THE EMPLOYMENT LAW REVIEW

Twelfth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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UNITED STATES

Susan Gross Sholinsky and Nancy Gunzenhauser Popper[1]

I INTRODUCTION

Employment law in the United States derives from a combination of federal, state and local laws and regulations. Historically, federal law has been the primary source of employment-related statutes and rules. In recent years, however, virtually all the legislative action in the employment arena – and there is plenty of it – has taken place at the state and local levels (i.e., cities and counties).

Federal law applies to all 50 states and Washington, DC. Generally, a federal law pre-empts state or local law when the latter conflicts with the former. On the other hand, there is no federal pre-emption issue when a state or local law addresses a matter not covered by federal law, such as private sector employee paid leave.

For the most part, recent state and local measures have significantly increased employees' legal rights, protections and benefits and have correspondingly expanded employers' legal obligations. As a result, employees in many states and localities enjoy greater rights than they have under federal law. Generally, employers must follow the law that is more favourable to their employees. For instance, many states and localities have enacted minimum wage increases in the past few years that surpass the current federal minimum wage rate. Thus, employers in those jurisdictions must pay their non-exempt employees the higher minimum wage.

Moreover, the ever-broadening scope of state and local laws regulating the employer-employee relationship continues to gain strength as a formidable exception to the long-established employment-at-will doctrine. 'At-will' means that the employment relationship can be terminated by either party, at any time, without notice and for any reason, as long as the termination does not contravene the terms of a written contract (including a collective bargaining agreement (CBA)) or a federal, state or local law. The most likely laws to be raised to contest a dismissal are the anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act and the Equal Pay Act, and their state or local counterparts. Further, a discharge may be challenged under a variety of other laws that also ban retaliation, such as state and local paid sick leave laws.

In addition to termination, the anti-discrimination laws protect individuals with certain characteristics from adverse employment actions involving other 'terms or conditions' of employment, including hiring, promotion, compensation, and so on. Federal law prohibits discrimination based on race, colour, gender, national origin, religion, age, disability,

1 Susan Gross Sholinsky is a shareholder and Nancy Gunzenhauser Popper is a partner at Epstein Becker & Green PC. The authors wish to thank attorneys David J Clark, Brian G Cesaratto, Kevin R Vozzo, Steven M Swirsky, RyAnn M Hooper, Donald Krueger, Elizabeth K McManus, Alison E Gabay, Jang H Im and Arit Butani for their assistance in the preparation of this chapter.

military or veteran status, and genetic information. A United States Supreme Court case of 15 June 2020 clarified that federal employment discrimination protections on the basis of sex includes protection against discrimination based on sexual orientation and gender identity. State and local laws in various jurisdictions prohibit discrimination based on additional categories, such as sexual orientation, gender identity, marital status and status as a victim of domestic violence. Employers doing business in the United States also should be aware that, while federal anti-discrimination laws generally apply to employers with a minimum of 15 or 20 employees, their state and local counterparts may have lower thresholds, and some may apply to all employers, regardless of size.

Anti-discrimination laws also prohibit employers from harassing employees based on a protected category, such as gender, age or race. Harassment is unwelcome conduct that is unlawful when the offensive behaviour becomes a term or condition of employment or continued employment, or when the conduct is sufficiently severe or pervasive to create a work environment that a reasonable person would consider intimidating, hostile or abusive.

These civil rights laws also protect employees and job applicants from retaliation for, among other actions, reporting harassment, discrimination or retaliation, either internally or to a government agency.

The US Equal Employment Opportunity Commission (EEOC) and its state and local counterparts oversee the enforcement of anti-discrimination laws.

Various federal, state and local government agencies enforce other laws governing the employment relationship. For example, the National Labor Relations Board (NLRB) administers, among other labour laws, the National Labor Relations Act (NLRA), which specifically permits non-supervisory and non-managerial employees in the private sector to engage in certain 'protected concerted activities', such as collectively discussing their terms and conditions of employment, engaging in union organising activities, and collectively bargaining with their employers. The US Occupational Safety and Health Administration ensures safe and healthy working conditions for American workers, and it administers several federal whistle-blower laws. Similarly, the US Department of Labor (DOL) promotes the welfare of American workers by, among other measures, overseeing the laws that protect retirement and healthcare benefits, guarantee a minimum hourly wage and overtime pay (under the Fair Labor Standards Act (FLSA)) and provide for unemployment insurance.

In addition to seeking redress for an alleged violation of an employment law via government enforcement agencies, many of these laws grant employees the right to bring a lawsuit in court, although filing a complaint with the appropriate agency often is a precondition to instituting litigation.

II YEAR IN REVIEW

i Sexual harassment and the impact of #MeToo

One of the most significant developments in employment law during the past few years has been the continuing, substantive impact of the #MeToo movement, sparked in October 2017 when the hashtag exploded on Twitter, resulting in a cascade of public sexual harassment and assault allegations involving high-profile names in the media, entertainment and financial services industries. In one of the swiftest transitions from cultural movement to legislative action, the #MeToo movement, which prompted the enactment of workplace anti-harassment laws in states from coast to coast, has continued apace.

There are three predominant trends emanating from the recently enacted anti-harassment laws. The first has been laws mandating employee sexual harassment prevention training. This type of training is now required in California, Connecticut, Delaware, Illinois, Maine and New York. In New York, training must be conducted annually and needs to be interactive. In California, training is required every other year and must be one hour for employees and two hours for managers. Connecticut employees must be trained within three months of hire but only need to be retrained every 10 years. Relatedly, a number of states now require that employers maintain and distribute written anti-harassment policies.

The second trend has been the pushback on the use of non-disclosure provisions in settlements of employee harassment claims. New Jersey now has a sweeping ban on the use of these non-disclosure clauses, so as to allow employees to discuss publicly the underlying facts and circumstances of their allegations. New York and California both require an employee to confirm in writing that it is the employee's preference to incorporate a non-disclosure provision before it may be added to a settlement agreement resolving a claim of sexual harassment. In New York, this requirement was recently expanded to apply to all claims of harassment, discrimination or retaliation.

The third trend has been the weakening of mandatory arbitration agreements. New York and California have essentially banned the use of final and binding pre-dispute mandatory arbitration agreements to resolve potential harassment and discrimination claims. New York's ban, which was extended in 2019 to all discrimination claims, has already been struck down by one federal court, which found that the prohibition was pre-empted by the Federal Arbitration Act (FAA). California's law, which was due to take effect as of 1 January 2020, faced a successful challenge on FAA pre-emption grounds, but further appeals may keep this law alive.

ii The FLSA

New rule for differentiating between independent contractors and employees

On 22 September 2020, the DOL released a new proposed rule for distinguishing independent contractors from employees under the FLSA. The DOL finalised the rule on 6 January 2021. The DOL's final rule adopts a modified version of the 'economic realities' test, focusing on certain factors, and clarifying and rearticulating others.

Perhaps most importantly, the final rule focuses on two core factors that bear on a worker's economic dependence: (1) the nature and degree of the individual's control over the work; and (2) the individual's opportunity for profit or loss. The final rule also lists three other secondary factors that are less probative to the analysis: (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship between the individual and the potential employer; and (3) whether the work is part of an integrated unit of production.

The final rule was scheduled to come into effect on 8 March 2021. However, on 20 January 2021, the Biden administration implemented a regulatory freeze on pending regulations to allow for further review, among other things.

Rule for evaluating joint employment finalised then invalidated

On 16 January 2021, the DOL's Wage and Hour Division published in the *Federal Register* its final rule regarding joint-employer status under the FLSA, completing the rule-making process initiated in early April 2019.

Under the final rule, joint employment was to be determined using a balancing test focused on whether the putative joint employer (1) hires or fires the employee, (2) supervises

and controls the employee's work schedule or conditions of employment to a substantial degree, (3) determines the employee's rate and method of payment, and (4) maintains the employee's employment records.

Under the rule, all four of these factors would not need to be present for a business to qualify as a joint employer. In addition, other factors could be considered if, for example, they were indicative of the putative joint employer's exercise of significant control over the terms and conditions of the employee's work.

However, on 8 September 2020, a federal district court struck down the final rule, concluding that it violated the Administrative Procedure Act by impermissibly narrowing the definition of joint employment under the FLSA. The DOL subsequently appealed the district court's ruling. However, under the Biden administration, the DOL will likely abandon its appeal.

iii NLRB developments

Series of new administrative rules issued

The NLRB has engaged in formal rule-making in the following areas of NLRB law:

a NLRB election law – procedures and timelines, the procedure by which an unfair labour practice charge may block a petition for union representation or decertification, and the conversion of construction industry CBAs into a conventional Section 9(a) bargaining relationship;

b the NLRB's treatment of graduate student teachers as employees; and

c a union's right to gain access to a company's private property.

With regard to NLRB election law, on 1 June 2020, the NLRB published a rule-making that would amend the agency's rules and regulations governing the path to union representation for employees (see discussion in Section XI). The new rules make three significant changes to the representation petition procedure:

a blocking charge policy: the NLRB's amended rule replaces the prior blocking charge policy with a vote-and-impound procedure. Elections will no longer be blocked by pending unfair labour practice charges, but the ballots will now be impounded and not counted until the charges are resolved;

b voluntary recognition bar: The NLRB rule returns to the rule of *Dana Corp*.[2] For voluntary recognition under Section 9(a) of the NLRA to bar a subsequent representation petition – and for a post-recognition CBA to have contract-bar effect – unit employees must receive notice that voluntary recognition has been granted and of a 45-day open period within which to file an election petition, which would allow them to vote on the issue of representation; and

c Section 9(a) recognition in the construction industry: the NLRB rule provides that in the construction industry, where bargaining relationships established under Section 8(f) cannot bar petitions for an NLRB election, proof of a Section 9(a) relationship will require positive evidence of majority employee support and may not be based on contract language alone, overruling *Staunton Fuel*.[3]

2 351 NLRB 434 (2007).

3 335 NLRB 717 (2001).

On 13 December 2019, the NLRB also announced its proposed adoption of a new Final Rule, published on 18 December 2019, that will restore certain provisions of the NLRB's procedures for union representation elections. The proposed rule changes timing and procedure, and permits parties to litigate issues, including whether persons are supervisors under the NLRA and whether a unit is appropriate for bargaining before the NLRB directs and conducts an election.

The NLRB's rule was challenged in federal district court and, on 30 May 2020, the court invalidated the following four provisions:

a reinstitution of pre-election hearings for litigating eligibility issues;
b timing of the election date;
c election observer eligibility; and
d timing of the NLRB Regional Director's certification of representatives.

On 1 June 2020, the NLRB announced that it will implement in full all the changes that were not vacated by the federal court's order.

On 28 July 2020, the NLRB published a Notice of Proposed Rule-making proposing that the Board eliminate the requirement that employers provide unions with available personal email addresses and home and cell phone numbers for all eligible voters in union elections. The Board also proposed an amendment for absentee ballots for employees who are on military leave.

With regard to the status of graduate students as employees, in September 2019, the NLRB proposed a rule seeking to establish that graduate students performing services for compensation, including teaching and research, in connection with their studies are not employees under the NLRA.

Proposed federal labour law legislation

On 6 February 2020, the US House of Representatives passed a bill entitled the Protecting the Right to Organize Act (the PRO Act). The PRO Act is a top priority for labour unions and if it becomes law, it will represent a fundamental shift of US labour laws in favour of unions. The more significant changes in the proposed law include provisions to:

a return to a more expansive definition of 'joint employer' under the NLRA;
b institute card check recognition of unions without elections;
c reinstate the 2014 NLRB 'ambush election rules';
d require employers to post an NLRB notice informing employees of their rights under the NLRA;
e ban state right to work laws;
f codify the California ABC test for independent contractor status into the NLRA;
g provide for civil penalties, including liquidated damages for NLRA violations;
h require binding arbitration for first contracts;
i prohibit employers from permanently replacing strikers;
j allow unions to engage in secondary boycotts; and
k require law firms assisting employers in union elections to make significant public disclosures.

The future of the PRO Act is uncertain as it must still pass the US Senate and then be signed into law by the President.

Proposed New York City law requiring just cause for discharging fast-food workers

On 16 December 2020, the New York City Council passed two extraordinary bills that, if they become law, will end the traditional 'at-will' employment rule for fast-food workers in New York City and provide a template for other classifications of workers to seek similar protections and relief. Mayor de Blasio has indicated that he will sign the bills.

The first bill prohibits fast-food employers from discharging workers or substantially reducing their hours without just cause. The bill defines just cause is as 'demonstrated misconduct or poor performance' that is demonstrably and materially harmful to the employer's legitimate business interest. A reduction in hours is a reduction in weekly hours totalling at least 15 per cent of the employee's regular schedule. The bill further imposes that employers engage in 'progressive discipline' before discharging an employee or reducing hours. Employers cannot rely on discipline that occurred more than one year before the contemplated action.

If the bills become law, employers would be required to provide employees with the precise reasons for discharge or reduction in hours within five days of the adverse action.

Penalties for non-compliance include reinstatement, back pay for loss of wages and benefits, punitive damages, reasonable attorneys' fees and costs, rescission of discipline and a US$500 penalty per violation.

The bill excludes employees who have worked fewer than 30 days from the just cause and progressive discipline requirements.

The second bill allows a fast-food employer to lay off workers for limited bona fide economic reasons supported by the employer's business records. If an employer has laid off employees, it may not hire new employees or assign existing employees to additional shifts unless it makes reasonable efforts to reinstate employees discharged within the past 12 months.

Last, the bill provides that employees may file an arbitration demand, including on a class action basis, in lieu of a lawsuit. The bill vests the arbitrator with authority to impose substantial damages.

These bills reflect the growing trend of states and localities to step into the field of US labour relations.

iv State and local sick leave and paid family leave

During the past decade, one of the biggest trends affecting employers has been the enactment of state and local laws mandating paid leave for employees to use (depending on the specific law) for their own illness; to care for family members; to address situations relating to sexual violence, domestic violence, or stalking; or when welcoming a new child to their family. Currently, there are more than 30 jurisdictions requiring some type of paid sick or safe leave for employees.

These laws take a variety of different forms and all are drafted slightly differently. Most generally provide paid sick or safe leave pay based on the number of hours the employee has worked. Some laws limit the amount of time off an employee can accrue, some require carrying over unused, accrued time from year to year, and some mandate that employees be allowed to use time in small increments (e.g., 15 minutes). The proliferation and variety of laws has made compliance tricky, especially for companies with multiple locations across the United States.

More recently, states and cities have enacted laws that expand employees' entitlement to disability or paid family leave insurance benefits to provide partially paid leave for such matters as care for a new child or an ill family member. (See also Section IX.)

v Covid-19

In light of the global covid-19 pandemic, the federal government, as well as state and local jurisdictions, passed various laws in 2020, providing employee protections such as paid time off and non-retaliation rules. Various state and local governments propounded guidance mandating certain safety protocols, such as employee training, social distancing and capacity rules, and the institution of required safety plans.

III SIGNIFICANT CASES

Several of 2020's significant cases emanate from the Supreme Court of the United States (the Supreme Court) and address the standard for analysing claims brought in age, sex and race discrimination claims, applying different standards for each type of claim.

i Comcast v. NAAAOM (decided 23 March 2020)

The Supreme Court unanimously held that a claim of race discrimination under 42 USC Section 1981 requires that the plaintiff show that race was the 'but for' cause of the injury.

A suit was filed by the National Association of African American-Owned Media (NAAOM) and black-owned Entertainment Studios Networks, Inc (ESN) against Comcast, alleging that Comcast systematically disfavoured '100% African American-owned media companies'. The suit further alleged that Comcast did not carry ESN's channels owing to racial *animus* against ESN, in violation of Section 1981, which prohibits racial discrimination in employment, banking, consumer and business transactions, and other economic relationships involving contracts. ESN did not dispute that, during negotiations, Comcast had offered legitimate business reasons for refusing to carry its channels, but instead argued that these reasons merely constituted a pretext. The district court dismissed ESN's complaint and subsequent amended complaints for failure to state a claim. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, finding that the district court used the wrong causation standard when assessing ESN's pleadings. The Ninth Circuit held that a plaintiff must only plead facts plausibly showing that race performed some role in the defendant's decision-making process.

In determining that a plaintiff must show that race was the but-for cause, rather than merely one factor among others that led to the adverse action, the Supreme Court explained that although Title VII of the Civil Rights Act of 1964 allows for a 'motivating factor' causation test, amendments to Section 1981 do not mention any motivating factors. Thus, a plaintiff must meet a stricter burden, whereby the plaintiff must initially plead and ultimately prove that, but for their race, the plaintiff would not have suffered the loss of a legally protected right.

ii Babb v. Wilkie (decided 6 April 2020)

Following the opinion in *Comcast*, the Supreme Court decided another case involving the appropriate causation standard in the context of discrimination claims brought pursuant to the Age Discrimination in Employment Act of 1967 (ADEA). In contrast to the *Comcast*

decision, the Court held that a heightened but-for causation standard should not be applied to federal employees and applicants to prove age discrimination. This decision does not affect private employers who are not covered by the federal-sector provisions of the ADEA.

In an 8-1 decision, written by Justice Samuel A Alito, the Supreme Court determined that the plain meaning of the ADEA supports the reading that age does not need to be a but-for cause of an adverse action for there to be a violation. If age is shown to be the but-for cause of the adverse action, however, that fact may be important in determining the remedies available to a plaintiff, because remedies must be tailored to the injury and the injury is measured, in part, by the causal relationship.

iii Bostock v. Clayton County (decided 15 June 2020)

The Supreme Court, in a 6-3 decision, held that Title VII of the Civil Rights Act of 1964 (Title VII) prohibits workplace discrimination on the basis of sexual orientation and gender identity. Title VII makes it unlawful for employers 'to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin'.

The case, consolidated with *Altitude Express v. Zarda* and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, concerned instances where a long-serving employee was fired for being homosexual or transgender. In *Bostock*, Clayton County, Georgia, terminated the employment of Gerald Boston, a child welfare services coordinator, shortly after Bostock began participating in a gay recreational softball league. Bostock filed a charge of discrimination with the Equal Employment Opportunity Center and then a lawsuit, *pro se*, against the county alleging discrimination based on sexual orientation in violation of Title VII. The district court dismissed the lawsuit for failure to state a claim, and the United States Court of Appeals for the Eleventh Circuit affirmed the ruling, holding that Title VII does not prohibit employers from firing employees because of sexual orientation.

The Supreme Court determined, however, that discrimination against an employee because of homosexuality or transgender status is, necessarily, discrimination against an individual because of their sex. Therefore, 'an employer who fires an individual merely for being gay or transgender violates Title VII'. Accordingly, employers are prohibited from discriminating against employees on the basis of gender identity, transgender status and sexual orientation. Notably, the decision expressly declined to address dress code or bathroom policies, stating that the Court does 'not purport to address bathrooms, locker rooms, or anything else of the kind' and left open the question of the ruling's interaction with issues of religious freedom.

iv General Motors LLC, 369 NLRB No. 127

In *General Motors LLC*, the NLRB modified the standard for determining whether employees have been lawfully disciplined or discharged after making abusive or offensive statements in the course of activity otherwise protected under the NLRA. This case overrules long-standing NLRB precedent, which had granted employees considerable leeway where inappropriate conduct occurred in the context of union organising or other activities protected under the NLRA.

The NLRB had previously held that discipline based on abusive conduct while engaging in activity protected under the NLRA violated the Act unless the Board determined that

the abusive conduct lost the protection of the Act. The NLRB applied different standards depending on whether the outburst was directed at management, in social media posts or to co-workers, or in the course of a strike. The NLRB's earlier analysis of these types of cases reflected a view that employees engaging in inappropriate conduct while participating in activities protected under the NLRA should be given leeway for impulsive behaviour. The NLRB will now analyse all such cases under the traditional Board *Wright Line* analysis for determining whether an employer unlawfully disciplined or discharged an employee.

Under *Wright Line*, the NLRB General Counsel must first prove that the employee's protected conduct was a motivating factor in the employer's decision to discipline or discharge the employee. If this is shown, the employer will be found to have violated the NLRA unless it can prove that it would have taken the same action in the absence of the protected activity. An employer can meet this burden by showing that it has disciplined or discharged other employees for similar misconduct who were also not engaged in protected activity. If this burden is met, the NLRB must prove that the employer's stated reason is false or a pretext for a violation of the NLRA.

General Motors is a significant win for employers because it brings consistency to the NLRB standard for disciplining employees in these types of cases. It further reflects the position by employers, by the EEOC and by state and local anti-discriminatory agencies that this type of intemperate conduct, which often includes profane or sexually or racially abusive language, will not be tolerated in the workplace.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

As discussed in Section I, absent an enforceable contract, most US employment relationships are governed by the at-will doctrine, meaning that, absent an employment contract providing otherwise, an employment agreement may be terminated for any lawful reason without cause or notice. In fact, owing to the nature of at-will employment, generally, employers may unilaterally change terms and conditions of employment.

Employment may be established via oral agreements, which typically are deemed subject to the at-will employment doctrine, although an employer's unwritten practice of providing certain privileges or benefits, such as paid vacation, may create a legal obligation in some jurisdictions.

Employers and employees also are free to enter into written contracts governing various aspects of the employment relationship, including the term of employment, compensation, location of employment, services to be provided, restrictive covenants and benefits. A written employment contract may be amended by mutual agreement.

Employers may also establish various terms and conditions of employment through policies set forth in an employee handbook or manual. Generally, handbook provisions are not considered an implied contract of employment for any specific duration, especially where there is a disclaimer that the employment relationship is 'at-will'.

ii Probationary periods

US employers are not mandated by either federal or state law to establish probationary periods for new hires, although many employers find them useful, as they provide both the employer and new employee an opportunity to assess whether the arrangement is a good fit for both parties. Often, employees do not receive certain benefits during their probationary

period, such as health insurance. Employment during a probationary period typically remains 'at-will' and that status does not change once the probationary period is successfully completed, unless a written contract between the parties specifies otherwise.

iii Establishing a presence

Generally, corporations and even unincorporated companies doing business in the United States must register with federal and state (and sometimes local) authorities, obtain a tax identification number, and pay various business and payroll taxes, such as Social Security and Medicare (at the federal level), and, depending on the state, contributions into unemployment insurance funds, government-mandated disability or family leave insurance programmes, and workers' compensation reserves. Some taxes, such as Social Security and Medicare, also require employers to withhold the employees' share of those taxes from their salary and submit those withholdings to the appropriate government agency. Such taxes and withholdings typically do not need to be paid for *bona fide* independent contractors.

Depending on the state (and sometimes the county or city) where operations are located, as well as the nature of the business, a company may need to obtain certain licences, pass health and safety inspections, and fulfil other government-imposed obligations to establish a legal enterprise.

V RESTRICTIVE COVENANTS

An employer may include restrictive covenants in an employment contract to prohibit an employee from (1) competing with the employer, (2) soliciting the employer's customers or employees, or (3) disclosing confidential information or trade secrets after the employment relationship has ended. US state law controls whether and under what circumstances a restrictive covenant is enforceable against an employee.

In most states, including New York, Illinois and Delaware, narrowly tailored restrictive covenants that do not overly infringe upon an employee's ability to secure new employment may be enforceable, depending on whether the agreement, overall, is deemed reasonable. Specifically, factors that are commonly used to determine whether a restrictive covenant should be enforced as reasonable include the following:

a Does the employer have a legitimate interest to protect, such as a trade secret or client relationships?
b Are the time and geographical restrictions reasonable?
c Is the employee unduly burdened in pursuing his or her livelihood?
d Will enforcement harm some public interest?

To be enforceable, restrictive covenants typically also need to be supported by consideration. In most states, the commencement of new employment is sufficient consideration for a restrictive covenant. Whether continued at-will employment constitutes sufficient consideration for a later-signed restrictive covenant varies widely from state to state. A promotion, increase in compensation or receipt of another benefit (e.g., stock options) may support a new restrictive covenant.

Many, but not all, states follow the 'blue pencil' rule, which allows a court to edit or even rewrite a restrictive covenant that is overly broad in scope to reflect more reasonable

terms. However, if an employer is perceived to have abused its bargaining power by requiring an employee to sign a patently unreasonable restriction, the court is unlikely to modify the covenant and more inclined to strike it completely.

A recent trend, initiated by Massachusetts in 2018, and followed to varying extents in 2019 by Maine, Maryland, New Hampshire, Rhode Island and Washington State, and in 2020 by Virginia, concerns the enactment of statutes outlawing non-compete agreements for lower-wage workers and setting strict requirements that employers must follow when asking employees to sign such agreements (including providing advance notice of the non-compete, an opportunity to consult with counsel, or some form of payment during the non-compete period).

Finally, in a small minority of states, restrictive covenants are virtually unenforceable in the employment context. For instance, California generally prohibits covenants not to compete as a restraint against an employee's ability to engage in a lawful trade, business or practice.

VI WAGES

Under federal and state law, employees are entitled to a minimum hourly wage for each hour they work. Employees are also entitled to overtime pay for any time they work in excess of 40 hours in a working week. Overtime is generally calculated at one-and-a-half times the employee's regular rate of pay.

The FLSA governs the payment of a minimum wage and overtime under federal law. However, many states have enacted their own minimum wage and overtime laws, and some of these laws are more generous than the FLSA. In California, for example, employees are entitled to overtime pay for any time they work in excess of eight hours in a single day (even if they do not work more than 40 hours in the working week). Employers must comply with the laws that are most favourable to their employees.

Certain employees, such as executive, administrative and professional employees, may qualify as being exempt from federal and state overtime laws if they satisfy both the applicable tests for duties and salary basis. The duties test generally requires that employees perform exempt work as their primary duty. Typically, the kind of work they must perform depends on the particular exemption. The salary basis test generally requires that employers pay the employees on a salary basis, at a level that meets or exceeds the minimum salary threshold required for that exemption.

Both federal and state wage payment laws impose stringent record-keeping requirements on employers. The maintenance of accurate and comprehensive records has become increasingly important in recent years as more states and localities enact wage theft laws and implement aggressive enforcement initiatives of those laws. A number of states – most recently New Jersey and New York, among others – have enacted wage theft laws that provide employees greater rights to recover unpaid wages or impose stiffer penalties on employers for violations (or both).

VII FOREIGN WORKERS

When employing any individual in the United States, whether a US citizen, a permanent resident (i.e., holds a green card) or a foreign national, an employer must ensure that it is abiding by all applicable immigration laws for employment verification and work authorisation. These requirements can be broken down into (1) completing Form I-9 verification for all US workers and (2) obtaining work authorisation for foreign nationals.

i Form I-9 employee verification

The process for verifying any worker's eligibility to be lawfully employable in the United States involves the completion, verification and retention of Form I-9 for Employment Eligibility Verification. New hires, by the first day of employment, must present specified original, unexpired work authorisation documentation, including identification documents, to their employer. The employer must verify the new hire's US work authorisation within three days of the hire date, and retain the verified Form I-9 for up to three years from the hire date, or one year from the employment termination date, whichever is later.

The federal government offers a service called E-Verify, which allows employers to verify new hires electronically to supplement the Form I-9 requirements. E-Verify is voluntary under federal law, but it is mandatory in certain states, such as Arizona, North Carolina and Tennessee, to name a few. Even where not mandatory, E-Verify may be a valuable tool for employers in industries that are particularly vulnerable to employment verification fraud.

ii Types of work-authorised non-immigrant visas

US employers that wish to employ a non-US worker (i.e., a foreign national) must obtain the proper work authorisation for that individual before the person is allowed to be employed. Among the most common types of non-immigrant worker visas are:

a the H-1B Specialty Occupations visa for those positions that require at least a bachelor's degree relevant to the position;

b the L-1A visa for intracompany transferees who work in managerial or executive positions in a company located outside the United States, and the L-1B visa for intra-company transferees who work in positions that require specialist knowledge;

c the free-trade-based non-immigrant worker visas for nationals of Australia (E-3 visa), Canada and Mexico (TN visa), Chile (H-1B1) and Singapore (H-1B1); and

d the O-1 visa for individuals with 'extraordinary ability or achievements' in business, entertainment, the arts or the sciences.

Many of these non-immigrant work authorisations have specific requirements for eligibility and myriad restrictions.

iii Immigrant visas

The non-immigrant work authorisation visas discussed above also have specific beginning and ending periods. For some employers, these restrictive timeframes may make long-term employment difficult. For those situations, the immigration laws allow US employers to sponsor non-immigrant visa work authorisation holders for US permanent residency (i.e., a green card), which is known as an immigrant visa. The process for obtaining such a visa is intricate, lengthy and, without expert legal guidance, difficult to navigate.

To summarise, employers must fulfil the above employment verification mandates for their entire US workforce and obtain proper work authorisation for their non-US workers.

VIII GLOBAL POLICIES

Absent a written contract or CBA, employers may develop and implement employment policies and practices concerning a wide range of issues, including hiring, compensation, benefits, discipline, promotions, and so on. However, as previously discussed, myriad federal, state and local employment laws impose certain legal limitations and obligations on how an employer treats its employees, such as the prohibition on discrimination, harassment and retaliation concerning terms and conditions of employment based on a protected category; bans or restrictions in various jurisdictions on certain pre-employment enquiries (e.g., criminal, credit and salary history checks); and minimum wage and overtime pay mandates.

US employers also are required under federal and state law to provide reasonable accommodations to certain cohorts of workers, such as those with physical or mental disabilities and individuals with sincerely held religious beliefs, unless doing so would result in undue hardship. Some states and localities have broadened this obligation to include accommodation of pregnancy and related medical conditions (including lactation accommodation), and accommodation for victims of domestic or sexual violence, or human trafficking.

Notwithstanding the numerous obligations and limitations imposed on employers under federal, state and local law, many US employers provide their employees with greater benefits than the law requires, such as paid vacation and holidays, and they set forth these and other terms and conditions of employment in an employee handbook. Handbooks typically also include policies prohibiting sexual harassment and providing for equal employment opportunities, and they may set forth dress code rules and guidelines concerning appropriate workplace conduct. Many employee handbooks also provide employees with rules for use of the employer's electronic systems (e.g., use of email and the internet), including that they should have no expectation of privacy when using those systems.

As a best practice, an employer usually requires its employees to sign an acknowledgement that they have received and read the employee handbook.

IX PARENTAL LEAVE

The United States is one of the few countries that does not provide or require employers to provide paid parental leave (for either the birth parent or the co-parent). The federal Family and Medical Leave Act provides eligible employees with 12 weeks of unpaid leave for an employee's own illness, to care for a family member, for parental leave, or for certain military exigencies.

Some of the most recent paid sick and family leave laws provide job protection for employees who have worked for relatively short periods of time and benefits for employees working at very small companies. As of January 2021 (unless otherwise stated), the following states and cities provide paid medical or family leave: California, San Francisco (California), Massachusetts (for bonding with a new child, or an employee's serious medical condition and, as of 1 July 2021, for care of a family member with a serious medical condition), New Jersey, New York, Rhode Island, Washington State and Washington, DC. In the coming years, the following states will also provide similar leave: Colorado, Connecticut and Oregon.

X TRANSLATION

For the most part, businesses, courts, legislatures and government agencies in the United States use English as their primary language. Increasingly, however, workplaces and various government offices are becoming bilingual (usually English and Spanish).

Generally, documents relating to employment are not required to be translated into an employee's primary language, nor are court documents. Nevertheless, there are some important exceptions to this general rule. Many federal, state and local laws require the posting of certain notices in the workplace. Although these must be in English, many must also be posted in an employee's primary language, if the translated notice is available from the appropriate government agency. For example, certain states and cities require a specific wage notice to be provided at hire, in English and in the employee's first language. Similarly, some states and cities now mandate that anti-sexual harassment training be provided in an employee's first language.

If a significant portion of a workforce speaks a language other than English, it is a best practice to provide relevant documents, policies and training in that other language (or languages) to ensure that employees are aware of their obligations and rights.

XI EMPLOYEE REPRESENTATION (PROTECTED CONCERTED ACTIVITY)

The NLRA establishes the rights of most private sector employees to come together for the purpose of mutual aid and protection, and to discuss terms and conditions of employment. If employees so choose, they may organise themselves as a group or in a union for the purpose of negotiating or bargaining with their employer about the terms and conditions of their employment. Managers and supervisors with the ability to hire, fire or assign work are excluded from the NLRA's rights and protections for employees.

Certain actions taken by employers or unions may violate the NLRA. These actions are considered unfair labour practices and may result in administrative sanctions, monetary liability or the NLRB granting injunctive relief. For example, an employer may not retaliate against employees who come together to speak with their employer concertedly about issues affecting more than one employee, such as wages, work schedules or safety concerns.

Under the NLRA, employees also have the right to form or join a union (or refrain from forming or joining a union). To form a union or to decertify an existing union, an employee (or a union) may file a petition with the NLRB, with evidence that at least 30 per cent of employees in the proposed bargaining unit is interested in union representation. The employer may contest the validity of the proposed bargaining unit. Once these issues have been resolved, the NLRB will conduct an election by secret or mail ballot. If a majority of the employees who vote in the election opt to be represented, the NLRB will certify the election and the employer must bargain in good faith with that union regarding the employees' terms and conditions of employment. (The NLRB also maintains procedures for decertification elections, which allow employees to vote on whether they wish to continue to be represented by the union.) The bargaining obligation is ongoing and, in most instances, exists until employees vote to decertify the union.

Employers may not threaten employees with discipline or termination, or promise benefits to an employee, for supporting or not supporting a union. Likewise, a union may not threaten an employee with expulsion from the union or force the employer to terminate an employment agreement because an employee refuses to participate in a union or other

protected concerted activity. However, employers have limited rights to restrict employee union activity on company property and during employee work time through legally compliant no-solicitation and no-distribution rules.

XII DATA PROTECTION

Currently, no one federal law addresses data protection, although specific laws address privacy protection for certain types of data, such as medical information. Here, again, states are stepping in to fill the void.

California currently leads the way on privacy legislation. Under the California Consumer Privacy Act (CCPA), employers that meet the triggering thresholds for coverage (e.g., more than US$25 million in gross revenues) must provide applicants and employees with notice of the categories of personal information (i.e., that which is not publicly available) collected and the purposes for which the information will be used, at or before the time of collection. Employee or applicant consent to the collection of personal information is not required. There is no requirement that California employers register with data protection authorities before collecting personal information about their employees or job applicants.

The categories of personal information to be identified in the notice include:

a identifiers, such as a name or email address;
b characteristics of protected classifications under California or federal law;
c biometric information;
d internet or electronic network activity;
e geolocation data;
f audio or visual information;
g professional or employment-related information; and
h education information.

Further, employers must implement reasonable cybersecurity safeguards to protect certain sensitive employee personal information (e.g., Social Security numbers and medical or health insurance information) or risk employee lawsuits for data breach, including class actions seeking statutory damages. The CCPA broadly defines personal information as 'information that identifies, relates to, describes, is capable of being associated with or could reasonably be linked, directly or indirectly, with a particular consumer or household'. Reasonable safeguards may include limiting access to persons with a business need to access sensitive employee information and technical measures based on a risk determination.

The CCPA is effective as of 1 January 2020; however, all employee rights other than the notice of collection and private right of action for any data breach (e.g., the right to have personal information deleted) have been postponed until 2023.

In New York, the recently enacted Stop Hacks and Improve Electronic Data Security Act (known as the SHIELD Act) mandates that all employers collecting private information about New York State residents, including employees, implement a data security programme that incorporates 'reasonable administrative, technical, and physical safeguards to protect the security, confidentiality and integrity of the private information'. Failure to implement a compliant information security programme by 21 March 2020, may result in an action by the New York State Attorney General. Injunctive relief and civil penalties of up to US$5,000 may be imposed against an organisation and individual employees for each violation. Reasonable

safeguards may include limiting access to employees' private information based on business need and technical safeguards, but there is no requirement that employers register with New York State government agencies.

Also of note is the Illinois Biometric Information Privacy Act (BIPA), which requires employers to provide written notice and obtain consent from employees (and customers) prior to collecting and storing any biometric data. Under BIPA, employers must also maintain a written policy identifying the 'specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used'. In *Rosenbach v. Six Flags Entertainment Corp*, the Illinois Supreme Court held that mere collection of an individual's biometric information may be enough to state a claim under BIPA. Texas and Washington State also have laws regulating the collection, use and disposal of biometric information.

US law does not prohibit the transfer of US resident employees' data out of the United States. There are no legal requirements that employers register with data protection authorities, obtain employee consent, enter into a joint user agreement or make a safe harbour registration before transferring personal information about US resident employees to overseas providers, subsidiaries or third parties.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

As previously discussed, the employment-at-will doctrine allows an employer to terminate an employment relationship for any lawful reason, without cause or notice. However, the doctrine may not apply when, for example, the employee has a specified term of employment, or the employer's policy or an employment contract provides for discharge for specified reasons, sets forth a progressive disciplinary policy, or contains a notice period requirement.

There is no statutory right to severance or separation pay upon termination of employment, but an employer may agree to provide severance in individual contracts or via a severance policy or plan.

Typically, CBAs contain just cause provisions or other contract clauses that limit the reasons why, or the process by which, an employer may dismiss an employee. Most CBAs have a dispute mechanism often referred to as the grievance and arbitration procedure, and the parties must work within that contractual framework to resolve disputes regarding employment actions, including terminations.

ii Redundancies

The federal Worker Adjustment and Retraining Notification (WARN) Act requires that employers provide notice for certain group lay-offs and plant closures. Specifically, employers with 100 or more full-time employees must provide 60 days' notice to affected employees and certain state and local government agencies when there is a qualifying mass lay-off or plant closure, as those terms are defined by the statute. Some states have 'mini WARN' laws that cover additional events or contain more stringent notice requirements. For instance, New Jersey's WARN Act, which has been held from enforcement during the covid-19-related public health declaration, requires employers to pay severance.

If an employer provides severance pay in connection with a reduction in force (pursuant to a contract or otherwise), it is likely to require the employee to sign a release of claims in exchange for severance benefits. If an employee is aged 40 or older, for a waiver of federal age

discrimination claims to be enforceable, employers must follow the review and revocation periods for releases, as set forth in the Age Discrimination in Employment Act, as amended by the Older Workers Benefit Protection Act.

In a unionised workplace, the CBA may dictate the notice, actions or bargaining that must take place before a group lay-off, plant or site closure, or reduction in force may occur.

XIV TRANSFER OF BUSINESS

There is no generally applicable transfer of undertakings law in the United States. In the case of a transfer of business, however, US employers should review applicable employment contracts and CBAs for relevant provisions, regardless of whether the transfer will result in the termination of employment for the employees covered by the contract.

Employers should also determine whether the transfer implicates the WARN Act or a mini-WARN Act (discussed in Section XIII.ii), although in most transactions in which the employees of the seller are merely transferred to the buyer, the WARN Act's notice requirements will not apply. On the other hand, significant post-transaction lay-offs could implicate the law.

Finally, any business closure, sale or merger involving a unionised workforce can trigger the employer's legal obligation to bargain with the union. The acquisition of a company with a unionised workforce could also activate the obligation to bargain.

XV OUTLOOK

The results of the 2020 presidential and congressional elections will likely result in a renewed focus on employment matters at the federal level.

As a general rule, a Democratic administration tends to be more employee-friendly than a Republican-led executive branch. Accordingly, it is expected that President Joseph R Biden Jr, buoyed by Democratic control of both houses of Congress, will seek to provide various groups, such as the LGBTQ+ community, with greater workplace protections against discrimination, make it easier for unions to organise workers, enact a private-sector paid family leave law, restrict non-competition and mandatory arbitration agreements, raise the minimum wage, classify more workers as non-exempt (and therefore entitled to overtime pay) and gig economy workers as employees rather than independent contractors, and strengthen pay and racial equity and sexual harassment prevention laws. Employers also should anticipate expanded obligations under, and enforcement of, existing equal opportunity, wage and hour, labour relations and occupational health and safety laws and rules.

That said, legislative efforts are likely to be tempered by the fact that the Democrats hold extremely slim majorities in both the House of Representatives and the Senate, as well as the reality that there are legal limits on what President Biden can achieve through executive orders and agency regulations.

Appendix 1

ABOUT THE AUTHORS

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Susan Gross Sholinsky is a shareholder in the employment, labour and workforce management practice in the New York office of Epstein Becker & Green. She counsels clients on a variety of matters, in a practical and straightforward manner, with an eye towards reducing the possibility of employment-related claims.

Ms Sholinsky counsels multinational companies on the unique labour and employment issues they face. Day to day, she counsels employers on avoiding disputes on matters stemming from employee discipline, leaves of absence and accommodation requests, reorganisations and termination of employment (including voluntary and involuntary reductions in force). Ms Sholinsky also drafts various agreements for clients, and develops and audits employers' policies and procedures, including those pertaining to covid-19, to ensure compliance with applicable federal, state and local law and best practices. Ms Sholinsky also conducts workplace training seminars for employees, managers and human resources personnel in a variety of industries, and conducts investigations into alleged wrongdoing.

In 2019 and 2020, Ms Sholinsky was recommended by *The Legal 500 United States* in the area of workplace and employment counselling. In 2020, Ms Sholinsky was named in *City & State New York*'s The Responsible 100, an annual list honouring individuals whose work is making life better in communities in New York City and across the state. Within the firm, Ms Sholinsky serves as vice chair of the National Employment, Labour and Workforce Management Steering Committee and of the Diversity and Professional Development Committee. She also serves as New York co-chair of 2020 Women on Boards: Global Conversation on Board Diversity, a campaign to increase the number of women board directors. She also serves on the adjunct faculty of the Cornell University School of Industrial and Labour Relations, where she teaches courses concerning human resources and the law. Ms Sholinsky frequently speaks on employment law topics and authors numerous publications on the subject.

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Nancy Gunzenhauser Popper is a partner in the employment, labour and workforce management practice in the New York office of Epstein Becker & Green. She advises employers in all facets of the employment relationship, from pre-employment considerations and hiring to terminations and post-employment restrictions, including auditing employers' employment policies, procedures and handbooks to ensure compliance with applicable laws and best practices (including those pertaining to covid-19), and preparing employment, consulting and separation agreements. She counsels clients on compliance with equal employment opportunity laws, the Americans with Disabilities Act, the Family and Medical Leave Act, worker classification issues, and other federal, state and local statutes governing the workplace.

Ms Popper also assists in defending clients in labour and employment-related litigation in a broad array of matters, such as discrimination, harassment, retaliation, breach of contract, and wage and hour disputes. Within the workplace, she conducts training seminars on a variety of topics for employees, managers and human resources personnel.

In 2020, Ms Popper was recognised by *The Best Lawyers in America* on its Ones to Watch list, for attorneys who are at an earlier stage in their careers and who demonstrate 'outstanding professional excellence in private practice'. Prior to joining Epstein Becker & Green, Ms Popper worked as an intern in the law department of the Kings County Supreme Court, the employment law department of one the world's largest professional services, risk management, and insurance brokerage firms, and the Social Security Administration, among other positions.

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