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GLOBAL PRACTICE GUIDE

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USA Regional Employment

Second Edition

Connecticut
Wiggin and Dana LLP

chambers.com

2019

Law and Practice

Contributed by Wiggin and Dana LLP

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Wiggin and Dana LLP is a full-service law firm with more than 140 attorneys. With offices in Connecticut, New York, Philadelphia, Washington DC and Palm Beach, the firm represents clients throughout the USA and globally on a wide range of sophisticated and complex matters. The Labor, Employment and Benefits Department has been providing employers with extensive advice and advocacy in the realm of employee relations since the firm's inception. From publicly traded corporations to mid-sized businesses and tax-exempt institutions, the experienced team provides consultative services and litigation defenses to the employer community in a broad range of industries, including: utilities, financial services, publishing, communications, entertainment, transportation, education, insurance, banking, manufacturing, biotechnology and healthcare. In addition, as a full-service firm, they work closely with colleagues in other practice areas, such as corporate, mergers and acquisitions, insurance, IP and real estate.

Authors

Mary Gambardella brings decades of experience in helping clients comply with ever-changing labor laws and regulations, as well as in managing employment challenges such as sensitive terminations, sexual harassment, reductions in workforce, discrimination claims and severance agreements. Mary is chair of the firm's Labor, Employment and Benefits Department and regularly represents employers in state and federal court litigation, administrative and regulatory proceedings, and mediations and arbitrations. She handles all aspects of labor and employment law, including discrimination claims, sexual harassment, wrongful discharge, wage/hour and employment contract claims. She has handled complex, multi-plaintiff claims and class actions and has first-chaired dozens of bench and jury trials through to verdict. Mary regularly assists clients in developing policies and procedures to ensure compliance with fluctuating regulations. She frequently conducts management and human resource personnel training, leads internal investigations, assists with wage audits and defends clients under investigation by state or federal agencies, including the Department of Labor, the federal Occupational Safety and Health Administration (OSHA), state human rights commissions and the Equal Employment Opportunity Commission (EEOC). She has also handled Title IX and Clery Act matters.

Lawrence Peikes represents the interests of management in all aspects of the employer-employee relationship and is particularly experienced in litigation defense. He has advocated for employers in a varied assortment of employment cases before arbitrators, mediators and government agencies as well as in state and federal courts. Larry has successfully tried cases at both federal and state levels. Larry's practice encompasses the full range of employment law issues, including: workplace discrimination, sexual and other forms of harassment, wrongful discharge, wage-and-hour compliance, non-competition agreements, trade secret protection and contract negotiations. Larry represents employers in administrative proceedings before such agencies as: the U.S. Equal Employment Opportunity Commission; the Connecticut Commission on Human Rights and Opportunities; the New York State Division of Human Rights and its New York City counterpart, the National Labor Relations Board; the U.S., Connecticut and New York Departments of Labor; and other administrative bodies charged with enforcing federal and state labor laws.

Authors Continued

Najia Khalid is a business immigration lawyer who has dedicated her career to helping US and international employers secure work authorization on behalf of individuals with specialized skills. An immigrant herself, Najia leads Wiggin and Dana's Immigration and Nationality Law and Compliance Practice and serves as chair of the firm's Inclusion, Diversity and Equity Committee. Najia represents a wide range of employers in their business immigration and compliance efforts, including: national and multinational companies and emerging companies and franchisors, as well as research, educational, healthcare and religious institutions. She serves clients in financial services, life sciences, technology, manufacturing, utilities, retail, defense, the arts and more. She has recently helped several clients prove that their desired analysts, executives, marketing experts and young careerists are essential, uniquely skilled "professionals" qualified for the positions for which they are being recruited.

Caroline Park acts as counsel in Wiggin and Dana's Labor, Employment and Benefits Department and is a member of the firm's Diversity Committee. Her practice encompasses federal and state court litigation and the arbitration and mediation of employment discrimination claims, wrongful discharge claims, wage and hour claims, disputes over the enforcement of covenants not to compete and other employment-related disagreements. Caroline also represents employers in cases involving claims of discrimination, harassment and retaliation before the Commission on Human Rights and Opportunities and the Equal Employment Opportunity Commission. A significant portion of her work focuses on traditional labor relations, which includes union organizing drives, proceedings before the National Labor Relations Board, grievance and arbitration proceedings and labor contract negotiations. In addition, Caroline advises employers on a broad range of personnel-related matters, such as disciplinary issues, termination and separation issues, reasonable accommodations, the Family and Medical Leave Act and personnel policies and practices.

1. Current Socio-Economic, Political and Legal Climate; Context Matters

1.1 "Gig" Economy and Other Technological Advances

Beyond an array of federal labor and employment laws, employers in the US are generally subject to a patchwork of statutes and regulations issued on a state, county and city-wide basis that can vary greatly from jurisdiction to jurisdiction. Legislative enactments and agency rules cover a wide range of workplace initiatives including minimum wage rates and other wage and hour requirements such as: overtime pay; benefit eligibility; requirements regarding handbook policies and postings; paid sick time and family and medical leave entitlements; and applicable tests for independent contractor versus employee status.

Connecticut's proximity to major metropolitan hubs in New York and Massachusetts have historically made it an attractive location for businesses. Although a relatively small state, Connecticut holds a position in the vanguard of progressive employment laws, including paid sick leave, paid family leave and expansive civil rights protections for employees. Despite its advantageous geographic location, Connecticut has not seen the same level of gig economy growth as the neighbouring states of New York and Massachusetts.

For a variety of reasons, including avoidance of payroll taxes, or the myth that independent contractor classification provides more flexibility in the relationship, entities operating gig economy businesses often classify initial service providers working full or part-time for the company as "consultants" or "independent contractors". Connecticut law provides a strong disincentive to misclassifying employees. A global entity seeking a foothold in Connecticut must contend with the pitfalls of misclassifying independent contractors, including potential exposure to tax liabilities and costly class action lawsuits. Connecticut has adopted a stringent independent contractor test requiring the hiring entity to show that: (a) the worker is free from the control and direction of the hiring entity in connection with the performance of the work; (b) the worker performs work that is outside the usual course of the hiring entity's business and/or place of business; and (c) the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed. Misclassification can lead to substantial penalties under both Connecticut and federal laws for failure to pay minimum wages, overtime pay and other wage and hour liabilities and employer payroll taxes – not to mention the potential failure to provide employment-related benefits and workers' compensation insurance coverage.

As far as social media considerations are concerned, pursuant to the National Labor Relations Act ("NLRA"), US employers cannot preclude non-supervisory employees from communicating with each other regarding the terms and conditions of employment, including complaints or criticisms. This prohibition includes exchanges that take place on social media platforms. Of course, these rights are not without boundaries – employees may lose the protection of the NLRA where their conduct is belligerent, menacing, discriminatory, sexually harassing or physically aggressive. Furthermore, employers may restrict the sharing and/or misappropriation of confidential information and trade secrets in on-line forums as well as impose heightened restrictions where the employer's sponsored social media platforms are involved.

Connecticut is one of approximately 26 states with legislation regulating employer access to employees' social media accounts. Connecticut's law prohibits employers from requesting or requiring an employee or applicant to provide a username and password or any other authentication means for accessing a personal online account. Under the law, employers also are prohibited from requiring an employee or applicant to authenticate or access a personal online account in the presence of the employer. Further, employers are prohibited from requiring an employee or applicant to invite the employer, or accept an invitation from the employer, to join a group affiliated with the employee's or applicant's account. Connecticut law does not prohibit employers from conducting certain investigations to ensure compliance with state or federal laws or regulatory requirements or prohibitions against work-related employee misconduct based on the receipt of specific information about activity on an employee's or applicant's personal online account. In addition, the law does not "prevent an employer from complying with the requirements of state or federal statutes, rules or regulations, case law or rules of self-regulatory organizations".

1.2 "Me Too" and Other Movements

The Connecticut legislature responded to the #MeToo movement by passing the "Time's Up" Act in the summer of 2019. The Act is geared toward preventing and providing recourse for sexual harassment in the workplace and will go into effect as of October 1, 2019.

This new legislation requires companies with three or more workers to provide all employees with two hours of sexual harassment training by October 1, 2020. Regardless of the number of Connecticut-based employees, companies must train all supervisors by the same deadline. Thereafter, employers must provide supplemental training at least once every 10 years, although the Connecticut Commission on Human Rights and Opportunities ("CHRO") – the administrative agency charged with enforcing the state's anti-discrimination laws – recommends that training take place at least every three years.

Employers must also provide notice of their sexual harassment policies. A written notice must be posted in a prominent and accessible location and provide employees with information on the illegality of sexual harassment and remedies available to victims of sexual harassment. This same information must be provided to all new hires via email within three months of their start date if the company provides employees with email accounts or otherwise by a posting on the employer's website.

Recourse for workplace sexual harassment under Connecticut law was also expanded under the Time's Up Act in that the deadline for bringing a claim to the CHRO has increased from 180 days to 300 days. Finally, the new law empowers courts to impose additional remedies, including punitive damages as well as legal costs.

The Connecticut legislature has also responded to women's equality concerns by enacting new pay equity laws prohibiting employers from inquiring about prospective employees' wages or salary histories. The purpose of this law is to close the wage gap by ensuring that future salaries are not anchored by previous salaries.

1.3 Decline in Union Membership

Though union membership has declined in Connecticut (as it has across the country) over the past few decades, according to the Bureau of Labor Statistics, Connecticut's union membership rate is higher than the national average (16% of employees are unionized in Connecticut as compared to a national average of 10.5%) and ranks sixth in the nation. Available data suggests a majority of Connecticut's unionized workers are employed in the public sector. There are myriad reasons for the decline in private sector union membership, including job growth in industries that historically have not had high unionization rates coupled with job losses in industries such as manufacturing where unions typically have a much stronger presence. Nonetheless, unions can still exert considerable power in extracting costly terms after lengthy negotiations with private employers.

Private employers operating in Connecticut must look primarily to federal labor law (particularly the National Labor Relations Act ("NLRA")) for the applicable legal principles governing unionization, collective bargaining and concerted employee activities. The NLRA is enforced by the National Labor Relations Board ("NLRB").

Perhaps in response to the decline of unions, in the last ten to fifteen years the NLRB began to enforce the NLRA more aggressively in non-union workplaces. Thus, the NLRB developed a webpage targeting non-union employees, explaining their rights under the NLRA and providing examples of protected concerted activity. Through this and other initiatives, the NLRB made known its intent to make all employees, and specifically non-union employees, aware

of their rights to engage in protected activity to improve pay and other working conditions and/or to fix job-related problems.

The Obama-era Board was marked by a spate of cases challenging employee handbooks, policies, guidelines and work rules at non-union facilities. The Board took aim at all manner of common employee handbook provisions-at-will statements, confidentiality policies, provisions regarding contact with the media and social media policies among others-finding unlawful policies that the Board determined would be perceived by employees to chill protected concerted activities under Section 7. However, in late 2017 the Board adopted a new standard to gauge the legality of work rules. Now, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will look at: (i) the nature and extent of the potential impact on NLRA rights and (ii) legitimate justifications associated with the rule. The Board also announced three categories of rules. Category 1 includes rules that, when reasonably interpreted, do not prohibit or interfere with NLRA rights or the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Category 2 includes rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights and, if so, whether the adverse impact is outweighed by legitimate justifications. Category 3 includes rules the Board will designate as unlawful because they would prohibit or limit NLRA-protected conduct and the adverse impact on NLRA rights is not outweighed by justifications associated.

In June of 2018, the NLRB published further guidance on handbook rules helpfully identifying common handbook policies that fall into Category 1. Examples of lawful Category 1 policies include: the civility rule, ie, disallowing inappropriate conduct or rude behavior; no-photography and non-recording rules; rules against insubordination, non-cooperation or on-the-job conduct that adversely affects operations; disruptive behavior rules; rules protecting confidential, proprietary and customer information; rules against defamation or misrepresentation; rules against using employer logos or intellectual property; rules requiring authorization to speak for the company; and rules banning disloyalty, nepotism or self-enrichment. It is important to note that just because a rule falls in Category 1 and is facially lawful, an employer cannot use that rule to prohibit protected concerted activity.

The Board also gave examples of Category 2 handbook policies that may be lawful depending on the overall context, including broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in or voting for a union; confidentiality rules broadly encompassing "employer business" or "employee information" (as opposed to confidentiality rules regarding customer or proprietary information); and rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media on the employer's behalf).

Finally, the Board identified Category 3 handbook policies, ie, those that are generally unlawful because they would prohibit or limit NLRA conduct. Category 3 policies include: confidentiality rules specifically regarding wages, benefits and working conditions and rules against joining outside organizations or voting on matters concerning the employer.

While the Board's newly-announced standard for establishing work rules is a marked improvement and provides valuable clarity, work rules remain the primary way a non-union employer may find itself the subject of an unfair labor practice charge. Thus, even employers who do not anticipate having a unionized workforce must be aware of the rights all employees enjoy under the NLRA and be cognizant of the Board's standards when adopting and applying rules for the workplace.

1.4 National Labor Relations Board

The National Labor Relations Board ("NLRB") is a federal administrative agency charged with enforcing the National Labor Relations Act ("NLRA"), the federal statute governing union organization and representation in the private sector and protecting the rights of employees to full freedom of association, self-organization and designation of representatives of their own choosing. The NLRB is headed by a five-member Board appointed by the President of the United States and maintains regional offices throughout the country. It is authorized to fulfill its responsibilities both through the adjudicatory process and by rulemaking, but has traditionally opted for the former.

Historically, and particularly so in recent times, Republican presidents have appointed Board members with backgrounds representing management while Democratic presidents have appointed Board members with union backgrounds. As the composition of the Board shifts with each change in party control of the White House, a 3-2 majority may be held either by a group of Board members with a business-friendly orientation or by those with a focus on employee and union rights. As a result, NLRB precedent, particularly on some topics of great consequence to the collective bargaining relationship, has vacillated over the years.

While NLRB precedent constantly evolves, the last fifteen years or so have brought many striking changes. In some cases, the NLRB reversed its own precedent within a couple of years. For example, in 2015 the Board announced a new standard for determining whether a joint employment relationship exists, but that decision was overturned only two years later in a decision that was subsequently vacated based

on concerns about the participation of a Board member whose former law firm represented one of the two alleged joint employers in the earlier case, thus effectively reinstating the standard from 2015. Under that standard, an entity that possesses "reserved authority" or potential authority or indirect control over the employees is considered a joint employer. Dissatisfied with this standard, the NLRB has endeavored to change the rule; under the NLRB's proposed rule, entities would be deemed joint employers only where they possess and exercise substantial, direct and immediate control over the essential terms and conditions of employment of another entity's employees. The NLRB's final joint employment rule is expected to issue in the last quarter of 2019.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

A global entity seeking to establish a presence in the United States, in Connecticut or otherwise must clearly define its relationship with its workers. The definition is often reduced to employer-employee, independent contractor or paid or unpaid internship. Employment status typically implicates payroll taxes, withholdings, benefits eligibility, overtime entitlements and legal protections reserved for "employees", such as workers compensation and unemployment insurance. The status as an employee also implicates coverage under the National Labor Relations Act ("NLRA") which in turn implicates an employee's right to engage in collective bargaining.

An often-overlooked logistical consideration with implications for the type of relationship is the extent to which the global entity wishes to have an American presence. An entity operating overseas will need to establish federal and state tax identification numbers, bank accounts and payroll mechanisms to comply with federal and state wage payment requirements; the lead time required to establish these structures can be significant.

Viewed through the lens of federal and state administrative agency enforcement, the practice of mis-labelling employees as independent contractors as a cost-saving measure is fraught with risk. When a service provider is misclassified as an independent contractor, the employer resultantly does not withhold regular taxes or FICA tax, remit payroll taxes and may not properly offer required benefits. The Connecticut Department of Labor is a signatory to a memorandum of understanding with the purpose of sharing information concerning misclassification with the federal Internal Revenue Service, sending a clear signal that the IRS and Connecticut Department of Labor are aware of misclassification abuses and routinely audit companies suspected of misclassifying employees as independent contractors, often resulting in significant penalties and fines. This is not to suggest that it is impossible to establish and maintain a legitimate independent contractor relationship, it is only to say that the relationship should be thoroughly vetted, understood and documented before it is implemented.

A related consideration concerns the joint employment arrangements that occur when an employer uses a staffing agency, either for administrative convenience or based on the presumption that its liability is totally passed on to the agency for any compliance issues. The Department of Labor is in the final stages of promulgating rules concerning joint employment under the Fair Labor Standards Act that focus on the economic realities of the relationship rather than the theoretical ability of an alleged joint employer to exert control over another. Joint employment is also the subject of rulemaking by the National Labor Relations Board. The Board's proposed rule would find a joint-employment relationship only if the entity "possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship."

Finally, a global entity might consider using interns as a component of its workforce. There is strong temptation to bring on young, energetic talent at a low wage rate or to avoid paying wages altogether in favor of an educational experience. However, the federal and state Departments of Labor have turned a keen eye to the primary beneficiary of the relationship. Global entities can look to interns as useful members of the workforce, but they should not do so without offering an appreciable benefit in exchange for the interns' work, otherwise the intern will be considered an employee entitled to all the benefits and costs of employment.

2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity

Although there are essentially three categories of relationships between an entity and its workers, there are myriad permutations within those categories that require further definition. From the outset, it is critical to consider and document the type of employment relationship, including whether employment will be at-will, under a contract or exempt from wage and hour requirements.

At-Will Employment

Under Connecticut law, the employment at-will doctrine is the "default" rule governing employment relationships and has been for over 100 years. The purpose of this rule is to preserve managerial discretion in the workplace and to provide employers and employees with the freedom to make their own contracts. The concept of an at-will relationship where either party can terminate the relationship at any time and

for any reason is often novel to global entities accustomed to more egalitarian relationships.

Over the last 40 years, the "at-will" doctrine has eroded as numerous statutory and judicially created exceptions have developed. As such, the general rule of employment at-will is most accurately defined by its myriad exceptions and limitations. The impetus for these exceptions was a desire to limit the potentially abusive exercise of employers' powers to terminate employees and to "level the playing field" for the vast majority of employees who lack sufficient bargaining power to negotiate a contract of employment for a specific duration or limit the reasons for discharge. The development of employment discrimination claims, implied employment contracts, the implied covenant of good faith and fair dealing, public policy considerations and speech and whistleblower protections have added a complexity to the at-will relationship. It is therefore important to clearly and consistently delineate in offer letters and employer policies whether the relationship is at-will and what, if any, limitations exist for employee termination.

Employment Contracts

In lieu of an at-will relationship, employers may also choose to enter into express contracts with employees. Connecticut courts will apply general principals of contract law to an express employment agreement, which can be written or oral. There must, however, be a mutual and identical understanding between both parties of the definitive terms of the agreement. In other words, there must be a "meeting of the minds". Additionally, assent to the agreement must be unequivocal; representations that merely indicate an intent to enter into a contract for future employment do not create a contract. Either a written or oral express agreement containing a durational provision or limiting the employer's right to terminate takes the employment relationship out of the "at-will" category. Connecticut courts have found that employment agreements for a definite term can be terminated only on a showing of cause, unless the agreement expressly states otherwise.

Implied contracts may arise during the hiring process. For instance, an employee may claim an implied contract was formed through either the terms of an advertisement, offer letter, personnel policy, employee handbook, statements of policy or procedure or oral assurances made during the interview process. As with express contracts, there must be mutual agreement. The employee alleging the existence of an implied contract has the burden of proving the employer has agreed, either by words or by action, to undertake some form of actual contractual commitment for employment other than at-will. The language contained in employee handbooks has been the source of ample litigation in Connecticut regarding implied employment contracts. These claims can be avoided with appropriate language in offer letters indicating that the letter supersedes all prior verbal or written agreements, as well as handbook disclaimers confirming that a contract has not been created and reaffirming that, absent a signed agreement providing otherwise, employment by the company is on at-will basis.

Exempt vs. Non-Exempt Status

Another important onboarding consideration concerns the use of salaries in lieu of hourly wages and, more broadly, the widely held misperception that compensating employees on a salaried basis automatically entitles the company to classify those employees as "exempt" from minimum wage and overtime laws. Indeed, some employers attempt to simplify their payrolls and endeavor to circumvent the hassle of compliance with wage and hour laws by paying all employees a fixed salary for all hours worked on the assumption that overtime pay is not required. Similarly, it is a widely held misbelief that if employees receive a salary, especially if it's a relatively high salary, there is no requirement to track the employee's work hours. Unfortunately, under both federal and state law, simply paying an employee a salary does not of itself alleviate the need to track and pay for all hours worked and to pay overtime. Instead, payment by salary is only one part of a two-part test for exemption from wage and hour laws (and the salary threshold under Connecticut law is $20.00 more per week than under federal law). The second, and arguably more critical, component of the test requires an analysis of the employee's position and duties.

There are seven federal wage and hour exemptions: business owners, executive, administrative, professional, computer, outside sales and highly compensated employees can all be considered exempt if they satisfy fact-specific tests based on the employee's actual duties, not a job description. While the FLSA exemptions have been widely adopted and adapted by the states, some states do not recognize every exemption. For example, Connecticut only recognizes the highly compensated employee exemption for individuals employed as mortgage loan originators and does not recognize the business owner exemption at all.

Connecticut maintains a higher minimum wage than the $7.25 required under federal law. Starting October 1, 2019, non-exempt employees in Connecticut must be paid $11.00 per hour. Under a recently passed minimum wage increase law, the hourly rate will increase by one dollar per hour in 11-month increments, reaching $15.00 per hour on June 1, 2023.

2.3 Immigration and Related Foreign Workers

Immigration and compliance considerations are critical for global entities serviced by non-US and US workers (ie, US citizens or permanent residents); such considerations are related to entity structure and ownership interests, mergers and acquisitions, job requirements and interviewing, worker classification, compensation/taxes, export compliance and termination and require attention to federal regulations and

agency procedures, although there are some state-specific caveats.

Recruitment and Hiring Guidance
Employers cannot discriminate based on actual or perceived national origin or citizenship status. Therefore, candidates for employment should not be asked any questions during the recruiting process about national origin, citizenship status and immigration status. Candidates may be asked the following in written applications and/or interviews: 1) Are you legally authorized to work in the US for [EMPLOYER] and accept new employment in the US? and 2) Do you now, or will you in the future, require sponsorship from [EMPLOYER] in order to obtain, extend or renew authorization to work in the US? Candidates may be asked the following in written applications and/or interviews: 1) Are you legally authorized to work in the US for [EMPLOYER] and accept new employment in the US? and 2) Do you now, or will you in the future, require sponsorship from [EMPLOYER] in order to obtain, extend or renew authorization to work in the US? If a candidate responds no to #1 and yes to #2, employers may state that only applicants currently authorized to work in the US and accept new employment with any employer are being considered for a specific position and, as applicable, that the employer does not provide sponsorship for work authorization for the position (both statements can also be noted upfront in job postings).

Employment Eligibility Verification
Federal law requires all employers to verify the identity and employment authorization of individuals hired in the US and to complete and retain a Form I-9 for every such employee. The process requires employees to complete Form I-9 on or before the first day of employment, attest to employment authorization and present the employer with original acceptable documents to evidence identity and employment authorization. Within three business days of the first day of employment, the employer must examine the original document(s) presented by the employee to determine whether the document(s) appear to be reasonably genuine and relate to the employee and record the document information on the Form I-9. The E-Verify government program to check social security numbers for newly hired employees is supplemental to the I-9 process and is not required in Connecticut. Although Form I-9 is not required for independent contractors or individuals providing labor through contract or staffing services, employers cannot engage anyone for services if it is known that she or he is not authorized to work.

All offers of employment and continuous employment are contingent upon an individual's ability to secure and maintain the legal right to work for a specific employer and complete the I-9 process. If efforts at securing or providing valid work authorization should fail, the offer of employment may be withdrawn with no liability on the part of the employer for any reason.

2.4 Collective Bargaining Relationship or Union Organizational Campaign

Companies considering the acquisition of an existing business with a unionized workforce must be aware of the potential for successor liability. The question of whether a successor employer has a duty to recognize and bargain with the predecessor's union arises whenever there is a change in the employing entity through a purchase, merger or other type of acquisition.

The test of successor liability, ie, whether a company assumes an obligation to recognize and bargain with an incumbent union, turns on two factors: (1) whether there is substantial continuity of business operations in the sense that the new employer conducts essentially the same business as the predecessor employer and (2) whether there is substantial continuity in the workforce. Substantial continuity exists if: (i) the jobs and supervision of the new employing entity essentially do not differ and (ii) the new employing entity operates in essentially the same manner. This continuity may not be avoided simply by refusing to hire the unionized employees: it is unlawful to refuse to hire employees of a predecessor because such employees were represented by a union, thereby preventing the union from obtaining majority status and bargaining rights on behalf of the new workforce.

Unless the acquiring entity constitutes a "perfectly clear" successor, it generally has the right to set initial terms and conditions of employment without first bargaining with the union, though any changes to those initial terms must be collectively bargained. A "perfectly clear" successor employer, meaning one that expressly or implicitly demonstrates its intent to continue the business with substantially all the existing bargaining unit members and does not express an intention to establish new terms and conditions of employment, inherits the status quo of the predecessor's terms and conditions of employment as well as the predecessor's bargaining obligation and must continue the existing terms and conditions of employment until either a new collective bargaining agreement is negotiated or negotiations over changes to the status quo reach an impasse. In a decision issued in April 2019, the National Labor Relations Board narrowed the application of the "perfectly clear" successor exception, ruling that an employer will no longer be forced to bargain prior to setting the initial terms of employment if the employer engaged in discriminatory hiring practices as to some, but not all, of the predecessor's former employees.

3. Interviewing Process

3.1 Legal and Practical Constraints

The interviewing process itself triggers a multitude of legal considerations which vary from state to state and Connecticut is not unique in this regard. For example, Connecticut law now prohibits: (a) unless subject to a recognized exception, asking about a candidate's criminal history "during the application process"; (b) directly or indirectly through a third party making inquiries about salary or wage history; and (c) unless also subject to a recognized exception, conducting background or consumer credit history checks pre-offer. Employers need to be mindful of the requirements of the federal Fair Credit Reporting Act as well. That law requires certain disclosures and protocols be followed in connection with background checks, including criminal background checks.

Unlawful inquiries designed to elicit information regarding membership in certain protected categories, along with questions about citizenship status (as opposed to questions about "authorization to work in the US"); disability (as opposed to questions about the ability to perform the essential functions of the job "with or without accommodation"); and prior workers' compensation claims, among others, should also be excluded from the hiring process.

These types of limitations are especially challenging for entities headquartered overseas given the stark distinction between the hiring process in their home countries and the multiple limitations imposed here in the US.

4. Terms of the Relationship

4.1 Restrictive Covenants

Connecticut courts recognize that, by definition, covenants by employees not to compete with their employers after termination of the employment relationship restrain trade in a free market. Consequently, restrictive covenants may be against public policy, and therefore unenforceable, where the employer's primary aim is to curb competition. On the other hand, Connecticut courts routinely enforce non-competition and non-solicitation covenants where (1) the agreement is supported by consideration, such as an offer of employment, a salary increase or a bonus (it remains an open question in Connecticut as to whether continued at-will employment constitutes adequate consideration for a non-competition covenant entered into with an existing employee) and (2) the restrictions are narrowly tailored to protect the employer's legitimate interest in safeguarding confidential information and/or preserving customer or employee relationships.

Restrictive covenants are enforceable only if their imposed restraint is reasonable, an assessment that depends upon the competing needs of the parties as well as the needs of the public. These needs include: (1) the employer's need to protect legitimate business interests, such as trade secrets and customer lists; (2) the employee's need to earn a living; and (3) the public's need to secure the employee's presence in the labor pool.

More specifically, Connecticut courts consider five factors in evaluating the reasonableness of a non-competition covenant: (1) the length of time the restriction operates; (2) the geographical area covered; (3) the fairness of the protection accorded to the employer; (4) the extent of the restraint on the employee's opportunity to pursue his occupation; and (5) the extent of interference with the public's interest. This five-prong test is disjunctive rather than conjunctive; a finding of unreasonableness in any one of the criteria is enough to render the covenant unenforceable.

The public interest factor comes into play only rarely, typically in cases involving doctors in rural or remote locations where enforcement of a non-competition covenant may well deprive the public of essential health care services. (In 2016, Connecticut enacted legislation imposing limits on the allowable duration and geographic scope of restrictive covenants entered into by physicians, negating such covenants where the physician was terminated without cause or his or her contract was not renewed). The interests of the employee must also be protected; a restrictive covenant is unenforceable if by its terms the employee is precluded from pursuing his or her occupation and thus prevented from supporting himself or herself and his or her family. This consideration turns primarily on evidence of the employee's marketability and the availability of positions in the local community that fit his or her qualifications in terms of education, skill set and experience.

In most cases where a company sues a former employee to enforce a non-competition or non-solicitation covenant, the central issue is whether the time and geographical restrictions are reasonably necessary to protect company secrets and/or preserve the company's relationships with customers and/or employees. If the employment involved the development of professional contacts and associations with clients or customers, it is appropriate to restrain the use of the knowledge acquired in developing these client relationships for competitive purposes. Thus, in the case of a sales employee, for example, a covenant barring solicitation of those customers with whom he or she developed a business relationship for a period of time until such time as the replacement employee is able to develop his or her own rapport with the customers would likely be deemed both reasonable in scope and duration and carefully tailored to protect the former employer's legitimate objective of preserving those existing customer relationships.

An overly broad a restrictive covenant will not necessarily be set aside by a court. Some employment contracts include

"blue pencil" provisions authorizing the court to edit restrictions deemed unreasonable. Although arguably permissible, at least where the restrictive covenant provisions of the contract are divisible, in practice courts will ordinarily not narrow an overly broad geographic term if there is no term in the contract allowing for blue pencilling. The "blue pencil" rule is most often used to strike an unreasonable restriction to the extent a grammatically meaningful reasonable restriction remains after the words making the restriction unreasonable are stricken. Thus, in applying the "blue pencil" rule, Connecticut courts will usually only erase terms that exceed the bounds of reasonableness when the erasure leaves in place a reasonable restriction. Although this is the general rule, where authorized to do so by express contract language, some Connecticut trial courts have gone beyond erasing overly broad restrictions and rewritten an offensive covenant so as to render it enforceable. In other cases, Connecticut courts have shown restraint and declined to "blue pencil" restrictive covenants that overreach and go to the very heart of the agreement.

4.2 Privacy Issues

Connecticut has adopted the Uniform Trade Secrets Act, thereby providing employers with statutory protection against the misappropriation of trade secrets. The Act defines "trade secrets" broadly to encompass a formula, pattern, compilation, program, device, method, technique, process, drawing, cost data or customer list that derives actual or potential independent economic value because it is generally unknown and not readily ascertainable through proper means by another person who can obtain economic value from its disclosure or use, and is the subject of reasonable efforts under the circumstances to maintain its secrecy. Applying this definition, Connecticut courts have found that various types of information qualify as trade secrets, including components of a strategic business plan, a specialized manufacturing process and, in certain cases, customer lists and customer-specific information. Under Connecticut's version of the Uniform Trade Secrets Act, an employer aggrieved by an employee's misappropriation of trade secrets may obtain injunctive relief, as well as monetary remedies including lost profits, a reasonable royalty, attorneys' fees and, in egregious cases, punitive damages.

Augmenting state law protections is the recently enacted federal Defend Trade Secrets Act, providing a federal cause of action to remediate harm caused by the misappropriation of company trade secrets. Particularly noteworthy, the Defend Trade Secrets Act includes a civil seizure provision that allows a company claiming to have been victimized by a misappropriation to seek an order on an ex parte basis to seize property necessary to prevent the propagation or dissemination of the trade secrets that are the subject of the action. Beyond the state and federal statutory protections, employers often require employees to execute non-disclosure agreements barring misuse of not just the company's trade secrets but also confidential information that may not rise to the level of a trade secret for one reason or another.

Connecticut employees enjoy a wide range of privacy-related protections. For example, Connecticut is one of a handful of states to adopt a comprehensive drug testing statute. Under this law, an employer may not "determine an employee's eligibility for promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action solely on the basis of a positive urinalysis drug test result unless (1) the employer has given the employee a urinalysis drug test, utilizing a reliable methodology, which produced a positive result and (2) such positive test result was confirmed by a second urinalysis drug test, which was separate and independent from the initial test, utilizing a gas chromatography and mass spectrometry methodology or a methodology which has been determined by the Commissioner of Public Health to be as reliable or more reliable than the gas chromatography and mass spectrometry methodology." The law prohibits random urinalysis testing of active employees; such testing is only permissible where the employer has a reasonable suspicion of impairment. Other forms of testing, such as saliva and hair-follicle testing, are not regulated by the statute. However, in one case, a court held that an employee subjected to a hair-follicle test could pursue a common law claim for invasion of privacy.

Connecticut's Palliative Use of Marijuana Act ("PUMA") prohibits an employer from refusing to hire a prospective employee or taking an adverse employment action against an existing employee because of his or her status as a "qualifying patient" or "primary caregiver". The statute defines a "qualifying patient" as "a person who is 18 years of age or older, is a resident of Connecticut and has been diagnosed by a physician as having a debilitating medical condition" permitting the palliative use of marijuana. A "primary caregiver" is defined as anyone over 18 who "has agreed to undertake responsibility for managing the well-being of the qualifying patient with respect to the palliative use of marijuana". Nothing in the law restricts an employer from prohibiting the use of intoxicating substances during work hours or disciplining employees for being under the influence at work. However, in one case a federal district court ruled that an employer violated PUMA by rejecting an applicant who was a "qualifying patient" and failed a pre-employment drug screen by testing positive for marijuana. The decision has prompted some Connecticut employers that conduct pre-employment drug tests to treat a positive screen for marijuana as a negative result where the applicant provides proof that he or she is a "qualifying patient" under PUMA.

A newly enacted pay secrecy law went into effect in Connecticut on January 1, 2019. The statute prohibits employers from asking prospective employees about their wage and salary history during the hiring process or directing a third party to ask about a prospective employee's wage and salary history.

The prohibition does not apply if (i) the prospective employee voluntarily discloses his or her wage and salary history or (ii) to any actions taken by an employer, employment agency or its employees or agents under a federal or state law that specifically authorizes the disclosure or verification of salary history for employment purposes. Employers are permitted to ask about other elements of a prospective employee's compensation structure (eg, eligibility for stock options) so long as there is no inquiry into the value of those elements. Employers posing unlawful salary inquiries may be found liable for compensatory damages, attorneys' fees and costs and punitive damages.

4.3 Discrimination, Harassment and Retaliation Issues

Prohibitions on Discrimination, Harassment, and Retaliation

The Connecticut Fair Employment Practices Act ("CFEPA") complements and largely overlaps with federal laws prohibiting discrimination, but goes further than its federal counterparts by expressly including sexual orientation, gender identity or expression, marital status and ancestry as protected classes. The statute also provides for "aider and abettor" liability on individual actors, whereas the federal statues do not allow for individual liability. Connecticut law further prohibits discrimination based on erased criminal records as well as inquiries regarding those records. These protections apply to all stages of the employment relationship, including: recruitment, promotions, transfers, pay and benefits and termination.

Implicit Bias

Connecticut courts have yet to deal specifically with a claim of implicit bias in the context of employment discrimination. Any employee making such an argument would be required to prove that the alleged implicit bias made a difference in the employer's decision-making process.

Employers may protect against claims of implicit discriminatory bias in the recruiting process by removing identifying characteristics that might suggest that racial, national origin, gender or any other characteristics of the applicant play a part in the application process. Additionally, employers can also guard against implicit bias by providing comprehensive anti-discrimination training and maintaining a diverse workforce and management team.

Training Considerations and Requirements

Connecticut employers are required specifically to provide sexual harassment prevention training to all supervisors within six months of assuming a supervisory position. Regulations promulgated by the Connecticut Commission on Human Rights and Opportunities encourage, but do not require, employers to provide training updates once every three years. Such training creates a common understanding regarding behavior that is and is not permissible in the workplace and, therefore, can help prevent discrimination and harassment claims.

Further insulation against liability for a CFEPA claim can be garnered by contemporaneously documenting all decisions made throughout the course of the employment relationship, including performance management. This documentation should identify those responsible for hiring, promotion, pay and disciplinary decisions, as well as the rationale for the said decisions and align the same in "real time" with company policies and procedures. Thorough documentation may serve as important evidence that an employment decision was truly predicated on a non-discriminatory reason.

Finally, employers in Connecticut are well-advised to establish and distribute policies prohibiting discrimination, harassment and retaliation. These policies should include a variety of examples of discriminatory or harassing conduct and should make it clear that such behavior will result in discipline action, up to and including termination of employment. Employees should be given at least two names of managers or supervisors to whom they can bring complaints regarding harassment and discrimination; managers and supervisors should be required to report conduct violative of the company's policies.

4.4 Workplace Safety

While compliance with applicable laws and regulations is expected, many employers seek to enhance workplace health and safety programs and implement protections that are workable for their business operations but are not required by regulation or other legal requirement. By way of background, the Occupational Safety and Health Act of 1970 and the regulations, policies, interpretations and guidance materials that have been promulgated and published by the U.S. Department of Labor and the Occupational Safety and Health Administration ("OSHA") thereunder, comprise a broad and, in certain areas, complex set of requirements applicable to US employers. These federal OSHA requirements may be supplemented, modified or otherwise enhanced (but not diminished) through State Plan programs, which are OSHA-approved workplace safety and health programs implemented by individual States or US territories. Connecticut's OSHA-approved State Plan covers state and local government workers only.

In light of the myriad workplace health and safety requirements potentially applicable to US employers, there are several resources available to the regulated community – each of which is free – to assist with developing and maintaining effective workplace safety and health programs and practices, including OSHA Compliance Assistance Specialists in OSHA's Regional and Area Offices who provide outreach and guidance and, in certain areas, OSHA staff will perform a workplace compliance assessment in connection with OSHA's Consultation Program (as contrasted with an

inspection or other enforcement activity). Certain states also operate similar outreach programs. In terms of best-in-class workplace health and safety programs, OSHA's Voluntary Protection Program ("VPP") certifies workplaces that demonstrate compliance with defined expectations; sites that are accepted into the VPP are exempt from OSHA citations issued through planned OSHA inspections.

In addition to regional differences in occupational safety, employers considering establishing operations in Connecticut should be aware of the liability limits of the state's workers' compensation system. That system precludes employees from bringing suits against their employers to recover damages for workplace-related injuries, except where the injuries are caused by (i) an intentional act of the employer or (ii) the negligence of an employer who is not insured under the workers' compensation system.

4.5 Compensation and Benefits

A global business entity seeking to establish operations in the US should be aware that a significant portion of the retirement security income system and the healthcare insurance system is employment-based. Thus, in Connecticut (as in the other states), employees will be looking for, and value, generous retirement benefits and comprehensive healthcare benefits.

Retirement Benefits. In general, retirement plans are regulated at the federal level through the Internal Revenue Code (the "Code") and the Employee Retirement Income Security Act ("ERISA"); federal law pre-empts most state laws relating to these types of benefits that are provided by private employers. This allows for standardization of plans across state lines.

In 2016, Connecticut passed legislation creating the Connecticut Retirement Security Exchange. The Exchange is charged with setting up a program whereby employers with at least 5 employees who do not otherwise provide their employees with access to a federally qualified retirement plan (such as a 401(k) plan) must enroll employees in a payroll-deduction IRA arrangement. As of August 2019, the implementation of this program has been indefinitely delayed.

Healthcare Benefits. Like retirement plans, most healthcare benefit plans are regulated at the federal level through the Code and ERISA. Although federal law pre-empts most state laws relating to healthcare plans, federal law does not preempt state laws relating to insurance. Thus, if a private employer chooses to provide healthcare benefits through an insured plan, the insurance will be regulated by state law.

Connecticut has a history of requiring relatively comprehensive coverage under insured healthcare products. While, in general, employees appreciate the quality of healthcare coverage that is made available under insured healthcare plans, the premium costs for such coverage is generally higher than the national average. Employers need to factor this into their benefits costs, especially in light of the current federal requirements that employer-provided healthcare coverage satisfy certain "affordability" criteria. However, quality healthcare is generally available throughout the state and the state is home to multiple nationally ranked hospitals and three medical schools.

Under federal law, private employers with 20 or more employees who provide healthcare coverage to their employees must also extend continuation coverage (ie, "COBRA coverage") to employees and their dependents if coverage is lost for various reasons. Private employers with fewer than 20 employees who are not subject to federal COBRA may find themselves subject to a Connecticut continuation coverage requirement that is substantially similar. The full cost of continuation coverage may be shifted to the covered individual.

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

The decision to terminate an employee, even an at-will employee, should never be taken lightly. Clearly, the multiple exceptions to at-will employment, including statutory bans on discrimination tied to age, race, gender, sexual orientation, disability and other protected characteristics should be kept in mind, as should the protection provided certain whistle-blowers. Because employment claims are often a matter of "optics", it is imperative that adequate documentation substantiating the legitimate grounds for a termination decision be maintained.

For this reason, employers must always consult offer letters or other agreements with the employee to ensure nothing was written or stated that could potentially alter the at-will relationship, be incriminating or otherwise guarantee some type of severance or other post-employment compensation. Other onboarding documents to review and consider include: arbitration agreements, which often include a waiver of class action claims; post-termination restrictive covenants; change-in-control agreements that trigger a severance payment or bonus compensation; and any applicable collective bargaining agreement.

Logistical considerations also come into play when severing ties with an employee. In most states, for example, final wages must be paid at or immediately after the termination date. In Connecticut, final wages must be paid by the next business day with an involuntary termination, while payouts for fringe benefits, as well as final wages with a voluntary termination, can be made by the next regular payroll date. It is advisable to provide the employee with written notice identifying the last day of employment as well as the

date benefits terminate, in addition to the forms required by the Department of Labor to facilitate an application for unemployment insurance benefits.

6. Employment Disputes: Claims; Dispute Resolution Forums; Relief

6.1 Contractual Claims

While at-will employment is the default rule in Connecticut, there are myriad exceptions limiting the employer's right to terminate; these exceptions have been both legislatively and judicially conceived.

The parties can agree to modify the default rule of at-will employment by an express or implied contract where the required elements of offer, acceptance and consideration are satisfied. There is no legal difference between these two types of contracts; either can be formed through oral assurances, provided there is actual agreement between the parties that, for example, employment will be for a specified duration or term or that the employee may be discharged only for specified reasons. In an employment contract, certain material terms such as the duration, salary, fringe benefits and other conditions of employment are deemed essential. If an employer breaches such a contract of employment by, for example, terminating the relationship before the expiration of the specified term or for reasons other than those agreed upon, it will be liable to the employee for any damages flowing from the breach, including lost wages.

The employment at-will doctrine is also limited by the tort of wrongful discharge, applicable where an employee alleges he or she was fired for engaging in conduct implicating public policy, such as by blowing the whistle on or refusing to engage in illegal conduct. Some protections rooted in public policy considerations have been codified by legislation. For example, Connecticut's whistleblower law prohibits employers from disciplining, discharging or otherwise penalizing any employee because he or she has reported violations or suspected violations of the law to a public body or because he or she has participated in an investigation, hearing or inquiry by a public body or a court action. Connecticut is also one of the few states to extend free speech protections to the private workplace by prohibiting employers from disciplining or discharging employees for speaking out on a matter of public concern unless the employee's speech materially interferes with his or her job performance.

6.2 Discrimination, Harassment and Retaliation Claims

Employees in Connecticut can seek redress for harassment or discrimination under either federal or state law. An employee raising a claim under the Connecticut Fair Employment Practices Act ("CFEPA") must first exhaust his or her administrative remedies before filing a complaint in court. Specifically, the employee must file a charge with the Connecticut Commission on Human Rights and Opportunities ("CHRO"), the state administrative agency tasked with investigating and remediating charges of employment discrimination under CFEPA. If the claim is not resolved at the CHRO level, then the CHRO releases jurisdiction and the employee is free to file suit in the appropriate state or federal court.

An employee who successfully raises a claim of discrimination or harassment under the CFEPA may be entitled to back pay, front pay, reinstatement, injunctive relief and compensatory damages for emotional distress, as well as attorneys' fees and, as of October 1, 2019, may seek punitive damages. Notably, legislative efforts in Connecticut to change the standard for establishing actionable harassment under the CFEPA failed in the summer of 2019. Unlike New York, where the standard for illegal harassment was recently changed to behavior that "rises above the level of petty slights and trivial inconveniences", Connecticut has retained the more stringent "severe and pervasive" standard.

6.3 Wage and Hour Claims

Claims asserting employee misclassification, non-payment of overtime or failure to pay nondiscretionary bonuses are among the most common types of wage and hour suits faced by employers.

The Connecticut Department of Labor is authorized to investigate and pursue wage claims on behalf of individuals to collect unpaid wages. This includes the ability to enter an employer's place of business during business hours to ascertain the employer's compliance with wage and hour laws by inspecting records, interviewing employees, taking depositions and calling hearings. In addition to seeking recoupment of unpaid wages, the Connecticut Department of Labor is also authorized to collect substantial civil penalties as well as seek injunctive relief requiring compliance with wage and hour laws.

In addition to the Department of Labor's enforcement authority, individual employees can also bring a civil action to recover unpaid wages. A prevailing employee can recover up to twice the amount of unpaid wages plus attorneys' fees and costs. Additionally, employers, including officers or agents of the employer who authorize the payment of less than minimum wage, can be subject to substantial fines and imprisonment under Connecticut law.

6.4 Whistle-blower/Retaliation Claims

Applicable statutes covering whistleblower and associated retaliation claims vary depending on several factors: (a) whether the entity is a public or private entity for the purpose of determining whether federal laws apply, ie, the Sarbanes-Oxley and Dodd-Frank Acts; (b) whether a state statute covers these types of claims; (c) whether the appli-

cable law requires the exhaustion of remedies (ie, making a complaint externally or threatening to do so) prior to the employee being entitled to file suit; (d) whether there is a private right of action with respect to the specific claim; and (e) in general, what type of misconduct is being alleged to determine whether the statutes apply in the first place.

For example, the federal False Claims Act specifically provides protection for "[a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee... in furtherance of an action under this section [which creates liability for certain acts of fraud committed against the US government]". Laws prohibiting workplace discrimination invariably include anti-retaliation provisions barring employers from taking adverse employment actions against employees who register good faith internal complaints of unlawful discrimination or participate in an investigation or legal proceeding involving allegations of discriminatory conduct. Also of note, Sarbanes-Oxley, bolstered by Dodd-Frank, provides for remedies as well as potential awards to those who report potential and actual fraudulent conduct prohibited by the Securities and Exchange Act.

Employers in Connecticut are prohibited from discharging, disciplining or otherwise imposing any penalty on an employee because that employee or a third party at his or her direction or on his or her behalf reports or participates in a report of a violation or suspected violation of federal, state or local law or a regulation or an ordinance of a governmental agency. After exhausting available administrative remedies, an aggrieved employee may bring a civil action and seek reinstatement, backpay, restoration of benefits and reasonable attorney's fees.

6.5 Dispute Resolution Forums

Grievance and arbitration provisions are commonplace in collective bargaining agreements between unions and employers, a practice that long predates the popularity and prevalence of arbitration and mediation as an alternative to litigation of employment-related disputes. The arbitration process remains integral to labor relations. Collective bargaining agreements typically contain a provision requiring that employees and unions utilize an internal procedure to lodge complaints regarding the terms and conditions of employment. Should that procedure fail to produce a satisfactory remedy, binding arbitration is typically the last and final step and the only mechanism for resolving the claim. Collective bargaining agreements typically set out a method for selecting the arbitrator and the procedural rules for conducting the arbitration, eg, pursuant to the Labor Arbitration Rules of the American Arbitration Association. A labor arbitrator's decision can only be overturned by a court in exceedingly rare cases, such as where the award does not draw its essence from the collective bargaining agreement or is incompatible with a clear mandate of public policy.

6.6 Class or Collective Actions

Connecticut's state law class certification requirements mirror those found in the Federal Rules of Civil Procedure and Connecticut courts look to federal law for guidance in resolving class litigation issues. Although not as prevalent as in other states, Connecticut has seen its fair share of collective action wage and hour lawsuits brought under the federal Fair Labor Standards Act and its state-law analogue. It is less common for Connecticut employees to pursue class action claims predicated on allegations of discrimination, although the U.S. Equal Employment Opportunity Commission can and has pursued such claims in Connecticut.

In a ground-breaking case, the U.S. Supreme Court recently sanctioned the use of arbitration agreements containing class action waivers as a means of evading class-type lawsuits. As such, employers can use a carefully crafted waiver to limit or eliminate exposure to class or collective action claims by requiring employees to sign agreements providing for the resolution of any employment-related disputes by way of an individual arbitration case. The comparatively lower cost, efficiency and enhanced likelihood of a reasonable award should factor into a company's consideration of arbitration agreements. However, arbitration is not without its drawbacks. In response to class action waivers, some plaintiffs' lawyers have filed hundreds of individual arbitration cases, thereby increasing costs exponentially. An arbitrator's award is not appealable and can only be vacated under very narrow circumstances, such as arbitrator misconduct or in those rare instances where the award is incompatible with public policy. Under the Federal Arbitration Act an arbitrator's mistake of law is not grounds to vacate an award. In addition to appellate concerns, although arbitration costs remain comparably lower than litigation costs, they have grown more unwieldy in recent years as arbitrators have taken on more complex disputes and permitted more aspects of traditional litigation to seep into arbitration proceedings. Employers frequently face the expense of compelling employee arbitration disputes, a proceeding that has to occur in a court before arbitration commences. Coupled with the fact that employers typically bear the burden of paying for the arbitration, costs should not be an afterthought.

6.7 Possible Relief

Available remedies vary depending on the nature of the claim. Federal anti-discrimination statutes carry their own set of remedies including reinstatement; backpay; front pay; compensatory and punitive damages; certain types of emotional distress damages; and attorneys' fees and costs. Connecticut, like most states, has comparable anti-discrimination laws offering the same types of remedies, although emotional distress damages are generally more limited even where requested pursuant to a common law claim.

7. Extraterritorial Application of Law

Federal courts presume that federal statutes apply only within the territorial jurisdiction of the United States. This principle, commonly called the presumption against extraterritoriality, has deep roots. The presumption rests on the common sense notion that Congress generally legislates with domestic concerns in mind. At the same time, the presumption prevents unintended clashes between US laws and those of other nations which could result in international discord.

The presumption against extraterritoriality is a canon of statutory construction. It provides that, absent clearly expressed congressional intent to the contrary, federal laws shall be construed to have only domestic application. The courts employ a two-step framework where a case implicates extraterritoriality issues. At the first step, the court asks whether the presumption against extraterritoriality has been rebutted, ie, whether the statute gives a clear, affirmative indication that it applies extraterritorially. If the statute is not extraterritorial, then at the second step the court determines whether the case involves a domestic application of the statute. The courts make this determination by identifying the statute's focus and asking whether the conduct relevant to that focus occurred in United States territory. If it did, the case involves a permissible domestic application of the statute.

Wiggin and Dana LLP

One Century Tower
265 Church Street
New Haven
Connecticut 06510

Tel: 203 498 4400
Fax: 203 782 2889
Email: mgambardella@wiggin.com
Web: www.wiggin.com

Although there is little case law on the subject, Connecticut courts have recognized the presumption against extraterritoriality and, therefore, absent a clear indication the Legislature intended otherwise, a state statute will ordinarily not reach conduct occurring outside Connecticut's borders. While the issue of extraterritoriality has been only infrequently litigated in the employment context, both a state and federal trial court have held that Connecticut's wage and hour laws do not protect non-resident employees of Connecticut companies working outside the state. There does not appear to be any case law addressing whether other Connecticut laws regulating the workplace apply extraterritorially.