

United States

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SCOPE OF LAWS

1. Do the main laws that regulate the employment relationship apply to:
 - Foreign nationals working in your jurisdiction?
 - Nationals of your jurisdiction working abroad?

Laws applicable to foreign nationals

All the main US employment laws apply to foreign employers doing business in the US, including:

- Title VII of the Civil Rights Act 1964 (Title VII) (see *Question 14*).
- Americans with Disabilities Act 1990 (ADA) (see *Question 14*).
- Age Discrimination in Employment Act 1967 (ADEA) (see *Questions 2 and 14*).
- Equal Pay Act (EPA) (see *Question 14*).
- Employment Retirement Income Security Act 1974 (ERISA) (see *Questions 11, 12, and 27*).
- Fair Labor Standards Act (FLSA) (see *Questions 6 and 7*).
- Family & Medical Leave Act (FMLA) (see *Questions 9 and 10*).
- Genetic Information Nondiscrimination Act (GINA) (see *Question 14*).
- National Labor Relations Act (NLRA) (see *Question 5*).
- Occupational Safety & Health Act (OSHA) (see *Question 22*).
- Sarbanes-Oxley Act 2002 (SOX) (see *Question 15*).
- Worker Adjustment & Retraining Notification Act (WARN) (see *Question 18*).
- Older Workers Benefit Protection Act 1990 (OWBPA).
- Civil Rights Act 1866.
- Immigration and Nationality Act (1952).
- Immigration Reform and Control Act 1986.

Laws applicable to nationals working abroad

The Equal Employment Opportunity Commission (EEOC) (under Title VII, the ADA and the ADEA) allows employees to sue extra-territorially for employment discrimination of US citizens employed abroad by US or US-controlled entities.

In some circumstances a US employer may claim a “foreign laws defense”, which may prohibit the application of the US statutes where conduct violating these provisions is mandated by the law of the foreign jurisdiction in which the US employer operates.

Other US employment laws normally do not apply to US nationals working abroad.

EMPLOYMENT RESTRICTIONS AND INCENTIVES

2. Are there any age or nationality restrictions on managers or company directors? If so, please give details.

Age restrictions

The ADEA prohibits discrimination on the basis of age against employees aged 40 years or older. The Act applies to employers employing 20 or more employees, as well as labour organisations, employment agencies, apprenticeship programmes, and training programmes. As an exception, highly paid executives may have to retire at 65 if they receive at least US\$44,000 (as at 1 August 2010, US\$1 was about EURO.8) in annual retirement income and they either:

- Were a bona fide executive.
- Held high policy-making positions.

Some state governments have adopted restrictions on age discrimination that are even broader (for example, in New York, where employees aged 18 or over are protected from age discrimination).

Nationality restrictions

Title VII strictly prohibits nationality restrictions on managers or directors.

3. Are any grants or incentives available for employing people? If so, please give details.

There are generally no grants or incentives available for employing people. However, federal, state or local laws may contain measures to respond to specific community needs, such as programmes, incentives and training for employers that hire and employ people with disabilities.

WORK PERMITS

4. What permits do foreign nationals require to work in your country? Please explain:
 - How these permits are obtained.
 - How much they cost.
 - How long the process takes.

US immigration law distinguishes between permanent residence (immigrant) visas and temporary (non-immigrant) visas (the most



common of which are discussed below (*see below, Non-immigration visas*).

Each visa category has different eligibility requirements and benefits.

Canadian citizens are visa-exempt and can therefore present themselves at the border with appropriate documentation to request admission under the various temporary visa categories, without first obtaining a visa at a US embassy or consulate. Canadian citizens returning from travel in the Western Hemisphere are not required to have a passport.

Non-immigrant visas

B-1 (Business Visitor) Visa. This visa does not authorise employment by a US employer but is commonly used by foreign employers to send employees to the US to perform brief assignments (for example, travelling sales people or business meeting attendees).

This visa can also be used for a temporary assignment to a related US entity, for example, for training or business meetings, if it is clear that the assignment is intended to benefit the employee's foreign employer and will not directly benefit a US entity. The employee cannot receive remuneration from a US employer for services provided during a B-1 visit.

E-1 (Treaty Trader) and E-2 (Treaty Investor) Visas. This visa is useful for business owners, managers and employees who must remain in the US for extended periods to oversee or work in an enterprise engaged in trade between the US and a foreign state or that has made a major investment in the US. This visa is only available if a treaty of friendship, commerce and navigation or a bilateral investment treaty providing for non-immigrant entries exists between the US and the foreign state (except with Sweden and Australia, which are covered without a treaty).

A foreign company only qualifies for this visa if a majority of the company is owned by nationals of the treaty jurisdiction. Each employee or principal of the company who seeks E status under the treaty must be a citizen of the treaty jurisdiction.

Legislation established an E-3 visa status (limited to 10,000 per year) for citizens of Australia who are professionals meeting the H-1B visa standard (*see below, H1B (Specialty Worker) Visas*).

H-1B (Specialty Worker) Visas. This visa allows employers to sponsor a foreign person for employment in a specialty or "professional" position. The position must require at least a baccalaureate degree in a specific, relevant field as a minimum requirement to perform the job duties. Jobs requiring only a college degree or degree in business administration and not a specific business specialty generally do not qualify for H-1B status.

Obtaining this visa involves three major steps:

- A prevailing wage determination must be obtained confirming the foreign person will be paid at least the prevailing wage for the occupation in the area of intended employment.
- A Labor Condition Application (LCA) must be filed with the US Department of Labor's Regional Certifying Officer. Under this the employer agrees (and provides supporting documentation to prove) that:
 - the foreign person will be paid the prevailing or actual wage, whichever is higher;

- the foreign person will be granted prevailing terms and conditions of employment so that US employees are not adversely affected by the foreign person's employment;
 - there is no strike or lockout affecting the position in question at the time the LCA is filed;
 - the appropriate union (if any) or those in similar employment have been notified of the employer's intent to fill the position with an H-1B foreign person.
- The H-1B petition must be filed with the regional USCIS service centre that has jurisdiction over the employment site. It often takes many months to process a petition so it is expedient to request the premium processing service.

The H-1B visa initially authorises up to three years' stay but can be renewed up to a maximum of six consecutive years of authorised H-1B employment. This limit is cumulative for all H-1B employers; therefore foreign persons who work for each of three employers for two years in H-1B status cannot undertake any further H-1B employment until they have left the US for a cumulative period of 365 days. Time spent in L-1 status also counts towards a foreign person's H-1B stay limits.

It is sometimes possible to obtain H-1 status extensions in one-year increments beyond the six-year limit if the foreign person is subject to a labour certification application or immigrant visa petition that has been pending for more than 12 months.

H-2B (Temporary Worker) Visas. These permit employment of foreign persons in temporary or seasonal jobs. The employer must:

- Demonstrate that the job itself is temporary in nature.
- Undertake an extensive documentation process to obtain certification from the US Department of Labor (DOL) that there are no qualified US employees available to fill the employer's temporary need. This is similar to the labour certification process which applies to most employment-based permanent residence cases.

H-3 (Trainee) Visa. This allows foreign persons coming to the US to receive training unavailable in their native jurisdiction. The employer providing the training must document the formal training programme, which can include some on-the-job training. The foreign person cannot displace a US employee and cannot work for the US employer once the training programme finishes.

L-1 (Intra-company Transferee) Visas. This is one of the most useful options available to multinational companies intending to bring foreign employees to the US. L-1A status is available for managers and executives and L-1B status permits transfer of foreign employees with specialised knowledge of aspects of the company that is not readily available in the US workforce. L-1A managers and executives are usually eligible for a streamlined permanent residence process. Recent legislation permits spouses of L-1 foreign persons to obtain employment authorisation.

The foreign persons must:

- Have been employed by the foreign entity as a manager, executive or specialised knowledge employee for at least one full year during the three years preceding the transfer.
- Be coming to a managerial, executive or specialised knowledge (though not necessarily the same) position with the related US employer.



This visa authorises up to seven years of employment for executives and managers and up to five years for specialised knowledge personnel. L-1 status is initially granted for three years but can be extended in two year increments. If the foreign person is coming to the US to open a new branch or office, L-1 status is only granted for one year but can be extended in two year increments with proof that the new office or branch is successful.

Treaty NAFTA Visas. The North American Free Trade Agreement (NAFTA) incorporated the immigration provisions of the US-Canada Free Trade Act and extended some of those immigration benefits to Mexican citizens. There are two principal immigration benefits that resulted from NAFTA's adoption by the US, Canada, and Mexico:

- Mexican and Canadian citizens seeking L-1 status can apply directly at the US border by presenting a completed L-1 petition with supporting documentation. The US employer need not file a petition in advance with USCIS.
- Mexican and Canadian citizens may qualify for a temporary Treaty NAFTA (TN) visa status if they are employed in certain defined occupations (set out in an Annex to NAFTA). Usually at least a baccalaureate degree in the relevant profession is required. For Canadian citizens, TN status can be obtained directly at the US-Canada border, but Mexican citizens seeking TN status must apply for a visa at a consulate and then apply for admission at the US border.

TN visa status is granted in one year increments. Extensions are possible through filing a petition with USCIS or by re-applying at the US border.

Permanent residence visas

Foreign persons who intend to reside in the US indefinitely must obtain permanent residence. Foreign persons can apply for permanent residence on the basis of:

- A family relationship to a US citizen or permanent resident.
- Current or prospective employment.

Other foreign persons may qualify by grant of asylum or admission as a refugee. To promote cultural diversity, the law occasionally allows random lotteries which can result in permanent residence status.

Unlike non-immigrant visas, which generally have no quotas limiting visa availability, immigrant visas are subject to two kinds of quota systems:

- Categorical quota created by the annual allocation of visas to different permanent residence categories.
- Per-jurisdiction quota system designed to ensure that foreign persons from no single jurisdiction consume too many of any category's visas.

Combined, the two quotas make it difficult to immigrate in some categories and foreign persons can face a delay of years before visas are available in certain categories.

Since permanent residency can take some time, most employers seek temporary status for foreign persons.

Once the foreign person is in the US working under the non-immigrant visa status, the employer then sponsors the foreign person for permanent residence.

Several categories of employment-based permanent residence require certification by the DOL that no qualified US employees are available to fill the position. Since this process requires positive recruitment efforts (monitored by state and federal agencies) it can be a costly, lengthy procedure. If a qualified US employee surfaces during the recruitment campaign, the employer may have to wait six months, and then re-file the certification application. Labour certification should be avoided whenever possible.

The most common employment-based permanent residence categories are:

- **Priority workers.** This category has 40,000 visas annually. Labour certification is not required. There are three groups of foreign persons who can qualify:
 - foreign persons of extraordinary ability in arts, sciences, education, business or athletics. This group is generally reserved for Nobel laureates or recipients of internationally recognised prizes and awards. Foreign persons meeting this high standard need not have a firm offer of employment in the US, but can qualify solely on the basis of their promise to seek employment commensurate with their standing in the profession or field;
 - outstanding professors and researchers. This allows academic and research institutions to hire the best qualified people regardless of citizenship status. The foreign person must have at least three years experience in teaching or research and must be able to demonstrate an outstanding reputation in the field. The employer must demonstrate that the position requires the services of an outstanding teacher or researcher and that the foreign person will be filling a tenure or tenure-track position (or an indefinite position in a non-academic research centre);
 - intra-company transferee managers and executives. This recognises that multinational companies with US operations may need to transfer key executives and managers from foreign entities to related US companies for an indefinite period of time. Therefore, the standard for this category is the same as for the L-1A non-immigrant visa (that is, the foreign person must have been a manager or executive for the foreign employer for at least one year during the three years before admission to the US, and must be filling a managerial or executive position with the related US entity).
- **Professionals with advanced degrees and foreign persons of "exceptional ability" in the arts, sciences or business.** This category has 40,000 visas annually. Foreign persons must have a post-baccalaureate degree or exceptional ability in a field relevant to the proposed employment and possess skills or knowledge necessary to the US employer or that will substantially benefit the US prospectively. Labour certification and a job offer are required but may be waived if the employment of the foreign person serves important "national interests" (which requires considerable evidence) and so is difficult to obtain.
- **Other professionals and skilled or unskilled employees.** This is a catch-all category for other foreign employees desiring permanent residence. No more than 10,000 of the 40,000 visas allocated annually to this category can be taken by unskilled employees. Labour certification and an offer of employment are always required in this category.



- **Labour certification.** Formally known as Alien Employment Certification, this process confirms that although the job offer is fairly offered, no US employees are available and qualified to fill the position for which the foreign person is being sponsored. In almost all cases, labour certification requires a supervised recruitment campaign to test the labour market for availability of US employees. An exception from labour certification is granted for certain positions, such as physical therapists and registered nurses, because there is either a chronic shortage of US employees or the position itself is not the type for which recruitment would be meaningful.

In March 2005, DOL implemented a new labour certification process called PERM, which requires extensive recruitment efforts before filing an electronic application. If no US employee surfaces during these recruitment efforts, the employer files the labour certification application electronically. Applications are reviewed and certified within six to 12 months; a substantial improvement in processing time. The review includes a determination that the minimum requirements are normal for the job and industry in question. Excessive requirements must be justified by business necessity. The application must also include a prevailing wage determination obtained from the State Workforce Agency.

Once the application is certified, the employer can file the permanent residence petition with the USCIS regional service centre. When the petition is approved, the foreign person must apply for adjustment of status or initiates consular visa processing. Recent changes in processing allow concurrent filing of the employer's permanent residence petition and the foreign person's application for adjustment of status, suggesting that the total processing time may be reduced in the future.

Cost

The costs are as follows:

- **Visa.** Fees vary depending on the category of the visa. For the H-1b, for example, fees are US\$1,500 for petitioners with 25 or more full-time employees and US\$750 for employers with fewer than 25 full-time employees (Visa Reform Act 2004), for just one of these applicable filing fees. In general, fees for a visa range (depending of the visa) from US\$2,500 to US\$20,000 including legal and USCIS filing fees.
- **Green Card.** Costs vary and range from US\$6,000 to US\$15,000, including legal and USCIS filing fees.

Length of process

The length of process is as follows:

- **Visa.** This varies depending on the category of the visa from one to six months or longer. The process may be expedited for an additional filing fee.
- **Green Card.** The process can take from one to many years, but may be reduced if no labour certification is required.

TERMS OF EMPLOYMENT

5. What terms govern the employment relationship? In particular:

- **Is a written employment contract or statement of employment terms required?**
- **Are any terms implied by law into the employment contract (in addition to the terms referred to in Question 1)?**
- **Are collective agreements with trade unions or employee representatives common (generally or in specific industries)?**

Written employment contract

Employers do not have to enter into employment contracts with their employees. In most states, the employment relationship is presumed to be at-will and may be terminated for any reason (other than an unlawful reason), with or without cause or notice, at any time by the employee or the employer (*see Question 16*). In some states, employees may rebut this presumption if they can demonstrate there is an express or implied contract to the contrary. Therefore, many employers require their employees to acknowledge, in writing, the at-will nature of the employment relationship. Many executives working at US companies have written employment agreements with their employers, which may alter their status from the typical at-will employment relationship.

Implied terms

Employers can create rights for employees in contracts and through their conduct, for example, that employment is for a fixed term or requires good cause for dismissal. Employers must avoid creating such terms if that is not their intention.

Collective agreements

There are no works council requirements in the US. Collective agreements are only reached with labour unions representing a majority of a specific bargaining unit. Currently, less than 10% of the private-sector workforce in the US is represented by a labour union. Collective bargaining agreements (CBAs) are frequently used in:

- Construction and maintenance.
- Healthcare.
- Transportation and distribution.
- Manufacturing.

The NLRA guarantees employees the right to organise unions and bargain collectively and empowers an administrative agency (the National Labor Relations Board (NLRB)) to conduct union certification elections and to investigate and prosecute violations of employee rights.

The NLRA requires both employers and unions to bargain in good faith over certain terms and conditions of employment, but does not provide substantive terms for these contracts.



MINIMUM WAGE

6. Is there a minimum wage? If so, please give details, in particular whether it applies to all employees, regardless of their age and experience.

The minimum wage under the FLSA increased to US\$7.25 per hour from 24 July 2009. States can (and many have) set a higher minimum wage. Generally, federal wage and hour laws do not pre-empt state laws.

WORKING TIME

7. Are there restrictions on working hours? If so, please give details.

There are no federal restrictions on employees' working hours. However, the FLSA generally requires employers to pay employees an additional 1.5 times their regular rate for all hours worked over 40 a week. An employer can contract to pay overtime after fewer hours of work. Neither employees nor employees' union representatives can waive overtime pay due under FLSA. Many states have additional requirements, for instance, that non-exempt employees take meal and rest periods.

8. Is there a minimum holiday entitlement? If so, please give details. How many public holidays are there in a year and are they included in the minimum holiday entitlement?

Private companies are not required to grant employees any paid holidays or vacation time. The typical amount of vacation, sick leave or paid time off (PTO) varies from ten to 20 days per year.

In some states, PTO becomes vested as it accrues so if employment is terminated, employers must pay employees for any PTO they have not taken. In other states, employment policies including forfeiture provisions relating to holiday entitlements are acceptable.

In addition to other PTO, many private employers provide PTO for the 11 federal holidays. Many states have their own additional public holidays that private-sector employers may recognise.

ILLNESS AND INJURY PAY

9. What rights do employees have to time off in the case of illness or injury? Is that time off paid? Can an employer recover from the state sick pay granted to its employees?

Employees may be eligible for 12 weeks of unpaid leave during a 12-month period under the FMLA if they cannot work due to a serious health condition, as defined by the Act, if both:

- The employees have worked:
 - for the employer for at least 12 months, including non-consecutive months completed within the last seven years (updated section 825.110(b));

- at least 1,250 hours in the 12 months before the first day of leave.
- The employer is either:
 - private and employs 50 or more employees within a 75-mile radius of the worksite;
 - a public agency, regardless of the number of employees employed.

The National Defense Authorization Act (NDAA), signed 28 January 2008, amended the FMLA, by creating two new qualifying events eligible for unpaid leave, which were expanded by the National Defense Authorization Act 2010, signed 28 October 2009:

- **Leave during family member's active duty.** Employees who have a spouse, parent or child who is on, or has been called to, active duty in the armed forces can take up to 12 weeks of FMLA leave yearly when they experience a "qualifying exigency".
- **Injured service member family leave.** Employees who are the spouse, parent, child or next of kin of a service member or veteran who incurred or aggravated a serious injury or illness on active duty in the armed forces can take up to 26 weeks of leave to care for the injured service member in a 12-month period (combined with regular FMLA leave).

If eligible employees take FMLA leave, the employer must maintain coverage under any group health plan for the duration of the leave, at the level and under the conditions that would have been provided had leave not been taken.

Employers are generally not required to pay employees if they take time off for illness or injury. However, eligible employees can elect, or an employer may require them, to substitute any accrued paid vacation leave, personal leave or family leave for any part of the 12 work-week period of leave due to the birth or placement of a child or to care for employees' children, spouses or parents with a serious health condition. Employers can also require employees to comply with all of their normal paid time-off policies and procedures applicable to the type of paid leave being used in conjunction with FMLA leave.

There is no mandated quantity of paid sick leave under federal law, and few states independently impose such requirements.

Employees are entitled to receive prompt medical treatment for on-the-job injuries or illnesses no matter who is at fault and, in return, are prevented from suing employers over those injuries under the employees' compensation system. Employers are generally required by law to have employees' compensation insurance, even if they only have one employee.

PARENTS AND CARERS

10. What are the statutory rights of employees who are parents or carers (including those of disabled children and adult dependants)? How is employees' pay affected during periods of leave?

Maternity rights

The FMLA grants up to 12 weeks of unpaid leave to employees who give birth to, adopt or foster a child (*see also Question 9*).



Employees who are temporarily and medically disabled by pregnancy, childbirth or related medical conditions must be treated the same as those temporarily and medically disabled by other non-work-related conditions or injuries (*Pregnancy Discrimination Act (PDA), amending Title VII*). Some states have enacted statutes protecting pregnant women more than employees with other temporary medical disabilities. Employees on FMLA leave are protected against termination or discharge and can return to the same position or job they had before taking leave.

Paternal rights

Fathers are entitled to FMLA leave to care for a newborn child, a newly adopted or fostered child (*see above, Maternity rights*).

Adoption rights

The FMLA grants entitlement leave to care for a child placed with the employee through adoption (*section 102*).

Parental rights

Employees can take FMLA leave to care for their child (or indeed spouse or parent) who has a serious health condition (*see Question 9*).

Carers' rights

Eligible employees are entitled to FMLA leave if close family members are suffering from serious health conditions. Statutes prohibiting discrimination may cover caregivers. In 2007, the EEOC published guidance on the treatment of employees with care-giving responsibilities, including those caring for children, the elderly and the disabled.

CONTINUOUS PERIODS OF EMPLOYMENT

11. Does a period of continuous employment create any benefits for employees? If individual employees are transferred to a new entity, are they deemed to retain their period of continuous employment?

Benefits

Other than wages and salaries, employers attract and retain qualified personnel using employee benefits. Most employers voluntarily provide a variety of benefit packages that often include medical and/or dental insurance.

The Employee Retirement Income Security Act (ERISA) regulates employee benefit plans and the employers and unions involved in establishing and maintaining these plans. The term employee benefit plan includes both welfare and pension plans established or maintained by an employer, a labour organisation representing employees, or by both.

Transfer

Generally, employees who begin working for another employer have no seniority rights and do not retain any period of continuous employment.

While the effects of a corporate merger or acquisition and an asset transaction have the same result (a transfer of ownership) and generally affect the employees in the same way, they may present different employment law issues in certain situations.

CBAs generally include requirements and conditions relating to the sale of the business and the transfer of the employees to a new employer. Generally, if an employer takes on employees with such an agreement, it does not have to abide by their previous agreement, but may negotiate a new one with the employees' union. Employers should be aware of some special concerns that exist in the unionised environment.

Some local laws require a new employer in a limited number of industries to retain some or all of the employees being transferred, but this is not required under federal law.

TEMPORARY AND AGENCY WORKERS

12. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees?

Both ERISA and the Internal Revenue Code (IRC) permit employers to exclude independent contractors, temporary employees and part-time employees from participation in employee benefit plans. Employers need not provide any particular benefits and can provide benefits for some employees but not others. However, a plan subject to ERISA's minimum participation standards (that is, a pension plan) cannot base these distinctions on age or length of service more restrictive than the minimum age and service provisions of section 202 of ERISA. The plan must explicitly state if an employer intends to benefit some employees and not others.

DATA PROTECTION

13. What statutory data protection rights do employees have?

The Electronic Communications Privacy Act (ECPA) amended the Federal Wiretap Act to extend its protections to electronic communications. The ECPA comprises:

- The Wiretap Act, which addresses communications in transit.
- The Stored Communications Act, which prohibits employers from intentional and unauthorised access to stored communications.

Employees may also have a claim for tortious invasion of privacy. Employers are often able to defeat electronic privacy claims if they adopt and effectively communicate policies that minimise or eliminate expectations of privacy.

DISCRIMINATION AND HARASSMENT

14. What protection do employees have from discrimination or harassment, and on what grounds?

Discrimination

Employers must treat employees fairly and equally at all stages of their employment. The main federal laws on discrimination are:

- **Title VII.** This applies to private and public employers with 15 or more employees and discrimination against an individual on the basis of race, colour, sex, national origin, religion or pregnancy.



- **The ADA.** This prohibits public and private employers from discriminating against persons with physical or mental disabilities, which may include intellectual impairments.
- **The ADEA.** This prohibits discrimination on the basis of age against employees aged 40 or older.
- **The Equal Pay Act.** This is part of the FLSA and provides for equal pay for equal work performed by both sexes working in the same establishment.
- **GINA.** This prohibits employers from discriminating against employees on the basis of genetic information.

To demonstrate discrimination, an individual must establish a connection between the employment condition or decision and a prohibited basis, such as race or sex. A connection may be established by pointing to:

- **Disparate treatment.** An employee is treated differently because of an illegal criterion.
- **Adverse or disparate impact.** An employment practice that appears neutral is discriminatory in operation.
- **Retaliation.** The ADA, the ADEA, GINA and Title VII prohibit employers from retaliating against employees for filing employment discrimination charges or assisting others in filing them and for opposing unlawful employment practices.

Harassment

All of the anti-discrimination statutes also prohibit harassment of individuals on the basis of their protected status (*see above, Discrimination*).

There are two types of harassment claims:

- **Economic harassment.** This normally involves some type of tangible employment action resulting in a monetary loss for an employee or significant changes in workload or work assignment. It requires the threat of job detriment or promise of job benefit to actually result in employment action. Employers are strictly liable for conduct by managers that constitute economic harassment.
- **Environmental harassment.** This can be based on gender, race, colour, religion, national origin, age, disability or any other characteristic protected by law. Environmental harassment occurs where the conduct is:
 - unwelcome;
 - related to a protected category;
 - offensive both to the recipient and to a reasonable person; and
 - severe or pervasive.

An employer is not liable for environmental harassment by managers if the employer can show both that:

- It used reasonable care to prevent and correct harassment.
- The employee failed to make a complaint or otherwise avoid harm.

All employees are protected against discrimination and harassment regardless of their length of service.

15. Do whistleblowers have any protection? If so, please give details.

Most states have whistleblower statutes prohibiting employers from retaliating against employees who report to public bodies on matters of public concern.

Under federal law, a large number of statutes regulating many areas of commercial operations contain whistleblower protections enforced by the DOL. Additionally, the SOX created a new federal cause of action, protecting employees of publicly-traded companies who provide information about actions that they reasonably believe to be a violation of:

- Federal securities law.
- Rules of the Securities and Exchange Commission (SEC).
- Any provision of federal law relating to fraud against shareholders.

The American Recovery and Reinvestment Act 2009 (ARRA) contains new protection for public and private employees who report on:

- Gross mismanagement or waste of covered funds.
- Public health or safety risks.
- Violations of laws or regulations relating to the grant of the funds.

The Dodd-Frank Wall Street Reform and Consumer Protection Act extends the SOX whistleblower protection provisions to employees of subsidiaries and affiliates of publicly-traded companies. This Act also contains new whistleblower protections for employees that perform work related to offering a consumer financial product or service.

DISMISSALS AND REDUNDANCIES

16. What rights do employees have when their employment contract is terminated? Please provide information on:

- **Notice periods.**
- **Severance payments.**
- **Any procedural requirements for dismissal.**

Notice periods

The employment relationship is generally at-will and employers can lawfully dismiss employees provided it is not for an unlawful reason. Any employment agreements may specify a notice period.

Severance payments

Employers do not have to offer severance payments to employees but they may be agreed in an employment contract. Employers are recommended to offer severance payment in exchange for employees' release and waiver of claims.

Procedural requirements

There are no procedural requirements to terminate an employee outside of those set out in the employer's policies or any proce-



dures included in an employment contract or collective agreement. If the employer seeks to obtain a release of potential claims, such an action must be knowing and voluntary on the part of employees, and for age discrimination claims must satisfy specific rules as to the form and process governing these waivers.

17. What protection do employees have against dismissal? Are there any specific categories of protected employees?

Laws against discrimination and retaliation provide significant protection to employees who are terminated in violation of those laws. Some states provide additional protection against dismissal based on a violation of public policy. Some states also enforce contracts including provisions requiring good cause or reason for dismissal.

18. What rules apply on redundancies?

An employer can reorganise its employees if it does not violate anti-discrimination statutes or act in bad faith. Most employers with 100 employees or more must give 60-days written notice of a plant closure or mass layoff or terminating 50 or more employees (*Workers' Adjustment and Retraining Notification Act (WARN)*). Failure to do so may subject employers to serious penalties. Some states have enacted their own statutes that may provide better protection for employees (for example, New York and New Jersey).

In unionised workplaces, an employer may be obliged under the NLRA to negotiate with the labour union concerning the decision to close or relocate operations, the effects of that action, or both.

TAXATION OF EMPLOYMENT

19. What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
 - Nationals of your jurisdiction working abroad?
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Foreign nationals

Taxation of foreign nationals depends largely on whether they are resident or non-resident foreign persons. Resident foreign persons are taxed in the same way as US citizens on their worldwide income, while non-resident foreign persons are taxed only on their US-source income. Where foreign nationals earn employment income from services performed in the US, such income is generally subject to US federal income taxes.

Certain income may be excluded under an income tax treaty between the US and the host jurisdiction.

There is a de minimis exemption if the amount of income earned is less than US\$3,000 for work not exceeding 90 days in the US. Income tax treaties can significantly impact what income is subject to federal income tax. For example, many treaties exclude income earned for a period, often 183 days, for employees sent to the US by foreign employers. In addition, certain academics, such as professors, have special rules relating to taxation.

The US also has treaties addressing social security taxes that allow foreign nationals to continue to pay into their own jurisdictions' system and not the US system under certain conditions.

Nationals working abroad

US citizens working outside the US are generally subject to tax on their worldwide income, including employment income earned abroad. There are two primary exemptions:

- Foreign earned income exclusion.
- Foreign housing allowance exclusion.

Under the foreign earned income exclusion, US citizens working abroad may exempt up to US\$91,500 in income from their US federal income tax in 2010. The housing exclusion is generally limited to 30% of the foreign earned income exclusion; however, higher amounts may be excluded in certain high-cost locales as determined by the Treasury Department.

If employees have employment income earned abroad exceeding foreign earned income and housing exclusions, this is subject to US federal income taxes. A foreign tax credit can be used to offset US income taxes if foreign income taxes were paid. In certain cases an income tax treaty may impact the amount of income subject to US income tax.

20. What is the rate of taxation on employment income? Are any other taxes or social security contributions levied on employers and/or employees? If so, please give details, including the rates.

Employees owe personal income taxes on all wages they earn. The federal government taxes employment income at progressive rates between 15% and 39.6% depending on, for example, the amount of income earned and employees' marital status.

Social security taxes are levied at 6.2% on both employees and employers on the first US\$106,800. Medicare (a publicly funded health insurance programme) taxes are levied at 1.45% on both employees and employers. Medicare taxes apply to all wages.

Employers pay federal unemployment taxes on the first US\$7,000. The tax rate varies from 0.8% to 6.2% depending on various factors.

LIABILITY

21. Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
 - A parent company can be liable for the acts of a subsidiary company's employees?
-

Employer liability

An employer can be held liable for employees' negligence while acting within the scope of their duties. An employer can also be held liable for employees' acts that are outside the scope of the employment under the causes of action referred to as negligent hiring, supervision, retention and training.



An employer is strictly liable under Title VII for any sexual harassment by a supervisor that results in an employment action. Managers and supervisors who create hostile work environments or engage in sexual harassment can create liability for the employer.

Parent company liability

A parent company may sometimes be liable for the acts of a subsidiary company's employees if it has sufficient control over the subsidiary company and their business operations are interrelated.

22. What are an employer's obligations regarding the health and safety of its employees?

Employers have a general duty, under the Federal Occupational Safety and Health Act (OSHA) to:

- Furnish a place of employment free from recognised hazards that cause, or are likely to cause, death or serious physical harm to employees.
- Comply with the occupational safety and health standards under the Act.

REPRESENTATION AND CONSULTATION

23. Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Management representation

Without a CBA providing for management or board representation, employees are not entitled to any such representation.

Consultation

Generally, employees are not entitled to consultation about issues that affect them. However, if there is a union in the workplace, the employees' representatives must be involved in any negotiations on issues that affect the employees' employment terms and conditions.

Major transactions

In most parts of the private sector, employees' consent, input and consultation are not required for any major transactions on the employer's part. Unions may have rights to bargain over the decision or effects of the action and a union contract may have specific provisions triggered by transactions.

24. What are the remedies that are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

Remedies

There are no official remedies available to employees as they have no management or consultation rights. The only remedy is set out in a collective agreement (if any) and under the NLRA if the employer fails to satisfy any applicable bargaining obligation.

Employee action

Employees are not entitled to independent action such as obtaining an injunction or restraining order to prevent proposals from going ahead. However, employees may turn to various tactics to voice their concerns such as work stoppage and strike.

TRANSACTIONS

25. Is there any statutory protection of employees on a business transfer? In particular:

- Are they automatically transferred with the business?
 - Are they protected against dismissal (before or after the disposal)?
 - Is it possible to harmonise their terms of employment with other (existing) employees of the buyer?
-

Automatic transfer

There is no federal statute regulating employee transfers. Generally, the at-will relationship means either the new or existing business owner can terminate employment without notice or cause.

Protection against dismissal

Under the at-will relationship, the buyer and seller of the business are generally not required to hire the target company's employees. If there is a CBA, and the sale affects employees covered by the agreement, the employer may have to bargain with the union in good faith over the effects of the sale on the employees.

Harmonisation

In at-will employment relationships, employees do not generally have contractually protected wages and employment benefits. Therefore, a buyer does not generally have to offer the same terms and conditions as the purchased company, unless there is an alternative agreement.

Before engaging in any corporate transaction, it is important for the buyer to conduct proper due diligence to determine whether affected employees have contractually protected wages or any other employment benefits.

PENSIONS

26. Do employers and/or employees make pension contributions to the state in your jurisdiction? If so, please give details of:

- The contributions payable.
 - The tax treatment of those contributions.
 - The monthly amount of the state pension.
-

Contributions

The only governmental pension plan for private employers is the federal social security programme providing retirement benefits to retired employees. Employers and employees make contributions to the programme.



Tax

Social security's old-age, survivors, and disability insurance (OASDI) programme and Medicare's hospital insurance programme are financed primarily by employment taxes. Tax rates apply to earnings up to a maximum amount, which increases annually (see *Question 20*).

The OASDI tax rate for wages paid in 2008 is set by statute at 6.2% for employees and employers and at 12.4% for self-employment income.

Monthly amount

The monthly amount of social security payments varies depending on calculations based on employees' lifetime earnings.

27. Is it common (or compulsory) for employers to provide access, or contribute, to supplementary pension schemes for their employees? Do such schemes provide pensions the value of which:

- Can usually be determined at the start of the arrangement (for example, the value is linked to the employee's salary)?
- Cannot usually be determined at the start of the arrangement (for example, the value is dependent on employer and employee contributions and investment return on those contributions)?

Although not required, many employers sponsor private pension plans and retirement savings plans for their employees. Significant tax advantages for establishing and maintaining certain employee benefit plans motivate employers to provide additional benefits to their employees. Every employee benefit plan must be established and maintained under a written instrument (*section 402, ERISA*). ERISA generally prohibits assignment and alienation of ERISA plan benefits.

Retirement benefits in the US cannot be determined at inception. They are either:

- Contribution plans where the benefit depends on the amount of contributions (which vary as salary amounts change) and investment performance.
- Benefit plans where the benefit is based on years of service and pay.

Both are unknown at inception.

28. Is there a regulatory body that oversees the operation of supplementary pension schemes? If so, please briefly summarise the regulatory framework.

The administration of ERISA is divided as follows:

- Title I contains rules for reporting and disclosure, vesting, participation, funding, fiduciary conduct and civil enforcement and is administered by the Employee Benefits Security Administration within the DOL.
- Title II is administered by the Internal Revenue Service (IRS).
- Title III concerns jurisdictional matters and is enforced and regulated by both the DOL and the IRS.
- Title IV covers the insurance of defined benefit pension plans and is administered by the Pension Benefit Guaranty Corporation (PBGC).

29. Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)? If so, please give details.

Several types of retirement plans receive favourable tax treatment. Individual retirement accounts (IRAs) comprise a special class of retirement accounts providing varying tax benefits.

401(k) and 403(b) plans are "qualified plans" that permit participants to defer taxes on a portion of their compensation, which is contributed, at their election to the plan. Plan contributions are made in lieu of the participant's receipt of taxable pay. Tax law places numerous restrictions on 401(k) plans, including limits on annual contributions and penalties for early withdrawals before employees have reached a certain age. There are also supplemental "nonqualified" plans that employers can establish, which permit tax deferral of greater amounts than can be contributed to a qualified plan. These arrangements must contain strict rules relating to the manner in which income may be deferred, the timing of distributions and permissible distribution triggers.

30. Is there any legal protection of employees' pension rights on a business transfer? In particular:

- Do supplementary pension rights qualify as acquired rights that transfer automatically under national legislation?
- If not, is there any other protection for pension rights on transfer?

In the US, supplementary pension plans are called non-qualified plans. Generally, there is a clause in such plans that provides that benefits which have accrued under the plan (which generally takes into account the amount accrued, taking into account the participant's age, service and compensation on the date of any plan amendment or termination) are protected, but any future benefits are not protected. Generally, employers have the unfettered right to change or terminate these plans at any time, irrespective of whether there is any business transfer occurring.

31. Can the following participate in a pension scheme established by a parent company in your jurisdiction:

- Employees who are working abroad?
- Employees of a foreign subsidiary company?

Employees working abroad

The IRC contains complicated rules governing US retirement plan and tax benefits for individuals employed abroad. Individuals working for a foreign branch or affiliate controlled by a US employer can continue to participate in the US retirement plan. If employees are US citizens, they also receive the tax relief referred to in *Question 29*. However, employees' participation in such plans is more complicated if they do not work for US or US-controlled companies.

Employees of a foreign subsidiary company

Foreign nationals working for a foreign subsidiary company of a US employer can participate in the subsidiary's retirement plan. Because the foreign national is the US employer's employee, participation is generally automatic and even if not their employee, the employer can extend the plan. Because the foreign national is not a US citizen, the employee would not receive the tax relief referred to in *Question 29*.



BONUSES

32. Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded? If so, please give details.

Generally, there are no restrictions or guidelines on what bonuses employers can award and the decision to grant them is at the employer's discretion. Some employers contractually agree to provide bonuses. Some states consider bonuses to form part of employees' wages and a failure to pay a bonus may be a violation of the law. If a bonus is performance or formula based, rather than a discretionary bonus, then it most likely constitutes a protected wage. Equity awards may be subject to deferred compensation tax rules, therefore, gain attributable to the award is included in income and subject to tax, even if the award recipient does not receive actual payment, unless certain specific deferral rules are followed (*IRC*).

IP

33. If employees create IP rights in the course of their employment, do the employees or the employer own the rights?

As a condition of employment, employers may require employees to sign an agreement assigning ownership of all intellectual property rights for anything they create or invent during the course of their employment.

Under the work-for-hire rule, employers typically retain ownership in IP that employees create as part of their work duties and within the scope of employment.

RESTRAINT OF TRADE

34. Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer pay its former employees remuneration while they are subject to post-employment restrictive covenants?

Employers can restrict employees' activities during employment by requiring employees to sign non-compete agreements, either as a condition of employment or as a condition of receiving bonuses or other forms of benefit.

An employer's ability to restrict employees' activities post-employment varies from state to state. Most states view non-compete agreements unfavourably and construe them narrowly. Some states, such as California, do not enforce them. Where they are lawful, courts view them as enforceable only when they are narrowly tailored to temporal and geographic scope and only prohibit activity necessary to protect a legitimate employer interest. Most courts attempt to balance the employer's interest in protecting confidential information and the employee's interest in earning a living.

Presently, no state law requires an employer to pay its former employees remuneration while they are subject to post-employment restrictive covenants. However, in California, where non-competes are generally, unenforceable, if an employee is paid post-employment by their employer during a "consulting period", the employer can require non-compete obligations. In Oregon, where

new statutory amendments only allow non-competes for higher-level employees earning a threshold amount in wages, there is a savings clause allowing employers to enforce non-competes with employees outside the high-level group, if the employer pays at least 50% of the employee's annual gross base salary and commissions at the time of the employee's termination.

PROPOSALS FOR REFORM

35. Are there any proposals to reform employment law or pensions law in your jurisdiction?

In 2008 and 2009, two measures were enacted to expand discrimination law protections and remedies:

- The Americans with Disabilities Act Amendments Act reversed several decisions of the Supreme Court that narrowly interpreted the federal disability bias law.
- The Lilly Ledbetter Fair Pay Act reversed a Supreme Court decision on the timeliness of challenges to pay discrimination claims based on gender, but expanded potential liability for discriminatory pay practices linked to other protected characteristics as well.

Congress is considering additional discrimination measures, including those that:

- Eliminate caps on jury awards for pay discrimination.
- Limit the use of mandatory arbitration of employment claims.
- Provide protection from employment discrimination on the basis of sexual orientation at federal level.

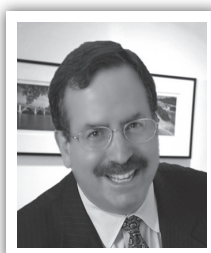
Also pending before Congress are the:

- Employee Free Choice Act, which would enhance the ability of labour unions to secure recognition and representation rights through a system of "card checks", rather than secret-ballot elections, and provide for mediation and arbitration over the terms of an initial CBA if the parties are unable to reach agreement on the terms of a contract.
- Protecting Older Workers Against Discrimination Act, which would reverse the Supreme Court decision in *Gross v. FBL Financial Services, Inc* holding that mixed motive cases could not be brought under the ADEA.
- Healthy Families Act, which would require employers to provide up to seven days of paid sick time per year.
- RESPECT Act, which would dramatically reduce the number of employees that employers can designate as supervisors and therefore exclude from potential bargaining units.
- Patriot Employers Act, which would provide a tax benefit to employers that satisfy certain requirements, such as providing healthcare benefits and maintaining a neutral stance towards unionisation.

Congress (and many state governments) is debating a number of measures relating to illegal immigration and the eligibility of individuals to lawfully work in the US. Apart from the employment eligibility verification requirements under current law, some of the new measures would impose new obligations on employers (and expose them to additional potential penalties) when screening job applicants and new employees.



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Areas of practice. Employment and labour law.

Recent transactions

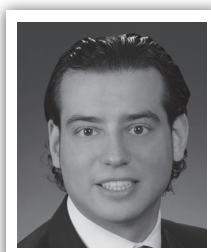
- Working with global employers on human resources policies, and a broad range of workplace issues.
- Handling the defence of discrimination and harassment claims, traditional labour law matters, a wide variety of occupational safety and health issues, and protected leave issues.
- Counsel to several national trade associations on employment law and workplace safety and health matters, including legislative developments in the US Congress.
- Rulemaking proceedings before Federal agencies, such as the US Department of Labor.

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Areas of practice. Employment and labour law; litigation.

Recent transactions

- Representing and advising clients in various aspects of employment and labor law, including age, sex, race and disability discrimination, and sexual harassment litigation.
- Representing clients in cases involving wrongful termination, breach of contract, employee benefits, wage and hour violations, enforcement and defence of restrictive covenants, arbitrations, and in collective bargaining negotiations.
- Representing employers in court proceedings and before administrative agencies in all aspects of employment and labour law.



ARIEL D WEINDLING

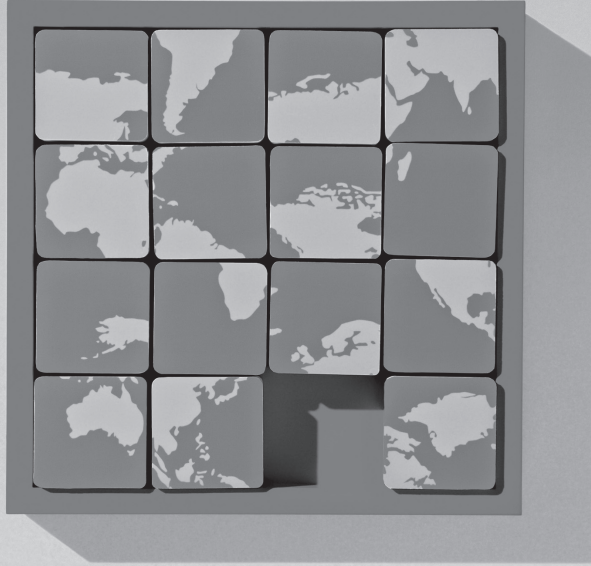
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Areas of practice. Employment and labour law.

Recent transactions

- International employment law and advising global employers on their US employment law needs and cross-border human resources issues in Asia, Europe and South/Central America.
- Representing major corporations in labour expansion worldwide.
- Advising employers on day-to-day employment issues, such as hiring, promoting, disciplining and terminating employees, workplace investigations, wage and hour issues and compliance.
- Representing employers in all facets of labour and employment law including wrongful termination, harassment and discrimination.



The more you move your people between countries, the more convoluted your compliance issues get.

Keeping track of employment laws from one country to another can put stress on your HR people. Littler Mendelson can help. Employment and labor law is all we do. We're the only U.S. member of *Ius Laboris*, the global alliance of more than 2,500 attorneys, with member firms in more than 45 countries and coverage in 100-plus countries. This means we can put together a complete mobility solution to address work rules, taxes, benefits, and the entire spectrum of global migration issues.

Littler