CARLTON FIELDS

Employment and Labor Law Road Map for Employers Entering the U.S. Market

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Foreign companies and investors that enter the U.S. market will be governed by numerous state and federal labor and employment laws. When opening a business in the United States, it is therefore critical to work with experienced lawyers who can guide you through the following steps. **STEP 1: Hiring and Recruitment** An employer may not discriminate against candidates based on their age, race, sex, national origin, disability, or other protected status under governing local, state, and federal laws. It is crucial to follow appropriate hiring practices to comply with the laws of the jurisdictions in which you operate—and to avoid potential litigation. *The Job Description* When advertising the position or posting it on your website, job search engine, social media, or elsewhere in writing, be specific about the job requirements and the skills and experience the applicant must possess. *Employment Applications and the Interview Process* Federal and state laws govern what can be asked on employment applications and in interviews. Generally, employers cannot ask about or seek to identify an applicant's race; sex; age; disability; religion; national origin; marital status; union membership; HIV/AIDS, or sickle cell trait status. Notations on the employment application indicating any of these characteristics should be avoided, as should any questions regarding criminal history or convictions. Also, pose no medical questions or questions about prior workers' compensation cases on an employment application or during an interview. Adopt employment applications for all positions and use them uniformly. Keep the application simple, focused on education, employment history, and attestations regarding consent to conduct certain drug tests, background checks, credit checks (where permitted by state law), employment verification, and to seek employment references. Depending on the company's location, employers may see applicants who are foreign nationals with work time-limited permits who will inquire about visa sponsorship. Employers must decide whether to adopt a policy of sponsoring such applicants and to what extent. Employers should implement an immigration sponsorship policy that simply states the parameters of employment and sponsorship. Having such a policy will ensure hiring and retaining the most talented workforce and minimize liability if the employer is audited or litigation ensues. **STEP 2:**

Offer Letters Offer letters serve to document the employment relationship and can also be the basis for termination. Short-form letters can be used for non-executive employees. These should include the following information about the position: job title; whether it is exempt or non-exempt; location; hours; pay and frequency of pay; start date; benefits, eligibility, and date of eligibility; contingency clauses; whether employment is at-will or may be terminated for-cause; and the time frame to accept the offer. The letter should be on employer company letterhead and executed by an authorized employee. Offer letters for executives will be more detailed and can include non-compete provisions; severance language; bonus information; restrictive covenants; and provisions regarding confidentiality and trade secrets. Employment arrangements regarding contract employees, remote employees, part time employees, or other unique situations should also be detailed in a written document spelling out the arrangement. **STEP 3: Acceptance and I-9 Compliance** All employers in all states must complete and maintain a Form I-9 employment verification form for each employee hired after November 6, 1986, the date the Immigration Reform and Control Act of 1986 (IRCA) was enacted. Employers must complete the Form I-9 in a timely manner, usually within three days of hire; have the employee complete and sign the appropriate section, (Section 1); review the acceptable documents presented by the employee; and complete Section 2. Employers cannot, in the process of completing the Form I-9, discriminate or retaliate by actions, remarks, threats, over-documenting, or requesting specific documents. Employees must be given the list of acceptable documents found on the last page of the Form I-9. As companies grow, it is critical to establish and maintain a formal I-9 policy and conduct regular internal I-9 audits to be compliant and avoid heavy monetary fines resulting from U.S. government audits. **STEP 4: Wage and Hour Laws** The vast majority of legal disputes faced by many small and emerging companies result from claims that employees were inadequately compensated for overtime work. Failure to properly classify and compensate employees may lead to significant legal problems. Federal minimum wage and hour standards are governed by the Fair Labor Standards Act (FLSA), which also governs overtime compensation for hours worked in excess of 40 per week; record-keeping requirements; and pay equality between men and women. Many states have state wage and hour statutes that set higher minimum wage standards or that contain special provisions for rest and meal breaks. In those states, the employer must follow the wage and hour laws that are more generous or favorable to the employee. Employers should also know they cannot avoid minimum wage or overtime requirements by merely calling an employee an “independent contractor,” labeling a position “exempt,” or paying the employee a salary. The FLSA (and emerging judicial decisions) look to several factors to determine whether an employee or a certain position (e.g., executive, administrative, professional) is properly classified as exempt. **STEP 5: Employee Benefits and Incentive Competition** Since cash flow may be limited in the early days of a startup or small company, employers may offer other forms of incentive compensation to their executives and to attract talent. Examples may include restricted stocks, stock options, restricted stock units, or stock appreciation rights. Other types of compensation may include incentive bonus plans, severance benefits, health plans that are available under the 2014 health care reform law, and retirement benefits (e.g. a 401(k) plan). Any alternative compensation plan should be structured with the advice of an employee benefits expert, and detailed in the offer

letter. **STEP 6: Drafting and Maintaining Employment Policies** As your company and workforce grow, developing and implementing employment policies and practices will facilitate compliance with applicable employment laws and minimize workplace disputes. To benefit the employer and foster employee morale, clearly establish policies regarding vacation, sickness, Family Medical Leave Act (FMLA) rights, harassment, discrimination, and prohibited conduct and consequences. Take care, however, to avoid overly restrictive social media policies, or policies that afford greater protection to employees than the employment laws require. Update your policies regularly to ensure compliance with changing laws. Although employee manuals, policies or handbooks are not viewed as enforceable contracts in most states, it is good practice to clearly state so in the handbook or manual itself. Finally, the keys to ensuring that an employment manual is effective are consistent application and enforcement of its policies; and adequate, regular harassment and discrimination prevention training for employees at all levels including supervisors. **STEP 7: Employee Evaluation and Discipline** Employee performance evaluations are critical to a company's personnel practices. Honest and effective evaluations can gauge whether employees are performing in accordance with expectations, identify areas for improvement, and serve as valuable tools when an employment decision is questioned or challenged in court. Evaluations should be conducted at least annually. But if performance issues are identified, mid-year reviews are often advisable. If discipline or termination appears warranted, the reason for those decisions should be clearly documented. Termination further requires compliance with wage laws and, if applicable, proper notification for continuation of insurance and benefits pursuant to the Consolidated Omnibus Budget Reconciliation Act and the Employee Retirement Income Security Act. **OTHER CONSIDERATIONS** Depending on the company's size, it may be subject to several state and federal employment laws. For example, the IRCA, the FLSA, the Uniformed Services Employment Reemployment Rights Act of 1994, and many state workers' compensation laws apply regardless of the size of your workforce. A single employee can trigger liability for violation of these laws. By contrast, other federal employment legislation requires a minimum number of employees before the statutes apply: Title VII of the Civil Rights Act of 1964, as amended (Title VII), and the Americans with Disabilities Act each require a minimum of 15 employees; the Age Discrimination in Employment Act (20 employees); the FMLA (50 employees); and the Worker Adjustment Retraining Notification Act (100 employees). Many local and state laws have lower workforce thresholds, so it is important to understand which laws apply to your company. Small or startup companies should have written agreements with all service providers detailing the exact terms and conditions of the services (e.g., payroll, benefits administration, or other human resources services) to be provided to the company. Using social media to recruit and hire is a developing legal area. So employers should be extremely cautious to avoid possible claims of discrimination or invasion of privacy, and to avoid gathering information not otherwise permissible in the hiring process. Because startups may have intangible assets to protect, intellectual property concerns should be addressed early, ownership and value well-documented, and the company should ensure that employees sign confidentiality agreements before commencing employment. **CONCLUSION** When opening a company in the United States, it is best to use reputable and trustworthy counsel to help develop employment programs that will be compliant, efficient, and

cost-effective. Opening a new company and becoming operational as quickly as possible is a difficult process. So, early counsel and guidance from experts in the area of labor and employment law is vital to address the considerations raised here, and to avoid expensive headaches.

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