Start-Up Guide for Foreign Employers in the United States

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I. INTRODUCTION

When Columbus left Spain to discover a new route to East Asia more than 500 years ago, he did so without an accurate map to alert him to the perils and promises of his journey. Full of hope for new wealth, Columbus embarked on his journey and endured significant hardship before ultimately finding success. Today, some entrepreneurs take a similarly hopeful—but blind—approach to establishing businesses and employment in other lands. Unfortunately, such unguided expeditions often encounter difficult storms or rocky shoals that sap the energy of the new business and cast it on the rocks.

Even the most adventurous businesses benefit from an accurate understanding of new opportunities and their risks. Whether you are looking across the seas or simply across the border to the United States for business opportunities, this Start-Up Guide will give you an essential understanding of the broad contours of U.S. employment law perils and resources. Although it cannot address every employment issue you may face, it is designed to present the basic knowledge necessary to chart a course through the U.S. employment seas.

II. OVERVIEW

A. The United States Federal System

There are two primary spheres of law in the United States: federal and state. The U.S. Constitution is the foundation for all federal law and is the supreme law of the land. Federal law is legislated and enforced by the national government through its own system of courts and administrative agencies.

In addition, the United States is comprised of 50 states and various territories. Elected legislatures, assemblies, and executives govern each state and pass laws effective within the borders of their own jurisdiction. Furthermore, each state has its own enforcement organizations, including separate judicial systems and administrative agencies.

Some areas of law are governed solely by one system or the other. For example, private sector collective bargaining in the United States is legislated and enforced exclusively at the federal level. Employee retirement and pensions is also an area governed solely by national law. On the other hand, the manner and timing of wage payments or an employee's accessibility to his or her own personnel file are state issues.

Many laws, at one level or another, are governed by both federal and state law. Discrimination laws can be found in both federal and state statutes. Minimum wage and overtime laws are also governed by both federal and state statutes. In addition, the scope of the protections under each statute changes often.

It should be noted that there is a third sphere of law which may impact employment decisions, as well: local law. Municipalities, counties, towns, and villages establish their own laws to govern local issues. While such entities do not often regulate employment directly, some localities exert significant control over employment issues. For example, New York City has passed its own anti-discrimination rules which are more protective of employees than either the federal or New York State laws.

B. U.S. Employment Laws

In the United States, employment laws can be found in federal and state constitutions, statutes, codes, administrative regulations and executive directives. The United States, as a common law jurisdiction, has also adopted the principle of *stare decisis*, *i.e.*, that judges can interpret the laws passed by the federal and state legislatures and their decisions serve as precedent in subsequent disputes.

Some of the more significant federal laws that govern the employment relationship include the Fair Labor Standards Act; Title VII of the Civil Rights Act of 1964; the Americans with Disabilities Act; the Age Discrimination in Employment Act; the Family Medical Leave Act; National Labor Relations Act; and the Occupational Safety and Health Act. States, and some localities, have adopted similar laws.

» ***The United States is an extremely litigious country when it comes to employment law.*** *There are few negative consequences for an employee or former employee to bring a lawsuit. For the most part, employees bringing claims do not incur legal fees: lawyers who represent plaintiffs in most types of employment disputes generally work on a contingency basis, so even if the lawsuit fails the plaintiff does not need to pay his or her lawyer and rarely will be ordered to pay the employer's legal fees. Further, in contrast to the usual rule in the United States, most employment statutes shift the burden of attorneys' fees to the losing employer (but not to a losing employee). Consequently, some plaintiffs' attorneys are quite aggressive in seeking clients to represent in employment disputes, especially for class action claims.*

Unlike some countries, there is no general court or arbitrative body that is solely responsible for deciding all employment disputes, such as the labor courts found in many jurisdictions. Employment laws are enforced in large part by private litigation brought in federal or state court and various administrative agencies. Most employment laws provide for civil and/or equitable remedies. Several statutes, such as the National Labor Relations Act, limit enforcement exclusively to a particular administrative agency.[1] In some cases, those agencies can act only on a complaint filed by a third party. In other instances the administrative agency can enforce a statute on its own initiative. Other statutes provide for parallel enforcement by private individuals and by the designated administrative agency.

Another defining characteristic of employment disputes in the United States is the tremendous amount of money at risk, due to a combination of factors: the litigation process involves extensive pre-trial discovery (*e.g.*, requests for document production, factual affidavits, and live testimony by parties and witnesses); the expenses of archiving, searching and producing electronic data; and the availability of jury trials in certain cases. The average jury award for wrongful termination claims exceeds $1.5 million, and one-fifth of jury awards top the $1 million mark.[2] When the economy is slower, the number of lawsuits rises dramatically.[3]

C. Employment Contracts and At-Will Employment

A hallmark of U.S. employment jurisprudence is the doctrine of at-will employment. The doctrine creates a rebuttable presumption that the employment relationship may be terminated at the will of either the employer or the employee. This means that either of the parties may terminate the employment relationship, for any lawful reason, at any time, without providing prior notice and without triggering entitlement to some form of compensation.

The doctrine of at-will employment is not governed by federal law and a uniform set of rules does not exist for applying this important concept. Instead, the doctrine is governed by the statutes or common law of each of the states.[4] One common feature of at-will employment, however, is that the parties are not required or even encouraged to enter into a written employment agreement. Indeed, given the presumption of at-will employment, written employment agreements are infrequently used in the United States, except for executive or other key positions, or when specifically required by law.[5]

As indicated, the at-will presumption is rebuttable. Employers can explicitly limit their discretion to terminate an employee by agreeing to discharge only "for cause" or only after a certain fixed period of time or notice period. The parties have the freedom to define "cause," the length of the contract term, or the notice period in any fashion they desire as long as the provisions of the contract do not violate some other law. By way of example, "cause" can be defined to include gross misconduct, embezzlement, conviction of a felony, disclosure of trade secrets or other such misconduct.

Employers can unintentionally undermine the at-will relationship as well, creating an implied contract. A common means by which employers have inadvertently created an implied contract with their employees is by the language used in employee handbooks. While handbooks serve a useful purpose, they can become dangerous documents unless drafted with the objective of preserving the at-will relationship. For example, policies in a handbook that promise to terminate employees only for cause or that promise to follow a detailed discipline or termination process have been found by state courts to modify the at-will status of those employees governed by the policies. Thus, the employer's failure to comply with the terms of these policies amounts to a breach of contract.

The at-will doctrine is not without limits. This doctrine has seen significant inroads in some states which, for example, prohibit terminations that violate public policy or are based in malice or bad faith. The doctrine also does not exempt employers from complying with statutes passed by the federal and state legislatures. By way of example, regardless of an employee's at-will status, the employer cannot terminate an individual for reasons that violate federal and state anti-discrimination laws nor can the employer fail to pay an employee wages protected by the wage and hour laws. The doctrine also does not apply to employees who are subject to a collective bargaining agreement since such agreements almost uniformly limit an employer's right to terminate employees at-will. For these reasons, the at-will doctrine is only a limited shield from litigation brought by current and former employees.

Additional topics…

III. EMPLOYEE PROTECTIONS

- A. Discrimination
  1. Civil Rights Act of 1866 ("Section 1981")
  2. Uniformed Services Employment and Reemployment Rights Act (USERRA)
  3. Equal Pay Act (EPA)
  4. Immigration Reform and Control Act (IRCA)
  5. Title VII of the Civil Rights Act of 1964, as amended ("Title VII")
  6. Americans with Disabilities Act (ADA)
  7. The Genetic Information Nondiscrimination Act (GINA)
  8. Age Discrimination in Employment Act (ADEA)
  9. State and Municipal Discrimination Laws
- B. Harassment
- C. Whistleblowers and Retaliation
- D. Workplace Safety
- E. Privacy
  1. Monitoring Employees in the Workplace
  2. Employee Data
- F. Dismissal and Severance
- G. Collective Bargaining

IV. EMPLOYEE COMPENSATION AND BENEFITS

- A. Wages and Hours
- B. Leaves of Absence
  1. Vacation or Holiday Leave
  2. Paid Sick Leave
  3. Family Medical Leave Act (FMLA)—Unpaid Leave
  4. Leave Under the Americans With Disabilities Act (ADA)
  5. Workers' Compensation Insurance
  6. Disability Insurance
  7. Other Leaves
- C. Pensions or Retirement Benefits

Additional topics…

V. COMPLIANCE ISSUES RELATED TO WORKFORCE MANAGEMENT

A. Hiring
   1. Authorized Workers Only
   2. Employment Applications
   3. Offer Letters

B. Employee Handbooks

C. Reporting, Posting, and Record Retention Requirements

D. Taxation

VI. RESTRICTIVE COVENANTS

A. Intellectual Property

B. Unfair Competition

VII. ENDNOTES

VIII. APPENDICIES

A. Checklist of Recommended Employee Handbook Provisions

B. 50-State Survey on Protected Classifications

C. 50-State Survey on Wage Payments: Frequency and Timing

D. I-9 Form

IX. OTHER LITTLER RESOURCES

If you would like to receive the entire **Start-Up Guide for Foreign Employers in the United States**, please contact:

- **Adam Forman**, Shareholder – AForman@littler.com
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1 The National Labor Relations Board, which is responsible for enforcing the National Labor Relations Act, a federal statute, adjudicates disputes between management and labor unions.

2 Reed Abelson, *Surge in Bias Cases Punishes Insurers, and Premiums Rise*, N.Y. TIMES, Jan. 9, 2002, *available at* http://www.nytimes.com.

3 John J. Donahue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 66 S. Cal. L. Rev. 709, 711 (1993).

4 Only one state, Montana, has eliminated the at-will employment presumption. Montana employees who complete an initial probationary period are protected from being fired without "good cause." Good cause means that the employer must have a legitimate business reason or proof of a performance deficiency in order to terminate an employee. Of course, Montana's rule is the exception in the United States. Note that in Puerto Rico (a U.S. territory) the employment at will doctrine does not apply and a person hired for an indefinite period of time may only be discharged for "just cause." *See* THE LITTLER MENDELSON GUIDE TO INTERNATIONAL EMPLOYMENT AND LABOR LAW (Second Edition 2010), Puerto Rico, § 14.1.

5 New York, for instance, requires that commissioned salespersons have a written employment agreement that satisfies certain requirements, failing which the salesperson's statement of the terms of his employment and commissions are presumed correct. N.Y. Lab. Law § 191.1(c).

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