



Top Ten Practice Pointers: U.S. Employment Law

Labour & Employment Global Law Forum – September 10, 2019

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#1: Employing Personnel for the First Time in the U.S.

- Sales activities undertaken by employees of a non-U.S. company likely creates a permanent establishment in the U.S., subjecting company to U.S. and state income taxes and state and local sales tax obligations
- No requirement to set up a U.S. subsidiary, but would have to register in each state in which employs people or otherwise engages in business, and obtain a federal Employer Identification Number to comply with employment taxes
- We generally recommend setting up a U.S. subsidiary. Most common state of incorporation is Delaware; then register to do business in other states
- Can engage a Professional Employer Organization (PEO) to assist with HR functions (e.g. payroll processing).
 - Some states have laws that require PEOs to be registered in that state.
 - New York Department of Labor provides list of currently registered PEOs
 - PEOs can help provide some basic HR support on a “one-size fits all” basis; for specialized, tailored support and more complex queries, we recommend that you engage counsel

#2: Compliance with Federal, State, and Local Employment Laws

- In the U.S., the employer-employee relationship is governed by a patchwork of federal, state, and local laws and regulations.
- Several states (including CA, NY, NJ, and MA) and cities (New York, San Francisco) have enacted laws that provide greater protections to employees than federal law

Discrimination laws

- **Federal level: Protected categories are age, color, race, sex, national origin, disability, military status, and religion.**
- **State and local level: Protected categories also include sexual orientation, arrest or conviction record, ethnic hair style, marital status**

Minimum wage and overtime exemption salary requirements

- **Federal law: \$7.25/hour (\$23,660 salary exemption from OT; proposal to raise to \$35,308)**
- **NYC: 11+ employees (\$15/hr; \$58,000 for salary exemption)**
 - **≤ 10 employees (\$13.50/hr; \$52,650 for salary exemption)**
- **LA: 25+ employees (\$14.25/hr; \$49,920 for salary exemption)**
 - **≤25 employees (\$13.25/hr; \$45,760 for salary exemption)**

#3: Classifying Personnel as Employees vs. Independent Contractors

Highly fact-sensitive inquiries:

- Does contractor have his/her own business (e.g., LLC; own website; business cards)?
- Is contractor performing core functions of company's business?
- Is contractor performing the same/similar work as employees?
- Is contractor working on company premises for extended periods?
- How much control does company have over contractor's performance of services? (e.g., setting hours; dictating terms of performance)
- Does contractor supply his/her own materials and/or equipment?
- Does contractor provide services to other companies?
- Does contractor have a title with company?

#4: Employee Recruitment and Onboarding

- **Background checks (credit and criminal history)**

- Federal law (FCRA)

- Must get written authorization from candidate for background check
- Before declining to hire based on background check results, must give applicant opportunity to respond. If still not hiring, then must provide notice to applicant setting forth reasons.

- State and local laws provide greater protections

- Cannot seek permission for background check until after conditional offer of employment

- **Bans on Salary history inquiries**

- **New York City** prohibits *inquiries into job applicants' salary history*

- Exceptions: OK to discuss future salary **expectations**; and whether the job applicant might be at risk of forfeiting deferred compensation or unvested equity

- **New Jersey Pay Equity Law** (Effective July 1, 2018)

- Equal pay for “equal work” to cover employees “performing **substantially similar work**, when viewed as a composite of skill, effort and responsibility,” with some enumerated exceptions
- Extends beyond gender; unlawful to have unequal pay for member of **any protected class** under NJ’s Law Against Discrimination
- Employer may pay a different rate of compensation if the employer demonstrates differential is based one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as **training, education or experience**; prohibits employers from reducing the pay of an employee to comply with the new law

#5: Eligible for Overtime Pay: Exempt vs. Non-Exempt

OT eligibility requirements – Salary PLUS Duties Test

- **Salary test**
 - Must meet minimum threshold salary to be exempt (higher in some states)
- **Duties test – major categories**
 - **Executive**
 - Primary duty managing the business, or a department of the business
 - Supervise at least 2 other full-time employees
 - **Administrative**
 - Primary duty performance of office work related to management of business
 - Primary duty includes exercise of discretion and independent judgment with respect to matters of significance
 - **Professional (learned and creative)**
 - **Learned**: Primary duty is performance of work requiring advanced knowledge (science or learning); work is predominantly intellectual in character; knowledge customarily acquired by prolonged specialized intellectual instruction
 - **Creative**: Primary duty is performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor
 - **Computer Employee**
 - Computer systems analyst, programmer, software engineer
 - **Outside Sales**
 - Primary duty is making sales, or obtained orders/contracts; must be regularly engaged away from employer's place of business

#6: At-Will Employment vs. Term of Years

- **At Will**: In the U.S., the default employment relationship between employers and employees is AT WILL employment. Employer or employee may terminate at any time, with or without notice, for any lawful reason.
- **Term of Years**: In some cases (particularly with more senior executives or other strategic hires), the company will offer a term of employment (generally no more than 3 years, with options for renewal periods).
 - This does not mean, however, that there is a guarantee of employment for such term. In the U.S., cannot force employee to remain employed. However, generally have notice period (up to 90 days or more) if employee to be terminated or resign during the term.
 - This is all a matter of contract and what parties may agree upon.
 - For example, “Garden Leave” period may be shortened at Company’s discretion, with pay in lieu of notice

#7: Restrictive Covenants

- **No federal law; enforceability governed by state statutes and/or common law**
- **Massachusetts:** Effective October 1, 2018, the new law requires that:
 - Non-compete restrictions cannot exceed **one year in duration**.
 - Employers **must provide payment** of “garden leave” or some “other mutually agreed upon consideration” during the restricted period; **minimum amount** is “at least 50% of the employee’s highest annualized base salary within the 2 years preceding the employee’s termination” on a pro-rata basis.
 - Non-competes may not be enforced against: (1) employees who are nonexempt under the Fair Labor Standards Act; (2) undergraduate or graduate students in a short-term employment relationship; (3) employees laid off or terminated without cause as the term “cause” is defined in their employment agreement; and (4) employees under 18.
 - Non-compete agreements signed after commencement of employment be “supported by **fair and reasonable consideration** independent from the continuation of employment.”
 - The new law defines a **reasonable geographic scope** as the areas in which the employee “during any time within the last 2 years of employment, provided services or had a material presence or influence.”
- **California:** non-compete provisions generally have not enforceable under CA state law (with limited exceptions, e.g., sale of business)
 - For contracts entered into after January 1, 2017, non-California choice of forum or choice of law provisions are prohibited for individuals that work or reside in California, unless they are represented by counsel.

#8: #MeToo

- ***State and local laws aimed at harassment prevention***
- **New York state**, certain provisions effective October 9, 2018
 - (i) Expands protections to non-employees, including contractors, subcontractors, vendors, consultants, and other persons providing services pursuant to a contract
 - (ii) Prohibits the use of non-disclosure (confidentiality) provisions in agreements settling claims of sexual harassment, unless included at the “complainant’s preference”
 - (iii) Requires employers to adopt mandatory, interactive sexual harassment training program (effective Oct, 9, 2019) for all employees who work in NY
 - On an annual basis and within 30 days of hire for new hires
 - Applies even to employees who work in NY for a modest amount of time
 - (iv) Sets out model standards to meet for anti-sexual harassment policy (including complaint form and information about rights of redress in administrative and judicial proceedings)
 - (v) Prohibits employers from requiring individuals to arbitrate claims of sexual harassment
 - May be preempted by FAA

#9: Employee Leave Issues

- **Federal law: Family and Medical Leave Act (FMLA)**

- Provides for up to 12 weeks per year of **unpaid** leave for serious health conditions or following birth, adoption or foster placement of a child
 - To be eligible for FMLA benefits, employee must have worked for company for at least 12 months, worked at least 1,250 hours in the past year, and work at a company that employs at least 50 employees within a 75 mile radius of employee's main work location

- **State and city laws: Paid Family Leave and Paid Sick Leave**

- Many states and cities providing minimum levels of **paid** family and sick leave
- **New York state:** Employees eligible for 10 weeks paid leave for: (1) the birth, adoption or foster placement of a child, (2) to care for certain family members with serious health conditions, or (3) obligations arising out of family member's active military duty.
 - Benefits will increase yearly until 2021 when employees will be eligible for 12 weeks paid leave.
 - Employee gets 50% of average weekly wage, up to 50% of NYS average weekly wage (\$746.41)
 - Employees who work 20+ hours/week eligible after 26 weeks of employment
 - Employees who work <20 hours/week eligible after 175 days worked
- **New York City:** employees eligible for up to 40 hours of paid sick leave per year
 - Applies to employers with 5+ employees
- **New Jersey:** Employees eligible for up to 6 weeks of paid family leave; can be taken intermittently
 - Applies to employers with 30+ employees
 - Effective July 1, 2019: entitled to 2/3 of average weekly wage, up to \$637/week max
 - Effective July 1, 2020: increase to 12 weeks of benefits; 56 days can be taken intermittently; entitled to 85% of average weekly wage, up to \$859/week max

#10: Employee Terminations

- **No severance required**: unless agreed to in contract or company has written policy
- **If paying severance, get a release incorporated into larger separation agreement**
 - Remind employee of restrictive covenants
 - Confidentiality
 - Non-disparagement
 - Class-action waiver (consider arbitration clause)
 - Choice of law provision
- **Certain protections under Age Discrimination in Employment Act (ADEA)**
 - For employees 40+ who are waiving ADEA claims, must be given 21-day review period and 7-day revocation period
 - If group termination (more than 1 employee), then must be given 45-day review period, and specific notices re: employees included in termination and those remaining
- **Federal WARN Act and State mini-WARN Acts (for large scale layoffs; plant closings)**
 - **Federal law**: applies to layoffs of 50 or more persons if such is 33% or more of the workforce, or total layoffs of 500 persons; requires 60 days notice to affected employees
 - **State law**:
 - NY: applies to terminations of 25+ employees if constitute 33% of workforce, or aggregate layoffs of 250+; requires 90 days' notice to affected employees,
 - CA: applies to terminations of 50+ employees, regardless of percentage of workforce

Evan Parness – Biography and Contact Information



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Evan Parness has a full-service labor and employment practice that includes litigating cutting-edge issues at the trial and appellate levels, negotiating employment aspects of complex M&A deals and other business transactions, and counseling global employers on compliance with national, state, and local employment laws and regulations.

Evan represents employers and senior executives in non-compete, harassment, discrimination, retaliation, ERISA, and business tort litigation in state and federal courts, administrative agencies, and alternative dispute resolution bodies. Evan has secured significant trial and appellate victories for clients, including complete dismissals of discrimination and retaliation lawsuits, successful verdicts following trial, and injunctive relief on behalf of clients enforcing restrictive covenants.

Evan also counsels established and emerging companies on compliance with federal, state, and local employment laws and regulations, and litigation avoidance measures in connection with all aspects of workplace employment issues. Evan conducts sensitive internal investigations of alleged discrimination and harassment, and assists employers in shaping workplace policies to comply with law and promote a productive working environment.

CREDENTIALS

Education

Brown University (2002) B.A.

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Cornell Law School (2007) J.D.

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Evan Parness – Biography and Contact Information

Evan advises leading companies on the labor and employment aspects of significant business transactions and acquisitions. He negotiates employment-related provisions in business transaction documents and oversees due diligence of a potential target's employment practices. Evan also counsels clients on executive employment and restrictive covenants agreements.

Law 360 named Evan a 2018 Rising Star in Employment Law. Evan was one of only five employment attorneys nationwide to receive this honor. The award recognizes attorneys under age 40 whose legal accomplishments transcend their age.

Evan has also been recognized as a "Rising Star" by New York Metro Super Lawyers in 2013, 2014, 2015, 2016, 2017, and 2018.

