

## **CHAPTER 7**

### **LABOR AND EMPLOYMENT**

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#### **1. WHY FOREIGN BUSINESS INVESTORS SHOULD PAY ATTENTION TO EMPLOYMENT LAW**

Employers are highly regulated in the United States. There are numerous laws and rules dictating how employers should treat applicants, employees and former employees. Employment laws are often complex and can overlap, resulting in different and sometimes contradictory standards.

Given all these laws and rules, it is relatively easy for a foreign business to inadvertently violate them. Some violations result only in fines, but many violations lead to extremely expensive lawsuits. For example, the average jury verdict for an employment law violation in one U.S. city is more than \$400,000 (even excluding all verdicts over a million dollars), and employment suits are filed almost every week. In states such as California and New York, the average verdicts and number of cases are even higher.

Most American employees have a good understanding about their employment rights. It is not unusual for employees to consult attorneys after an involuntary termination or if they feel treated unfairly by management. In addition, there are many government agencies that inspect an employer's practices, documents, and records to check on compliance with employment laws.

Because the costs of non-compliance can be high, Japanese businesses starting U.S. operations should, prior to hiring any U.S. employees, carefully plan the employment policies and practices to be implemented.

#### **2. BASIC OVERVIEW OF U.S. EMPLOYMENT LAWS AND REGULATIONS**

U.S. employment laws cover almost every aspect of the employment relationship, from hiring to firing and beyond. For example: there are rules regarding recruiting, hiring, pay, leaves of absence, safety, taxes, immigration, whistle blowing, background checks, testing, record retention, disclosing employee information, workplace posters, employee illnesses, injuries, terminations, and references to prospective employers.

U.S. employment rules derive from different source:

- First, there are laws passed by U.S. Congress, which are usually supplemented by regulations issued by U.S. government agencies. These laws apply in every state.
- Second, there are laws passed by each state legislature, which are sometimes supplemented by state agency regulations. These laws apply within that state only.

- Within a state, counties and cities often pass their own employment laws.
- Finally, U.S. federal and state courts independent of the statutes, have created additional employment rights.

To understand its obligations under any employment law, an employer must know what the actual law provides, how the law is affected by regulations (if any), and how the courts have interpreted the law and relevant regulations. Without help from legal counsel, this task can be difficult.

Some employers are subject to multiple sets of employment laws and rules. Because any geographic area may have different employment laws, regulations and cases, employers need to tailor policies and practices to local workplace rules. The courts usually apply the most protective employment rule when there are multiple and overlapping federal and local laws governing the same issue. For that reason, employers often carry out the same practice – pick the strictest standard from applicable law, so they can demonstrate their best efforts to comply.

Employee rights may be increased by employers intentionally or inadvertently entering into employment contracts. In many U.S. states, under certain circumstances employer statements, verbal or written, can become contracts binding the employer to obligations it would not otherwise have. Often, until a lawsuit is filed, the employer is completely unaware that the employee believes there is an employment contract.

### 3. PRACTICAL GUIDANCE FOR BUSINESSES STARTING OPERATIONS IN THE UNITED STATES

The volume and complexity of U.S. employment law can seem overwhelming to foreign businesses starting U.S. operations. However, we have developed simple and practical guidelines to assist businesses in developing compliant personnel management systems in a cost-effective manner.

The first step toward compliance is setting up basic personnel systems. To illustrate how these systems can be broken down into manageable steps, the following is a partial employment checklist for new businesses:

#### *Step One*

**Employment Type:** Determine, based upon local and federal law, whether the persons you plan to hire are independent contractors or employees. A common mistake by new employers is to misclassify employees as independent contractors. The test for true independent contractors is narrower than most employers would expect. Take this step seriously; misclassification can result in exposure to substantial liability.

#### *Step Two For Independent Contractors:*

- **Contracts:** Draft contracts that protect the employer. For example, deal with insurance issues and include wording that tracks the local and federal tests for independent contractor status.
- **Policies:** Draft internal policies designed to avoid a situation in which a manager inadvertently converts a contractor into an employee.

*Step Two For Employees:*

- **Tax:** Set up system to ensure tax and social security withholdings are properly calculated and issued. Also, mark your calendar with all IRS reporting obligations.
- **Safety:** Check local and federal safety rules to ensure the work location complies with the most protective standards. When required by the rules, set up safety committees and trainings on required safety procedures. Draft safety policies and install required safety posters. Consider, with input from legal counsel, whether to use federal or local governments' complementary consultation services to maximize initial compliance.
- **Immigration:** Set up a system to verify new employees' eligibility to work in the United States. Establish record-keeping processes to comply with government retention and disclosure rules.
- **Workers' Compensation:** Obtain industrial insurance coverage information from the local labor and industry department. Draft policies regarding employee injury reporting and procedures. Draft forms for employee injury reporting.
- **Unemployment Insurance:** Obtain from the local employment security department information about all required unemployment insurance coverage. Information regarding this insurance is usually sent to you with confirmation of your local business license.
- **Wage and Hour:** Determine whether your employees must be paid a higher wage (called overtime) for work performed beyond a certain number of hours in a day or week or whether they are exempted from the federal and local overtime or minimum wage obligations. One of the most common employer mistakes in this area is misclassifying employees as exempt because the exemptions are much narrower than commonly believed. This type of misclassification can also result in costly claims against the employer.

If employees are not exempt from the minimum wage, then ensure the proposed pay is at or above the applicable minimum wage rate. If employees are not exempt from overtime, then set up a time recording system and draft related policies to ensure proper determination of overtime wages. Set up rest and meal period policies and practices.

Set up pay periods and rate-of-pay calculation systems that comply with applicable law. Draft wage and hour policies such as hours worked provisions.

- **Contracts:** Determine whether there is a true need for any employment contract. Employers often enter into unnecessary employment contracts – except for business protection agreements (to protect against disclosure of the employer’s business information). Employee contracts should be the exception, not the rule. Draft policies to minimize risk of inadvertent contractual claims. Draft offer letters for noncontractual employees.
- **Handbook:** Draft employment policies and rules. These can be in handbook or some other format depending on your workplace needs. We have model handbooks that can be easily adapted to your workplace. Certain key provisions should be considered for every handbook, such as a properly drafted disclaimer and complaint procedures that satisfy the case law on affirmative defenses.
- **Forms:** Prepare standard human resources forms such as leave requests and notices.
- **Performance Management:** Design and draft forms for a standard performance management system to minimize disparate treatment claims.
- **Hiring System:** Set up a basic hiring system designed to comply with the nondiscrimination laws. For example, develop an interview checklist about what the interviewer should do and what the interviewer should avoid, an application form that complies with applicable laws, and an orientation checklist.
- **Training:** Plan initial manager training on basic employment matters. Plan initial diversity training for all employees.

#### 4. CONCLUSION

Set up personnel systems that comply with applicable law at the earliest possible stage of establishing a U.S. business. It is more cost effective to implement best practices and forms, than trying to convert personnel systems as issues arise.

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