severity of a disability, or to require the applicant to take a medical examination before making a job offer. The ADA applies to employers with 15 or more employees and prohibits discrimination based on an employee’s or an applicant’s disability, or association with a person with a known disability.

After a conditional job offer is made and before the commencement of employment duties, an employer may require an applicant to take a medical examination as a condition of employment. However, applicants must not be tested for the presence of a genetic characteristic and the medical information obtained must be kept on separate forms in separate, confidential files. If the employer requires a medical examination, it must avoid using the examination in a discriminatory manner, the examination should relate to specific job requirements and, if required, to a particular position, and it must require that all applicants receiving an offer for those job requirements or particular position undergo the examination.

An offer of employment may be withdrawn based on the results of a medical examination only if: (i) the applicant is unable to perform the essential functions of the job even with reasonable accommodation; (ii) no reasonable accommodation exists that would allow the applicant to perform

the essential functions of the job; or (iii) the applicant poses a direct threat to health or safety in the workplace and no reasonable accommodation would eliminate this risk or reduce it to an acceptable level.

Pre-employment questions about current illegal drug use are not a disability-related inquiry and they are allowed. Pre-employment questions relating to past illegal drug addiction/rehabilitation or current lawful drug and alcohol use are likely prohibited “disability-related inquiries” under the ADA.

Pre-employment testing for illegal drug or alcohol use is permitted as follows:

- Pre-offer testing: Testing for illegal drug use is not considered a “medical examination” and it is permitted. Testing for alcohol use is considered a “medical examination” and it is prohibited.
- Post-offer testing: An employer may require new hires for a particular position to undergo a “medical examination,” which could include testing for illegal drug and/or alcohol use, as long as it does so for all entering employees in the same position. Certain localities, including Nevada and New York City, restrict an employer’s right to screen job applicants for marijuana use.
- After employment begins: An employer may only require testing or a “medical examination” after employment begins if the examination is job-related and consistent with business necessity.

Employers must maintain medical information in a separate and confidential medical records file.

Employers must pay employees for their time when requiring employees to take drug or alcohol tests, even if the testing occurs outside their normal working hours.

4 Immigration

Please refer to our handbook The Global Employer: Focus on Global Immigration and Mobility, which is accessible HERE, for information about the immigration system in the US.

5 The employment contract

5.1 Form of the employment contract

Written employment contracts are not required in the US. Individual written employment contracts are optional and typically not used for non-executive employees. Instead, as mentioned above, it is common and recommended to use a short “at-will” offer letter with employees (see **2.3.5**).

Employers sometimes use employment contracts for high-level executives or key employees, such as when an executive negotiated specific terms and conditions of employment that are not provided to other employees. In these situations, a written employment contract is advantageous because it clearly sets out the terms of the agreement between the parties. In a written contract, the employee and employer may agree to any provision that is not prohibited by law.

5.2 Types of employment contracts

Types of contract	
Employees below executive level	For most employees in the US, especially for non-executives, a simple offer letter outlining basic terms suffices to form the employment contract (see **2.3.5**).
Key employees/high-level executives	Contracts for key employees and high-level executives, when used, typically contain provisions outlining terms such as remuneration for services rendered, basis or timing for increases in or changes to remuneration, reporting lines, term of employment, requisite notice in the event of termination of employment by the executive or the company or upon a sale of the business, work location, expense reimbursements and other specifically negotiated terms. Terms and other provisions relating to the company's intellectual property and confidentiality (including post-termination noncompete and non-solicitation provisions) are commonly set forth in stand-alone agreements, such as a proprietary information and inventions assignment (PIIA) agreement (see **9.4**).
Independent contractors	Contracts with independent contractors should specify the work requirements for the particular job; a starting and end date; and the conditions for contract termination. Importantly, the contract should state that the person is an independent contractor (not an employee) and the contractor will not be eligible for benefits that are afforded to employees. Independent contractors are not paid a salary like employees. Rather, they are only paid the compensation identified in their agreement, usually on a per job basis. Although an independent contractor may have contractual obligations to pay wages, benefits and salary to its own employees, the company can be liable to those workers under a joint employer relationship. For this reason, using a reputable vendor and including strong indemnification language in the contractor agreement is recommended.

5.3 Language requirements

Generally, there are no mandatory language requirements for employment documents but a translation may be recommended if employees are not fluent in English. Some states have specific translation requirements and they may require an employer to provide translated notice of laws or forms in the language the employer normally uses to communicate employment-related information.

6 Working terms and conditions

6.1 Trial periods

There are no requirements for a probationary period. Generally, probationary periods are uncommon in the US due to the concept of “at-will” employment. Instead, both the employer and employee can generally terminate employment at any time, with or without cause or notice.

6.2 Working time

Employers in the US can set working hours except in certain safety-sensitive jobs, such as airline pilots, truck drivers or jobs involving minors, in which work hours are regulated by law. Federal law

does not require meal breaks, rest breaks or other work breaks. However, when employers do offer short breaks (usually lasting about five to 20 minutes), federal law considers the breaks as compensable work time that must be counted as hours worked and paid. When an employer grants employees an uninterrupted meal period that lasts 30 minutes or more, the employer does not have to pay for the break time.

Reasonable breaks are required for breastfeeding mothers. If rest breaks are typically compensated, then an employee who expresses breast milk during such break must be compensated as well.

Many states have specific working time, meal and rest break, and day of rest requirements.

6.3 Wage and salary

The federal FLSA applies to "covered enterprises," essentially employers whose annual sales total USD 500,000 or more or employers that are engaged in interstate commerce. Courts have interpreted the term "interstate commerce" broadly, so that the FLSA applies to most employers. The FLSA requires minimum wages and overtime pay for certain workers in the US. The FLSA classifies employees as those who are "exempt" and "nonexempt" from mandatory overtime pay.

In 2021, the federal minimum wage is USD 7.25 per hour. Nonexempt employees are also entitled to overtime pay for specified work hours (see **6.5**). Tips and gratuities can be included in the calculation of minimum wage under federal law, up to a certain amount. However, some states limit the use of tips and gratuities toward minimum wage requirements. Covered federal contracts and subcontracts entered into as of 1 January 2020 must contain a provision specifying that covered employees (with limited exceptions) must be paid a minimum wage of USD 10.80 per hour. For certain federal contractors, the minimum wage increased — effective 1 January 2021 — to USD 10.95 per hour for covered hourly employees and USD 7.65 per hour for covered tipped employees. The federal contractor minimum wage may be increased annually. The DOL has released a proposed rule implementing and enforcing President Biden's EO 14026, which requires federal contractors to pay their workers at least USD 15 per hour and increases the minimum wage for tipped federal contractors to USD 10.50 per hour starting 30 January 2022.

"Exempt" employees include certain salaried executive, administrative, professional, highly compensated, outside sales employees, inside sales employees working at retail or services establishments and computer professionals. Job titles are not determinative of exempt classification and a court or government agency will look beyond the job title to the actual job duties to determine if the employee is properly classified as exempt. These exempt positions must primarily perform specified duties for the particular exemption.

Except for outside sales employees, employees must be paid on a salary basis meeting a certain threshold to be exempt. These minimum salaries are as follows:

- USD 684 per week or USD 35,568 annually for the executive, administrative and professional exemptions
- USD 684 per week or USD 27.63 per hour for the computer professionals exemptions
- USD 107,432 annually for highly compensated employees, with at least USD 684 per week paid on a salary basis

Additional compensation such as bonuses, equity or housing or travel allowances generally cannot be used to satisfy the minimum salary requirements. However, pursuant to the DOL Final Rule announced on 12 December 2019, the cost of certain employee perks and benefits must be included in the employee's regular rate of pay for purposes of calculating an employee's overtime rate under the FLSA (see **6.5** below).

Reductions in exempt employee salaries based on the quality or quantity of hours worked are generally prohibited.

The FLSA does not specifically address when an employer must pay its employees.

Many states and municipalities have higher minimum wage and overtime pay requirements or stricter exempt classifications. They also have specific requirements for when employees must be paid and require certain information to be included in wage statements.

6.4 Making deductions

Employers are required to withhold various taxes from employee paychecks, including federal income taxes, state income taxes (if applicable) and social security taxes. The Internal Revenue Code (“**Code**”) and other federal and state statutes mandate these deductions.

Other deductions from paychecks may be permitted in limited circumstances. For example, an employee may be subject to a wage garnishment order (discussed below), or the employee may voluntarily authorize certain deductions to enroll in employee benefits, make retirement contributions or for other purposes. Many state laws prohibit certain deductions from employee pay. Even when permitted, however, certain deductions cannot reduce the employee’s pay below the minimum wage or overtime pay requirements.

When an employee’s wages become subject to a garnishment order (a legal order for collecting a monetary judgment or debt owed by the employee), the federal Consumer Credit Protection Act prohibits employers from terminating employment because of the garnishment and restricts the amount of money that can be garnished. Some states also have laws imposing greater restrictions on wage garnishments.

6.5 Overtime

Under federal law, nonexempt employees (see **6.3** above) are entitled to receive overtime pay for time worked in excess of 40 hours in a workweek. A “workweek” is defined as a fixed and regularly recurring period of 168 hours — seven consecutive 24-hour periods. The employer may designate when a workweek begins and ends. The workweek need not coincide with the calendar week and instead can begin on any day and at any hour of the day.

The federal rate for overtime work in excess of 40 hours in a workweek is equal to 1.5 times an employee’s regular rate of pay. The employee’s “regular rate” of pay for overtime is not limited to their base salary or hourly rate but may also include other types of compensation for work performed. For example, an employee’s “regular rate” of pay may include commissions, production or incentive bonuses, prizes (if awarded for work quality, quantity or efficiency) and other forms of compensation.

Under federal law, overtime pay is not automatically required for work performed on Saturdays, Sundays, holidays or regular days of rest if the total hours worked in the workweek do not exceed 40 hours.

Some states have laws imposing additional overtime pay requirements.

6.6 Bonus and commission

Employers are not required to offer bonuses or commissions, as long as employees are paid the applicable minimum wage. Nevertheless, it is common for US employers to offer commissions or bonuses to some employees, particularly those who are at an executive level or who are involved in sales. These arrangements may include bonus plans that are discretionary or non-discretionary, and based on the employer’s or employee’s performance over a particular period, or a combination; on the

sales achieved by the employee; or on a profit-share scheme. Bonuses and commissions are subject to tax similar to regular wages.

If bonuses or commissions are offered, they can be subject to state laws governing bonuses or commissions.

6.7 Benefits in kind

In the US, there is no universal healthcare system administered by the government. As a result, the majority of US employers provide tax-favored health insurance to their employees. Employers may pay all, part or none of the premiums for this coverage.

In 2010, the Affordable Care Act (ACA) passed and expanded healthcare coverage to previously uninsured Americans. The ACA (or any other federal law) does not require employers to provide their employees with health benefits. However, under the ACA, employers of a certain size (generally more than 50 full-time employees) can be subject to tax if they do not offer health coverage meeting certain enumerated requirements to a certain percentage of their full-time employee population. The ACA also implemented healthcare tax reporting requirements for employers with more than 50 full-time employees. Under the ACA, prior to 2019, individuals (including certain expats) who failed to obtain healthcare insurance were subject to a tax (unless the individual qualified for an exemption). The federal tax on an individual for failing to have healthcare insurance no longer applies starting in 2019; however, certain states (e.g., Massachusetts, New Jersey, California, etc.) impose a state tax on their residents that do not have healthcare coverage. Further, the changes to the requirements for individuals do not affect an employer's obligations under the ACA and, therefore, the employer tax for failing to offer healthcare coverage remains in effect and it will continue to apply.

Some large cities, such as San Francisco, require employers to provide some healthcare benefits to their employees (either directly or by payment into a citywide fund).

In addition to health benefits, employers may also provide a variety of other benefits to their employees on a tax-favored basis (e.g., disability, life insurance, accidental death and disability insurance, etc.). However, a number of rules must be complied with to preserve the tax-favored status.

6.8 Equity incentive plans

An employer may use its equity to compensate its employees. Equity compensation is generally subject to tax laws, securities laws and state corporate law; however, equity compensation is generally exempt from the ERISA.

Stock options

An employer may grant employees the option to purchase its stock under a stock option plan. These grants may be broad-based or targeted to key employees. Options may be tax-advantaged incentive stock options (ISOs) or nonqualified stock options (NSOs). Except with respect to a deferral election made under Code Section 83(i) for stock issued pursuant to tax-deferred qualified stock options granted by private companies, as discussed further below, the recipient of an NSO is generally subject to income tax on the spread at the time the NSO is exercised. The recipient of an ISO is generally not taxed on the spread at exercise, assuming certain holding and other requirements are met, but the recipient is subject to tax, at capital gains rates, on the subsequent appreciation in the value of the option shares when they dispose of such shares. However, if an employee makes a deferral election under Code Section 83(i) with respect to the stock received pursuant to the exercise of an ISO, as discussed further below, the option will not be considered granted pursuant to an ISO. To avoid the potential violation of Code Section 409A, stock options must meet several requirements, including generally: (i) the stock option must be a right to purchase common stock of the corporation

for which the service provider (option grantee) performs direct services or certain eligible parent entities that possess at least 50% of the voting power or value of the service recipient corporation's ownership; (ii) the exercise price is not less than the fair market value of the underlying stock on the date the option is granted; (iii) the number of shares subject to the stock option is fixed on the date of grant; (iv) the transfer or exercise of the option is subject to taxation under Code Section 83 and 26 CFR §1.83-7; and (v) the option does not contain a feature for the deferral of compensation beyond the later of the exercise or disposition of the option or the time the stock acquired pursuant to the option becomes substantially vested (i.e., the taxable income resulting from the exercise or disposition of the option must be fully includable as income at the time of exercise/disposition of the option). In general, a violation of Code Section 409A will result in immediate taxation of the amount in violation to the extent vested and the imposition of an additional 20% tax (plus, in certain situations an additional premium interest tax) on the employee, and it could result in the employer being potentially subject to penalties for failure to withhold and report on income.

Employee stock purchase plans

Employers may offer their employees an employee stock purchase plan (ESPP). If the ESPP is a broad-based program designed to comply with Code Section 423, then the employees may be offered the shares at a discount with favorable tax treatment. In addition, if certain holding period requirements are satisfied, the employee is taxed at ordinary income tax rates on the spread between the purchase price and the fair market value of the underlying stock on the date of grant (or if lesser, on the amount by which the sale price exceeds the purchase price) and any additional gain will be taxed at capital gains rates. If an employee makes a deferral election under Code Section 83(i) with respect to the stock received in connection with the exercise of an option granted under an ESPP, as discussed further below, the option will not be considered as granted pursuant to an ESPP. ESPPs typically permit employees to purchase shares on regular purchase dates using payroll deductions to accumulate the funds for the purchase price.

Tax-deferred qualified stock grants

Code Section 83(i), introduced under the Tax Cuts and Jobs Act of 2017 and, effective as of 1 January 2018, permits eligible employees of eligible corporations whose stock is not readily tradable on an established securities market to elect to defer for up to five years federal income tax attributable to stock options upon the exercise of the stock options (assuming fully vested stock is received) and to restricted stock units upon vesting. Eligible employees generally exclude significant shareholders of the eligible corporation, as well as certain executive officers and their family members. If an eligible employee makes a timely deferral election, then the employee will be subject to income tax on the earlier of: (a) the date the stock received upon exercise of the option or upon vesting of a restricted stock unit is transferable; (b) the date the employee becomes ineligible to make a deferral election under Section 83(i); (c) the date on which any stock of the eligible corporation becomes publicly traded; (d) five years after the eligible employee's right to the stock is substantially vested; and (e) the date the employee revokes the election.

Other stock-based compensation

Other forms of stock-based compensation include restricted stock, restricted stock units, phantom shares and stock appreciation rights (SARs). Restricted stock is generally subject to income tax at vesting. However, a recipient of restricted stock may elect to recognize income at the time of grant by making a Code Section 83(b) election. Except with respect to a deferral election made under Code Section 83(i) for stock issued pursuant to tax-deferred qualified restricted stock units, as discussed further above, income tax for restricted stock units is incurred after vesting upon delivery of the underlying shares (or the cash value thereof). Phantom shares and SARs are not actual equity awards (unless the SAR is a stock-settled SAR), but rather use the stock value on the date of grant as a measure of the amount of the award. An employee exercising an SAR or cashing out a phantom

share is generally entitled to the appreciation in the value of the shares since grant. The award can be paid in cash or stock and it is taxed as ordinary income. As with options, to avoid the potential application of Code Section 409A, SARs must generally be granted with an exercise price equal to the fair market value of the underlying stock on the date of grant.

6.9 Pensions

Employers may offer qualified and nonqualified retirement plans to their employees. Generally, qualified retirement plans are broad-based whereas nonqualified retirement plans must be limited to a select group of management or highly compensated employees. The federal government also provides eligible individuals with retirement benefits through its social security program.

Qualified retirement plans

A qualified plan is a way for employers to provide tax-favored retirement benefits to their employees. An employer with a qualified plan sets aside money for its employees' retirement in exchange for a current income tax deduction (at the time the money is set aside). Moreover, the investment gains on the funds accumulate tax-free. Employees do not pay income tax on the contributions and earnings on those contributions until they actually receive the retirement benefits. Due to these tax advantages, qualified plans are highly regulated under the Code and the ERISA and they must meet numerous operational and documentary requirements, including annual limits on the amounts that may be contributed. Generally, part-time employees may not be excluded from participation in a qualified retirement plan once the employee has worked 1,000 hours for the employer. There is no mandatory retirement age in the US.

Qualified retirement plans come in multiple forms: (i) defined benefit plans; (ii) defined contribution plans; and (iii) hybrid plans that are defined benefit plans but have characteristics of defined contribution plans. Typically, all but very small employers will offer some form of qualified retirement plan. Defined contribution plans are currently much more common, although companies in traditional manufacturing industries or with union employees may offer a defined benefit plan.

Defined benefit pension plans

Defined benefit plans are structured to provide a certain benefit at retirement. Often this benefit is expressed as a percentage of pay or a flat dollar amount multiplied by the employee's years of service with the employer. The amount of benefit does not change based on the plan's investment gains and losses. In other words, the employer bears the risk of the investment loss since the employer is obligated to "fund" the fixed benefits. An actuary is required to determine how much the employer must contribute each year to fund the plan; funding requirements are regulated by the Code and the ERISA. Payments are generally made when an employee retires on or after retirement age, although payments may begin earlier under certain circumstances. The default form of payment is generally an annuity paid in monthly payments. Annuity payments generally last from the date the employee retires until death. If a participant is married at retirement, benefits are generally required to be paid to the spouse for life if the spouse survives the participant, unless the participant waived this form of benefit, with the consent of the spouse. Other payment options, such as installments or a lump sum, may be available with spousal consent (if applicable).

Defined contribution pension plans

Under a defined contribution plan, the final pension benefit is not known. In these plans, the employee, the employer or both may contribute to the employee's account. The contribution may either be discretionary or a fixed predictable amount. The annual contributions made to this type of retirement plan are allocated to accounts of the participating employees and the investment experience of the trust fund, whether positive or negative, affects the account balance. In defined contribution plans, the employees bear the risk of loss (and enjoy the gain on investments). The final

pension benefit is based on the value of the total account balance (contributions adjusted for earnings and losses) when the benefit is paid (generally at termination of employment or retirement).

Common forms of defined contribution plans include profit-sharing, employee stock ownership plans and 401(k) plans. The 401(k) plan is the prevalent type of defined contribution plan in the US. Under a "401(k)" plan (named after the section of the Code that sets forth many of the rules of governance), employees are permitted to reduce their taxable pay by contributing a portion of their compensation to the plan on a pre-tax basis. Some 401(k) plans also permit after-tax employee contributions under a Roth account feature. Employers that provide 401(k) plans may match a portion of the employees' contributions as an incentive for employees to save for retirement. Generally, the employee is given the discretion to direct the investment of the assets held in their plan account by selecting from a menu of investment options established by the employer.

Social security retirement benefits

Social security is a social insurance program funded by payroll taxes, which are shared by the employer and its employees. Under this program, the federal government makes retirement benefits available to employees and the Social Security Administration, an independent agency of the federal government, administers these benefits. An employee's retirement income is generally based on the average of the highest 35 years of the employee's covered earnings and it is calculated after taking a number of factors into account. Payment of retirement income will normally begin on a monthly basis at a retiree's normal retirement age (age 65, 66 or 67, depending on the employee's year of birth).

6.10 Annual leave

There is no federal or state law in the US requiring employers to grant employees paid vacation or to provide paid holidays. That said, it is common to provide at least some paid vacation to employees, increasing with seniority, and to offer paid holidays.

If vacation is granted, it can be subject to state laws that vary in limitations or requirements.

6.11 Sick leave and pay

Prior to the FFCRA, there was no federal law in the US requiring typical employers to grant employees paid sick leave. However, on 2 April 2020, the FFCRA became effective. The FFCRA was historic because, for the first time in US history, many private employers were required to provide US-based employees with paid sick leave (up to 80 hours) and paid family care leave (up to 10 weeks) when employees are unable to work or telework for reasons related to COVID-19. The cost of the leave entitlements are ultimately borne by the federal government through offsetting employer tax credits. The mandatory paid leave provisions of the FFCRA expired on 31 December 2020. Effective 1 January 2021, paid leave under the FFCRA became optional through 31 March 2021, with covered employers who "opted in" continuing to receive tax credits for payments made to employees on leave for covered reasons. Subsequently, the American Rescue Plan Act of 2021 (ARPA and also known as the COVID-19 Stimulus Package) extended and expanded the FFCRA in several ways, including extending the "opt in" period through 30 September 2021.

Certain federal government contractors and subcontractors are required to offer paid sick leave of at least one hour for every 30 hours worked on or in connection with the employer's federal contract or subcontract. Covered employees may accrue at least 56 hours per calendar year. All covered contractors are required to inform employees in writing of the amount of paid sick leave they have accrued no less than once a month and at other times.

In addition, under the FMLA, certain employers are required to permit unpaid time off for medical leave for an employee's "serious health condition" as defined in the FMLA regulations, as well as

other types of leave (see **7.2** and **8.1**). A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice or residential medical care facility
- a period of incapacity requiring an absence of more than three calendar days from work, school or other regular daily activities that also involve continuing treatment by (or under the supervision of) a healthcare provider
- any period of incapacity due to pregnancy or for prenatal care
- any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.)
- a period of incapacity that is permanent or long term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.)
- any absences to receiving multiple treatments (including any period of recovery therefrom) by, or on referral by, a healthcare provider for a condition that would likely result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.)

An employee is eligible for FMLA leave if they: (i) have worked for the employer for at least 12 months, which need not be continuous; (ii) have at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave; and (iii) work at a location where the employer has at least 50 employees within a 75-mile radius. Employees are entitled to take up to 12 weeks of unpaid leave for covered FMLA leaves (though military caregiver leave is permitted for 26 weeks — see **8.1**) combined in total during a 12-month period, with a right of reinstatement following the leave. A growing number of states and municipalities require paid sick and paid family care time.

Workers' compensation leave

Workers' compensation leave, if required, provides time off for employees who are injured in the course of employment. Workers' compensation requirements are governed by state law and they can vary from state to state. The employee is normally entitled to the amount of leave required by the workers' compensation physician and the employee may be entitled to accommodations of work restrictions upon their return to work. The workers' compensation insurer or system normally covers the employee's lost wages. Workers' compensation systems under state law will govern whether the employees are entitled to reinstatement and payments due in the event of termination.

Disability leave

Under the federal ADA (see **1.2.1**), an employer may be required to grant unpaid leave to an employee with a disability that substantially limits a major life function, as a "reasonable accommodation," unless providing leave is an undue hardship. The ADA requires employers to provide reasonable accommodations for disabled employees who can either perform the essential functions of the job with or without accommodation or who require a temporary or intermittent leave as a reasonable accommodation if the disability leave or accommodation can be provided without an undue burden to the employer. Employees may be entitled to leave as an accommodation under the ADA even if the employee is not eligible for leave under the federal FMLA or if FMLA leave has been exhausted (see **8.1**). The length of the reasonable leave and reinstatement rights are determined based on the facts of the situation. The ADA also requires an "interactive process" (i.e., a conversation with the employee) to discuss available and effective reasonable accommodations.

6.12 Taxes and social security

Federal tax law requires that employers withhold and match a certain percentage of each covered worker's pay and remit it to the government for deposit. Federal income tax withholdings vary based on published withholding tables. Flat rates (for 2021, 22% or 37%, depending on the circumstances) can be used for supplemental wages, such as bonuses, equity compensation, etc. Employers are responsible for taxes under the Federal Insurance Contributions Act (FICA), which includes social security (for 2021, at a rate of 6.2% each for the employer and employee, or 12.4% total, only on the first USD 142,800 in earnings) and hospital insurance known as Medicare. Employers are also responsible for taxes under the Federal Unemployment Tax Act (FUTA) for unemployment.

In addition to these federal withholdings, there are also state and local tax withholdings and employer contributions.

7 Family rights

7.1 Time off for antenatal care

Antenatal leave may be permitted in some states and municipalities. Employers should be familiar with the state and local leave law requirements for the locations where their employees work.

7.2 Maternity leave and pay

The FMLA (see **6.11**) is the only federal law that requires time off for family rights-related leave.

The FMLA requires employers to permit eligible employees to take up to 12 weeks of leave during a 12-month period, with a right of reinstatement following the leave, for the birth of a child or to bond with a newborn or adopted child, as well as for certain other types of leave (see **6.11** and **8.1**).

An employer may deny reinstatement following leave in limited circumstances, such as where the employee is a "key employee," as defined by the FMLA regulations, or if the employee would have been terminated for reasons unrelated to the leave.

Leave under the FMLA is unpaid; however, the employer must maintain healthcare benefits coverage during the leave. Employees may elect to use accrued paid vacation or paid sick time, if any, for part of the leave. It is common for US employers to offer some form of pay during parental or maternity leave, or for family care needs. In addition, some states and municipalities require unpaid or paid family care leave or sick pay, or provide social insurance payments to employees taking such leave. Receipt of such compensation usually runs concurrently with the leave and it does not extend the amount of leave to which an employee is entitled, except where local law otherwise requires.

7.3 Paternity leave and pay

See **7.2**.

7.4 Parental leave and pay

See **7.2**.

7.5 Adoption leave and pay

See **7.2**.

7.6 Other family rights

See **6.11**, **7.2** and **8.1**. Some states and municipalities have local laws that provide additional employee rights for other family reasons, such as for leave to visit the school of the employee's child.

8 Other types of leave

8.1 Time off for dependents

The 12 weeks of leave permitted under the FMLA applies to eligible employees taking leave to care for the employee's spouse, child or parent who has a serious health condition. The FMLA also covers eligible employees taking leave for certain "qualifying exigencies" arising out of the fact that the spouse, son, daughter or parent of the employee is on active duty in the military. In addition, the FMLA requires employers to permit eligible employees to take a single 26-week period of leave during any 12-month period for military caregiver reasons to care for the employee's spouse, child, parent or next of kin who is a veteran or member of the armed forces (including a member of the National Guard or Reserve) who incurs or aggravates a serious injury or illness while on active duty.

8.2 Public duty leave

Under the federal USERRA, employees are entitled to take unpaid leave for service in the Armed Forces Reserve, the National Guard or other uniformed services for up to five years (with certain statutory extensions). Employees are required to provide advance verbal or written notice of the required leave, unless giving notice is impossible, unreasonable or precluded by military necessity. Employees must be reinstated to the job that they would have attained had they not been absent for military leave, with the same seniority, status and pay for the position they would have attained. Employers must take reasonable efforts, such as training or retraining, to enable employees to qualify for reinstatement to such a position. If the employee cannot qualify for such position, the employer must reinstate the employee to a comparable one.

Employees who are reinstated following USERRA leave cannot be terminated, except for cause, for one year after being reinstated if the employee served in the military for more than 180 days or for 180 days after being reinstated if the period of service was less than 180 days but more than 30 days.

There are numerous additional types of public duty leave required under state or municipal law, including voting time, volunteer firefighter, reserve peace officer and emergency rescue personnel leaves. Some leaves are paid and others are unpaid. Employers should be familiar with the state and local leave law requirements for the locations where their employees work.

9 Termination provisions and restrictions

9.1 Notice periods

Due to "at-will" employment in the US, employers are only obliged to give notice to employees pursuant to a contract, company policy or CBA, or when the federal WARN Act and/or state "Mini-WARN" acts apply (see **15.10**).

9.2 Payment in lieu of notice

When notice is required due to a contract, company policy or CBA, employers may be able to provide payment in lieu if permitted in the terms of the agreement. In situations where notice is required by the WARN Act (see **15.10**), unilateral payment of salary and benefits in lieu of notice by the employer may preclude any liability and damages under the WARN Act. However, nothing in the WARN Act or regulations permits payment in lieu of notice.

9.3 Garden leave

"Garden leave" is a global term intended to describe the situation where an employee is required not to attend work during a period of notice but to stay at home "on call." Garden leave is not a term typically used by US employers; however, such situations do arise. For example, when notice is

required due to a contract, company policy or CBA, employers may be able to place an employee on, or negotiate, garden leave. Additionally, many employers excuse employees from actively reporting to work, with full pay and benefits, during a notice period when the WARN Act applies (see **15.10**).

9.4 Intellectual property

The common practice in the US is to provide appropriate employees with a stand-alone PIIA, which is presented with an offer letter (see **5.2**). This stand-alone agreement should: (i) restrict the improper disclosure and use of confidential and proprietary information, both during employment and after employment ends; and (ii) ensure that ownership of any intangible rights that may be developed by the employee in the course of employment will remain and/or vest with the employer. The latter is obviously particularly important if the US company operates or will operate in a technical field and employee inventions are expected.

A well-drafted PIIA typically contains a tailored definition of proprietary information covered by the agreement, including all information about the company's current and planned products, marketing, forecasts, pricing, customer lists and other confidential information or trade secrets of the employer. The PIIA should also:

- prohibit the use or disclosure of proprietary information during and after employment
- assign to the company all inventions developed by the employee that can be legally assigned and require the employee to identify any inventions not subject to the agreement
- prohibit an employee from engaging in competitive employment during employment without permission
- reiterate "at-will" employment (if applicable)
- include a required notice under the DTSA to permit employee disclosures of trade secrets to the government and in certain cases

Some PIIAs also include information regarding noncompetition and solicitation of employees or customers for a specific period after employment. However, the permissibility and consideration requirements of various types of post-termination restrictions vary from state to state (see **9.6**).

A PIIA that assigns an employee's rights in an invention to the employer should exclude certain inventions developed entirely on the employee's own time and it must provide notice of these rights at the time the agreement is made. Some states have their own laws governing the assignment of inventions by employees.

The PIIA should preferably be executed before the new employee starts work. If the PIIA is executed after the employee commences employment, the assignment of intellectual property will not be retroactive to cover any inventions created during the period between the commencement of employment and the date the employee executed the PIIA.

9.5 Confidential information

During employment, employees have an implied obligation of good faith and, in some states, a duty of loyalty to their employer. This includes the obligation not to disclose or misuse the employer's trade secrets or other confidential information of the business.

For the broadest protection, most companies enter into a confidentiality agreement with employees at the outset of employment. For this reason, employers are strongly advised to have express clauses protecting confidential information and trade secrets. These are normally contained in a confidentiality agreement or PIIA (see **2.3.5**). However, pursuant to the DTSA of 2016, to retain all remedies under the DTSA, the employer must provide written notice to employees that disclosure of confidential

information is permitted in limited circumstances. Specifically, notice of the following must be provided:

- employees will not be held liable under any trade secret law for the disclosure of a trade secret made in confidence to a government official or an attorney for the sole purpose of reporting or investigating a violation of law
- employees may disclose trade secrets in a complaint or other document filed in a lawsuit or other proceeding if that filing is made under seal
- an employee who files a lawsuit alleging retaliation by the company for reporting a suspected violation of the law can disclose the trade secret to the employee's attorney and use the trade secret in the court proceeding, as long as the employee files any document containing the trade secret under seal and does not disclose the trade secret, except pursuant to a court order

9.6 Post-termination restrictions

Post-termination restrictive covenants are contractual restraints on workers that may include covenants preventing an employee from: (i) joining a competitor in a certain capacity for a limited time period following termination; (ii) soliciting customers for a limited time period following termination; and (iii) soliciting employees of the former employer for a limited time period following termination.

The particular rules governing the enforcement of restrictive covenants vary from state to state. For example, some states, such as California, do not permit or enforce employee post-termination noncompete agreements as a matter of public policy, except in limited situations such as a purchase of the worker's business. Other states that do enforce restrictive covenants typically follow the "rule of reasonableness." Under this approach, a restrictive covenant will be enforced if an employer's legitimate proprietary interest needs protection and the covenant is reasonably limited in terms of subject matter, duration and geographic scope. The court determines whether the time, subject matter and territorial limitation imposed by the covenant have a reasonable relationship to an employer's legitimate proprietary interest. An employer's "legitimate proprietary interests" generally consist of the protection of confidential and trade secret information and the protection of customer relationships.

Time, territory and subject matter limitations should be consistent with the scope of the employer's proprietary interests in its customer relationships and/or confidential information and the employee's actual activities during employment. For example, if an employer's only protectable interest is its customer relationships, a customer non-solicitation covenant is more appropriate than a covenant completely barring any form of competition. Similarly, if an employer's trade secrets have a short "shelf life," the duration of the covenant should not exceed the "shelf life" of the secrets.

9.7 Retirement

With very limited exceptions (such as for pilots and police officers), there is no mandatory retirement age in the US. Contractually requiring mandatory retirement at a certain age can violate federal and state age discrimination laws.

10 Managing employees

10.1 The role of personnel policies

In the US, only a handful of employment policies must be in writing under state and federal law. Nevertheless, US employers typically adopt and utilize written personnel policies with their workforce. Most often, these policies are set out in an employee handbook that is distributed to all employees and for which the employer obtains a signed acknowledgment from each employee. These policies are also typically available on the employer's company intranet.

Well-drafted personnel policies in the US serve several goals: (i) as guideposts for employees of workplace conduct and expected benefits from the work relationship; (ii) to prove to government auditors that the employer's practices comply with statutory mandates; and, perhaps most importantly (iii) as loss-prevention and risk-management mechanisms to help control or minimize employment-related exposures. Personnel policies appropriate at one company may not be appropriate at another company, but the policies discussed below should be considered by all US employers.

10.2 The essentials of an employee handbook

There is generally no requirement for a privately held, nongovernment contractor employer to maintain specific work rules or an employee handbook. Publicly traded companies do have some requirements — see **10.3**. Federal and state laws have various "posting" requirements that require employers to post certain notices in conspicuous locations in the workplace (see **17.7**). The majority of US companies choose to have written employee handbooks or policies to serve the goals explained in **10.1**.

For companies that choose to have written employee handbooks or policies, it is possible for those work rules to be enforced as contracts between the company and its workers if they contain specific promises — for example, that terminations will be implemented only after progressive counseling steps or for "just cause." Unless the company intends to create such contractual obligations, it is important to have an express, written handbook provision that the policies do not create contractual obligations and they can be unilaterally amended or rescinded by the company at any time (except for the at-will policy and any dispute resolution policy, if applicable).

Recommended handbook policies include those set out below.

Recommended policies
Open door/grievance/complaint procedure policies
Wage and hour, overtime and timekeeping policy
Sick, vacation or other paid time off policies
Confidentiality policy
Use of company IT and mobile devices
Equal employment opportunity policy (nondiscrimination, non-harassment and non-retaliation)
Disability accommodation policy
Religious accommodation policy
"At-will" employment

Recommended policies
Workplace conduct policy
Attendance and leave of absence policies

10.3 Codes of business conduct and ethics

Under the Sarbanes-Oxley Act and Securities and Exchange Commission rules, companies traded on national US stock exchanges must have a code of business conduct and ethics (or "code of conduct") applicable to at least their principal executive officer, senior financial officers, principal financial officer and comptroller or principal accounting officer, or persons performing similar functions. The code should include written standards that are reasonably designed to deter wrongdoing and promote honest and ethical conduct, among other compliance requirements.

The company's audit committee must establish procedures for addressing complaints relating to questionable accounting and auditing matters (e.g., a whistleblower hotline).

In addition, stock exchanges, including NASDAQ and the New York Stock Exchange, have additional requirements for a code. Finally, many state and federal contractors are required to adopt a code of conduct. In general, there is no specific requirement for a private US company to have a code of conduct but some companies implement one, especially in anticipation of listing.

In practice, codes of conduct often cover topics beyond the minimum requirements and generally should at the least cover observing laws and regulations; disclosure and financial reporting; maintaining accurate and complete company records and internal controls; insider trading; antitrust/competition; fair dealing; avoiding conflicts of interest; corporate opportunities; use of company assets; protecting confidential information; bribes and kickbacks to government officials; nongovernmental bribes and kickbacks, including gifts, gratuities and entertainment; compliance with applicable export controls; political activity; environment, health and safety; mutual respect; and, increasingly, given the vast amounts of data held and processed by any given company and increasing exposure in this heavily regulated area globally, data privacy and data protection. A process for reporting suspected violations should be outlined in the code of conduct.

For US multinationals with foreign operations, code-related requirements can create certain tensions or conflicts with local law, particularly trade laws (including conflicting boycott and boycott-blocking laws), local privacy and whistleblowing laws (including country-specific guidelines and restrictions on reporting to the US), which require careful navigation during the drafting and implementation of US codes to international subsidiaries and employees.

11 Data privacy and employee monitoring

Please refer to our Global Privacy Handbook, which is accessible HERE, for information on data privacy and monitoring requirements in the US.

12 Workplace safety

12.1 Overview

Both federal and state laws regulate workplace safety in the US. The primary federal law is the OSHA, which sets rules and regulations pertaining to workplace health and safety, record keeping, inspections and the imposition of penalties. The DOL enforces the increasingly complex OSHA standards by assessment of penalties, inspections and possible criminal liability for willful violations of the OSHA.

Several states have Occupational Safety and Health Administration approved state plans, covering either both private and state/local government workplaces or state/local government workplaces only. Many states also have laws that protect workers and may cover workplace hazards not included under the OSHA.

12.2 Main obligations

Among other obligations, the OSHA requires a covered employer to: (i) provide employees with safety training programs and information regarding the safety considerations associated with the various components of their jobs; (ii) maintain a workplace free of serious recognized hazards; and (iii) maintain accurate records of work-related injuries and illnesses or work-related deaths. The OSHA has a complex regulatory scheme covering many types of workplace hazards and specific industries. Of note, COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties.

Generally, employers with more than 10 employees (unless otherwise exempt) must maintain reports (OSHA Forms 300A and 301) and records of all work-related injuries and illnesses resulting in death, absence from work, work restrictions, transfers to another job, medical treatment beyond first aid and/or unconsciousness (OSHA Form 300). Many employers are required to electronically submit the summary of injuries to the OSHA.

Potential workplace violence is recognized as a workplace safety and health hazard in the US. Accordingly, employers are legally obligated to prevent workplace violence and are subject to citation for failure to implement proper workplace violence policies. All employers, regardless of size, should have some type of workplace violence policy or procedure that provides, in part:

(i) a statement that the employer will not tolerate any physical and verbal acts or threats of violence, harassment or bullying and any employee committing violent acts or threats will be disciplined

(ii) a request that employees notify the employer about any actual or threatened violent acts or threats

(iii) a statement that the employer will immediately investigate any actual or threatened violent acts or threats of violence

(iv) a statement that the employer will impose appropriate discipline for violations of its workplace violence policy and procedures.

12.3 Claims, compensation and remedies

An employee has the right to file a complaint with the OSHA, as well as their employer, of any possible workplace hazards. It is unlawful for an employer to take any action or “retaliate” against an employee who files a complaint.

Many US states have enacted workers’ compensation insurance programs to compensate employees who have been temporarily or permanently disabled by accidents or diseases in the course of their employment. The requirement to participate and pay premiums into the workers’ compensation program and protections from liability for employee claims due to such injuries varies by state.

13 Employee representation, trade unions and works councils

Information about working with trade unions and works councils can be found throughout this guide. For more information about this subject in the US, please contact us. See Key contacts for contact details.

14 Discrimination

14.1 Who is protected?

Federal employment discrimination laws are broad in scope and protect all types of workers — those who have contracts, those who are employed “at will” and those covered by CBAs. The nondiscrimination laws cover all aspects of the employment relationship including recruitment, the provision of terms and conditions of employment, promotion, training and dismissal.

Federal law prohibits discrimination and the harassment of workers on the basis of their race/color, religion/creed, sex (including pregnancy, sexual orientation and gender identity), national origin/ancestry, age (40 and over), mental/physical disability, genetic characteristics or genetic information, military and veteran status, citizenship status when otherwise authorized to work, and union status. Employers with 15 or more employees (20 or more employees in age discrimination matters) are generally covered by federal nondiscrimination statutes.

Federal law also prevents discrimination or retaliation against an employee based on certain protected conduct, such as employee complaints of unlawful conduct or taking statutorily mandated leaves, or concerted activities by employees. As such, personnel policies need to be carefully drafted so as not to restrict employees from engaging in statutorily protected activities.

In addition, most of the 50 states, and some major metropolitan areas, in the US have employment discrimination prohibitions that mirror or exceed federal law. Examples of state laws that are broader than federal law include those that prohibit discrimination on the basis of marital status. These state laws may also apply to smaller employers (with fewer than 15 or 20 employees). Therefore, it is not uncommon for the three sets of laws — federal, state and local — to prohibit employment discrimination.

Federal government contractors and subcontractors may also be subject to additional nondiscrimination obligations. For instance, certain federal contractors are required to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. In addition, covered government contractors and subcontractors must include an equal employment opportunity clause in nonexempt contracts.

Certain non-construction contractors with 50 or more employees and government contracts of USD 50,000 or more must annually prepare and maintain written affirmative action programs (AAP) for women and minorities and individuals with disabilities (and for protected veterans when the contract value is USD 150,000 or more) for each establishment. An AAP for women and minorities must contain certain topics and concepts including an organizational profile, placement goals and identification of problem areas. AAPs for individuals with disabilities and protected veterans must include components such as a policy statement, review of personnel processes, and a review of physical and mental qualification standards.

If a contractor or subcontractor does not comply with the applicable rules and regulations, that contractor or subcontractor could face sanctions including back pay and interest; cancellation or termination of federal contracts; restrictions on the contractor receiving future government contracts; and enforcement proceedings brought before the Department of Justice or the Equal Employment Opportunity Commission.

14.2 Types of discrimination

Prohibited employment discrimination, harassment and retaliation include the following:

- Intentional discrimination — i.e., the employee’s protected categories in **14.1** are used as the basis for an employment decision adversely affecting the worker.

- "Quid pro quo" sexual harassment — when employment decisions are made on the basis of submission to or rejection of unwelcome sexual conduct.
- A neutral employment practice that has a disproportionately adverse impact on protected classes as compared with nonmembers of the protected class.
- Harassment because of an employee's protected category that creates a hostile work environment, such as unwelcome verbal or physical conduct, that would be offensive to a reasonable worker and adversely impacts the employee's terms or conditions of employment based on a totality of the circumstances. Harassment can be caused by slurs, graffiti, offensive printed or visual material, offensive comments or other verbal or physical conduct. Prohibited harassment can include harassment by co-workers, vendors, customers or contractors, if the company knows or it should have known about the harassment and failed to take reasonable steps to promptly correct the conduct.
- Retaliation against employees for engaging in any protected activities, such as filing an administrative charge of unlawful conduct, making an internal or external complaint of unlawful conduct, or participating in an investigation of alleged unlawful conduct. An adverse employment action that may constitute retaliation may include a post-employment action such as a negative reference.

14.3 Special cases

14.3.1 Disability discrimination

The ADA and most state and local laws prohibit discrimination by an employer against a qualified individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the job. The definition of "disabled" is quite broad and it covers a wide variety of physical and mental impairments. Normally, reliance on a doctor's certificate of a disability will suffice.

The ADA requires all covered employers to provide "reasonable accommodations" to a disabled employee that enable the employee to perform the essential functions of their job, unless the employer can prove that the requested accommodation would constitute an undue hardship or would pose a direct threat to the health and safety of the individual or others in the workplace, regardless of the accommodation. Additionally, if a requested accommodation would not permit the employee to perform the essential functions of the position, it is not considered a required "reasonable" accommodation.

An employer is not required to provide an employee with an accommodation that could cause an "undue hardship." An undue hardship arises when the accommodation would cause significant difficulty to implement, would be too expensive or would fundamentally change the nature or operation of the business or service. Undue hardship must be based on an individualized assessment of the essential functions of the particular position and the employee's needed accommodation, and it can include:

- the nature and cost of the accommodation needed
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity)
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer
- the impact of the accommodation on the operation of the facility

In determining whether a "reasonable accommodation" should be provided, the employer should involve the employee when identifying potential accommodations and it must engage the employee in discussions called the "interactive process." The employer should document all discussions with the employee regarding efforts to accommodate an employee's disabilities or agreed upon accommodations.

14.3.2 Equal pay

Under the federal EPA of 1963, US employers must pay equal wages to women and men in the same establishment for performing "substantially equal work." Wages include more than just hourly or annual pay — bonuses, company cards, expense accounts, insurance and more may be included. Job content, not job titles, determine whether jobs are "substantially equal." Unequal compensation can be justified only if the employer shows that the pay differential is attributable to a fair seniority, merit or incentive system, or a factor other than sex.

The EEO-1 is a report all employers who have at least 100 employees are required to file with the Equal Employment Opportunity Commission (EEOC). Employers must report on the number of employees who work for the business by job category, gender and race/ethnicity, referred to as component 1 data. Under the EEO-1 reporting requirements, US companies with more than 100 employees were required to file two reports in 2019. The first report was required to reflect data on the number of employees who worked for the business by job category, gender and race/ethnicity (component 1 data). The filing deadline for the 2020 filing of component 1 data was extended several times, finally to 23 August 2021 due to the COVID-19 pandemic. The second report required employers to report certain pay data by job category, gender and race/ethnicity across 12 pay bands (component 2 data). Currently, there is no future filing requirement for additional component 2 data.

In addition, several states and some major metropolitan areas in the US have pay equity laws that exceed federal law. Examples of state laws that are broader than federal law include those that prohibit reliance on prior salary as a justification for setting wages or restrict employees from discussing their wages and compensation. California and Illinois now require employers to collect and report pay data. Federal contractors are also subject to a pay transparency rule that prohibits restrictions on employees from discussing their compensation, with limited exceptions.

14.4 Exclusions

14.4.1 Occupational requirements

US employers may have certain defenses for permitted types of discrimination. The following exclusions are limited and narrowly construed:

- Employers may make employment decisions (but not harass) on the basis of bona fide occupational qualifications where the qualification is reasonably necessary to the normal operation of that particular business or enterprise. Examples can include gender preferences for models or acting roles, or caregivers based on the gender of the patient.
- There is also a national security exception to the federal nondiscrimination law, which provides for an affirmative defense to a charge of discrimination where the position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any national security requirement under any security program in effect pursuant to or administered under any statute of the US or any executive order of the president. This defense is most often used in the context of race, national origin or citizenship discrimination claims, where an employer took an adverse action against an employee or applicant when they have not fulfilled or have ceased to fulfill an applicable national security licensing or security clearance requirement.

- Friendship, commerce and navigation (FCN) treaties are in place between the US and several other countries. Where an FCN treaty exists with appropriate clauses, foreign employers operating within the US may discriminate in favor of their own foreign nationals in certain management and technical positions.

14.5 Employee claims, compensation and remedies

Workers may file claims of discrimination, harassment or retaliation before various governing federal and state agencies, courts or arbitrators. The government agencies have substantial powers to enforce and administer employee charges, including:

- the ability to pursue charges "on their own motion" (i.e., regardless of whether a worker files a complaint), on an individual basis or as a "pattern and practice" case potentially obtaining remedies for an employer's workforce nationwide
- the authority to fully investigate complaints, which includes the power to interview employees and other witnesses, to require employers to provide access to personnel files and other documents, and to remove files for the purpose of copying them
- the power to settle or adjudicate complaints

An employee who wins an employment discrimination, harassment or retaliation case can recover an award equivalent to lost salary and fringe benefits, as well as compensatory damages and punitive damages, and mandatory reinstatement. In certain situations, a successful employee can secure relief known as front pay, which is an award equivalent to the future compensation and benefits the employee would have received but for the unlawful employer conduct. The court will generally award money to a prevailing employee to compensate them for their own damages, as well as for the reasonable fees of their attorney. Compensatory damages are for the alleged pain, suffering and emotional distress experienced by the employee due to the employer's discriminatory or harassing conduct. Punitive damages are more in the form of a penalty and they are imposed to deter wrongful conduct or to punish a lawbreaker. Unlike many other jurisdictions around the world, it is difficult for an employer to recover its attorneys' fees even if it prevails on all claims.

Certain federal employment discrimination laws have limits on awards of compensatory and punitive damages depending on the size of the employer. For example, Title VII of the Civil Rights Act provides the following caps:

- USD 50,000 for employers with between 15 and 100 employees
- USD 100,000 for employers with 101 to 200 employees
- USD 200,000 for employers with 201 to 500 employees
- USD 300,000 for employers with 501 or more employees

Employees who win age discrimination cases may also be entitled to a doubling of an award of lost wages and fringe benefits if they can show that the employer engaged in a "willful" violation of the law.

State laws may have different caps on damages that exceed those under federal law and some states, such as California, have no caps at all. It is not uncommon for a multimillion dollar award of compensatory and punitive damages to be sought by, and awarded to, an employee suing for discrimination, harassment or retaliation under state and local employment discrimination laws.

Certain whistleblower statutes also permit whistleblowing employees who make reports to government agencies that result in a recovery against the company for a statutory violation to receive a percentage of the government's recovery. Such "whistleblower bounties" are intended to incentivize employees to come forward with information to, and cooperate with, government investigations.

14.6 Potential employer liability for employment discrimination

A worker can sue a company and, in certain jurisdictions or under certain statutes, the supervisor who made the personnel decision at issue. In certain circumstances, a court may also impose damages on management personnel found to have committed unlawful discrimination or harassment. Workers who can sue include applicants, employees and, in some instances, third-party employees of staffing companies or vendors where the engaging company is found to be liable under a "joint employer" theory of liability.

Employers are also liable for any discrimination, harassment or retaliation committed by a supervisor where the worker suffered a tangible job detriment (e.g., a termination, denial of a raise or promotion or undesirable reassignment).

14.7 Avoiding discrimination and harassment claims

In the US, the prevention of employment-related liabilities is dependent to a large degree on the maintenance of appropriate policies and practices to provide a work environment free of discrimination, harassment and retaliation.

Through its policies, the employer needs to notify employees and supervisors of the prohibitions against discrimination, harassment and retaliation, advise employees of the consequences of engaging in prohibited conduct, provide employees with an avenue to bring forward a complaint and set out a procedure for the investigation of complaints. Employers should ensure that the policies are distributed to new and existing employees and they should train employees on the policies. Employers should also promptly investigate complaints of discrimination, harassment or retaliation.

Federal law also provides employers an affirmative defense to claims of harassment where the employer can prove: (i) that it exercised reasonable care to prevent and promptly correct any conduct constituting harassment; or (ii) the employee unreasonably failed to take advantage of a personnel policy or procedure to report, prevent and correct any conduct amounting to harassment. Under the second element of this affirmative defense, a worker has the practical burden to come forward and complain to management about any incident of harassment when the company has a policy to report such incidents (also referred to as an "open door policy").

In practice, employers should also follow the below guidance to ensure as much as possible that employees feel they are being treated fairly:

- give clear warnings and instructions to employees
- apply all personnel policies equally to all employees
- provide prompt and candid appraisals of performance to all employees
- assume all employees desire to be promoted
- provide equal training opportunities and counseling
- promote an open door policy such that employee complaints are passed on and responded to by personnel management

15 Termination of employment

15.1 General overview

The at-will employment rule in the US permits the employment relationship to be terminated by either the employer or the employee, without notice or cause. Exceptions include contractual obligations,

CBAs or company policies that require notice or cause to terminate, and for certain mass terminations (i.e., collective redundancies — see **15.10**).

15.2 By the employer

See **15.1** and **15.10**.

15.3 By the employee

See **15.1**.

15.4 Employee entitlements on termination

Upon termination, employees are entitled to pay of all earned wages, including earned bonuses and commissions, accrued vacation if required by state law or company policy, information about entitlements to continue health benefits post-termination and certain notices of unemployment benefits rights. The timing of final pay and termination notices are generally governed by state law and they can be as early as the date of termination.

15.5 Notice periods

Except when the WARN Act or a state equivalent applies (see **15.10**), there are currently no federal or state laws that require an employer to give notice to an individual employee of an impending termination. Of course, employers may be obliged to give notice to employees pursuant to a contract, company policy or CBA.

15.6 Terminations without notice

Where a notice period applies and the employer does not provide the required notice, the employer may be liable for the amount of damages that would place the employee in the same monetary situation in which they would have been had the employer provided the requisite notice. Employees also have a corresponding duty to “mitigate” their loss. This means the employee must take reasonable steps to look for other suitable work. Therefore, any money an employee earns at a new job after their termination (or reasonably could have earned with a reasonable job search or other mitigation efforts) may be deducted from any breach of contract award.

15.7 Form and content of notice of termination

The form and content of a notice of termination will be governed by the terms of the contract, company policy or CBA. For certain mass terminations (collective redundancies), the WARN Act requires (and any applicable state equivalent laws may require) that specific information be provided in notices to employees, labor representatives (if any) and specified government agencies (see **15.10**).

15.8 Protected employees

A number of statutory protections prohibit the termination of employees for certain protected types of conduct, including the following:

- Certain statutory leaves of absence require the employer to reinstate an employee following the leave to the position the employee most recently held with the employer if it still exists or to a comparable position if it does not (see **7.2** for example).
- Whistleblower and anti-retaliation laws prohibit termination due to the employee reporting perceived unlawful conduct.

In addition, if the decision to terminate an employee is based in whole or in part on a protected classification (e.g., race, color, national origin, sex, gender, religion, age, disability, etc.) (see **14.2**), the employee may have a discrimination claim.

15.9 Mandatory severance

There are no laws in the US requiring the payment of severance to an employee who is dismissed by an employer. An employer may be obligated to offer or pay severance pursuant to contractual obligations, CBAs or company policies.

Many US employers choose to voluntarily offer severance to employees terminated as, for example, part of a reduction in force and require employees to waive all claims against the employer in order to receive severance benefits. Some severance benefits will be covered by the federal law, the ERISA (see **1.2**), and must provide impacted employees with a written summary benefit plan and summary plan description. Where the company has a prior practice or policy of providing severance from which it wishes to deviate, or where the calculation for severance is other than a simple lump-sum payment, where continued administration of the severance is required (such as through continued pay or company-paid benefits), or where the company may use administrative judgment to determine employee eligibility for severance, then an ERISA-compliant severance plan is required. Even if not technically required, many companies elect to prepare such an ERISA severance plan, as the ERISA preempts state law claims and provides a more limited remedy to employees who dispute their severance. An ERISA severance benefit plan must satisfy statutory requirements, including administrative filings, and the company's attorneys should coordinate it to ensure compliance with the ERISA.

15.10 Collective redundancy situations

A reduction in force (RIF) is allowed in the US for any legitimate business need, including economically driven position eliminations, reorganizations and acquisitions or divestitures. Unless the employer has a policy, practice or contractual obligation requiring advance notice or selection criteria, employees in small RIFs can be terminated without any advance notice and for any reason, giving significantly more flexibility to US employers, in comparison to most other jurisdictions around the world. Employers undertaking a RIF in the US should consider unions, contractual entitlements, prior company practice and policy, and precautions to avoid discrimination claims when selecting employees, including giving employees severance conditioned upon signing waivers and releases.

However, if the employer has 100 or more employees, excluding part-time employees (or 100 or more employees including part-time employees who in the aggregate work more than 4,000 hours per week), the WARN Act applies to larger RIFs or plant closings by the employer in the US. A "part-time" employee is defined as either: (i) an employee who is employed for an average of fewer than 20 hours per week; or (ii) an employee who has been employed for fewer than six of the 12 months preceding the notice date.

If the WARN Act covers the employer, then 60 days' advance notice is required if the company is conducting a "plant (or business unit) closing" or a "mass layoff," as defined by the WARN Act. A "plant closing" is the shutdown of a single facility or the elimination of one or more business units at a single facility resulting in the terminations of 50 or more employees from that facility. A "mass layoff" is a RIF involving the termination from a single facility of: (i) 50 or more employees if they make up 33% of the employer's active workforce (excluding "part-time" employees); or (ii) 500 or more employees. Employees who work remotely are counted at the facility to which they report. A "mass layoff" also includes a temporary shutdown that results in a break of employment of more than six months or a reduction in more than 50% of the work hours during each month of any six-month period. Employees will not be counted toward the WARN Act thresholds if: (i) they are offered relocation to a different site of employment that is within a reasonable commuting distance and with no more than a six-month

break in employment; or (ii) they are offered relocation to any location (regardless of commuting distance) and with no more than a six-month break in employment and the employee accepts such relocation within 30 days of the offer or of the layoff, whichever is later.

In certain very limited situations, an employer can give less than the normally required 60 days' notice under the WARN Act. Reduced notice is permissible if the RIF is caused by a business circumstance not reasonably foreseeable at the time notice otherwise would have been required. This exception is very narrowly interpreted and it only arises under circumstances entirely outside the employer's control, such as a natural disaster, termination of a major contract by a principal client, a strike at a major supplier or a government order to close an employment site. The WARN Act also recognizes shortened notice where a faltering company was actively seeking capital or business to avoid the shutdown and giving notice would have precluded the employer from acquiring the capital or business. In all situations where the WARN Act permits reduced notice, the employer must still give notice as soon as practicable and the notice must contain the reason for the shortened period.

<u>Procedure and information and consultation requirements</u>

If the WARN Act is triggered, the employer must provide 60 days' advance notice to the following parties: (i) the employees being terminated; (ii) the head of the state dislocated workers' unit; (iii) the chief elected official of the unit of local government in which the employment site is located; and (iv) the union representative (if any).

The notice must include:

- the name and address of the employment site
- a statement as to whether the mass layoff or plant closing is permanent or temporary
- the expected date or a 14-day period in which the terminations are expected to occur
- an indication of whether bumping rights exist
- the names and job titles of employees who will be affected
- the name and telephone number of a company official to contact for further information

Failure to provide the requisite notice under the WARN Act may expose the employer to claims for back pay and benefits for the period of violation (up to 60 days), as well as a civil penalty of USD 500 for each day of violation.

US employers should also check the state laws for the states in which they are conducting RIFs for additional notice requirements. Many states have enacted "Mini-WARNs," equivalent statutes to the WARN Act that can have lower triggers or may require longer notice. For example, New York's WARN Act requires 90 days' notice.

15.11 Claims, compensation and remedies

Employees who believe they were terminated for an improper reason can litigate their claim in court or before an arbitrator where there is a written arbitration agreement. Many discrimination and whistleblower statutes require the employee to first file their claim with certain federal or state agencies before proceeding to court or arbitration. CBAs may also have a mandatory dispute resolution or arbitration provision that applies when employees believe the termination violated the terms of the CBA.

The various statutes that set out prohibited bases for termination provide for varying types of compensation and remedies. Employees who believe they were terminated in violation of a contract or company policy can seek contractual remedies, which include many of the same remedies.

15.12 Waiving claims

Most US employee claims can be settled and waived. A properly drafted waiver signed by an employee, accepting a sum of money (or other valuable consideration) in full and final settlement of all claims, will generally be fully enforceable with respect to most claims. The amount of offered severance can be any monetary amount or additional benefits the employer chooses (including cash severance, post-termination benefits, outplacement services, etc.), and it can be based on position, length of service or location. The severance offered for a waiver must be in addition to anything the employee is entitled to by law or contractual entitlement. Waivers of age discrimination claims by employees aged 40 and over need to meet certain requirements, which vary based on whether the employee is part of an individual or group severance plan or program offered by the employer.

While a signed release is effective to waive most employment claims, there are some employment claims that cannot be waived under US law, such as the following:

- federal claims related to military leave under the USERRA
- ability to seek government investigations or share information with the government
- federal overtime and minimum wage claims under the FLSA
- the right to file a charge with the Equal Employment Opportunity Commission (EEOC) or to participate in an investigation (though an employee’s right to recover from the employer either in the employee’s own lawsuit or a lawsuit brought by the EEOC can be waived)
- claims for retaliation under the Dodd-Frank Wall Street Reform and Consumer Protection Act
- workers’ compensation claims
- unemployment claims

Some state law claims also cannot be waived.

16 Employment implications of share sales

16.1 Acquisition of shares

In general, under federal employment laws in the US, if a transaction involves a transfer or exchange of the equity ownership of the target business, there is no transfer of employees but simply a change in the ownership of the employer. As such, the purchaser inherits all those rights, duties and liabilities previously owed by, or to, the employees of the target company, by virtue of being the new owner of the target company. Likewise, if the target company has a union and/or any existing CBAs, the purchaser generally “steps into the shoes” of the seller and assumes all such obligations upon transfer.

However, employment contracts may contain a provision where a change in control provision in the target company would constitute a termination or trigger an employee’s right to terminate or to receive payment as a result of the share sale. Typically, these change in control provisions are intended to apply to executive level or senior managerial employees.

Generally, similar rules apply if the transaction is structured as a reverse triangular merger. In a forward triangular merger, however, where there is a change of the employing entity from an employment perspective, employees transfer to the purchaser through termination and rehire. Accordingly, transferring employees as part of a forward triangular merger is a more complicated process, and the parties should budget sufficient time between signing and closing to notify impacted employees and effectuate the termination and rehire process.

16.2 Information and consultation requirements

Employers in the US are generally free to sell all or part of their businesses without consulting in advance with employees or their labor unions. There are, however, a few exceptions.

There can be an obligation imposed by federal labor law to negotiate the effects of the decision with a union that represents the employees of the selling business. A seller with union employees is generally not required to bargain with a union representing its employees over the decision to sell a business. Employers are required, however, to provide union(s) with sufficient advance notice of a sale to afford the union(s) a meaningful opportunity to bargain over the effects of the transaction (e.g., severance pay, insurance continuation and transfer rights). A seller is not obligated to agree to any of a union's "effects" in bargaining proposals but it must negotiate in "good faith."

Additionally, if the transaction or the employee transfers related to the transaction trigger the federal WARN Act or similar state laws, advance notice to the employees and certain governmental entities may be required (see **15.10**).

17 Employment implications of asset sales

17.1 Acquisition of assets

If a transaction involves the sale or transfer of the underlying assets and liabilities of a business, the status of the employees becomes an important issue. Generally, in the US, an asset purchaser is not obligated to offer employment to the employees of the seller, unless required to do so by the terms of the deal. As a result, except where contractual provisions require otherwise, the purchaser can choose the employees who will receive offers of employment from the purchaser, depending on the needs of the purchaser's business.

If the employees are intended to transfer along with the assets and liabilities, they must be terminated by the current employer and formally accept a new offer of employment with the new employer. If no offer is made to an employee, or if the employee does not accept an offer, that employee remains employed by the existing business and does not transfer with the underlying assets and liabilities. In most instances, if the target company will not continue to operate post-closing, any remaining employees of the target company will be terminated. Due to these consequences, a seller will often insist that the purchaser offers employment on substantially the same terms and conditions in the aggregate to its employees as part of the transaction. In addition to securing employment for its former employees, transferring the employees on such terms helps the seller avoid triggering the federal WARN Act or similar state laws and potential claims (e.g., breach of contract or applicable CBA, claims related to severance obligations or other liabilities).

If, post-closing, the new employees constitute a majority of the employees who were previously represented by a union while working for the seller and there is substantial continuity of the seller's business, the purchaser is considered a "successor" employer and will be required to recognize and bargain with the union as the bargaining representative of the employees. However, the purchaser is not bound by the terms of the previous CBA if it makes it clear to the union and employees that it is not assuming or adopting the contract. If the purchaser does not recognize the union, this may trigger pension plan withdrawal liability, which may be substantial and which the purchaser may be obligated to pay.

17.2 Transfer of employees

Employees of the selling company are not automatically transferred to the new company that is purchasing assets. As detailed in **17.1**, a purchaser of the assets of a business is usually not obliged to hire any of the employees of the seller unless the purchaser assumes that obligation in the asset purchase agreement or other agreement. Nonetheless, when hiring a new workforce, a purchaser of

assets most often looks to the seller's current workforce and cannot refuse to hire these employees on the basis of legally protected classifications (see **15.8**).

In a typical asset sale, the seller's employees are terminated on or before the closing date of the transaction. The seller is normally responsible for paying any termination obligations, such as accrued but unused vacation and other benefits, as well as satisfying any "change of control" benefits in individual employment contracts or other agreements. The seller may also be obligated to provide COBRA and federal and/or state WARN Act notices, although the parties are free to negotiate which party is ultimately responsible for liabilities related to these obligations. Some major municipalities in the US also regulate the transfer of employees in specific industries.

17.3 Changes to terms and conditions of employment

Unless the terms of the transaction agreement provide otherwise, a purchaser of assets may offer new wages, benefits and other terms and conditions of employment for any employees it hires from the selling company. That said, it may make business sense for the buyer to offer comparable or more favorable terms and conditions to certain transferring employees (e.g., highly skilled and key employees). In certain situations, the purchaser may also wish to recognize the transferring employees' seniority or benefits with the seller (e.g., accrued vacation), or to waive benefit plan eligibility requirements or preconditions to plan enrollment, as this may incentivize certain employees to accept offers of employment from the purchaser.

As set out in **17.1**, CBAs do not transfer as part of the sale unless the purchaser assumes them through contract or conduct. The purchaser may set initial terms and conditions of employment during the hiring process that deviate from previous bargaining agreements, provided that notice is given before the time of hiring.

17.4 Information and consultation requirements

See **16.2**.

17.5 Protections against dismissal

Unlike many non-US jurisdictions, employment in the US is generally "at will," meaning that employers are not required to retain employees or give specific severance pay on the termination of employment due to an acquisition. Exceptions arise where: (i) the employee's underlying employment agreement, or a company severance plan, contains such requirements; (ii) the federal and/or state WARN Act require advance notice (for instance, when there is a "plant closing" or "mass layoff" — see **15.10**); and/or (iii) CBAs require advance notice. Depending on the type of transaction or degree of continuity in an acquisition, such statutes or contract provisions may apply to the purchaser. Federal law also requires that a terminated employee be allowed to continue in any employer-sponsored health program for a period of time, generally at the expense of the employee, though in certain instances, the employer may choose to cover the cost of such health coverage. In addition, under the ARPA, certain employers are required to offer free COBRA coverage to certain individuals between 1 April 2021 and 30 September 2021, including some individuals whose right to COBRA coverage previously ended. The ARPA provides tax credits to employers to offset the cost of the COBRA coverage. If these matters are not properly addressed both pre-signing and pre-closing, employees could file claims against one or both parties, which could lead to significant liabilities and ultimately affect the purchase price.

17.6 Other considerations

A purchaser should consider whether it is able to take credit for the wages paid by the seller to its employees during the calendar year for the purposes of meeting the wage base with respect to FICA and FUTA taxes (see **6.12**). The general rule is that FICA and FUTA wage bases apply separately to wages paid by each common law employer. However, a purchaser may be able to take advantage of the FICA restart exception if: (i) there is a mid-year transfer of substantially all the property used in a trade or business of the seller to the purchaser; (ii) the purchaser employs the employees previously engaged by the seller without an interruption in service; and (iii) the wages were paid during the calendar year in which the acquisition occurred and prior to the acquisition. In that case, the successor employer is entitled to receive credit, for FICA and FUTA tax purposes, for the wages paid during that calendar year and prior to the acquisition by the predecessor employer. There are two procedures available for implementing the successor employer rules and the seller and purchaser will need to file certain forms to take advantage of the exception.

A purchaser should also consider whether key employees currently have post-termination noncompetition and non-solicitation agreements in place and/or whether it needs to procure new restrictive covenant agreements or obtain assignment of the existing agreements from the seller (assuming the existing restrictive covenant agreements include assignment clauses). The parties also should analyze whether such post-termination restraints are permissible and enforceable. Some states (e.g., California) prohibit post-termination noncompetition agreements unless certain criteria are met in the context of a transaction. Other states permit restrictive covenant agreements if they are narrowly tailored with respect to geography, duration and scope.

17.7 Other information and notification obligations

In the US, specific notice and posting requirements are triggered by employee headcount, as follows:

Number of employees	Source	Poster
1	DOL, Federal Minimum Wage and Overtime Law	"Employee Rights Under the Fair Labor Standards Act" poster
	DOL, Polygraph Protection Act	"Employee Rights: Employee Polygraph Protection Act" poster
	US Citizenship and Immigration Services	E-Verify "Participation Poster" and "Right to Work" poster (in English and Spanish) Only required for employers who participate in E-Verify
	OSHA	"Job Safety and Health: It's the Law!" poster; injury-specific/hazard-specific postings
	OSHA	Injury-specific/hazard-specific postings
	USERRA	Notice of rights, benefits and obligations under the USERRA
15	ADA; Title VII; GINA	"Equal Employment Opportunity is the Law" poster
20	ADEA	"Equal Employment Opportunity is the Law" poster
50 within a 75-mile radius	FMLA	"Employee Rights under the Family and Medical Leave Act" poster. (Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate.)

Depending on the company's industry and the types of workers it hires (e.g., foreign workers), a company may be required to make other postings.

Federal contractors may have additional posting requirements depending on the size of their workforce and the dollar amount of their federal contracts. Most states and some localities have additional posting requirements as well, including posters reflecting information about state and local minimum wage laws and state and local human rights laws.

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