AIGA

Employment Laws for Design Firms Part Two

by Wendy Stryker

In the previous article, we looked at the hiring process and some important compensation issues. Now we're ready to discuss employment-related documentation, anti-discrimination laws, guidelines for leaves and accommodations, and laws that cover employee benefits.

3. What Written Agreements Should You Have with Employees as they Arrive or Leave?

Agreements with your employees are strictly governed by state laws. While it is up to the individual employer what should go into each agreement, here are some areas for consideration.

3a. Term vs. "At-Will" employment. Most states provide as a matter of law that, unless otherwise agreed by the employer and employee, employment is considered to be on an "at-will" basis. This means that either party can terminate the arrangement at any time and for any reason, except for those that are illegal[1]. Employers are advised to clearly state in any written documents, whether an employment agreement or offer letter, that employment is on an "at-will" basis. Employers who wish to engage employees for a specific term (such as a one- or two-year contract) are advised to consult counsel to prepare such documents.

3b. Other potential terms for employment agreements. Employers may wish to enter into written agreements with employees with respect to other subject matters, such as the protection of confidential documents and information, non-disparagement provisions (in which the employee agrees that s/he will not disparage the employer during or after employment), and who will own intellectual property created by the employee either as part of the employee's job, made using the employer's premises or materials, or created during the time employee is employed by the employer. Employers may also consider including contract provisions such as arbitration clauses (requiring employees to bring employment-related lawsuits in arbitration rather than in court) or other provisions known as "restrictive covenants." These can be used to prohibit employees from soliciting or working for clients after the end of employment, or from engaging in certain jobs that compete with the employer. State law will govern how broad these provisions may be, and they can be prohibited in certain jurisdictions. California, for example, prohibits non-compete agreements and limits the use of non-solicitation agreements as well.

3c. Commission Agreements. Employers may wish to pay employees commissions on sales in addition to salary. The FLSA (Fair Labor Standards Act, which we discussed in the previous article) does not require the payment of commissions. Should an employer decide to pay an employee commissions, however, state laws may mandate that such an agreement be in writing, and may mandate that the parties agree on certain provisions, such as when commissions are considered "earned" (i.e. an employer may designate that commissions are not earned until the employer actually receives payment from the client), when such commissions are to be paid, and what happens to commissions when an

1 See section 4 below.

employee ceases to be employed at the company. Employers should take car in creating such agreements to guard against creating contract terms in which the withholding of commissions (such as the treatment of draws or "clawbacks"—a term that refers to the recovery of money that has already been disbursed) operate to create an illegal deduction from wages.

3d. Employee Handbooks. Employee handbooks can be a valuable vehicle to describe firm policies about leave and benefits, and to establish codes of conduct. Firms should also consider using handbooks to establish anti-discrimination and anti-harassment policies, privacy policies, and social media policies. Employee handbooks are not a substitute for contracts with individual employees; if firms wish to enter into contractual terms with employees, such as with respect to confidentiality, such promises should be contained in a separate agreement. Employers should also utilize clear language to communicate that their handbook is not a contract, and that the firm is not, for example, promising that certain benefits will continue when the firm wishes to maintain the discretion to change policies from time to time.

3e. Termination Letters and Separation Agreements. What document should a firm use when it is time for an employee to end employment? Some states require than an employer provide a written termination letter including information such as the last day of employment, the status of employee benefits, and whether such employment ended for "cause" (a term that, if not defined in a contract, generally means severe conduct or excessive absenteeism but not poor job performance). In cases where an employee is leaving employment on a voluntary basis, i.e. for other employment, firms may consider including information in the letter indicating that an employee has resigned their employment.

In circumstances where an employer has paid the employee compensation in addition to the employee's last paycheck or earned commissions, for example where a dispute has arisen regarding payment or discrimination, the firm may also wish to consider a written separation agreement. These agreements contain provisions for what payments will be made, generally in exchange for a release of claims against the firm. Firms should note that the requirements for releases under the ADEA (the Age Discrimination in Employment Act, which we discussed in the previous article). must be treated differently from releases under other anti-discrimination provisions and that additional protections are provided where employers are terminating the employment of two or more employees during the same period of time, when at least one of these employees is over the age of 40. Employers who have not previously obtained agreements from employees with respect to confidentiality, non-disparagement or non-solicitation may consider including such provisions in separation agreements as well.

4. Avoiding Discrimination Claims

4a. Federal, State, and Local laws. Almost every employee is subject to protection against discrimination at work under a number of federal, state, and local laws. These laws vary in the scope of their protection. Many of these federal laws were discussed in the previous article [see section 1(c)(i)]. Just as these laws—TITLE VII, PDA, ADEA, ADA and GINA—protect employees from discrimination in hiring, they also protect employees of covered employers from discrimination in other aspects of employment, including with respect to compensation, promotions, training, and termination from employment based on protected class characteristics. Employers who take adverse employment-related actions against any employee who asserts their rights or makes a complaint under any of these statutes may also be liable for retaliation, so long as the employee's complaint was made in good faith.

4b. Laws prohibiting sexual harassment. TITLE VII of the Civil Rights Act of 1964 and related state/local laws also provide the basis for protecting employees of covered employers against both "quid pro quo" and "hostile workplace environment" sexual harassment. The Equal Employment Opportunity Commission (EEOC) has defined sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."

Sexual harassment is not limited to making inappropriate advances. In fact, sexual harassment includes any unwelcome verbal or physical behavior that creates a hostile work environment. Examples of "hostile work environment" sexual harassment include:

- *Sharing sexually inappropriate images or videos, such as pornography or salacious GIFs, with co- workers.*
- *Sending suggestive letters, notes, or e-mails.*
- *Displaying inappropriate sexual images or posters in the workplace.*
- *Telling lewd jokes, or sharing sexual anecdotes.*
- *Making inappropriate sexual gestures.*
- *Staring in a sexually suggestive or offensive manner, or whistling.*
- *Making sexual comments about appearance, clothing, or body parts.*
- *Inappropriate touching, including pinching, patting, rubbing, or purposefully brushing up against another person.*
- *Asking sexual questions, such as inquiries about someone's sexual history or their sexual orientation.*
- *Making offensive comments about someone's sexual orientation or gender identity.*

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

» *Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.*
» *The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee such as a client or customer.*
» *Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex.* For example, it is illegal to harass a woman by making offensive comments about women in general.
» *A hostile workplace environment can be created on the basis of offensive remarks about a person's other protected class characteristics, such as race or national origin.*
» *Sexual harassment can take place at work and at other extensions of the work environment, such as work-related social events and under certain circumstances, via social media and other forms of online interaction.*
» *The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.*
» *Unlawful sexual harassment may occur without economic injury to the victim and can occur even where a victim remains employed in their job.*

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

In addition to the federal anti-discrimination and harassment laws, most states and many localities have laws providing expanded protections. These protections can include coverage for employers with fewer employees. For example, while TITLE VII applies to employers of 15+ employees, New York state and city anti-discrimination laws cover employers of only four or more employees, and cover employers of only one employee for sexual harassment claims.

Employees who have been discriminated against or harassed are entitled to seek a range of damages against their employers, including compensatory damages (i.e. payment of salary for the period the employee has been out of work), emotional distress damages, punitive damages, and payment of their attorneys' fees.

4c. Additional anti-discrimination laws. Other laws that protect employees from discrimination in employment include the Equal Pay Act of 1963 ("EPA"),

29 U.S.C. § 206, which requires that employers pay male and female employees the same wages for performing the same job, thus mandating "equal pay for equal work". The EPA does not address pay equities with respect to other characteristics such as race or religion; the EPA applies only to gender. The Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1324, prohibits employers of four or more employees from discriminating against applicants and employees on the basis of their citizenship or national origin. Finally, the Civil Rights Act of 1866, commonly known as Section 1981, protects all private employees (except employees of the federal government) from discrimination in employment on the basis of race.

5. Leaves and Accommodations

There are a number of different federal, state, and local laws mandating when an employer is required to provide leave (both paid and unpaid) to employees. These laws can contain complicated provisions as to eligibility, how such laws overlap and interact with each other, and how employers must treat employees regarding use of accrued leave time and returning to work.

5a. The Family and Medical Leave Act ("FMLA"). The FMLA requires covered employers to provide eligible employees up to 12 weeks of unpaid leave due to the birth or adoption of a child, or their own or a family member's serious health condition (26 weeks for a serious injury or illness due to military service) and mandates continuation of medical benefits for the 12-week (or 26-week) leave period. For purposes of the FMLA, a "covered employer" has at least 50 employees; an "eligible employee" has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other. The most common serious health conditions that qualify for FMLA leave are: (i) conditions requiring an overnight stay in a hospital or other medical care facility; (ii) conditions that incapacitate an employee or his/her family member (for example, that render them unable to work or attend school) for more than three consecutive days and involve ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication); (iii) chronic conditions that cause occasional periods when your employee or their family member is incapacitated and require treatment by a health care provider at least twice a year; and (iv) pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically- required bed rest). The FMLA requires that an employee who has taken FMLA leave be reinstated to the same job upon that employee's return to work, or an equivalent job if the original position is no longer available.

5b. The Americans with Disabilities Act ("ADA"). The ADA and its amendments prohibit discrimination on the basis of disability in employment

and include the requirement that covered employers (employers with 15 or more employees) provide “reasonable accommodations” to applicants and employees with disabilities that require such accommodations due to their disabilities. A reasonable accommodation is, generally, "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. pt. 1630 app. §1630.2(o). Reasonable accommodations can include providing assistive technology (such as a standing desk for employees with back pain rising to the level of a protected disability), modifications to work schedules or job duties, and providing leave when needed for a disability, even where an employer does not offer leave to other employees, or where FMLA or other leave has been exhausted. Reasonable accommodations do not require an employer to provide paid leave beyond what it provides as part of its paid leave policy; additional leave under the ADA is generally on an unpaid basis. While an individual with a disability may request a change due to a medical condition, this request does not necessarily mean that the employer is required to provide the change. A request for reasonable accommodation is the first step in an informal conversation—called the “interactive process”—between the individual and the employer as to what accommodations may be required and which will suffice to enable an eligible employee to perform the core functions of the job. Under the ADA, an employer can deny requests for leave when it can show that providing the accommodation would impose an undue hardship on its operations or finances. The ADA also requires the employer to hold the employee’s job open during any covered leave period, or to provide the employee with an alternative position with equivalent pay and benefits upon their return.

IMAGE 1:
The Americans With Disabilities Act is administered by the Equal Employment Opportunity Commission: www.eeoc.gov

Protections under state and city laws are generally similar to federal standards (i.e. require that employers not discriminate and provide reasonable accommodations) but may vary in respects that are more protective of employees including a broader definition of what constitutes a “disability”, covering additional and smaller employers, or requiring a more robust “interactive process” including documenting such discussions in writing.

5c. The Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”). USERRA imposes affirmative obligations on public and private employers to provide employees with leave to serve in the military (including active duty, Reserves and National Guard). USERRA also requires employers to reinstate employees returning from military leave and to train or otherwise qualify those returning employees. The Act guarantees employees a continuation (at the employee’s expense) of health benefits for the first 24 months of military leave and protects an employee’s pension benefits upon proper return from leave. Finally, the Act requires that employers not discriminate against an employee because of past, present, or future military obligations.

Unlike many other federal statutes that require an employer to have a minimum number of employees to be covered under the law, USERRA contains no minimum employee requirement.

5d. Jury Duty/witness leave/voting leave. Federal law does not currently address an employer's obligation to an employee regarding time off for jury duty or to be a witness in a legal proceeding. These matters have been left to individual state law. While most states have laws prohibiting employers from discharging employees for engaging in these activities, very few (currently, Alabama, Colorado, Connecticut, Georgia, Louisiana, Massachusetts, Nebraska, New York, Tennessee, and the District of Columbia) require a certain amount of paid leave. Other states prohibit employers from requiring employees to utilize vacation or other paid leave for this purpose.

Federal law also does not require that employers allow their workers time off to vote. However, the majority of states have at least some level of protection for employees who want to leave work to engage in their civic duty. The specifics vary by state, and employers are required to know the laws and to provide adequate accommodations according to the rules of that state. These laws generally require that employers provide time off to vote where there is not sufficient time before or after the workday when the polls are still open.

5e. Bereavement leave. Bereavement leave is leave taken by an employee due to the death of another individual, usually a close relative. The time is usually taken by an employee to grieve the loss of a close family member, prepare for and attend a funeral, and/or attend to any other immediate post-death matters. Currently, there are no federal laws (and almost no state laws) that require employers to provide employees either paid or unpaid leave. Employers, at their discretion, may maintain bereavement leave policies or practices.

5f. Paid Family Leave laws. Family leave (also known as maternity or paternity leave) laws allow employees to take time off from work to care for and bond with a new child. These laws are separate from leave laws covering periods in which a woman may be considered "disabled" as a result of birth or pregnancy-related complications, which may be covered under the ADA and related state and local laws.

There is currently no federal law mandating that employers provide paid parental bonding leave; under the FMLA, employers are required to provide only unpaid leave. However, many states have taken steps to close this gap and have added laws granting employees paid and job-protected time off to bond with a new child (i.e. California, New Jersey, New York, and Rhode Island currently mandate the provision of paid family leave funded through employee-paid payroll taxes and administered through their respective disability programs).

Other states have passed laws providing expanded FMLA-type coverage. For example, California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington and Wisconsin, as well as the District of Columbia, have their own FMLA and/or pregnancy leave laws that are more generous to employees than the corresponding federal laws, e.g., requiring coverage of employers with fewer than 50 employees, providing an expanded definition of "family," or providing leaves of longer duration than 12 weeks. Other states mandate that employers provide employees with a certain amount of parental leave each year to attend school-related functions.

5g. Paid Sick and vacation leave. There is no federal law mandating that employers provide paid sick leave. However, at least nine states (Arizona, California, Connecticut, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, and Washington, plus the District of Columbia), and 30 cities (including New York City, Chicago, Los Angeles, Philadelphia, San Francisco, and Seattle) have enacted paid sick leave laws covering full-time, part-time, and even seasonal employees. Many of the paid sick leave laws also include prohibitions against retaliation for employees using their sick leave entitlements.

There are no federal or state laws mandating that an employer provide paid vacation leave, although most employers choose to do so to prevent employee burnout and maintain morale. States may vary, however, in how employers are required to treat accrued vacation days, with some allowing employers to have written “use it or lose it” policies, and others mandating that accrued vacation is an entitlement that must be paid out to departing employees when their employment at the firm has ended.

Employers are not required to provide separate banks of vacation and sick days and may consider whether combined “PTO” (“paid time off”) policies are right for their workplace. When creating vacation and/or sick leave policies, however, employers should be mindful of the legal requirements of their location which may require separate tracking of sick leave accruals.

5h. Holiday leave. Holiday leave allows employees to take time off on specific days they would otherwise be required to work. Both the federal government and state governments have designated certain days as holidays. However, most states do not mandate that private employers provide employees with time off, either paid or unpaid, on those days. A small number of states (i.e. Massachusetts and Rhode Island) require that employees be provided with time off or premium pay for certain holidays, so employers should be sure to check their local laws when formulating leave policies. Employers should also keep in mind that under some circumstances, they may be obligated to provide time off as a reasonable accommodation for employees with religious beliefs.

5. Employee Benefits

Employee benefits fall into two categories: those required by law and those an employer chooses to offer voluntarily.

In addition to the leave benefits described above, benefits required by law include the following:

» *Workers' Compensation:* This insurance offers benefits to employees who become ill or are injured at work. The details are different in every state because coverage is dictated at the state level. In addition, some states require employers to purchase disability insurance.
» *Short-Term Disability:* Disability benefits are employee benefits that guarantee income if an employee cannot work due to illness or an accident. Some states, such as California, Hawaii, New Jersey, New York, and Rhode Island, require that employers carry such policies. In other states, employers may carry them as an option. Short-term disability insurance programs usually run from 30 to 90 days, but some may continue for longer. Benefits vary under short-term programs and usually range from about 60 percent to 70 percent of an employee's pre-disability income, subject to a weekly maximum. Additionally, there may be a waiting period before employees are eligible to receive short-term benefits.
» *Long-Term Disability:* Long-term disability insurance programs, which are provided voluntarily by many employers, generally take over after short-term benefits have been exhausted. Benefits usually cover a percentage of an employee's pay (e.g., 60 percent of an employee's pre-disability income) and may be subject to a monthly maximum. Long-term disability benefits are typically reduced by the amount of Social Security disability benefits and/or workers' compensation benefits that the employee may receive.
» *Social Security:* Employers are required to pay Social Security taxes. This is in addition to the amount withheld from employee checks on the first $128,700 of annual income (this maximum generally increases year to year). The current rate is 6.2% each for the employee and the employer (for a combined total of 12.4%). Employers must also pay a tax of 1.45% for Medicare. An equal amount must be withheld from employee checks up to $200,000 in annual income, after which the employee rate increases to 2.35%.
» *Health Insurance:* Employers with 50 or more full-time equivalent (FTE) employees are required to provide health coverage to full-time employees or else pay a tax penalty under the Patient Protection and Affordable Care Act (usually referred to as the "ACA"). For the purposes of the statute, full-time employees are defined as those who work an average of 30 hours a week or more. Employers with fewer than 50 FTE employees are not subject to these tax penalties for not offering health insurance

IMAGE 2:
The Affordable Care Act and Medicare are both administrated by the Department of Health and Human Services. ACA regulations and guidance for employers can be found at www.hhs.gov. Consumer information can be found at www.healthcare.gov

coverage, although employers providing such health insurance may be eligible for tax credits.

» *COBRA:* Employers with 20 or more employees are subject to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. § 1161 et seq. COBRA allows departing employees to maintain their insurance coverage at the employer's group rates for a period of up to 18 months, provided that the departing employee pays the full premium. This applies to any individuals who were on the group plan: the former employee, a spouse, dependent children, and retirees.

State requirements for these benefits may vary and may provide greater coverage and/or a greater benefit to eligible employees.

Conclusion

Employment law is complicated. Doing everything correctly can be a challenge for a first-time entrepreneur who is launching a small company. Eventually, your firm may grow to the point where you can hire a full-time HR professional. In the meantime, it's wise to study these requirements, maybe pick up a book on the subject, and perhaps sign up for a continuing-education course. Also—don't hesitate to seek help from an appropriate legal advisor.

IMAGE 3:
The Social Security Administration is an independent federal agency: www.ssa.gov

DISCLAIMER:
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