

# Workforce

## Creating Employment Success in the United States



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The key to any organization is people, and any company doing business in the United States will have to recruit, interview, hire, and manage a workforce. The process of hiring and managing a U.S.-based workforce may differ greatly from those practices customary in other countries. In the United States, employers are regulated by (1) federal laws that apply to all companies regardless of location; (2) state laws, for the individual state(s) where the employees are physically working; and, (3) local- or city-based ordinances in some larger cities. Also, the law may be shaped by “public policy” considerations and court decisions. Employers are generally afforded great latitude in structuring their workplace policies and practices. This freedom, however, is not without limits, as federal, state, and local laws regulate such areas as minimum wage and other issues relating to the payment of wages and prohibit workplace decisions taken for discriminatory reasons. There are also other types of protections, including those for disabled or pregnant workers.

This chapter is designed to provide a general overview of federal, state, and local laws; how these laws work to protect employers and employees; and how the United States works to provide safeguards against discrimination through the classification of people into “Protected Classes.” In fact, these protected classes should be some of the most important considerations for employers as they delve into the laws governing the workplace. *Title VII of the Civil Rights Act of 1964* and corresponding federal civil rights statutes define who is protected. In the United States, employment laws prohibit discrimination based on these protected characteristics, which Federal law identifies as age, race, sex and gender, national origin, disability, color, and religion. Several U.S. states and some local governmental entities have added to these categories to provide broader protections.



## Section 1 – The Employment Relationship

### Recruitment

In a nutshell, recruitment cannot show a preference for a class of people or discourage someone from applying because they are in a protected class. This is true whether an employer recruits through job postings, recruiters, or word of mouth. For example, job postings cannot seek “females” or “recent college graduates,” since the first would show a preference for women and discourage males from applying, and the second would discourage people over 40 from applying. Likewise, employers cannot direct their

recruiters to only interview people inside or outside protected categories or recruit in a way that will only yield members outside the protected categories. Therefore, employers should review job postings for potential issues to ensure neutral language and impact and review directions given to recruiters. There are also some state-specific restrictions on what employers may inquire about pre-hire, such as salary histories.

Employee benefits are an essential part of U.S. recruitment and compensation. While benefits vary by size of the business, geographic region, and sector of the economy, the most common are health care (medical, dental, and vision), retirement plans, and paid time off. Some less common, but still popular, benefits include incentive programs, education reimbursement, and discounts on some products. Employee benefits are constantly evolving to incorporate new concepts and new expectations from employees. Many companies are reassessing their benefits in light of the priorities of the workforce they are looking to attract and retain. Each employer is free to choose the types of benefits they offer and how these benefits are provided. However, some benefits must be offered uniformly to all similarly situated employees. There are also some selected benefits that can be tailored for specific employees or potential employees. A key point to remember is that the legal requirements and restrictions are changing as fast as the benefits.

## **Interviews**

Like recruitment, employers should not inquire into, or make decisions based upon, an applicant's disability, race, color, gender, sex, national origin, age, or religion. Employers should avoid asking questions about family or marital status and club or union membership. Instead, interview questions should be limited to determining if a person is qualified for the job. For example, if a job requires an employee to lift 50 pounds, the interviewer can ask if the applicant meets all the required qualifications. On the other hand, the interviewer should not ask, "I see you are in a wheelchair. Can you still lift 50 pounds?" Similarly, if an employer requires applicants to take a test as part of the hiring process, the test must be related to the job and may not exclude people because of their membership in a protected category.



## **Ban the Box Laws**

Multiple states (14 at the time this chapter was drafted) have implemented so-called "Ban the Box" laws. These laws are designed to limit or eliminate employers' ability to inquire into past criminal convictions or use past convictions in hiring decisions. While these laws

vary between states (and localities), they generally: restrict the type of conviction that can be asked about; limit the ability to use past convictions in hiring decisions; delay background checks; and require that employees be notified when criminal information is used in hiring decisions. Several localities within these states have additional requirements on what information can be sought or used. Some states require a detailed analysis be undertaken before rejecting a candidate based on a criminal conviction.

### **Pre-Hiring Drug Testing**

Pre-hiring drug testing is another area where the laws and requirements vary dramatically between various states and localities. Some states have no restrictions on pre-hiring drug testing; others have some limited restrictions. Certain localities go even further by eliminating the ability to require pre-hiring drug testing, except under very limited situations, or by restricting employers from testing for certain drugs such as cannabis, except in certain narrow circumstances. Some states that permit the use of medical marijuana have revised testing procedures to accommodate the use of cannabis outside of work. There is some tension between federal and state law on the issue of drug testing. Some employers who have federal contracts, federal grants, or are subject to Department of Transportation (DOT) or Department of Defense (DOD) guidelines, may have more expansive drug testing requirements than those permitted under state law.

### **Managing the Workforce**

Employers have great latitude about decisions on promotions, pay increases, discipline, or termination. However, employers must be mindful to follow Equal Pay Act laws and other non-discrimination laws in making these important workplace decisions. Again, employers must consult federal, state, and local laws on these topics. (Refer to Section 4: Compliance) In general, employers are free to design pay policies based on merit, performance metrics, client development, or other important considerations without being lock-stepped solely by tenure or the position level.

## **Section 2 – At-Will Employment**

Almost every state in the United States applies some version of the “at-will” employment doctrine. Generally, the at-will doctrine means that either the employee or employer may terminate the relationship at any time, without notice or “cause.” Any employment decision, even taken in a state that follows a broad application of the at-will employment doctrine, must still comply with all federal, state, and local laws regulating employment decisions, including protected classes.

The at-will doctrine may be a new concept for international business investors, who may be accustomed to hiring through employment contracts with a fixed term (duration) that may restrict the ability to terminate employees. Under the at-will doctrine, there is no set term

of employment, no standard affecting employment decisions, and, as a result, each party can end the employment relationship at any time. In short, the doctrine does not require a long-term commitment by either party. In an at-will situation, an employee who simply wishes to stop working can end the employment relationship at any time, as can the employer. Indeed, since 1888, Texas has held that employers can terminate an employee for good cause, bad cause, or no cause at all. Most other states have court decisions that contain similar holdings.

Employers and employees can disregard the at-will doctrine by entering into contracts that specify the length of employment and the conditions for, and consequences of, termination. Even without an express written contract, however, the doctrine does have some limitations. Even though the at-will employment doctrine presents a straightforward approach to the employment relationship—both parties will continue to work together if each party desires to continue the relationship—the application of federal and state law supersede the doctrine. The most obvious exception is that an employment decision cannot be based on an act or reason that has been deemed “illegal,” and for purposes of this chapter any hiring or firing practices where the decision is based on the employee’s identification with any protected class is illegal.

In addition to non-discrimination limits, several states provide protection against “retaliation,” such as termination because an employee has engaged in whistleblower activities (such as reporting illegal or fraudulent conduct; filing a complaint about discrimination or unpaid wages; seeking workers’ compensation benefits; or engaging in some other protected action).

Moreover, when applying the at-will employment doctrine, some states exercise an amended version of the doctrine. For example, some states apply an implied contract exemption to the doctrine, meaning employers can establish a “just cause” standard for employment decisions through a contract, an employee handbook, or other employment policies. Further, some states applying the doctrine also exercise a good faith exemption. In these states, even though the at-will doctrine applies, an employer may only terminate employees for “just cause.”

While the at-will doctrine provides employers with a fair amount of flexibility, there are limits based on federal, state, or local law that must be considered. Employers should take care that internal personnel policies do not create contractual expectations. As a practical matter, most employers use caution when terminating employees. The expense of hiring and training and the impact on employee morale are all important considerations that practical employers evaluate before terminating employment.

In addition, unemployment insurance is an important consideration. Most states require that employers contribute monies into a state unemployment insurance fund administered

by the state government. Employees who are terminated are often eligible to make a claim for unemployment benefits, which is a partial wage replacement for a period to assist the employee until he or she can locate new employment. The amount the employer is required to contribute to the fund is determined by several factors, including the total amount of the payroll dollars and the employer's claims experience. If an employer has high turnover of its employees, and many former employees file for unemployment benefits, the employer is likely to receive a risky rating and may be required to contribute a higher percentage based on its adverse claims experience. Employers and employees can submit information relating to the termination and claim; employers can object; and there are limited appeal rights if either employee or employer disagree with the findings of the unemployment claims examiner.

As a practical matter, employees who do not understand why they are terminated are more likely to file an administrative or court claim against their employer alleging discrimination or wrongful termination. As such, most employers attempt to resolve performance problems and terminate only where the problems are unsolvable, the employee is unsuitable, or there are financial issues compelling the termination.

### Section 3 – Use of Employment Agreements

An employer may decide that it is useful to have employment agreements for its executives or key employees. This type of agreement is helpful to cover such essential terms as: (1) length of employment; (2) expanded notice upon resignation; (3) compensation and bonus structures; (4) equity participation; (5) termination for cause or without cause; (6)



severance; (7) post-employment restrictions, such as non-competition, non-solicitation, and non-disclosure covenants; (8) detailed performance expectations; (9) housing, car, or entertainment stipends or allowances; and (10) relocation benefits and expectations. If the business is a start-up or encountering financial difficulties, the agreement may cover a "stay bonus" or otherwise incentivize remaining with the

employer for a period. Severance provisions can be important as a method of pre-negotiating the end of the employment agreement, minimizing the consequences of any potential emotions. Often, severance agreements are conditioned on the employee giving up the right to make a post-employment claim for damages, where permitted.

In addition to executives, employment agreements are useful for employees who have access to, and work with, trade secrets and confidential information; who are hired to

invent or work on research and development (R&D) activities; or where the employee will be responsible for developing good will (sales). There is federal and state statutory protection for some of an employer's intellectual property rights; however, in the absence of a written agreement and affirmative steps to safeguard proprietary information, an employer's rights may be unsettled or result in shared ownership of an intellectual property asset. Employers may wish to impose post-employment restrictions on working for a competitor, soliciting employees or customers, or disclosing confidential information. Invention agreements detail ownership rights in intellectual property conceived or developed by the employee with the employer's time or resources. An employer may elect to have stand-alone agreements covering the protection of trade secrets, good will, non-competition, or intellectual property rights. Employers may instead include these post-employment restrictions in a general employment agreement covering the topics identified in the preceding paragraph.

State law varies on the requirements for such agreements and their ultimate enforceability. All agreements must be supported by "consideration." In legal terms, consideration is a bargained-for exchange of something of value for something else of value. The parties of the agreement can decide if what they are exchanging is valuable enough to be part of the agreement. Sometimes, continued employment can be deemed sufficiently valuable and therefore enough "consideration" to uphold the agreement. The agreements themselves must be reasonable in scope, duration, and geographic area subject to the post-employment restraints. In addition, they must support legitimate interests, such as protection of trade secrets or goodwill. Under no circumstance can they be created for the sole purpose of limiting competition between similar goods or services. Lastly, the agreement cannot violate public policy, be injurious to the public interest, or unduly burdensome to the employee. Courts enforce these agreements to varying degrees; if this is of importance, employers should consult with employment counsel in their specific geography and/or their specific industry, as specialized aspects to these negotiations might exist.

## Section 4 – Compliance

### Employment Laws

U.S. federal and state employment laws generally prohibit discrimination, harassment, and retaliation based on protected classes, characteristics, and conduct. Most federal employment laws cover employers with 15 or more employees. Federal laws prohibit discrimination based on race, color, national origin, religion, sex, disability, familial status, genetic information, citizenship, pregnancy, veteran or military status, and age (federal law protects employees who are over age 40, Oregon and the District of Columbia protect employees 18 and older, and Michigan and New Jersey protect employees of all ages).

Federal law does not include sexual orientation as a protected class; however, at the time of publication, 24 states protect sexual orientation and/or gender identity/expression.

State employment laws expand coverage to smaller businesses or provide additional protection, such as:

- Height and weight: Michigan and Washington
- Possession of a driver's license: California
- Exercise of free speech rights: Connecticut
- Reproductive health decisions: Delaware, Hawaii
- Family responsibilities: Delaware, the District of Columbia
- Personal appearance, matriculation, or political affiliation: The District of Columbia
- Credit history: The District of Columbia, Hawaii, Illinois, Oregon
- Breastfeeding: The District of Columbia, Illinois
- AIDS and HIV status: Florida, Missouri, Nebraska, Vermont
- Sickle cell trait: Florida, Louisiana, North Carolina, New Jersey
- Arrest record and sealed/expunged convictions: Hawaii, Illinois, New York
- Protective order status: Illinois
- Choice of a Sabbath: Kentucky
- Status as a smoker or non-smoker: Kentucky, Louisiana, Mississippi, New Hampshire, New Jersey, Nevada, Oklahoma, Oregon
- Exercise of right to bear arms: North Dakota

Medical and recreational marijuana users are protected in Arizona and to a lesser extent in Colorado, Connecticut, and Illinois. New Jersey and New York also prohibit hairstyle discrimination.

## **Wage & Hour Laws**

The Federal Fair Labor Standards Act (FLSA) and the related wage and hour law enacted by individual states require that employers comply with minimum wage requirements. Where the state and federal rules differ, states can enact a higher minimum wage rule, but cannot go below the minimum threshold wage set by the federal government. Generally, federal and the various state wage and hour laws require that employers comply with minimum wage requirements; properly classify workers as exempt or non-exempt from overtime pay; and impose recordkeeping obligations, child labor restrictions, and posting requirements. The Federal Equal Pay Act requires that employers pay similarly situated employees the same wage, regardless of gender, if they perform jobs that require substantially equal skill, effort, and responsibilities. There are some exceptions for compensation plans based on seniority or merit. Most states have enacted their own equal pay laws, and at least seven states have greatly expanded coverage to require equal pay on the basis of all protected characteristics.)



### **Leave of Absence (LOA) Laws**

Federal and state LOA laws require employee LOAs in specific circumstances and prohibit retaliation against employees who exercise their LOA rights. The Federal Family Medical Leave Act (FFMLA) requires employers with 50 or more employees who work in a 75-mile (120-kilometer) radius to provide 12 weeks of unpaid leave for eligible employees' own serious medical condition or the care of a covered family member. Other federal and state LOA laws require unpaid leave for military service; jury and witness duty; voting; victims of domestic violence or criminal activity; blood, bone marrow, and organ donation; school activity; pregnancy and nursing mothers; and voluntary firefighter, first responder, or civil air patrol. Although federal LOA laws require only unpaid leave, 13 states and various municipalities now require paid sick leave. Some companies may elect to exceed federal and state mandated requirements by offering incentives like paid leave as a benefit to employees.

### **Required Harassment Prevention Training**

Federal law does not require that employers provide sexual harassment prevention training; however, it is required in California, Connecticut, Delaware, Illinois, Maine, and New York state, as well as some large cities. It is also recommended by the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor, as well as state agencies serving a similar purpose.

### **Posters, Notices, and Filings**

U.S. employers must post conspicuous summaries of applicable federal and state employment laws. The Department of Labor (DOL) [e-Laws Poster Advisor](#) helps employers determine which federal law posters must be posted. States require additional posters for unemployment insurance, worker's compensation, workplace safety, and wage laws. More information on [employment law poster requirements by state](#) can be found on a state-by-state basis.

### **Work Eligibility Concerns**

All employers are required to have employees complete I-9 Forms and provide appropriate documentation that the employee is eligible to work in the United States. Employers are required to maintain such records and provide access to these completed forms if audited.

### **"Right-To-Work"**

In the United States, workers in many industries have unions that are designed to help employees in bargaining for wages and benefits with employers. Unions are not necessarily present in all industries, and some unions are more powerful than others, but where unions exist, members pay dues. The "Taft-Hartley Act" (better known as *The Labor*

*Management Relations Act of 1947*) implemented the right-to-work concept at the federal level by putting into law that employees can choose to join a union or not, pay dues or not, and cannot be forced out of their job if they choose not to join a union. In addition, employees who do not join the union can still benefit from the services offered by the union because the union exists to represent all employees. This relationship is so ingrained that employees who are not union members and/or do not pay dues can sue the union if they feel they were not well represented in their case against their employer. In addition to the federal-level regulation, 27 states and Guam have right-to-work laws currently in effect.

## Section 5 – Privacy Laws

Employee privacy in the United States does not consist of a unified privacy law, but rather a series of laws at the local, state, and federal level, many of which apply only to specific aspects of privacy or certain sectors of the economy. At the federal level, there are several prominent laws dealing with privacy, three of which often come into consideration with hiring and employment matters.

First is the Federal Trade Commission Act (FTC Act), which governs the collection of personal information on websites. Most importantly, the FTC Act requires those collecting personal information from a website to specify what information is collected and how it will be used. This is critical to keep in mind when hiring individuals or seeking qualified candidates for a position through a website, even if a third party or add-in is used to do so. The FTC Act will apply if the information is collected by employers or for their benefit.

The second applicable federal law is the Health Insurance Portability and Accountability Act (HIPAA), which covers health benefits provided to employees once employed. HIPAA requires certain disclosures to employees and prohibits disclosure of protected health information without express authorization. Employers must also set up HIPAA-specific procedures and practices, conduct a risk assessment, and enter into agreements with third parties that may receive information subject to HIPAA on the employer's behalf.

The third important privacy regulation is the Genetic Information Nondiscrimination Act (GINA), which prohibits employers from using genetic information to make most decisions about employees.

At the state level, almost every state and the District of Columbia has passed laws protecting their residents. While these laws differ greatly and are being revised and expanded regularly, a few key components are common and applicable to employment. First, in the event personal information is used in a way that violates the law or is used contrary to its intended purpose, the individual must be notified about what happened, advised on how to prevent the risk of identity theft, and, in many cases, the employer must contact the state or federal government. Second, many states have passed laws prohibiting

employers from requesting or otherwise accessing personal accounts of employees, especially social media. Third, individuals, including employees, must receive notice of their rights regarding their personal information and how their personal information is being used. This often goes well beyond what is required to comply with the FTC Act described above. Specifically, in some states, notices must be provided about where information is obtained, how long it is stored, who it is shared with, and whether it is sold as part of a dataset. Fourth, states are increasingly restricting when and how very sensitive information, such as biometric information, can be collected and used.

In all cases, employers must carefully monitor their data collection and maintain employee privacy, keeping such information well contained. Meeting these standards at the state and federal level requires the assistance of knowledgeable professionals. If data is exchanged outside of the United States in countries that have their own data protection laws, U.S.-based employers must comply with those laws as well.

## Section 6 – Employee Recourse

If employers run afoul of federal, state, or local employment laws, aggrieved employees have several avenues to vindicate their rights. First, if the employer has workplace policies, the employee can use the employer’s internal resources, such as their manager or human rights manager, to address the departure from a workplace rule or law. Employees are not required to do this, but this is a viable option. An employee may file a complaint with either a federal or state civil rights agency, such as the EEOC or the state’s department of labor. Some laws require that the employee first file a complaint with such an administrative agency (called “exhaustion of administrative remedies”). Other laws do not require exhaustion and an employee can file a complaint with any court that has jurisdiction to hear the controversy – typically the state or federal court where the employee works or lives. Lastly, by agreement, an employer may compel the employee to pursue claims through an alternative dispute mechanism, such as arbitration.

## Conclusion

The United States provides great investment opportunities and a well-educated diverse workforce. There is a substantial amount of freedom to recruit, manage, and retain a productive workforce. This chapter has sought to provide a high-level review of these key areas of flexibility as well as the restrictions that employers need to know. However, it is strongly encouraged that any business consult legal advisors for more specific information about the legal requirements where the new business will operate.

## Glossary

**Arbitration:** Arbitration is a private method of resolving a dispute without either party having to file a complaint with an administrative agency or court. The parties can use the rules established by a recognized arbitration association, set their own rules by contract, or refer to the federal or state arbitration act. The purported benefits to using arbitration are confidentiality (no public filing in an agency or court), shorter time to resolve the dispute, and a smaller expense of attorneys' fees. There are downsides to arbitration, such as no judge to make decisions, no jury to hear the dispute, and limited appeal rights.

**At-Will Employment:** At-will employment is a policy that provides employee or employer with the freedom to end the employment relationship at any time, for any reason (except for an unlawful reason), without advance notice. In the absence of an employment agreement, or a specific federal or state statute, employers need not pay any separation pay, severance pay, or notice pay. Employers must comply with the law in terms of paying wages and accrued but unused benefits (such as vacation or sick time); otherwise, employers are free to create employment policies addressing what is payable at the time of termination.

**Employee Benefits:** Employee benefits typically refer to the accoutrements or emollients of employment, such as paid time off, health insurance, retirement plans, and flexible benefit plans. Most states do not require provision of paid time off, except for sick time. But most employers routinely provide time off not only for sickness, but personal reasons or vacation as well. Most states do not require payment of unused paid time off at the time of termination, but some do. If the employment policies or practices require such payment, then the employer must follow those policies or practices.

**Consideration:** Consideration" is a bargained-for exchange of something of value for something else of value (for example, the promise to work in exchange for payment).

**Exhaustion of Administrative Remedies:** A federal or state law may require that an employee file a complaint with a specific administrative agency before he or she can file the complaint in court. The idea behind exhaustion is that the specific administrative agency is charged with the responsibility to enforce the law and has expertise in interpreting the law, an interest in deterring violation of the law, and expertise and authority to issue a remedy, including a public-facing remedy. For example, if an employee wants to file a claim under Title VII of the Civil Rights Act alleging she was fired because she was a woman, she will first have to file the complaint with the EEOC and provide them with an opportunity to resolve the dispute before she can file a complaint with a federal or state court of law and submit her dispute to a jury.

**Federal Law:** Federal law refers to the United States Constitution and its Amendments, and the Acts passed by the United States Congress and signed by the sitting President. Various federal agencies having oversight or enforcement responsibilities for certain laws may publish regulations that interpret federal law and provide more detail on the scope of the law. Also, federal agencies may publish guidelines that provide interpretative guidance to regulatory bodies, employers, employees and the courts. In this paper, all these sources are considered federal law.

**State Law:** The United States is comprised of 50 sovereign states, each with its own executive branch, legislative branch, and judicial system. Instead of a president, states have governors. States are permitted to pass laws if the state law does not conflict with or override federal law. For example, the states can establish their own minimum wage which may differ from the federal law but cannot be a lesser amount than the federal minimum wage law. The states can enact more generous rules of law, but not more restrictive. Many states augment federal employment law by providing greater employment rights or benefits; however, some do not. The law of some states closely mirrors that of federal law. One approach is not better than the other. It is simply something to be aware of when conducting business in the United States. Business activities need to comply with federal and state law, and even local law, such as that enacted by larger cities.

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## Disclaimer

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