

# United States of America

## Introduction

The United States has a well-developed set of laws prohibiting employment discrimination and harassment against employees falling within specified protected categories. This system of rules stems from federal, state and local laws. In major metropolitan areas of the United States, it is not uncommon for all three sets of laws to prohibit certain types of employment discrimination and harassment. However, as a rule, employees in general have relatively limited employment rights when compared to many other developed nations. The primary reason for this is a legal concept known as the “at-will” employment rule. This rule of law provides that an employer in the United States is free to dismiss an employee for any reason or no reason at all, with or without previous notice, and at any time. Absent a contract or employer policy to the contrary, an employer can terminate an employee without any financial obligation whatsoever to the discharged worker. In essence, an employee works at the will of the employer. This rule of law is found in all 50 states that make up the United States. Outside of the mass layoff or plant closing context, there is no federal law in the United States providing notice rights or indemnity requirements in the context of the termination of an individual employee.

The at-will employment rule, however, is not interpreted uniformly in all 50 states. Courts in some states interpret the rule broadly, while courts in other states have created exceptions to the rule or otherwise restricted the application of the at-will employment doctrine. In addition, some states provide statutory protections against terminations that narrow the application of the rule.

Litigation involving employment disputes is not unusual in the United States. Indeed, some consider it to be relatively common, as there is little stigma attached to the process by which one may sue their employer. A sophisticated bar of attorneys representing workers in employment-related litigation is common in most jurisdictions in the United States. Awards are often not limited to reimbursement of wages. Exemplary or punitive damages, which are designed to deter and punish a wrongdoer, are also frequently allowed. Some jurisdictions are considered more liberal or “employee friendly” than other areas of the country (the states of California, Colorado,

Michigan, New York and New Jersey are the primary jurisdictions where this observation is relevant). Other areas of the country are considered more conservative or “employer friendly.”

## Terminations

### Restrictions On Employers

The at-will employment rule in the United States provides that an employer has no legal restrictions on its ability to dismiss an employee, unless it is based on a reason that violates a law, such as race discrimination. In the past decade, however, the prevailing trend of United States courts has been to grant additional rights to workers. As a result, the at-will employment rule is becoming narrower, and wrongful termination litigation is a fact of corporate life in America.

### Contract Restrictions

The first and most important exception to the at-will employment doctrine is a contract limiting the employer’s absolute right to dismiss a worker. Unlike some countries, the laws of the United States do not require or mandate employment contracts. Although written employment contracts are relatively rare in the United States for middle management and lower-level employees, such contracts are fairly common for high-level executives or key employees. When contracts are for a specific duration (for example, providing employment for two years), employers can generally dismiss workers only for “good cause” or “just cause” unless the contract itself otherwise authorizes the circumstances of a termination. Collective bargaining agreements for union employees are similar in principle, at least with respect to terminations, although they can be quite different in detail.

In some states, certain oral representations can also restrict employers from dismissing a worker. In essence, verbal statements or representations can create an enforceable contract in certain circumstances. For example, a manager who assures a worker that “*you will have a job here for the rest of your life*” may well have created a contract of employment with the employee in some states. However, most states require written statements, especially for a promise lasting more than a year.

Employers may also be subject to contractual liability to workers in the United States under concepts known as “promissory estoppel” and the “covenant of good faith and fair dealing.” Courts may invoke the doctrine of promissory estoppel to enforce

promises made to employees in the absence of a contract. In this respect, a claim of promissory estoppel is often alleged by a worker as an alternative to a breach of an oral contract theory. To recover for promissory estoppel, an employee must show that an employer made a clear oral promise on which the employee relied to his or her detriment, and that it would be unjust to allow the employer to escape its promise. A typical example of this concept arises when an employer promises a job to an individual who quits his or her present job in reliance on such a promise. Additionally, the covenant of good faith and fair dealing is a concept that courts in certain jurisdictions (most notably in California) imply as a term of all employment relationships. In effect, this creates an implied contract requiring employers to have good cause to dismiss an employee.

### Judicial Exceptions

Additional restrictions on an employer's right to dismiss an employee in the United States are the result of judicial decisions created as exceptions to the at-will employment rule. In the United States legal system, judicial decisions create what is called "common law," a body of law that is based on legal precedents. In most states, the common law provides that an employee who has been dismissed in violation of a well-established public policy can recover damages against an employer. The most common example of this restriction is when an employee is dismissed in retaliation for having filed a claim for worker's compensation benefits or reporting alleged illegal activities of a company to law enforcement agencies. This is known as the tort of retaliatory discharge. Commentators refer to cases involving the reporting of illegal activities as "whistle-blower" cases because the individual seeks protection from retaliation for having raised an alleged illegal act to public attention. In addition to this public policy exception, the vast majority of states in the United States have contract type claims based on employee handbooks. Basically, if an employee handbook makes promises that are sufficiently definite and specific for an employee to rely on (and fail to contain conspicuous disclaimers negating the promises by providing that the employee handbook does not constitute a contract), courts will enforce such promises as though they constitute an employment contract. Thus, employee handbooks are often enforced as implied contracts between the company and its workers if they contain specific promises - for example, that terminations will be implemented only after progressive counseling steps or for "just cause."

## Statutory Exceptions

Finally, federal, state and local laws banning employment discrimination also restrict the ability of employers to dismiss employees in the United States. Typically, such laws allow employers to dismiss a worker for any reason, so long as the reason is not prohibited by statute (e.g., due to the employee's sex, race, etc.).

## **Notice Provisions/Consequences Of A Failure To Provide The Required Notice**

There are no laws in any jurisdictions in the United States that require an employer to give notice to an individual employee of an impending termination. Of course, employers may be obligated to give notice to an employee if there is a written contract requiring such notice that the parties voluntarily negotiated. In those circumstances, the consequences of a failure to give the required notice are typical breach of contract damages (i.e., the amount of money equivalent to the number of days or weeks of salary for which notice should have been given but which the employer failed to give to the employee).

In mass termination situations, however, federal law requires the provision of notice to employees in certain circumstances. This is as a result of a federal statute known as the Worker Adjustment and Retraining Notification Act, more commonly known as the "WARN" Act. This statute requires an employer to give 60 days written notice to employees of large-scale layoffs or plant closings. The WARN Act has nothing to do with the right to continued employment. It concerns only an employer's obligation to provide advance notice of a job loss. Rather, the goal of the law is to provide employees with an opportunity to look for other jobs or to seek retraining for other employment opportunities. Regardless of whether notice is given, an employer is free to dismiss or lay off its workers. The WARN Act applies only to businesses that employ 100 or more employees. In general, notice is required in circumstances where an employer dismisses at least 500 workers at one site or, alternatively, more than 50 workers if the total number of workers dismissed is 33% or more of the employees at a particular work site. A covered employer must also give notice if an employment site is shut down resulting in employment loss for at least 50 employees.

## **Termination Indemnities**

There are no laws in the United States requiring the payment of a termination indemnity to an employee who is dismissed by an employer. In the case of a mass layoff situation covered by the WARN Act, an employer that fails to give the required notice can be liable for payment of up to 60 days of compensation to any worker who was entitled to receive the statutory notice.

## **Laws On Separation Agreements, Waivers, And Releases**

Because of the vagaries of wrongful termination litigation in the United States, it is common for employers to seek a release of liability from workers at the time of their termination. A release or waiver of legal claims will be upheld in the United States if consideration is provided to the employee. Consideration in this context means the employer has given the employee something of value that the company has no legal obligation otherwise to give to the worker. Consideration in most circumstances involves the payment of money. However, consideration is not limited to money; for example, it can include a letter of recommendation, payment of the employee's insurance premiums, or waiving a loan.

The law of separation agreements, waivers and releases may differ in the 50 states. However, if an employer seeks a release of potential claims for age discrimination arising under federal law, a statute known as the Older Workers Benefit Protection Act of 1990 (OWBPA) applies to the release and its negotiation. The primary purpose of the OWBPA is to ensure that employees age 40 or over do not waive any potential age discrimination claims unless they do so knowingly and voluntarily. The OWBPA specifies seven minimum conditions that must be met before a release agreement is valid and enforceable:

- (1) The release agreement must be written in a way that is easily understood by the employee;
- (2) The release must specifically refer to rights or claims arising under the federal age discrimination law so the employee is made aware of his or her rights under this law;
- (3) The employee cannot be asked to waive future claims that may arise after the date the release is executed;

- (4) In return for signing the release, the company must give the employee something of value above and beyond that to which he or she is already entitled;
- (5) The employee must be advised in writing to consult with an attorney prior to executing the agreement;
- (6) The employee must be given a period of at least 21 days (or 45 days in the case of a group termination) within which to consider the agreement; and
- (7) The release must provide that for a period of seven days following the execution of the agreement, the employee has the absolute right to revoke the agreement if for any reason he or she has second thoughts and changes his or her mind.

## **Litigation Considerations**

The majority of employment disputes that entail litigation in the United States involve terminations. Most claims are for “wrongful termination,” and generally involve discrimination allegations, common law theories or both. In the past decade, approximately one in five cases brought in federal courts are over employment-related disputes. Most employees have little to no trouble finding a lawyer who will litigate a case on their behalf. As is discussed below, the fee-shifting nature of employment discrimination laws is such that there is no economic disincentive for workers and their attorneys to bring lawsuits against employers.

## **Employment Discrimination Laws**

Employment discrimination is prohibited by federal, state and local laws of the United States. Federal law prohibits discrimination against workers based on age, sex, national origin, race, color, religion, disability, veteran status and pregnancy. The majority of these prohibitions are found in a law that is commonly referred to as Title VII of the Civil Rights Act of 1964 (“Title VII”). Age discrimination is prohibited by a separate law called the Age Discrimination in Employment Act of 1967 (ADEA), and grants right to workers 40 years of age and older. The ADEA prohibits intentional discrimination as well as certain policies or practices that may have a disproportionate impact on workers age 40 or over. The Americans With Disabilities Act of 1990 (ADA) prohibits discrimination based on a disability. Finally, the Civil Rights Act of 1991 establishes remedies to implement Title VII, the ADEA and the ADA and also clarifies various procedural and substantive issues under these laws.

Federal employment discrimination laws are exceedingly broad in scope. The laws protect all types of workers - those who have contracts, those who are employed at-will and even those covered by collective bargaining agreements. The laws also protect applicants for jobs from discrimination in the hiring process. Employers are not required to hire or promote individuals protected by employment discrimination laws or to lower performance standards for such workers. Rather, employment discrimination laws prohibit employers from taking an individual's membership in a protected category into consideration in any employment-related situation (e.g., hiring, firing, promoting, determining pay, etc.).

All but two of 50 states have employment discrimination prohibitions applicable to private employers that are similar to federal law (the exceptions are Mississippi and North Carolina). Most state statutes mirror the protections of federal law, although some states actually provide greater protections than Title VII, the ADEA, the ADA and the Civil Rights Act of 1991. Examples of state laws that are broader than federal law include those that prohibit discrimination on the basis of marital status, genetic traits or sexual orientation. Generally speaking, state laws also apply to employers with a smaller number of employees who are otherwise exempt from federal law (Title VII and the ADA apply to companies with 15 or more workers, and the ADEA applies to business entities with 20 or more employees). In addition, many local governmental units have ordinances prohibiting employment discrimination.

Female employees have special rights in terms of maternity leave and equal pay. A law known as the Family & Medical Leave Act of 1993 (FMLA) guarantees female employees the right to take an unpaid leave of absence for medical complications with pregnancy. Unpaid leave under the FMLA is allowed for up to 12 weeks in connection with the birth or adoption of a child, or for serious health conditions of the employee or a family member. The FMLA offers male employees similar unpaid leave protection. The FMLA also prohibits discrimination or retaliation against any employee who exercises the right to take leave under the law. Additionally, the Equal Pay Act of 1972 specifies that employers must pay a female employee the same wage as a male employee for similar work. Most states have similar leave and equal pay laws.

Employees of publicly traded companies are protected against retaliation for corporate whistle-blowing under the Sarbanes-Oxley Act. The Act makes it unlawful to discharge or otherwise take action against an employee who reports suspected corporate fraud in good faith to a federal regulatory agency, any member

of Congress or a Congressional committee, or the employee's supervisor or any company employee with authority to investigate, discover or terminate prohibited corporate conduct. The employee must reasonably believe that the suspected misconduct involves mail, wire or securities fraud; a violation of the Securities and Exchange Commission rules or regulations; or violation of any federal law relating to fraud against shareholders.

## **Employee Remedies For Employment Discrimination**

An employee who wins an employment discrimination case can recover an award equivalent to lost salary and fringe benefits, as well as compensatory damages and punitive damages. Compensatory damages are for the alleged pain, suffering and emotional distress experienced by the employee injured by the employer's discriminatory conduct. Punitive damages are more in the form of a penalty and are imposed to deter wrongful conduct or to punish a lawbreaker. By virtue of the Civil Rights Act of 1991, federal employment discrimination laws have a sliding scale of limits on awards of compensatory and punitive damages depending on the size of the employer. Current federal law provides the following caps: US\$50,000 for employers with between 15 and 100 workers; US\$100,000 for employers with 101 to 200 workers; US\$200,000 for employers with 201 to 500 workers; and US\$300,000 for employers with 501 or more workers. State laws may have different caps on damages and may exceed those under federal law. Employees who win age discrimination cases, as opposed to race or gender cases, are also entitled to a doubling of an award of lost wages and fringe benefits if they can show that the employer engaged in a "willful" violation of the law. In certain situations, a successful employee can secure relief known as front pay, which is an award equivalent to the future monetary damages the worker is apt to experience due to the lingering effects of past discrimination. Reinstatement to a job is also a possible remedy in lieu of front pay. An employee in an employment discrimination case is also entitled to prejudgment interest on the monetary award rendered by the court in their favor. By law, interest is calculated at the prime rate and compounded daily.

Federal and state employment discrimination laws also have special provisions that provide that employees winning their case are also entitled to an award of attorney's fees. The court will generally award money to a prevailing employee to compensate him or her for their own damages, as well as for the reasonable fees of their attorney. Unlike many jurisdictions, it is difficult for an employer to recover its fees even if it prevails on all claims.

## **Potential Employer Liability For Employment Discrimination**

A worker can sue a company and, in certain jurisdictions or under certain statutes, the supervisor who made the personnel decision at issue. A court can award equitable, injunctive and monetary relief against the employer. In certain circumstances, a court may also impose damages on management personnel found to be guilty of discrimination.

## **Practical Advice To Employers On Avoiding Employment Discrimination Problems**

In the United States, the prevention of employment-related liabilities is dependent to a large degree on the maintenance of appropriate policies and employee records, contemporaneous documentation of personnel decisions and appropriate decision-making with respect to discipline, evaluation and terminations. Discrimination lawsuits are generally filed by employees, applicants or ex-employees who feel that they have been treated unfairly. In addition, courts and juries in the United States may view anything that has the appearance of unfairness in the workplace as constituting unlawful discrimination if it happens to a member of a protected group. The best way for employers to prevent unfairness or even the appearance of discrimination is to adhere to certain basic guidelines in supervising, evaluating and terminating employees.

These guidelines include:

- (1) Giving clear warnings and instructions to employees;
- (2) Applying all personnel policies equally to all employees;
- (3) Providing candid appraisals of performance to all employees;
- (4) Assuming all employees desire to be promoted;
- (5) Providing equal training opportunities and counseling;
- (6) Promoting an open-door policy so that communication between employees and management ensures that all possible employee grievances and complaints are passed on and responded to by management.

# Sexual Harassment

## Laws On Sexual Harassment

Sexual harassment can be a serious legal problem for employers in the United States. Sexual harassment is considered to be a form of sex discrimination, and, as such, is illegal under Title VII of the Civil Rights Act of 1964. The statute, however, is silent as to what behavior constitutes sexual harassment. The United States government, through an agency known as the Equal Employment Opportunity Commission (EEOC), has issued detailed policy guidance memoranda concerning various issues involving sexual harassment. Court rulings have also created a set of rules that describe the conduct that constitutes sexual harassment. Furthermore, most state employment discrimination laws mirror Title VII and also prohibit sexual harassment.

Title VII does not make all conduct of a sexual nature illegal if it occurs in the workplace. The EEOC's policy guidance memoranda and court decisions typically consider sexual harassment to be any unwelcome verbal statements or physical conduct of a sexual nature that unreasonably interfere with another employee's job or work environment. Generally speaking, there are two types of sexual harassment. The first type is "quid pro quo" sexual harassment. The second type is "hostile environment" sexual harassment. The lines between these two types of harassment are not always clear, and the two forms of conduct often occur simultaneously.

Quid pro quo sexual harassment occurs in a legal sense when employment decisions on hiring, promotion, transfer, discipline or termination are made on the basis of submission to or rejection of unwelcome sexual conduct. For example, if a supervisor requests sexual favors from an employee, he or she refuses and the supervisor then dismisses or demotes him or her on account of the refusal, the courts will conclude that the employee is a victim of quid pro quo sexual harassment.

Hostile environment sexual harassment occurs where conduct of a sexual nature creates an intimidating, hostile or offensive working environment. It can take many forms, including verbal abuse, discussing sexual activities, commenting on an employee's physical attributes or appearance, uttering demeaning sexual terms, using crude and vulgar language, making unseemly sexual gestures or motions, engaging in unnecessary touching or any of these types of activities in combination or if repeated over time.

## Employee Remedies For Sexual Harassment

In cases involving sexual harassment, federal and state employment discrimination laws allow the victim of the conduct to recover compensatory and punitive damages, as well as lost salary and fringe benefits if applicable. The rules discussed previously with respect to recovery of attorney's fees also apply with equal force in a case of sexual harassment. Compensatory and punitive damages for sexual harassment under federal law are capped at a maximum of US\$ 300,000 for employers of more than 500 employees. However, it is not uncommon for a multi-million dollar award of compensatory and punitive damages to be sought by, and awarded to, a plaintiff suing for sexual harassment under state and local employment discrimination laws.

## Potential Employer Liability For Sexual Harassment

The U.S. Supreme Court clarified the rules regarding employer liability for sexual harassment involving the conduct of a supervisor. In two cases decided in June of 1998, the U.S. Supreme Court ruled that employers are absolutely liable for any sexual harassment committed by a supervisor where the victim of harassment suffers a tangible job detriment. In two cases, *Faragher v. City of Boca Roton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the U.S. Supreme Court ruled that:

- Employers may be held vicariously liable to a victimized employee under Title VII for the acts of supervisors that constitute sexual harassment, irrespective of the employer's policies and practices and even if the employer lacked actual notice of the supervisor's conduct;
- When the supervisor's sexual harassment results in adverse tangible employment action (e.g., a termination, denial of a raise or promotion, undesirable reassignment, etc.) suffered by the worker, the employer's liability is absolute; and
- When the supervisor's sexual harassment does not result in an adverse tangible employment action (e.g., the supervisor makes an unwelcomed sexual advance or unfulfilled threats to deny job benefits unless the employee agrees to sexual favors), the worker nonetheless may recover although the claim is subject to an affirmative defense.

The U.S. Supreme Court also held in the *Ellerth and Faragher* cases that employers may avail themselves of an affirmative defense where the worker is not subjected to an adverse tangible employment action. The affirmative defense has two components: (1) the employer must prove that it exercised reasonable care to prevent and promptly correct any conduct constituting sexual harassment; and (2) the employer must prove that the plaintiff unreasonably failed to take advantage of a personal policy or procedure to report, prevent or correct any conduct amounting to sexual harassment. As the second element of the affirmative defense implies, a worker has the practical burden to come forward and complain to management about any incident of sexual harassment.

## **Practical Advice To Employers On Avoiding Sexual Harassment Problems**

Court decisions indicate that the best possible defense to a charge of sexual harassment is for an employer to have an anti-harassment policy and complaint procedure. Without such a policy, it is very difficult for an employer to defend against sexual harassment charges. Accordingly, the personnel policies of any employer in the United States should include such a policy and a complaint procedure. The policy should define sexual harassment, prohibit it as a matter of company policy, provide an avenue for aggrieved employees to make complaints regarding what they believe to be sexual harassment, provide for proper investigation of those complaints and authorize disciplinary action against any harassers. To potentially limit or avoid liability, an employer must immediately investigate any complaints of sexual harassment and, where warranted, institute prompt remedial measures to prevent any future reoccurrences of sexual harassment.