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INTRODUCTION TO AMERICAN EMPLOYMENT LAWS

A. INTRODUCTION

This will provide an introduction to key American employment laws, focusing on federal law. However, the employment relationship is subject to many state and local laws, as well as agency and industry specific laws. It is not uncommon to have multiple duplicative or overlapping laws applicable to an employment issue. Employers should ensure that they are compliant with all applicable laws.

B. THE EMPLOYMENT RELATIONSHIP

As a general rule, employment laws only apply to "employers" and "employees." However, the definition of these terms may vary depending on the circumstances. One of the most common tests used to determine if an individual is an employee is the economic reality test utilized by the Fair Labor Standards Act, the federal wage and hour law (see discussion below). The "economic reality test" determines whether a worker is dependent on the business that he provides services to, considering the following factors:

(1) The degree of the alleged employer's right to control the manner in which the work is to be performed;
(2) The alleged employee's opportunity for profit or loss depending on his managerial skills;
(3) The alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
(4) Whether the service requires a special skill;
(5) The degree of permanence of the working relationship; and
(6) Whether the service rendered is an integral part of the alleged employer's business. (*See, e.g., Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981).)

As another example, the Internal Revenue Service has promulgated a Twenty Factors Test. (Rev. Ruling 87-41.)

These tests are primarily used to distinguish employees from independent contractors. Misclassifying, or incorrectly treating, an employee as an independent contractor can have significant legal implications. These include running afoul of tax requirements, liability for work-related injuries due to failure to obtain workers' compensation coverage, and exposure for unpaid overtime.

> ***Tip:*** *A related concept is that an employee can have more than one employer. For example, in Hunt v. State of Missouri, Dept. of Corrections, the court found that nurses who were employed by a temporary staffing agency and assigned to work at a prison could sue the agency and Department of Corrections as dual employers for violations of Title VII. (297 F.3d 735 (8th Cir. 2002).)*

C. AT-WILL EMPLOYMENT

At-will employment is an employment relationship which either party can end at any time, without needing "cause" to do so. All states except Montana permit at-will employment. In many states, an employment relationship is presumed to be at-will, in the absence of an agreement to the contrary.

At-will employment may be modified by contract. For example, an employer and employee may agree that their relationship can only be ended if there is good cause. Such agreements may be express (in writing or verbal) or implied from the parties' course of conduct.

Although at-will employment permits an employer to terminate an employee without having cause or for no reason, it does not permit an employer to terminate an employee for a reason that violates a law. There are many statutes and other laws that prohibit employers from terminating employees for a variety of reasons, for example, because of the employee's race or because the employee has reported the employer engaged in illegal conduct.

Because the at-will relationship can be modified by an express or implied agreement, employers should to confirm the relationship in writing.

> **Sample At-Will Provision**
>
> *Employee understands that his employment with Company is at-will. This means that either Employee or Company can end the employment relationship at any time, with or without notice, and with or without cause. This provision may only be changed by a writing signed by the President of Company.*

D. WAGE & HOUR LAW

The Fair Labor Standards Act ("FLSA") is the federal law regulating employee wage and hours. Among other things, the FLSA covers minimum wages, maximum hours, overtime compensation, and child labor.

The current minimum wage for most employees is $7.25 per hour. Also, as a general rule, the FLSA requires employers to pay employees overtime when they work more than 40 hours in a workweek. The overtime rate is one and one-half times an employee's regular hourly

rate. The FLSA normally does not require overtime based on the number of hours worked in a day or an increased overtime rate (such as double time) for working a sixth or seventh day in a week.

The FLSA establishes categories of employees who are exempt from overtime and other requirements. The most common exemptions are for executive, administrative, and professional employees. In order to be qualify for one of these exemptions, an employee must meet a duties test, and normally meet a salary level test and be paid on a salary basis.

Exempt employees currently must be paid a salary of at least $455 per week. Being paid on a "salary basis" means that an employee must receive his full salary for any week in which he performs any work. The concept is that exempt employees are being paid to perform a job, not for the hours they work.

[The FLSA is enforced by the U.S. Department of Labor. For further information go to: www.dol.gov/.]

E. OTHER KEY EMPLOYMENT LAWS

1. Anti-Discrimination Laws

Title VII

Title VII prohibits employers with 15 or more employees from discriminating against and engaging in other adverse conduct towards employees on the basis of race, color, religion, sex, or national origin.

Title VII also requires employers to provide reasonable accommodation for employee religious beliefs and observances or practices unless the accommodation would present an undue hardship.

[Title VII is enforced by the Equal Employment Opportunity Commission ("EEOC"). For further information go to: www.eeoc.gov/.]

Age Discrimination in Employment Act

The Age Discrimination in Employment Act ("ADEA") prohibits employers with 20 or more employees from discriminating against individuals age 40 or older on the basis of age.

[The ADEA is enforced by the EEOC. For further information go to: www.eeoc.gov/.]

Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") imposes obligations on employers with 15 or more employees with respect to applicants or employees who have disabilities. "Disability" is a term of art defined in the ADA. In order to be covered by the ADA, an employee must be a qualified individual, meaning that he is capable of performing the essential functions of his job, either with or without reasonable accommodation.

The ADA prohibits employers from discriminating against employees on the basis of a disability. The ADA also imposes affirmative obligations on employers. Employers are obligated to provide reasonable accommodation to disabled employees if doing so will enable them to perform their essential job functions.

Examples of reasonable accommodations include making work facilities accessible (installing a wheelchair ramp) and providing devices that enable disabled employees to perform their jobs (voice recognition software for an employee with carpal tunnel syndrome). Employers are obligated to provide reasonable accommodation to qualified employees with disabilities unless doing so would result in an undue hardship.

The ADA also requires that employers and employees engage in an interactive process. The interactive process is a good faith dialogue between the employer and employee to explore possible accommodations.

> ***Tip 1:*** *The ADA requires that employee medical information be stored separately from other personnel records, secured, and only accessible on a need to know basis. This applies to medical information obtained by the employer for any reason, not just ADA-related reasons.*

> ***Tip 2:*** *The Job Accommodation Network ("JAN") is a good resource for information on accommodating employees with disabilities. (https://askjan.org)*

[The ADA is enforced by the EEOC. For further information go to: www.eeoc.gov/.]

Conduct Prohibited by Anti-Discrimination Laws

Anti-discrimination laws such as Title VII prohibit discrimination with respect to employee compensation, terms, conditions, or privileges of employment. There are two types of discrimination: "Disparate treatment" is when an employer intends to discriminate on the basis of a protected classification. "Disparate impact" discrimination involves an employment practice that is facially neutral but in practice disproportionately impacts a protected group and cannot be justified by business necessity. As an example, excluding job applicants who have a criminal history disproportionately impacts African American and Latino candidates. This may violate Title VII unless the employer can show that there is business necessity justifying the practice. (*El v. Southeastern Penn. Trans. Authority*, 479 F.3rd 232 (3rd Cir. 2007).)

Anti-discrimination laws also prohibit harassment. Although case law largely addresses harassment based on sex, harassment on the basis of any protected classification is unlawful.

Sexual harassment was originally divided between "quid pro quo" and "hostile work environment" theories. Quid pro quo harassment involves an employee being asked to submit to sexual conduct as a condition of a job benefit. Hostile work environment harassment involves sexual conduct that unreasonably interferes with an employee's job performance or creates an intimidating, hostile or offensive work environment.

This distinction has become less significant. Under Title VII, an employer will be vicariously liable for any type of harassment that results in a tangible employment action (significant change in employment status). If unlawful harassment does not result in a tangible employment action, the employer may have an affirmative defense by showing that it exercised reasonable care to prevent and promptly correct sexually harassing behavior and the employee unreasonably failed to take advantage of these preventative or corrective opportunities, or otherwise avoid harm.

Harassment is only unlawful if it is sufficiently severe or pervasive to change the terms and conditions of employment. This is measured by subjective and objective standards. The objective standard is viewed from the perspective of a reasonable person in the employee's position.

Anti-discrimination laws also prohibit retaliation. Retaliation is defined as taking an adverse action against an employee because the employee has opposed an act prohibited by law, or made a charge, testified, assisted or participated in any way in an investigation, proceeding or hearing under Title VII or a similar law.

2. **Leaves of Absence**

Family and Medical Leave Act

The Family and Medical Leave Act ("FMLA") requires covered employers to provide eligible employees with a leave of absence and guarantee reinstatement to the same or a comparable position. In order to be covered, an employer must be working in interstate commerce and have 50 or more employees.

In order to be eligible for FMLA leave, an employee must have worked for the employer for one year, have worked 1,250 hours in the preceding year, and be working in a location where the employer has 50 or more employees working within a 75 mile radius.

The leave may be taken for the following reasons:

- The employee's own serious illness
- The serious illness of the employee's spouse, child, parent, or sibling
- Baby-bonding (includes bonding with a newborn, newly-adopted child, or newly-placed foster child)
- Military exigency (employee's family member needs assistance while on active duty or due to being called to active duty)
- Military caregiver (employee is needed to care for a family service member wounded in the line of duty)

The FMLA requires employees be granted up to 12 weeks of leave, except for military caregiver leave, which allows for up to 26 weeks. Most types of leave may be taken on an intermittent or reduced schedule basis, in addition to continuously.

The FMLA does not require employers to pay employees while they are on leave. However, employees may use accrued paid time off and, under certain circumstances, employers may require employees to use paid time off.

Employers must continue to provide group health insurance while an employee is on FMLA.

> ***Tip:*** *Although FMLA leave for an employee's own illness is limited to 12 weeks, an employer may be legally required to provide additional leave as a reasonable accommodation under the Americans with Disabilities Act.*

[The FMLA is enforced by the U.S. Department of Labor. For further information go to: www.dol.gov/.]

Pregnancy Discrimination Act

The Pregnancy Discrimination Act ("PDA") added pregnancy, childbirth and related medical conditions to the definition of "sex" under Title VII. The PDA also requires that women affected by pregnancy, etc., are to be treated the same for all employment purposes as non-pregnant employees with similar restrictions on their ability to work. This means that if an employer has a leave of absence policy regarding employee disabilities, it must treat pregnant employees the same.

Employers with 50 or more employees who are covered by FMLA, may be required to provide leave for a pregnant employees if her condition qualifies as a serious medical condition and she meets the other eligibility requirements. However, under federal law, unless an employer voluntarily has a leave of absence policy for disabled employees (and therefore the PDA applies), employers with fewer than 50 employees are not required to grant leave to pregnant employees.

[The PDA is enforced by the EEOC. For further information go to: www.eeoc.gov/.]

Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") protects employees who take leave for military service. USERRA applies to all employers and employees, regardless of number of employees or length of service.

USERRA prohibits discrimination against employees based on military service and retaliation for exercising USERRA rights. USERRA requires employers to permit employees to take leave for military service for up to a total of five years.

As with FMLA, USERRA leave is unpaid although the employee may use accrued vacation and, if permitted by the employer, paid sick leave. Employers are required to continue group health benefits for employees on USERRA leave.

An employee returning from USERRA leave must be reemployed promptly, which under normal circumstances means within two weeks of notification by the employee. Employees

returning from USERRA leave are entitled to "escalator" protection. This means that they must be placed in the position they would have been in if their employment had not been interrupted with military service.

[USERRA is enforced by the Department of Labor. For further information go to: www.dol.gov/]

3. Whistleblowers and Anti-Retaliation

Most federal and state anti-discrimination laws include anti-retaliation provisions protecting employees who complain about violations or participate in investigations or other proceedings under those laws. In addition, there are many laws protecting employee whistleblowers in certain industries.

For example, the False Claims Act ("FCA") makes it unlawful for entities to submit false claims for payment to the federal government (31 USC § 3729 *et seq.*). The FCA permits private parties (known as relators) to bring a *qui tam* action on behalf of the government to recover from entities who have violated the Act. The FCA contains an anti-retaliation provision protecting employees who have acted in furtherance of a *qui tam* action or made other efforts to stop violations of the FCA. (31 USC § 3730(h).)

> ***Tip:*** *It is not uncommon for employees who are being disciplined for insubordination to attempt to claim they are whistleblowers. Before disciplining an employee for insubordination or disruptive conduct, evaluate whether the conduct could be characterized as complaining about a violation of law.*

4. Miscellaneous

Occupational Safety and Health Act

The Occupational Safety and Health Act ("OSHA") imposes numerous requirements on employers to assure that employees have safe and healthful working conditions.

[The OSHA is enforced by the Occupational Safety and Health Administration, which is part of the Department of Labor. For additional information go to: www.osha.gov/.]

State Workers' Compensation Laws

Most states require employers to carry workers' compensation insurance, providing benefits for employees who suffer injuries or illnesses arising out of the course and scope of their employment. Workers' compensation laws vary from state to state. As a general rule, workers' compensation is a no-fault system and employers who have workers' compensation coverage generally cannot be sued outside the workers' compensation system.

Worker Adjustment and Retraining Notification Act

The Worker Adjustment and Retraining Notification Act ("WARN") requires covered employers to provide 60 days' written notification before a plant closing or mass layoff.

For purposes of WARN, an employer is any business enterprise that employs 100 or more employees, not including part-time employees; or 100 or more employees who work in the aggregate at least 4,000 hours per week.

The required 60 days' notice must be given to affected employees and to the state dislocated worker unit and chief elected official of the local government where the closing or layoff will occur. "Affected employees" are those who reasonably may be expected to experience an employment loss.

[The WARN Act is enforced by the Department of Labor. For further information go to: www.doleta.gov/layoff/warn.cfm.]