

EMPLOYMENT PRACTICES

LEGAL ISSUES IN THE UNITED STATES

05 APRIL 2018

As you build a workforce to support your Australian business in the United States, you will be required to follow federal, state, and local employment laws. An employment attorney can assist you with compliance at all stages of employment, including recruiting, hiring, compensation, leaves of absences, performance management, misconduct complaints, and separation.

RECRUITING AND HIRING

Employment applications and interviews

Application and interview questions should be limited to job-related inquiries. At least 30 states and 32 cities in the US have passed 'ban-the-box' laws limiting questions about criminal history (e.g. California, New York, Delaware, San Francisco, Seattle), which ban prospective employers from asking applicants to disclose criminal history on an application. At least three states and five cities have equal-pay laws that prohibit questions about salary history (e.g. California, Oregon, Massachusetts, New York City, and Pittsburgh). These laws are designed to prevent propagating salary disparities for women and minorities. In addition, the US Equal Employment Opportunity Commission (EEOC) has issued guidance on the use of criminal history, and on permissible and impermissible interview questions. See [Pre-Employment Inquiries](#) on the EEOC website.

Offer letters

Offer letters are useful to outline the terms of employment (such as start date, title, compensation, benefits, work location, work hours). The offer letter should confirm the presumption that employment is 'at will', which means that you or your employee can decide to terminate the relationship at any time for any or no reason, as long as it is not for an unlawful reason (e.g. discrimination or retaliation).

Background checks

Once you extend an offer of employment, it may be contingent on passing a background check. If you use an outside agency to conduct the background check, you must comply with federal laws requiring disclosures, authorisations, an opportunity to contest, and adverse action notices. Some states and cities have additional requirements limiting background checks.

Mandatory arbitration agreements

You may require employees to submit employment disputes to mandatory private arbitration instead of going to court. There are advantages (less public, jury bias in favour employees) and disadvantages (expensive, limited appeal rights, mutuality).



Australian Government

Australian Trade and Investment Commission



Confidential information and invention assignment agreements

You may require employees and consultants to agree to keep company information confidential and protect its trade secrets. You may also require employees to assign inventions made in the course of their employment to the company.

Government-required new hire documents

You are required to administer the following government documents for all employees:

- › [Form I-9](#) – Employment Eligibility Verification
- › [Form W-4](#) – Employee's Withholding Allowance Certificate
- › Affordable Care Act Notice
 - [Employers who offer a health plan to some or all employees](#)
 - [Employers who do not offer a health plan](#)

Some states and cities have additional requirements. For example, in California, you must provide the following documents to employees:

- › Wage Theft Protection Act Notice
- › Sexual Harassment Brochure
- › Disability Insurance Notice
- › Paid Family Leave Notice
- › Workers' Compensation Time of Hire Pamphlet
- › California Family Rights Act Notice (50+ employees)
- › DE-4 – California Withholding Allowance

POSTERS

You must post notices of federal, state, and local employment laws at the workplace. These posters can be obtained from various government websites or consolidated posters may be purchased from private vendors.

COMPENSATION AND BENEFITS

Minimum wages

All workers in the US must be paid the applicable minimum wage, unless an exception applies (certain volunteers, student interns, independent contractors). The federal minimum wage in 2018 is US\$7.25 per hour. Many states and municipalities have their own, higher minimum wages. In 2018, California's minimum wage is US\$11 per hour for employers with 26+ employees, and US\$10.50 for employees with 25 or fewer employees. San Francisco's minimum wage is US\$14 per hour until July 1, 2018, when it increases to US\$15 per hour.

Overtime: Exempt vs. non-exempt employee

Employees who work more than 40 hours in a work week, must be paid an overtime premium of 1.5 times their regular hourly rate, unless the employee is exempt from overtime. Only certain professional, executive, administrative and sales employees are exempt, and only if they receive certain duties and salary tests. Some states, such as California, also require daily overtime for work greater than eight hours in a work day.

Incentive compensation

Employers may offer incentives to employees in the form of commissions or bonuses, both of which are considered wages. There are different rules governing the calculation, payment, and administration of commissions versus bonuses.

Paid sick leave

A growing number of states and cities, including California, Oregon, Washington, Arizona, Massachusetts, San Francisco, Oakland, Los Angeles, New York, Seattle, and others require employers to provide employees with paid sick leave that can be used for themselves or family members, and for various other purposes, such as domestic violence, caring for a service dog, and others, depending on the jurisdiction.

Vacation

You are not required to provide employees with paid vacation leave but, if you do, you must follow the state rules governing the administration and payment of vacation leave.

Meal and rest periods

Some states have meal and rest period laws. For example, in California, all employees must be provided with a 30 minute unpaid meal period on or before completing five hours of work. Non-exempt employees must also be provided with a 10 minute rest period for every four hours of work or major fraction thereof.

Workers' compensation insurance

You must carry workers' compensation insurance to cover work related illnesses and injuries.

Health insurance benefits

Employers with 50 or more employees must offer employees affordable insurance or pay a penalty.

WORK RULES

Having clear written work rules and policies promotes fairness and reduces the risk of liability. Employers must have a written policy against workplace harassment, discrimination and retaliation. Other recommended work rules include attendance, conflicts of interest, social media use, workplace violence, drug and alcohol use, and others.

LEAVES OF ABSENCE

Depending on the size of the company and the state, employees may be entitled to take a number of job-protected leaves of absence (paid or unpaid) for purposes such as:

- › disability
- › pregnancy
- › family medical
- › parental bonding
- › organ or bone marrow transplants

- › domestic violence
- › crime victim
- › alcohol rehabilitation
- › school activities
- › military service
- › military spouse
- › volunteer fire fighter service.

PERFORMANCE MANAGEMENT

Implementing consistent performance management tools help to develop, motivate, and reward employees.

Such tools include:

- › 30/60/90-day reviews
- › annual performance reviews
- › written counselling, performance improvement plan, and discipline templates.

MISCONDUCT COMPLAINTS

Promptly and fairly investigating workplace complaints and taking appropriate remedial action is key to providing a safe and productive work environment and is sometimes required by anti-harassment and anti-discrimination laws.

See the sexual harassment case study in the sidebar on the next page.

SEPARATION

Reasons for separation

Either you or your employee may end the employment relation for any or no reason (as long it is not for an unlawful reason). If you have a plant closure or mass layoff affecting 50 or more employees, then you may have an obligation to provide 60 days notice to the affected employees and government authorities under the federal Worker

CASE STUDY – SEXUAL HARASSMENT

Challenge

An engineer employed by the Company complains to Human Resources that the CIO of the Company is sexually harassing him.

Action

The Company conducts a prompt and thorough investigation. It engages a neutral third party investigator who interviews the engineer, the CIO, and relevant witnesses and reviews and considers relevant documents and/or other evidence. The investigator provides a written report to the Company summarising the evidence and her findings. The investigator finds the CIO frequently gave the engineer unwanted 'back rubs ' and hugs, and told him she found him physically attractive, and did not stop these behaviours after the engineer told her he was did not feel comfortable with these attentions. The investigator found the CIO told the engineer if he did not go on an out of town business trip with her, he would not be promoted.

Outcome

Based on the investigator's findings, the Company decided to terminate the CIO's employment. The Company informed the engineer that it had completed its investigation and had taken appropriate steps.

Take Away

US law requires employers to take allegations of harassment seriously, to conduct a prompt, thorough and fair investigation, and to take appropriate action to prevent harassment, discrimination and retaliation.

Adjustment and Retraining Notification (WARN) Act, and/or other notices under state law.

Final pay

You must provide employees with their final pay in accordance with state law. For example, in California, if the company terminates an employee or an employee quits with at least 72 hours' notice, then payment must be made no later than the last day of employment. If an employee quits with less than 72 hours' notice, final payment must be made within 72 hours of the notice. Depending on the state, final pay may have to include any unused accrued vacation/PTO/floating holidays, but does not have to include accrued paid sick leave.

COBRA

Under the Consolidated Omnibus Reconciliation Act (COBRA), if an employee is on the company's health benefit plan(s) as of the separation date, then the employee must be given the option to continue coverage under the employer's plan, at the employee's own expense, for up to 18 months. The company must ensure the employee is provided with notice of the right to elect COBRA coverage.

Unemployment insurance benefits

Depending on the circumstances of separation, employees may be eligible to receive unemployment benefits from the state, and should be given information about applying for such benefits.

Government-required documents

Some states require employers to provide employees with state-specific termination notices.

Separation agreement and release of all claims

Depending on the circumstances, you may offer a departing employee the opportunity to receive a separation package in exchange for a release of all claims.

EMPLOYMENT PRACTICES LIABILITY INSURANCE

Employers are encouraged to consider purchasing Employment Practices Liability Insurance (EPLI) to insure the business and its officers and directors against certain employment-related legal risks. Note that the terms of EPLI policies and the cost can vary greatly.

DISCLAIMER

While care has been taken to ensure the information in this document is accurate, the Commonwealth of Australia represented by the Australian Trade and Investment Commission does not provide warranty or accept liability for any loss arising from reliance on such information.

Prepared by Daijogo & Pedersen,
LLP

www.dpemploymentlaw.com

Maki Daijogo, Partner
Corte Madera, CA

maki@dpemploymentlaw.com