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Law and Practice

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Duane Morris LLP's Employment, Labor, Benefits and Immigration practice has more than 70 attorneys and provides a wide spectrum of global services, from timely advice on regulatory issues through litigation developments. Duane Morris employment lawyers regularly counsel and advise employers on compliance with federal, state and local employment laws with the goal of increasing workplace efficiency and preventing potentially disruptive litigation. We also represent management interests in responding to union organizing campaigns, negotiating collective bargaining agreements, handling administrative agency investigations and defending employment-related litigation. Duane Morris offers practical counseling designed to prevent potentially disruptive labor and employment disputes. We handle a wide variety of employment-related litigation and are experienced in management labor relations matters. Our employment services are individually tailored to reflect each client's business goals and objectives. We assist clients in preparing employee manuals, crafting personnel policies to address the client's business needs, implementing customized supervisory and non-supervisory training programs, and designing compliance strategies. With our extensive experience in the labor and employment field, we strive to place our clients' issues directly before the appropriate decision-makers. In representing clients in employment and labor matters, issues may arise that require the skills of lawyers practicing in a variety of disciplines. Because of the broad scope of services offered at Duane Morris, our employment attorneys, when necessary, consult with lawyers on matters involving employee benefits, bankruptcy, business law, real estate, complex trial work and healthcare. We also offer a unique series of CLE, SHRM and HRCI accredited programs in Philadelphia, at client work sites, and online through the Duane Morris Institute (DMi), which provides a wide range of training workshops on issues faced by HR professionals, benefits administrators, in-house counsel and other senior managers. Duane Morris lawyers teach all DMi courses, webinars, on-site training, and in-house seminars.

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

1.1 "Gig" Economy and Other Technological Advances

The "gig" economy forces courts to determine how various statutory schemes apply to new business models not contemplated when the statutes were enacted. For example, the "gig" economy intersects with wage-related laws, such as the federal Fair Labor Standards Act ("FLSA") and Pennsylvania's Wage Payment and Collection Law ("PA WPCL"), in that workers at "gig" economy companies have filed lawsuits challenging their classification as independent contractors. In one recent case, the United States District Court for the Eastern District of Pennsylvania granted summary judgment to Uber where the plaintiffs alleged Uber misclassified drivers as independent contractors (as opposed to employees) and failed to pay them minimum wage and overtime hours. *Razak v. Uber Tech., Inc.*, Civil Action No 16-573 (E.D. Pa. Apr. 11, 2018).

Further, effective 1 July 2018, a new Pennsylvania law requires that Pennsylvania businesses that pay at least $5,000 of non-employee compensation withhold from such payments the current applicable income tax rate. As a result of this change, many entities, such as "gig" economy companies, will need to establish administrative, accounting and payroll protocols and procedures that they may not have had previously.

The pervasiveness of social media in society extends to Pennsylvania companies. Employers should establish a policy regarding the use of social media in the workplace and remind employees that restrictions in certain policies apply to social media. For example, the equal employment opportunity policy should extend the prohibition of harassment and discrimination to social media.

1.2 "Me Too" and Other Movements

The recent #MeToo movement increased sensitivity to gender issues, including gender pay inequities, sexual harassment prevention and "sensitivity" or "civility" training programs. Pushed by the #MeToo movement, the U.S. Equal Employment Opportunity Commission ("EEOC") and state agencies continue to receive a significant number of claims involving sex/gender discrimination and pay inequity.

Pennsylvania employees in private entities do not generally have strong privacy or due process rights in the workplace. For instance, employees and their personal effects (including personal vehicles on company premises), as well as company-provided phones, computers and other equipment, and company-provided storage places (desks and lockers) are all subject to search if reasonable under the circumstances. However, entities should make clear in related employment policies that they reserve their right to search the locations and items listed above. As a result, employees should be informed that they have "no reasonable expectation of privacy" in such locations and storage places while at work. At the same time, employers generally should not conduct random searches of employees' belongings, desks, cars, phones, etc., but, rather, only search when there is reasonable suspicion to believe that there has been a violation of company policy or that other circumstances (such as workplace violence) make searching reasonable. Employees may be able to argue successfully that random or other "unfair" searches violate their privacy and due process rights if the circumstances are such that they have not been put on notice that they should have no expectation of privacy in equipment or storage places used as part of their jobs.

1.3 Decline in Union Membership

Pennsylvania has a long connection to organized labor that is traceable to its history as an industrial center. Although union membership has declined in Pennsylvania (as it has across the country) in the past few decades, unions still op-

erate and can have considerable power in extracting costly terms after lengthy negotiations with employers. Unions also have considerable power in matters involving local and national politics that cannot be underestimated, particularly given the use of social media to address matters of concern to many union employees. Potential unionization should be considered by any employer considering operations in Pennsylvania.

For example, if a workforce is being initially hired or if it has not been traditionally unionized and the employer would prefer to keep it that way, employers should work with counsel to develop a sound union avoidance strategy. The need for such a strategy is particularly significant in industries that have traditionally been unionized or are located near similar facilities that are unionized. Employers who are in the process of selecting locations in which to operate in Pennsylvania might, for example, consider picking a site in a location that is traditionally non-union, if that is a feasible option.

Private employers operating in Pennsylvania must look primarily to federal labor law (particularly the National Labor Relations Act ("NLRA")) for the applicable legal principles governing unionization and concerted employee activities. It is important to note that certain rights under the NLRA apply to non-union as well as unionized employees. The NLRA is enforced by the NLRB. For reasons such as these, Pennsylvania employers should evaluate how the NLRA may impact their practices and policies.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

The At-Will Employment Relationship

Pennsylvania is an employment at will jurisdiction to which there are limited exceptions. "Employment at will" defines the relationship between an employer and an employee who is hired for an indefinite period of time. The doctrine provides that either employer or employee may terminate the employment relationship: (1) at any time; (2) for any or no reason; and (3) with or without prior notice. Absent a contract or other evidence limiting an employer's ability to terminate an employee only "for cause," Pennsylvania law generally presumes that employment is at will. As will be discussed elsewhere in this article, however, state and federal laws prevent employers from firing employees who are employed at will for illegal reasons (such as discriminatory or retaliatory reasons).

Pennsylvania law also recognizes that the at-will employment relationship may be altered by contract (including by operation of employer policies, handbooks, promises and other representations). For example, if a written contract provides a specific duration of employment or a promise of dismissal for just cause only, this would supplant the at-will relationship.

Pennsylvania courts have, on occasion, found that an implied employer-employee contract exists which modifies the at-will nature of the employment relationship. Promises of "permanent" or "lifetime" employment have been found too vague to create an implied contract. Pennsylvania courts have infrequently found an implied employer-employee contract where an employee provides "additional consideration" or substantial benefits to an employer or suffers substantial hardship beyond the services the employee was hired to perform.

As a practical matter, Pennsylvania employers should consider extending all offers of employment through offer letters. Such offer letters should provide that employment is at will and state all conditions that must be satisfied by the employee to commence employment, such as: providing required documents establishing the right to work in the United States, entering into agreements protecting against the disclosure of confidential information or trade secrets and/or prohibiting unfair competition, entering into any mandatory arbitration agreement and passing any drug or other pre-employment test or examination that may be required. While it is useful to state the starting compensation and benefits provided, the document should make clear that these are subject to change in the employer's sole discretion. If changes will be made, it is advisable for the employer to provide advance written notice of such changes.

It is important to understand that what is stated about whether an employee is exempt or non-exempt in an offer letter will not determine whether overtime is due. Instead, the issue of an employee's status (as exempt or not, or as a supervisor or not) will be determined based upon the relevant facts and applicable statutory standard.

All human resources policies should be included in a handbook that clearly and prominently provides that it is not a contract, that employment is at will and explains what that means. Prior to the termination of employment, employers should evaluate and comply with any contractual requirements and consider documenting the lawful business reasons for terminating the employee's employment.

Whether a worker is an employee or an independent contractor turns on the application of several different tests advanced by different governmental agencies such as the Internal Revenue Service and the NLRB, among others, and applicable law.

As a practical matter, if a worker is performing the same or similar job under the same supervision as a regular employee, that person is likely to be found to be an employee.

Factors considered in determining whether a worker is a contractor or employee include: (1) the degree of control the employer exercises or has the right to exercise over the worker's hours and performance; (2) whether the employer provides the worker's tools and benefits; (3) the length of the relationship; and (4) payment method. Other tests may be applied including the economic realities test, which also focuses on whether the so-called contractor is engaging in independent business activities or is largely economically dependent upon the alleged employer.

It is important for employers to characterize properly the individuals working for them as employees or independent contractors. A failure to correctly characterize employees could result in significant liability, governmental investigation and potential litigation by governmental agencies and private individuals. It is also important to note that a particular entity may be found to be a "joint employer" of an individual even if another entity holds itself out as his or her employer. Although contract language between an employer and an independent contractor or agency that provides independent contractors may be considered when determining whether an individual is an independent contractor or an employee, contract language is not determinative and many other factors will be considered.

As a practical matter, employers should consider requiring that the workers it treats as contractors be employed by entities such as staffing companies or service providers that are to perform all employer responsibilities required by applicable law (for example, paying the employee, withholding and remitting to the government required taxes, providing employee benefits and workers' compensation coverage and securing insurance coverage for various employment-related claims). Employers should also consider requiring that these entities indemnify and insure the employer with respect to liabilities arising from the failure to meet these obligations or other claims by the workers.

2.2 Immigration and Related Foreign Workers

Choice of entity and overall global corporate structure will have significant impact on the company's ability to obtain certain types of visas. Below is a brief description of the most common work visas and the choice of entity considerations:

E-visas are available to those foreign nationals from countries with whom the United States has a Treaty of Trade and Navigation, and their employees who are coming to the United States to start up, manage, run and/or conduct daily operations in a company that will be doing substantial trade with the United States. U.S. entities that will form the basis for this visa status must be at least 51% owned by a national or company of the treaty country from where the visa applicant is a national.

L-visas are available to intra-company transferees. These are defined as foreign nationals who have been employed abroad for one out of the last three years by a parent, subsidiary or affiliate of the U.S. company to which they are being transferred. U.S. immigration authorities are extremely careful when reviewing corporate documentation to ensure that the proper affiliations existing between the foreign national's employer abroad and in the United States.

H-1B visas are available to "specialty occupation" employees who will be working in a professional position that requires a bachelor's degree or higher as the minimum requirement for entry into the field. Although not unheard of, U.S. immigration authorities rarely approve H-1B visas for company owners and never for independent contractors.

The immigration climate in the United States has become difficult for employers due to new restrictions and more detailed application processes employed by U.S. immigration agencies to discourage employers from pursuing foreign national workers for employment in the United States. Employers should anticipate detailed documentation requests, delayed adjudications and unexpected denials of visa applications.

2.3 Collective Bargaining Relationship or Union Organizational Campaign

One of the initial questions for an acquiring entity is whether to purchase the stock of its target or just the target's assets. The answer to this question will determine how much flexibility the acquirer will have in dealing with a labor organization that represents the employees of the target. If the acquirer chooses to purchase the stock of the target – that is, acquire the entity which owns the desired assets itself – the acquirer will be obligated to recognize and deal with the labor organization and comply with the existing union contract (collective bargaining agreement). However, if the acquirer purchases just the assets of a target, the acquirer may or may not have to deal with the labor union and may or may not have to adopt the terms of the existing contract. The balance of this answer will relate only to asset purchases, since it is in this context that an acquirer will have to deal with multiple and difficult issues as part of and at the time of the purchase transaction. While the general principles governing the resolution of these issues may be stated simply, slight variations in facts may cause a different result. Consequently, the general principles stated here will not govern every situation that may occur.

Obligation to Recognize and Deal with the Labor Union Representing the Employees of the Seller in an Asset Acquisition

For the purposes of union relations, employees of an employer are divided into units of employees who have a common community of interest. Each unit may be represented by a union, and there may several unions representing dif-

ferent units of employees of a single employer. A buyer of assets will be required to recognize and deal with the labor union representing the seller's employees in a specific unit if a majority of the employees in the same or similar unit of the buyer had been employed by the seller. In this connection, however, a buyer, when considering whether to hire an employee of the seller, cannot take into consideration whether the employee had been represented by the union while employed by the seller. An individual's union status is protected by the law and cannot be a factor in making hiring decisions.

Setting the Initial Terms and Conditions of Employment of the Seller's Employees
A buyer who is required to recognize and deal with a union representing the seller's former employees, however, is not required to adopt the contract the union had covering those employees with the seller. The buyer will have an obligation to negotiate with the union concerning a new contract. If a buyer makes it clear that it intends to hire the seller's employees under the same terms and conditions as those employees had under a union agreement, the buyer will not be able to change those terms and conditions without negotiating them with the union. If a buyer makes it clear in its offer of employment to the seller's employees that its initial terms and conditions of employment will be different from those in the seller's contract, the buyer may establish terms and conditions different from those in the seller's contract. The negotiations with the union will then proceed from the base of the new terms and conditions.

Negotiations of a First Union Contract
In the negotiations of a first union contract, the union and the employer are both required to deal with the other in good faith, that is, in a sincere effort to get an agreement. This does not mean that the employer is required to make an agreement. It is not. An employer can refuse to agree to anything that it believes in good faith not to be in the employer's best interest. If no agreement can be reached and an impasse exists, the parties can resort to economic coercion to compel the other to change its position(s). For the union, this would be a strike. For the employer, this would be a lockout. Sit-down protests, continuing to occupy the employer's premises without working or repeated "quickie" walkouts are prohibited by law.

A Union's Loss of Representative Status
On occasion, employees of a buyer who had been employees of the seller are dissatisfied and petition or otherwise indicate that they no longer wish to be represented by the union. It would be illegal for an employer to withdraw its recognition of a union in that situation if it is less than six or 12 months (depending on the facts) after the first negotiation session after the purchase of the assets. This is known as the "successor bar," and the representative status of a union is secure during that period.

Multi-Employer Pension Liability
Many, if not all, multi-employer pension plans into which employers contribute for retirement benefits for their employees are underfunded. Most of these plans are sponsored by unions. Buyers of companies and the assets of companies must be aware. The law provides that if the employees of an employer withdraw from such plans, the contributor, almost always the employer, must pay its share of the liability for the underfunding of the benefits provided by the fund to the employees. Often, this amount may be in the millions of dollars. If a buyer buys assets of a company, and the employees of the seller are participants in a multi-employer pension fund, the buyer may be liable for the multi-employer liability. Unless the buyer assumes this obligation and contributions going forward, the buyer or seller must pay the liability. Who pays and how much is often part of the negotiations of the transaction. If the issue is not resolved during the negotiations, the liability may become the buyer's.

3. Interviewing Process

3.1 Legal and Practical Constraints
As to the consideration of criminal history background information, in the general case, a Pennsylvania statute limits employers' consideration of information about an applicant's criminal history to felony and misdemeanor convictions, and then "only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." 18 Pa. Const. Stat. Ann. § 9125(b). This section is significant in three ways. First, it allows employers to consider, when relevant in hiring decisions, convictions but not arrests or other dispositions that the law may regard as "non-convictions." Second, the only convictions that may be considered are felonies and misdemeanors. Third, the statute and its limitation relate to an "employment applicant's criminal history record information file" ("CHRI"). 18 Pa. Const. Stat. § 9125(a). Where an employer makes a decision not to hire an employee based in whole or in part on CHRI, applicants must be notified in writing. However, at least one court interpreting this statute has held that where a prospective employer obtains criminal history information from an applicant him or herself on an application, Section 9125 does not apply. It should be noted that Pennsylvania law may, for certain specific industries including, but not limited to, those relating to education and work with children and other vulnerable populations, impose mandatory background check requirements on employers operating in such industries.

In addition to state law, the City of Philadelphia has enacted a ban-the-box ordinance that places additional restrictions on an employer's ability to ask for and use criminal background information during the hiring process. In short summary, employers cannot inquire about applicants' criminal histories until *after* applicants receive a conditional offer of employment. Philadelphia's ban-the-box ordinance requires

that "an employer may give notice, to prospective applicants or during the application process, of its intent to conduct a criminal background check after any conditional offer is made, provided that such notice shall be concise, accurate, made in good faith, and shall state that any consideration of the background check will be tailored to the requirements of the job." Significantly, covered employers can consider applicants' criminal convictions in hiring decisions if decisions are based on individualized assessments of the following factors: (1) the nature of the offense(s); (2) when the offense(s) took place; (3) the duties sought by the job applicant; (4) the applicant's character or employment references, if any; and (5) any evidence of the applicant's rehabilitation. If arrest records or convictions are more than seven years old, they cannot be considered.

As to the consideration of wage or salary history, Pennsylvania does not have any specific state law on the subject. Philadelphia has enacted a local ordinance that has been the subject of litigation. On April 30, 2018, the United States District Court for the Eastern District of Pennsylvania held that the portion of the Philadelphia Wage Equity Ordinance that prohibits employers from *inquiring* as to an applicant's wage history is unconstitutional and cannot be enforced (meaning the employer may make such inquiries). However, the portion of the law that prohibits employers from *relying* on an applicant's wage history in determining the wages for the applicant remains intact. *The Chamber of Commerce for Greater Philadelphia v. The City of Philadelphia Commission on Human Relations*, No. 2:17-cv-01548 (E.D. Pa. April 30, 2018). The decision essentially puts Philadelphia employers in an untenable position – employers may ask about an applicant's wage history, but then generally may not rely upon that information in setting the applicant's wages.

The salary history ordinance also appears to create a narrow exception to the prohibition against an employer relying on the applicant's wage history where the applicant "knowingly or willingly" discloses his or her wage history. However, a relevant provision states that an applicant "'knowingly and willingly' discloses the employee's salary history in the context of an employment interview if the [applicant] voluntarily, *and not in response to question from the interviewer*, makes the disclosure while knowing or *having been informed that such disclosure may be used* in determining any offered salary."

As to questions about other protected classes (such as age, pregnancy, disability and reasonable accommodation), employers can ask applicants whether any reasonable accommodation is necessary to complete the application for employment/hiring process. However, as a general matter, due to risks under federal and state anti-discrimination laws (including laws discussed elsewhere in this article), employers should generally avoid asking an applicant on an application form or during an interview whether the applicant will need reasonable accommodation to perform the job. Employers should proceed with similar caution in inquiring relating to other protected classes (such as age, pregnancy, race, etc.).

At this time, unlike some other states and local governments, Pennsylvania does not have a credit/character check law that is generally applicable to private employers.

Employers may not discriminate on the basis of national origin or citizenship status during the hiring process. The recommended question to ask regarding immigration status is the following: "Are you a legal permanent resident, refugee, asylee or otherwise authorized to work for any employer in the United States?"

4. Terms of the Relationship

4.1 Restrictive Covenants

Post-employment restrictive covenants are not favored in Pennsylvania and have been historically viewed as trade restraints that prevent former employees from earning a living. However, covenants against competition and restrictions upon solicitation are typically enforceable in Pennsylvania when (1) supported by adequate consideration; (2) reasonably necessary to protect a legitimate business interest; and (3) reasonably limited in both duration and territory.

Employment is sufficient consideration to support a covenant against competition, so long as the offer of employment was conditioned upon agreeing to the restriction and the agreement is signed in connection with commencing employment. The best practice is to communicate as a part of the initial offer of employment that signing an agreement prohibiting competition or solicitation is a precondition to commencing employment, and to require that the agreement be signed and provided to the employer before or at the time employment begins. Post-employment restrictive covenants entered into after the employment relationship is established must be supported by other consideration. The continuation of employment alone is not valid consideration in Pennsylvania.

Pennsylvania requires post-employment restrictive covenants to be only as broad as necessary to protect the legitimate business interests of the employer seeking to enforce the covenant. Generally, legitimate business interests may include the protection of trade secrets, confidential information, customer goodwill or customer relationships. In order for the employer's relationship with customers to be a legitimate basis for prohibiting solicitation or competition, the employee subject to the agreement must have had either contact with the customer or confidential information that would make it unfair for the employee to use, solicit or compete for the business of the customer. In some situ-

ations, specialized skills and training may support a restrictive covenant.

Post-employment restrictive covenants must be reasonably limited in time and geographic scope to be enforceable under Pennsylvania law. Typically, Pennsylvania courts will not disturb post-employment restrictive covenants that last one year, but have also enforced covenants of two years or longer, depending on the circumstances. Longer restrictions are more likely to be enforceable if entered into in connection with the sale of a business and reasonably necessary to protect the goodwill that is being purchased.

As to geographic limitations, Pennsylvania courts will examine whether there is a direct connection between the territorial restriction and the employer's market size and the employee's role with the employer. Accordingly, where the employee's duties and the employer's customers are geographically broad, a similarly broad geographic limitation will be enforced. Additionally, if confidential information can be used to unfairly compete in a broad geographic area, a correspondingly broad geographic scope may be enforceable. Non-solicitation covenants that prohibit the employee from soliciting entities which are already customers of the employer may be enforced without a stated geographic limit because the location of the customers provides the geographic limit.

Where the agreement at issue provides a reviewing court with the authority to strike unenforceable provisions or to reform restrictive covenants to an extent that would make them enforceable, courts have the authority to do so. However, courts may refuse to modify blatantly unenforceable provisions. Accordingly, it is advisable for employers to draft agreements in a manner that is reasonably calculated to protect their legitimate business interests in light of an employee's duties, the confidential information and customer relationships the employee possesses, and the nature of the employer's business. This often means that not all employees should be subject to the same restrictions.

Where a court order is sought to prohibit competition or solicitation, the court exercises its equitable jurisdiction. In doing so, the court will balance the employer's interests with those of the employee in earning a living and sometimes consider the interests of the public. For this reason, if it is critical to an employer that a non-competition agreement be enforced, it is advisable for the agreement to provide that the employee will be entitled to post-employment payments from the employer if its enforcement by the employer prevents the employee from obtaining new employment.

The manner in which the employment relationship ended may influence whether a court will enforce restrictive covenants. For example, if an employee is terminated for poor performance, a court may reason that the employee will be unable to cause harm if working with a competitor, due to a lack of ability. For this reason, employers should consider how the grounds for termination may impact a restrictive covenant's enforceability before terminating an employee.

In 2004, Pennsylvania adopted the Uniform Trade Secrets Act, which largely codified existing common law. What may qualify as confidential information or trade secrets will vary by industry. However, Pennsylvania courts often use the following six factors when determining whether such interests should be protected: (1) the extent to which the information is known outside of the employer's business; (2) the extent to which the information was known by other employees and third parties involved in the employer's business; (3) the extent of measures taken by the company to safeguard the secrecy of the information; (4) the value of the information to the company and its competitors; (5) the amount of effort or money the company spent on developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated.

Remedies under this law include injunctive relief, damages and attorneys' fees. Further, if the misappropriation was willful and malicious, the law provides for punitive damages of up to twice the amount of any actual damages.

Although this law prohibits employees from using or disclosing trade secrets for the benefit of persons other than the employer, it is still useful to have employees sign agreements providing for the protection of confidential and trade secret information. The benefits of agreements of this nature include defining what the employee and employer agree are trade secrets and confidential information. Agreements of this nature need not be of limited duration or geographic scope to be enforceable, unlike restrictive covenants. Such agreements often also include provisions that facilitate the protection of intellectual property, including providing that inventions created at work or relating to the employer's business are the sole property of the employer.

Agreements should provide that they may not be assigned by the employee but may be assigned by the employer to any purchaser of the employer's business, in whole or in part, or to an affiliated employer. If the agreement does not contain a suitable assignability provision, the employee must consent to assignment of the restrictive covenant for the assignment to be valid.

4.2 Discrimination, Harassment and Retaliation Issues

The Pennsylvania Human Relations Act ("PHRA"), which applies to private and public employers with four or more employees, including the state and its political subdivisions, prohibits a multitude of employment practices based on sex, race, color, religious creed, ancestry, age or national origin, such as: (1) refusing to hire, employ or contract with, bar-

ring, discharging or otherwise discriminating against qualified individuals in compensation, hire, tenure and terms of employment or contract; (2) eliciting information, keeping records or using application forms to inquire about race, color, national origin or ancestry prior to employment; (3) printing or publishing employment notices/advertisements indicating race/color/national origin/ancestry preferences or limits; (4) denying or limiting employment through a quota system due to race, color, national origin or ancestry; (5) limiting recruitment or hiring of individuals to employee-referring sources that service individuals predominantly of the same race, color, national origin or ancestry; (6) discriminating against individuals for opposing forbidden practices or participating in proceedings under this law; (7) aiding and abetting the doing of unlawful discriminatory practices or obstructing compliance; (8) failing to post required fair practices notices (*see* 43 Pa Rev. Stat, Sec. 955); and (9) interfering with the commission in the performance of its duties. *See* 43 Pa Rev. Stat, Sec. 961.

Local jurisdictions in Pennsylvania may also enact laws prohibiting discrimination, harassment or retaliation. For example, the Philadelphia Fair Practices Ordinance prohibits discrimination in the areas of employment, public accommodations and housing. In the employment context, the Philadelphia Fair Practices Ordinance provides protections on the basis of age, ancestry, breastfeeding, color, disability, domestic/sexual violence, ethnicity, gender identity, genetic information, familial status, national origin, pregnancy, childbirth or related medical conditions, race, religion, retaliation, sex and sexual orientation.

Notably, the Philadelphia Fair Practices Ordinance expands previously enacted federal protections for certain classes, including, but not limited to, breastfeeding women. The Philadelphia Fair Practices Ordinance requires businesses with one or more employees to provide reasonable accommodations for women needing to pump breast milk in a safe, sanitary and private non-bathroom space as long as the requirements do not impose an undue hardship on the employer. In addition, employers have to provide unpaid breaks or allow employees to use paid breaks or mealtimes to express breast milk. The Philadelphia ordinance covers all employees, expanding previously enacted federal protections under the FLSA, which requires break time only for non-exempt nursing mothers to express breast milk.

Entities should be sure that they have appropriate policies and procedures in place to address prohibitions on discrimination and harassment in the workplace, such as an Equal Employment Opportunity ("EEO") policy. An EEO policy should include, for instance: examples of a wide range of conduct that is prohibited; a complaint procedure (with multiple points of contact) to raise internally any complaints; a prohibition on retaliation for reporting concerns; and clear warning of disciplinary action, including termination of employment, for violations of the policy. It is also important that entities train their employees – especially executives and managers – on their EEO policy, how to enforce it and, perhaps most importantly, the obligation of any manager-level employee to report any complaints received to the entity's Human Resources department in order for the complaint to be investigated.

Some entities have sought ways to increase diversity and to work to reduce the unconscious or "implicit bias" inherent in the interviewing and hiring process, such as by increasing the diversity of interviewer panels, standardizing the interviewing process by using uniform questions and reducing the impact of internal referrals.

4.3 Workplace Safety

Pennsylvania does not have a state-specific division of occupational safety and health or state-specific occupational safety and health rules. Employers in Pennsylvania must comply with the federal Occupational Safety and Health Act, which is enforced by the Occupational Safety and Health Administration ("OSHA"). OSHA typically investigates workplace safety and health concerns at a particular employer location that come to its attention through employee complaints or reports arising from serious workplace injuries or illness, such as those resulting in death, amputation or hospitalization. Employers operating in Pennsylvania should ensure that they have adopted and implemented the types of safety programs required for their business under the act, including conducting and documenting required employee training. In addition, employers must actively enforce their safety and health rules including disciplining employees as necessary to effectively ensure compliance.

Workers' compensation insurance is a program designed to protect employers and employees. Employers pay for insurance coverage that, in turn, pays the medical bills and lost wages for an employee who suffers a work-related injury. Workers' compensation coverage is mandatory for most Pennsylvania employers. Employers may purchase workers' compensation insurance from a private insurance company or directly through the Commonwealth.

4.4 Compensation & Benefits

ERISA is the federal law that generally preempts all state laws that relate to employee benefit plans. Therefore, the state selected as the place of business would not have any impact with respect to compliance with ERISA's mandates.

COBRA is the federal law regarding the obligation to offer continued medical coverage and generally applies to all companies with 20 or more employees. As a federal law, it would also control over state law and would not be impacted based on the state of domicile. However, some states (including Pennsylvania) have "mini-COBRA" laws that can apply to entities that are not covered by COBRA because

they employ fewer than 20 employees. Consideration should be given to that relevant state with respect to any applicable state mini-COBRA laws. For example, Pennsylvania's mini-COBRA statute applies to employees of smaller businesses (two to 19 employees) and it is for a shorter length of time (nine months, versus federal COBRA's general 18-month continuation period).

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

At Will and "For Cause"

As noted above, there is a strong presumption in Pennsylvania that employment is at will. In light of the strong presumption of employment at will in Pennsylvania, courts recognize a cause of action for termination of an at-will employment relationship (i.e., wrongful termination) *only* in limited circumstances. Specifically, a wrongful termination claim only exists if the termination implicates a clear mandate of public policy in the Commonwealth. This exception to the at-will presumption is applied very narrowly in Pennsylvania. The plaintiff must allege that some public policy motive or goal in the Commonwealth is injured or undermined because of the employers' termination of the employee.

Public policy violations arise where an employer (1) requires an employee to commit a crime; (2) prevents an employee from taking affirmative actions mandated by law; and (3) terminates the employment of an employee for a reason prohibited by a clear mandate of public policy, such as a statute or source of law (for example, constitutional provisions, legislation or professional codes of ethics). As such, courts recognize claims for wrongful termination when, for example, an employee is fired for filing a workers' compensation claim, or refusing to participate in Medicare fraud. There is also a whistleblower law that protects certain employees from opposing or reporting unlawful or wasteful employer acts or omissions – although a connection to a "public body" is typically necessary to state such a claim.

Layoff/Reduction in Force

Although Pennsylvania has no state law equivalent to the Worker Adjustment and Retraining Notification Act ("WARN Act"), the City of Philadelphia enacted its own WARN Act. Philadelphia's Worker Adjustment and Retraining Notification Act ("Philadelphia WARN Act") requires Philadelphia-based businesses with 50 or more employees to submit a letter ("impact statement") to the Philadelphia Director of Commerce specifying the anticipated economic impact associated with the impending and involuntary closure or relocation of their facilities. The impact statement must include the employer's payroll, the number of employees affected by the action and the employer's efforts to find suitable employment for those affected by the closure or relocation. Similarly to the federal act, the Philadelphia WARN Act requires covered employers to provide notice to affected employees, and any employee organization which represents the affected employees, no less than 60 days prior to the date of the closing or relocation. The Philadelphia WARN Act does not apply to any involuntary closing (defined as a closing pursuant to court order or caused by fire, flood, natural disaster, national emergency, acts of war, "civil disorder or industrial sabotage"), an employer who has filed for bankruptcy, or discharge of employees due to strikes and lockouts.

Under the Philadelphia WARN Act, the court can enjoin the employer from carrying out its closure or relocation until it has given the required notice. In the alternative, if the employer violates the Philadelphia WARN Act and has already closed or relocated, the court will award damages to each affected employee in an amount equal to the average daily wage of that employee times the number of work days, up to 60 days, in which notice was not provided by the employer.

Severance Pay and Wages Upon Termination

An employer must pay an employee who has been discharged or terminated, who has quit or resigned or who has been laid off, all wages due no later than the next regular payday on which the wages would have been paid if employment had continued. An employer must send the wages to the employee by mail if the employee requests it. *See* 43 P.S. Labor § 260.5.

Pennsylvania law does not require employers to provide terminated employees with severance pay. However, if an employer has a severance policy or plan in effect or is party to a contract that requires severance pay, it must follow the policy, plan or contract in offering severance. Where an employer has no legal obligation to provide severance, the employer should request that the employee sign a release of claims in exchange for severance pay.

In Pennsylvania, accrued unused paid time off ("PTO"), vacation or sick leave may be deemed wages under the PA WPCL that are required to be paid upon termination. Specifically, if the employer's written policy or practice is to pay accrued unused benefits of this nature upon termination, then an employer will be required to pay them.

Releases

Pennsylvania law does not require a release of claims agreement to contain an express provision releasing particular statutory or common law employment claims for the release to be effective as to those claims. However, it is common practice in Pennsylvania to include a non-exhaustive list of specific claims as examples of the types of claims released by such agreements. Inclusion of any particular claim is a strategic decision based on the risk associated with each employer and employee.

The Pennsylvania claims typically included in a release agreement are: wrongful termination in violation of Pennsylvania public policy; discrimination or retaliation in violation of the PHRA; claims for termination or retaliation under the Pennsylvania Whistleblower Law; and Pennsylvania Equal Pay Law ("PEPL"). Pennsylvania employers may also want to reference specific local laws, if applicable, in the release agreement, such as the Philadelphia Fair Practices Ordinance and Philadelphia Sick Leave Law.

There are limitations on what may be released. Workers' compensation claims cannot be released without compliance with procedures of the Pennsylvania Workers' Compensation Act.

The PEPL and the Pennsylvania Minimum Wage Act ("PMWA") make any agreement aiming to vary or contravene any requirements of either statute unenforceable. *See* 43 P.S. §§ 333.113 and 336.5. Under the Pennsylvania Whistleblower Law, releases of unemployment compensation claims are ineffective. *See* 43 P.S. § 861. Waivers of claims under the PA WPCL are generally invalid. *See* 43 P.S. § 260.7. However, Pennsylvania courts have upheld waivers of such claims where it is clear the parties are compromising a disputed wage claim.

Alternative Dispute Procedures and Arbitrations
Pennsylvania law establishes dispute resolution procedures for employers and employees. Public and private employers are covered by the Pennsylvania Uniform Arbitration Act. The Pennsylvania Uniform Arbitration Act does not govern agreements to arbitrate disputes on a non-judicial basis unless they are in writing and expressly provide for arbitration under the law or a similar law; otherwise these agreements are covered by common law arbitration. *See* 42 Pa. Cons. Stat. §§ 7341, 7342. However, certain claims are subject to statutory arbitration, including collective bargaining agreements. *See* Pa. Cons. Stat. § 7302(b)-(c).

If parties to arbitration agreements refuse to arbitrate pursuant to these agreements, courts can order them to arbitrate. Courts also can direct arbitrators to hold prompt hearings and issue timely decisions. Parties to arbitration agreements can agree on a method for appointing arbitrators. Pennsylvania courts also can appoint arbitrators if the parties cannot agree on this method, the method fails, any party fails to participate in arbitration, or arbitrators fail to act and no successor is appointed. Written arbitration agreements are valid, enforceable and irrevocable, except as permitted for revocation of contracts. Courts can decide whether arbitration agreements exist and whether disputes are subject to these agreements. The Pennsylvania Uniform Arbitration Act covers all aspects of the arbitration process.

Collective Bargaining Agreements
The Commonwealth recognizes employees have the right to organize or join employee organizations for the purpose of collective bargaining. Many collective bargaining agreements require processing of disciplinary actions or terminations of employment of employees covered by the collective bargaining agreement entirely under the procedures of the collective bargaining agreement.

Class or Collective Action Waivers
In the past, Pennsylvania courts held that the Federal Arbitration Act preempts Pennsylvania common law deeming class action waivers substantively unconscionable. Notably, a recent U.S. Supreme Court decision upheld the enforceability of class action waivers set forth in arbitration agreements between employers and employees.

Plant Closings
Pennsylvania does not have a plant closing law, although local jurisdictions may enact their own law. *See* discussion above regarding the Philadelphia WARN Act.

Pension Plan Withdrawal Liability
State law would not be relevant with respect to federal pension plan withdrawal liability as federal pension withdrawal liability is again covered by ERISA, which generally preempts any state law that relates to an employee benefit plan. While state law is not a deciding factor, an employer should still consider the potential for withdrawal liability under ERISA any time that it employs a unionized workforce and contributes to a multi-employer pension plan. To the extent an employer does participate in a multi-employer pension plan, it is entitled under ERISA to request an estimate of withdrawal liability on an annual basis. It is a recommended practice to make such a request on an annual basis to ensure that the employer is fully aware of the potential liability that could be assessed in the event of a withdrawal under ERISA.

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

6.1 Contractual Claims

Employment contracts, whether oral or written, are enforceable. If compensation is earned and an agreement to pay it is breached, the employee or former employee may bring a claim under the PA WPCL, as described below.

Employees who are terminated in violation of the terms of a contract may sue for breach of contract to recover what they are due under the agreement. Claims arising out of employee discipline may result in discrimination claims but rarely are subject to contractual disputes in a non-union setting.

6.2 Discrimination, Harassment and Retaliation Claims

Pennsylvania employees may bring claims for unlawful discrimination, harassment and retaliation to the federal U.S. EEOC or the Pennsylvania Human Relations Commission ("PHRC"), which enforces the PHRA. Some localities also have their own commissions to hear claims under their own regulations; for instance the Philadelphia Commission on Human Relations ("PCHR"), the Pittsburgh Commission on Human Relations and the Allentown Human Relations Commission. Employees are able to dual-file with multiple agencies, as long as each agency enforces a law under which an employee is seeking relief.

Employees can bring a civil action for a violation of the PHRA. To bring suit under the PHRA, a plaintiff must first have filed an administrative complaint with the PHRC within 180 days of the alleged act of discrimination. 43 Pa. Cons. Stat. §§ 959(a), 962. Charges with EEOC covered by a state or local anti-discrimination law are to be filed within 300 days. If a plaintiff fails to file a timely complaint with the PHRC and/or EEOC, then he or she is precluded from pursuing claims under the PHRA or enforced by the EEOC. Pennsylvania courts have strictly interpreted this requirement.

Claims may be brought under a handbook. To avoid such claims, the handbook should explicitly provide for at-will employment, state that it is not a contract and state that the company reserves the right to unilaterally alter, modify or withdraw any policy or the entire handbook at any time and for any reason.

6.3 Wages and Hours Claims

Pennsylvania Minimum Wage Act ("PMWA")

The PMWA establishes a fixed minimum wage and overtime rate for employees in Pennsylvania. Currently, Pennsylvania's minimum wage is $7.25 per hour. Employers also have to pay overtime at a rate of one-and-a-half times the rate of pay after 40 hours of work for covered employees. The statute of limitations for claims under the PMWA is three years.

The requirements under the PMWA are substantially similar to the requirements under the federal FLSA. But there are some differences between the FLSA and the PMWA, and employers must follow Pennsylvania's regulations even if those rules are more stringent for employers than the federal requirements.

For example, there are differences in the exemptions available under the FLSA and PMWA. While the FLSA provides that an employee earning over $100,000 annually may be exempt from overtime requirements, under the PMWA, such highly compensated employees are not exempt from overtime requirements.

In addition, the PMWA does not contain the exemption for "computer employees" that is available under the FLSA. Thus, if Pennsylvania law applies, overtime must be paid to computer employees if there are no other Pennsylvania rules excluding these employees from overtime pay.

Notably, on June 23, 2018, the Pennsylvania Department of Labor and Industry published proposed rulemaking containing significant changes to some of the exemptions available under the PMWA. While these rules are not final, this highlights that Pennsylvania employers must be vigilant for changes in the state law relating to minimum wage and overtime.

In addition to paying the correct Pennsylvania minimum wage, employers must keep accurate records of employee wages and hours, allow inspection and furnish copies of these records, when requested, to state investigators, and allow state investigators to question employees during work hours and at the employer's place of business. Employers must also display a poster explaining the PMWA in a conspicuous place where employees normally pass and can read the posters. This poster is available for free from the Department of Labor and Industry.

Pennsylvania Wage Payment and Collection Law ("PA WPCL")

The PA WPCL establishes a statutory right to enforce an employer's promise to pay earned wages and benefits and permits a prevailing employee to collect wages, benefits, liquidated damages, attorney's fees and costs. The PA WPCL does not create a right to wages or benefits, but rather provides a statutory remedy where the employer breaches a contractual right to wages that have been earned. Under this law, a corporate officer may be personally liable for the corporation's failure to pay wages if such individual is involved in compensation decisions relating to employees.

The PA WPCL covers all employees employed in Pennsylvania and provides that every employer shall pay all wages, other than fringe benefits and wage supplements, due its employees on regularly scheduled paydays designated in advance by the employer. Employers must notify each employee at the time of hiring of the time and place of payment and rate of pay and the amount of any fringe benefits or wage supplements to be paid to the employee, a third party or a fund for the benefit of the employee.

The waiting time between the end of a pay period and payday must not exceed: (a) the time specified in a written contract between employer and employee; (b) the standard time lapse customary in the trade; or (c) 15 days. Pay for overtime must be included with wages for the next pay period.

The PA WPCL provides that employers may make deductions from wages as provided by law or by regulation for the

convenience of the employee. The regulations itemize the specific deductions that are permissible under the law.

The PA WPCL imposes liquidated damages for wages due and not paid within 30 days after the regularly scheduled payday, or within 60 days beyond filing of proper claim. Liquidated damages are equal to 25% of the unpaid wages or $500, whichever is greater. However, an employer may avoid liquidated damages if there is a good-faith contest or dispute of any wage claim, or good-faith assertion of a right of setoff or counterclaim explaining such nonpayment.

The statute of limitations for a PA WPCL claim is three years from the date wages are due and payable. 43 P.S. §260.9a(g). This is also the statute of limitation that Pennsylvania courts apply with respect to claims for past-due benefit payments under ERISA.

Under the PA WPCL, the term "wages" specifically includes vacation pay. The PA WPCL does not, however, require an employer to pay a terminated employee for his or her accrued vacation time, *unless* the employer's policy or contract provides for such payment. If the employer has a "use it or lose it" policy for vacation time, that should be clearly communicated to employees, in writing. Stock options and stock repurchase payments are wages under the PA WPCL if they are offered to the employee as part of his or her employment and are intended to be compensation.

As noted above, employees cannot waive claims for wages owed under the PA WPCL by a private agreement. However, the PA WPCL provides that an employee "shall have the power to settle or adjust his claim for unpaid wages." Pennsylvania courts discussing this provision of the PA WPCL have held that where there is a bona fide dispute as to whether wages are owed, an employee can validly release a claim to such wages in a private agreement. That said, wages to which an employee is already entitled or which are not disputed cannot be deemed consideration for a release of wage-related claims.

6.4 Whistleblower/Retaliation Claims

Under Pennsylvania's Whistleblower Law, Title 43, Section 955 and Sections 1421 to 1428, a "whistleblower" is a person "who witnesses or has evidence of wrongdoing or waste while employed and who makes a good faith report of the wrongdoing or waste, verbally or in writing, to one of the person's superiors, to an agent of the employer or to an appropriate authority." The Whistleblower Law provides that no employer may "discharge, threaten or otherwise discriminate or retaliate against an employee … because the employee or the person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste by a public body or an instance of waste by any other employer as defined by this act." The law also prohibits retaliation against the employee for the employee's cooperation in any investigation, hearing or inquiry into the report. *See* Sec. 1423(a)-(b).

An employee who alleges a violation of the Pennsylvania Whistleblower Law may file a civil action in court within 180 days after the occurrence of the alleged violation. A claim under the Whistleblower Law requires an employee to present evidence that he or she made a good-faith report of wrongdoing prior to the adverse employment action and some evidence of a connection between the report and the adverse employment action. Once the employee meets this burden, the employer must present evidence "that its reasons for taking the adverse actions are: 'separate,' 'legitimate,' and 'non-pretextual,' that is, not merely a pretext for exacting retribution."

6.5 Dispute Resolution Forums

Pennsylvania has several alternative dispute resolution forums. Arbitration agreements often call for disputes to be arbitrated by the American Arbitration Association ("AAA"). Pennsylvania's Office of General Counsel also offers a mediation program for disputes involving Commonwealth employees or agencies. Private employers looking to mediate can also turn to the Pennsylvania Council of Mediators or other private mediation companies, such as JAMS, ADR Options, etc.

The EEOC offers mediation services relating to statutes enforced by the EEOC, such as Title VII, ADEA and the ADA. The PHRC also offers mediation services as a method to resolve employment and public accommodation disputes under the PHRA. Mediation is confidential under Pennsylvania law. This allows the parties the freedom to express themselves without fear of what they say being held against them. The mediator does not keep any notes of the discussions that take place during the mediation session. The EEOC and PHRC offer mediation services to the parties free of charge.

6.6 Class or Collective Actions

As noted above, the U.S. Supreme Court has ruled that employers can require their employees to arbitrate claims on an individual basis as a condition of employment. This means that employees can be required to arbitrate their claims instead of bringing them in court, and to waive the right to participate in class or collective actions.

While the Supreme Court has held that agreements requiring mandatory arbitration on an individual basis are lawful, that does not mean that *all* agreements are enforceable. An agreement to arbitrate will remain subject to challenge under state law, as would any other contracts, on grounds such as lack of proper offer and acceptance, lack of consideration, fraud, duress or that its terms or the manner in which it was presented are unconscionable. Employers must pay careful attention to whether the agreement is properly drafted and

entered into, particularly when email is used, as these factors will determine whether a particular agreement is enforceable.

6.7 Possible Relief

Pennsylvania Statutes

Pennsylvania Human Relations Act ("PHRA")

The PHRC can bring its own action for violations of the PHRA. Potential avenues of relief for such actions include:

- Cease and desist order;
- Reimbursement of certifiable travel expenses in matters involving the complaint;
- Compensation for loss of work in matters involving the complaint;
- Reinstatement, upgrading or hiring of employees, with or without back pay;
- Reasonable accommodations;
- Reasonable out-of-pocket expenses caused by an unlawful discriminatory practice;
- Actual damages, only in cases alleging a violation of Sections 955(d) (retaliation) and 955(e) (aiding and abetting a discriminatory practice), including damages for embarrassment and humiliation;
- Compliance reporting;
- Interest on lost wages;
- No requirement to offset unemployment benefits against back wages;
- Fines from USD100 to USD500, up to 30 days in prison, or both for willfully interfering with or violating an order of the PCHR.

Employees may also bring a civil action to recover damages as follows:

- Injunctive relief;
- Reinstatement or hiring;
- Back pay, limited to three years before the filing of the complaint;
- Attorneys' fees and costs to a prevailing employee; or employer, if the employee brought the complaint in bad faith;
- Other appropriate legal or equitable relief.

Unlike Title VII, which places significant caps on compensatory and punitive damages, the PHRA does not limit the amount of compensatory damages that may be awarded. Compensatory damages can include damages for back pay, front pay and emotional distress. The PHRA does not provide for punitive damages. The PHRA does, however, provide for an "aiding and abetting" theory that allows for individual liability of managers or other decision-makers who are found to have engaged and/or aided in discriminatory conduct. Attorneys' fees and costs are also available under both Title VII and the PHRA should the employee prevail.

Minimum Wage Act of 1968 ("PMWA")

The PMWA sets the amount of wages an employer must pay to each of its employees. In Pennsylvania, every employer must keep a true and accurate record of the hours worked by each employee and the wages paid to each employee.

If any employee is paid by his or her employer less than the minimum wages provided by the act, such worker may recover in a civil action the full amount of wages owed minus any amount actually paid by the employer, costs and reasonable attorneys' fees. *See* 43 Pa. Stat. Ann. § 333.113. The PMWA also provides for several different types of penalties.

Pennsylvania Wage Payment and Collection Law ("PA WPCL")

This law is discussed above.

Pennsylvania Equal Pay Law ("PEPL")

The PEPL prohibits employers from discriminating between employees on the basis of sex in any establishment where the employees work by paying employees of one sex a wage rate that is lower than the rate paid to employees of the opposite sex for equal work on jobs that require equal skill, effort and responsibility, and that are performed under similar working conditions.

For a knowing and willful violation of the PEPL (regarding unequal wage rates), an employee can recover unpaid wages, an equal amount as liquidated damages and reasonable attorneys' fees and costs.

Other penalties provided for by the PEPL include:

- Fines from $50 to $200 for:
  - (a) willfully and knowingly violating any provisions of the PEPL;
  - (b) discharging or discriminating against any employee because the employee makes a complaint, institutes a proceeding or testifies in any proceeding under the PEPL;
  - (c) failing to keep the records required under the PEPL;
  - (d) falsifying records;
  - (e) failing to furnish records to the secretary upon request;
  - (f) delaying, hindering or otherwise interfering with the Secretary in enforcing the PEPL; and refusing official entry into an establishment which the Secretary is authorized to inspect;
- Imprisonment from 30 to 60 days, if the employer defaults.

Notably, each day a violation continues constitutes a separate offense.

Child Labor Law

The Pennsylvania Child Labor Law ("CLL") was enacted to "provide for the health, safety, and welfare of minors by for-

bidding their employment or work in certain establishments and occupations, and under certain specified ages." The CLL requires minors to obtain work permits prior to beginning work. This law, with the exception of farm work or domestic service in a private home, covers work in any establishment other than the minor's residence. It provides for fines of up to USD5,000 for each civil violation and for fines of up to USD1,500 for criminal violations, among other penalties.

Pennsylvania Military Affairs Act ("PMAA") (also referred to as the Pennsylvania Military Leave of Absence Act)
The PMAA prohibits employers from discriminating against employees or prospective employees on account of their military obligations and/or from terminating and/or discharging any employee on account of or as a result of any such obligations. The PMAA states that it is the public policy of the Commonwealth of Pennsylvania that employees engaged in uniformed service shall not be subjected to employment discrimination on the basis of their participation in such services.

There are no specific remedies specified; however, the PMAA is generally construed in accordance with USERRA.

Jury Duty Leave
Pennsylvania law states: "An employer shall not deprive an employee of his employment, seniority position or benefits, or threaten or otherwise coerce him with respect thereto, because the employee receives a summons, responds thereto, serves as a juror or attends court for prospective jury service." In a civil action, an employee can recover lost wages and benefits and attorneys' fees. The law also provides for criminal penalties.

Witness Duty/Crime Victim Leave
This law provides that "[a]n employer shall not deprive an employee of his employment, seniority position or benefits, or threaten or otherwise coerce him with respect thereto, because the employee attends court by reason of being a victim of, or a witness to, a crime or a member of such victim's family." In a civil action, an employee can recover lost wages and benefits and attorneys' fees. The law also provides for criminal penalties.

Pennsylvania Whistleblower Law
Pennsylvania's Whistleblower Law is discussed extensively above. Potential remedies include lost wages and benefits and attorneys' fees. Fines up to $10,000 may be imposed.

Workers' Compensation Act ("PWCA")
The workers' compensation system in the Commonwealth protects both employees and employers. Employees receive medical treatment and are compensated for lost wages associated with work-related injuries and disease, and employers provide for the cost of such coverage while being protected from direct lawsuits by employees.

Workers' compensation coverage is mandatory for most employers under Pennsylvania law. Employers who do not have workers' compensation coverage may be subject to lawsuits by employees and to criminal prosecution by the Commonwealth.

Pennsylvania Unemployment Compensation Law ("PUCL")
The PUCL establishes a system of unemployment compensation to be administered by the Department of Labor and Industry and its agencies.

Under the law, the Commonwealth of Pennsylvania may obtain a lien on all property of any employer who has unpaid unemployment assessments. If an employer's failure to provide complete, accurate and timely information about an employee's eligibility for unemployment causes an employee to receive benefits in error, any overpayment to the employee will be charged to the employer.

Employers who fail to pay the contributions assessed under the PUCL must pay interest on any unpaid amount. Employers committing a summary offense are also liable for a civil penalty, the amount of which depends on which subsection of the law is violated.

Penalties for a summary offense include fines from USD100 to USD1,500 and/or imprisonment up to 30 days. Summary offenses include but are not limited to making false or misleading statements, omitting information to prevent an employee from obtaining benefits and willfully failing or refusing to make contributions or payments due under the PUCL. Other offenses are treated similarly.

Criminal History Record Information Act
The Criminal History Record Information Act is described above. In a civil action, remedies include actual damages and attorneys' fees. Exemplary and punitive damages from $1,000 to $10,000 may be awarded for any willful violation.

Pennsylvania Wiretapping and Electronic Surveillance Control Act
The Commonwealth also provides protection for employers and employees from wiretapping and certain types of surveillance. Potential remedies for intercepting, disclosing or using a wire, electronic or oral communication in violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act ("PWESCA") or causing another to do so include: (1) actual damages, but not less than liquidated damages computed at the rate of USD100 a day for each day of violation, or USD1,000, whichever is higher; (2) punitive damages; (3) reasonable attorneys' fees; and (4) other reasonably incurred litigation costs. Furthermore, intentionally intercepting, disclosing or using any wire, electronic or oral communication without *all* parties' consent or attempting to do so is a third degree felony.

Pennsylvania Uniform Trade Secrets Act
The Pennsylvania Uniform Trade Secrets Act ("PUTSA") is discussed above. Potential remedies include injunctive relief, damages, exemplary damages for willful and malicious misappropriation of not more than twice the award of monetary damages and attorneys' fees. In addition, Pennsylvania law may impose criminal penalties for stealing trade secrets.

Criminal Theft of Trade Secrets
The Commonwealth also affords protections against the theft of trade secrets. A violation of the Criminal Theft of Trade Secrets Law can amount to second or third degree felonies.

Philadelphia Statutes
Philadelphia Fair Practices Ordinance (Phila. Code §§ 9-1101 to 9-1129)
The PCHR can bring its own action for violations of the Philadelphia Fair Practices Ordinance, as can employees. In actions brought by employees, in addition to the types of damages available under the PHRA, punitive damages are also available.

Philadelphia Fair Criminal Records Screening Standards Ordinance (Phila. Code §§ 9-3501 to 9-3507)
The PCHR can bring its own action for violations of the Philadelphia Fair Criminal Records Screening Standards Ordinance. Potential avenues of relief for such actions include compensatory damages, punitive damages, not to exceed USD2,000 per violation and USD2,000 for each violation committed on or after January 1, 2009.

In a civil action, employees can recover compensatory damages, punitive damages and reasonable attorneys' fees.

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Philadelphia Entitlement To Leave Due To Domestic Violence, Sexual Assault, or Stalking Ordinance (Phila. Code §§ 9-3201 to 9-3210)
The City of Philadelphia offers protections to employees who are entitled to leave due to domestic violence, sexual assault or stalking. Employees may file a claim with the PCHR to enforce their rights to unpaid leave, restoration and benefits under the ordinance. Employers may recover health coverage premiums paid for maintaining health coverage during the leave period, if the employee fails to return from leave. *See* Phila. Code § 9-3206(2)(b).

Philadelphia Wage Theft Ordinance (Phila. Code §§ 9-4301 to 9-4310)
The Philadelphia Wage Theft Ordinance creates an avenue for complaints alleging non-payment of wages or "wage theft," and the position of Wage Theft Coordinator to facilitate enforcement. In addition to payment of back wages and attorneys' fees, the Philadelphia Wage Theft Ordinance carries substantial penalties. Each week in which any wages are unpaid is a separate violation of the ordinance. The Wage Theft Ordinance also provides that an employer will be subject to penalties up to USD2,300 for *each violation* where no "good faith contest of the wages owed exists." Thus, employers could be subject to multiple USD2,300 fines for a single employee's complaint for unpaid wages if the complaint spans multiple weeks.

In addition to monetary damages, Philadelphia may deny, revoke or suspend any license or permits issued to an employer. The Wage Theft Ordinance also provides that any license or permit issued by Philadelphia may be revoked or suspended if the license or permit holder violated the ordinance or any other federal or state wage payment law and failed to satisfy the judgment entered against him or her within the lawful period.

Violations of the federal, state and local wage laws, such as the PMWA and PA WPCL, may be reported to the Wage Theft Coordinator. Violations ranging from $100 to $10,000 may be reported. *See* Phila. Code § 9-4301(b).