The Rose Group
ATTORNEYS AT LAW ©
A Global Employment Law and Consulting Firm

U.S. LABOR AND EMPLOYMENT LAWS

BY: Kenneth J. Rose, Esquire, The Rose Group, San Diego, California*

Originally Prepared for the "All China Federal Trade Union of the Peoples' Republic of China"-- (Translated into Chinese by TransAsia Lawyers, Beijing and Shanghai, China-- http://www.transasialawyers.com)

***Kenneth J. Rose, an Attorney, is the Founder and Principal of The Rose Group. A Global Labor and Employment Law Firm located in San Diego, California, U.S.A. Mr. Rose represents employers with regard to international and domestic employment and labor law issues in a wide variety of industries. Mr. Rose is listed in the Guide to the World's Leading Labour and Employment Lawyers, published by the Legal Media Group. He is co-author of the chapter on U.S. employment and labor law in the multi-volume International Handbook on Contracts and Employment, published by the International Bar Association and Kluwer Law International, and has authored numerous articles on domestic and international employment law issues. Mr. Rose graduated in 1972 from the Cornell University School of Industrial and Labor Relations in Ithaca, New York. He received his law degree with honors in 1976 from the George Washington University Law School in Washington, D.C. Mr. Rose can be reached by Email: krose@rosegroup.us

10616 Scripps Summit Ct., Suite 200, San Diego, CA 92131
Phone 619-822-1088 *Fax* 1-708-575-1495
WWW.ROSEGROUP.US

U.S. Labor and Employment Laws

TABLE OF CONTENTS

10616 Scripps Summit Ct., Suite 200, San Diego, CA 92131
Phone 619-822-1088 *Fax* 1-708-575-1495
WWW.ROSEGROUP.US

INTRODUCTION

United States labor and employment law derive from four primary sources: federal and State statutes enacted by legislatures; common law developed by the judiciary; regulations and executive orders promulgated by federal and State administrative agencies and/or the chief executive of the jurisdiction; and contracts, including collective bargaining agreements.

The principle of federal preemption directs that where the United States Congress intended a federal statute to occupy the entire field of law (as do the National Labor Relations Act in the field of union-management relations, and the Employee Retirement Security Act in the field of employee benefits), federal law will prevail over any state or local laws dealing with the same subject matter. More frequently, however, federal and state laws are intended by Congress to co-exist, as in the case of federal and state wage and hour laws regulating minimum pay and overtime. Where the federal and state statutes conflict, as they often do, employees in that jurisdiction receive the highest level of protection afforded by either the federal or the state law.

A. SOURCES OF THE U.S. EMPLOYMENT LAWS

The laws in the United States that govern the employment relationship have three primary sources, each of which is discussed briefly below:

1. Statutes

The primary source of the employment laws that regulate the employment relationship on a national basis are legislatively enacted statutes. State governments also enact statutes that regulate the employment relationships.

2. Common Law

While there is a federal court system in the United States in addition to the courts of the 50 states, strictly speaking there is no national or federal common law, save for the case law that has developed which interprets federal statutes. Instead, the common law has been developed by the state courts. While there are distinct similarities in the common law from state to state, wide variances in common law principles often do exist from state to state.

Common law concepts govern the law of contracts, including the employment contract. Other subjects largely governed by state common law include the definition of independent contractor; the law of unfair competition and tort laws that often arise in the employment setting, including defamation and fraud in the inducement.

3. Regulations

The legislation enacted to regulate parts of the employment generally provided for ongoing enforcement and/or administration by an administrative agency of the executive branch of government, including the United States Department of Labor and its counterparts in the 50 states. Administrative agencies generally have some degree of rulemaking authority under which a vast array of regulations has been promulgated that have the presumptive force of law.
Because they cannot be waived, the host of statutory rights conferred on employees by Congress and the various state legislatures in reality become implied terms of employment if every employee.

B. CONTRACTS OF EMPLOYMENT

1. Employment Relationships in the U.S. are Essentially Contractual in Nature

Contract law is a creation of state common law in the United States, and thus is subject to variance from state to state. There is no uniform national law of contracts. Despite the existence of broad concepts of contract law that are shared by each state, there is wide variation among the states on the law of employment contracts and its constituent elements.

While there is general recognition in the United States that the employment relationship is essentially contractual in nature, there is no requirement in the United States that there be a written employment contract or, for that matter that any formal or specific employment contract exist between the company and the employee.

A contract of employment can be either for an indefinite term or for a fixed term (*e.g.*, one year), depending upon the parties' agreement. The content of an employment contract is largely up to the parties to the agreement. If an employment contract is found to exist in a given situation and govern the relations between the parties, virtually all states recognize that it may exist in written or oral form. In addition, many, but not all states, recognize that an employment contract also may be implied-in-fact – *i.e.*, that it arises because of the facts and circumstances of the employment relationship.

Importantly, no employment contract, not even a written one for a fixed term, can effectively waive an employee's statutorily-conferred non-contractual rights in advance. Because they cannot be waived, the host of statutory rights conferred on employees by Congress and the various state legislatures in reality become implied terms of employment if every employee. For example, a written employment contract for a definite term cannot preclude an employee from asserting a race discrimination claim based on events which had not occurred prior to the date of the contract, or from asserting a right to statutory unemployment compensation benefits.

2. Employment "At-Will"

An employment contract that does not have a fixed term is generally presumed to be terminable at-will by either party, at any time, with or without cause. If an employer creates and successfully maintains at-will employment agreements with all of its employees, it will have a measure of protection against claims for breach of contract brought by employees whose employment is terminated

The employment at-will rule is a fixture of the common law of every state. This rule holds that an employment relationship that does not have a fixed term or duration may be terminated by either party to the relationship with or without a cause or reason, and with or without advance notice to the other party. Further, unless a contractual or statutory obligation independently imposes a duty on the employer to provide severance pay and/or benefits to a discharged employee, an employee lawfully terminated without cause or notice under the employment at-will rule has no right to severance pay or other paid benefits. Depending on the state in which the employment relationship arose, exceptions to its literal terms have been created.

Because the employment at-will doctrine is a rule of the law of contracts – an area of the common law that develops state-by-state—it cannot be analyzed or discussed with complete accuracy by referring to a generalized set of principles that apply nation-wide to employment relationships in every state. Moreover, since the doctrine generally is a creature of common law, and is riddled in most states with judicially-created exceptions that have evolved over many years, the principles that have developed in each state are not as easily extrapolated and categorized as would be the case if the rule instead was contained in state codes, statutes and regulations which could be summarized. Instead, applicable rules must be discussed on a state-by-state basis, and must be gleaned from the case law in each state.

Despite the caveat expressed above, several general principles pertaining to the employment at-will doctrine can be identified. First, the doctrine applies in all fifty states. Second, every state recognizes exceptions that are legislatively imposed and most have judicially-created exceptions as well. Third, the employment at-will doctrine generally is viewed as a "presumption" concerning the status of an employee whose employment has no definite term. Thus it is said that employment for an indefinite term is presumed to be terminable at-will unless evidence is produced to "rebut" that presumption – that is, facts are presented that establish that a recognized exception to the employment at-will rule applies to make the discharge unlawful. While not every state recognizes every category of exception, there is a group of well-defined categories, each of which is recognized by some states and rejected by others.

3. Implied In Fact Employment Contracts

In those states that permit an employee to assert the existence of an implied employment agreement, the courts often look to the "totality of the employment relationship" to determine whether a reasonable person would infer the existence of specific contractual terms and conditions of employment. *See, e.g., Pugh v. See's Candies*, 116 Cal. App. 3d 311 (1981).

Most typically the contractual terms alleged to arise by implication are said to impose limitations upon the employer's otherwise presumptively unfettered right to discharge an employee. This right to terminate employment with or without cause and with or without notice is referred to as the doctrine of "employment at will." Factors that are most often considered in determining the existence and contents of an implied employment contract requiring good cause for discharge include (1) the employee's length of service; (2) the existence of employer policies limiting or qualifying the employer's right to dismiss employees (*e.g.*, a progressive discipline policy or a declaration that "good cause" will be required to discharge employees); (3) industry practice; (4) absence of a record of past criticism of performance or behavior; and (5) general or direct assurances of continued employment. Some states will recognize the existence of and will enforce an implied contract not to terminate employment except for good cause when enough of the factors cited above are present. There are states in which an employer's distribution of an employee handbook containing rules and procedures that appear to be intended to induce reliance by employees will elevate the handbook to the status of an employment contract. Some states also recognize the concept of an implied contract not to demote except for just cause based on the existence of similar factors.

Employment under a fixed term contract can be renewed expressly at the end of its term, or it may be renewed automatically if, at the expiration of the contract, both parties continue to abide by the contract's terms. In the latter case, an inference arises that the parties have agreed to another contract for the same term, with the same salary and other terms and conditions as before. Under what commonly is referred to as an "evergreen clause," a contract may renew automatically from year to year until and unless notice of termination is properly given.

4. Fixed Term Contracts

A contract for a fixed term in most states is presumed to be terminable only for cause. However, like any presumption this general rule can be rebutted by evidence that the parties intended a contrary rule. The clearest method of demonstrating a contrary intent, of course, is the inclusion of an express term that the contract may be terminated at will, with or without cause.

A fixed term contract can be expressly renewed or it may also be automatically renewed if, at the expiration of the contract, both parties continue to abide by the contract's terms. In that case, the inference is that the parties have agreed to another contract of the same term, salary, and conditions. Under what is called an "evergreen clause," a contract may renew automatically from year to year unless termination notice provided for in the agreement is properly given.

5. Modification of Employment Contracts

After the employment relationship has commenced, employers often seek to modify their employee policies. In states that recognize and enforce oral and/or implied contracts of employment that arise at the inception of or during the course of employment, a unilateral change in policy by the employer can be viewed as an attempt to modify the employment contracts of the employees. It is a general principle of the law of contracts that oral and implied agreements may be modified (a) when the parties reach a subsequent written or oral agreement, or (b) by the creation of a subsequent implied agreement between the parties that has terms that conflict with the parties' earlier agreement. The question of whether adequate consideration for the modification exists often determines whether an effective modification has taken place.

6. Collective Agreements

The relationship between unionized workers and their employer ordinarily is governed by a specific kind of employment contract – the collective bargaining agreement. This is a contract negotiated by the bargaining representative of the employees and the employer. Once negotiated it is subject to ratification by a majority of the employees in a vote. If approved it contains the terms and conditions of employment of all of the unionized employees for the stated term. These terms and conditions typically supplement the many state and federal laws that provide minimum conditions of employment such as a minimum wage and overtime pay for hours worked in excess of forty in a week. Collective bargaining agreements also often include grievance procedures and a mandatory arbitration provision for the resolution of disputes arising under the agreement. A new agreement generally is negotiated close to the expiration of the term of the collective bargaining agreement.

C. STATUTORY EMPLOYMENT RIGHTS

1. Maximum Working Hours

Federal law does not limit the number of hours an employee can work in one week. However, in most industries, federal and state law require that employees in most categories and positions receive overtime pay when they work more than forty hours in one week.

Some state laws limit the number of consecutive hours an employee may work without time off in certain occupations, such as truck drivers, pharmacists, workers in smelters and underground workers, and certain railroad employees. A few municipalities limit the amount of overtime that an employee may work. A number of states also limit the number of days in a workweek that an employee may work. For example, under California law, an employee must be provided with at least one day's rest in seven, unless seven days of work is shown to be reasonably required by the nature of the employee's work. Where it is shown that a California employee is required to work seven consecutive days by the nature if the work, that employee must receive premium pay for the work performed on the seventh day *and* must average one day off in seven during the calendar month.

Federal law does not require employers to provide employees with rest periods. However, many state laws make rest breaks obligatory. In California, for example, a 10 minute on the clock rest period break must be provided for every four hours worked by a non-exempt employee. Under federal law, there are no special break requirements for young people, but several states maintain laws requiring employers to give minors additional breaks.

2. Overtime Pay

Under federal law and the laws of most states, executive, administrative and professional employees, as these categories are defined by statute, are exempt from the coverage of most wage and hour laws, including minimum wage and overtime regulations. Employees who are eligible for statutory overtime pay are categorized as “non exempt employees.”

Both federal and state law require that non exempt employees in most categories and positions receive overtime pay at the rate of 1.5x the hourly wage when they work more than forty hours in one week. Additionally, some states, most particularly California, require payment of overtime pay when an employee works greater than a certain amount of hours in a day -- usually eight hours.

Federal and state laws require employers to keep and maintain accurate records of employees’ hours of work and compensation. Employee hours of work must be recorded on a daily basis. Some states have more stringent record keeping requirements. In California, for example, employee timecards maintained by the employer must also indicate the exact start and finish of each work period and meal period and must be retained for three years

3. Minimum Wages

The same classifications of non exempt employees deemed eligible for overtime pay when their hours worked exceeds the statutory maximums also are protected by the minimum wage provisions of the Fair Labor Standards Act and/or the law of the state in which they work, whichever has the higher minimum wage. Currently, the federal minimum hourly wage is $5.15 per hour. The states are free to set a minimum wage that is higher than that which is required by federal law and many states have done so. For example, the current state minimum wage for California is $7.50 per hour, and on Jan. 1, 2008 the California state minimum wage increases to $8.00 per hour. .

4. Occupational Health and Safety

In the United States, the federal Occupational Safety and Health Act (“OSHA”), 29 U.S.C. § 651, *et seq*., defines an employer’s duties with respect to maintaining the health and safety of its employees in the workplace. Under OSHA, literally thousands of regulations have been promulgated by the Secretary of Labor which

10616 Scripps Summit Ct., Suite 200, San Diego, CA 92131
Phone 619-822-1088 *Fax* 1-708-575-1495
WWW.ROSEGROUP.US

establishes a myriad of duties for employers covered by the statute. In substantive areas where there is no specific standard or regulation, an employer still has a general duty under the Act's "general duty clause" to keep its places of employment safe and free from recognized hazards likely to cause death or serious harm to employees. 29 U.S.C. § 654(a)(1).

5. Workers' Compensation Insurance

Employees are also entitled to industrial injury leave (known in the United States as "workers' compensation" leave) where they are injured during the course and scope of employment and are unable to perform their usual and customary job. Industrial injury leave is governed by each state's workers' compensation law. Generally, the duration of such leave is dependent upon the opinion of a selected physician, and an employee's compensation during the leave is based upon the severity of the injury and the employee's wages. Industrial injury leave can run concurrently with FMLA leave.

6. Family and Medical Leave

Federal and state family and medical leave statutes generally provide 12 weeks of unpaid leave per 12-month period for certain family and medical-related reasons, including the birth of a child and/or to care for a new born child, whether natural or adoptive, to care for a family member with a serious health condition, or to obtain treatment for the employee's own "serious health condition." The FMLA defines a "serious health condition" as an illness, injury, impairment, or physical or mental condition that requires inpatient care in a hospital or residential health care facility or that requires continuing treatment by a healthcare provider.

A woman may be entitled to additional pre-birth or post-birth leave if she is disabled due to her pregnancy. Many employers allow employees extended maternity leave beyond 12 weeks. Whether to provide such enhanced leave is at the discretion of the employer.

To qualify to take leave under the FMLA, an employee must have been employed with the employer for 12 months, and must have worked at least 1,250 hours in the 12 month period prior to the first day of leave. Federal family and medical leave only applies to employees who work for an employer that employs 50 or more people at or within 75 miles of the employee's work site. Most states that have enacted family and medical leave laws maintain similar eligibility requirements.

A qualified employee is entitled to a total of 12 workweeks of family and medical leave during a 12-month period. An employee may take “intermittent leave” for a qualifying health condition that requires periodic treatment. Thus, an employee is not required to take FMLA leave for one continuous period of time; an employee may take FMLA leave in increments as small as an hour, if it can be justified.

While on leave, the employer is required to continue the employee’s health insurance on the same basis as before the leave commenced. Upon return from such leave, the employee is usually entitled to return to his/her former position or to a substantially similar position. Some states provide employees with more expansive family and medical leave entitlements. Note that FMLA leave is in addition to any pregnancy disability leave an employee may be entitled to under federal and/or state pregnancy leave statutes.

Under federal anti-discrimination law, an employee’s job must be held open while she is on maternity leave to the same extent that jobs are held open for employees on other disability leaves. In most states that have separate pregnancy leave statutes, employees are guaranteed the right to return to the same or a similar position at the conclusion of a pregnancy leave absent exceptional circumstances.

Separate from FMLA leave, disabled employees may be entitled to leave under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, et seq. The ADA requires employers to reasonably accommodate qualified individuals with disabilities. Courts have held that a leave of absence can be a reasonable accommodation under the ADA. Under the ADA, leave may be requested for a number of reasons, including to obtain medical treatment or rehabilitation services, to recuperate from an illness or an episodic manifestation of a disability, or to obtain repairs on a wheelchair or other medically-required equipment. Generally, an employer can only deny a qualified disabled employee’s request for leave as an accommodation if it can demonstrate undue hardship to its operations and/or can suggest an alternative reasonable accommodation.

The federal Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires employers to treat employees who are temporarily and medically disabled due to pregnancy or childbirth the same as other employees who are disabled due to non work-related events. Some state statutes afford pregnant employees even greater protection than other disabled employees. For example, in California, employers are required to allow employees who are disabled by pregnancy or childbirth to take unpaid leave for up to four months, regardless of the employer’s policy for other disabled employees. Alternatively, the employer may temporarily transfer the pregnant employee to a less hazardous or less strenuous position.

7. Military Service Leave

While the United States presently does not subject its citizens to mandatory military service, the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301 *et seq*., requires employers to provide employees with up to five years of leave to serve in the military. USERRA also requires employers to continue an employee's health benefits for the first eighteen months of leave, to protect an employee's pension benefits upon return from leave and to reinstate employees returning from military leave and to provide them with training if necessary.

D. EMPLOYEE BENEFITS

1. Commemorative Holidays and Vacations

In the United States, "holiday" in the Asian or European sense is referred to instead as "vacation." On the other hand, "holiday" refers to a day of remembrance or celebration on a national and/or state level. It is extremely important not to confuse the terms when referring to employment laws and/or policies since the distinction is a meaningful one. Further, significant differences exist in the United States with respect to the treatment of both "holidays" and "vacations" when compared to practices in other countries.

Generally, and unlike the laws of many countries, neither federal nor state law requires most employers to provide employees with paid or unpaid holidays, nor do employees have any vacation entitlement by law.

While employers are not required to give employees vacations, many states regulate the manner in which vacations are treated once employees are advised they are entitled to specified vacation. In some states, employees effectively "vest" in vacation entitlement as it accrues. Thus, in those states, if an employee accrues one day of vacation per month worked, he or she would be entitled to six days after six months. Should that employee work for six months and then resign or be discharged, he or she would be entitled to six days' pay in lieu of vacation, assuming the employee had not taken any vacation time. In states such as these, employers ordinarily may not force employees to use their vacation or "lose it", as it is vested and the entitlement is considered earned, much like compensation.

Generally, and unlike the laws of many countries, paid or unpaid holiday or vacation entitlement is not required by federal or state law. However, some states and municipalities require employers doing business with those entities to pay "prevailing wages" and benefits, including holiday and vacation benefits. Prevailing wages and benefits are determined by the federal and state governments, and are normally the same as those provided by major union contracts in the geographic area where the work is performed.

2. Sick leave

There is no statutory entitlement to paid sick leave in most states. Most employers provide employees with a finite amount of sick leave, and many permit employees to accrue sick leave much as they accrue vacation. Some states, such as New York, require employers to provide short term disability insurance that provides up to a specific number of weeks of compensation – e.g., 26 weeks, which is often the trigger for long-term disability insurance eligibility – after the employee has been absent for an initial three or five days

3. Health Insurance Plans

There is no national health insurance in the United States. For this reason it became and remains common for employers to assume the role as provider of the opportunity for employees and their families to obtain health insurance. Employer policies differ with respect to the coverage provided and the percentage of insurance premium costs employers bear, as opposed to passing along to their employees. At one extreme, some employers pay for their employees' health insurance. Other employers simply make insurance available for employees to purchase at group rates through the company. By pooling many individuals together, an employer typically can obtain significantly lower insurance premiums for its employees than any employee could obtain on his/her own. The majority of employers that provide this benefit fall into the middle and defray a portion of the cost of the health insurance for employees and their families, or pay for the employee's insurance only. Employer-provided health care plans may include inpatient and out-patient care, prescription drugs, dental care and/or eye care.

The federal Consolidated Omnibus Budget Reconciliation Act ("COBRA") requires employers having twenty or more employees to provide specific notice and allow employees who have lost their employer-provided medical coverage (whether discharged for cause, laid off for lack of work or due to death or disability) the right to continue the same coverage for up to 18 months (29 months for disabled persons). COBRA continuation rights for up to 36 months are also provided to surviving spouses, divorced spouses, spouses of Medicare-entitled employees and certain dependent children. Premiums for the continued health-plan coverage are paid by the COBRA participant.

4. Pensions

U.S. Social Security System

The United States Social Security mandatory system is a form of public pension. Employees become eligible to receive Social Security benefits by paying into the Social Security system for the required number of years. At the same time, the employer of each employee also must pay a matching amount into the system. These payments are made in the form of a payroll tax, known as "F.I.C.A.", or Federal Insurance Contributions Act ("FICA") taxes.

While normal retirement benefits may be collected by a retired worker at age 65, the Social Security system permits retirees to claim early retirement benefits in a reduced amount once the retiree reaches age 62. Covered employees are eligible for full benefits if they retire at or after age 65. Eligibility for full benefits is set to increase gradually to age 67 by the year 2022.

Social Security benefits are subsistence benefits at most. There are few areas of the United States in which retirees can afford to live solely on the amounts they receive from the Social Security system. Social Security payments are increasingly secondary to payments from private forms of retirement benefits – most typically employer-sponsored pension and retirement plans.

Private Pensions

Many employers offer some type of private retirement plan. Employee benefit plans – pension plans included—essentially are promises an employer makes to its employees. The employer generally is under no legal compulsion to establish an employee benefit plan. Rather, it acts voluntarily when establishing these arrangements, and generally has no obligation to provide its employees with pensions and other "fringe" benefits. However, the labor incentives and significant tax advantages of establishing and maintaining certain employee benefit plans, as well as market forces, motivate employers to provide additional benefits to their employees.

Once created, employer pension plans, along with a variety of other employer health and welfare plans, are regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq*. ERISA provides minimum standards for plans in order to prevent abuses in their management and administration, such as under-funding and imprudent investments. Section 402 of ERISA requires every employee benefit plan to be established and maintained pursuant to a written instrument. This "written plan document" requirement further obligates the plan sponsor to identify one or more named fiduciaries who will have the authority to control and manage the operation and administration of the plan.

Some employers maintain retirement plans that are funded entirely by employee contributions. Other employers match employee contributions. In the latter type of plan, if the employee contributes a percentage of his/her monthly salary to the plan, the employer will contribute an equal amount (or some portion thereof) to the plan on the employee's behalf, generally up to a stated maximum percentage.

Employer-established retirement plans are a tax efficient method of saving for employees because employees are not taxed on the money contributed to such plans until they receive the money during their retirement in the form of a distribution. Likewise, interest, dividends and other earnings attributable to assets in the retirement plan are deferred until distributed during retirement. It is presumed that when employees retire, their taxable income is less.   This places them in a lower tax bracket during retirement which means that their tax rate is lower. Employer pension plans are also tax efficient for the employer because the employer is allowed an immediate tax deduction for the amounts that it contributes to the plan.

The two types of retirement plans most typically utilized in the United States are defined benefit plans and defined contribution plans. A third variant, the Cash Balance Plan, has grown in popularity.

The defined benefit plan provides an employee with a monthly annuity upon retirement. The monthly annuity can be determined by applying a formula that is prescribed by the specific plan. For example, in some plans the monthly annuity is determined by an employee's years of service and his/her average annual salary during the last five years of employment. The employer makes contributions to the plan in an amount sufficient to fund the benefits, as determined by an actuary. The employer bears the risk if the plan's assets do not grow as anticipated and its contributions turn out to be insufficient to fund the benefits; the employer must make up the deficit through additional contributions.

The defined contribution plan provides an employee with retirement benefits based upon the amount the employee and his/her employer(s) have contributed over the years, plus any interest and investment gains realized. A separate account must be maintained for the assets of each employee. Unlike defined benefit plans, in many defined contribution plans, employees are permitted to make contributions to their retirement fund over and above the employer's contribution, up to a ceiling for pre-tax contributions, and may contribute additional amounts of after-tax dollars. Employees generally are permitted to contribute up to 15 percent of their pre-tax income, up to a maximum of $10,000, depending on the type of plan. The total amount of annual contributions on an employee's behalf from both the employer and the employee in a defined contribution plan cannot exceed the lesser of $30,000, or 25% of the employee's pre-tax income, without losing tax deferred treatment.

Some defined contribution plans, like defined benefit plans, have vesting schedules that are applied before an employee becomes eligible to receive benefits derived from employer contributions to the plan. However, contributions made to a defined contribution plan by an employee/participant out of the employee's own salary are always 100 percent vested and non-forfeitable.

A "401(k)" plan is a popular and commonly-found form of defined contribution plan. 401(k) plans do not have any vesting requirements, and are fully portable. That is, they allow employees to carry their plan benefits over to a new plan when they change jobs. Profit-sharing plans, savings plans and stock bonus plans are other forms of defined contribution plans.

ERISA imposes specific reporting and disclosure requirements on pension plans and provides a claim procedure for the recovery of benefits.

E. ANTI-DISCRIMINATION LAWS

Employers in the United States are faced with a myriad of federal and state laws regulating the equal employment opportunity impact and motivation of their employment decisions.

1. Federal Legislation Prohibiting Employment Discrimination

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e et seq. (Title VII), prohibits an employer from discriminating against an individual on the basis of race, color, sex, national origin, or religion with respect to hiring, discharge, compensation, promotion, classification, training, apprenticeship, referral for employment, or other terms, conditions, and privileges of employment. The Act includes in its definition of sex discrimination employment decisions made because of, or on the basis of, pregnancy, childbirth, or related medical conditions. Title VII applies to employers with 15or more employees, Title VII also applies to United States citizens working abroad for American-owned or -controlled companies.

The Americans with Disabilities Act

Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., prohibits employers from discriminating in employment against persons with physical or mental disabilities who, with or without reasonable accommodation, are able to perform the essential functions of their position. The ADA requires employers to make reasonable accommodation to the needs of disabled applicants and employees in order to permit them to perform the essential functions of their position, as long as the accommodation does not result in undue hardship to the employer’s operations. The ADA also applies to United States citizens working abroad for American-owned or controlled companies.

The Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*., prohibits discrimination on the basis of age against employees aged forty or older. An employer is prohibited from discriminating on the basis of age with regard to hiring, discharge, compensation, or other terms and conditions of employment. The Act provides an exception for highly paid executives, and provides that they may be required to retire at age 65 so long as they receive at least forty-four thousand dollars in annual retirement income. Like Title VII, the ADEA is enforced by the EEOC. The ADEA also applies to United States citizens working abroad for American-owned or controlled companies.

Equal Pay Act

Guarantees of equal pay for equal work are imported into every employment relationship by the Equal Pay Act as amended—a part of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219. The Equal Pay Act, which forms a part of the web of federal employment discrimination prohibitions, requires payment of equal pay for equal work performed by both sexes working in the same establishment. The Act prohibits discrimination on the basis of sex with respect to wages paid for equal work on jobs that require equal skill, effort, and responsibility, and that are performed under similar working conditions. The Act allows unequal pay, however, where the disparity is made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any factor other than sex.

The Civil Rights Act of 1991.

The 1991 Civil Rights Act (CRA), Pub. L. 102-66, rather than creating omnibus rights for a specific class of employees, instead amended Title VII, section 1981, the Rehabilitation Act, the ADA, and the ADEA to accomplish a set of goals under each of these statutes. The CRA added remedies to each of these laws, allowing awards of compensatory and punitive damages. In addition, the CRA provided for the right to jury trials under Title VII, the ADA, and the Rehabilitation Act. The CRA also amended Title VII and the ADA to specifically provide that both laws apply to United States citizens working abroad for American-owned or -controlled companies.

Under the CRA, a schedule for awarding punitive and compensatory damages was enacted, with caps on such awards that are based on the size of the employer:

- Up to 100 employees: $50,000
- 101-200 employees: $100,000
- 201-500 employees: $200,000
- 500+ employees: $300,000

Unlawful Harassment

All of the statutes discussed above prohibit harassment based on the characteristics and/or classifications that they protect. Thus, it is not just females who are protected from harassment based on sex; members of various racial groups are protected from racial harassment; the disabled and the aged are protected from harassment; and religion and national origin also may not be the basis for harassing an employee.

The United States Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* defined two categories of harassment: those involving a "tangible employment action" and those involving a "hostile work environment."

Harassment causing a "tangible employment action" (also called "economic harassment") normally involves some type of tangible employment action resulting in a monetary loss for an employee or significant changes in workload or work assignment. It requires that the threat of job detriment or promise of job benefit actually result in some sort of employment action, such as a termination, promotion, demotion or reassignment to a considerably different job. Employers are strictly liable for conduct by managers that constitutes economic harassment.

Hostile environmental harassment creates adverse working conditions which may not result in a tangible employment action. Such harassment can involve unwanted sexual advances, offering employment benefits in exchange for sexual favors jokes, graffiti, comments, stories, photographs, gestures, e-mail, or written materials that interfere with an employee's work performance. Environmental harassment will be found where the conduct in question is: (1) unwelcome; (2) related to a protected category; (3) offensive both to the recipient and to a reasonable person; and (4) severe or pervasive. In addition, threats of job detriment or promises of job benefits that do not result in tangible employment actions may amount to environmental harassment if the threats create an intimidating, hostile, or offensive work environment.

Retaliation

Title VII, the ADEA, the ADA, and virtually every state anti-discrimination statute, prohibit employers from retaliating against employees for exercising their rights to complain or bring a claim under each statute, or for opposing discrimination against others under the statute. In practice, the threat of a retaliation claim presents perhaps the most daunting challenge for an employer that continues to employ an employee who has charged it with some form of discrimination.

Further, employees often have a far more difficult time proving an underlying claim of discrimination than they do prevailing on a claim that they were retaliated against for asserting that discrimination claim. To establish a claim of retaliation, there is no requirement that the discrimination claim upon which the retaliation is said to have been predicated be proven to be valid. That is, an employee may win a retaliation case even if the discrimination claim for which the retaliation occurred is found to have been without merit.

In order to prevail in a lawsuit alleging retaliation, an employee generally must prove: (1) the employee engaged in protected conduct, such as the filing of a charge of discrimination; (2) the occurrence of a negative or adverse action by the employer, such as a demotion or discharge directed against the person engaging in the protected conduct; and (3) a cause-and-effect relationship between the first two elements.

2. State and Local Employment Discrimination Laws

In addition to the layer of federal laws that prohibit discrimination in employment, states and local governments also are permitted to and do regulate the field. As observed above, in addition to the classes protected under federal law, some states and/or localities also protect against employment discrimination based on marital status, sexual orientation, gender identity, political activity, age even if under 40, and physical characteristics (e.g., weight or height).

For example, California's anti-discrimination statute-- the California Fair Employment & Housing Act (FEHA)--is more expansive than the analogous federal laws. To begin with, FEHA applies to employers with five or more employees (whereas Title VII is applicable to employers with 15 or more employees). As does federal law, FEHA prohibits employment discrimination and harassment on the basis of race, color, national origin, ancestry, sex, physical and mental disability, age (40 and above), and religion. However, unlike the federal statutes, FEHA also prohibits discrimination based upon a medical condition or marital status. Medical condition is defined as a condition relating to cancer or to genetic characteristics. The California FEHA allows not only the relief provided by Title VII and other federal laws, but also unlimited compensatory and punitive damages. Additionally, the California Supreme Court established that the California Constitution creates public policy against discrimination may not be invoked as a common law claim against employers.

3. Proving and Defending Against Employment Discrimination Charges

Employees' rights under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Americans with Disabilities Act may be enforced by the federal Equal Employment Opportunity Commission (EEOC) or by bringing private lawsuits. Before bringing a private action under Title VII, the plaintiff must exhaust his or her administrative remedies through the EEOC. The EEOC investigates complaints of discrimination and has the authority to bring suit in federal court to redress discrimination. However, the vast majority of Title VII litigation is brought by individuals. Most states have agencies analogous to the EEOC and require similar administrative exhaustion of remedies before individual discrimination lawsuits may be brought in state court. In some states, including California, however, administrative exhaustion is not necessary and plaintiffs can bring claims based on common law and state constitutional theories, without having filed discrimination charges with state or federal agencies.

The laws prohibiting discrimination in employment do not prohibit all employment decisions that an applicant or employee may consider *unfair*. Discrimination because of a non-prohibited factor is not a violation of law. For example, the employment discrimination laws do not prohibit an employer from discriminating against an individual on the basis of merit, initiative, or performance.

To demonstrate discrimination, an individual must establish a connection between the employment condition or decision and a prohibited basis (such as race or sex). Such a connection may be established by pointing to: (1) individual instances of different or *disparate* treatment based on prohibited criteria, or (2) neutral policies or practices that have a much harsher or *adverse* effect upon a protected class to which an employee or applicant belongs (such as women, racial or ethnic minorities, persons over age 40).

Disparate Treatment.

Disparate treatment discrimination occurs when an employee is intentionally treated differently because of an illegal criterion, such as race, or membership in a protected class. The plaintiff has the initial burden of establishing a *prima facie* case of disparate treatment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To do so, the plaintiff must produce either direct or circumstantial evidence of the employer's unlawful motivation. Direct evidence may take the form of a supervisor's comments about the plaintiff's race, sex, or other protected criteria. Because employment discrimination in the modern workplace tends to be subtle, the existence of direct evidence of discrimination is relatively unusual, and circumstantial evidence must be relied upon. In *McDonnell Douglas Corp. v. Green, supra,* a failure-to-hire case, the United States Supreme Court held that to establish a circumstantial case of race discrimination, the plaintiff must prove that: (1) he or she is within a protected class (*e.g.*, is of the race at issue), (2) he or she applied for a job for which the employer sought applicants, (3) he or she was qualified for the job, (4) he or she was denied the job, and (5) the employer continued to accept applications for the job.

.

A plaintiff also may establish disparate treatment by demonstrating that he or she was forced to leave employment because of intolerable and discriminatory working conditions. The test of such a *constructive discharge* is whether a reasonable person in the plaintiff's position would have felt forced to quit.

If an applicant or employee establishes discrimination under a disparate-treatment theory, an employer may rebut the plaintiff's case by showing that the plaintiff was not treated any differently from other employees – that is, by showing that the plaintiff cannot establish a *prima facie* case of discrimination. For example, in a discipline case involving an Asian employee, the employer might show that a number of other employees of other racial backgrounds were similarly disciplined under like circumstances.

If, however, an employee was treated differently, the employer may show that the reasons for the different treatment were legitimate and nondiscriminatory. For example, nondiscriminatory reasons in hiring may include a consideration of qualifications, past experience, performance on an objective ability test, and past work record. Similarly, legitimate, nondiscriminatory reasons for discharge decisions may include breach of work rules and misconduct.

The United States Supreme Court has reaffirmed that once the employer articulates a legitimate nondiscriminatory reason for its decision, the employee then must prove that the reason the employer has given either was false, or that it is a pretext for what in reality is a discriminatory motive. *See*, *Reeves v. Sanderson Plumbing Supply Co.*, 530 U.S. 133 (2000).

Disparate or Adverse Impact

The anti-discrimination laws prohibit not only intentional discrimination but also the unintentionally discriminatory consequences of employment practices that apply to all employees. Accordingly, under the adverse-impact theory, the employer's motivation in establishing the particular employment practice is irrelevant. The plaintiff presents a *prima facie* case of discrimination by showing that a neutral policy has a harsher or adverse impact on a protected class (*i.e.*, Hispanics, females, Asians, etc.)

If a plaintiff establishes that an employer's practice has an adverse impact upon a protected class, the burden of proof then shifts to the employer to demonstrate that the practice is job-related and consistent with business necessity. If the employer demonstrates, however, that a specific practice does not cause the adverse impact, the employer does not need to further prove that the practice is required by business necessity.

However, even if an employer successfully establishes business necessity, a plaintiff may still prevail on an adverse-impact claim by demonstrating that an alternative and equally effective business practice exists that would have a less discriminatory effect, and the employer refuses to adopt the alternative practice.

Defenses to Harassment Claims

Under federal law, in cases where supervisory behavior is severe and pervasive enough to constitute environmental harassment, but does not result in a tangible employment action, employers have an affirmative defense to liability if they have exercised reasonable care in attempting to prevent and promptly correct workplace harassment. Generally, an employer will not be liable for environmental harassment engaged in by managers if the employer can show that it used reasonable care to prevent and correct the harassment and the employee failed to make a complaint or to otherwise avoid harm. Conversely, if the employer cannot show that it used such reasonable care to prevent or correct harassment, particularly when the employee has utilized the employer's complaint procedures, the employer can be found liable.

An employer's actions in generating, disseminating and enforcing an appropriate anti-harassment policy and procedure are critical elements of an employer's affirmative defense to claims of harassment. The courts analyzing this defense have considered not only whether the employer has an anti-harassment policy, but also whether the policy had been effectively communicated to supervisors and employees. To this end, courts have generally found sexual harassment training strengthens an employer's ability to assert the affirmative defense. Employers may avoid or limit liability by establishing the existence of a harassment policy and the employee's unreasonable failure to use it.

4. Remedies

The remedies available under all of the federal anti-discrimination laws, include back pay (lost salary and benefits), front pay where appropriate, reinstatement and/or other injunctive-type relief. Under Title VII and the ADA, but not the ADEA, damages for pain and suffering may be awarded (which, together with punitive damages, if appropriate, may not exceed the statutory caps referred to above.)

The ADEA does not provide for pain and suffering or punitive damages. Instead, a prevailing plaintiff may receive an award of liquidated damages that effectively doubles the back pay damages awarded where the jury finds that the employer's discriminatory acts were willful.

F. TERMINATION OF EMPLOYMENT

Under the at-will employment rule, an employment relationship, that neither contractually requires good cause for termination nor is for a fixed term, may be terminated by either the employer or employee with or without a cause or reason, and with or without advance notice to the other party, unless an exception applies. The federal and state courts and legislatures have identified a wide variety of grounds upon which employers may not base the discharge of an employee, even in an at-will employment relationship. For example, the National Labor Relations Act prohibits the discharge of an employee based on union membership or engaging in any activity that is protected under its provisions. This includes activities intended either to support or oppose a labor union. The federal Occupational Safety and Health Act prohibits the discharge of any employee who cooperates with OSHA inspectors or who complains to OSHA with respect to any condition believed to impact on the safety and/or health of any employee or employees. The federal and state anti-discrimination laws make it unlawful to terminate the employment of any person based on his or her membership in any category protected by federal law, as well as categories protected by the law of the state or municipality in which the employee works. In addition, the courts of some states have supplemented this list by prohibiting discharges that offend the public policy of a state.

1. No Statutory Minimum Notice Period

United States law – federal and state—is distinctive in the fact that there is generally no statutory minimum notice period that requires that an employee give and/or to receive prior notification regarding the termination of an individual employment contract or relationship. To the contrary, the right to receive notice is typically governed, if at all, by contract, and is inconsistent with the notion of employment at-will. In at-will employment relationships, the "contract," if there is one, provides that either party may terminate the employment contract without any advance notice.

Where employment is not terminable at-will or is otherwise governed by a written employment agreement, the employer is, of course, bound by the agreed-upon form of notice, if any. Both individual employment agreements and collective bargaining agreements may impose contractual notice provisions and also may provide for pay in lieu of notice at the employer's option. If an employment contract is for a fixed term, it will terminate on its expiration date, unless the contract provides for automatic extension of the agreement. While in general employers are not under an obligation to provide notice or severance pay, the Workers Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109 imposes notice or severance pay requirements in certain circumstances. In general, WARN requires employers with one hundred or more employees to give sixty days' notice prior to laying off or dismissing fifty or more employees.

2. Potential Legal Consequences for Employer and Employee on Termination

Where the termination of the employment of an employee has been found to be unlawful or wrongful, the employee may be found to be entitled to a variety of remedies. These will depend on the nature of the wrongdoing; whether the employee is a member of a union representing employees at the place of employment; and/or whether some other contract governing the relationship exists that provides remedies.

Unionized Employee s

Union-represented employees almost always have the right to grieve their dismissals under the provisions of their collective bargaining agreements, and if not resolved, the grievance over the dismissal will be taken to arbitration. An employer found by an arbitrator to have terminated the employment of unionized employees wrongfully generally will be liable for back pay and will be ordered to reinstate the employee as well.

Non-Unionized Employees

In addition to the remedies available to unionized workers – reinstatement and back pay – a non-unionized employee who has been wrongfully discharged might be entitled to damages for pain and suffering, punitive damages and, if the wrongdoing violates a statute, whatever other remedies the statute provides. In recent years, the most rapidly-growing source of employer liability has been the concept of wrongful discharge, discussed below.

3. Wrongful Discharge

As has been discussed, under the at-will employment rule, an employment relationship that does not have a fixed term may be terminated by either party to the relationship with or without a cause or reason, and with or without advance notice to the other party, unless an exception applies. Further, unless a contractual or statutory obligation independently imposes a duty on the employer to provide severance pay and/or benefits to a discharged employee, an employee lawfully terminated without cause or notice under the employment at-will rule has no right to severance pay or other paid benefits. Because the employment at-will doctrine is a rule of the law of contracts – an area of the common law that develops state-by-state—it cannot be discussed with complete accuracy by referring to a generalized set of principles that apply nation-wide to employment relationships in every state. Moreover, since the doctrine generally is a creature of common law, and is riddled in most states with judicially-created exceptions that have evolved over many years, the principles that have developed in each state are not as easily extrapolated and categorized as would be the case if the rule instead was contained in state codes, statutes and regulations which could be summarized. Instead, applicable rules must be discussed on a state-by-state basis, and must be gleaned from the case law in each state.

Despite the caveat expressed above, several general principles pertaining to the employment at-will doctrine can be identified. First, the doctrine applies in all fifty states. Second, every state recognizes exceptions that are legislatively imposed and most have judicially-created exceptions as well. Third, the employment at-will doctrine generally is viewed as a "presumption" concerning the status of an employee whose employment has no definite term. Thus it is said that employment for an indefinite term is presumed to be terminable at-will unless evidence is produced to "rebut" that presumption – that is, facts are presented that establish that a recognized exception to the employment at-will rule applies to make the discharge unlawful. While not every state recognizes every category of exception, there is a group of well-defined categories, each of which is recognized by some states and rejected by others.

One category of exceptions to the employment at-will rule is statutory. It consists of a group of prohibitions that the federal and state legislatures have created to specifically prohibit employers from discharging employees for reasons that the government deems unlawful for the good of society. This category of exceptions is recognized in every state. At the federal level these statutes are comprised of the employment discrimination laws which, among other things, prohibit the discharge of employees for reasons of race, gender, age, religion, creed, nationality, disability, pregnancy, and other protected characteristics. Statutes also protect employees against discharge in retaliation for exercising the right to complain about perceived employment discrimination or for engaging in the right to form unions. Most states have parallel statutory prohibitions that also permit victims of employment discrimination to bring an action under state law despite the existence of the employment at-will rule. In reality, these state and federal statutes create exceptions to the employment at-will rule. Often state laws protect employees against discharge for protected characteristics that range beyond those covered by federal law, such as marital status, sexual orientation or obesity.

The second category of exceptions is largely judge-made, and is subject to wide variance from state to state. There are three primary judicially created exceptions to the employment at-will rule: (1) discharge in breach of express or implied-in-fact contract; (2) discharge in breach of the implied-in-law covenant of good faith and fair dealing; and (3) discharge in violation of public policy. However, not all of these exceptions are recognized in every state, and to further complicate matters, there are wide differences even among states that recognize the same exception over the circumstances under which and how the exception applies.

4. Judicially-Created Exceptions to the Employment At-Will Rule

In addition to federal and state statutes that abridge the employment-at-will doctrine by prohibiting discriminatory discharges, employees may attempt to challenge discharge actions by asserting claims that fall into one or more of the following categories: (1) breach of an express or implied contract to discharge only for cause; (2) violation of a judicially recognized public policy prohibiting discharge in particular circumstances; and (3) breach of a covenant of good faith and fair dealing which is implied by law into certain contracts.

Implied In Fact Contractual Restrictions on At-Will Employment

Many courts have come to recognize that by their words and actions, an employer may lead its employees reasonably to believe that their employment will not be terminated at-will, but that they instead will not be terminated without good cause and/or until after certain progressive disciplinary procedures have first been exhausted. While there are many kinds of actions and statements that might lead one to believe that they could not be fired without cause, the main factors that courts find significant in determining whether an implied-in-fact contract exists appear to be: (1) the personnel policies and practices of the employer, (2) the employee's longevity of service, (3) actions or communications by the employer reflecting assurances of continued employment, and (4) practices in the industry.

Personnel policies and practices that articulate grounds for which employees can expect to be discharged might suggest that employees will not be discharged for any unlisted reasons or for no reason. A progressive disciplinary process that suggests that prior to discharge employees can expect to receive verbal warnings, a written warning and a final warning (or probation) might lead an employee to believe that a good cause must exist to discharge them and that they will not be fired without first receiving warnings and an opportunity to improve. Performance evaluations also can be read as suggesting that employees whose poor performance or conduct is not first documented on an evaluation will not be discharged for poor performance. Because the implied contract exception is based on employee expectations derived from employer acts and statements, statements prominently placed in personnel policies and employee handbooks which state that the policies are not binding, but are merely guidelines, and reaffirming that employment is at will, in many states are adequate to defeat an implied contract claim.

Longevity of service, while generally found inadequate alone to create an implied contract requiring good cause for termination, will help an employee who can point to other factors relied upon in believing that discharge had to be for cause. Courts and juries are more likely to find that a long-term employee, particularly one who has been successful at work, is justified in believing that some good reason must exist before discharge is permitted. The concept is almost akin to tenure or vesting, although if an employer can establish that employees should be on notice that it is an at-will employer, a long-term employee has no greater rights to continued employment than does a short term employee.

Assurances of continued employment made by a superior having authority often are cited by employees as a basis for their belief that they had been promised continued employment terminable for good cause only. Often this kind of statement and assurance is said to have been made during the recruitment process and is cited as an important factor leading the employee to have resigned a secure position to accept employment with the employer who purportedly fired him or her without good cause. Another setting in which such assurances are claimed to have been made are in performance evaluations, where a good performance evaluation is said to be accompanied by glowing verbal comments and promises never to let the employee go.

Implied In Law Covenant of Good Faith and Fair Dealing

The second common judicially created exception to the employment-at will presumption is the covenant of good faith and fair dealing that the law of many states implies into every contract. It is predicated on the principle that one party to a contract may not perform an act in bad faith, whether or not the act technically breached the contract, for the purpose of depriving the other party of the benefits of the contract. This exception is recognized in fewer states than is the implied contract exception, and can be conceptually elusive. In general, a breach of the covenant of good faith and fair dealing can also be a breach of contract, whether the contract is express and in writing, or implied in fact. This happens, for example, when the breach of the contractual commitment is motivated by some sort of bad faith or malice, or by self-dealing. For example, where an employ-ment contract requires good cause for discharge, and an employee not only is discharged without any good cause, but her supervisor also fired her in order to put his paramour into the job, a breach of the covenant of good faith and fair dealing has occurred.

However, the covenant of good faith and fair dealing also creates a claim where the employer acts in bad faith and injures the employee, but does not technically breach the employment contract. For example, an employee discharged for refusing to take a drug test might not be able to argue that good cause did not exist because he or she may have been insubordinate or may even have been under the influence of some substance. If the demand to submit to a drug test was unreasonable, a claim for breach of the covenant of good faith and fair dealing might be brought in states recognizing such claims.

Exception to Employment At-Will Where Discharge Would Violate Public Policy

Virtually every state permits a claim of wrongful discharge to be brought where the employee's discharge violated some clear mandate of the public policy of the state. While some states have codified the so-called "public policy exception" to the employment at-will rule, the common law of virtually every other state recognizes an exception where the discharge of an employee violated some tenet of a public policy of the state or the nation.

In virtually every state that permits common law claims for wrongful discharge in violation of public policy, the courts have held that it is not sufficient for a court to declare on its own that public policy was offended the discharge in question. Instead, the public policy must be identified as such by a federal or state statute or regulations promulgated by an administrative agency authorized by law to do so, or by the constitution of the U.S. or a state in order to be actionable. The reason for this rule is that in the U.S., the definition of public policy is a legislative function and not a judicial one. Thus, to involve public policy there must be a statute or a constitutional provision that applies in the state in which the employee was employed that protects, forbids or regulates conduct in which the employee was engaged or refused to engage in.

Claims for wrongful discharge in violation of public policy tend to fall into one of two categories: (1) the plaintiff claims that the employer retaliated against him/her for engaging in an activity that was protected by a statute; (2) the plaintiff claims that the employer fired him/her for refusing to engage in unlawful or harmful activity. Examples of the first kind of public policy claim would include discharging the plaintiff for testifying truthfully against the employer's interests at a trial and firing the plaintiff for reporting employment discrimination against another employee. Examples of the second kind of public policy claim include discharging a healthcare worker for refusing to provide care along side unqualified coworkers, and the termination of the employment of a liquor salesperson for refusing to violate liquor regulations at the direction of his employer.

A final common characteristic of public policy claims is that to be actionable, the public policy raised must be one of truly public concern as opposed to an issue that is largely private. Thus, an employee allegedly fired by a manager in retaliation for reporting petty theft by a more favored co-worker would not state a valid claim in most states because while most states have statutes forbidding theft, the theft of small amounts of an employer's resources does not raise an issue of true public concern. Similarly, while a refusal to work with unqualified healthcare personnel does state a claim since unqualified healthcare workers could endanger the health and safety of large numbers of patients, no wrongful termination claim can be brought for violating the public policy of encouraging proper medical care because encouragement of proper care is not the same as providing a safe and healthful workplace, the latter being of true public concern.

It is not enough for a discharged employee to prove that he engaged in an activity protected by public policy and that later he was fired. He instead must prove that the protected activity was the cause of his discharge.

Unlike the other forms of wrongful discharge exceptions to the employment at-will rule which proceed as breach of contract claims for which economic losses only may be recovered, many states treat a cause of action for discharge in violation of public policy as tort claims. This, in turn, makes damages for pain and suffering and also punitive damages available, depending on the state involved.

5. Private Arbitration of Employment Disputes in the Non-Union Workplace

Arbitration has been a fixture in the unionized workplace for many years. It is only recently, however, that arbitration has found its way into the non-unionized workplace as a means for resolving employment disputes. While it generally is a quicker and less expensive means of dispute resolution than is litigation, mandatory use of arbitration has not been universally embraced by the courts and is subject to rigorous standards of fairness before it will be enforced.

Some employers in the United States are requiring employees to sign agreements to arbitrate disputes in lieu of bringing a court action as a condition of becoming employed even though their workplaces have not been unionized. Binding arbitration has grown in popularity among defendant employers in direct proportion to the increasing cost of litigation and the increasing size of jury awards (particularly large multimillion dollar punitive damage awards). To avoid the costs and uncertainties of the jury system, as well as the propensity of juries to render larger damage awards, many employers have turned to requiring employees, either as a condition of initial employment or as a condition of continued employment, to agree to binding arbitration of all employment disputes.

6. Special Provisions Relating to Plant Closures and Mass Layoffs (WARN Act)

While there is no general obligation to provide notice or severance pay prior to discharging an employee, a statutory exception applies to companies with 100 or more employees that undergo plant closures or mass layoffs of affecting fifty or more employees. Failure to abide by the Act's requirements may subject an offending employer to serious penalties, including sixty days' back pay plus benefits for all affected employees; five hundred dollars a day to the local government where the reduction in force occurred; and payment of attorneys' fees in litigation.

7. In Mergers and Acquisitions, U.S. Law Does Not Require A Transfer of Undertakings

In an asset transaction of part or the entirety of the seller's operations, the purchaser is not automatically obligated to employ the seller's displaced employees. The employees whose jobs are affected by the asset sale will be terminated from their employment. Of course, the seller and buyer can contractually agree that the buyer will offer positions to the displaced employees.

On the other hand, if the purchaser acquires the corporate shares of the buyer, there will be no direct employment consequences to seller's employees. This is because, in the case of a change in share ownership, the legal entity that employs the employees (the company itself) does not change.

G. UNION-MANAGEMENT LAWS

1. National Labor Relations Act

The right of employees to be represented by labor unions is governed exclusively by, a federal law, the National Labor Relations Act ("NLRA"). Section 7 of the NLRA provides as follows:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain

> collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities...

2. Role of Trade Unions

Labor unions attain collective bargaining rights by demonstrating majority status either through obtaining the informal consent of the employer or through an election and certification process conducted by the NLRB. In those instances where the labor union seeking representation rights is not accorded recognition by the employer voluntarily, a statutory procedure has been established in the NLRA for administrative determination of the fundamental questions of appropriate bargaining unit and the election of an authorized employee representative/labor union.

A core principle of the NLRA is that of exclusive representation of all bargaining unit employees by the labor union chosen by the majority of the employees in the bargaining unit. The protections afforded by the NLRA are available to all employees, not only those who are members of organizations or who are represented by labor unions. Under the NLRA, a labor union owes a duty of fair representation to each member of the bargaining unit for which it is the recognized or certified representative, regardless of whether the employee is an actual member of the union.

3. Unfair Labor Practices

The NLRA protects employees from certain activities by employers and unions that are viewed as impinging on the employees' free exercise of rights guaranteed by the NLRA. These prohibited actions are collectively known as "unfair labor practices" in violation of the NLRA. For example, the NLRA prohibits employers from discriminating against employees because of their union activity with respect to hiring, discipline or any other aspect of employment. The NLRA also protects employers against certain types of union conduct. For example, the NLRA prohibits unions from engaging in acts of violence against employees who cross a picket line or work during a strike.

4. Lawful Concerted Activity

The NLRA protects the right of employees to engage in "concerted activity." Such activity includes, but is not limited to strikes. Other forms of concerted activity are picketing, distributing leaflets, calling for boycotts of the employer's products, and engaging in corporate campaign activity such as making appeals to shareholders, boards of directors, lenders and investors.

The NLRA permits certain employer responses to lawful strikes. While an employer cannot terminate employees who engage in a lawful strike, the employer has the right to hire replacement employees during the strike. In all strike situations an employer has the right to hire temporary replacements. In an unfair labor practice strike, the employer does not have the right to hire permanent replacements. Following an unfair labor practice strike, the employer must allow striking employees to return to their regular jobs when they abandon the strike. In an "economic strike," the employer has the right to hire permanent replacements – employees who have the right to keep their jobs even after the strikers have offered to return to work. Even in an economic strike, however, the former strikers who seek unconditional reinstatement and who have been displaced by permanent replacements must be placed on a preferential rehire list and brought back to work before any more new employees are hired for the strikers' positions.

Also, an employer always has the right to temporarily subcontract bargaining unit work during a strike without prior negotiation over this subject with the union. An employer never has the right to subcontract work permanently as a result of a strike, unless it has first negotiated with the union and has achieved agreement or impasse in negotiations on that subject.

5. Lockouts

Lockouts are the flip side of strikes. Just as labor unions can withhold the services of their members to exert economic pressure on an employer, so too may employers lock out employees for the purpose of bringing economic pressure on a union in support of the employer's legitimate bargaining position.

6. Collective Bargaining

The NLRA directs the employer to bargain with the majority labor union concerning wages, hours and other terms and conditions of employment. Equally important, it directs the employer not to bargain on such matters with any person(s) other than the majority representative labor union.

The NLRA requires the employer and the labor union to "meet at reasonable times." The NLRA imposes parallel duties on employers and unions to bargain in good faith over certain terms and conditions of employment. Where a union has been certified by the NLRB or recognized by the employer as the exclusive bargaining representative of the employer's employees in an appropriate bargaining unit, the NLRA requires the employer and the union to engage in good-faith bargaining towards achieving an agreement. With respect to bargaining, the NLRA guarantees a process, not a result.

Where there exists a collective bargaining agreement between the employer and the labor union, the party seeking to "terminate or modify" the labor contract must, among other things, serve notice upon the other party sixty days before the contract expiration date or if the contract lacks an expiration date, sixty days before the proposed termination or modification is to take effect.

The product of successful collective bargaining is a written agreement between the employer and the labor union known as a *collective bargaining agreement*. A collective bargaining agreement is the embodiment of the agreements between the employer and the union regarding all aspects of the terms and conditions of employment, including wages, hours, working conditions and benefits for employees in the bargaining unit.

The NLRA does not provide any minimum or maximum duration for collective bargaining agreements and, thus, these agreements can be of any length agreed to by the parties.

7. Private Arbitration for Resolving Employment Disputes in the Unionized Workplace

Most collective bargaining agreements contain express provision for resolution of disputes through an agreed to grievance and arbitration procedure. These disputes may involve contract interpretation, contract enforcement, application of contact terms, employee discipline or termination etc. Where applicable to the dispute, the grievance-arbitration procedure becomes the parties' exclusive remedy to resolve the dispute and supplants any right of the parties to seek relief through the state or federal courts.

The grievance procedure is the precursor to arbitration and may involve several steps. The union and/or the individual employee-grievant typically brings a grievance to a low-level supervisor in the first instance, and if unresolved the grievance is brought to higher levels of supervision. If the dispute remains unresolved at the highest level of the grievance procedure, it will be submitted to a private arbitrator who has been voluntarily selected by the parties to the contract.

Arbitration proceedings tend to be more informal, more expeditious and less costly than court litigation. The parties may be, but often are not, represented by attorneys.

Labor unions are often represented by full-time union representatives and companies by their labor relation's representatives. Formal rules of evidence do not apply, and arbitrators tend to admit into evidence a substantial amount of testimony that would be objectionable in court as irrelevant or hearsay. In addition to oral testimony taken at the hearing, the arbitrator may allow the parties to file pre-hearing and/or post-hearing briefs. The arbitrator's decision will usually be in writing, is final and binding and is subject to court review only in very limited circumstances.

Collective bargaining agreements that contain mandatory grievance and arbitration procedures generally contain explicit no-strike/no lockout clauses in recognition of the fact that disputes during the term of a contract are intended to be resolved through the grievance arbitration procedure rather than through the exercise of economic force. Even where a contract does not contain an explicit no-strike provision, courts will imply such a provision where a mandatory, final and binding grievance/arbitration procedure exists.

8. Successor Rights

Labor law implications arise whenever there is a change in business ownership and the seller is party to a collective bargaining agreement with a labor union. The purchaser will be deemed a *successor employer* of the bargaining unit employees where following the sale there is substantial continuity in the identity of the employing enterprise. But, a purchaser of a business is not obligated by the NLRA to hire any of the previous employer's workers, provided that the hiring decision is not the result of discrimination against union members.

Thus, the relevant inquiry is whether the resulting company is engaged in substantially the same business operations at the same location, with substantially the same workforce working under the same supervisors, and without a substantial change in working conditions. Of these factors, substantial continuity of the workforce is the paramount determinant of successorship status.

H. CONFIDENTIALITY OF EMPLOYER'S BUSINESS INFORMATION AND TRADE SECRETS

Most states, but not all, have adopted the Uniform Trade Secrets Act ("UTSA. UTSA originally was a "model" statute, and it governs the disclosure of trade secrets in those states in which is has been adopted. UTSA makes it unlawful to misappropriate, or improperly acquire and use, a trade secret.

Under UTSA, a “trade secret” is defined as: “Information, including a formula, pattern, compilation, program, device, method, technique, or process that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertained by proper means by other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” With respect to remedies for misappropriation of a trade secret, most states provide for the recovery of actual loss caused by the misappropriation of a trade secret, as well as recovery of any unjust enrichment gained by the wrongdoer.

The concept of trade secrets derives from common law and those states that have not adopted UTSA generally have retained their common law protections for trade secrets. The common law definition of a trade secret is similar to the one in UTSA.

Confidentiality restrictions on business information in addition to those imposed by statutory or common law trade secret prohibitions also may be imposed on an employee by contract. Vol-untary nondisclosure agreements generally prohibit an employee from using or disclosing an employer’s confidential and/or trade secret information. The type of information that an employer may prohibit or restrict an employee from disclosing includes company financial information, research and development information, customer/client information and other trade secrets (e.g., devices, inventions, records, and compilations of information). The restrictions and covenants that typically are seen and applied will vary by industry. For example, in the technology industry, it is customary for agreements to restrict the disclosure of research and development information. Among employees working in sales, employers often restrict the disclosure of customer/client information. Courts often are hesitant to enforce restrictions beyond those imposed by the UTSA. However, most courts will enforce restrictions that are reasonable, and that are shown to be reasonably necessary for the protection of the employer, so long as the employer itself takes reasonable steps to treat the information as confidential. Thus, courts want to satisfy themselves that the employer has a policy regarding confidential business information, and that the policy is enforced.

I. NON-COMPETITION AGREEMENTS

In the United States an employer has an unquestioned right to prevent a current employee from engaging in acts of competition with it, or from co-opting its business opportunities during the term of the employee’s employment. An employer's right to restrict the competitive activities of a former employee is far less certain.

An employer and an employee may enter into a contractual non-competition agreement. Under the terms of a non-competition agreement, an employee typically agrees not to accept employment with a competitor in a defined geographic area for a limited period of time following termination of employment. An employer and an employee may also agree that the employee will not contact and/or solicit business from the employer's customers or clients, following termination of employment.

Because of the anti-competitive intent of a non-competition agreement, most courts view them with disfavor, but most also will enforce them at least in some circumstances. Those states that permit non-competition agreements will only enforce them in limited circumstances where the employer can prove that the restriction is reasonable and necessary to its business. Typically this requires a showing that the restriction is reasonably limited with respect to territory, time and persons; where the employer has provided the employee with special training; and where the employee is privy to company information that would allow him/her an unfair competitive advantage.

Some states, such as California, generally prohibit non-compete agreements between employers and employees completely. Most states will permit agreements which restrict an employee from soliciting customers with whom the employee became familiar because of the employment.

J. INDEPENDENT CONTRACTORS

In the United States, the terms "employee" and "worker" often are used interchangeably. However, there are dramatic distinctions with respect to employment rights of and duties owed to an *employee* and an *independent contractor*. An independent contractor is typically retained to perform specific work or undertake a specific project, but relies on his/her own discretion in deciding how and when to perform the work agreed upon, and uses his/her own equipment and his or her own office space. Independent contractors typically are used for a limited or defined amount of time and have multiple clients for which they are performing work at any given time.

Generally, an employer will retain the services of an independent contractor where it requires the performance of specialized tasks for a short period of time, or where it seeks certain services or the completion of a specific project, but lacks either the ability or desire to direct and control the work. For example, a business may retain the services of a computer professional as an independent contractor in order to install or correct a specific problem with its computer network.

The status of service providers has generated considerable controversy in recent years, particularly given the effort of businesses to control both wage and benefit components of their labor costs. For tax reasons as well as for purposes of protecting employee rights, the designation of workers by employers as "independent contractors" rather than "employees" is under increasing scrutiny by the government.

1. Tests for determining independent contractor vs. employee.

There are several tests commonly used for determining whether a worker is an employee or an independent contractor, depending upon the purpose for which the determination is being made.

Right of Control Test

The most common test, which is used for federal tax purposes, is the common law *"right of control"* test. Under this test, a person is an employee, as opposed to an independent contractor, if the employer has the right to direct and control when, where and how the work for which the person was hired is to be performed and completed, regardless of whether the employer actually exercises the control. There are 20 common law factors that are considered in determining independent contractor status under this test. These factors include whether the individual uses his own tools, whether the individual has a significant investment in his trade, whether the services of the individual are available to the general public, and whether the individual may be held liable for non-completion of the work. State taxing authorities typically follow the right of control test, but often vary over the factors considered and how they are weighed.

Economic Realities Test

Another test commonly used to determine independent contractor status is the "economic realities test." This test is employed in determining whether a worker is an employee for federal wage and hour law purposes – *i.e.*, in determining whether minimum wage and overtime laws apply. Under this test, the so-called "economic realities" of the employment relationship are examined. Sig-nificant factors that are scrutinized include the level of supervision over the work; whether the worker's job duties are interchangeable with the job duties of others; and whether the employer supplies the equipment and work premises used on the job. If the person acts like an employee in these respects, he or she will be deemed to be one.

2. Advantages for Employer in Using Independent Contractors

Because there are a number of benefits to which independent contractors are not entitled but to which employees are entitled to receive if offered, the proper classification is of consequence in the benefits area. In addition to paying a salary or wage, an employer may offer fringe benefits to its employees, such as retirement plans, health and life insurance, and disability benefits, with favorable tax treatment. An independent contractor can be compensated for services in a manner which may be calculated as a flat fee or an hourly rate. However, if benefits are provided to an independent contractor above and beyond the fee for service, government authorities take the position that they should be reclassified as employees. The government views receipt of fringe benefits to be a hallmark of employee status, and presumes that the recipient is not an independent contractor.

There is also a difference in the treatment of employees and independent contractors from a taxation standpoint. While in almost all cases employees have most of their personal income taxes withheld by the employer, independent contractors are not subject to withholding of their income taxes. Instead, independent contractors are responsible for reporting their own taxable income and deductions to the government, and are responsible for paying their income taxes when due. An employer also is obligated to withhold from an employee's wages Social Security and Medicare taxes, and is obligated make matching payments for these taxes. However, independent contractors are required pay both the employer's and employee's portions of these taxes completely out of their income. The user of the contractor's services generally must report income paid to contractors to the federal Internal Revenue Service annually. Finally, employers pay unemployment insurance taxes which fund unemployment benefits for terminated employees under certain circumstances. Independent contractors cannot receive unemployment benefits.

K. CLASS ACTIONS

The class action is a procedural device provided for under the Federal Rules of Civil Procedure that allows named plaintiffs to sue on behalf of themselves and other similarly situated but unnamed persons. The device is intended to facilitate the fair and efficient adjudication of the dispute. Class actions have been used effectively in numerous substantive legal areas, including antitrust, consumer fraud, products liability, government benefit entitlements, and mass torts. In employment law, class actions have traditionally been used to challenge systemic wage law violations and employment discrimination.

A class action is a lawsuit brought by an individual or several individuals on behalf of a larger group (the class), whose actual joinder in the lawsuit would be procedurally impractical. The named plaintiff represents the interests of the absent putative class members. Courts assume a heightened role in managing and monitoring the prosecution and settlement of class action lawsuits to ensure that absent class members' interests are protected. Once a lawsuit is filed as a class action, any proposed settlements, compromises, or dismissals must be approved by the court.

A class action may proceed as such initially, but early in the litigation a searching inquiry is undertaken to determine whether the case is appropriate for class action treatment. If the case is deemed appropriate, then a class (or several classes, depending on the case) is "certified." Certification always is conditional, however, and a class always can be de-certified.

Under Rule 23(a) of the Federal Rules of Civil Procedure, an action may be brought by representative parties on behalf of a class only if four prerequisites are met: numerosity, commonality, typicality, and adequacy of representation. Whether or not these prerequisites all are satisfied is decided at the class certification hearing.

L. FOREIGN NATIONALS WORKING IN THE U.S.

1. Hiring and Employing Foreign Nationals

The hire and employment of foreign nationals in the United States is regulated exclusively by federal law—The Immigration Reform and Control Act, 8 U.S.C. §1324, et seq. ["IRCA".] Under IRCA, an employer must verify the identity and the eligibility for employment of every individual it hires, making every offer of employment contingent upon proof of both identity and eligibility. All non-American citizens who wish to work in the United States must possess a lawful permanent resident alien card, commonly referred to as a "green card", or a time-limited work permit.

2. Application of U.S. Employment Laws to Foreign Nationals Working In the U.S.

Foreign nationals employed in the United States are protected by all of the statutory and common law protections under U.S. federal and state laws, including against being discharged wrongfully and/of for a discriminatory purpose.

M. APPLICATION OF U.S. LAWS TO FOREIGN EMPLOYERS DOING BUSINESS IN THE U.S.

1. Federal Anti-Discrimination Laws

Foreign employers doing business in U.S. are subject to the laws generally applicable to domestic companies operating in the U.S., including the federal anti discrimination laws. Foreign employers may also be subject to jurisdiction in the U.S. for alleged breaches of contract with employees working in the U.S. Citizenship of the employee is not relevant to coverage in the United States. Both U.S. and non-U.S. citizens are protected.

2. Impact of International Treaties on Foreign Employers Doing Business in the U.S.

Friendship, Commerce and Navigation (FCN) Treaties have been negotiated by the U.S. with over 16 countries, including Japan, Italy, France, Korea, Belgium, Taiwan, and Germany, to encourage U.S. investments abroad in countries recovering from World War II. The US has a FCN Treaty with Taiwan, but not with the PRC.

The treaties include the right of companies of either party to select within the territories of the other certain classes of employees, such as executives, attorneys or technical experts "of their choice," without regard to nationality. Thus, these treaties allow the party nations to favor their own nationals in staffing their foreign branches. American subsidiaries of foreign corporation are not covered by FCN. *Avagliano v. Sumitomo Shoji America, Inc.*, 457 U.S. 176 (1982); *Spiess v. C. Itoh & Co.*, 725 F.2d 970, 975 (5th Cir. 1984); *see also Kirmse v. Hotel Nikko,* 51 Cal. App. 4th 311 (1996). An important exception to this rule applies when the foreign parent makes the decision, FCN applies. *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991).

N. APPLICATION OF U.S. EMPLOYMENT LAWS TO U.S. NATIONALS ASSIGNED TO WORK OUTSIDE THE U.S.

1. Statutes that May be Applied Extraterritorially

American expatriate employees of U.S. corporations assigned to their employer's overseas operations maintain the protection of the U.S. federal anti-discrimination and harassment laws including Title VII, ADEA and the ADA. Thus, American expatriates have the statutory right to file a charge of discrimination with the EEOC and sue for employment discrimination occurring anywhere they work for a U.S. corporation or an employer controlled by a U.S. corporation, even when they work overseas. These extraterritorial protections apply only to U.S. citizens; foreign citizens employed by a U.S. entity or U.S.-controlled entity abroad are not protected.

2. The "Foreign Laws Defense"

The 1991 Civil Rights Act contains a foreign laws exemption for U.S. companies employing Americans overseas. It is not a violation of U.S. law for an employer to take action that might otherwise constitute unlawful employment discrimination, when such action is necessary to avoid violating a local law of the foreign country in which the workplace is located. Thus, "[It is a defense for violations of Title VII or the ADA if compliance with those statutes,] with respect to an employee in a workplace in a foreign country," would "cause" a covered entity to "violate the law of the foreign country in which such workplace is located." 42 U.S.C. §§ 2000e-1(b), 12112(c)(1)).

The goal of this exemption is to relieve U.S. companies of the impossible task of complying simultaneously with inconsistent legal obligations where application of the U.S. antidiscrimination laws would violate the law of the foreign country where the U.S. citizen is employed. To invoke he foreign laws defense, the employer must show that: the action is taken with respect to an employee in a workplace in a foreign country; compliance with U.S. antidiscrimination laws would cause the employer to violate the law of the foreign country; and the law is that of the country in which the employee's workplace is located.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

10616 Scripps Summit Ct., Suite 200, San Diego, CA 92131
Phone 619-822-1088 *Fax* 1-708-575-1495
WWW.ROSEGROUP.US