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Contributed by Ray Quinney & Nebeker P.C.

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Ray Quinney & Nebeker P.C. covers key practice areas that encompass all areas of employment and labor law litigation (Title VII, ADA, Fair Labor Standards Act, Labor Relations, ERISA litigation, Family Medical Leave Act, Immigration, Discrimination and Harassment, Noncompetition Agreements, OSHA, Worker's Compensation, Whistleblower and Executive Agreements) and has served clients in Utah, the western region, and across the country since 1940. With over 100 attorneys in two Utah offices, Ray Quinney & Nebeker offers clients an experienced, talented, and diverse team of

attorneys supported by qualified associates, paralegals, and staff. A broad client base includes large multinational employers as well as small employers in many locations and industries, including banks, insurance companies, financial services firms, manufacturers, Fortune 500 companies, healthcare providers and hospitals, energy companies and utilities, entrepreneurs and emerging businesses. The firm represents the needs of numerous individuals and privately held local businesses, as well as nonprofit and charitable organizations.

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

1.1 “Gig” Economy and Other Technological Advances

Utah has one of the most highly educated workforces in the nation. Many companies recognize the value of Utah’s highly educated workforce, pushing 2019 job growth in Utah to 3.19%, making Utah number two for total job growth in the United States. Much of this growth is attributable to the high-tech industry anchored along Utah’s Wasatch Front, known locally as ‘Silicone Slopes’.

Silicone Slopes is home to numerous high-tech industry leaders, including Adobe Systems, SanDisk, IM Flash Technologies, and EA Sports. The presence of these companies in Utah provides ample evidence that the state’s infrastructure – at many levels – has fully matured to support business growth in the area of cyberspace, artificial intelligence, social media and other technological advances. Policy makers, thought leaders and educational institutions have embraced Silicone Slope businesses, which has aided many high-tech companies to locate and grow on the Wasatch Front.

Utah’s technology workforce is also exceptionally young. As a result, companies seeking to locate in Utah must cater to the interests of younger employees. Some Utah companies have come to recognize that younger Utah workers demand opportunities to learn and grow at the company and desire recognition and mentorships in their community and at work. Successful Utah companies address these concerns by regularly surveying employees about their interests and skills, aligning those skills with business needs, offering flexible schedules and adopting formalized mentoring programs that enable employees to succeed at work, and in the community at large.

Utah does not appear to have departed from the rest of the nation with respect to what is often referred to as the ‘gig’ economy. Nationally, in 2017 the share of workers engaged in ‘alternative work practices’ was 10.1%, nearly the same percentage of workers so engaged in 1995. Utah’s gig economy is probably experiencing the same stasis, perhaps suggesting that the current strong job economy is keeping technology workers fully employed in traditional work environments.

Nonetheless, Utah has seen its fair share of job growth in drive-share and other ‘gig’ sectors of the state’s labor market. Like in other states, Utah employers who perform services in this area should take care to ensure they are properly classifying gig workers as employees or independent contractors. The U.S. Department of Labor and Utah’s Labor Commission regularly investigate Utah employers on questions related to, for example, whether the employer has properly classified a worker as an independent contractor. Misclassifying an ‘employee’ as an ‘independent contractor’ can lead

to employer liability for a failure to provide benefits, failure to make proper withholdings, and in other areas.

1.2 “Me Too” and Other Movements

Like the rest of the nation, Utah is responding to employment issues associated with the ‘Me Too’ movement, concerns about on-line privacy and due process, and fairness issues. The ‘Me Too’ movement has brought an increased awareness of sexual harassment issues throughout the state. As a result, our firm has seen a marked increase in client requests for anti-discrimination and anti-harassment training for management-level and staff-level employees.

While Utah lacks the high-profile sexual harassment incidents seen elsewhere in the nation, it is clear that employees are highly sensitized to sexual harassment issues and – perhaps more important – their rights to protection from hostile work environments.

Privacy issues are also front and center in Utah. Employees and employers are fully aware of recent and dramatic incidents of hacking and data breaches that have sensitized many to the need to protect personal identifying information in the workplace and elsewhere. Utah’s Protection of Personal Information Act requires employers to protect personal identifying information. While the Act does not create a private right of action, Utah’s Attorney General can prosecute violations of the Act, which carries a civil penalty of up to USD100,000. Prudent employers are well aware of this law, and their employees’ sensitivity to protection of personal information.

1.3 Decline in Union Membership

Utah is a right-to-work state and has been since 1955, when it became the 17th state to enact right-to-work legislation. Since then, union membership in Utah has steadily declined, consistent with national trends. In 1964, 23.8% of Utah’s workers were union members, but this proportion declined precipitously over the next 50 years, such that by 2016, only 4.7% of Utah workers were union members and by 2018, the number had dropped further to 4.1%, giving Utah the third lowest rate of union membership among all 50 states and the District of Columbia.

The reasons for Utah’s particularly low rate of union membership are probably the same as those for the nation as a whole. In addition, Utah is the youngest state in the nation and politically conservative.

Because of this low rate of union membership, labor strikes and other labor unrest are very rare in Utah.

1.4 National Labor Relations Board

In general, decisions of the National Labor Relations Board have relatively little impact in Utah because of the very low rate of unionization. Nevertheless, during the Obama

administration, the Board issued numerous rulings that impacted non-union employers. For example, the Board ruled that employers, whether union or non-union, deprived their employees of the right to engage in protected, concerted activity simply by issuing employee handbooks with typical 'at will' disclaimers or policies requiring employees to work together 'harmoniously'. Such pro-union, anti-management decisions are now being discarded by the more business-friendly Board appointed by the incumbent administration.

For example, the Board has returned to a narrower definition of joint employment, a test for statements in employee handbooks that takes into account legitimate employer interests and not just potential impact on protected concerted activity, its previous position that employers may unilaterally change working conditions so long as the change is consistent with past practices, and a requirement that unions proposing so-called 'micro units' show that the workers in such units are sufficiently distinct to justify separate status from the rest of a larger potential unit, among other decisions.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

Determining whether a worker is properly classified as an employee or an independent contractor can have significant implications for an employer. Likewise, it is important to determine whether the employer may be considered a joint employer of a worker.

Employers are responsible for properly classifying their workers. Such determinations must be made on a case-by-case basis. Under Utah law, like federal law, there is no single test for determining whether a worker is an employee or an independent contractor. For example, under the Utah Employment Security Act regulations, the analysis focuses on whether the worker is customarily engaged in an independently established trade or business, and free from the employer's control and direction while performing services for the employer. The analysis under the Utah Workers' Compensation Act also examines several similar factors, including the employer's right to exercise direction and control over the employee, the provision of equipment, the right to hire and fire, and the method of payment, ie, wages/fees or payment for a completed job or project.

Various federal agencies, including the Internal Revenue Service (IRS) and the Department of Labor (DOL), use their own tests for classifying workers. The Utah Tax Commission applies the factors adopted by the IRS.

Employer liability for improper worker classification may include the following: federal and state tax liability, unemployment contributions, damages for workplace injuries,

unpaid overtime and minimum wage violations, and criminal penalties.

Employers must also be aware of the joint employer doctrine, which makes it possible for an employer to be liable for the conduct of a worker, or his or her employment-related claims, although the worker is not an employee of the employer, eg, a worker on assignment from a temp agency. Under the Fair Labor Standards Act (FLSA), for example, if a joint employment relationship is found to exist, both employers are responsible for compliance with the FLSA. Courts analyzing the joint employer doctrine under the FLSA have historically applied an economic realities test, which examines whether the employee depends on the alleged employer for his or her economic livelihood based upon the working relationship. While various courts apply different tests to determine whether entities are joint employers, the primary issue for most courts is the economic reality of the situation. In the Tenth Circuit, for example, courts apply a five-factor version of the economic realities test.

The DOL, however, recently proposed a new four-factor test that considers whether the potential joint employer actually exercises the power to:

- hire or fire the employee;
- supervise and control the employee's work schedules or conditions of employment;
- determine the employee's rate and method of payment; and
- maintain the employee's employment records.

The proposed rule is still under review.

Utah is one of several states that enacted legislation aimed at protecting franchisors from joint employer liability. Utah amended the Utah Payment of Wages Act, the Utah Anti-discrimination Act, and the Utah Employment Security Act to state that a franchisor is not deemed a joint employer of a franchisee's employee so long as the franchisor exercises only the type or degree of control customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.

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

In Utah, employment relationships are presumed to be 'at will'. Thus, both the employer and the employee may terminate the employment relationship at any time without cause and without notice. An employer, however, may enter into an express agreement with an employee to specify certain employment terms, including modifying the at-will nature of the agreement.

Even in the absence of an express contract, Utah courts may find that the employer and employee intended to create an implied-in-fact contract. Evidence of such intent may include announced personnel policies, employment manuals, the course of conduct between the parties, and relevant oral representations. Thus, while it may make sense to use offer letters, handbooks, manuals and other policy directives to establish an employee's benefits, compensation and status (full-time/part-time, exempt/non-exempt), such documents should prominently display 'clear and conspicuous' language disclaiming any contractual relationship, if the employer wishes to maintain an 'at-will' relationship.

2.3 Immigration and Related Foreign Workers

Utah employers who employ 15 or more employees must use a status verification system, such as E-Verify, to confirm their employees are eligible to work in the United States. However, there is currently no actual penalty for noncompliance.

According to the American Council on Immigration, about 11% of Utah's employees are immigrants (born outside the United States).

2.4 Collective Bargaining Relationship or Union Organizational Campaign

A global employer must accommodate its employee relations to federal labor laws whenever its employees are represented by a union. As a right-to-work state, Utah does not impose any collective bargaining obligations beyond those required by federal law. Union organizing campaigns are also governed exclusively by federal law. A global employer acquiring a Utah business is not likely to encounter union issues because of Utah's generally very low rate of unionization, but should nevertheless conduct appropriate due diligence to determine whether any employees of the business being acquired are represented by a union.

3. Interviewing Process

3.1 Legal and Practical Constraints

Wage and Salary History

Utah does not have a state law prohibiting employer inquiries into an applicant's wage or salary history.

Criminal History and Background Checks

Under Utah's Employment Selection Procedures Act, an employer may request an applicant's Social Security number, date of birth or driver's license number only if:

- the request is applicable to all applicants applying for the position; and
- the information will be used by the employer to:
 - (a) obtain a criminal background check;
 - (b) obtain a credit history subject to the FCRA;
 - (c) obtain driving records from the Driver License

Division;

- (d) determine whether the applicant was previously employed by the employer or previously applied with the employer; or
 - (e) to provide it to a government entity for specified purposes; and
- the applicant consents.

An employer's use of this collected information is generally limited to determining whether to hire the applicant.

With certain exceptions, public employers may not exclude an applicant from an initial interview because of a past criminal conviction or require an applicant to disclose criminal convictions on an employment application. Private employers are not subject to this prohibition.

Age and Other Protected Categories

The Utah Antidiscrimination Act prohibits discrimination based on race, color, sex, pregnancy, childbirth or pregnancy-related conditions, age, religion, national origin, disability, sexual orientation or gender identity. Employers should not ask interview questions concerning these protected categories, unless related to a bona fide occupational qualification. In addition, under the Utah Antidiscrimination Act, an employer may not refuse to hire a person based on his or her lawful expression regarding the person's religious, political or personal convictions, including convictions about marriage, family or sexuality, unless the expression is in direct conflict with the essential business-related interests of the employer. Accordingly, employers also should not ask applicants about their political beliefs or activities unless related to an essential business-related interest.

4. Terms of the Relationship

4.1 Restrictive Covenants

As a general rule, Utah's covenant not to compete laws are employer-friendly and favor the enforcement of restrictive covenants. However, recently, the Utah legislature has restricted the parameters of enforceable covenants not to compete. Under Utah's Post-employment Restriction Act, which commenced May 10, 2016, any new non-compete covenant which exceeds a period of one year from when an employee's employment has terminated is void.

In addition, to enforce a covenant not to compete, a Utah employer must establish that it is reasonable in geographic scope. As a general matter, Utah employers should closely scrutinize covenants not to compete to ensure that they pertain to a geographic area confined to the same geographic of where the employer does business. While there is Utah case law that recognizes enforceability of even worldwide covenants not to compete, employers must take great care

to ensure their covenants not to compete are restricted to the geographic market area in which they in fact compete.

In addition, to enforce a covenant not to compete in Utah a Utah employer must be prepared to demonstrate that a breach of a covenant not to compete would threaten an identifiable protectable interest. Customer relationships, also known as good will, and trade secrets, generally constitute protectable interests in Utah that will warrant enforcement of a covenant not to compete. As a result, Utah employers will generally be unsuccessful in attempting to enforce covenants not to compete against low-level employees who have little or no access to trade secret information. In contrast, high-level employees with access to trade secret information or who are responsible for customer relationships and good will may be enjoined by a court enforcing a properly drafted covenant not to compete.

If a covenant not to compete is declared unenforceable, the employer seeking to enforce it will be liable for the employee's attorney fees and costs, as well as any other damages.

4.2 Privacy Issues

Utah has adopted the Uniform Trade Secrets Act for its trade secret laws. Utah's thriving high-tech industry and the growth of Silicone Slope-based companies has heightened attention on the protection of trade secrets and confidential and proprietary information. Thus, as a general proposition, Utah courts will not hesitate to take action, including providing employers with injunctive relief, against employees and others who violate companies' trade secret rights.

Under Utah's Trade Secrets Act, a trade secret is defined as information, including a formula, pattern, compilation, program device on a process that derives independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Utah's court dockets are flush with claims for enforcement of companies' trade secret rights. This is likely the consequence of Utah's burgeoning high-tech industry. It is also evidence that Utah businesses will not hesitate to protect their trade secret rights.

4.3 Discrimination, Harassment and Retaliation Issues

Companies with strong human resource policies and procedures, including effective anti-sexual harassment policies, fare well under Utah's anti-discrimination laws. Like many jurisdictions, it is unlawful in Utah to discriminate on the basis of numerous protected classes, including sexual orientation. The Utah Antidiscrimination and Labor Division enforces Utah's antidiscrimination laws and adjudicates hundreds of claims of discrimination a year. In addition, Utah's

employment plaintiffs' lawyers file numerous discrimination claims in our state and federal courts.

While it is too soon to determine whether the 'Me Too' movement has affected the rates at which plaintiffs file discrimination claims, quite clearly Utah employers are sensitive to the need to monitor and strengthen anti-discrimination policies in the workplace. In addition, many employers are conducting implicit bias training to further protect their employees against discrimination in the workplace.

One unique aspect of Utah's Antidiscrimination Act is a 2015 provision that, not without controversy, is intended to balance religious freedom and protections against discrimination of LGBTQ people in the workplace. The 2015 legislation protects employees who want to express their religious or moral beliefs in the workplace 'in a reasonable, non-disruptive, and non-harassing way.' It also states that an employer may not discharge or otherwise take adverse action against a person for the lawful expression of, or expressive activity outside of the workplace regarding, the person's religious, political or personal convictions, 'including convictions about marriage, family or sexuality, unless the expression or expressive activity is in direct conflict with the essential business-related interests of the employer.'

These nuances in Utah's anti-discrimination law highlight the need for strong human resource policies for any Utah employer. Good training practices will ensure that managers understand the nuances of Utah's laws, help Utah employers protect the rights of their employees and promote a productive workforce.

4.4 Workplace Safety

Utah employers are subject to the federal Occupational Safety and Health Act ('OSHA'), which is enforced, for the most part, by the Utah Occupational Safety and Health Division ('UOSH'), pursuant to federal approval of Utah's state plan. State plans must be at least as effective as OSHA in protecting workers and preventing workplace injuries. Utah adopts most federal OSHA safety standards, but has promulgated additional requirements in numerous industries. Employers seeking to employ workers in the State of Utah should consult rules for their particular industry to determine whether UOSH has promulgated safety rules beyond the rules promulgated by OSHA.

UOSH is a division of the Utah Labor Commission. UOSH enforces safety protections by conducting inspections and issuing citations. Such inspections can be random or prompted by a worker complaint or other tip. Once a citation is issued, the employer can request an informal conference to attempt to reach a settlement with the Division. Alternatively, or if the informal conference does not resolve the issues, the employer can formally challenge a citation by filing a notice of contest, which initiates an administrative

adjudication process within the Labor Commission. Cases are presented to and decided by an administrative law judge. ALJ rulings can be appealed to the Appeals Board within the Labor Commission and then to the Utah Court of Appeals. As with federal safety rules, Utah rules bar retaliation against employees who ‘blow the whistle’ on safety violations.

UOSH also offers free consultation services to employers upon request. The consultation services are offered without risk of citation for safety violations detected during the process of consultation.

4.5 Compensation and Benefits

Employee benefits in Utah are governed by the Employee Retirement Income Security Act (‘ERISA’), which comprehensively regulates most types of employee benefits for virtually all private employers. Employee ‘COBRA’ rights are also governed by federal law. In general, there are no Utah laws that affect employer obligations under ERISA or COBRA.

However, Utah employers typically distribute employee handbooks to their workforce for several reasons. First, employee handbooks are a useful way to confirm that employees are employed ‘at will’, and that the relationship can be terminated at any time and for any reason (except an illegal reason) by either the employee or the employer. Second, employee handbooks are used to promulgate the basic rules and policies that govern the workplace. For example, the employer’s discipline policy is usually stated in the employee handbook. Third, sexual harassment and other policies are also typically included in the employee handbook.

The vast majority of Utah employers include a disclaimer of contractual status in the handbook to guard against the possibility that an employee might sue the employer for violation of a rule stated in the handbook. Policies that require employees to protect confidential and proprietary information, as well as other policies that may need to be enforced in a court, may be included in the handbook, but should also be included in specific agreements because of the contract disclaimers in employee handbooks.

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

There is a presumption of at-will employment in Utah, which means employees can be discharged at any time for any reason. The at-will presumption can be rebutted by evidence of an express or implied promise or agreement.

Upon termination, employees are not entitled to severance pay or accrued vacation or sick pay, unless the employer has contractually agreed to do so.

Utah does not have a statute similar to the federal Worker Adjustment and Retraining Notification Act (‘WARN’). Accordingly, employers need to comply with WARN, but there are no additional state rules.

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

6.1 Contractual Claims

As explained above, in general, employment in Utah is ‘at will’. Consequently, both the employer and the employee may terminate the employment relationship at any time without cause and without notice. In Utah, this general rule is subject to several exceptions.

First, the employment relationship may be governed by an implied or express contract that modifies the at-will nature of the relationship, eg, limits the parties’ ability to terminate the employment relationship. For example, the express terms of an employee’s contract may require the employer to demonstrate cause for terminating the employee. Such an employee terminated without cause may bring a claim for breach of contract.

In addition, Utah courts may find that the parties intended to create an implied-in-fact contract. Evidence of the parties’ intent may include announced personnel policies, employment manuals, the course of conduct between the parties, and relevant oral representations. Employers, however, may avoid any contractual relationship by using ‘clear and conspicuous’ disclaimer language that is prominently displayed.

Second, notwithstanding the at-will nature of an employment relationship, Utah courts have determined that an employer may not terminate an employee for a reason that violates a clear and substantial Utah public policy. The Utah Supreme Court has recognized four categories of public policy that may provide a basis for a wrongful termination claim:

- refusing to commit an illegal or wrongful act;
- performing a public obligation, such as accepting jury duty;
- exercising a legal right or privilege, such as filing a workers’ compensation claim; or
- reporting criminal activity of the employer to a public authority.

Third, an employer’s right to terminate or discipline an employee may be restricted by Utah statutes or regulations. An employer, for example, may not terminate or discipline an employee in violation of Utah’s laws against discrimination and retaliation.

6.2 Discrimination, Harassment and Retaliation Claims

The Utah Antidiscrimination Act prohibits workplace discrimination, harassment and retaliation based on race, color, sex, pregnancy, childbirth or pregnancy-related conditions, age, religion, national origin, disability, sexual orientation or gender identity.

The Antidiscrimination Act also includes ‘religious liberty protections,’ which allow employees to reasonably express their religious and moral beliefs in the workplace unless in direct conflict with the employer’s essential business-related interests. An employer may not discriminate, harass or retaliate against an employee for lawful expression outside the workplace regarding the person’s religious, political or personal convictions, including convictions about marriage, family or sexuality, unless the expression is in direct conflict with the essential business-related interests of the employer.

Claims under the Utah Antidiscrimination Act are limited to an administrative remedy of filing a charge of discrimination with the Utah Labor Commission. An employee cannot bring a cause of action in court for violation of the Antidiscrimination Act. Once a charge of discrimination is filed with the Utah Labor Commission, it will be investigated by the Utah Antidiscrimination and Labor Division. Following the Division’s issuance of a determination, either party may request an evidentiary hearing before an administrative law judge with the Utah Labor Commission to review de novo the investigator’s determination.

A new law called the Emergency Services Volunteer Employment Protection Act was enacted in 2019. This act prohibits an employer from terminating the employment of an employee solely for being an emergency services volunteer, or for being absent from or late to work as a result of responding to an emergency as an emergency services volunteer.

6.3 Wage and Hour Claims

Unlike states like California, where local wage and hour laws are complex and varied, Utah’s wage and hour laws are relatively straightforward. As a general proposition, employers should be largely concerned with compliance with the federal Fair Labor Standards Act, which guarantees minimum wage and overtime pay for eligible employees, because Utah’s minimum wage and overtime laws generally track the federal rules. As a result, employers with payroll systems that comply with the FLSA have few other payroll concerns in Utah.

Nonetheless, the Utah Labor Commission sees a healthy flow of wage claims filed by employees contending they have not been properly paid. The Utah Payment of Wages Act, which now includes a private right of action as a result of recent legislation, governs the manner in which employers must pay their employees. One nuance under the law that regu-

larly trips up employers is that terminated employees must be paid their final paycheck within 24 hours of termination. Employees who voluntarily quit, however, may be paid their final wages on the next regular payroll cycle.

Employers who run astray of Utah’s Payment of Wages Act run the risk of accumulating penalties, including attorney fees, for failing to abide by the statute.

Finally, a recent Utah Court of Appeals decision recognized a cause of action for breach of the covenant of good faith and fair dealing where an employer terminates an at-will employee in order to interfere with the employee’s right to an upcoming commission payment. This decision serves as a limitation on what otherwise is largely construed as Utah’s employer-friendly view of the doctrine of at-will employment. One way of guarding against such a claim is to review commission policies so that they reserve discretion in the employer to determine eligibility for commission pay. Such discretion can help guard against formation of a contractual expectation to commission pay that could otherwise be denied in breach of the covenant of good faith and fair dealing.

6.4 Whistle-blower/Retaliation Claims

Utah has various statutory prohibitions against retaliation. For example, the Utah Antidiscrimination Act (‘Antidiscrimination Act’) prohibits an employer from taking adverse action against an employee or applicant because he or she opposed any employment practice prohibited under the Antidiscrimination Act, or filed charges, testified, assisted or participated in any way in any proceeding, investigation or hearing under the Antidiscrimination Act.

Similarly, Utah law prohibits an employer from retaliating against an employee who files a claim for wages or participates in a wage-claim proceeding. And an employee who files a complaint, institutes a proceeding, testifies, or otherwise exercises a right under the Utah Occupational Safety and Health Act is likewise protected from retaliation.

Utah also has a public policy exception to the ‘at will’ doctrine. This allows an employee to sue an employer for wrongful discharge, if the employer has violated a ‘clear and substantial public policy’ of the State of Utah. For example, an employee who is terminated for filing a workers’ compensation claim may have a claim for wrongful discharge under Utah law.

Numerous federal statutes also contain provisions that protect whistleblowers or otherwise prohibit retaliation. For example, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, and the Family and Medical Leave Act each contain anti-retaliation provisions. In addition, OSHA enforces more than twenty

whistleblower statutes, including the Sarbanes-Oxley Act of 2002, Clean Air Act, Safe Drinking Water Act, Federal Water Pollution Control Act, Toxic Substances Control Act, Solid Waste Disposal Act, Comprehensive Environmental Response, Energy Reorganization Act, Asbestos Hazard Emergency Response Act, Federal Railroad Safety Act, National Transit Systems Security Act, Surface Transportation Assistance Act, Consumer Financial Protection Act of 2010, Consumer Product Safety Improvement Act, International Safe Container Act, Pipeline Safety Improvement Act, FDA Food Safety Modernization Act (Section 402), and Affordable Care Act.

6.5 Dispute Resolution Forums

Employment disputes in Utah are decided in a number of different ways, depending on the nature of the dispute. Statutory claims, including discrimination and retaliation, safety violations, whistleblower claims, unfair labor practices, and so forth, are decided by state and/or federal administrative agencies. Agencies start with a charge or complaint of wrongdoing, which the agencies investigate and then decide. Most agency decisions in the labor area can be appealed within the agency itself, or the plaintiff can withdraw the claim and file in court, usually federal court. These enforcement processes are basically federal in nature, and therefore uniform from state to state. However, Utah judges and juries are generally more conservative than other states, which makes the state more employer-friendly than other, more plaintiff-friendly jurisdictions. Employment claims that are not settled out of court are often resolved short of trial by a motion for summary judgment, and when an employment case does go to trial, employers can usually be confident that they will not encounter a 'runaway jury'.

In addition, state agencies in Utah encourage mediation early in the investigative process to try to resolve claims before the investigation is even begun, and even where the parties do not elect to participate, or where mediation fails, parties are encouraged to try again at any point in the process. Such mediation services are provided free of charge where the mediator is a state employee. The parties may also hire private mediators for a fee to resolve such disputes.

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Many Utah employers have begun implementing arbitration and mediation policies that require their employees to participate in mediation before a dispute goes to an adversary process or to participate in arbitration instead of filing suit in court. Such policies are typically enforceable and encouraged as a matter of state and federal public policy. Most of these policies limit the cost to employees by providing that the employer pays all costs of the mediation or arbitration except a reasonable filing fee and the employee's attorney fees.

Arbitration policies and agreements often will include a provision requiring claims to be asserted on an individual basis only. Such provisions, which are intended to preclude class actions and collective actions, are generally enforceable under federal law. Although there is little Utah case law directly on point, employers can be generally confident that a carefully drafted class action waiver would be enforced by Utah courts.

6.6 Class or Collective Actions

Increasingly, plaintiffs' lawyers are recognizing Utah as fertile ground for class or collective actions based on an employer's alleged violation of various employment laws, most particularly under the FLSA. For example, plaintiffs' counsels scour the landscape for employers who commit technical violations of the FLSA, and then attempt to assert collective actions under 29 U.S.C. Section 216(b). While on an individual basis, such claims offer little value to the affected employees, plaintiffs' lawyers can collectivize the claims and substantially increase the value of the claims, including with respect to attorney fees. This is another reason for employers to carefully monitor their payroll practices to ensure compliance with every aspect of the FLSA.

Utah has not seen a great deal of class action activity founded on other claims such as for discrimination or retaliation in the workplace. Nonetheless, the risk of such class action exposure is present, and employers would be well served to vigilantly enforce strong and effective human resource policies in this area.

6.7 Possible Relief

Employees who prevail on a claim of discrimination, harassment or retaliation under the Utah Antidiscrimination Act may be entitled to the following relief:

- an order requiring the employer to cease any discriminatory or prohibited employment practice;
- reinstatement;
- back pay and benefits;
- attorney fees; and
- costs.

7. Extraterritorial Application of Law

Our firm generally recommends that in drafting employment-related agreements, employers insist on a Utah choice of law provision. Like most courts, Utah courts will generally apply the contracting parties' choice of law and choice of venue provisions.

Relying heavily on a Utah choice of law provision is especially important, given that Utah's employment laws generally are more employer-friendly than those of many other states. Clearly, a Utah employer's covenant not to compete or non-solicitation agreement should reference Utah law to ensure application of Utah's common law that, again, generally favors the employer. In addition, our firm has a high level of confidence in Utah's judiciary. As a result, a well-drafted choice of law and choice of venue provision requiring adjudication of disputes before a Utah judge is highly advisable.