Terms of employment Q&A: United States

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Country Q&A | Law stated as at 31-Oct-2020 | United States

US specific information concerning the key legal and commercial issues to be considered when drafting terms of employment for use internationally.

This Q&A provides country-specific commentary on *Practice note, Terms of employment: International*, and forms part of *Cross-border employment*.

See also *Standard document, Terms of employment: International*, with country specific drafting notes.

Regulation of the employment relationship

1. How is the employment relationship governed and regulated?

Written employment terms

Under federal law, there are no minimum requirements for an employment contract. Also, in most states, the terms do not need to be recorded in writing.

An employment relationship in the US is presumed to be "at-will" (that is, terminable by either party, with or without cause or notice). A majority of employees in the US are employed on an "at-will" basis, without a written employment contract.

In some states (for example, New York), employers must by law notify employees in writing of some of the terms of employment (but not as extensively as is required under the law of many civil law countries).

Under New York law, employers must notify employees in writing at the time of hiring of various details of their terms and conditions, including:

- The regular rate of pay.
- The pay day.
- The overtime rate, if applicable.

- The method of payment (that is, whether employees will be paid by the hour, shift, day, week, salary or piece or commission).
- Any allowances that will be claimed as part of the minimum wage (for tips, meals or lodging).

It is market practice for highly-skilled and highly-compensated employees (for example, high-level executives) to be employed under written employment contracts.

These contracts specify the basic terms and conditions of employment, such as:

- Position.
- Job responsibilities.
- Salary.
- Compensation.
- Incentive pay.
- Stock options.

They will also define what conduct will justify termination for cause, and provide for severance pay in the case of termination without cause.

Whether the employment relationship is "at-will" or under a written employment contract, the parties are free to negotiate and set the terms and conditions of their relationship, so long as none of the provisions breach any federal, state or local law, or rules or regulations governing the employment relationship (for example, the pay practices established in the Fair Labor Standards Act, and the prohibition of discrimination under the federal Civil Rights Act of 1964 (see *Question 3*)).

Implied terms

Unless stated otherwise, employment is assumed to be "at-will".

Collective agreements

There are no automatically binding or sector-wide collective bargaining agreements as in some countries. Collective agreements are generally negotiated on a company or site basis, and cover approximately 7% of private sector employees

2. What are the terms in the employment agreement called in your jurisdiction?

There is no specific terminology applied to the employment agreement. The description used for terms may include clauses, articles, paragraphs or sections.

Employment status

> 3.Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

A worker may be classified as an independent contractor or consultant rather than an employee (see *Country Q&A, Consultancy agreements (short form): United States* for full discussion on classification).

Even where a worker is classified as an employee, under US federal law (and the law of many states), employees are classified as either "exempt" or "non-exempt" from wage-hour (including overtime) provisions.

However, there are other federal and state-level protections that will apply generally to all employees, regardless of classification, where the employer is over a certain size.

Fair Labor Standards Act

The federal Fair Labor Standards Act (FLSA) regulates the following in relation to employees who are not exempt from its remit:

- Wages.
- Working hours.
- Overtime pay.

The FLSA provides for a (national) minimum wage for all non-exempt employees of USD7.25 per hour.

States are free to legislate a higher minimum wage. The majority of US states have minimum wage rates above the federal standard (as of January 2020, 29 states and the District of Columbia (DC)).

Some cities also impose higher minimum wage rates for employees that work for employers in the municipal areas of those cities (for example, in San Francisco, the minimum wage is USD16.07 per hour as of July 2020).

As discussed above, non-exempt employees are entitled to overtime pay (generally at 150%) for work above 40 hours in a week. In addition, individual states have laws and regulations regarding other wage-hour matters such as required breaks and holiday pay.

Exempt employees. Certain categories of employees are not covered by the FLSA and are deemed "exempt" from its requirements. These include, among others:

- Those in executive, administrative or professional positions.
- Outside sales employees (that is, those who regularly perform duties away from the employer's place of business).
- Certain skilled computer professionals.
- Employees of certain seasonal amusement and recreational businesses.
- Casual babysitters.
- Persons employed as companions to the elderly or infirm.

Other categories of employees are exempt from the FLSA's overtime pay requirements only. These are:

- Certain commissioned employees of retail or service establishments; auto, truck, trailer, farm implement, boat, or aircraft sales-workers; or parts-clerks and mechanics servicing autos, trucks, or farm implements, who are employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers.
- Employees of railways and air carriers, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans.
- Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations.
- Domestic service workers living in the employer's residence.
- Cinema employees.
- *Farmworkers*.

Statutory rights applicable to all employees

There are a number of statutory rights that apply to all employees.

Health and safety. The Occupational Safety and Health Act (OSHA) requires employers to provide all employees (regardless of classification) with a safe and healthy place of employment, which is free from recognised hazards (death or serious physical harm). The OSHA regulations, established and published by the OSHA to serve as criteria for measuring whether employers are in compliance with OSHA itself, govern a wide variety of workplace conditions, and require employers to:

- Remedy known workplace hazards.
- Limit the amount of hazardous chemicals to which workers can be exposed.
- Use certain safe practices and equipment.
- Monitor hazards and keep records of workplace injuries and illnesses.

Discrimination. Under the anti-discrimination laws (detailed below) it is also illegal under US federal law to discriminate against an employee (regardless of an employee's classification), either intentionally or through a disparate impact, on account of their:

- Race.
- Colour.
- Religion.
- Sex (including pregnancy).
- National origin.
- Age (40 or older).
- Disability.
- Genetic information.
- Sexual orientation.

Harassment qualifies as a form of employment discrimination under the federal anti-discrimination laws described below. It is illegal to harass an employee on account of these protected characteristics or to retaliate against an employee because they:

- Complained about discrimination.
- Filed a charge of discrimination.
- Participated in an employment discrimination investigation or lawsuit.

In general, the person engaging in harassing conduct does not need to be the victim's supervisor and can be any agent of the employer, a co-worker, or a non-employee. However, the employer will only be liable for harassment by a non-supervisory employee or non-employee if it has control over the harasser and it knew, or should have known, about the harassment and failed to take prompt and appropriate corrective action.

Most employers with at least 15 employees are covered by this body of federal anti-discrimination laws, as are most labour unions and employment agencies.

The anti-discrimination laws which make up this body of federal legislation are:

- **Title VII and Title II of the Civil Rights Act 1964.** Title VII prohibits discrimination against employees and applicants on the basis of race, colour, sex (including pregnancy), national origin and religion. Title VII and other federal discrimination laws also protect employees from retaliation for complaining of discrimination, filing a charge or assisting in an investigation of discrimination.
- **Age Discrimination in Employment Act (ADEA).** This prohibits employment discrimination against people aged 40 and older.
- **Americans with Disabilities Act (ADA).** This prohibits discrimination against individuals (employees, applicants, and guests) with a disability and requires the provision of a reasonable accommodation (that is, a modification or adjustment to a job, hiring process, or work environment) to someone who is legally

disabled. The ADA Amendments Act of 2008, which expressly overturned several landmark Supreme Court decisions interpreting the definition of "disability" narrowly, significantly expanded the protections afforded to disabled individuals. As a result, many more health conditions are now considered "disabilities" under the ADA, for which reasonable accommodation may be required.

- **Equal Pay Act (EPA).** The EPA is an amendment to the Fair Labor Standards Act that prohibits paying different wages to employees of different sexes who perform equal work under similar conditions.
- **Pregnancy Discrimination Act (PDA).** The PDA is an amendment to Title VII that prohibits discrimination against an employee because of pregnancy.
- **Genetic Information Non-Discrimination Act (GINA).** GINA prohibits employers from discriminating against employees because of an employee's "genetic information". The law also prohibits employers from requesting, requiring or purchasing genetic information of an employee, subject to a small number of limited exceptions. Under GINA, "genetic information" means information about the "genetic tests" of an individual or their family members, and information about the manifestation of a disease or disorder in family members of those individual. Medical tests such as blood counts, cholesterol screenings or liver function tests are not "genetic tests".

Many states have passed laws that prohibit discrimination, which generally apply to work conducted within the states in which they are enacted. Often these laws mirror federal statutes, but in some cases these laws provide additional or increased protections not required by federal laws. In states with more expansive employee protections, state law will often predominate as a basis for employment law claims.

Parental leave. The Family Medical Leave Act (FMLA) requires employers with 50 or more employees within 75-mile radius to provide covered employees with 12 weeks' unpaid leave in a 12-month period for the birth or placement (adoption and fostering) of a child. In order to be eligible for the leave, an employee must work for a covered employer for at least 1,250 hours during the 12 months prior to the start of leave.

Some state laws provide for maternity leave for employees who are not covered under the FMLA. In addition, several states provide workers with partial pay during parental leave. Whether the trend toward state paid family leave laws will continue remains to be seen.

Sick leave. Employees may be entitled to unpaid sick leave under the FMLA, which allows eligible employees to take up to 12 weeks' unpaid medical leave in a 12-month period for a serious health condition that prevents the employee from performing the functions of their job. A serious health condition covers a range of illnesses, though colds, headaches and routine medical care are typically not covered.

Though there is no national law guaranteeing paid sick leave, a number of states, counties and cities require employers doing business within their boundaries to offer paid sick leave. The laws vary considerably in details as defining who is a covered employer, who qualifies as an eligible employee, how much sick leave is available, how it is accrued and when it can be taken.

Full-time/part-time worker

Whether a worker is classified as "full-time" or "part-time" generally has an impact on their eligibility for employer-provided benefits (for example, health insurance, parental leave and vacation days), including employer health insurance under the federal Affordable Care Act (see *Question 4*). Typically, employees are considered "full-time" if they work 30 or more hours per work week.

Time periods

No legal provisions govern fixed- or unlimited- term contracts, nor define categories of employees who may enter into them. Unlike many other countries, American law does not limit the duration of a fixed-term employment contract or the circumstances under which the parties may enter into a fixed-term employment contract. In the absence of an employment contract, employment relationships are presumed to be "at-will," terminable by either party at any time, with or without cause.

Part-time workers

4. To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

Part-time workers are entitled to some, but not all, of the same rights and benefits as full-time workers.

Part-time employees have equal entitlement, regardless of the hours they work, to:

- Protections under the FLSA (regulating working hours, overtime and wages).
- Protections under the anti-discrimination laws (see *Question 3* above)).

(See *Question 3*.)

Part-time employees may also have access to:

- Health insurance through their employer under the Affordable Care Act, but only if they work at least 30 hours per week (or 130 hours per month) (see *Question 3*).
- Any retirement plan that is available to other employees, if, under the Employment Retirement Security Act (ERISA), they have completed 1,000 hours of service in a 12-month period.
- Leave benefits under the FMLA if they work for a covered employer and they have worked at least 1,250 hours for the employer during the 12 months before the start of leave (see *Question 3*).

State and local laws vary, and may require that benefits such as paid sick leave, health insurance plans or premiums be offered to part-time workers.

Restrictions on managers and directors

5. Are there any restrictions on who can be a manager or company director in your jurisdiction?

Nationality restrictions

No.

Other

N/A.

Continuity of employment

6. Does your jurisdiction recognise the concept of continuity of employment (see *Standard document, Terms of employment: International: clause 1.3*)?

An employer may choose to recognise previous employment for the purposes of eligibility in certain benefits plans, but it is generally not required to do so. If an employee is a member of a union, the concept of continuity of employment may be addressed by the terms of the applicable collective bargaining agreement between the employer and the union.

7. What statutory rights does an employee have on commencement of their employment? What employment rights does an employee acquire after a period of continuous employment?

Statutory rights on commencement

See *Question 3*.

Statutory rights acquired

Under the FMLA, an employee of a covered employer is eligible for leave if they have been employed for at least 12 months, and for at least 1,250 hours during the previous 12-month period for that employer.

Under ERISA, employees are entitled to access any retirement plan available if they have completed 1,000 hours of service in the previous 12-month period.

Other states and local jurisdictions also provide additional rights that accrue after employment commences. For example, under the New York State Family Leave Program, employees (including non-citizens) are eligible for paid family leave time under certain circumstances, if they have been employed by a covered employer at the time of application for benefits:

- Full-time for 26 weeks.
- Part-time for 175 days.

Permission to work

8. In your jurisdiction, is it permissible to make the employee's employment subject to the requirements set out in *Standard document, Terms of employment: International: clauses 1.5* and *Clause 1.6*?

Yes.

9. In your jurisdiction, is it possible for employees to provide the warranty as set out in *Standard document, Terms of employment: International: clause 1.7* (that is, that they are not in breach of any other agreement, contract or arrangement that prevents them from lawfully fulfilling their employment obligations to the new employer)? If not, is there any other wording that would be used to give the same effect?

Yes.

Probationary periods

10. In your jurisdiction, are probationary periods recognised and what are the legal requirements in relation to them (see *Standard document, Terms of employment: International: clause 1.4*)? Is the information set out in Practice note, Probationary period: International correct for your jurisdiction?

Probationary periods generally have no legal significance in the US (as employment is at will) so there is no reason to provide for them unless the employer wishes to set expectations or use them as eligibility periods for benefits.

The probationary period language should be carefully drafted to avoid the implication that post-probationary employees can only be terminated for cause.

However, it should be noted that, in a situation where the employees are represented by a labour union and so are protected against termination without cause, there may be a probationary period during which the provisions of the collective bargaining agreement protecting the employees against discharge without cause do not apply.

Job Duties

11. Will the duties listed in *Standard document, Terms of employment: International: clause 2.2* be understood in your jurisdiction? Are there any other duties that would be standard practice to include within the agreement? Are any additional duties implied by national law?

Yes, the duties listed in *Standard document, Terms of employment: International: clause 2.2* are common terms found in an employment agreement. There are no other duties considered standard practice to include in the agreement.

Implied duties

No duties are implied by federal law, but many states recognise a common law duty of loyalty, also referred to as a fiduciary duty. The duty of loyalty generally implies a duty on the employee:

- To act in the employer's best interests.
- Not to compete with the employer (during the term of their employment).
- Not to divert business to a competitor.
- To protect the company's confidential and proprietary information.

Working Overseas

12. In your jurisdiction, is there a legal requirement for employers to provide certain information to employees who will be working overseas (see *Standard clause, Working overseas: International*)?

No.

Relocation expenses

13. If an employer agrees to pay the employee's relocation expenses in accordance with *Standard clause, Relocation expenses: International*, what exemptions from tax, social security or other charges may be applicable under national law?

Relocation expenses paid directly by the employer are exempt from US federal income, social security and Medicare taxes if the relocation expenses, had they been directly paid or incurred by the employee, would have qualified as deductible relocation expenses under the US Tax Code.

Relocation expenses that qualify for deduction under the US Tax Code generally:

- Meet certain distance and period-of-employment tests:
    - the distance test is that the location of the job must be at least 50 miles farther from employee's previous home than the location of their previous job; and
    - the period-of-employment test is that the employee must have worked as a full-time employee for 39 weeks in the year following the move.
- Cover the cost of transferring household goods and personal effects to the new residence, and travel costs to the new place of residence.

14. In your jurisdiction, is it permissible for the employee to have to repay relocation expenses paid to them, as set out in *Standard clause, Relocation expenses: International: clause 1.3*?

Yes.

Salary and Bonuses

15. Is it permissible in your jurisdiction for salary to be deducted as set out in *Standard document, Terms of employment: International: clause 4.3*?

Yes, but only within the parameters set under individual state laws. For example, under Illinois law, an employer can make certain deductions from employee pay, but each employee must be furnished with an itemised statement of deductions for each pay period. Deductions may be made:

- When required by law (such as taxes).
- To the benefit of the employee (such as, for example, health insurance premiums, union dues).
- A valid wage assignment or wage deduction "order in effect", made with the express written consent of the employee, given freely at the time the deduction is made.

16. Is it common practice in your jurisdiction for performance and salary to be reviewed annually? Can the employer make any increase discretionary as set out in *Standard document, Terms of employment: International: clause 4.5*?

Yes, it is common practice for performance and salary to be reviewed annually. Employers can also make any salary increase discretionary, as set out in *Standard document, Terms of employment: International: clause 4.5*.

17. Is *Standard document, Terms of employment: International: clause 4.2* sufficient to ensure that a discretionary, non-contractual bonus is being offered to the employee? Are there restrictions or guidelines on what bonuses can be awarded?

Yes, an employer can, at its discretion, pay a bonus at such intervals as the employer determines, taking into account specific performance targets.

It is worth noting that under the FLSA, for non-exempt employees, for a bonus to qualify as discretionary, "the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the [bonus] period . . . The sum [must be] determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, he has abandoned his discretion." (*29 C.F.R. § 778.211(b), FLSA*).

If a bonus does not qualify as discretionary, it will be included in the regular rate of pay for purposes of calculating overtime for "non-exempt" employees.

For both FLSA exempt and non-exempt employees, bonuses up to USD1 million are subject to federal withholding at a 22% flat rate, and at 37% on bonus funds above the first USD1 million.

A bonus is also subject to state taxes, although the withholding rate will vary by state (for example, 10.23% for California).

There are no other restrictions or guidelines on bonuses for exempt employees.

Benefits

18. What provision for retirement is required to be made in your jurisdiction (see *Standard document, Terms of employment: International: clause 5.1*)?

Unless otherwise provided for under a collective bargaining agreement or an employment contract, employers are not required to provide employee pensions or any retirement benefits.

However, many American employers do provide some retirement benefit to their employees, increasingly in the form of a retirement savings plan. This is a defined contribution plan and is commonly known after the applicable section of the Internal Revenues Code as a "401k" plan.

A 401K plan is an employer-sponsored retirement account, giving employees the opportunity to contribute a percentage of their pre-taxed salary to a retirement account which is then matched by the employer for some or all of the contributions. As of 2020, the basic limits on employee contributions are:

- USD19,500 per year for workers under age 50.
- USD26,000 for those aged 50 and above (including the USD6,500 catch-up contribution).

If the employer also contributes, the total employee/employer contribution is capped for workers under 50 at the lower of:

- USD57,000.
- 100% of employee compensation.

For those aged 50 and over, the limit is USD63,500.

19. Are the benefits set out in *Standard document, Terms of employment: International: clause 5.3* recognised in your jurisdiction? Does the employer lawfully have the ability to delay participation in the benefits schemes for a period of time after commencement?

The benefits set out in *Standard document, Terms of employment: International: clause 5.3* are both recognised and common in the US.

The Affordable Care Act does not require an employer to offer coverage to any particular employee or class of employees, including part-time employees, but it bars an employer from requiring an otherwise eligible employee (or dependant) to wait more than 90 days before coverage under a group health plan becomes effective.

Annual Leave

20. Is there a minimum paid annual leave entitlement for employees in your jurisdiction (see *Practice note, Annual leave: International*)?

Minimum holiday entitlement

No federal law requires employers to provide employees with paid vacation time. In practice, all employers nearly always provide employees with paid vacation time. It may range from one week per year during the first few years' service to three weeks or more for long-serving employees.

Employees represented by a labour union may receive more generous vacation time.

Public holidays

Although the US government recognises several national holidays, no federal law requires employers to provide employees with time off for a national holiday.

However, it is customary for employers to provide employees with paid time off to observe nationally and locally recognised holidays. For example, the public holidays widely observed by employers in private industry are:

- New Year's Day.
- Martin Luther King Day (January).
- Presidents Day (February).
- Memorial Day (in late May).
- Independence Day (July 4th).
- Labor Day (early September).
- Thanksgiving Day (third Thursday in November).
- Christmas Day.

Some states require that employees working on particular holiday days be paid at a higher rate of pay.

21. In your jurisdiction, is it permissible for the employer to restrict the employee from carrying over untaken annual leave into the next holiday year (see *Standard document, Terms of employment: International: clause 7.4*)? Can employers take any steps to encourage employees to take their annual leave in the current holiday year?

Carryover of untaken vacation is generally governed by state law, and in most states a "use it or lose it" policy is permitted. There are exceptions, however, such as California and Colorado, where it "use-it-or-lose it" provisions regarding untaken vacation are prohibited. For example, Colorado law permits a cap by the employer on the total amount of unused vacation time an employee can accrue. Once an employee reaches the cap, they will stop accruing vacation time until the balance falls below the cap. This requires employees to use vacation time in order to continue accruing it.

22. In your jurisdiction, is it permissible for the employer not to pay the employee for untaken annual leave? Would the employer have to pay the employee in the circumstances set out in *Standard document, Terms of employment: International: clause 7.5*?

Payment of untaken annual leave is subject to state law. For example, in California and Colorado the employer must pay the employee for untaken leave, whereas in New York these terms are governed only by the employment agreement.

Therefore, whether the employer would have to pay the employee in the circumstances set out in *Standard document, Terms of employment: International: clause 7.5* will depend on the applicable state law.

23. On termination, is it permissible in your jurisdiction for the employer to deduct any excess holiday pay as set out in *Standard document, Terms of employment: International: clause 7.6*?

An employer is permitted under federal law to make a deduction from a non-exempt employee's final pay to recover excess holiday pay.

A *Department of Labor opinion letter* indicates that an employer can deduct advanced paid leave from a non-exempt employee's final pay when both the following apply:

- It is communicated to employees before leave is advanced that such a deduction will be made.
- The deducted amount reflects the rate of pay earned when the advanced leave was taken.

However, a deduction from an exempt employee's final pay in these circumstances is not recommended, in particular if that deduction would result in the employee's compensation being under the state or federal minimum wage per hour limit.

24. Is any additional payment required to be made to employees in respect of their salary and annual leave?

No.

Restrictions on working time

25. Is the information regarding working hours as set out in *Practice note, Working hours: International* correct for your jurisdiction? Can the employer and employee agree to exceed the legal limits?

Full-time working hours

Under the FLSA, non-exempt employees must receive 1.5 times their regular rate of pay for all hours worked in excess of 40 hours per week.

Generally, non-working time is not counted toward the 40-hour per week overtime threshold; this includes:

- Leaves of absence.
- Rest periods.
- Holidays.
- Vacation time.

There are similar obligations under state minimum wage laws.

Part-time working hours

There are no special restrictions applicable to the working hours or rest breaks for part-time workers.

26. In what circumstances (if any) is mandatory overtime payable to employees in your jurisdiction? Can time off in lieu be given instead of overtime pay?

Non-exempt employees can accrue compensatory time off in lieu of receiving payment for overtime hours worked (*29 CFR § 553.22, FLSA*).

Illness and injury of employees

27. What rights do employees have to time off in the case of illness or injury? Is the information in *Practice note, Sick leave entitlements*: International accurate for your jurisdiction? Are they entitled to be paid during this time off?

Entitlement to time off

Employees may be entitled to unpaid sick leave under the FMLA, which allows eligible employees to take up to 12 weeks' unpaid medical leave in a 12-month period for a serious health condition that prevents the employee from performing the functions of their job. A "serious health condition" covers a range of illnesses including chronic illnesses (for example, asthma, diabetes, migraine headaches), but minor illnesses such as colds or headaches would not be covered, and nor, typically, is routine medical care such as physicals or standard dental check-ups (see *Question 3*).

Entitlement to paid time off

Though there is no national law guaranteeing paid sick leave, a number of states (for example, California, Connecticut, Massachusetts), and more than two dozen counties, cities and towns, require employers doing business within their boundaries to offer paid sick leave. The laws vary considerably in details such as:

- Who is a covered employer.
- Who qualifies as an eligible employee.
- How much sick leave is available.
- How the entitlement to sick leave is accrued.
- When sick leave can be taken.

Recovery of sick pay from the state

If a leave of absence is covered by private disability insurance (generally a matter of agreement between an employer and an employee (or the employee's representative), the disability insurance carrier will typically pay the employee directly during the time of coverage.

In states and localities where paid sick leave laws exist, employers are required to pay workers their usual rate of pay. It is not possible for the employer to recover the cost from the government.

Legislation and guidance regarding "disability insurance" coverage has become increasingly common during COVID-19. For example, in New Jersey, employees who test positive or have symptoms of COVID-19 may be eligible for temporary disability insurance payments. In addition, in New Jersey employees may be eligible for Family Leave

Insurance (FLI) (wage replacement benefits provided by the state for up to 12 weeks(if they are caring for a family member who is confirmed to have COVID-19 or has symptoms of the virus.

28. Under the laws of your jurisdiction, is the employer required to continue making payments to the employee's pension or retirement scheme during any period of incapacity (see *Standard document, Terms of employment: International: clause 8.4*)?

As discussed in the response to *Question 18*, Unless otherwise provided for under a collective bargaining agreement or an employment contract, employers are not required to provide employee pensions or any retirement benefits. If an employer does offer such benefits, the requirement to continue contributions into a pension or retirement scheme during incapacity will be governed by the contractually agreed terms.

29. In your jurisdiction, is the employer able to require the employee to undergo a medical examination as set out in *Standard document, Terms of employment: International: clause 8.5*?

A medical examination, also referred to as a "fitness-for-duty" examination, is only permissible to the extent necessary to determine whether an employee is able to perform the essential functions of their job.

For example, the FMLA permits an employer to conduct fitness-for-duty evaluations if they are job-related and consistent with business necessity following an employee's restoration to their position following a medical leave.

Likewise, the ADA requires an individualised inquiry into the employee or applicant's ability to perform a particular job, if it focuses on the medical condition's actual effect on the employee.

An employer can be found in breach of the ADA if its decision not to hire an applicant or terminate an employee's employment was based on information obtained from an inadequately individualised assessment of the applicant or employee's medical condition.

Termination of employment

30. In your jurisdiction, what needs to be included in the employment terms regarding termination (see *Standard document, Terms of employment: International: clause 9*)?

Notice periods

Notice given by employees. Except in certain mass dismissals (see below) or as provided for in an employment contract or a collective bargaining agreement, US law does not impose a formal "notice period" to terminate an individual employment relationship. Most employees are employed "at-will", and either party can terminate the employment relationship without notice.

In some states where payment of unused vacation time is not required by law, employers will frequently pay an employee for unused vacation days in reciprocation for the employee providing advance notice of resignation.

Under the federal Worker Adjustment and Retraining Notification Act (WARN Act), employers must give 60 days' advance notice to affected employees in advance of plant closings or covered mass layoffs, and many states have analogous local notice requirements for some collective dismissals

Notice given by employers. The position is the same as discussed above.

Procedural requirements for dismissal

No filings need to be made when terminating employment, except that in some collective dismissals in some states, a notification to local authorities may be required.

31. In your jurisdiction is the employer able to make a payment in lieu of notice on termination where it is clearly stated in the agreement as set out in *Standard document, Terms of employment: International: clause 9.2*?

As US law does not impose a formal "notice period", payment in lieu of notice is also not required. However, such a provision may be included in a collective bargaining agreement or employment agreement.

32. In what circumstances can the employer terminate the employee's employment immediately without notice in your jurisdiction?

The US default position is that private sector employment relationships are "at-will": either the employer or the employee may terminate the employment relationship at any time, for any (non-discriminatory or non-retaliatory) reason, with or without notice. Therefore, the employer can always terminate without notice unless a contract provides otherwise.

Where there is a contractual notice period, the contract may also define particular circumstances (such as gross misconduct) in which termination can occur without notice.

Standard document, Terms of employment: International: clause 9.3 is therefore permissible.

Policies and procedures

> 33. Is it a legal requirement in your jurisdiction for employers to follow a disciplinary procedure? Should the employment terms set out the procedure or can reference be made to the employer's policy as set out in *Standard document, Terms of employment: International: clause 12*?

Unless established in a collective bargaining or employment agreement, specific disciplinary procedures are not required.

However, an employer can set out a disciplinary procedure in its employment terms, or can refer in those terms to its disciplinary policy.

Data protection

> 34. Are there any requirements protecting employee privacy or personal data that need to be addressed in the employment agreement? If so, what are they? Is *Standard document, Terms of employment: International: clause 11.1* sufficient to address the legal requirements?

Employees' data protection rights

Standard document, Terms of employment: International: clause 11.1 is sufficient to address US legal requirements regarding the protection of employee privacy or personal data.

In the US, there is no centralised data privacy law; however, there are certain federal and state laws that govern specific areas of data privacy or protection. For example, the Stored Communications Act (SCA) generally prohibits the accessing of the online account of another without that individual's consent.

Similarly, simply asking employees for the passwords to access their social media or online account generally is impermissible in a number of states. In addition, employees have common law "privacy rights" which are enforced through tort claims based on invasion of privacy theories.

Further, the National Labor Relations Board (NLRB) recently ruled that employees have a statutory right under the National Labor Relations Act (NLRA) to use an employer's email system or other IT resources, for personal purposes under the NLRA, such as union organising. That said, the NLRB's approach may change under a new administration.

While different employers can reach different conclusions about whether to monitor employees' social media use, in all cases, employers should avoid efforts to gain unauthorised access to an employee's social media account information, and should carefully consider any employment decisions they intend to implement based on information obtained through social media.

California Consumer Privacy Act

In addition, under the California Consumer Privacy Act (CCPA), effective from 1 January 2020, covered employers (that is, those doing business in California and collecting personal information of California residents) have certain obligations regarding employee personal information:

- Employees of businesses covered by the CCPA are entitled to a privacy notice (notice of collection), giving details of the categories of personal information the employer will collect, and the purposes for which it will be used (this requirement is adequately covered by *Standard document, Terms of employment: International: clause 11.1*).
- Employees could bring a private action (including a class action) if affected by a data breach caused by the employer's failure to maintain reasonable safeguards.

It should be noted that, although employee personal information is currently excluded from most of the CCPA's requirements (for example, requests for access and requests for deletion of personal information), this is temporary and the exclusion of employee personal information from the CCPA's remit is set to end on 1 January 2022.

Employers' data protection obligations

Federal law has established a number of protections for employee information, primarily employee health-related information. These laws, which seek to safeguard some of the most sensitive employee data, include:

- ADA.
- GINA.
- FMLA.
- The Health Insurance Portability and Accountability Act (HIPAA).

Under the ADA there are restrictions on an employer's acquisition and use of medical examinations, disability-related inquiries at the application, pre-offer and employment stages and other protections for confidentiality. Once

an employer acquires employee medical information subject to the ADA, the employer must maintain that data's confidentiality. This means that employee medical information must be maintained separate from personnel records and may only be shared with certain personnel and third parties (for example, first aid and safety personnel, or law enforcement in certain circumstances such as a criminal investigation investigation).

Under GINA, employers are required to keep employees' genetic information confidential, with similar requirements to the ADA. Specifically, GINA restricts the acquisition and the disclosure of genetic information, and also requires that genetic information be maintained as a confidential medical record.

Generally, similar requirements that apply under the ADA also apply to the medical information obtained in connection with the administration of leaves covered under the FMLA. Under the FMLA, an organisation can obtain medical information not just about an employee, but also about an employee's family members (for example, medical certifications, re-certifications or medical histories).

HIPAA's privacy and security regulations do not apply to employers acting as employers, but they nevertheless have implications for employers. For example, these rules apply to the group health plans that an employer sponsors (that is, offers to employees) or administrates for its employees. HIPAA covers "group health plans", which are both insured and self-insured employee welfare benefit plans that:

- Have 50 or more participants or use a third-party administrator.
- Provide health benefits.

Employers that sponsor or administer a group health plan are subject to HIPAA's privacy and security rules which regulate the use and disclosure of protected health information (PHI), and require implementation of administrative, physical, and technical safeguards to secure electronic PHI. They can also apply to the business functions the organisation performs, such as if it is a covered health care provider.

Finally, an increasing number of states require organisations to actively safeguard personal information that they own or maintain pertaining to state residents; for example, their:

- Social security number.
- Drivers' licence number.
- Financial information, including credit and debit card and bank account information.
- Medical information.
- Biometric information.

States that have enacted laws with these requirements include Arkansas, California, Connecticut and Florida.

35. In your jurisdiction, are employers able to monitor and record the electronic communication equipment used by employees as set out in *Standard document, Terms of employment: International: clause 11.2*?

Yes, subject to the considerations outlined below.

When organisations decide to engage in any level of surveillance or search of employees, they should consider what their employees' expectations are concerning privacy. In general, it is best practice to provide employees with a well-drafted acceptable use and electronic communication policy that specifies what they can expect when using the organisation's systems, whether in the workplace or when working remotely.

This includes addressing employees' expectation of privacy, as well as listing the information systems and activity that are subject to the policy.

Surveillance raises a number of legal and employee relations risks, including:

- **CCPA.** Businesses subject to the CCPA will need to be sure that any employee surveillance activity is appropriately covered in notices of collection for employees who reside in California (see *Question 34*).
- **State social media password protection laws.** Over 25 states have laws that prohibit employers from requesting or requiring that employees provide passwords to their online personal accounts. Deploying spyware or keylogging technologies arguably may not constitute a request or requirement in the general sense, but employers should consider how these laws may be interpreted, and shape their approach accordingly.
- **Stored Communications Act.** As mentioned in *Question 34*, accessing personal social media communications or other personal online account communications may run up against protections under the Stored Communications Act.
- **Common law.** As mentioned in *Question 34*, employees also have common law "privacy rights" which are enforced through tort claims based on invasion of privacy theories.

Anti-bribery and corruption

36. What national and international anti-bribery and corruption legislation may apply to the employment relationship in your jurisdiction (*Standard Clause, Anti-bribery and corruption (employment): International*)?

The Foreign Corrupt Practices Act (FCPA) prohibits the influencing of foreign officials with any personal payments or rewards, and therefore applies to employment relationships because employers must ensure employees are not in breach of the FCPA.

The FCPA has extraterritorial reach, but its extent is under debate in the courts. Most recently, the US Court of Appeals for the Second Circuit held that the proper exercise of jurisdiction over a foreign national located abroad charged with violating the FCPA requires a demonstration that the foreign national took some action in furtherance of the violation while in the US, or otherwise acted as an employee, officer, or agent of a US entity in furtherance of the violation.

This is considered a narrow reading of the FCPA, but it is uncertain whether other circuit courts will follow this application of the law. Companies will often elect to settle FCPA allegations instead of risking an adverse determination in court, given the uncertainty of the FCPA's extraterritorial reach.

While the FCPA will apply without inclusion in the contract, reference to the FCPA is sometimes included in more comprehensive contracts.

Intellectual property (IP)

37.If an employee creates IP rights in the course of their employment, in the absence of a provision in the employment agreement, who owns those IP rights?

In general, under US common law, if an employee creates IP rights in the course of their employment, and the employer hired the employee for the purpose of creating the IP, in the absence of a provision in the employment agreement, the employer owns those IP rights.

Restraint of trade

38. Is it possible to restrict an employee's activities during employment (as set out in *Standard document, Terms of employment: International: clause 2(g)* and *Clause 2(h)*) and after termination? If so, in what circumstances can this be done?

The enforceability of restrictive covenants is governed by state law, and varies significantly from state-to-state. For example, "employee-friendly" states such as California and Nevada impose strict requirements that rarely uphold restrictive covenants. Conversely, "employer-friendly" states such as Michigan and Texas provide greater leeway for employers to limit a former employee's future activity in the workforce. Generally, courts in states that

enforce restrictive covenants hold that a covenant restricting the activities of an employee on termination of their employment with the employer will be enforced if it:

- Protects a legitimate business interest.
- Is reasonably limited in scope, time and place.
- Is supported by consideration.
- Is reasonable.

In other words, it should afford only a fair protection to the employer's interest, and not be so broad in its operation as to interfere with the interests of the public or prevent an employee from engaging in their livelihood.

Restriction of activities during employment

Yes, it is generally permissible to restrict the employee, during the period of employment, from engaging in other employment, trade or business without written consent, to the extent that this could reasonably be expected to:

- Compete with the employer's interests.
- Prevent the employee from devoting full attention to the responsibilities of the job.

Post-employment restrictive covenants

It is permissible, and common practice, for US non-compete clauses to prohibit an employee from working for competitors or otherwise engaging in competitive business activities for a set period after employment.

Some common elements of a non-compete clause include:

- A tolling provision: time for non-solicit/non-compete is tolled during the period of any breach (for example, if an employee had a 12-month non-compete, and they breached it for six months, then the restricted period could be extended by an additional six months).
- A provision clarifying that the agreement supplements, rather than replaces, statutory and common law obligations (for example, the employee duty of loyalty or applicable trade secret statute).
- A provision permitting the employee and/or employer to show the agreement to potential subsequent employers.
- Provisions allowing the court to "blue pencil" any restrictions it deems to be overly broad, and to enforce the remainder of the covenant.

Other types of common post-employment restrictive covenant include:

- Non-solicitation of customers.
- Non-solicitation of employees.

Unlike in some countries, compensation during the period of a non-compete is neither legally necessary nor common practice. Some employers do provide compensation, and that may be a factor supporting enforcement of a non-compete.

Variation of contract

39.In your jurisdiction, is an employer able to change the non-essential terms of employment by giving at least 30 days' notice as set out in *Standard document, Terms of employment: International: clause 15.2?*

Yes. As employment relationships are typically of an "at-will" nature, the relationship can be changed at any time. However, if an employer wishes to change the terms of employment, it is best practice to provide adequate notice in advance of the change even though this is not required by law.

Survival of Obligations

40. Does *Standard document, Terms of employment: International: clause 16* have any effect in your jurisdiction (that is, the survival of obligations to enable the provision of the confidentiality clause (see *Standard document, Terms of employment: International: clause 10*) and any restrictive covenants that may be included in the agreement to continue after termination of the agreement)?

Yes, *Standard document, Terms of employment: International: clause 16* enables the provision of the confidentiality clause (*clause 10*) and any restrictive covenants that may be included in the agreement to continue after termination of the agreement. It is common in the US for restrictive covenants, such as a non-competition, non-solicitation or a confidentiality provision, to survive the employment relationship.

Governing law and jurisdiction

41. Does the law in your jurisdiction dictate which governing law and jurisdiction will apply to the employment agreement (see *Standard document, Terms of employment: International: clause 18*)?

The employee's statutory rights, such as protection against discrimination or retaliation in the jurisdiction where work is performed, cannot be displaced by contractual choice of law.

Otherwise, under common law, the parties to the employment agreement are free to determine governing law and jurisdiction, as long as these have a reasonable relationship to the parties or agreement at issue.

Scope of employment regulation

42. 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

Foreign nationals legally employed in the US enjoy the same legal protections under federal Equal Employment Opportunity (EEO) laws (see *Question 3*) as US citizens.

This will generally also be the case under state discrimination laws.

Laws applicable to nationals working abroad

US citizens working abroad are protected by the US EEO laws while working abroad for a US company or a company controlled by a US company.

In most states, the extraterritorial reach of state discrimination law has not been defined.

It should be noted that a US citizen seeking to bring a claim in the US courts based on extraterritorial conduct would either have to:

- Demonstrate adverse action taken by the US company or controlled company.
- Successfully claim that any foreign entity is subject to US jurisdiction.

Language

43. Does the agreement need to be in a language other than English in order for it to be valid and enforceable (see *Standard document, Terms of employment: International: clause 20*)?

No. That said, the Equal Employment Opportunity Commission has found failure to provide non-native English speakers with translated employment policies and disciplinary documents to be discriminatory on the basis of national origin (*EEOC Enforcement Guidance on National Origin Discrimination*). It is recommended that employment documents and notices be translated into the language known to be the primary language of a substantial percentage of the workforce.

Execution

44.How does this agreement need to be executed in order to ensure that it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

Execution formalities

None.

Registration formalities

None.

45. In your jurisdiction, are the parties able to sign the agreement separately as set out in *Standard document, Terms of employment: International: clause 19*?

Yes.

Proposals for reform

46. Are there any proposals to reform any employment/labour laws in your jurisdiction?

On the federal, state and local level there is constant reform of employment and labour laws. In particular, given the 2019 novel coronavirus disease (COVID-19) pandemic, there have been changes and updates regarding paid sick leave, furloughs, temperature monitoring and COVID-19 testing in the workplace, employment benefits and more (see the Department of Labor *site* (*https://www.dol.gov/agencies/whd/pandemic*) for tracking relevant legislative updates related to COVID-19 in the workplace).

General

47. Are there any clauses in *Standard document, Terms of employment: International* that would not be legally enforceable or not standard practice in your jurisdiction?

No.

48. Are there any other clauses that would be usual to see in *Standard document, Terms of employment: International* and/or that are standard practice in your jurisdiction?

The US default position is that private sector employment relationships are "at-will": either the employer or the employee may terminate the employment relationship at any time, for any (non-discriminatory or non-retaliatory) reason with or without notice. Therefore, it is common for an "at will" clause, highlighting the nature of the relationship, to be included in the employment agreement. This could be worded along the following lines:

"The Company and the Employee acknowledge that the Employee's employment with the Company will be "at will", meaning that employment may be terminated by either party at any time with or without cause."

Also, it would be common to have a separate confidentiality and invention agreement with very detailed definitions of proprietary information and provisions covering rights to intellectual property. That agreement often also contains restrictive covenants.

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