

# DOING BUSINESS IN THE UNITED STATES



A Guide to Basic Employment and  
Labor Laws for Foreign Companies

**Preston|Gates|Ellis** LLP



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## A Guide to Basic Employment and Labor Laws for Foreign Companies

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# Introduction

A company contemplating doing business in the United States should be familiar with the laws governing relationships with employees. U.S. subsidiaries of foreign-owned companies may be subject to U.S. employment and labor laws. In addition, parent companies may, in some circumstances, be held responsible for the acts or omissions of their U.S. subsidiaries.

This guide introduces many of these laws. However, it provides only general information regarding certain laws and is not intended as a legal opinion or legal advice. Readers should consult with legal counsel on the application of the law to their particular situations.

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## FOREIGN EMPLOYERS BEWARE

Foreign companies frequently have every intention of lawfully employing their U.S. workforce, but find themselves out of compliance because they do not understand the differences between employment law in the United States and the laws back home. Employment laws in the United States can be highly technical, making strict demands on employers in areas of employment such as recruiting, hiring, background checks, compensation and benefits, workplace conduct and termination. Further, employees in the United States tend to be more litigious than employees in many other countries. In lawsuits against employers, juries in the United States may award employees amounts that far exceed recoveries that would be awarded to employees in foreign courts. Such lawsuits are sometimes brought on behalf of numerous members of the workforce (“class actions”), resulting in damage awards or settlements in the millions of dollars. Certain employment laws may impose personal liability against officers or agents of the employer.

Because of these dangers, foreign employers establishing work forces in the United States should learn the requirements of U.S. law and make sure that the practices of their U.S. companies comply with applicable requirements.

## THE RELATIONSHIP BETWEEN FEDERAL, STATE AND LOCAL LAWS

The rights and duties of employers and employees in the United States are governed by an extensive set of federal, state and local laws. State and local laws are often more favorable to employees than federal laws, and their requirements will be applied in addition to federal laws in a particular situation. Company officials should not rely on their general knowledge of federal law or the laws of other states in managing their companies.

## A WORD ABOUT UNIONS

A union is the official representative of a group of employees in some workplaces. A private employer's relationship with unions is governed by federal and state law as well as the particular contract with the union, which is known as a collective bargaining agreement.

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If a company's workforce is unionized, many aspects of the employment relationship will be governed by the terms of the collective bargaining agreement and applicable labor laws, rather than the legal principles outlined in this guide. Companies are also restricted by law in the statements that they are allowed to make and actions they may take in the event of a union organizing effort.

Even if a company's workforce is not unionized, certain laws protect the employees' rights to organize in groups and communicate with the company regarding compensation and working conditions. Employers must be careful not to restrict or "chill" this type of activity.

## **HIRING THE WORKFORCE**

**Advertising and Interviewing.** Companies should briefly describe the position, salary and benefits, job requirements and qualifications, and the terms of employment in advertising and interviewing for open positions. Applicants should be informed of any particular requirements for employment, such as a drug screening, availability to work overtime, training period or physical agility requirements.

Companies may not require applicants to possess (or not possess) certain personal characteristics such as a particular age, race, national origin, sex, marital status or religion. Similarly, a company cannot question applicants about certain characteristics or about possible disabilities during employment interviews. Under the discrimination laws, an employer cannot make employment decisions based upon the presence (or absence) of these characteristics. All employment decisions should be made on neutral, job-related criteria like education, years of experience, skills and similar factors. Managers should be trained on lawful interviewing techniques.

**Employment Application Forms.** Job application forms vary enormously in quality and style. Forms used by a company should be reviewed by legal counsel to assure that they do not inquire into impermissible areas (for example, medical histories). Counsel should also confirm that applications contain an adequate description of the employment relationship (e.g., at-will) and a release for obtaining information from prior employers.

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State and federal laws govern an employer's obligations when having third-party agencies conduct background checks on applicants and employees. These laws require the employer to obtain consents from employees in a specified form and to provide certain notices to the employees. Employers must observe such laws when undertaking background checks covered by these laws.

**Testing.** Companies employ a variety of testing procedures in an effort to hire the best employees, including honesty or personality tests, drug screens and medical examinations. Caution should be used in implementing any pre-employment testing program. Some procedures, such as polygraph tests, are prohibited by law for employment purposes. Other tests, like pre-offer alcohol screens, may violate disability laws. Medical exams required before an offer is presented are likely to violate laws that protect disabled employees. Even personality tests could raise legal issues in certain circumstances. In all circumstances, a company's testing plans should be reviewed by legal counsel.

**Obligations to Applicants with Physical or Mental Disabilities.** Companies have an affirmative obligation to accommodate the needs of qualified applicants with physical or mental disabilities. The federal Americans with Disabilities Act (ADA) and similar state statutes prohibit an employer from discriminating against an individual with a disability who is otherwise qualified to do the job, and also require the company to reasonably accommodate the special needs of a disabled applicant in the application process. If accommodation would create an "undue hardship" for the company, it need not be provided. Reasonable accommodations may include allowing employees time away from the workplace, including the adjustment of work schedules or permitting leaves of absence. In beginning U.S. operations, companies should make a special effort to inform themselves about the unique requirements of laws protecting individuals with physical or mental disabilities. Also, because of the complexity of these laws, employers should consult with their counsel when these situations are present.

**Nature of the Employment Relationship.** The laws of many countries outside the United States mandate certain aspects of the employment relationship, including circumstances under which termination may occur and employee entitlements regarding notice of termination and/or severance. Generally, U.S. employers have more flexibility in fashioning the terms and conditions of employment and termination. In particular, the concept of at-will employment is common among U.S. employers and unfamiliar to many foreign employers.



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Employers in most states in the United States may hire their employees for no set term or length of employment. In the absence of an agreement or arrangement to the contrary, employment may be terminated by the employer or employee “at will,” without cause or advance notice. While it is unusual for an employer to terminate the employment of an employee with absolutely no reason, the benefit of the at-will relationship is that it decreases the likelihood of costly wrongful termination litigation. Such litigation can be quite costly, even if meritless. At-will employers are, of course, free to provide advance notice or severance at termination if they wish, but are not legally required to do so.

It is important to have an employee sign a written statement that has been reviewed by counsel, acknowledging “at will” status at the time of hire (e.g., in the offer letter). It is also important to avoid implementing policies that could destroy the at-will status, such as strict progressive discipline policies, probation policies or other similar policies typical to employers outside the United States. Please note that not all states permit at-will employment, for example Montana.

Some companies have a “for cause” standard of employment for some or all employees. These employers have agreed that they will only terminate an employee when they have “cause” to do so (e.g., failure to perform work duties, insubordination or dishonesty). With a “for cause” standard of employment, a company cannot terminate an employee at will, but must be able to demonstrate that cause existed for the termination. Most union contracts and some executive contracts contain a “for cause” standard. This form of employment is not common in the United States, as it limits the employer’s discretion and is more likely to give rise to employment litigation or other claims for damages or termination.

**Hiring of Aliens.** The Immigration and Reform Act of 1986 prohibits the hiring of unauthorized aliens. Additionally, employers may not discriminate against job applicants based on their national origin. All new employees must complete I-9 forms attesting that the employee is a United States citizen or an alien admitted for permanent residence or authorized to work in the United States.

**Independent Contractors.** Companies in need of temporary help often use the services of “independent contractors.” This type of relationship is very common in the software and other high-tech industries. True independent contractors are not employees of the company, and the company does not withhold income

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taxes or pay unemployment and workers' compensation premiums for these individuals. Instead, these individuals are responsible for their own taxes and insurance.

Companies must be careful when categorizing individuals as independent contractors. Strict state and federal guidelines must be met before a company can legally treat individuals as independent contractors rather than "employees." If these guidelines are not met, the company may be exposed to liability, including penalties, for failing to provide benefits or withhold payroll taxes, and other consequences of the misclassification. If a company in the United States uses independent contractors, it is important to have an independent contractor agreement in place that clearly reflects the relationship. Please note, however, that use of an independent contractor agreement does not insulate an employer from problems in this regard. The courts and agencies may look beyond the agreement to determine whether the relationship is truly one of employment, with a key factor being the amount of control exerted over the contractor by the employer.

**Non-Disclosure, Non-Compete and Assignment Agreements.** Many employers require employees to enter into non-disclosure and/or non-compete agreements at the outset of employment. Non-disclosure agreements serve to protect confidential company information, and non-compete agreements limit a former employee from working for a competitor for a reasonable period of time. These agreements can be particularly important for companies in software and other high-tech industries. The laws governing the lawfulness and enforceability of non-compete agreements vary from state to state. For example, in California most non-competition agreements pertaining to post-employment competition are prohibited by law. Such agreements are permitted in Washington and Oregon, but only if certain conditions are satisfied. The timing of any employee's signing of a non-compete can be critical to its enforceability. Employers should check with their counsel before providing forms of such agreements to employees.

Other agreements commonly used to protect the intellectual property of employers are assignment agreements. In the absence of such agreements, an employer may not own all of the work product produced by an employee, particularly in the case of patented inventions. The content of such agreements may vary, based on differing requirements of state law.

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## WAGE AND HOUR ISSUES

**Exempt versus Non-exempt Status, Minimum Wage and Overtime.** The federal Fair Labor Standards Act and its state counterparts regulate the wages and hours for employees in the United States. These laws designate which employees are subject to minimum wage and overtime requirements. Exemptions from these laws may be available for employees in certain positions, although state and federal laws may differ on these points. The laws pertaining to the classification of employees are complicated and can be quite confusing, even to employers who have maintained a workforce of employees in the United States for years. Unfortunately, these issues sometimes give rise to class actions, and penalties resulting from violations of these laws can be significant. Also, wage and hour claims may also give rise to personal liability in certain cases.

Many workforces will be staffed largely with non-exempt personnel. Non-exempt employees must be paid at least the minimum wage and must be paid overtime wages at a rate determined by law for all hours worked over 40 hours in a work week. In many cases, the worker's overtime rate will be one and a half times the employer's regular rate of pay for that pay period. However, other rates of overtime are possible as well, depending on the circumstances. In some states, such as Oregon, California and Alaska, overtime wages must also be paid when an employee works more than eight or ten hours in a workday, depending upon the circumstances and the industry.

Because of the frequency of litigation in this area, the potential for class action lawsuits, and the stiff penalties for non-compliance, employers should obtain guidance to make sure they are complying with the laws relating to wages and hours in each state where employees are located.

**Breaks.** Specific state and federal laws set the standards for required lunch periods and breaks. Some breaks are paid and others not.

**Leaves.** Companies generally follow the custom of the industry or the regional area in providing vacation time or paid leave. Generally, the availability of these benefits is determined by the employer, not the law. If, however, paid leave benefits are offered, state and federal laws may dictate an employee's right to those benefits in certain circumstances. For example, in California, any vacation time that has been earned but not yet used must generally be paid at the time the employee resigns or is terminated. In Washington, if an employer gives its

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employees paid sick leave or vacation, employees must be able to use the leave not only for their own illnesses but also to care for a number of family members identified by statute.

Additionally, there are laws requiring employers to provide leave for activities such as jury duty, military service and voting. Laws differ from state to state.

**Health & Welfare and Pension Benefits.** Health & welfare and pension benefits of this type are governed by a federal law – the Employee Retirement Income Security Act (ERISA). This law governs, for example, the requirements pertaining to medical and dental benefits, pensions and 401(k) plans. Strict compliance with the requirements of ERISA is essential. Failure to comply can result in disqualification of plans, with severe tax consequences and other penalties.

**Family and Medical Leave.** The federal Family and Medical Leave Act (FMLA) requires that many companies provide their employees with up to 12 weeks of unpaid leave each year: (1) for the birth or adoption of a child, (2) in order to care for a seriously ill family member, or (3) due to an employee's own serious health condition. Similar state laws in some states add additional requirements for employers.

Not all employers are covered by FMLA, as it applies only to employers with more than 50 employees (and this can include affiliates, under certain circumstances). Also, not all employees are entitled to leaves under FMLA. If an employee is entitled to FMLA leave, the employer will be required to provide the employee with certain notices and provide the employee with certain benefits and job return rights. Employers should note, however, that even if an employee is not entitled to a leave under FMLA, he or she may be entitled to a leave as a reasonable accommodation for disability under the Americans with Disabilities Act and similar state statutes.

During leaves under FMLA, health insurance provided during employment must be maintained under the same conditions as before the leave commenced. At the conclusion of family or medical leave, the company must generally return the employee to his or her position or to a position with comparable pay, seniority and benefits.

**Wage Payments.** Strict regulations govern the payment of wages and deductions from employee pay checks. Companies should be particularly cautious

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in this area. For example, a Washington employer that wrongfully deprives an employee of his or her wages may be liable for double the amount of wages withheld, plus all attorneys' fees and costs incurred by the employee. Further, in Washington, personal liability for wrongfully withheld wages can be imposed on certain personnel acting on behalf of the employer. In the event that an employee complains to one of the agencies responsible for enforcing wage and hour regulations, the company may be subjected to an audit of all of its payroll practices and/or enforcement action on behalf of a single employer or an entire class of employees.

## RECORDKEEPING

The requirements for retaining personnel records vary based on the document and legal standards. Different records have different retention period requirements under the various state and federal laws.

Employees in Washington, Oregon, California and Alaska have the right to review the contents of their personnel files upon reasonable notice to their employer. In certain circumstances, an employee may request that an employer review the file and permit the addition of an employee's statement regarding the file contents.

## HANDBOOKS OR PERSONNEL POLICIES

**Handbooks.** An employee handbook or personnel manual is a compilation of policies that apply to employment at the company. Handbooks can include policies governing vacation and sick leave accrual and use, employee benefits such as medical care and tuition reimbursement, conduct rules, and other rules or benefits that the company wishes to communicate to its employees. There is no general requirement that a company adopt such a handbook or manual, but generally, a well-written handbook can be very helpful to an employer in avoiding and addressing employment disputes. If the company elects to create a policy handbook, the employer should take care in drafting and updating the policies, as the handbook will be an important legal document and can be used as evidence in favor of or against the employer. In any event, certain types of policies are highly recommended, such as policies relating to unlawful harass-

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ment, since well-drafted policies may reduce the chance of claims and protect the company in the event harassment claims do arise.

A handbook or manual can in some circumstances create an unwanted contractual relationship between the employer and its employees and obligate the employer to provide the benefits outlined in the manual. For example, some courts have held that if manuals use “for cause” termination language or provide progressive discipline systems, such policies preclude termination of employees on an at-will basis. In order to help protect against this problem, policy manuals should be designed to give the company discretion in interpreting and applying the policies and should be reviewed by legal counsel before they are provided to employees.

**Postings.** State and federal law require the posting of certain types of policies and legal information at the workplace.

## EVALUATION OF EMPLOYEES

Employee evaluations are not generally required by law. However, employers may find it advisable to undertake some form of performance evaluation of their employees.

To the extent possible, employee evaluations should be based on objective and verifiable evidence of performance. A frequent error employers make is to “sugar coat” performance reviews; this can be particularly troublesome if an employee later challenges termination, demotion or the like. Employees should be allowed a place to comment in writing on the evaluation. If well written, evaluations may help employees improve their performance and also may protect the employer in the event of an employee claim based on termination.

## PROMOTIONS

Discrimination laws affecting hiring decisions are equally applicable to decisions made during the course of employment. Specifically, a company cannot base advancement within the company on impermissible factors such as race,

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religion, disability, national origin, sex or marital status. These laws may evoke challenges for foreign employers who tend to promote employees of foreign national origin.

## HEALTH AND SAFETY IN THE WORKPLACE

**Workers' Compensation.** State workers' compensation programs are intended to provide an employee's exclusive remedy against his or her employer for most injuries sustained on the job, although some exceptions exist. Employers pay a premium for this coverage based upon the number of employees, their job duties and the level of risk. Coverage requirements vary state by state. A state may allow employers to provide coverage through an insurance company or to self-insure, or may require contribution to a state fund. If an employer has employees in more than one state, it should make sure that each employee is covered in the correct state.

**Occupational Safety and Health Administration (OSHA).** OSHA and its state counterparts regulate the safety guidelines for United States employers. Companies should become familiar with the regulations governing their businesses, which range from guidelines for the storage of photocopying chemicals, the creation of accident-prevention plans and safety committees, to placement of scaffolding at construction sites. Government agencies perform inspections and have the power to cite and impose penalties for violations. These agencies and private safety consultants can provide information to employers regarding business safety and health concerns.

**Drugs and Alcohol.** Employers facing a substance abuse problem in their workforce, or wishing to avoid one, have several means available to maintain a drug-free work environment. These include enforcing a substance abuse policy that prohibits use, possession and performance under the influence of controlled substances, provides employee assistance programs, and allows for drug testing procedures. Employers may adopt programs to conduct drug testing of workers, but are encouraged to have such programs reviewed by their counsel. Certain industries such as transportation and fisheries may be subject to mandatory government substance abuse and testing programs.

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Caution should be used in this area. Substance abuse policies and programs can subject companies to liability under a variety of legal theories, depending in part on varying state laws.

## INTRODUCTION TO DISCRIMINATION LAWS

Prohibitions against discrimination are found in federal, state and local laws. These laws protect individuals from adverse action based upon a number of personal characteristics such as race, color, disability, national origin, sex, veteran status and religion.

**Protected Classes.** In addition to federal law, many state and local governments have protected certain groups through state or local laws. For example, Washington, Oregon, California and Alaska laws protect applicants and employees from discrimination on the basis of race, national origin, religion, sex, age, marital status, color, or the presence of any mental, sensory or physical disability. In other words, a company cannot make employment decisions (such as whether to hire or whether to give raises or promotions) based upon these factors. Some local governments have more expansive legislation that protects additional classes of individuals. For example, several cities in Washington, Oregon and California prohibit discrimination on the basis of political ideology or sexual orientation.

If an employee successfully sues a company for discrimination, the employee may be entitled to damages suffered because of the discrimination (for example, lost pay and benefits), an amount to compensate the employee for emotional distress suffered, and attorneys' fees and costs. Under certain circumstances, a plaintiff may be entitled to recovery of punitive damages.

Discrimination lawsuits can be very expensive. Companies should take actions to prevent and/or eliminate discrimination at the workplace and address allegations of discrimination promptly and effectively. Additionally, companies should periodically review their employment procedures in order to correct any potentially discriminatory practices. Foreign companies should be especially sensitive to the potential for complaints of discrimination against American employees on the basis of national origin, especially in hiring and promotions.



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**Equal Employment Opportunity Policy.** An equal employment opportunity policy should be posted at the workplace and included in any employee manual or handbook. The policy should reflect the company's commitment to a discrimination-free environment. The policy should contain a complaint policy that meets the requirements of law and involves some procedures that would be followed in such circumstances.

**Sex Discrimination.** Unlawful discrimination against employees and applicants based upon gender can take a variety of forms, such as denial of promotions based on gender, sexual harassment or a disparity in wages between male and female employees.

**Sexual Harassment and Other Unlawful Harassment.** Sexual harassment is a form of sex discrimination. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature or based on gender when: submission to conduct is made a term or condition of employment; submission to or rejection of conduct is a basis for employment decisions; or the conduct has the purpose or effect of interfering with work performance or creating an intimidating, hostile or offensive work environment. Sexual harassment can include same-sex harassment.

There are other forms of unlawful harassment, in addition to sexual harassment. For example, harassment based on a person's race or religion would also be unlawful and could result in serious claims.

Employers should have a clear written policy on unlawful harassment that is disseminated to all employees and posted on the employee bulletin board. The policy should include the company's policy that all unlawful harassment is prohibited. The policy should also include a complaint procedure for employees. The presence of and compliance with this policy—along with training of employees and management—should aid the company in avoiding unlawful harassment and in defending against a sexual harassment lawsuit.

**Equal Pay Concerns.** Employees with similar skills, experience and responsibilities who are performing essentially the same jobs should be paid similarly. No distinction in employees' salaries may be made on the basis of sex or marital status.

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**Maternity Leave.** Under federal law and the law of many states, pregnancy discrimination is prohibited. The various states differ regarding an employee's entitlement to a leave for the period of sickness or disability related to pregnancy or childbirth. Such laws may apply in addition to FMLA.

**Disability Discrimination, Americans with Disabilities Act (ADA).** As pointed out earlier, the federal ADA and similar state statutes prohibit companies from discriminating against disabled employees who are otherwise qualified to do the job. Employees are given the greatest protection available, whether that is found in federal or state law. These laws require companies to take reasonable measures to accommodate the needs of a disabled employee to enable the employee to perform the essential functions of the job. Determining whether an employee is "disabled" or whether a particular accommodation is required can be difficult. Therefore, it can be important to seek legal counsel when confronted with situations involving an employee who is disabled or who the company believes may be disabled.

## TERMINATIONS AND LAYOFFS

Terminations and layoffs of employees can provide grounds for lawsuits against companies unless handled properly. The decision to terminate employment should be reviewed carefully by more than one person, and legal counsel should be consulted regarding appropriate termination procedures. Further, companies should review applicable handbooks and policies to make certain that the company's own practices and procedures are followed.

**Severance.** Unlike many countries outside the United States, severance is generally not required in the United States, unless this is agreed to by the employer (but see the section on WARN below). Employers may wish to avoid blanket policies that eliminate its ability to exercise discretion in this area. In many circumstances, an employer may require the employee to provide a release of claims in connection with the payment of severance. Employers should make sure that the form of release used is adequate to waive and release claims under federal law and under applicable state law.

**Unemployment Compensation.** After leaving a company, most employees may apply for unemployment compensation benefits. Entitlement to benefits is the

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decision of the state agency administering such benefits and depends upon the circumstances of the separation. Normally, if the employee left voluntarily or due to a high level of misconduct, benefits will be denied. If, on the other hand, the employee was considered “constructively discharged” or was laid off or terminated for more routine reasons, benefits may be granted. Benefits granted will affect an employer’s experience rating, potentially leading to higher premiums for the employer.

**Workers Adjustment and Retraining Act (WARN).** The Workers Adjustment and Retraining Act or “WARN” requires employers of 100 or more employees to provide employees and government agencies with 60 days’ written notice of a mass layoff or plant closing in certain circumstances. Companies facing the prospect of layoffs, numerous terminations, or a plant closing should consult with legal counsel well in advance of the contemplated action to determine the applicability of WARN. Damages from WARN violations can be significant, and employers are encouraged to seek counsel well before triggering a WARN event.

**Consolidated Omnibus Budget Reconciliation Act (COBRA).** Pursuant to the Consolidated Omnibus Budget Reconciliation Act or “COBRA,” employees who received group medical benefits while employed may have the right to continue those benefits at their own cost for a certain period of time after separation from employment. The notification requirements and sanctions for failure to comply with COBRA are quite strict. Companies should be sure that they are supplying all departing employees with correct information about their rights to continued benefits.

## CONCLUSION

This summary provides a snapshot of certain employment laws. Each of the laws and circumstances described are subject to detailed provisions and requirements that may impact an employer’s obligations to its employees. We strongly recommend that foreign employers consult with their counsel to adopt systems and procedures that facilitate compliance and that protect the company from needless and costly employment claims.

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