ICLG

The International Comparative Legal Guide to:

Employment & Labour Law 2016

6th Edition

A practical cross-border insight into employment and labour law

Published by Global Legal Group, with contributions from:

A. Lopes Muniz Advogados Associados
AB Legal LLP
Advokatfirmaet Grette
Anderson Mōri & Tomotsune
Barrios & Fuentes Abogados
Bird & Bird
Bloomfield Law Practice
Cárdenas & Cárdenas Abogados Ltda.
Chajec, Don-Siemion & Żyto Legal Advisors
CLAUDE & MARTZ, S.L.P.
CMS Reich-Rohrwig Hainz
Concern Dialog law firm
Debarliev, Dameski and Kelesoska, Attorneys at Law
Dittmar & Indrenius
EmpLaw Advokater AB
FCB Sociedade de Advogados
Ferraiuoli LLC
Gürlich & Co.
Hogan Lovells BSTL, S.C.
Hogan Lovells International LLP
Homburger
Kommatas & Associates Law Offices
Koushos, Korfiotis, Papacharalambous LLC
Latournerie Wolfrom Avocats
Law firm Šafar & Partners, Ltd
Lund Elmer Sandager Law Firm LLP
McCann FitzGerald
Moravčević Vojnović i Partneri
in cooperation with Schoenherr
Nishith Desai Associates
Noerr
Pachiu & Associates
People + Culture Strategies
Rátkai Law Firm
Shook, Hardy & Bacon L.L.P.
Skrine
Stibbe
Stikeman Elliott LLP
Toffoletto De Luca Tamajo e Soci
Willkie Farr & Gallagher LLP

glg
global legal group

global legal group

Contributing Editors
Elizabeth Slattery & Jo Broadbent, Hogan Lovells International LLP

Chief Operating Officer
Dror Levy

Sales Director
Florjan Osmani

Account Directors
Oliver Smith, Rory Smith

Senior Account Manager
Maria Lopez

Sales Support Manager
Toni Hayward

Senior Editor
Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
March 2016

ISBN 978-1-910083-86-4
ISSN 2045-9653

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Continued Overleaf →

global legal group

Country Question and Answer Chapters:

EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Employment & Labour Law*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of labour and employment laws and regulations.

It is divided into two main sections:

Two general chapters. These chapters examine issues when structuring international employment arrangements for multi-national companies and global employment standards and corporate social responsibility.

Country question and answer chapters. These provide a broad overview of common issues in labour and employment laws and regulations in 43 jurisdictions.

All chapters are written by leading labour and employment lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Elizabeth Slattery and Jo Broadbent of Hogan Lovells International LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Chapter 45

USA

William C. Martucci

Shook, Hardy & Bacon L.L.P.

Carrie A. McAtee

1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Employment issues are governed by a host of federal, state, and local laws that vary depending upon jurisdiction. The primary sources of federal employment law include the: Age Discrimination in Employment Act (ADEA); Americans with Disabilities Act (ADA); Civil Rights Acts of 1866 (Section 1981); Equal Pay Act (EPA); Fair Labor Standards Act (FLSA); Family and Medical Leave Act (FMLA); Title II of the Genetic Information Nondiscrimination Act (GINA); National Labor Relations Act (NLRA); Occupational Safety and Health Administration Act (OSHA); Title VII of the Civil Rights Act of 1964 (Title VII); Uniformed Services Employment and Reemployment Rights Act (USERRA); and Worker Adjustment and Retraining Notification Act (WARN).

Employers are generally prohibited from retaliating against employees for exercising rights under these laws. There are also a myriad of other federal laws that protect whistleblowers who raise complaints that those laws have been violated.

Each state and some localities have their own set of employment laws that often offer protections similar to, or even greater than, those afforded by federal law. State law also governs the areas of unemployment compensation, workers' compensation for on-the-job injuries, employment contract, covenant, and tort matters, as well as wrongful discharge based on public policy considerations.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Coverage of the employment laws is generally determined by the number of employees working for the employer. While many of the federal employment laws do not apply to small employers, the various state employment laws may cover those employers.

Employees are often distinguished based on whether they are "at-will" or subject to a collective bargaining or other employment contract. Under the "at-will" employment doctrine, the employee or the employer can end the employment relationship at any time. In contrast, employees subject to a contract may be protected by a "just cause" requirement or other terms and conditions of employment to which they would not ordinarily be entitled. Employees are also distinguished based on whether they work in the private or public sector, as different sets of employment laws often apply depending on this factor.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

No. Employment is generally assumed to be at-will, meaning either the employee or the employer can end the employment relationship at any time. For those employment relationships that are under contract, most are in writing. However, depending on applicable state law, the employment contract need not be in writing to be enforceable.

There is no federal law that requires employers to provide specific written information to employees at the time of hire, but some states require employers to disclose information such as the employee's wages or regular payday at the outset of employment.

1.4 Are any terms implied into contracts of employment?

While employment is generally assumed to be at-will, almost every state recognises various exceptions to this rule. Depending on the jurisdiction, such exceptions may include: 1) an express or implied contract; 2) an implied covenant of good faith and fair dealing; or 3) an exception prohibiting discharge if it would violate the state's public policy. The law surrounding these exceptions varies widely by state.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes. Minimum terms and conditions of employment are imposed by federal and state laws that require most employers to pay a minimum wage. These laws also require most employers to pay overtime – time and one-half the employee's regular rate – for each hour worked over forty hours per week, unless the employee is statutorily exempt. Some states expand these minimum terms and conditions to also include mandatory breaks, overtime in excess of eight hours in a day, or overtime for work performed on weekends.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

The National Labor Relations Act (NLRA) protects employees' rights to organise a union. While nearly one-half of U.S. employees in the private sector belonged to unions in the 1940s, union employees now represent a shrinking segment of the U.S.

workforce. In fact, the use of collective bargaining in the private sector has decreased in recent years to a rate below 10 per cent. In contrast, the percentage of union employees in the public sector has been an area of dramatic growth for labour organisations.

For workforces that are organised, bargaining typically takes place at the company level. Some large unions do coordinate bargaining within an industry. However, they still have to come to independent agreements with each company.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The NLRA gives most private sector employees rights to organise a union in the workplace, and prohibits employers from interfering with, restraining, or coercing employees in the exercise of these rights. Employees generally decide on whether they desire union representation through a formal election decided by a majority of votes cast.

2.2 What rights do trade unions have?

When employees choose a union to represent them, the employer and the union are required to meet at reasonable times to bargain in good faith to reach a binding agreement setting out terms and conditions of employment. The employer does not have to adopt any proposal by a union but is required to bargain in good faith.

If no agreement can be reached, the employer may declare an *impasse*. However, the union may appeal to the National Labor Relations Board (NLRB) if it contends that the employer has not conferred in good faith. The NLRB can order the employer back to the bargaining table.

2.3 Are there any rules governing a trade union's right to take industrial action?

Yes. The NLRA protects activities such as strikes and picketing, so long as they are done in a lawful manner. The NLRA governs acceptable purposes and timing of strikes as well as the conduct of workers involved in a strike or picketing.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

No. In the United States, the union is the form through which employee representation occurs.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable.

2.6 How do the rights of trade unions and works councils interact?

This is not applicable.

2.7 Are employees entitled to representation at board level?

No, they are not.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes. Employment discrimination is prohibited by a variety of federal, state, and local laws. Federal law prohibits employment discrimination based on the protected characteristics of race, colour, national origin, sex, pregnancy, religion, age, disability, citizenship status, genetic information, military affiliation, and also prohibits retaliation against employees who oppose, or participate in, proceedings challenging unlawful discrimination.

Most state and some local laws contain analogous prohibitions, with certain jurisdictions expanding the list of protected categories to include such characteristics as marital and/or familial status, sexual orientation, gender identity, political affiliation, language abilities, use of tobacco products, public assistance status, height, weight, and personal appearance.

3.2 What types of discrimination are unlawful and in what circumstances?

Prohibited discriminatory practices generally include bias in all terms, conditions and privileges of employment, including hiring, promotion, evaluation, training, discipline, compensation, classification, transfer, assignment, layoff, and discharge. These activities are often referred to as "adverse actions". To demonstrate discrimination, an employee must establish a connection between the protected characteristic and the adverse action or condition.

Workplace harassment is also unlawful. While most harassment cases involve allegations of sexual harassment, harassment based on other protected categories is also actionable. Employer liability in harassment cases depends on who engaged in the harassment, whether the harassment resulted in a tangible employment action, and the employer's response to the harassment.

Finally, it is unlawful to retaliate against employees who raise concerns about unlawful discrimination or harassment. An employee need not prove that discrimination occurred in order to prove that the employer's response to the employee's complaints constituted unlawful retaliation. Rather, an employee simply needs to prove a causal connection between the complaints and the adverse action.

3.3 Are there any defences to a discrimination claim?

Yes. The primary defence to a discrimination claim is establishing that the adverse action was taken for a legitimate, non-discriminatory reason. There are also affirmative defences to discrimination claims that may apply in limited circumstances and depending on the nature of the claim. For example, employers are generally allowed to discriminate on the basis of sex, age, religion, or national origin because of a *bona fide* occupational qualification (BFOQ). A BFOQ exists when a specific characteristic is necessary for the performance of the job. Gender may be a relevant factor, for example, in job performance for a model of women's clothing. The BFOQ defence is very narrowly restricted and should not be relied on in most situations.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees enforce their discrimination rights by filing a charge of discrimination with the applicable government agency and/or a civil lawsuit. Federal and state fair employment agencies enforce most laws prohibiting employment discrimination, and often serve as gateways for employees seeking to enforce their discrimination rights. For most types of discrimination, an employee must file a claim with the applicable agency before filing any private lawsuit in court.

Employers can settle discrimination claims either before or after they are initiated. In age discrimination claims, the Older Work Benefit Protection Act expressly provides additional procedural safeguards pertinent to a paid release of age discrimination claims.

3.5 What remedies are available to employees in successful discrimination claims?

Remedies available for discrimination claims depend on the law under which those claims are asserted, but generally include some combination of back pay, lost benefits, front pay, liquidated damages, compensatory damages (which include emotional distress damages), punitive damages, and attorneys' fees and costs, as well as equitable relief such as reinstatement.

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

No, they do not.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

There is no nationwide law mandating paid maternity leave. U.S. law does require unpaid maternity leave for some employees, but not all. The federal Family and Medical Leave Act (FMLA) provides for 12 weeks of unpaid maternity leave, but it only covers eligible employees who work for companies with 50 or more employees. To be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months and for at least 1,250 hours in the 12 months prior to the first day of leave.

A number of states have enacted family leave statutes that similarly afford leave, some of which expand employee rights by covering smaller employers and extending the time for unpaid leave up to 16 weeks.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Under the FMLA, an eligible employee is entitled to: 1) up to 12 weeks of unpaid maternity leave per year; 2) continuing health insurance benefits during the leave (if already provided by the employer); and 3) job protection (an employee is guaranteed to return to the same job or its equivalent).

Some state family leave laws provide more generous leave benefits than the FMLA by covering smaller employers, extending the time for unpaid leave for up to 16 weeks, and permitting intermittent maternity leave.

4.3 What rights does a woman have upon her return to work from maternity leave?

An employee must be restored to the same position or its equivalent with equivalent pay, benefits, and other terms and conditions of employment upon her return from maternity leave. The FMLA also prohibits employers from interfering with employees' FMLA rights and from retaliating against employees for having requested FMLA leave or otherwise exercised FMLA rights.

4.4 Do fathers have the right to take paternity leave?

The FMLA enables both eligible mothers and fathers to take up to 12 weeks of unpaid paternal leave, but it only covers eligible employees who work for companies with 50 or more employees. If the mother and father work for the same employer, the employer may limit their combined FMLA paternal leave to a total of 12 weeks.

4.5 Are there any other parental leave rights that employers have to observe?

Under the FMLA, eligible employees are also entitled up to 12 weeks of unpaid parental leave to care for the employee's child who has a serious health condition. Additionally, the FMLA affords up to 12 weeks of unpaid parental leave for any qualifying exigency arising out of the fact that the employee's son or daughter is a military member on active duty, and up to 26 weeks of unpaid leave to care for a military service member with a serious injury or illness who is the employee's son or daughter.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

Yes. The FMLA permits eligible employees to take up to 12 weeks of unpaid leave to care for a covered family member who has a serious health condition. This leave may be taken intermittently or in the form of reduced schedule leave when medically necessary.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

The type of sale may affect the status of the seller's employees: a sale of ownership shares generally does very little to change the business, while a sale of assets extinguishes the former business. When the sale of the business is an asset sale, the employment relationship ends and the buyer generally has no duty to retain the former employees, but may elect to do so.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

Generally, the buyer has the right to set the initial terms and conditions of employment under which it will hire employees. A union that asserts its rights can then require the employer to bargain collectively after the initial establishment of terms.

There are three common ways that a collective bargaining agreement would transfer to the buyer. First, since a collective bargaining agreement is a contract, general U.S. contract law principles apply. The buyer can: agree to the collective bargaining agreement as part of the terms of sale; adopt it by express agreement; or impliedly adopt it by continuing to follow its terms and otherwise showing consent to it. Second, the buyer may be obligated to bargain with the union upon consideration of several factors, including whether: (a) the seller's employees represent a majority of the buyer's employees; and (b) the identity of the employing enterprise remains substantially intact in structure and business purpose. Third, the NLRB could determine that the buyer intends to retain the seller's employees and has led them to believe they would be retained without changes to their conditions of employment.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

No, unless the business sale results in a plant closing or a mass layoff, in which case the employees may be entitled to 60 days' notice of the layoff under the federal Worker Adjustment and Retraining Notification Act (WARN) or an applicable state law counterpart.

5.4 Can employees be dismissed in connection with a business sale?

Yes. An employee who was at-will with the seller retains this at-will status when the ownership of a business transfers. If the sale is an asset sale, the employer must decide whether to retain each employee and is generally free to choose not to hire any of the former employees.

Any layoff of the employees pursuant to the sale must generally be done in accordance with WARN or an applicable state law equivalent. These laws generally require 60 days' notice of a plant closing or mass layoff.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Generally, an employee who was at-will with the seller would retain the at-will status when the ownership of a business transfers. As a result, the buyer – just like the seller – could require that the employee's terms of employment change if the employee wants to stay employed. There are no particular protections for employees in this instance.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

No, except in some circumstances involving a plant closing or mass layoff, in which case the employees may be entitled to 60 days' notice of the layoff under WARN or an applicable state law equivalent. Some of these analogous state laws are more expansive in terms of coverage and employee rights.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

While employers may utilise a "garden leave" arrangement with employees, this is not common in the United States.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Employment is generally assumed to be at-will, meaning either the employee or the employer can end the employment relationship at any time for good reason, bad reason, or no reason at all. There are four major exceptions to this employment at-will doctrine: 1) dismissal due to discrimination or retaliation in violation of a federal, state, or local statute; 2) an express or implied contract, including a collective bargaining agreement; 3) an implied covenant of good faith and fair dealing; and 4) a public policy exception prohibiting discharge if it would violate the state's public policy. The law surrounding these exceptions varies considerably by state.

There are two basic types of involuntary termination, known often as being "terminated" and being "laid off". Termination is the employer's choice to end the employment relationship, generally for reasons relating to the performance or conduct of the employee. A layoff is usually not strictly related to an employee's performance, but instead due to the elimination of jobs for economic reasons or the employer's business need to restructure.

Consent from a third party is not required before dismissal, unless such a provision exists in an applicable collective bargaining agreement or other employment contract.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

Employees subject to a collective bargaining or employment contract may enjoy special protection against dismissal depending on the terms of the contract. At-will employees are generally protected from dismissals that are discriminatory, retaliatory, or in violation of a state's public policy.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Employers are entitled to dismiss for reasons related to the individual employee or business-related reasons, so long as those reasons do not violate: 1) an applicable employment contract; 2) the employee's right to protected family, medical, or military leave; or 3) the laws prohibiting discrimination, retaliation, or wrongful termination in violation of public policy.

Employees are generally not entitled to compensation on dismissal beyond their final pay and any other business expenses owed to them at the time of dismissal.

Depending on the law of the state in which the employee works, an employee may be entitled to receive temporary and partial wage replacement called "unemployment compensation", which is generated by the state government from a special tax paid by employers.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

No, unless otherwise required by contract, collective bargaining agreement, or, in some cases, if the employee works in the public sector.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

The types of claim an employee can bring vary depending on jurisdiction. Employees can bring a variety of claims under federal, state, and local law, including: unlawful discrimination; breach of express or implied contract; breach of the implied covenant of good faith and fair dealing; violation of the statutes guaranteeing family, medical, and military leaves; tort claims, such as infliction of emotional distress, negligent hiring, supervision or retention, invasion of privacy, or defamation; wrongful termination, including wrongful termination in violation of public policy and retaliation for having raised a workers' compensation claim; and retaliation for exercising rights under the various employment statutes.

Remedies available for these employment claims vary considerably depending on the law under which the claims are asserted and the jurisdiction. Such remedies generally include some combination of back pay, lost benefits, front pay, liquidated damages, compensatory damages (which include emotional distress damages), punitive damages, and equitable relief such as reinstatement, as well as attorneys' fees and costs under some employment statutes.

6.8 Can employers settle claims before or after they are initiated?

Employers can settle the majority of employment claims either before or after they are initiated. However, special rules exist for employers seeking to settle claims based on violations of the Fair Labor Standards Act (FLSA), which requires minimum wage and overtime pay for most employees. Individual employees cannot consent to work for less than what is prescribed by the FLSA and, therefore, cannot waive their rights under the FLSA by settlement unless the settlement is approved by either the United States Department of Labor or a federal court.

Similarly, employment class action settlements require court approval to ensure they are fair, adequate, and reasonable.

Federal law also contains special procedures that must be followed when settling age discrimination claims, but resolution of these claims does not require court approval.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Yes. In some cases involving a plant closing or mass layoff, employees may be entitled to advance notice of the layoff under the federal WARN Act or an applicable state law equivalent.

Also, the federal age discrimination law requires an employer to make certain disclosures to employees being dismissed as part of an exit incentive programme or other employment termination programme, if the employer offers consideration in exchange for signing a waiver of rights under that law. Any such waiver must include certain mandatory provisions to be valid.

An employer may have additional obligations when dismissing a group of employees as required by an applicable collective bargaining agreement, or, in some cases, if the employee works in the public sector.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

While a group of at-will employees may generally be dismissed by an employer at any time, the federal WARN Act and its state equivalents require some employers to provide employees advance notice of a layoff or plant closing. An employer who violates the WARN provisions by ordering a plant closing or mass layoff without providing appropriate notice is liable to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to 60 days, as well as civil penalties for each day of violation. Some state laws equivalent to WARN have even harsher penalties for violations. Employees enforce their WARN rights by filing a civil lawsuit.

To the extent employees believe the mass dismissal violated other employment laws, such as those prohibiting discrimination, the employees can file individual or class action claims with the appropriate employment agency and/or in court.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The laws governing enforceability of restrictive covenants vary considerably by state, and a covenant that is enforceable in one state may well be unenforceable in another. Most states recognise restrictive covenants regarding non-competition, non-solicitation, and non-disclosure of confidential business information. These covenants are generally enforceable if they are reasonable in scope and time, and do no more to limit the employee's ability to compete than is necessary to protect the employer's legitimate interests.

Some states (approximately 15 to 20) have substantially limited the circumstances under which covenants are enforceable. In California, for example, non-competition covenants are invalid unless otherwise covered by an express statutory exception.

7.2 When are restrictive covenants enforceable and for what period?

Most states follow the general rule that restrictive covenants are enforceable, provided they are necessary to protect a legitimate interest of the employer and are reasonably limited in duration, geographic scope, and the restrictions placed on the employee in pursuing his or her profession. The minority position – held most notably by California – prohibits the use of restrictive covenants in virtually all circumstances.

7.3 Do employees have to be provided with financial compensation in return for covenants?

In most circumstances, there is no separate, specifically identified compensation as such. However, since employment is a contractual relationship, some consideration must be given. In many states, continued employment is sufficient consideration for the imposition of a restrictive covenant.

7.4 How are restrictive covenants enforced?

An employer can enforce a restrictive covenant by filing a civil lawsuit seeking an injunction to prevent the employee from violating the covenant and/or damages to compensate the employer for the violation.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employee data protection laws in other countries are often much more restrictive, though the U.S. is trending toward more data protection obligations with an assortment of data protection laws that regulate the collection, use and transfer of employees' personally identifiable information ("PII") and personal health information ("PHI"). These laws are not limited to protecting active employee information, so employers' obligations extend to former employees, job applicants, independent contractors and other non-employee groups whose personal information they may obtain (such as customers). There are five primary federal data protection laws that impact the employment relationship: the Health Insurance Portability and Accountability Act ("HIPAA"), which dictates under what circumstances and to whom PHI may be released; the Genetic Information Nondiscrimination Act ("GINA"), which covers genetic information; the Americans with Disabilities Act ("ADA"), which limits when an employer may obtain medical information, how such information may be used, and disclosure of such information; the National Labor Relations Act ("NLRA"), which prohibits employers from interfering with workers' rights to engage in concerted activity, including such activity through social media, and the Fair Credit Reporting Act ("FCRA"), which applies to those who use consumer reports, including background checks conducted on applicants and employees. Another federal law, the Privacy Act, limits the type of information that federal government employers may keep on their employees. Additionally, most U.S. states have enacted some form of data protection legislation that often impacts the employment relationship, though these states impose a wide range of requirements. Almost all states have enacted laws requiring notification of security breaches involving PII and many have enacted laws requiring companies to destroy, dispose, or otherwise make PII unreadable or undecipherable. Some states have laws providing expanded protections to PHI. More recently, a significant number of states have enacted employee social media privacy laws.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

There is no federal law requiring current or former employees access to their personnel records. There are, however, federal laws regulating employee access to medical records, records of exposure to hazardous substances, and consumer reports. The Occupational Safety & Health Act ("OSHA") authorises employees who may have experienced workplace exposure to a toxic substance or harmful physical agent access to their medical records and records of such exposure. The Fair Credit Reporting Act ("FCRA") grants applicants and employees access to their consumer reports, which is defined to include background check reports.

Employee access rights to their personnel and medical records are guided by state law, and vary widely from state to state. In some states, employees have no legal right to these records. Many states, however, have some type of law authorising access to personnel and/or medical records and outlining the terms of such access.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Yes, though various federal and state laws regulate the process for conducting such checks and how they may be used. A federal law, the Fair Credit Reporting Act ("FCRA"), requires employers to obtain written consent from applicants or employees before obtaining background reports from any company in the business of compiling background information. If an employer thinks it might take an adverse action against an applicant or employee because of something in a background report, it must give the applicant or employee a copy of the report and a notice of FCRA rights. Some states and even localities have their own laws that offer protections for screening applicants and employees similar to, or even greater than, those afforded by the FCRA.

Various federal and state anti-discrimination laws prohibit checking the background of applicants or employees or using background report information when that decision is based on a person's protected status, such as race, national origin, colour, sex, religion, disability, genetic information, age, or other characteristics protected under state law. An employer's neutral practice of disqualifying applicants or employees based on criminal or credit history may disproportionately impact minorities, and therefore violate these anti-discrimination laws if not job-related and consistent with business necessity.

Beyond this general anti-discrimination rule, the law varies by state on whether, and to what extent, employers may consider background check information – especially criminal or credit histories – in making employment decisions. Some states impose very few restrictions on inquiries into and use of an applicant's criminal or credit history, while others take a much more restrictive position. For example, in some states, employers are prohibited from checking applicant credit reports altogether or may be allowed to do so only for certain types of jobs. Some states prohibit employers from asking about arrests, convictions that occurred beyond a certain time period, juvenile crimes, or sealed records. Some states permit employers to consider convictions only if the crime is job related, and others allow employers to consider criminal history only for certain types of jobs.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Generally, yes, with some exceptions. An employer is usually entitled to monitor employees' use of its email and computer system if it owns the devices and runs the network. Employee monitoring has, however, become more complicated by the surge of employees utilising personal devices for work activities. Various federal and state laws prohibit unauthorised access to employees' personal electronic devices and personal email even when accessed on the employer's device and network. Generally speaking, a broad workplace usage policy (particularly one that speaks specifically to these "Bring Your Own Device" and personal email issues) serves to protect an employer's right to monitor activity on its network. An employer planning to monitor should maintain such a policy and obtain employee acknowledgments that they do not have a reasonable expectation of privacy when using the employer's

devices and network. Some employees may have additional protection from email and computer monitoring, such as those in the public sector who may have constitutional privacy rights and those subject to union contracts that may restrict the employer's right to monitor.

An employer's right to monitor employee telephone calls is more limited. Under federal law, employers may monitor employee calls made "in the ordinary course of business" but cannot listen to or record calls it knows are of a personal nature. Some states have additional restrictions on monitoring employee telephone calls, such as requiring employers to inform the parties to the call that the conversation is being recorded or monitored.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Generally speaking, an employer may limit employees' use of social media during working hours and how employees use social media regarding the employer's business. For example, an employer usually has the right to discipline an employee who violates company policy by harassing other employees on social media or disclosing company proprietary information on social media. But, an employer's control over an employee's use of social media is limited. Many state and local laws prohibit employers from disciplining employees based on lawful, off-duty activity on social networking sites unless the activity implicates the employer's legitimate business interest. Additionally, the National Labor Relations Act ("NLRA") protects employees' rights to engage in "concerted activity", which includes such activity on social media. The NLRA applies to union and non-union employers alike, so all U.S. employers must be mindful of their social media policies and practices so as to not infringe upon these NLRA rights.

Employer access to private social media content is also limited. Federal law prohibits employer access to private social media accounts without consent from the employee or applicant. Many states have password privacy laws that prohibit employers from even requesting social media user name and password information from employees and applicants. These laws usually provide exceptions for employers when investigating workplace misconduct or complying with applicable law.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Federal courts have jurisdiction to hear cases arising out of the federal employment laws, employment cases in which the United States is a party, and employment cases between citizens of different states when there is more than $75,000 in controversy. The federal court system is comprised of 12 judicial circuits that are geographically divided across the country. Each circuit is divided into a number of geographic districts, with a trial court in each district. Decisions of these trial courts may be appealed to the district's corresponding circuit court of appeals, and ultimately to the Supreme Court. State courts have jurisdiction to hear cases arising out of state employment laws. Each state has a court system that is comprised of trial courts, courts of appeals, and a state supreme court.

Federal employment agencies such as the EEOC and DOL have authority to investigate certain employment claims and even litigate those claims in federal court on behalf of employees. These agencies also have authority to hear such employment claims through an administrative law judge.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The applicable procedure depends on the forum in which the employment claim is brought. Employment lawsuits pending in federal courts are governed by the Federal Rules of Civil Procedure, and each state has its own civil procedure rules that apply to employment lawsuits pending in its courts. Likewise, each administrative agency with jurisdiction to investigate or hear employment claims is governed by statute or procedural regulations that apply to such claims.

The EEOC is statutorily required to engage in conciliation before it is permitted to file a lawsuit against an employer on an employee's behalf. Otherwise, conciliation is not mandatory before a complaint can proceed, absent a contract or collective bargaining agreement to the contrary.

Typically, there is no fee to be paid by the employee in this judicial and/or administrative setting. The opportunity to resolve the dispute is considered to be a sound public policy approach for early dispute discussion and potential resolution.

9.3 How long do employment-related complaints typically take to be decided?

Courts have substantial discretion to determine the length of time afforded for each employment case and will take into account the complexity of the litigation and the claims asserted. For employment cases that are decided at trial, it is rare for an employment claim to be tried in less than a year from the filing date of the case. More complex individual or class cases are often litigated for several years before being tried.

9.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Yes. Interlocutory appeals are only permitted in limited circumstances, but it is possible to appeal a lower court's final judgment. Depending on the jurisdiction and complexity of the litigation, an appeal can take anywhere from six months to a few years in more complex cases.

William C. Martucci
Shook, Hardy & Bacon L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004-1305
USA

Tel: *+1 202 783 8400*
Fax: *+1 202 783 4211*
Email: *wmartucci@shb.com*
URL: *www.shb.com*

Bill serves as the practice group leader of SHB's National Employment Litigation & Policy Practice, representing corporate employers exclusively. Chambers notes "Bill is worth having on any dream team for employment litigation and policy issues. A preeminent figure in the employment litigation arena". He has successfully tried a number of jury cases and resolved a variety of class action cases. His primary practice areas target complex class action (employment discrimination and wage and hour) litigation, EEOC litigation, high-level executive disputes, whistleblowing, and unfair competition litigation. His jury work has been featured in *The National Law Journal*, while *Human Resource Executive/Lawdragon* has recognised Bill as one of America's Most Powerful Employment Lawyers. He teaches Multinational Business Policy and the Global Workplace at Georgetown.

Carrie A. McAtee
Shook, Hardy & Bacon L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108-2613
USA

Tel: *+1 816 474 6550*
Fax: *+1 816 421 5547*
Email: *cmcatee@shb.com*
URL: *www.shb.com*

Carrie is a partner in SHB's National Employment Litigation & Policy Practice, representing corporate employers exclusively. She has litigated a broad range of federal claims in the employment discrimination and harassment context, including age, disability, race and sex discrimination, as well as sexual and other forms of harassment, and retaliation. In addition, Carrie has broad experience dealing with the Equal Employment Opportunity Commission (EEOC), and guides clients through the administrative charge process and litigating with the EEOC in numerous jurisdictions. She also specialises in litigation matters involving federal wage and hour and FMLA claims. Carrie has successfully tried multi-party EEOC cases before juries across the United States and has written and lectured widely on different aspects of EEOC litigation and administrative processes.

SHOOK
HARDY & BACON

The SHB National Employment Litigation Practice represents corporate employers in complex class action (employment discrimination and wage & hour) and EEOC litigation. *Chambers USA*: *America's Leading Lawyers for Business* describes SHB as: "A Powerhouse. Truly one of the best litigation firms in the nation". Innovation and collaboration are SHB hallmarks.

Chicago | Denver | Houston | Kansas City | London | Miami | Orange County | Philadelphia | San Francisco | Seattle | Tampa | Washington, D.C.

For more information, contact:
William C. Martucci, Partner
Shook, Hardy & Bacon L.L.P.
1155 F Street, N.W., Suite 200, Washington, D.C. 20004-1305, USA
Tel: +1 202 783 8400
Fax: +1 202 783 4211
Email: wmartucci@shb.com
URL: www.shb.com

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk