The Legal 500 & The In-House Lawyer
Comparative Legal Guide
United States: Employment & Labour Law (3rd edition)

This country-specific Q&A provides an overview to employment laws and regulations that may occur in United States.

This Q&A is part of the global guide to Employment & Labour Law. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/practice-areas/employment-and-labour-law-3rd-edition/

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1. **Does an employer need a reason in order to lawfully terminate an employment relationship? If so, describe what reasons are lawful in your jurisdiction?**

   Except as otherwise provided in an employment contract or collective bargaining agreement, no law requires employers to follow a formal procedure when discharging individual employees. Generally, employees employed on an "at-will" basis may be terminated, with or without cause or grounds, provided it is not for an impermissible reason, most commonly discrimination on grounds of a category protected by law or protected "whistleblowing" activity (reporting or

objecting to certain employer activity where the employee reasonably believes that the employer has engaged in violations of specific laws). The employment contracts of executives and other highly-skilled individuals often incorporate a “just cause termination” clause, mandating that the employee may only be terminated (without severance or damages) for “cause” on specified permissible grounds.

2. **What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned?**

There are no restrictions on an employer’s ability to collectively dismiss its employees. However, the Worker Adjustment and Retraining Notification (WARN) Act requires covered employers to provide notice 60 days in advance of covered plant closings and mass layoffs to: 1) the affected workers or their representatives (e.g., a labor union); 2) the dislocated worker unit in the state where the layoff or plant closing will occur; and 3) to the local government.

In general, employers are covered by the WARN Act if they have 100 or more employees, excluding employees who have worked fewer than six months in the last 12 months and not counting employees who work an average of fewer than 20 hours a week.

A covered plant closing is defined as the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.

A covered mass layoff is defined as a layoff that does not result from a plant closing, but which will result in an employment loss at the single site of employment during any 30-day period for: (1) at least 33% of the employer‘s

active workforce (excluding any part-time employees) and 50 or more employees (excluding any part-time employees), or (2) at least 500 employees (excluding any part-time employees).
Even if a single mass layoff or plant closing does not trigger the WARN Act's collective dismissal requirements, an employer also must give the 60-day WARN Act notice if the number of employment losses for two or more groups of workers, each of which is fewer than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period, of either a plant closing or mass layoff.

In addition to the federal WARN Act, many states have implemented their own collective dismissal notification statutes, known as "mini-WARN" laws. The state mini-WARN laws often mirror the federal statute, but may provide additional protections such as increasing the notice period or lowering the minimum thresholds for providing notice. For example, Illinois, Iowa, and New Hampshire, New York, and Wisconsin's "mini-WARN" acts apply to layoffs of as few as 25 employees.

3. **What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?**

No statute governs the employment relationship when a business transfers to new ownership. As most employees are employed "at-will," a new employer is free to offer employment to the employees of the seller/transferor employer or alter the terms and conditions of employment at the employment site. If a union represents the employees of the seller, the new employer may be under a duty to bargain with the labor union and cannot change any terms and conditions of employment without first bargaining with the labor union.

There is no obligation for a party acquiring a business in an asset sale to retain any of the seller's employees. However, if the new employer reorganizes the

workforce after the transfer, which results in a covered plant closing or mass layoff, the new employer or “take over party” must notify employees 60 days in advance. In addition, an employer who acquires a workforce consisting of unionized employees is required to bargain with the union in good faith regarding the effect of the layoff on unionized employees and, in certain situations, may be required to honor the terms and conditions of employment articulated in an existing collective bargaining agreement.

4. **What, if any, is the minimum notice period to terminate employment?**

Due to the at-will nature of most employment relationships, either the employer or the employee may terminate the employment relationship at any time, for any reason or no reason at all, without providing notice, unless otherwise agreed. There are however limited circumstances, which trigger requirements, under the federal WARN Act, previously discussed in response to Question 2, and similar state law measures.

Another federal statute, the Older Workers Benefit Protection Act (OWBPA) does not require pre-termination notice but imposes notice requirements in obtaining releases and waiver of age discrimination claims. Under the OWBPA,(which amended the Age Discrimination in Employment Act (ADEA)) prohibiting employment discrimination and retaliation against employees and applicants age 40 or older, an employee separation agreement that includes the release of an age claim will not be considered knowing and voluntary unless, it (among other things) provides the employee at least 21 days to consider the agreement before signing and an additional 7 days to revoke the agreement.

If the termination is part of an exit incentive or other employment termination program including two or more employees, the employees must be given at least 45 days to consider the agreement before signing and an additional 7

days to revoke the agreement. In either case, the agreement is not effective or enforceable until after the expiration of the revocation period.

5. **Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?**

   Due to the at-will nature of most employment relationships, either the employer or the employee may terminate the employment relationship at any time, for any reason or no reason at all, without providing notice, unless otherwise agreed. Although the WARN Act requires a 60 day notice period, nothing under the Act specifically requires employers to continue to employ affected employees during the 60 day notice period. Consequently, employers may provide “payment in lieu” of providing WARN notice provided that they properly value the 60 day period, including all compensation and benefits. Failure to properly compensate affected employees under WARN may result in litigation, attorney’s fees, and civil penalties.

   Where the parties to an employment agreement have agreed to a notice period, they may also contractually agree to payment of money to a worker in lieu of a notice of termination.

6. **Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to say at home and not participate in any work?**

   Where an employee is entitled to a notice period by contract or statute, the employer generally may require the employee to remain at home and not participate in work. Unlike in many countries, however, it should not be assumed that garden leave arising from an employee’s obligation to provide pre-termination notice under an employment contract would be valid in the U.S.

if it does not satisfy restrictive covenant requirements. When used to keep an employee out of the work environment, garden leave operates much the same as a broad non-compete clause and has been recognized and scrutinized by the courts as such, as discussed in response to question 17.

7. **Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.**

Unless otherwise provided in an employment contract or collective bargaining agreement, no federal law requires employers to follow a formal procedure when discharging individual employees. Several states do require employers to provide notice to a terminated employee as to the date of termination and loss of employee welfare benefits, if provided, as well as issue the last paycheck within a set time period. Additionally, employees covered under an employer's health insurance program must be provided notice as to the option to continue coverage for a specific period of time following the termination, typically 18 months, at the employee's own expense.

8. **If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?**

Failure by the employer to follow the procedure set forth in the employment contract may result in any contractual remedies stipulated.

An employer may face additional consequences if a wrongful termination lawsuit is brought. The U.S. "at will" employment doctrine has been tempered in some states by a "good faith and fair dealing" provision that prohibits

employers from taking advantage of an employee's at will status. For example, an employer could be liable for terminating an employee just prior to receiving his/her bonus to avoid payment of the bonus. Generally consequences are monetary and may include compensation of lost wages and benefits, damages for pain and suffering, punitive damages (if a tort claim is stated), attorneys' fees, and court costs. Other non-monetary consequences include reinstating the employee to his/her former position, although this is an infrequent remedy in the US outside of the unionized workforce.

9. **How, if at all, are collective agreements relevant to the termination of employment?**

   One of the distinctive characteristics of collective bargaining agreements in the US is that the employee, unlike in the customary "at will" employment relationship, is typically protected from termination without just cause, and may challenge a termination through an internal grievance process and arbitration.

10. **Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?**

    Generally, unless the WARN Act or similar state statutes are implicated (see response to Question 2), an employer is not required to obtain the permission of or inform a third party before being able to validly terminate the employment relationship.

What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

11. Although individuals employed on an “at-will” basis can be dismissed with or

without cause, they are protected from discriminatory adverse employment actions, including dismissal, under the federal, state and local civil rights laws, as well as various anti-retaliation provisions.

Below is a list of statutes that protect workers from discrimination or harassment upon termination of employment, as well as throughout the employment relationship, on grounds of race, color, sex (including pregnancy), national origin, religion, age, disability, or genetic information.

- Title VII and Title II of the Civil Rights Act of 1964
- Age Discrimination in Employment Act ("ADEA")
- Americans with Disabilities Act ("ADA")
- Pregnancy Discrimination Act ("PDA")
- Genetic Information Non-Discrimination Act ("GINA")
- State Laws

Many states have passed laws that prohibit discrimination within their respective jurisdictions. While some of these laws mirror federal statutes, in many jurisdictions these laws provide additional or increased protections such as prohibiting discrimination on the basis of sexual orientation and eliminating or raising caps on damages.

12. **What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?**

Employees found to have been unfairly terminated in violation of the civil rights statutes or anti-retaliation provisions can resort to the various administrative agencies and the court systems. If an employee is found to have been terminated in violation of any applicable statute, the employee may be entitled to some or all of the following remedies: 1) reinstatement to former position; 2)

monetary damages for wages and benefits lost as a result of the termination; 3) monetary damages for any emotional or physical distress suffered as a result of the employer's actions; 4) punitive damages intended to punish an employer for egregious violations of the law; and 5) attorneys' fees.

Limits under federal law on the amount of compensatory and punitive damages a person can recover vary depending on the size of the employer, ranging from a limit of $50,000 to $300,000. These limits do not apply to awards of backpay, frontpay or attorney's fees. The U.S. Congress recently enacted the Tax Cuts and Jobs Act which, inter alia, eliminates tax deduction corporations may take for "payments related to sexual harassment and sexual abuse". In light of the recent #MeToo sexual harassment movement, this may signal future changes to harassment and discrimination related legislation and case law.

13. **Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?**

Under the Family and Medical Leave Act (FMLA) covered employees are entitled to up to 12 weeks of unpaid leave, and it is unlawful for an employer to terminate an employee for using or trying to use FMLA leave, opposing any practice made unlawful by the FMLA, or being involved in any proceeding under or related to the FMLA. Reasons for leave include: the birth of a child, adoption, to bond with child, to care for a spouse, child or parent, for one's own qualifying serious health condition, and for qualifying exigencies related to the foreign deployment of a military spouse, child, or parent. In addition, states have increasingly passed legislation to enhance family leave benefits. For example, in 2018 Massachusetts enacted a paid family and medical leave law, establishing a system for paid family leave up to 12 weeks to care for a family member, and up to 20 weeks for your own illness.

Employees with fixed-term contracts generally have no specific protections upon termination except as agreed by the parties.

14. **Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?**

Congress has established whistleblower protections for employees in the private sector through the adoption of whistleblower provisions in at least 18 federal statutes. In particular, the Sarbanes-Oxley Act of 2002 (SOX) prohibits publicly-traded companies, including any subsidiaries or affiliates whose financial information is included in the consolidated financial statements of such companies, and nationally recognized statistical rating organizations from discharging, demoting, suspending, threatening harassing, or in any other manner discriminating against an employee because such employee provided information, caused information to be provided, or otherwise assisted in an investigation, or filed, testified, participated in, or otherwise assisted in a proceeding regarding any conduct that the employee reasonably believes is a violation of SOX, any SEC rule or regulation, or any federal statute relating to fraud against shareholders. Some states have broader whistleblowing laws protecting complaints of possible fraudulent or criminal conduct, or violations of law, regulation, or public policy.

15. **What financial compensation is required under law or custom to terminate the employment relationship? How do employers usually decide how much compensation is to be paid?**

Except as otherwise provided in an employment contract or collective bargaining agreement, employers need not make severance payments to terminated employees. However, employers often offer severance payments as

consideration for an agreement made between the employer and employee at the time of termination to waive any potential claims arising out of the employment relationship. Although there is no “customary” amount of payment, severance payment is typically premised on the length of the employment relationship – for example, two weeks’ salary for each year worked. Larger employers commonly establish severance plans to facilitate consistent treatment of exiting employees.

16. **Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply.**

Separation agreements are not required under U.S. law, but are commonly entered into whenever the employer provides any termination- related payments on severance. Such agreements must generally meet a number of requirements to be enforceable, including the following: (1) the waiver must be knowingly and voluntarily executed by the employee; (2) the process for obtaining the waiver must be free of employer fraud, undue influence, or other improper conduct; and (3) the agreement must be supported by consideration over and above any benefits to which the employee is otherwise entitled.

Certain claims however, cannot be waived as a matter of law. Such claims include: waiving the right to file a charge with the Equal Employment Opportunity Commission (EEOC) and claims under the Fair Labor Standards Act (FLSA). Several states (including California, Florida, Illinois, New York, and Texas) prohibit waiver of claims for unemployment and/or workers’ compensation benefits.

Further, specific criteria must be satisfied for a waiver of federal age discrimination claims to be considered “knowing and voluntary” under the Older

Workers Benefit Protection Act (“OWBPA”), as discussed above in response to Question 4.

17. **Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.**

The extent to which a non-compete agreement is permissible by law varies by state. Generally, courts in states that enforce non-compete agreements hold that a covenant restricting the activities of an employee upon the termination of his or her 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, and is reasonable.

The reasonableness of a restrictive employment covenant often is considered in light of the following six factors:

- Length of time the restriction operates;
- Geographical area covered;
- Scope of business covered;
- Fairness of and business need for the protection accorded to the employer;
- Extent of the restraint on the employee’s opportunity to pursue his occupation; andv
- Extent of interference with the public’s interests.

Notably, in California and North Dakota non-compete agreements are generally invalid and unenforceable. Oklahoma law prohibits non-compete agreements, except that an employer may prohibit former employees from directly soliciting the sale of goods, services, or a combination of goods and services from “established customers”. Montana generally prohibits restrictive covenants except under certain narrow factual circumstances.

18. **Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?**

Employers can and commonly do require a worker to keep information relating to the employer confidential after the termination of employment, through contractual agreement. In addition, in May 2016, former President Obama signed into law the Defend Trade Secrets Act (DTSA) providing companies, for the first time, a federal private action for misappropriation of trade secrets. Although there were already similar state remedies in place, given the uncertainty of protection from one state to another the DTSA significantly enhances protection of trade secrets across multiple jurisdictions. The enactment of the DTSA resulted in an escalation in litigation centered on alleged trade secret misappropriation, in particular in the technology industry. In addition, large jury awards in recent trade secret misappropriation cases have helped what was once an underused cause of action, become an effective tool for protecting trade secret information in the digital age.

The DTSA does not preempt state trade secret laws, and state courts and state law remain an option for victims of trade secret misappropriation. With its federal forum and federal remedy, the DTSA, will over time create a nationwide body of law and provide a degree of predictability for company litigants. Remedies under the DTSA include civil seizure, an injunction, and an award of monetary damages. The court may award damages (i) for actual loss caused by misappropriation of the trade secret, (ii) for any unjust enrichment caused by misappropriation of the trade secret, and (iii) for a reasonable royalty for the unauthorized disclosure or use of the trade secret.

Are employers obliged to provide references to new employers if these are requested?

19. An employer has no legal obligation to provide references to new employers.

Moreover, it is common for an employer to adopt a company policy refusing to provide any references, or providing limited information only such as names, dates, and salary. Company policies which limit or refuse to provide references have arisen largely out of a desire to avoid defamation or other claims arising out of negative references.

20. **What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?**

Even though U.S. employment is generally “at will” and theoretically the employer may terminate without cause, discrimination and whistleblowing suits frequently turn on the employer’s poorly supported rationale for termination, which may appear pretextual. Accordingly, documentation to support the basis for employee termination is crucial. If the decision to terminate is based on performance, an employer should maintain a documented file of the employee’s performance, and the employee should have been put on notice that his/her performance was below company standards. If termination is the result of issues other than performance, the employer should document each incident to demonstrate a history of problems. Documenting the employee’s performance and history of problems, as well as documenting the termination process itself, can help build a strong defense for a wrongful termination claim.

Further, the employer should ensure, and be able to demonstrate that employees are familiar with company procedures and made aware of any updates. Employees should sign an acknowledgement that they have read and are familiar with all policies and procedures.

In general, employers unfamiliar with the U.S. legal system and culture need to guard against complacency based on the comparatively light degree of regulation of the employment relationship and recognize the perils of

terminating employees in protected classes without solidly supported evidence. It is also highly recommended to train expatriates (particularly managers) assigned to the US in how to prevent discrimination, harassment, and whistleblowing issues in the US workplace.

21. **Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?**

There have been minimal changes to the basic structure of federal employment law under the Trump administration. The majority of federal labor and employment bills introduced in 2018 were stalled in Congress. Most recent federal employment law developments have occurred through regulatory bodies. For example, the National Labor Relations Board (NLRB) issued a proposed rule clarifying the standard for determining if two or more employers are joint employers of employees, reversing its 2015 decision in *Browning-Ferris Industries*. The standard provides that an employer may be found to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine.

In other NLRB developments, the U.S. Supreme Court in *Epic Systems v. Lewis*, No. 16-285, recently held that class or collective action waivers in employment arbitration agreements (requiring employees to pursue work-related claims in arbitration) are lawful under the National Labor Relations Act (NLRA), but this did not end all controversies involving waivers. In several cases before it, the NLRB will determine whether the arbitration agreements independently violate the NLRA because they interfere with employees' ability to access the Board.

At the same time, employers should remember that state law is often the dominant influence in employment law matters, and the states remain free to either follow or resist any employment related trends in Washington, as well as set their own course in providing additional protections for employees. For example, California recently enacted a number of sexual harassment prevention and anti-discrimination laws that became effective January 1, 2019.