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10 Things to Know about US Employment Laws

GGI LDR Practice Group Meeting March 29-31, 2019



#1 Legal Framework

- Federal law – may preempt state law, but not always
 - E.g. Fair Labor Standards Act sets national minimum hourly wage, some states have a higher minimum wage
- State law - where employee lives and/or where duties are performed
 - Laws not identical in all 50 states, but some states have similar laws
- Local laws
 - Sexual orientation & paid sick leave



#2 Unfair treatment is not always illegal.

- Employment contracts are not required
- At will employment is the norm



At Will Employment

- “At will” employees may be terminated for
 - Good reason
 - Bad reason
 - No reason

- But...



...NOT for an Illegal Reason (exceptions to At Will doctrine) such as:

- Unlawful discrimination
- Discussing/complaining about terms and conditions of employment
- Asking questions about overtime pay
- Refusing to commit a crime
- Filing a worker's compensation injury claim
- Filing personal bankruptcy
- Reporting safety violations
- Taking leave under Family Medical Leave Act



- At will employees can be terminated WITH OR WITHOUT NOTICE

- except in some cases of plant closings or mass layoffs



#3 Some restraints on trade are permissible.

- E.g. employee agreements regarding non-competition, non-solicitation of customers and employees
 - Are permissible in some form or fashion in most states
 - no two states' laws are identical
 - common theme - restriction has to be reasonable
 - California is more employee friendly



- **Protection of confidential/trade secret information is enforceable through**
 - Confidentiality/non-disclosure agreements, and
 - Federal and state trade secrets statutes



#4 & #5 Wage and Hour Issues

- Under federal law (Fair Labor Standards Act – FLSA)
 - No limitation on number of hours worked and no required breaks,
 - But have to pay non-exempt employees
 - minimum wage and
 - overtime pay for hours over 40 in a workweek
- Under state law, some states more generous to employees
 - E.g., California – have to give one day off and breaks



#4 Salaried does not equal exempt under overtime laws.

- Exempt employees do not have to be paid overtime under wage and hour laws.
 - 2-part test for exemption:
 1. Salary basis (required for most exemptions) –
 - Federal - currently \$455 per week (\$23,466 annually)
 - Proposed regulations raise to \$679 per week (\$35,308 annually)
 - Some states – higher, e.g., California
 2. Duties test – Title not important; it's what the employee does that matters.
 - if employee does not meet duties test, then not exempt



#5 Independent contractors may actually be employees.

- What you call a worker is not determinative, even if you have a written independent contractor agreement.
- Different tests for independent contractor status (with some overlap)
 1. IRS – enforcement of employer tax obligations
 - Right to control
 2. Department of Labor – enforcement of minimum wage and overtime
 - Economic reality
 3. State agencies – enforcement of employer tax obligations and wage and hour laws



- IRS, DOL and state agencies share information.



#6 Individuals can be liable for wage and hour law violations.

- Individuals can be personally liable if they
 - make and implement pay policies, or
 - have operational control of the employer



#7 Retaliation claims are more attractive to plaintiff's lawyers.

- In a retaliation claim for complaining about or opposing unlawful discrimination,
 - retaliation plaintiff does not have to prove there was unlawful discrimination,
 - just that plaintiff had good faith belief of unlawful discrimination and that “but for” the complaint, the employee suffered an adverse employment action.



#8 It is illegal to restrict employees from discussing compensation.

- Parts of National Labor Relations Act apply to non-unionized work places.
- Protects certain concerted activity between employees, including right to discuss/complain about work conditions and boss



#9 Not all employees get paid leave.

- Under federal law and in many states, employees are not entitled to paid leave (e.g. vacation, sick time, personal leave, etc.)
- In most states, vacation time can be “use it or lose it”
 - But see, California



What kind of leave are employees entitled to?

- Family Medical Leave Act (FMLA)
 - Federal law - up to 12 weeks of unpaid leave for larger employers
 - Some states and cities are passing paid leave laws
 - E.g., California
 - Austin (State of Texas v.)



- American with Disabilities Act (and state anti-discrimination statutes)
 - Require employers to make reasonable accommodations to allow disabled employees to perform the essential functions of their jobs
 - Leave (paid or unpaid) could be a reasonable accommodation



#10 California is good for employees.

- California law is generally more friendly to employees, e.g.
 - Restraints on trade less favored
 - Paid family leave
 - “Use it or lose it” vacation policies are illegal
 - Limitations of hours worked
 - Right to work breaks
 - Stricter requirements on payment of final paycheck
 - Right to see personnel file
 - Etc.



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