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Coming to America: A Crash Course in U.S. Employment Law for Non-U.S. Employers

By Samantha Rozell

In this article, the author provides non-U.S. employers who are looking to enter the U.S. market or establish a U.S.-based workforce for the first time with a general overview of the key concepts to keep in mind when looking to engage or terminate workers in the U.S.

U.S. employment laws are relatively unique in terms of the flexibility that they provide employers to determine the terms and conditions upon which they wish to hire (and terminate) employees. However, because the U.S. employment law regime is governed by a patchwork of federal, state, and sometimes even local laws, it can prove challenging to navigate. This article aims to provide non-U.S. employers who are looking to enter the U.S. market or establish a U.S.-based workforce for the first time with a general overview of the key concepts to keep in mind when looking to engage or terminate workers in the U.S.

AT-WILL EMPLOYMENT

In all U.S. states other than Montana, absent an agreement to the contrary, the relationship between an employee and his or her employer is presumed to be “at-will.” This means that either party may terminate the employment relationship at any time, with or without notice, and for any reason, except for a reason prohibited by law. There are also different rules for certain group terminations. This “at-will” rule also generally

The author, a partner in the Chicago office of White & Case LLP, may be contacted at samantha.rozell@whitecase.com. Tal Marnin, co-head of Employment, Compensation & Benefits at the firm, contributed to the preparation of this article.

means that, absent an agreement otherwise, employers can change the terms and conditions of employment at any time (other than for a reason prohibited by law, including providing benefits that do not meet minimum requirements under applicable law).

Although this is the general presumption in most states, it is best practice for employers to state expressly that employment is “at-will” in any materials provided to employees (including application forms, offer letters, employee handbooks, employment policies, etc.) that might otherwise be interpreted as creating a fixed term of employment (and to have such documents reviewed by an attorney).

COMPLYING WITH APPLICABLE EMPLOYMENT LAW

Any entity doing business in the United States, regardless of whether the entity is foreign or domestic, must adhere to applicable federal, state, and other local labor and employment laws. Note that, in general, the relevant governing law is determined by the law of the state in which the employee works (and/or the state in which the employer operates in certain circumstances, such as if the employee is a remote worker reporting into the state in which the employer operates), rather than the law of the state in which the employing entity is incorporated.

Overview of Key Statutes

Notwithstanding the flexibility of the at-will employment relationship, employers are required to comply with various federal, state and local laws aimed at protecting employees’ rights and entitlements. These include, without limitation, laws regarding –

- *Registration Requirements* – In order to operate as an employer in the U.S., employers must first obtain a federal Employer Identification Number (EIN) from the U.S. Internal Revenue Service (IRS), following which they will need to register as an employer in the applicable state(s) in which they intend to have employees (employers may also have to register to do business in such state(s) and in other states where they intend to operate). The specifics of what needs to be done to register as an employer differ by state, but most, if not all, states require:
 - (i) registration with the applicable state Department of Labor for purposes of unemployment insurance, tax withholding and wage reporting;
 - (ii) new hire reporting (i.e., reporting the hiring of each new employee); and

(iii) workers' compensation insurance, as noted below.

- *Minimum Wages and Overtime Pay* – the federal Fair Labor Standards Act of 1938, as amended (the FLSA), mandates that employers pay most employees a minimum wage for all hours worked, as well as overtime pay for hours worked in excess of 40 hours per workweek (as discussed further below). State and local law can impose additional requirements, and some states require that employees be paid a wage higher than the federal minimum.
- *Workers' Compensation* – every U.S. state (other than Texas, in certain circumstances) requires employers to maintain a workers' compensation insurance policy for the benefit of their employees. Workers' compensation provides payment to employees who are injured while acting in the course of their employment. Most employers purchase private insurance to cover workers' compensation at or before the time the first employee is hired.
- *Discrimination* – employees are protected by federal and state (and, in some places, local) laws aimed at preventing discrimination based on “protected characteristics,” such as age, gender, race, religion, sexual orientation, national origin, and disability status. These laws apply during the hiring process and throughout the course of the employment relationship, and must also be considered when making termination decisions.
- *Collective Bargaining* – the National Labor Relations Act (NLRA), administered by the National Labor Relations Board (NLRB), grants employees the right to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing. The NLRA protects employees' rights to engage in concerted activities for mutual aid or protection, and prohibits employers from interfering with, restraining, or coercing employees in the exercise of these rights.
- *State Insurance Laws* – Certain states require employers to provide additional employee-related insurance, such as short-term disability insurance (i.e., mandatory insurance for non-work-related injuries or illnesses) and paid family leave insurance.

Employer Taxes

Employers are required to pay into certain social insurance programs on behalf of employees. Specifically, employers are required to pay a wage-based tax and additionally, withhold a percentage of each employee's wages per pay period. The tax and withheld pay are sent to

the Federal government to fund, among other things, Social Security, a social insurance program that provides retirement, disability, survivorship and other benefits. In addition, most employers pay a federal and state quarterly unemployment tax on part of their total payroll that goes towards subsidizing wages for employees who have been terminated involuntarily.

Work Authorization

Employers must ensure that all workers are authorized to work legally within the United States. Federal immigration laws require employers to verify the immigration status of their employees and refrain from knowingly recruiting or employing any unauthorized immigrants. This requires employees to fill out a Form I-9 (available on the website of the United States Citizenship and Immigration Services (USCIS)) with their personal details, and employers to review the employee's identifying documents (such as a passport, social security card, work visa, or green card) on the employee's first day of employment to ensure they are legitimate. A government computer program called "e-verify" is available (and sometimes required to be used) to assist employers in this process.

Overtime Eligibility

Under the FLSA and relevant state wage and hour laws, employers are required to provide employees who work more than 40 hours per workweek with overtime pay, unless the employees fall into an exemption from such requirement. State and local law can impose additional requirements. The minimum federal overtime pay rate is 1.5x the employee's hourly wage rate. Certain employees with supervisory responsibilities, specialized technical skills or knowledge, or who earn more than a certain amount annually (which amount is adjusted for inflation each year) are considered exempt from the overtime pay requirements; certain sales and other employees can also be considered exempt. Employers should consult with an attorney when onboarding employees to determine whether they should be classified as exempt or non-exempt from overtime pay requirements, and employers should revisit these classifications on a regular basis.

Professional Employer Organizations

Where a U.S. employer does not have the infrastructure or headcount to support a U.S. human resources (HR) function to process payroll, ensure all employment laws are complied with, and/or provide benefits,

it may engage a “professional employer organization” (a PEO). The PEO serves as the legal employer for tax reporting purposes, and sponsors healthcare and retirement plans in which the employees can participate; from a U.S. legal liability perspective. The employees are “co-employed” by the U.S. employer and the PEO. Many employers with a small U.S. footprint view the PEO as an attractive option due to its ease and cost relative to establishing an internal company U.S. HR function.

EMPLOYMENT AGREEMENTS

While some U.S. employers opt to enter into written offer letters or agreements with their employees, a written employment agreement is not required in the U.S. Indeed, many employers operate without written employment agreements other than for their senior-most executives. The majority of the workforce instead often receives a brief (one to two page) offer letter that confirms, among other things, their position and compensation and confirms the “at-will” nature of their employment. To be clear, at-will employees are not legally required to sign written contracts memorializing their at-will status, even though it is best practice to memorialize this status in writing in some form. Moreover, the existence of a written agreement does not, in and of itself, negate an employee’s “at-will” status.

Where a written employment agreement is in place, it will typically cover the material terms of employment, including the individual’s job title, classification as hourly or salaried and exempt or non-exempt from overtime pay requirements, base salary or wage rate, and eligibility to participate in company-sponsored benefit plans. Employment agreements will also often set forth an individual’s eligibility to earn a cash bonus under the applicable plan or policy (many employers maintain discretionary annual bonus policies, but employers have flexibility to structure these plans however they want to ensure they align with the company’s goals). In addition, if the employer elects to provide an employee with eligibility to receive severance upon certain terminations, this will often be set forth in an employment agreement (although it may also be set forth in a separate severance plan or policy document). Employment agreements may also contain restrictive covenants, which are discussed further below.

There are no laws or regulations in the U.S. mandating that an employment agreement follows a particular form. Employment agreements can range from simple one- or two-page letter-style agreements to lengthy formal contracts. The form generally depends on the norms in the industry, the employer’s typical practices, and the context in which the individual entered into the agreement (for example, if an executive negotiates an agreement with an employer in connection with a corporate transaction, that agreement will often be more robust than an agreement used by the company for rank-and-file new hires).

RESTRICTIVE COVENANTS

Many employers in the U.S. require their employees to agree to restrictive covenants in connection with commencing employment or as a condition of receiving certain other benefits (such as equity incentive awards or severance). These covenants may be contained in, for example, written employment agreements, standalone restrictive covenant agreements, or in equity incentive award agreements. The nature, scope, and duration of these covenants will depend on the employer's industry, the seniority of the relevant employees, and the applicable state law.

Confidentiality and IP Assignment

Most U.S. employers bind their employees to confidentiality covenants preventing them from disclosing or using any trade secrets or confidential company information at all times during employment and following any termination. U.S. employers also often obtain intellectual property assignment covenants from their employees, which ensure that the employer holds the rights to all intellectual property that the employee develops during employment which is related to the business of the employer (whether or not such intellectual property was developed on company time). In general, these covenants can be obtained with all employees (subject to legally required carveouts) in all industries, regardless of seniority or location.

Non-Disparagement

Some employers also obtain non-disparagement covenants with employees. These covenants generally apply during and following employment at all times. Note that the NLRA limits the breadth of non-disparagement covenants that can be obtained with employees who are not considered "supervisors," and non-disparagement clauses may not legally restrict employees from engaging in legally protected whistleblowing activities related to financial improprieties, workplace discrimination or other unlawful conduct.

Non-Compete, Non-Solicit and Non-Interference

Many U.S. employers also wish to bind their employees to covenants of non-competition, employee non-solicitation, and customer non-interference that apply during, and for a certain period of time following, the employee's employment. While this is achievable in many circumstances (with enforceability depending on the state in which the employee works,

as noted below), these covenants must be narrowly tailored to protect the value of the goodwill of the employer's business. Post-termination non-competes and non-solicit/non-interference covenants typically last anywhere from six (6) to 24 months following the employee's termination of employment, with the length of time dependent on the employee's import to the business, what is permitted under the laws of the state in which he is located, and the consideration provided in exchange for the covenant. Additionally, no-hire restrictive covenants, which prevent a former employee from hiring or attempting to hire the employer's other employees, may also be used and must similarly comply with state laws and be reasonably tailored.

Non-Compete Enforceability Challenges

Currently, the enforceability of non-compete, non-solicit, and non-interference covenants is generally dictated by the laws of the state where the impacted employee provides services, and in the absence of such laws, case law in state and federal courts. However, this is a rapidly evolving area of law in the United States. In most states, there is no requirement that an employee be paid for all or any portion of his post-termination non-compete period; continued employment and access to confidential company information is often considered sufficient consideration. However, at the time of this writing, four (4) U.S. states (California, North Dakota, Minnesota, and Oklahoma) have passed laws almost completely banning non-competes for all employees in the state, and another, growing list of states (including, without limitation, Wyoming, Massachusetts, and Colorado) have passed laws requiring employers to provide additional pay and/or notice to employees with whom they wish to seek non-competes. Many states also prohibit employers from entering into non-competes with employees making less than a certain amount annually. In 2024, the U.S. Federal Trade Commission attempted to implement a federal rule (which would supersede any state statute or case law) that would significantly curtail employers' ability to obtain enforceable non-competes with their employees, however that rule was preliminarily struck down by federal courts, and the Trump administration has not indicated a likelihood to pursue further federal prohibitions on non-compete agreements.

Therefore, employers that are looking to sign U.S. employees up to any restrictive covenants (and particularly non-compete covenants and non-solicit/non-interference covenants (which may be considered non-competes in and of themselves under the laws of certain states) should consult with an attorney to ensure that the covenants are enforceable (namely, reasonable in scope and duration, and supported by adequate consideration) under the statute or case law (as applicable) of the relevant U.S. state, as the legal landscape in this area is frequently changing.

TERMINATING EMPLOYEES

Employees in the United States generally do not have any statutory or common law severance or notice entitlements (except for employees who are not at-will and are therefore subject entitlements or damages under the relevant laws of the applicable state). Even with this flexibility, U.S. employers must approach any employee termination carefully, so as to avoid actually terminating, or appearing to terminate, an employee for legally prohibited reasons (e.g., discrimination, due to a workplace injury, or in retaliation for engaging in whistleblowing activities). To this end, U.S. employers should keep clear internal records of employee performance, to the extent such records would be able to support an objective rationale for termination.

Severance

Most U.S. employees are not eligible (whether under contract or otherwise) to receive any severance payments or benefits upon a termination of employment. However, where U.S. employers do offer severance, they typically do so in one (or more) of the following ways –

- **Senior Executive Contracts** – employers will often negotiate severance provisions with their key employees in the employees' individual employment agreements. In most publicly traded companies, most members of the senior executive team will have written agreements providing for severance. In privately-owned companies, the group of senior executives with written contracts providing for severance tends to be smaller.
- **Written Severance Policies** – some employers maintain written severance policies that apply to certain groups of employees, with severance determined based on the employee's seniority at the time of termination. In some cases, these severance policies will apply only upon certain termination events, such as a broad-based reduction in force. However, these tend to be disfavored by human resources professionals, as written severance policies sometimes must comply with the onerous requirements of the federal Employee Retirement Income Security Act of 1974, as amended (ERISA).
- **Ad-Hoc/Informal Severance Practices** – To the extent a U.S. employer provides severance to its general (non-executive) employee population, it will typically do so through an

unwritten, informal practice. This approach provides flexibility for the employer to change their practices from time to time and employee to employee.

In any case, severance is typically paid out in the form of a cash amount, which is often tied to the employee's base pay at the time of termination. Executive contracts will often provide for severance calculated as a multiple of the person's base salary, payable in installments over a period of time (although executives will often try to negotiate for lump sum payments). Employers use the installment payments as a way to encourage former employees to comply with any post-termination restrictive covenants (as most agreements will provide that severance cuts off upon an actual or threatened breach of a restrictive covenant during the severance period).

U.S. employers also sometimes offer to subsidize the cost of continued participation in company-sponsored healthcare plans following termination. Under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (COBRA), U.S. employers are required to offer terminated employees and their families the option to continue participating in company healthcare plans for up to 18 months post-termination at the employee's sole expense (which includes the approximately two percent (2%) administrative fee charged by plan administrators for permitting former employees to participate). As such, employers will sometimes offer, as a severance benefit, to subsidize those costs (so that the employee is paying only what they paid while still employed) or cover those costs in full.

The foregoing is not an exhaustive description of severance benefits offered in the U.S., which can be bespoke depending on the individual, seniority, industry and specific termination scenario. Because of the flexibility of the U.S. legal landscape, employers and employees are free to negotiate payment or provision of any benefits as severance, including accelerated vesting of equity incentive awards, waiver of post-termination non-compete covenants, or any other item of value agreed between the parties.

Release of Claims

A primary reason that a U.S. employer will offer to provide severance to an employee is that the payments and benefits provided will serve as consideration for a general release of claims in favor of the employer and its affiliates. Nearly all U.S. employers require employees to execute a release of claims as a condition to receiving any severance (whether under a negotiated agreement, a written policy, or an ad-hoc practice). By signing a release, the former employee is barred from pursuing legal action against his former employer for any claims that may have arisen

at any time prior to the date on which the release is signed (e.g., claims related to discrimination, unpaid wages, and workplace injuries), with the exception of certain claims that cannot be waived under federal and/or state law. Under U.S. law, claims cannot be released prospectively, meaning that in order to ensure all claims arising from an individual's employment are released, the individual should sign the release no earlier than his final day of employment.

Employers will usually give employees under 40 years of age between one (1) and three (3) weeks to consider whether to sign the release to ensure that the release will be regarded as knowing and voluntary. Employees 40 years of age and older are protected by federal age-based discrimination laws (the Age Discrimination in Employment Act (ADEA), which includes the Older Workers Benefit Protection Act (OWBPA)), claims under which federal age-based discrimination claims can be released only if the employee is afforded a minimum amount of time (at least 21 days in the case of most terminations; at least 45 days in the case of group terminations (generally layoffs involving two (2) or more employees as part of the same decision-making process) to consider whether to sign the release, and a seven (7) day period following his execution of the release, during which he is permitted to revoke his decision to execute the release. In addition, in order to obtain waivers of claims under ADEA, the OWBPA requires that employees 40 years or older who are laid off in a group termination receive certain information regarding the ages and titles of all employees considered for termination (whether or not they are actually terminated). In all cases, if the release is not signed during the stated time period (or if the employee revokes his signature within the permitted period), the severance offer will be deemed null and void (unless the employer and the individual agree to extend the period, at the employer's discretion). State and local law can impose additional requirements, regardless of the individual's age.

Group Terminations

When a U.S. employer is terminating multiple employees at the same time (or within any rolling 90 day period), the employer should consult with an attorney to determine whether such terminations could trigger notice obligations under the federal Worker Adjustment and Retraining Notification Act of 1988, as amended (WARN) and similar state-level statutes (sometimes referred to as "mini-WARN" laws). Federal and state WARN laws require applicable employers who undertake large-scale layoffs or shutter entire worksites to provide impacted employees with advance notice of such termination (and, in the case of New Jersey, severance as well).

LABOR UNIONS

U.S. employees have the right to form, join, or be represented by labor unions. In certain industries, labor unions use collective bargaining to establish the terms and conditions, including wages, benefits and working conditions, of employment relationships involving their union members. These terms are memorialized in collective bargaining agreements (CBAs) generally between each employer of unionized employees and the local bargaining unit of the relevant union that represents the employer's employees. Unlike in certain European jurisdictions, the U.S. does not have any statutorily mandated unions; however, federal law prohibits U.S. employers from taking any action to prevent their workforce from attempting to unionize.

Unionized employees may participate in healthcare, retirement, and other benefit plans sponsored either by their employer or the union. If they participate in union-sponsored plans, their employer will have certain contribution obligations to those plans set forth in the relevant CBA. Many CBAs require employers to contribute to union-sponsored defined benefit pension plans, called "multiemployer plans." Employers who contribute to multiemployer plans will be exposed to additional liability in the event that they cease their union activities, if other employers with employees in the same union plan(s) do the same, or if the plans have insufficient funding to cover existing or future benefit obligations. Employers should consult with an attorney if they are looking to engage a unionized workforce in the U.S. (or if the workforce in the U.S. attempts to unionize in the future) to help assess the relevant risks.

INDEPENDENT CONTRACTORS

When a U.S. company has specific need for expertise that is not possessed by its existing workforce (e.g., IT professionals, accountants) or that is required to complete a specific project, it may be attractive to engage someone as an independent contractor rather than an employee. Unlike employees, independent contractors are not eligible to participate in company benefit plans and are responsible for satisfying their own tax obligations (and employers do not have an obligation to withhold or make any tax payments on their behalf). Because of this, it is less expensive for U.S. companies to engage contractors than it is to hire employees.

However, employers should take care to ensure that they are not engaging individuals as contractors who should be classified under applicable federal and state wage and hour laws as employees. In order for someone to be properly classified as an independent contractor, he or she should have control, discretion, and autonomy in terms of how, where, and when he provides services to the engaging entity. This means

that such individual generally should not dedicate his or her full business time to the engagement (and should be permitted to set his own schedule), should provide services outside of the ordinary scope of services provided by employees of the entity, and should be able to provide the same or similar services to competitors. Ideally, a consultant also uses his or her own equipment and materials to provide services and does not have any indicia of agency on behalf of the entity (meaning that he does not have a company email address or wear a company uniform). For this reason, U.S. employers generally should also avoid entering into non-competes with consultants, as this may create some indicia of employment.

Ultimately, the question of whether a consultant should instead be classified as an employee is a fact-specific inquiry (and the issue generally arises upon an audit by a federal or state tax or labor authority, or due to a complaint by one or more allegedly misclassified workers). If a consultant is found to be misclassified, the engaging entity would be liable for, among other things, failure to withhold on their compensation, failure to permit them to participate in company benefit plans and potentially failure to pay them overtime pay. Employers should consult with an attorney when determining whether to engage someone as a contractor in the U.S.

EQUITY INCENTIVE AWARDS

U.S. employers often look to incentivize their workforce with equity or equity-based incentive awards. These awards may be granted broadly in publicly traded companies. In private companies, equity incentives are generally limited to a smaller subset of management-level employees.

The appropriate form of equity award for a given U.S. employer will depend on the legal entity structure, industry, and the results that the employer wishes to incentivize. Equity awards generally vest based on a combination of time (service)-based and company-wide performance-based criteria. Employers may grant stock options, either in the form of nonqualified stock options or incentive stock options, the latter of which are eligible for beneficial tax treatment if certain requirements are met. Employers with entities taxed as partnerships in their structure will often avail themselves of the opportunity to grant profits interests, which are an instrument that provides the holder the opportunity to participate in the up-side of the business following grant, with proceeds taxed at capital gains rates only on distribution, if certain IRS requirements are satisfied (including ensuring that the awards have a \$0 valuation at grant on a "liquidation basis," which is a valuation methodology that is generally not respected by non-U.S. tax regulators). Companies may also grant restricted stock units (RSUs), which may be stock- or cash-settled awards. These awards are

not an actual interest in the issuing entity, but instead give the holder a notional right to the value of a specified class of stock. RSUs are sometimes referred to as “phantom awards.” Finally, companies may also grant shares of stock subject to time- or performance-based vesting restrictions (i.e., restricted stock), although this form of award is less common because they may be subject to taxation on the shares as and when they vest (even if there is no liquidity with respect to such stock at that time).

Determining the right equity incentivization strategy is critical to an employer in ensuring that it hires and retains the best available workforce. Employers should consult an attorney to discuss the various options available and the market practices in different industries before determining the form in which equity awards will be granted to the U.S. workforce.

EMPLOYEE BENEFITS

Health and Welfare Plans

Most U.S. employers provide employees (together with their families) with the opportunity to participate company-sponsored health and welfare plans. Under these plans, employers pay a portion of the cost, and employees pay the remainder on a pre-tax basis, via the company’s deducting funds from their paychecks every pay period. In order to provide these benefits on a pre-tax basis, the employer must maintain a Section 125 “cafeteria” plan. U.S. employers should be careful to ensure that they have a valid Section 125 plan in place before offering benefits to employees to avoid an unexpected tax event for the employees on the cost of these benefits.

Retirement Plans

Most U.S. employers also provide employees with retirement savings programs. The most common such program is a defined contribution Section 401(k) plan, under which employees are permitted to defer a portion of their compensation (up to a statutory maximum that is set forth by the IRS each year), pre-tax, into a retirement account. Some employers will also contribute to employees’ 401(k) plan accounts, either in the form of a “matching” contribution up to a certain limit, a profit-sharing contribution, or some other discretionary contribution. Employer contributions are often subject to service-based vesting; employee contributions are always 100% vested. Upon termination, the employee generally may elect to keep his or her account balance in the 401(k) plan or receive a distribution of his account balance and roll over the

distribution, on a tax-free basis, to another employer's 401(k) plan or an individual retirement account.

Other retirement options are also available, including (i) excess deferred compensation (top hat) plans for senior executives, which permit employee deferrals above the statutory 401(k) plan maximum, and (ii) defined benefit pension plans (which have fallen out of favor in the last several decades due to administrative difficulties and challenges ensuring benefits remain funded). Employers should consult with an attorney to discuss the retirement options for their U.S. workforce, as well as the employer-side requirements to ensure that the programs remain tax efficient to employees.

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