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Global Mobility: Key Considerations for Foreign Investors When Employing in the U.S.

By Johan Lubbe

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In the ever-evolving global economy, businesses face the critical need to maintain a competitive edge by hiring or transferring personnel across the globe. When employing personnel within the U.S., foreign investors are surprised to find that the laws regulating employment in the U.S. are vast and complex. Unlike many other jurisdictions, U.S. employment laws are not consolidated in one single code and are set forth in federal, state and local laws. Further, numerous governmental agencies issue regulations that impact the workplace and carry steep penalties for non-compliance. When foreign investors hire employees in the U.S., the following are important employment considerations:

Litigious U.S. Culture

The U.S. ranks as one of the most litigious societies in the world. Within the employment law sphere alone, multiple laws create a private cause of action. Accordingly, workers may freely bring lawsuits against employers to vindicate an employment right, especially since bringing such claims typically does not carry negative consequences.

First, numerous federal and state laws protect employees from retaliation for engaging in a protected activity. Additionally, plaintiffs generally do not bear the financial risk for suing their employers: As most lawyers representing plaintiffs in employment disputes work on a contingent fee agreement, plaintiffs are not required to pay for any legal fees if the lawsuit fails. This system further encourages the plaintiff's bar to formulate novel legal claims.

Accordingly, it is paramount for foreign investors to engage local counsel early on, to navigate through the myriad of federal, state and local laws. Engaging local counsel to provide guidance for hiring and other employment decisions and to audit the ongoing human resources practices will help the foreign investor avoid costly litigation and administrative penalties.

Hiring Employees Is Easy

Few rules apply when hiring employees. Some important requirements are:

- *No discrimination*. Laws prohibiting discrimination against job applicants and employees based on their protected category are well developed in the U.S. For example, employers cannot discriminate against a job applicant because of race, colour, national origin, sex, physical or mental disability, genetic information, religion or age. Whereas, for example, employers in the United Kingdom may require job applicants to undergo medical examinations or health-related tests to assess their suitability for employment, federal and state laws in the U.S. impose strict restrictions on applicant medical examinations. Such restrictions may be enforced through government or individual action.

- *Work Authorisation Required*. Federal law prohibits employers from knowingly employing workers not authorised to work in the U.S. Employers must verify the identity and employment eligibility of every new hire by completing an Employment Eligibility Verification form (Form I-9) within three business days of hire.

- *Background checks*. Unlike many jurisdictions that have comprehensive personal data privacy laws, employers have greater flexibility to conduct pre-employment background checks, which may include a check on criminal history. If the employer uses a service provider to conduct the background check, federal law requires disclosure to the job applicant, obtaining the applicant's written consent, and an opportunity to address negative information obtained through the background check. Also, a past criminal conviction does not mean the applicant is automatically disqualified from the job. The criminal conviction must have some relevance to the job functions the applicant

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would perform in the new job.

- *Minimum hiring paper work required*. No written employment contract or a statement of particulars is required by law. Generally, written employment contracts are used only for senior managers; a short written offer of employment is issued to other employees in which the basic terms of employment (such as position, starting date, salary and benefits) are recorded. A few states, such as New York, require employers to provide employees written notice of certain employment terms (e.g., their wage rate and regular payday).

- *Registration of employers and employees*. Few bureaucratic rules exist about establishing the employment relationship. No incorporation of the business entity or a representative office is required. Federal law requires employers to report new hires and rehires, within 20 days of the hire date, to the State Directory of New Hires of the state in which the new hire works. Employers and employees must also register with federal and state income tax authorities to obtain a tax identity number and record payment of withholding taxes and social security contributions. Further, employers must ensure each employee is covered for workers' compensation (for wage replacement and medical benefits for an occupational injury or illness) and unemployment benefits under the law of the state in which the employees regularly work.

Terms and Conditions of Employment

U.S. federal law prescribes a few basic terms of employment, such as: a) minimum wage, nationally $7.25 per hour, higher in a few states (e.g., $8 per hour in California and New York) and cities (e.g., $10 per hour in San Jose, California); b) for employers with 50 or more employees, health insurance benefits (the so-called "Obamacare"); and c) overtime payment of 150% of employee's regular hourly wage rate (other than managers, senior administrative and professional employees) who work more than 40 hours per week. Notably, federal law does not prescribe minimum paid vacation time, sick time or public holidays for private industry employees. Many states require that employees have one day a week off. A few cities, such as New York City and San Francisco, require paid sick time for employees. Except for the above regulations, the terms and conditions of employment are left to the employer and employee to agree.

Managing Employee Attendance

Employers are obligated to maintain accurate records of the hours each employee works, and to pay employees for their overtime hours worked. Failure to do so can expose employers to fines and "liquidated damages" (double the overtime pay owed to employees). Well-funded and staffed federal and state government agencies actively enforce the laws and investigate employee complaints. Employees' remote access to company e-mails and electronic data systems outside normal working hours present special challenges to employers to accurately record working hours.

Generally, employers may dismiss employees who fail to maintain a good attendance record. However, employees with health problems and disabilities pose special challenges to managing their attendance. First, employers with 50 or more employees must retain the job positions of employees who are absent for childbirth, adopting a child or a serious health condition for up to 12 weeks within a one-year period. (Similar state laws apply to employers with less than 50 employees). Second, if the employee has a disability, the employer must afford reasonable accommodations to that employee, which could include additional time off to receive treatment or adjustment of working hours.

Dismissal and Employment *At-Will*

The doctrine of employment at-will prevails in all states except Montana. Under the doctrine, the employment relationship can be terminated by

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the employer or the employee, at any time, with or without notice and with or without any reason. Accordingly, it is relatively easy to terminate the employment relationship. Also, when a trade union has been recognised to represent the employees, the collective bargaining agreement negotiated with that union typically requires the employer to show "just cause" to dismiss an employee.

Regardless Employers Should Have a Lawful Reason to Dismiss

Despite the prevailing *at-will* doctrine allowing dismissal "for any or no reason," employers may not dismiss employees for unlawful reasons. Federal and state laws protect employees against dismissal on discriminatory grounds, or in retaliation for exercising a right, such as taking protected leave of absence, or whistleblowing (*i.e.*, reporting company conduct the employee reasonably believed constituted a violation of law). Accordingly, employers should have a legitimate business reason to dismiss an employee, and have back-up documents to prove the reason if the employee claims the dismissal was unlawful.

Termination and Release Agreements

Agreements to waive employee rights or protections are generally enforceable in the U.S. To avoid the uncertainty of litigation and the potential risk of high damage awards by a jury, employers regularly offer dismissed employees an ex gratia payment in return for a general waiver of all claims against the employer. Termination and release agreements should be carefully worded, and comply with federal and state laws regulating such agreements.

In summary, foreign investors who hire employees in the U.S. should carefully review all their employer obligations to ensure compliance.

Johan Lubbe is a shareholder in Littler's New York office and U.S. Practice Co-Chair of Littler's International Employment Law Practice Group. Johan represents many foreign companies that do business in the U.S. He is a recognised by various publications as a leading U.S. employment lawyer, and has testified before the Senate Foreign Relations Committee regarding labour issues surrounding the collapse of factories in Bangladesh.

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