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# Law and Practice

*Contributed by Smith, Katzenstein & Jenkins LLP*

## Contents

**Smith, Katzenstein & Jenkins LLP** represents both management and individual employees, most of whom are professionals or executive-level management. The firm's employment law practice routinely litigates cases in federal courts involving discrimination and retaliation under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act and the Family and Medical Leave Act. The firm also has broad experience in state courts in cases involving covenants not to compete, trade secrets and claims involving the implied covenant of good faith and fair dealing. The firm's employment litigation practice is enhanced by its extensive litigation experience in Delaware's Court of Chancery, world-renowned for its handling of corporate and alternative entity disputes. In addition to its broad litigation experience, the firm also routinely provides advice and training designed to avert litigation on a wide range of employment law issues.

## Authors

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**Kelly A. Green** is a partner at the firm and has been practicing law for 18 years. She advises both employers and employees, giving her insight from both perspectives. She provides counsel on matters such as employment agreements, separation agreements, and discrimination charges brought before the Delaware Department of Labor and the Equal Employment Opportunity Commission. Kelly litigates restrictive covenants, employment discrimination cases pursuant to the ADEA, Title VII, Section 1983, and the ADA, and retaliation claims. Kelly also represents clients in corporate litigation including contests over the governance and control of corporations, limited liability companies and partnership matters, dissolution actions, business torts and disputes over arbitration provisions.

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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 is a shift away from the traditional permanent employer and employee relationship into temporary or flexible jobs. The gig economy has been driven, in part, by evolving opportunities for computer-based connections between the ultimate customer and gig service providers. Individual workers are frequently hired as independent contractors, sometimes referred to as freelancers, who earn money based on a specific job or task.

The gig economy is replete with pros and cons for both businesses and the individuals performing the work. On the positive side for employers, the savings associated with hiring independent contractors, who generally do not receive benefits and do not require an employer to pay Social Security and Medicare taxes, state worker's compensation or unemployment insurance, can be passed along to the customer making the business more competitive. On the flip-side, an employer's use of independent contractors and freelancers can make it harder to establish long-term relationships with customers and clients because its workforce lacks consistency, employers cannot control the manner in which the independent contractor performs his or her work and gig workers may lack the loyalty and motivation since there will be few long-term consequences of poor performance.

For employees, the positive side of the gig economy is that it can provide a flexible schedule, a better work life balance, easier shifts in job focus (rather than a full-scale career change) and more opportunities for part-time work or supplemental income. To the detriment of the employee, the gig economy lacks long-term stability, blocks individuals from gaining institutional knowledge of the business and customers with whom they are working, discourages businesses from assisting with an individual's development of additional skills, doesn't require the payment of minimum wage or overtime and fails to facilitate retirement savings.

Another area of technology for employers to consider is the use of social media in hiring. Employers must decide whether they want to view an applicant's public social media as the employer may access information pertaining to protected classifications that they would be precluded from inquiring about during the interview process. Delaware has enacted a statute that prohibits employers from asking for or requiring applicants and employees to do the following: provide usernames or passwords to social media accounts, use social media as a condition of employment and add anyone to the employee's contacts. Employers are permitted to require or request an employee to disclose a username, password or other social media believed to be relevant to an investigation into allegations of employee misconduct or violation laws or regulations.

## 1.2 "Me Too" and Other Movements

In response to the #MeToo movement, Delaware's General Assembly passed House Bill 360 which provides significantly expanded protections for employees in the context of sexual harassment. The law, 19 Del. C. § 711A (the "Act") applies to all Delaware employers with four (4) or more "employees", which includes unpaid interns, applicants, joint employees and apprentices.

The Act includes a broader definition of sexual harassment. Specifically, unlawful harassment occurs when an employee is subjected to conduct that includes unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when the submission to such conduct is made an implied or express term or condition of employment; the submission to or rejection of such conduct is used as the basis for employment decisions affecting employment; or when the conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile or offensive working environment.

The Act also created new affirmative obligations for Delaware employers. First, employers are required to distribute an information sheet on sexual harassment to all employees. New hires must receive the information sheet within six months of being hired. The information sheet was created by and is available through the Delaware Department of Labor.

Second, the Act requires employers with 50 or more "employees" (as defined by the statute) to provide all employees with specific sexual harassment training within six months of consecutive employment. The training must be "interactive" and must address the topics in the Department of Labor's information sheet. Employers also must provide supervisor training addressing the prevention and correction of sexual harassment. Supervisors and employees must be retrained every other year.

## 1.3 Decline in Union Membership

Delaware follows a national trend as the overall union membership percentage in the private sector continues to drop. According to the US Bureau of Labor Statistics, only 10.3% of private sector employees in Delaware were members of a union in 2018, a reduction from 10.7% in 2017.

Along with 22 other states, Delaware is not a "right to work" state. This means that Delaware has not yet passed legislation preventing a union from negotiating a requirement in its collective bargaining agreement that all employees must either join the union and pay union dues or pay what is referred to as an "agency fee" for services it renders to the employee on its behalf. There have been, however, several recent attempts

to enact "right to work" legislation in Delaware. If successful, that may lead to a further decrease in union membership in the private sector.

### 1.4 National Labor Relations Board

The National Labor Relations Board (the "NLRB") enforces the National Labor Relations Act (the "NLRA"). The NLRA supersedes state law in the areas that it covers, which includes virtually all union representation in private employment, other than farm workers and those employees of companies not engaged in interstate commerce. If it chose to do so, Delaware could enact legislation regarding the unionization of private employers not subject to the NLRA. To date, however, Delaware has not adopted any comprehensive legislation that addresses or attempts to regulate the unionization of private employees not covered by the NLRA. Given the state's relatively small population, and the few employees that would be impacted by such legislation, it is unlikely that Delaware will enact such legislation in the near future, especially as union membership in the private sector continues to decrease. As a result, Delaware state law will likely continue to have little or no impact on the regulation of private employer unions operating in the state.

## 2. Nature and Import of the Relationship

### 2.1 Defining and Understanding the Relationship

It is important that Delaware employers define the type of relationship they are entering into with an applicant or newly hired employee. As explained in **Section 2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity**, employees can be contract based or at will, but within those categories lie several different types of potential relationships.

There is a nationwide trend toward gig economy relationships. The primary gig economy legal issue is the classification of individuals as independent contractors versus employees. In general, Delaware does not have a set definition of what constitutes an independent contractor; its strongest test is whether the business or the alleged independent contractor exercises control over the work itself. Delaware's Superior Court jury instructions, based on the Restatement (Second) of Agency, outline the factors that will be considered to determine whether an individual is an independent contractor, including: the terms of any agreement between the business and alleged independent contractor; the control that the business has over the manner and means by which the work must be performed; the alleged independent contractor's other work that doesn't involve the contracting party; the performance of the work at the job site and whether it is done with or without supervision; the skill of the alleged independent contractor; the relationship and dealings between the alleged independent contractor and his or her employees; the identity of the supplier of tools and place of work; and the length of the relationship between the alleged independent contractor and the business. In the event that a specific Delaware statute provides guidance on what constitutes an independent contractor, such as Delaware's unemployment compensation statute, such statutes generally reflect the same underlying considerations. The wrong classification of a gig economy worker as an independent contractor rather than an employee can have far reaching implications for an employer, including fines, the payment of taxes, tax penalties and, if found to be an intentional misclassification, criminal penalties. A worker misclassification can lead to an employer being liable for violations of the Federal Fair Labor Standards Act and the Delaware Wage Payment and Collection Act for failure to pay minimum wage or overtime.

With respect to franchise relationships, the Delaware Franchise Security Law protects the holders of franchises. A franchisor is prohibited from unjustly terminating or unjustly failing to renew a franchise. Unjust termination means that the termination was made without good cause or in bad faith. Additionally, this law requires least 90 days' notice prior to a termination or election not to renew a franchise.

Delaware recognizes joint employment relationships in which an employee has more than one employer for which he or she simultaneously performs work.

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

Delaware is known as a premier state for business entity formation. This reputation stems from a well-developed body of business case law consistently applied by a highly-regarded court system and statutory laws that permit alternative business entity structuring. With respect to the latter, Delaware's business statutes permit parties to create contract-driven alternative entities such as limited liability companies and limited liability partnerships. Alternative entities enable parties to structure the roles and responsibilities of key individuals by naming them managers, partners and managing members or managing partners. Such entities protect individuals against liability, permit flexible compensation arrangements and provide ownership opportunities.

For more traditional employee-employer relationships, Delaware employers can hire employees "at will" or can enter into contractual relationships with their employees. An employee's receipt of a handbook does not create contractual rights for the employee nor does it change an employee's at will employment status. Offer letters should state the nature of relationship between the parties, including whether the offer letter establishes a contractual relationship or if the offered employment is at will. Employers must advise employees before monitoring or intercepting phone

calls, emails or internet usage. An employer is not permitted to require, request or suggest that a prospective employee or employee take a polygraph, lie detector or similar test as a condition of employment or continuation of employment. The Delaware minimum wage is $8.75 per hour and will increase on October 1, 2019 to $9.25 per hour.

At will employees can be terminated for any non-discriminatory reason or no reason at all, with the exception of a termination that violates the implied covenant of good faith and fair dealing by: i) violating public policy; (ii) misrepresenting an important fact by the employer and the employee relied on the representation to accept a new position or remain in a current position; (iii) using an employer's superior bargaining position to deprive an employee of clearly identifiable compensation for past service; and (iv) falsifying or manipulating employment records by an employer to create fictitious grounds for termination.

With respect to contractual employees, Delaware courts, unlike some other jurisdictions, will not assume that an employee, particularly a high-level employee, is on unequal bargaining grounds with an employer. Thus, no benefit of the doubt is given to the employee; rather, the court will interpret the plain language of the contract between an employee and her or his employer.

### 2.3 Immigration and Related Foreign Workers

Since states do not have primary responsibility for immigration policy in the United States, Delaware's involvement in setting policy regarding immigration issues, including those that relate to employment, is limited. An office known as "Service of the Foreign Born" has been established within the State Office of the Attorney General to provide counseling services and assistance for residents of Delaware applying for citizenship. However, most employers seeking to hire non-citizens retain private counsel to assist as necessary with related immigration issues.

Delaware has not been particularly proactive in requiring employers to closely monitor the citizenship status of job applicants. E-Verify is a computer-based program that uses information on the I-9 Employment Eligibility Verification form submitted by the new hire and compares it to data from federal government records such as those stored by the Social Security Administration. In 2011, the U.S. Supreme Court confirmed that states could mandate the use E-Verify as they saw fit. In the event of a suspicious mismatch, employers and new hires receive notification so that the issue can be resolved. While the number of states that require E-Verify has increased over the last decade, Delaware has not taken action to require or otherwise regulate its use. Rather, employers in Delaware are left with the discretion to use E-Verify if they choose to do so.

### 2.4 Collective Bargaining Relationship or Union Organizational Campaign

The "ally doctrine" generally refers to situations when an employer subject to a strike uses the employees of a neutral employer as strike breakers. The doctrine allows a union to picket a secondary employer (the alleged "neutral" employer) which has become a so-called "ally" of the primary employer by entering into an arrangement through which the ally agrees to assist in the dispute by performing the work at issue.

The NLRA supersedes state law in the areas that it covers, which includes virtually all private employment, other than farm workers and those employees of companies not engaged in interstate commerce. To date, Delaware has not adopted any kind of comprehensive legislation that addresses or attempts to regulate the unionization of private employees not covered by federal law, including any issues concerning the interpretation and application of the "ally doctrine".

## 3. Interviewing Process

### 3.1 Legal and Practical Constraints

During the interview process, employers in Delaware should avoid questions intended to discover the candidate's protected characteristics, including: race, religion, age, sex, sexual orientation, gender identity, national origin, volunteer emergency responder status, marital status, genetic information, reproductive-health decisions, family responsibilities or status as a victim of domestic violence, sexual offences or stalking. 19 Del. C. §§ 711 & 719A.

"Family responsibilities" means the obligations of an employee to care for any family member who would qualify as a covered family member under the Family and Medical Leave Act. 19 Del. C. § 710(9). A "reproductive health decision" means a decision related to the employee's use or intended use of a particular drug, device or medical service, including the use or intended use of contraception or fertility control or the planned or intended initiation or termination of a pregnancy. 19 Del. C. § 710(22).

Delaware employers may not ask applicants or employees about salary or compensation at their previous place of employment. 19 Del. C. § 709B. This obligation extends to external recruiters or other agents used by an employer to identify potential candidates. An employer may, however, inquire about the applicant's compensation history after the applicant has accepted the job offer, provided the applicant authorizes the disclosure in writing.

Delaware private employers are prohibited by Delaware law from requiring applicants or employees to take a polygraph test. 19 Del. C. § 704.

## 4. Terms of the Relationship

### 4.1 Restrictive Covenants

Restrictive covenants, consisting of non-competition, non-solicitation and confidentiality clauses are clauses that prohibit a former employee from competing with his or her former employer. These provisions address items such as a former employee's ability to work in the same industry, solicit or communicate with customers of the former employer, hire employees of the former employer and use confidential business information of the former employer.

Restrictive covenant cases are frequently heard in the Delaware Court of Chancery which is extremely skilled in applying the applicable law and determining whether injunctive relief is appropriate on an expedited basis. Lawsuits based on restrictive covenants may be brought against a former employee and, at times, his or her new employer.

Delaware courts respect the freedom to contract and enforce reasonable non-competition agreements. To determine whether a restrictive covenant is reasonable, the court will examine the geographic scope and duration of the covenant and analyze if those provisions advance a legitimate economic interest of the employer. The court also considers the circumstances around the inception of the restrictive covenants. Delaware courts frequently permit broader geographic restrictions and longer time limits in a sale of a business scenario as compared to a strictly employer-employee relationship.

Traditionally, the Court of Chancery has blue penciled, or judicially rewritten, overly broad restrictive covenants to narrow the scope. Several recent Delaware Court of Chancery cases have suggested that the court will, under certain circumstances, decline to blue pencil an overly broad restrictive covenant and may instead refuse to enforce the overly broad provision in its entirety.

An employer's material breach of a contract containing restrictive covenants may excuse performance by the employee.

Many restrictive covenants contain tolling provisions. These provisions provide that the time an employee has been found to be improperly competing against the former employer will not count against the total time the employee is barred from competition. Such provisions are enforced in Delaware.

Normally, when parties select the law of Delaware to govern a contract, including one containing a restrictive covenant, Delaware law will apply. However, the court may determine to apply the law of a different state even if Delaware law is selected in the contract if (i) Delaware law has no substantial relationship and no reasonable basis to be applied or (2) the application of Delaware law is contrary to a fundamental policy of another state which has a materially greater interest. A conflict of law analysis includes a weighing of factors such as where the parties are located, whether the contract was negotiated, whether and where was work performed and where the restriction applies. The Delaware Court of Chancery has determined in a number of recent cases that, despite the presence of a contractual Delaware choice of law provision, the law of a different state governs the restrictive covenant. The Court of Chancery reached these conclusions after applying a conflict of law analysis and determining that another state with more significant contacts had a public policy against restrictions on competition.

### 4.2 Privacy Issues

#### Data-Breach-Notification Law

Delaware's security-breach-notification law requires any person who conducts business in the state or who owns, licenses or maintains personal information of Delaware residents to notify residents whose personal information has been subject to a data-security breach.

The notice must be made without unreasonable delay, but no more than 60 days from the date of discovery of the breach, unless, after an appropriate investigation, the breach is unlikely to result in harm. When a security breach affects more than 500 Delaware residents, notice must also be given to the state's Attorney General.

#### Electronic Monitoring

Delaware is one of a handful of states that require employers to give advance notice to employees prior to monitoring their use of the telephone, email or internet access. 19 Del. C. § 705. The requisite notice may take one of two forms. First, employers may provide written notice to employees, but the notice must be signed and acknowledged. A notice may be contained in a handbook or personnel manual provided that the employee signs an acknowledgement of receipt. Alternatively, the employer may provide the notice via an automatic message that appears upon each log-in.

Delaware employers may not request that an employee or applicant disclose his or her username or password for the purpose of accessing the employee's personal social media. Also, employers may not request or require that an employee or applicant grant the employer access to the employee or applicant's social-media content. 19 Del. C. § 709A.

#### Trade Secrets

Delaware's Uniform Trade Secret Act, 6 Del. C. § 2007(a)) ("DUTSA") is based on the model Uniform Trade Secrets Act and supersedes other civil remedies for the misappropriation of trade secrets. The DUTSA pre-empts claims for misappropriation of business information even in cases that do not meet the statutory definition of "trade secret". Alarm.com Holdings, Inc. v. ABS Capital Pts. Inc., No. 2017-0583-JTL (Del. Ch. June 15, 2018).

### 4.3 Discrimination, Harassment and Retaliation Issues

Employment discrimination is prohibited by the Delaware Discrimination in Employment Act. Companies in Delaware with four or more employees are subject to the state's anti-discrimination law that contains broader protected classes than the federal laws and regulations. Delaware protects the following classes of individuals from discrimination: race; color; national origin; religion; sex; disability; age; genetic information; marital status; sexual identity and gender identity.

In response to the #MeToo movement, as of January 1, 2019, sexual harassment became a separately addressed form of discrimination that violates Delaware law. Harassment is defined to include unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when: i) submitting to the conduct is explicitly or implicitly a term or condition of employment; ii) submitting or rejecting the conduct is used to make employment decisions; or iii) the conduct has the purpose or effect of unreasonably interfering with work or creates an intimidating, hostile or offensive environment. The sexual harassment prohibition applies to all individuals in covered work places including employees, political officials and staff, job applicants, apprentices, unpaid interns, staffing agency workers, independent contractors, agricultural workers and domestic workers. Men and women are protected equally by Delaware's sexual harassment law.

For employers with more than 50 employees, Delaware mandates interactive sexual harassment training for employees containing the following topics: i) sexual harassment is illegal; ii) definition of sexual harassment including examples; iii) an employee's legal remedies and the complaint process; iv) Delaware Department of Labor's contact information; and v) retaliation is illegal. Once the initial training is completed, it must be repeated every 2 years. Additional sexual harassment training is required for supervisors which must include supplemental information regarding a supervisors' specific responsibilities to prevent and correct sexual harassment and a supervisors' obligation not to retaliate. Employers are required to provide a Delaware Department of Labor information sheet regarding harassment of employees.

Delaware's Equal Pay Act prohibits employers from paying an employee a lesser wage than it pays an employee of the opposite sex for equal work. Employers are not permitted to retaliate against an employee who complains about unequal pay to the employer or the Delaware Department of Labor or for instituting or testifying in related proceedings. Additionally, in order to remedy the historic wage gap between men and women, Delaware employers are prohibited from discussing an applicant's compensation history.

Delaware's Handicapped Persons Employment Protections Act forbids discrimination in failing to hire, discharging, segregating or classifying qualified handicapped persons. An employer is also prohibited from discriminating against a qualified handicapped person based on physical, mental or other examinations that are not directly related to the essential functions of the job. Additionally, a Delaware employer must provide an employee with reasonable accommodations. Delaware's statute sets forth a guide for financially reasonable accommodations by capping the cost an employer is required to spend on an accommodation. For a new employee, an accommodation is unreasonable if the costs exceed 5% of the employee's annual salary or annualized hourly rate. For an existing employee, an accommodation is not reasonable if the total cost of the accommodation brings the total cost of all changes made to accommodate the employee to greater than 5% of the employee's current salary or current annualized hourly wage.

Finally, Delaware employers should be aware of the Delaware Equal Accommodations Law which bans discrimination in places of public accommodations based on race, age, marital status, creed, color, sex, disability, sexual orientation, gender identity or national origin. A recently added anti-retaliation provision prohibits employers from retaliating against employees who i) opposed a prohibited accommodation act or practice or ii) made a charge, testified, assisted or participated in an investigation, proceeding or hearing relating to such accommodation discrimination.

### 4.4 Workplace Safety

The Delaware Workplace Safety Program has been established by the Delaware Insurance Commissioner's Office in coordination with the Delaware Compensation Rating Bureau. The program gives employers the opportunity to substantially lower their workers' compensation premiums by complying with certain conditions, including: (i) adopting an effective health and safety program; (ii) providing adequate and effective employee training; (iii) identifying and eliminating potentially hazardous conditions; and (iv) providing three years of workplace injury data.

Although OSHA is a federal law enforced by a federal agency, a Delaware court recently addressed whether a state law claim for wrongful termination could be asserted by an employee claiming that he or she was retaliated against for having complained about an OSHA violation in his or her workplace. As a federal law, OSHA has its own enforcement mechanism for remedying retaliation. Despite the existence of this federal remedy, on rare occasions Delaware courts have recognized an exception to employment at will for asserting wrongful discharge claims when the employee was terminated for having complained about a matter of public policy. In this recent case, the Delaware Superior Court recognized the potential of asserting such a claim consistent with existing Delaware law. While the decision was issued

at an early stage in the case in response to a motion to dismiss and because the Delaware Supreme Court has not yet addressed the issue, it is too early to determine if this will become settled law.

### 4.5 Compensation and Benefits

Employers are well advised to maintain a written employee handbook. A written Family Medical Leave Act policy is needed for employers who qualify under the FMLA. Additionally, Delaware's sexual-harassment law, as discussed in Section **1.2 "#Me Too" and Other Movements** above, requires a specific written notice be provided to all employees. Finally, employers must provide written notice to employees regarding the availability of reasonable accommodations for known limitations related to pregnancy, childbirth and related conditions.

## 5. Termination of the Relationship

### 5.1 Addressing Issues of Possible Termination of the Relationship

A terminated employee, whether the relationship ended by firing, discharge, termination, lay-off, resigning or quitting, must be paid all wages due by the next regularly scheduled payday. Such a payment can be made through the regular pay channels unless the terminated employee requests to receive their last pay by mail. If a dispute exists over the amount of wages due to an employee, the employer must timely pay all wages that the employer concedes are owed. Acceptance of this amount by an employee does not constitute a release as to the balance of the employee's claim for wages; any employer requested release as a condition of payment is void. An employer may not make deductions from wages owed at termination for cash shortages, damaged or lost property, necessary equipment or dishonored checks.

With respect to non-traditional working relationships governed pursuant to an alternative entity agreement, disputing parties frequently cease working together via a dissolution of the entity. In Delaware, if there is a dispute as to whether an alternative entity should be dissolved, the party seeking dissolution must show it is not reasonably practicable to carry on the business in conformity with the operating agreement. To demonstrate such, Delaware courts consider whether there is deadlock between management and/or owners such that the entity cannot operate to fulfill its stated business purpose.

Delaware's legalization of medical marijuana has also created issues relating to termination. In conjunction with legalization, a wrongful termination claim is possible if a medical marijuana card holder is terminated following the failure of a drug test. Unless a failure to terminate would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer is not permitted to discriminate against a person by terminating or otherwise penalizing an individual because he or she holds a medical marijuana card or is a medical marijuana card holder who tests positive for marijuana components. Delaware's statute does not protect an employee from discrimination if he or she was impaired by marijuana on the employer's premises or during the hours of employment.

Finally, Delaware's Worker Adjustment and Retraining Notification Act ("Delaware WARN Act") has implications on certain terminations. The Delaware WARN Act requires qualified employers to notify employees before a mass layoff, plant closing or relocation that will cause "employment loss" as defined by the statute. The Delaware WARN Act applies to employers with a least 100 employees who work an aggregate of 2,000 hours per week. As with its federal counterpart, employees who do not receive the requisite notice from their employer prior to a mass layoff, plant closing or relocation will be able to seek back pay based on the average of his or her three-year regular rate of pay or at the employee's final rate of compensation, whichever is higher; the value of the cost of any benefits to which the employee would have been entitled; and costs and attorneys' fees. Employers may also be subject to a civil penalty of $1,000 per day of violation or $100 per day of violation per dislocated worker, whichever number is the greater, so long as such amount does not exceed what the employer could be liable for pursuant to federal law. The Delaware statute states that a civil action to enforce these rights may be brought in any court of competent jurisdiction.

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

### 6.1 Contractual Claims

Delaware law and courts respect the ability of parties to enter into contracts that define their relationship. If the terms of a contract are clear, the Delaware courts will not permit extrinsic evidence to interpret the intent of the parties or to vary the terms of the agreement. If a contract is unclear, a Delaware court will consider evidence outside of the four corners of the contract, such as prior agreements between the parties, other communications between the parties and the parties' course of dealing in order to determine the proper interpretation of the contract terms.

Contractual claims heard by Delaware courts include wrongful employment termination claims. Such claims frequently focus on whether a termination was properly classified as a "cause" or "not for cause" termination. The classification of a termination as "cause" or "not for cause" generally dictates the type of severance benefits received by the former employee. Contractually based restrictive covenant claims are also frequently litigated in Delaware. In addition to breach of contract claims related to competition, a new

employer may also bring claims for violation of contractual confidentiality provisions and concurrent trade secret claims. A former employer may also assert claims against an employee's new employer for tortious interference of contract. Other employment-related contract claims heard in Delaware include disputes over offer letters, stock option grants and enforcement of releases.

Contract disputes centering around alternative entity operating agreements, including management and partner roles, responsibilities and compensation, are frequently heard in Delaware.

There are multiple forums in Delaware to resolve contractual disputes. For example, the Delaware Court of Chancery, a court of equity, is frequently called upon to resolve disputes involving restrictive covenants when injunctive relief is sought. Additionally, Delaware's court of general jurisdiction, its Superior Court, is the location where state law discrimination claims, contractual claims and breach of an implied covenant of good faith claims are heard. The Delaware Superior Court has a Complex Commercial Litigation Division ("CCLD") with streamlined procedures and a set panel of experienced judges. The CCLD handles contractual disputes involving amounts in excess of $1 million. Employment contract disputes are also heard in the District of Delaware federal court.

### 6.2 Discrimination, Harassment and Retaliation Claims

The Office of Labor Law, Enforcement Division of Industrial Affairs ("DDOL") enforces state anti-discrimination law in Delaware. The DDOL provides 1) the employee with the ability to file a charge, 2) an opportunity for the parties to engage in agreed upon mediation and 3) investigates and issues a finding. Once the DDOL issues its finding, the complaining individual may file a lawsuit.

An employee's failure to exhaust the administrative process will result in the dismissal of a related lawsuit. A complaining party must elect a Delaware state or federal forum to prosecute an employment discrimination claim. Most such cases are filed in Delaware federal court.

Discrimination, harassment and retaliation claims can be brought under Delaware's Discrimination in Employment Act, Handicapped Persons Employment Act, Equal Pay Act and Delaware Equal Accommodations Law.

With respect to the newly categorized sexual harassment, an employer can be found responsible when: i) a supervisor's harassment results in a negative action against the employee; ii) the employer failed to take corrective measures against a non-supervisory harasser when the employer knew or should have known about the harassment; iii) a negative action is taken against an employee in retaliation for the employee participating in the Delaware Department of Labor's process, participating in a sexual harassment investigation or testifying about sexual harassment. Delaware's new harassment law provides affirmative defenses for employers when the harasser is a non-supervisor and the employer can demonstrate both 1) that the employer exercised reasonable care to prevent and correct promptly any harassment and 2) that the employee failed to take avail himself or herself of the preventive and corrective measures offered by the employer.

Under the Handicapped Persons Employment Act, claims can be brought for failure to hire, discrimination in the conditions of employment, wrongful termination and failure to accommodate. With respect to a failure to accommodate claim, an employer has statutory affirmative defenses including: despite reasonable accommodation, the potential employee or employee cannot satisfactorily perform the essential functions of the job; employment of the applicant or employee creates an unreasonable and demonstrable risk to the safety or health of the individual needing the accommodation or others; and the cost of the accommodation exceeds the statutory 5% cost limitation explained in Section **4.3 Discrimination, Harassment and Retaliation Issues** above.

### 6.3 Wage and Hour Claims

Delaware has enacted legislation that provides enhanced remedies for employees who claim that they are owed money for work already performed. The Delaware Wage Payment and Collections Act (the "DWPCA"), 19 Del. C., Chapter 11, is designed to encourage employers not to withhold wages that are lawfully due. The DWPCA provides this encouragement by expanding the scope of liability and remedies further than those otherwise available for a simple breach of contract claim. Essentially, it does this in three ways. First, it allows claims to be brought directly against officers and agents of the employer who knowingly allowed the statute to be violated. Second, it allows a successful employee to receive "liquidated damages", essentially doubling the amount of wages owed to the employee. Third, it allows the successful employee to be compensated for his or her attorneys' fees incurred in pursuing the claim.

Given the broad remedies available under the DWPCA, some plaintiffs have tried to expand the scope of its coverage to employees that do not actually work within the state but work for entities formed under the laws of the State of Delaware. Generally, those attempts have been unsuccessful.

Delaware has also enacted legislation to ensure that employers pay their employees the minimum wage. There is far less litigation under this statute than the DWPCA, for which there is no federal equivalent. Like the DWPCA, Delaware's minimum wage law provides for an award of attorneys' fees for successful litigants but does not allow for the possibility of liquidated damages.

### 6.4 Whistle-blower/Retaliation Claims

The Delaware Whistleblower Protection Act ("DWPA") is intended to provide protection for employees "who report violations of the law for the benefit of the public" and to "provide[ ] a check on persons in positions of authority, by ensuring that they do not take retaliatory action against subordinates who disclose misconduct". DWPA specifically prohibits an employer from discharging or otherwise discriminating against an employee for reporting a "violation" to the employer or to the employee's supervisor which he or she "knows or reasonably believes has occurred or is about to occur". A "violation" is defined to be "an act or omission by an employer … that is … [m]aterially inconsistent with, and a serious deviation from, standards implemented pursuant to a law, rule, or regulation promulgated under the laws of [Delaware]...."

The elements of a prima facie claim under the DWPA are: i) the employee engaged in a protected whistleblowing activity; ii) the accused official knew of the protected activity; iii) the employee suffered an adverse employment action; and iv) there was a causal connection between the whistleblowing activity and the adverse action. Since Delaware is an "at will" state, there have been many lawsuits filed attempting to fit the facts surrounding a termination within these elements. As with the federal and state discrimination laws, not only does the DWPA provide impacted employees with a remedy for wrongful termination, it also provides enhanced remedies if the claim is proven at trial. Those remedies may include back wages, reinstatement of benefits and seniority rights, expungement of records, actual damages and attorneys' fees.

In addition to DWPA, Delaware law provides statutory protection for alleged whistleblowing activities involving: i) campaign contributions; ii) child labor; iii) employment discrimination; iv) hazardous chemicals; and v) handicapped employee protection.

### 6.5 Dispute Resolution Forums

Delaware courts and administrative agencies universally favor alternative dispute resolution. As a result, depending on the nature of the dispute, there are often multiple opportunities for the parties to a dispute to seek the services of a third party – usually a mediator – to assist in resolving litigation without waiting for a court to decide the matter.

Many employment disputes in Delaware begin with the filing of a charge of discrimination with the Delaware Department of Labor ("the DDOL"). The filing of a charge is in most instances a prerequisite if an employee wishes to proceed with a lawsuit alleging discrimination or retaliation under either the federal or state statutes that provide remedies for those types of claims.

Once the charge of discrimination has been filed, the DDOL forwards a copy of the charge to the employer requesting a response to the allegations within twenty days. Along with a copy of the charge, the employee is sent a form that allows them to elect mediation in lieu of filing a response to the charge. Employers are encouraged to accept mediation for two reasons. First, it sometimes leads to a prompt resolution. Second, employers are not required to send their response to the charge (also known as a position statement) to the charging party directly if the mediation is unsuccessful.

If the DDOL concludes after conducting its investigation that reasonable cause exists to conclude that the charging party has been subjected to unlawful discrimination or retaliation in violation of state and/or federal law, then the parties are ordered to participate in a conciliation. A DDOL conciliation is essentially the same as a mediation in that a trained third party is charged with the responsibility of trying to encourage both parties to settle their dispute. If the conciliation is unsuccessful, the DDOL issues a right to sue for those claims asserted under state law and refers it the federal Equal Employment Opportunity Commission ('the EEOC") for review before it issues its own right to sue notice.

In most Delaware cases, discrimination cases are filed in the federal district court. While not mandated by court rules, most discrimination cases filed in federal court are referred for mediation to one of the four U.S. Magistrates. The timing of these mediations varies. In some cases, the parties want them done early, while in others one or both parties want to complete at least some formal discovery before participating in mediation.

In Delaware, the primary trial court is the Superior Court. In the Superior Court, virtually all cases are subject to mandatory alternative dispute resolution. In the event that the parties cannot agree, the default form of ADR is mediation. Unlike the federal court system, the mediators are usually selected by the parties. There are several former judges and attorneys who act as mediators as a substantial part of their practice. Unlike in federal court where the mediation fee is paid to the court and is relatively modest, the private bar acting as mediators charge widely divergent fees for their time.

Recently, the Superior Court issued a new rule mandating non-binding arbitration for cases involving less than USD50,000 in damages. This form of ADR is in addition to what already is required for any case filed in Superior Court and is intended to increase the likelihood of a prompt resolution.

### 6.6 Class or Collective Actions

There are several instances in which employees can bring employment-related class or collective actions. With respect to employment discrimination, Title VII provides for a class action mechanism whereby employers are unable to

discriminate against employees on the basis of race, color, religion, sex or national origin. Unlike the federal statute, the Delaware statute that provides protection from discrimination does not specifically address class actions.

With respect to wage and hour claims, the ability of employees to maintain a collective action for this type of violation is codified in the Fair Labor Standards Act. The federal statute states that collective actions may be maintained in state or federal courts. Employers are potentially liable for unpaid minimum wages, unpaid overtime compensation and an additional equal amount as liquidated damages. The employer can also be made subject to such legal and equitable relief as is necessary to remedy adverse actions taken against an employee in response to the employee enforcing his rights. In addition, the statute provides for costs and attorneys' fees to be assessed against the employer in connection with any violation. Like the FLSA, class actions are brought pursuant to the Delaware Wage Payment and Collection Act.

The Federal Worker Adjustment and Retraining Notification ("WARN") Act permits claims brought by a class of aggrieved employees. The federal WARN Act is enforced through the federal district courts in any district where a violation is alleged to have occurred or in a district in which the employer transacts business. An employer who violates the WARN provisions is liable to each employee for an amount equal to the back pay and benefits for the period of the violation, up to 60 days, but no more than half the number of days the employee was employed by the employer. Courts have the discretion to award the prevailing party's attorney fees. The remedies expressly provided for in the statute are deemed exclusive as the statute notes that federal courts are without authority to enjoin a plant closing or a mass layoff. Delaware also has a WARN Act. The Delaware WARN Act expressly contemplates that a class action may be brought in connection with any violation.

Delaware statutes do not address a party's ability to waive the right to bring a class action. As such, there is little Delaware law on this issue and the Delaware courts will likely be guided by federal case law with respect to such disputes.

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### 6.7 Possible Relief

In Delaware, remedies awarded for discrimination claims can be a mixture of back pay, lost benefits, front pay, compensatory damages including general and special damages, punitive damages and attorneys' fees and costs, as well as equitable relief such as hiring, promoting and reinstatement.

In cases involving restrictive covenants, injunctive relief is frequently sought. At times, preliminary injunctive relief is requested and a determination is made by the court prior to a full trial on the merits. To obtain preliminary injunctive relief in Delaware, a party must demonstrate a reasonable likelihood of success on the merits of the case, imminent irreparable harm if an injunction is not granted and that the balance of hardships weighs in favor of issuing the injunction. Since the preliminary injunction determination requires the court to determine the likelihood of success on the merits of the claims, it is not uncommon for restrictive covenant cases to be resolved after such a preliminary injunctive determination is made.

The remedies for other contractual based claims, such as those for severance, are determined based upon the terms of the contract and the damage that can be proven by the injured party. Delaware enforces employment contracts that shift fees to a prevailing party.

## 7. Extraterritorial Application of Law

Delaware typically applies the presumption against extraterritoriality with respect to its statutes. Therefore, conduct that occurs outside of Delaware generally may not be regulated by a Delaware statute. This presumption is explained in numerous Delaware court opinions.

The presumption against extraterritoriality is also demonstrated in Delaware's Wage Payment and Collection Act which defines an employee as "any person suffered or permitted to work by an employer under a contract of employment either made in Delaware or to be performed wholly or partly therein". The courts in Delaware have recognized that the Delaware General Assembly does not have the legislative jurisdiction to regulate conduct occurring outside of Delaware. Thus, while Delaware can readily regulate within its borders it cannot regulate the wages of an individual working in another state.