The Right of International Employees to Bring Employment Claims in the United States

For employees who work in or have connections with several different countries, it can be difficult to figure out which country's laws and courts offer protection in an employment dispute. In some cases, the employee may even have a choice between different jurisdictions.

This factsheet summarizes the key issues involved in deciding what rights or claims an international employee may have in the United States (US). Please note that while many aspects of US employment law are governed by federal laws, many important aspects vary considerably state-by-state. Thus, an employee's overall position will often depend on the state of employment.

Introduction

In the US, federal, state, and local statutes regulate the employment relationship, as well as common law principles that govern issues related to contracts, torts, and fiduciary duties. The extent to which an employee can bring a claim or have legal protection in the US will depend on the type of claim involved and where the claim is being brought.

Claims related to contract, torts, and fiduciary duties are governed by US common law, which is based on precedent rather than statute. Claims related to restrictive covenants fall into this category.

A "statutory" claim is one that comes from legislation enacted by the governments, such as claims of discrimination or retaliation.

1. Legal Claims in the US Generally

The US has no special tribunals for employment disputes, unlike many other countries. Instead, most such disputes are litigated in federal or state civil courts. Contract claims cannot proceed in federal court unless each party is from a different state or country and the person bringing the claim is asking for at least $75,000 in money damages. Federal statutory claims can be brought in federal court without regard to these factors because they arise under federal law.

Some disputes are handled by specialized administrative agencies of federal, state, or local governments relating to specific statutory rights. In addition, unlike many countries, many employment disputes in the US are resolved through arbitration, typically as a result of employer-imposed arbitration agreements.

Each type of claim available in the US has a window of time in which it must be filed, which period often varies by state. Some relevant time limits will be specified below.

2. Contract Claims

US employers do not have to enter into employment contracts with their employees. In most states, the employment relationship is presumed to be "at-will," which means that the relationship can be terminated

for any reason (other than an unlawful reason), with or without cause or notice (except in the event of a mass layoff), at any time by the employee or the employer. Some employees (typically executives and other senior employees) working for US companies negotiate employment agreements that alter the typical at-will employment relationship or that provide protections (such as a notice period and severance pay) in the event of termination.

a. Executive Contract Terms

If a material contract term is breached, an employee can bring a contract claim in state or federal court (assuming diversity of citizenship with respect to the latter). Often, employees coming from abroad to work in the US will enter into a written contract specifying the following non-exhaustive list of material terms:

3. Duration of the employment period
4. Location, title, and reporting chain
5. Salary, bonus, deferred compensation, and benefits
6. Relocation benefits for the move to the host country and upon return to the home country
7. Expatriate benefits during the employment period and for a limited time after
8. Circumstances constituting termination for cause and triggering severance benefits
9. Restrictive covenants

Each contract will vary depending on the circumstances, and employees should seek counsel to ensure that all material points have been addressed.

a. Time Limits for Filing Contract Claims

The time limit for filing a claim for breach of a written contract differs by state and can range anywhere from three to ten years from the date the breach was discovered. The limit in New York and Connecticut is six years, while California and Texas apply a four-year time limit from the date the breach was discovered.

b. Monetary Damages

Depending on the nature of the breach, different categories of monetary damages may be available to an employee who brings a contract claim. Compensatory damages are damages for a monetary amount that is intended to compensate the non-breaching party for losses due to the breach, or to “make the injured party whole again.” This includes what the injured party expected to receive from the contract (based on the terms of the contract) and indirect damages that were foreseeable upon entering into the contract.

Punitive damages are intended to punish the breaching party and to deter future breaches by that party. These are rare in contract cases, though they may be available in certain fraud and tort causes of action that overlap with contract law.

Liquidated damages are specifically provided for in the contract and are more likely available to employers than employees. These are available when damages may be hard to foresee and must be a fair estimate of what damages might be in case of breach. In the employment context, a liquidated damages provision is sometimes used by employers in an effort to ensure compliance with restrictive covenants by establishing a predetermined penalty upon breach. If the contractual amount is unreasonable, however, a court will not hesitate to strike it down.

b. Restrictive Covenants

During employment, employers can restrict employees' activities by requiring employees to sign non-compete agreements, either as a condition of employment or as a condition of receiving bonuses or other benefits.

Post-employment restrictions often are found in executive-level contracts. An employer's ability to restrict employees' competition and solicitation activities post-employment varies from state to state. For example, some states, such as California, do not enforce restrictions against competition. In most states, however, restrictive covenants are lawful and courts view them as enforceable, but only if they prohibit activity necessary to protect a legitimate employer interest for a reasonable amount of time and within a reasonable geographic scope. Most courts attempt to balance the employer's interest in protecting confidential information and the employee's interest in earning a living.

Presently, no state law requires an employer to pay its former employees while they are subject to post-employment restrictive covenants.

c. Choice of Law

US courts generally respect the choice of law agreed to by the parties in their contract unless the chosen state has no substantial relationship to the parties, or unless application of the chosen law would be contrary to a fundamental policy of the state in which the claim is brought and which has a material interest in the matter. When a choice-of-law provision is upheld, US courts will hear the case and apply the chosen law.

10. Statutory Claims

The statutes that are most relevant to employees working in the US are those that prohibit employer discrimination and retaliation. US statutes prohibit discrimination against employees based on such categories as race, national origin, religion, sex, age, disability, and sexual orientation (in some states). The US also has statutes prohibiting retaliation against employees for certain protected conduct, including complaining about unlawful discrimination or blowing the whistle on certain illegal, unsafe, or fraudulent conduct by the employer. US statutes also cover such things as workplace safety and working conditions, pensions and other employee benefits, as well as many other aspects of compensation (such as when and how wages are paid).

a. Application of US Statutory Laws

US statutory laws apply to all employees working in the US, without regard to the origin or parent or the employer. This includes US anti-discrimination and anti-retaliation statutes, with very few exceptions. For example, one narrow exception allows a foreign employer to "discriminate" in favor of nationals from the country of the employer for certain confidential or senior positions in the US.

b. Statutory Discrimination

The main federal laws on discrimination are:

1) Title VII of the Civil Rights Act of 1964. This law prohibits discrimination against an employee on the basis of race, color, sex, national origin, religion or pregnancy. It applies to private and public employers with 15 or more employees.

2) The Americans with Disabilities Act (ADA). This statute prohibits public and private employers from discriminating against persons with physical or mental disabilities.

3) The Age Discrimination in Employment Act (ADEA). This prohibits discrimination on the basis of age against employees aged 40 or older.

4) The Equal Pay Act of 1963. This law provides for equal pay for equal work performed by both sexes working in the same establishment.

5) The Genetic Information and Non-Discrimination Act (GINA). This prohibits employers from discriminating against employees based on genetic information.

To demonstrate discrimination, an employee must establish a connection between an adverse employment action (such as termination of employment or denial of promotion) and a protected status, such as race or sex. An employee can establish this connection by showing that he or she is treated differently because of an illegal criterion or that an employment practice that appears neutral is discriminatory in operation. All of the anti-discrimination statutes also prohibit harassment of individuals on the basis of their protected status. Finally, the ADA, the ADEA, GINA, and Title VII prohibit employers from retaliating against employees for filing employment discrimination charges or assisting others in filing them, and for complaining about or otherwise opposing unlawful employment practices.

c. Whistleblower Protections

Under federal law, many statutes regulating various areas of commercial operations contain whistleblower protections enforced by the Department of Labor. Additionally, the Sarbanes-Oxley Act of 2002 (SOX) protects employees of publicly-traded companies who provide information about actions that they reasonably believe violate federal securities laws or certain other laws protecting shareholders of publicly traded companies. The Dodd-Frank Act of 2010 extends the SOX whistleblower protection to employees of subsidiaries and affiliates of publicly traded companies. This Act also contains whistleblower protections for employees who perform work related to offering a consumer financial product or service.

The American Recovery and Reinvestment Act 2009 (ARRA) contains protections for public and private employees of employers receiving recovery funds who report on gross mismanagement or waste of covered funds, public health or safety risks, or violations of laws or regulations relating to the grant of the funds.

Most states also have whistleblower statutes prohibiting employers from retaliating against employees who report to public bodies on matters of public concern, such as illegal, unsafe, or fraudulent practices.

d. Time Limits for Filing Statutory Claims

Time limits for filing statutory claims vary depending on the statute. Importantly, some statutes require that individuals meet certain prerequisites before they can file a lawsuit. For example, a charge of employment discrimination must be filed with the appropriate federal or state administrative agency within 300 days of the date the discrimination occurred; in some states, that deadline is only 180 days. To bring a claim under SOX, employees must file a complaint with the Department of Labor within 180 days.

Executives should seek counsel to determine which time limits apply and which administrative agency, if any, is the appropriate place to file.

e. Damages

Compensatory and punitive damages may be awarded in cases involving intentional discrimination based on a person's race, color, national origin, sex, pregnancy, religion, disability, or genetic information. In this context, compensatory damages reimburse victims for out-of-pocket expenses caused by the discrimination (such as costs associated with a job search or medical expenses) and compensate them for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life). Attorneys' fees also may be recovered with respect to these types of claims.

Punitive damages also may be awarded to punish an employer who has committed an especially malicious or reckless act of discrimination.

Most federal anti-discrimination laws limit the amount of compensatory and punitive damages a person can recover, depending on the size of the employer:

- For employers with 15-100 employees, the limit is $50,000.
- For employers with 101-200 employees, the limit is $100,000.
- For employers with 201-500 employees, the limit is $200,000.
- For employers with more than 500 employees, the limit is $300,000.

In cases involving intentional age discrimination, or intentional sex-based wage discrimination under the Equal Pay Act, victims cannot recover either compensatory or punitive damages, but may be entitled to "liquidated damages." In this context, liquidated damages function more like punitive damages and are awarded to punish an especially malicious or reckless act of discrimination. The amount of liquidated damages that may be awarded is equal to the amount of back pay awarded the victim.

With respect to whistleblower claims, the damages vary depending on the statute. An individual who prevails in a whistleblower action may be awarded reinstatement, back pay with interest, and compensation for any special damages sustained as result of the discharge or discrimination, including litigation costs and reasonable attorneys' fees.

f. Extraterritorial Application of US Laws

As a general matter, US laws do not apply to employees working outside of the US. Nonetheless, important exceptions exist. For example, federal anti-discrimination laws generally apply to US citizens working abroad for US companies or for foreign companies controlled by US companies. Similarly, some federal anti-retaliation statutes apply abroad to certain conduct by US companies (or companies controlled by US companies).

Conclusion

A range of rights and legal options are available to international employees under US law.

For an initial discussion, with no obligations, please contact us as set out below.

This factsheet is intended for general information purposes only and not as a substitute for legal advice specific to an individual's circumstances. Please contact us for particularized advice.

This factsheet is correct as of April 2013.

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