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Law and Practice

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Richards, Layton & Finger's clients include national and regional employers of all sizes and in many businesses. The firm has particular strength in handling restrictive covenant and contract claims in the Delaware Superior Court and Delaware Court of Chancery, and federal discrimination and other employment law claims in federal court. Its lawyers have solid relationships with state employment law administrative agencies and know the state's processes and regulations, which can make the difference in resolving problems successfully in Delaware. The firm's Labor and Employment Group negotiates and drafts employment contracts, severance agreements, and personnel policies that are tailored to the individual employer, meet all legal requirements, and minimise the likelihood of claims and lawsuits. In addition, the team conducts and advises on internal investigations of harassment, discrimination, retaliation, and other employee claims at their early stages to recommend the best litigation-avoidance approach and help prevent future workplace issues.

Author

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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 has a growing presence in today's world. Rather than employ full-time workers, businesses in the United States and in Delaware are hiring independent contractors, such as consultants and freelance workers, on a short-term basis for specific projects. There are advantages to this business model for employers. For instance, hiring an independent contractor can cost less than hiring an employee. In most instances, employers do not have to provide certain benefits to independent contractors that may be required by or offered to their full-time employees, such as health insurance, vacation/sick pay and life insurance.

An employer's exposure to liability can be reduced when hiring independent contractors because independent contractors are not protected under certain laws. Employers can be held liable for discrimination, harassment and retaliation claims made by employees but not by independent contractors, under federal and Delaware state laws (see Title VII of the Civil Rights Act of 1965 and the Delaware Discrimination in Employment Act). Furthermore, employers do not have to make the required employer contributions to Social Security and Medicare taxes, state workers' compensation insurance or state unemployment insurance for independent contractors, as they do for employees.

In addition, provided an employer has the requisite number of employees (at least 50), they must provide employees with medical leave benefits to care for a family member's serious health conditions or the birth of a child. However, independent contractors are not entitled to such leave. Further, unlike independent contractors, employees must be paid minimum wage and overtime for any hours worked over 40 hours per week, under federal and state law. Additionally, general speaking, employers are not responsible for supplying office space, tools and equipment to independent contractors in order for them to conduct business; conveniently, in this global economy, an independent contractor's "office" is often wherever his or her laptop computer, cell phone or car is located.

Nonetheless, under federal and Delaware state law, not every worker will be appropriately classified as an independent contractor, and there are adverse consequences for misclassification of independent contractors. For additional information on independent contractors, see **2 Nature and Import of the Relationship**. Furthermore, there are some disadvantages for the employer to this approach of hiring independent contractors rather than full-time employees. For example, absent a contractual arrangement, an employer lacks control over the work relationship with an independent contractor, or the ability to discipline them. Also, absent contractual provisions to the contrary, an independent contractor is free to work for whomever they choose, even if it is an employer's direct competitor. An independent contractor also controls the time, manner and method in which he or she conducts business on behalf of the employer. Finally, intellectual property and copyright concerns may arise when hiring independent contractors who create their own work product using their own skills, knowledge and experience.

1.2 "Me Too" and Other Movements

The #MeToo movement has given a national voice to victims of sexual assault and harassment in workplaces all across the country. It has also made an impact on Delaware. Delaware's General Assembly recently passed House Bill 360 (H.B. 360), which broadens protections for Delaware workers against sexual harassment. The bill's intent is to prevent sexual harassment in the workplace while ensuring the safety and dignity of all Delaware workers, including state employees, unpaid interns, applicants, joint employees and apprentices. H.B. 360 applies to all Delaware employers with four or more employees, and includes the State, the General Assembly, State agencies, labor organizations and private employers. It awaits the Governor's signature, and, if signed into law, will take effect on January 1, 2019.

H.B. 360 defines sexual harassment as an unlawful employment practice when the employee is subjected to conduct that includes unwelcome sexual advances, requests for sexual favors, or verbal or physical conduct of a sexual nature. Additionally, H.B. 360 makes clear that an employer is responsible for sexual harassment of an employee under the following circumstances:

- if the harassment was by a supervisor when it results in a negative employment action;
- if the harassment was by a co-worker if the employer knew or should have known about the sexual harassment; or
- when an employee is retaliated against for making a claim of sexual harassment.

Notably, an affirmative defense exists for employers who can demonstrate efforts to promptly prevent and correct any sexual harassment, and who can prove that the employee unreasonably failed to take advantage of those efforts.

Employers are also required to distribute an information sheet on sexual harassment created by the Delaware Department of Labor (DDOL) to new employees at the time of hire, and to current employees within six months of the bill's enactment. The information sheet details the illegality, definition and examples of sexual harassment, the legal remedies and prohibitions against retaliation, and the DDOL's complaint process and contact information.

H.B. 360 also requires employers with 50 or more employees to provide employees who have been employed for at least six consecutive months with interactive training on the topics addressed in the DDOL's information sheet within one year of the bill's enactment, and to provide the same to new employees upon their hire. Additionally, employers must train supervisors on preventing and correcting sexual harassment within one year of the bill's enactment or within one year of the employee becoming a supervisor.

The DDOL is empowered to investigate employment practices, to make, revise and rescind rules or regulations to enforce H.B. 360, and to commence civil litigation for any violation. Any person aggrieved by a violation of H.B. 360 can file a charge of discrimination within 300 days of an alleged unlawful employment practice. In cases where the DDOL has either dismissed the charge or issued a no cause determination, or upon the parties' failed conciliation efforts, the DDOL will issue a Delaware Right to Sue Notice, allowing the charging party to file suit against the employer.

1.3 Decline in Union Membership

According to the US Bureau of Labor Statistics, the overall union membership rate for the country (ie, the percentage of wage and salary workers who were members of unions) was unchanged at 10.7% in 2017, but there was a 16% decline in Delaware from 2016 to 2017. Fewer than 1.5 out of ten employees in Delaware are employed in unions, and that it is continuing to decline (see US Department of Labor, Bureau of Labor Statistics Economic New Release Table 5 Union Affiliation of employed wage and salary workers by state).

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

While it is not necessary to enter into a written employment agreement in Delaware, it is crucial for employers to define the nature of the employment or service relationship at the outset of employment. For a discussion of more traditional relationships between employees and employers (namely, at will and contractual), see below as well as **5.1 Addressing Issues of Possible Termination of the Relationship**. A primary alternative approach is an independent contractor relationship, as discussed in part in **1.1 "Gig" Economy and Other Technological Advances** above. There

is no established definition of "independent contractor" under Delaware law or even federal law. Instead, various tests are applied to determine whether an individual or entity is properly classified as an independent contractor under common law, unemployment insurance, workers' compensation, anti-discrimination, and wage and hour laws. For example, under Delaware's Unemployment Compensation Law, the employer must demonstrate that the worker is and will continue to be free from the company's control and direction in connection with the performance of a service, and that the worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that of the service performed, and performing the service outside the usual course of the company's business, or all of the company's places of business (19 *Del. C.* § 3302(10)(K)). By comparison, Delaware courts use the factors listed in Section 220 of the Restatement (Second) of Agency to determine whether a person is an independent contractor under common law (*Fisher v. Townsends, Inc.*, 695 A.2d 53, 59 (Del. 1997)).

Delaware courts have also recognized the concept of "joint employment," particularly in workers' compensation cases. In joint employment, an employee is under simultaneous control of both employers and performs services simultaneously for both employers, and the services performed for each employer are the same or closely related (*A. Mazzetti & Sons, Inc. v. Ruffin*, 437 A.2d 1120, 1123-24 (Del. 1981)). Joint employment is often contrasted with "concurrent employment," which "occurs when employers act independently, the employee's work is separately allocated to each employer, the employee's services are independent and separate from each employer, and the employee does not perform simultaneously for both employers" (*Howard v. Peninsula United Methodist Homes, Inc.*, No. CIV.A. 03A-04-002RRC, 2003 WL 22701467, at *11 (Del. Super. Ct. Nov. 17, 2003)).

In Delaware, an individual employed for an indefinite period of time is considered an at-will employee (*Lankford v. Scala*, C.A. No. 94C-04-023, 1995 WL 156220 (Del. Super. Ct. Feb. 28, 1995)). Both the employer and the employee may terminate the relationship with or without cause, and without notice (*Heideck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095 (Del. 1982)). However, Delaware protects at-will employees in instances where the employer has breached its implied covenant of good faith and fair dealing (*Merrill v. Crothall-Am., Inc.*, 606 A.2d 96 (Del. 1992)). Under this implied covenant, if an employer acts in bad faith in the hiring or firing of an employee, he may be liable under a contract theory. A bad faith claim usually requires some aspect of fraud, deceit or misrepresentation (*Peterson v. Beebe Med. Ctr., Inc.*, No. 565, 1992, 1993 WL 102560, at *2 (Del. Mar. 24, 1993) (TABLE)). An alternative to this at-will approach is to agree in writing as to a set employment term, which may limit the employer's ability to quickly terminate an employee's employment without consequence.

2.2 Immigration and Related Foreign Workers

Like all US employers, Delaware employers are required to verify that every new hire is a citizen of the United States or is authorized to work in the country. All employees must complete Employment Eligibility Verification (I-9) forms and produce required documentation within three days of their hire date. Furthermore, under Delaware law, employers cannot discriminate against employees based on their immigration status.

3. Interviewing Process

3.1 Legal and Practical Constraints

Permissible and Impermissible Interview Questions

As an initial matter, employers should ensure that the entire hiring process, from job posting to job offer, is based on legitimate business reasons related to the job at issue, and that the process is fair and consistent to all applicants. Questions should prompt responses as to whether and to what extent the applicant's qualifications match the needs of the employer. There should be a standard set of questions and scoring criteria used for every applicant interviewing for the same job, and, if possible, the interviews should be conducted by the same interviewer(s) and scheduled for approximately the same length of time, to ensure consistency in the evaluation process. Even more importantly, these practices can be used to defend against a claim of unlawful discrimination in the hiring process.

There are certain questions that generally should not be asked during an interview, to avoid the actual or potential appearance of unlawful discrimination. Similar to federal law, Delaware law prevents employers from discriminating against an applicant in the hiring process on the basis of a protected class. Therefore, the less an employer knows about whether an applicant falls within a protected class, the better. Protected classes under Delaware law include race, marital status, genetic information, color, age, religion, sex, sexual orientation, gender identity, national origin, volunteer emergency responder status, status as a victim of domestic violence, sexual offences, stalking, reproductive health decisions or family responsibilities (19 *Del. C.* §§ 711 and 719A). In addition, the Delaware Persons with Disabilities Employment Protection Act prohibits discrimination against persons with a physical or mental impairment, and requires that employers provide reasonable accommodation for such persons (19 *Del. C.* §§ 723 and 724). For this reason, certain questions that may illicit information about an applicant's protected class should be avoided. For example, questions such as "Are you married?", "Do you have children?", "Have you ever filed a claim for disability or workers' compensation?" and "What medications are you currently taking?" should not be asked, and interviewers should avoid asking questions about an applicant's national origin, age and date of birth, religion or religious days observed, sexual

orientation, number of children or ability to have children. There are, however, permissible questions that may be asked in order to determine how well an applicant will assimilate into the employer's work environment and the applicant's enthusiasm for the job. For example, an employer may ask the applicant to describe the work environment in which they are most successful, the best part of their current work environment, work projects that have been challenging, and work-related obstacles that they have overcome.

Applicant Testing

Under Delaware law, there is generally no prohibition against tests or examinations that are related to the job requirements of the particular job position. However, similar to federal discrimination laws, Delaware state law states that medical examinations are prohibited before an offer of employment has been made (see *19 Del. C. § 724. Schuster v. Derocili*, 775 A.2d 1029, 1033 (Del. 2001)). "The Delaware Legislature has adopted an employment discrimination statute that is practically identical to its federal counterparts." Thus, if a procedure or test provides results about an applicant's physical or mental impairment or health, it is a medical exam and it is prohibited before an offer of employment is made. Conversely, a physical fitness test involving an applicant's performance of physical tasks such as walking or weight lifting is not a medical examination prohibited under the law.

With regard to psychological testing, if the test is created and utilized to determine only personality traits and work habits, it is not considered a medical test and is therefore permitted before an offer has been made. However, an employer is prohibited under federal and Delaware state law from giving applicants a test that will reveal certain medical conditions, such as bipolar disorder or depression, before an offer is made.

Employers can test applicants for current illegal use of controlled substances even though it involves an assessment of bodily function. Importantly, Delaware has legalized marijuana for medical purposes (16 *Del. C.* § 4901A-4928(A)), so applicants who are state-authorized marijuana cardholders are legally able to purchase marijuana at state-licensed, non-profit dispensaries known as "compassion centers." It is illegal for employers to discriminate against cardholders with respect to the terms and conditions of their employment, including, but not limited to, hiring, firing, promotions, transfers, etc. Furthermore, employers cannot discipline a cardholder for testing positive for marijuana unless he or she "used, possessed or was impaired by marijuana" at work. Employers can still test applicants for drug use, but they must have a process for treating cardholders in accordance with this law.

Most employers are also prohibited from giving a polygraph examination, but certain law enforcement and security officers may be required to take one (19 *Del. C.* § 724(a)(1)).

Criminal Background Checks

Delaware law permits criminal background checks, although employers cannot inquire about expunged records (11 *Del. C.* §§ 4371-4375). Although not specifically required by Delaware law, the best practice in conjunction with federal guidelines is to only exclude an applicant based on a conviction that is reasonably related to the job. Additionally, an employer should consider the nature of the conviction and how long ago the conviction took place. Furthermore, criminal history screening should be based upon criminal convictions and not arrest records, because an arrest does not confirm that the applicant committed a crime. Moreover, a practice of excluding applicants based upon arrest records should be avoided because it may lend itself to a potential claim that the employer's practice results in a disparate impact on applicants of a certain race. Delaware public employers are prohibited from asking about an applicant's criminal background before the applicant's first interview; this practice is also known as "banning the box": asking job candidates to check a box on the application if they have a criminal record. Police forces, the Department of Corrections, and other positions with a statutory mandate for background checks are excluded from the provisions of the Ban the Box law (19 *Del. C.* § 711(g)(1)-(3)). Notably, this statute does not place any requirements on private employers.

In an effort to address pay inequality between men and women, Delaware law prohibits employers and their agents from seeking compensation history from applicants or from their current or former employers (19 *Del. C.* § 709B). Additionally, Delaware employers and their agents are prohibited from screening applicants based on their past compensation, including by requiring that an applicant's prior compensation satisfy certain minimum or maximum benchmarks. Notably, there is a good faith exception as to employer liability if an employer can demonstrate that the employer's agent was informed of the requirements and instructed to comply. "Compensation" includes monetary wages, benefits and all other forms of compensation. An employer can discuss and negotiate compensation expectations with an applicant, so long as the employer does not request or require an applicant to provide past compensation history. An employer will still be allowed to inquire about an applicant's compensation history *after* the applicant has accepted the job offer, including its terms of compensation, provided the applicant authorizes such disclosure in advance in writing. The penalty for an employer who fails to comply with this statute is a civil penalty of between USD1,000 and USD5,000 for the first offense, and between USD5,000 and USD10,000 for each subsequent violation. For penalty purposes, interviewing and hiring for a single job position constitutes only one violation.

Wage History and Other Pay Equity Concerns

In Delaware, employers cannot prohibit an employee from discussing his or her wages or the wages of another employee (19 *Del.* C § 711(i)), and cannot require an employee to re-

frain from inquiring about, discussing or disclosing his or her wages or the wages of another employee as a condition of employment. In addition, it is an unlawful employment practice to require an employee to sign a waiver or other document that purports to deny an employee the right to disclose his or her wages, and an employer cannot discharge, formally discipline, or otherwise discriminate against an employee for inquiring about, discussing or disclosing his or her wages or the wages of another employee.

Pregnancy, Disability, Reasonable Accommodations and Related Inquiries

Under Delaware law, an employer cannot refuse to consider an applicant for employment because the applicant requires reasonable accommodation to compete for or perform a job. Employers must provide reasonable accommodations (ie, appropriate changes and adjustments) for the known limitations of applicants and employees who are pregnant or have a pregnancy-related condition, as long as the accommodation does not constitute an undue hardship for the employer. Examples of reasonable accommodations include making reasonable changes in the schedules or duties of the job, temporary transfers, time off to recover from childbirth, break time, modifying equipment and providing mechanical aids to assist in operating equipment (19 *Del. C.* § 711(a)(3)(a)-(f)). Delaware employers must also provide reasonable accommodations to applicants for employment who have a disability, under the Delaware Persons with Disabilities Protection Act, provided there is no undue hardship on the employer (19 *Del. C.* §§ 720-727). "Reasonable accommodations" means making reasonable changes in the workplace, including, but not limited to, making facilities accessible, modifying equipment and providing mechanical aids to assist in operating equipment, or making reasonable changes in the schedules or duties of the job in question that would accommodate the known disability by enabling the person to satisfactorily perform the essential duties of the job in question. In considering whether these accommodations would cause the employer an undue hardship, factors an employer should consider include the nature and cost of the accommodation and the effect the accommodation would have on business operations, including the effect on other employees (19 *Del. C.* § 722(6)(a)-(e)).

Delaware also prohibits employment discrimination based upon an individual's reproductive health decisions (19 *Del. C.* § 711(j)), so employers cannot fail or refuse to hire or discharge any individual or otherwise discriminate against any employee with respect to compensation, terms, conditions or privileges of employment because of a reproductive health decision by the employee. A "reproductive health decision" means any decision by an employee related to the 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.

Delaware employers are also prohibited from discriminating based upon an individual's caregiving responsibilities (19 *Del. C.* § 711(k)). Under this law, it is unlawful for an employer to fail or refuse to hire, or to discharge, any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions or privileges of employment because of the individual's family responsibilities. In addition, an employer cannot limit, segregate or classify employees in any way that would deprive or tend to deprive any individual of employment opportunities, or would otherwise adversely affect the employee's status as an employee because of such individual's family responsibilities. Under this law, "family responsibilities" means the obligation of an employee to care for any family member who would qualify as a covered family member under the Family Medical Leave Act. An employer is not obligated to make special accommodations for an employee with family responsibilities, provided all policies related to leave, scheduling, absenteeism, work performance and benefits are applied in a non-discriminatory manner.

4. Terms of the Relationship

4.1 Restrictive Covenants

Under Delaware law, employers may impose certain reasonable restrictive covenants on their employees, such as non-competition, non-disclosure or non-solicitation provisions. Delaware only enforces restrictive covenants to protect the legitimate business interests of employers, if such interests outweigh the harm of enforcement to the employee. Generally, Delaware gives greater scrutiny to restrictive covenants in employment contracts than to restrictions in the agreements for the sale of a business (*Faw, Casson & Co. v. Cranston*, 375 A.2d 463, 465 (Del. Ch. 1977)). Courts will also give greater scrutiny to restrictions placed on independent contractors rather than those on an employee (*EDIX Media Grp., Inc. v. Mahani*, No. Civ. A. 2186-N, 2006 WL 3742595, at *8 (Del. Ch. Dec. 12, 2006)).

Delaware courts apply a two-tiered approach in analyzing the enforceability of restrictive covenants (*Research & Trading Corp. v. Pfuhl*, C.A. No. 12527, 1992 WL 345465, at *11 (Del. Ch. Nov. 18, 1992)). First, the court must determine whether the agreement itself is valid and enforceable as a matter of contract law. Restrictive covenants must be supported by sufficient consideration, which can come in varying forms (*Faw, Casson & Co.*, 375 A.2d at 466-67). For example, having an employee sign an employment contract when he is hired is sufficient consideration to enforce a covenant (see, eg, *All Pro Maids, Inc. v. Layton*, No. Civ. A. 058-N, 2004 WL 1878784, at *3 (Del. Ch. Aug. 9, 2004), *aff'd*, 880 A.2d 1047 (Del. 2005) (TABLE)). A favorable change in the employee's status, such as a promotion or a raise, constitutes sufficient consideration to support a restrictive covenant (see, eg, *RHIS, Inc. v. Boyce*, No. Civ. A. 18924, 2001

WL 1192203, at *4 (Del. Ch. Sept. 26, 2001); *O'Leary v. Telecom Res. Serv., LLC*, C.A. No. 10C-03-108-JOH, 2011 WL 379300, at *5 (Del. Super. Ct. Jan. 14, 2011)). Furthermore, Delaware courts have held that continued employment of an at-will employee in exchange for a covenant not to compete with the employer constitutes adequate consideration (*Comfort, Inc. v. McDonald*, No. 1066(S), 1984 WL 8216, at *3 (Del. Ch. June 1, 1984)).

Second, the court will uphold the restrictive covenant if it is reasonable (*Pfuhl*, 1992 WL 345465, at *11-12). To determine enforceability, the court looks to whether the duration and geographic scope are reasonable, whether the purpose of the covenant is to protect the legitimate interests of the employer, and whether the covenant reasonably protects those interests. Legitimate interests may include the protection of trade secrets, trade secrets, proprietary information, customer lists and the goodwill of the business.

What is reasonable may depend on the nature of the job position, industry and competition. Typically, Delaware courts have upheld two-year restrictions for high-level executives with access to confidential long-term information (*Wal-Mart Stores, Inc. v. Mullany*, C.A. No. 6040-VCL (Del. Ch. Dec. 15, 2010) (TRANSCRIPT)). Delaware favors shorter restrictions for mid- to low-level employees, or may refuse to enforce the restrictive covenant in its entirety (*Elite Cleaning Co. v. Capel*, No. Civ. A. 690-N, 2006 WL 1565161, *8 (Del. Ch. June 2, 2006)). In sales, a one- or two-year covenant may also be reasonable (*Weichert Co. of Pa. v. Young*, C.A. No. 2223-VCL, 2007 WL 4372823 (Del. Ch. Dec. 7. 2007)). However, in a constantly evolving industry such as information technology, two years may be too restrictive.

Delaware also considers the balancing of equities of the employer and employee (*All Pro Maids, Inc.*, 2004 WL 1878784, at *5). When balancing the equities, Delaware courts will consider the employer's business activity, the actual harm suffered by the employer, whether the former employee unfairly competed against the employer, and whether any harm to the public exists (see, eg, *Young*, 2007 WL 4372823, at *5).

Generally, Delaware may modify or blue pencil an overly broad restriction by enforcing the provisions to the extent that they are reasonable (*Knowles-Zeswitz Music, Inc. v. Cara*, 260 A.2d 171, 175 (Del. Ch. 1969)). In cases involving high-level executives and employees in the sales industry, the court is more likely to blue pencil overbroad restrictions because there is more equal bargaining power (*Delaware Express Shuttle, Inc. v. Older*, No. Civ. A. 19596, 2002 WL 31458243, at *1 (Del. Ch. Oct. 23, 2002)). Courts may also modify and enforce a contract that is different from the original agreement between the parties. For example, the court may change the geographic restriction in a non-compete to reflect the area of the employer's actual customer base (see, eg, *Norton Petroleum Corp. v. Cameron*, No. Civ. A. 15212-NC, 1998 WL 118198, at *4 (Del. Ch. Mar. 5, 1998)). However, the Delaware Court of Chancery has also indicated that it may not always blue pencil covenants. In *Delaware Elevator, Inc. v. Williams*, a former employee argued that the facially invalid restrictive covenant should be stricken in its entirety. Applying Maryland law, the Delaware court blue penciled the overly broad restrictive covenant, but noted that, when a restrictive covenant is unreasonable, the court should consider striking the provision in its entirety to encourage employers to include only reasonable terms and to "equalize bargaining power up front" between an employer and employee (C.A. No. 5596-VCL, 2011 WL 1005181, at *11 (Del. Ch. Mar. 16, 2011)).

4.2 Privacy Issues

Delaware has adopted the Delaware Uniform Trade Secrets Act ("DUTSA"), which is based on the model Uniform Trade Secrets Act (6 *Del. C.* §§ 2001-2009) and supersedes conflicting tort remedies, restitutionary claims and civil remedies for trade secret misappropriation (6 *Del. C.* § 2007(a)). Under Delaware law, a trade secret includes a formula, pattern, compilation, program, device, method, technique or process that (1) derives actual or potential independent economic value, (2) is not generally known, (3) is not readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (4) is the subject of efforts that are reasonable under the circumstances (6 *Del. C.* § 2001(4)). In other words, to qualify as a trade secret, the information must be commercially valuable and derive independent economic value from its secrecy (*Interim Health Care v. Fournier*, Civ. A. No. 13003, 1994 WL 89007, at *7 (Del. Ch. Feb. 28, 1994)). Additionally, the party seeking to protect the information must demonstrate that it held the information sufficiently secret and valuable to give it economic advantage, and that it took reasonable efforts to maintain the secrecy of the information (*Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, C.A. No. 3718-VCP, 2010 WL 338219, at *16 (Del. Ch. Jan. 29, 2010)). Furthermore, Delaware follows the "majority rule," which states that the DUTSA preempts claims for "misappropriation of business information even in cases in which the claim does not meet the statutory definition of 'trade secret' under the Code" (*Alarm.com Holdings, Inc. v. ABS Capital Partners Inc.*, No. C.A. No. 2017-0583-JTL, 2018 WL 3006118, at *11 (Del. Ch. June 15, 2018) – but see *Dow Chem. Co. v. Organik Kimya Holding A.S.*, C.A. No. 12090-VCG, 2018 WL 2382802, at *7 (Del. Ch. May 25, 2018), suggesting there is a split among Delaware courts).

Delaware courts have found the following to be trade secrets:

- customer information that is not readily ascertainable;
- price and cost information derived from very particular knowledge of a company's cost factors;
- recipes for creating advanced compounds;

- private form contracts between a company and its clients; and
- the combination of steps into a process, even if all the component steps are known, so long as the process is unique and not known in the industry (at *19-20; *Elenza, Inc. v. Alcon Labs. Holding Corp.*, 183 A.3d 717, 721 (Del. 2018); *Beard Research, Inc. v. Kates*, 8 A.3d 573, 594-97 (Del. Ch. 2010), *aff'd sub nom.*, *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010); *Nucar Consulting, Inc. v. Doyle*, No. Civ. A. 19756-NC, 2005 WL 820706, at *8 (Del. Ch. Apr. 5, 2005), *aff'd*, 913 A.2d 569 (Del. 2006) (TABLE); *Am. Totalisator Co. v. Autotote Ltd.*, Civ. A. No. 7268, 1983 WL 21374, at *2-5 (Del. Ch. Aug. 18, 1983)).

Under Delaware law, employers may sue employees for the misappropriation (or the acquisition, disclosure or use) of trade secrets (6 *Del. C.* § 2001(2)). Misappropriation claims in Delaware are not limited to the "taking" of tangible information; in fact, Delaware courts have upheld misappropriation claims based on memorizing trade secrets (*Equitable Life Ins. Co. v. Young*, No. 7993, 1985 WL 11551, at *5 (Del. Ch. May 6, 1985)). Furthermore, Delaware recognizes the doctrine of inevitable disclosure. In instances where an employee has expressly or impliedly agreed in his employment contract that he or she will not disclose any trade secrets or other confidential information, the employer is entitled to an injunction against a threatened use or disclosure of confidential information by a former employee (*E.I. du Pont de Nemours & Co. v. Am. Potash & Chem. Corp.*, 200 A.2d 428, 431 (Del. Ch. 1964)).

Delaware law allows employers to monitor employees' use of technology, provided notice is given to employees prior to the monitoring of telephone use, electronic mail or internet access. Employees must also sign an acknowledgement of this notice (19 *Del. C.* § 705). If the monitoring policy is included in the employee handbook, the employee's signature acknowledging receipt of the handbook is sufficient. Delaware law also expands employee privacy protection to social media, with employers being prohibited from requesting an employee or applicant to disclose their username or password for the purpose of enabling access to personal social media, to access personal social media in the employer's presence, to use personal social media as a condition of employment, to divulge any personal social media, to add a person to a list of contacts associated with personal social media, or to alter privacy settings to affect a third party's ability to view the employee's social media (19 *Del. C.* § 705). However, an employer may still request employees to disclose social media information if it is relevant to an investigation of allegations of employee misconduct or violation of Delaware law. Finally, employers may not install a camera or listening device without an employee's knowledge and consent, as it is a criminal offense under Delaware law (11 *Del. C.* §§ 1335(a)(2), 1335(a)(3), 1335(c)).

4.3 Discrimination, Harassment and Retaliation Issues

Like most states, Delaware prohibits discrimination and retaliation based on an individual's race, disability, marital status, genetic information, color, age, religion, sex, sexual orientation or national origin (19 *Del. C.* §§ 711, 724). Notably, however, Delaware also prohibits discrimination and retaliation based on membership in a volunteer emergency responder organization, pregnancy, family responsibilities, reproductive health decisions, gender identity, criminal and/or credit history (for public sector employees only), and surviving sexual and/or domestic violence (19 *Del. C.* §§ 711, 719A). For example, an employer cannot deprive anyone of employment opportunities or otherwise adversely affect an individual's status as an employee because of the individual's family responsibilities (or the obligation of an employee to care for any family member who would qualify as covered under the Family Medical Leave Act) or reproductive health decisions (any decision related to the use or intended use of a particular drug, device or medical service related to fertility control or the planned or intended initiation or termination of a pregnancy) (19 *Del. C.* § 710(9)(22), 711). Additionally, Delaware law requires an employer to make reasonable accommodations to women who are experiencing medical limitations as a result of pregnancy, unless the employer can demonstrate that the accommodation would impose an undue hardship on their business operations (19 *Del. C.* § 711).

Furthermore, Delaware's Gender Identity Nondiscrimination Act of 2013 protects employees from discrimination based on gender identity. Title 19, Section 710(10) of the Delaware Code defines "gender identity" as a "gender-related identity, appearance, expression, or behavior of a person, regardless of the person's assigned sex at birth" (19 *Del. C.* § 710(10)). Additionally, gender identity may be demonstrated by "consistent and uniform assertion of the gender identity or any other evidence that the gender identity is sincerely held as part of a person's core identity," but cannot be asserted "for any improper purpose" (19 *Del. C.* § 710(10)).

Delaware recently enacted a law expressly prohibiting sexual harassment and implementing training requirements for employers that have 50 or more employees in Delaware (19 *Del. C.* § 711A). Notably, Delaware law also provides an affirmative defense for employers who can demonstrate efforts to promptly prevent and correct any sexual harassment, and who can prove that the employee unreasonably failed to take advantage of those efforts.

4.4 Workplace Safety

Delaware's workers' compensation law provides certain benefits for personal injury or death arising out of and in the course of employment. The benefits include medical care, temporary disability payments, compensation for a resulting permanent impairment and death benefits. Employers with one or more employees are required to carry work-

ers' compensation insurance (19 *Del. C.* § 2306). Benefits are paid by the employer or its insurer as a cost of doing business; employers are prohibited from charging an employee. Upon injury or occupational disease, employees are obligated to notify their employer in writing or risk losing their right to compensation. Employers must keep records of "all injuries" received by employees in the course of their employment (19 *Del. C.* § 2313). Employers must report the injury to the Delaware Industrial Accident Board within ten days of acquiring knowledge of such injury. Failure to do so may result in a fine. Delaware's workers' compensation law also applies to illegally employed minors (19 *Del. C.* § 2315). Other workplace safety requirements are dealt with at the federal level, such as through the Occupational Safety and Health Administration.

4.5 Compensation & Benefits

Delaware employers may also implement certain policies or employee handbooks to further define expectations of employment and employee benefits. For example, an employer should enact policies expressly prohibiting discrimination and harassment, and may also want to add policies regarding workplace violence, vacation, inclement weather, benefits, code of conduct, performance reviews, etc. Employee handbooks should also include information on the federal Family and Medical Leave Act (if applicable to the organization based on the number of employees) and Occupational Safety and Health Act, and employers should be aware that certain benefit information will be controlled by federal law – specifically, the Employee Retirement Income Security Act.

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

At-Will Rule and its Exceptions

Prior to any termination, an employer should determine whether the employee is at-will or has a set term of employment (which is a decision the employer should have made at the employment onset and again at other relevant times, such as a promotion to an executive level). Delaware is an at-will state, which means that an employer who hires an employee for an indefinite time period can terminate the employee at any time without prior notice or reason for the termination. However, there are some general exceptions. For instance, the right to terminate an at-will employee has been restricted under federal statutes such as Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, as well as under state statutes such as the Delaware Discrimination in Employment Act and Delaware's Handicapped Persons in Employment Act.

Another general exception to the at-will rule applies if the employee alleges that the employee was fired for refusing to violate a federal, state or local law, or alleges that the employer discharged the employee for reporting the employer's violations of a federal, state or local law (see Delaware's Whistleblower's Protection Act, 19 *Del. C.* § 1701-1708). Delaware case law has developed recognized exceptions to the at-will doctrine in Delaware – specifically, violations of public policy, misrepresentations by an employer of a material fact, an employer's use of superior bargaining power to withhold past compensation, and falsifying records to create fictitious reasons for terminating an employee (*Bailey v. City of Wilmington*, 766 A.2d 477, 480 (Del. 2001), citing *E.I. du Pont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443-44 (Del. 1996)).

Alternatively, where expressly provided, the terms of the employment contract will control whether, in what manner, and for what reasons an employer can terminate an employee. Additionally, if the employee is a union employee, the employer will need to follow the collective bargaining agreement. An employment agreement can set forth the time period for the employment relationship (eg, the "term"), as well as the basis upon which the employer can terminate the agreement before the expiration of its term (eg, "for cause"). There is no set standard or exact definition of "for cause" under Delaware law; its meaning will depend on how the parties choose to define it in the employment agreement. Generally, "for cause" is grounds for termination when the employee has acted willfully or recklessly and in contrast with the employer's interests. Examples of "for cause" include, but are not limited to, fraud, embezzlement, conviction for a crime involving moral turpitude, intentional breaches of the employment agreement, and a willful failure to perform services. An employment agreement may also provide that the employment relationship cannot be terminated without first providing notice to the employee and/or an opportunity to cure any deficiencies in his or her performance. If not for cause, the employment agreement may set forth important considerations for the timing, notice, method and consequences of an early contractual employment termination.

Similarly, an employer may be contractually obligated to maintain the employment relationship with an employee based upon an implied contract to do so. The contents and representations made by an employer in an employment handbook could create an implied contract; to avoid such an assertion, an employer should include clear and unambiguous language in the handbook to emphasize that the policies and procedures set forth therein do not create contractual rights to employment. Progressive discipline policies should also allow flexibility and discretion for employers to allow for immediate termination for more serious infractions, when justified.

Additionally, there is an implied covenant of good faith and fair dealing inherent in every employment relationship, including an employment contract and an at-will relationship

(*E.I. du Pont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443-44 (Del. 1996)). An employee cannot be terminated in retaliation for exercising certain statutory rights, such as filing a workers' compensation claim against the employer or refusing to take a polygraph test (19 *Del. C.* § 2365 and 19 *Del. C.* §§ 701-709).

An employer should also ascertain whether there is an internal grievance process related to discipline or terminations, as well as whether, if applicable, the parties have agreed in the employment agreement to resolve claims through litigation or arbitration and related terms regarding process and forum. Notably, an employment agreement or any other act by the employer cannot interfere with an employee's right to file a charge of discrimination with the Delaware Department of Labor or Equal Employment Opportunity Commission in regards to an alleged discriminatory termination, hostile work environment or other adverse action based on one's protected class.

Unemployment

Under Delaware law, most employers must contribute to an unemployment compensation fund. Employers should also be aware that employees who are terminated or laid off from employment are generally eligible to receive state-administered unemployment benefits funded by employer contributions, unless the employer can show that it had just cause in terminating the employment. Generally, the term "just cause" refers to a willful or wanton act in violation of the employer's interest, the employer's duties or the employee's expected standard of conduct (*Schaeffer v. Giant of Maryland, LLC*, C.A. No. S17A-11-001, 2018 WL 3199539, at *1 (Del. Super. Ct. June 28, 2018)). Additionally, employees may be disqualified from receiving unemployment benefits if they voluntarily leave their employment without good cause.

Severance Agreements and Releases of Claims

Another consideration when terminating an employment is whether the employee will be entitled to additional compensation, such as severance pay, based upon the employer's past practice, a policy or the terms of an employment agreement. Delaware law does not require the payment of severance to terminated employees unless they are there by contract, either expressed or implied. An employer may also want to consider whether to voluntarily provide severance in exchange for a release of any claims against the employer. The decision to enter into a severance agreement and release with an employee will depend on different factors. For instance, if the employee is already entitled to severance pursuant to the employer's policy, practice or employment agreement, the employer must offer additional consideration beyond the severance the employee is already entitled to receive to release any claims. An employer may choose to enter into a severance agreement and release if it has concerns that the employee may file or has filed an action against the employer for wrongful termination. Importantly, in order for a release of claims to be effective under Delaware law, the agreement should expressly state that the employee entered into the agreement knowingly and voluntarily (*Cole v. Gaming Entertainment, LLC*, C.A. No. 01-648-GMS (D. Del. May 6, 2002)).

Specific Delaware statutory claims that should be included in the release include the Delaware Discrimination in Employment Act (19 *Del. C.* § 710-719), the Persons with Disabilities Employment Protections Act (19 *Del. C.* §§ 720 to 728), the Delaware Whistleblower's Protection Act (19 *Del. C.* §§ 1701-1708), the Wage Payment and Collection Act (19 *Del. C.* §§ 1101-1115), the Fair Employment Practices Act (19 *Del. C.* §§ 701-709) and Delaware's WARN Act (19 *Del. C.* §§ 1901-1911). Notably, however, three particular state-based types of employment-based claims cannot be released by agreement in Delaware. Specifically, claims for unemployment benefits under Delaware's Unemployment Compensation Law (19 *Del. C.* §§ 3302-3391) and claims for compensation under Delaware's Workers' Compensation Act and Occupational Disease Law (19 *Del. C.* §§ 2301-2396) should not be included in a release portion of the agreement because they may invalidate an otherwise valid release. Employers may also want to consider whether to require employees to affirm in a separation agreement that they have no known workplace injuries or occupational diseases, and that the employer has paid all wages due to date. Although federal law requires certain periods for review and revocation for certain federal wage claims (ie, the Age Discrimination in Employment Act) to be effectively released, Delaware state law has no required time period for the review of a release nor a required revocation period.

Delaware's WARN Act

Certain employers in Delaware must also consider the Delaware Workers Adjustment and Retraining Notification Act (the "DE WARN Act") when terminating several employees in the same time frame (19 *Del. C.* §§ 1901-1911). The DE WARN Act is the state's recently enacted version of the federal Worker Adjustment and Retraining Notification Act ("federal WARN Act"), and requires certain employers to provide 60 days' advance written notice prior to an employment loss due to either a "mass layoff" or "plant closing" (each triggered based on certain defined thresholds, but in neither event less than 50 impacted employees), or a relocation of all or substantially all of the operations to another location 50 or more miles away (with no minimum number of impacted employees, provided the employer has the requisite number of employees to be an eligible employer). Advanced notice must be provided to the affected employees (as defined in the act) and their representatives, the Delaware Department of Labor, Division of Employment and Training ("DET"), and the Delaware Workforce Development Board.

The DE WARN Act applies to Delaware employers with 100 or more employees, excluding part-time employees, and

to employers with 100 or more employees that collectively worked at least 2,000 hours per week. Its main objective is to ensure the DET receives early notification of employment losses to quickly assist dislocated workers with minimal disruption to their economic security. If timely notice is not provided, the employer may be liable for back pay (as defined in the act) and the value of any benefits, including medical expenses, for up to 60 days or half the number of days the employee was employed, whichever is smaller. Importantly, any payment made under federal law satisfies payment under the DE WARN Act. The penalty for an employer in violation of the DE WARN Act is $1,000 for every day notice was not provided or $100 per day for each terminated employee, whichever is greater. However, the maximum penalty cannot exceed the maximum penalty under federal law.

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

6.1 Discrimination, Harassment and Retaliation Claims

The Delaware Discrimination in Employment Act prohibits an employer from discriminating against, terminating or refusing to hire an employee or applicant based on his or her race, marital status, genetic information, color, age, religion, sex, sexual orientation, gender identity, national origin, volunteer emergency responder status, status as a victim of domestic violence, sexual offences, stalking, reproductive health decisions or family responsibilities (19 *Del. C.* §§ 711 and 719A). Further, the Delaware Persons with Disabilities Employment Protection Act prohibits discrimination against persons with a physical or mental impairment, and requires that employers provide reasonable accommodation for such persons (*19 Del. C.* §§ 223 and 224).

Before an employee may bring a private lawsuit regarding an alleged violation of either of these acts, a charge of discrimination must be filed with the Department of Labor within 300 days of the date of the alleged violation (19 *Del. C.* § 712(c)). When the Department of Labor dismisses the charge or issues a "no cause" determination, or if conciliation efforts between the parties fail, the department may grant a Delaware Right to Sue Notice to the charging party (19 *Del. C.* § 712(c)).

Once the notice has been issued, an employee may file a civil action in the Delaware Superior Court, within certain time limitations (19 *Del. C.* § 714). The court has the authority to order injunctive relief, reinstatement or promotion of the employee, litigation costs, attorneys' fees, and general, special and punitive damages (19 *Del. C.* § 715). The Attorney General may also bring a civil action against the employer in the Court of Chancery (19 *Del. C.* § 713). Delaware courts generally look to federal case law interpreting Title VII when analyzing discrimination claims (*Miller v. State, Dep't of Pub. Safety*, C.A. No. 08C-07-231-JOH, 2011 WL 1312286, at *7 (Del. Super. Ct. Apr. 6, 2011)).

Disputes may also arise regarding the terms of employment, such as bonus plans and restrictive covenants. Either party can file a claim for breach of an employment contract. Delaware courts commonly apply the same standards of contract interpretation and enforcement in an employment contract lawsuit as in general breach of declaratory or contract claims (see *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009)). Injunctive relief may be appropriate for certain breaches of covenants not to compete, disclose or solicit in violation of an agreement. These claims would be filed in the Delaware Court of Chancery, which can provide equitable remedies separate from monetary damages.

6.2 Wages and Hours Claims

Several Delaware statutes codify employment-related wage and hour claims and their dispute resolution procedures. Under the Delaware Minimum Wage Act ("MWA"), all employers are required to pay a minimum wage of $8.25 per hour, which will increase to $8.75 on January 1, 2019 and $9.25 on October 1, 2019 (19 *Del. C.* § 902(a)). An employee may file a civil action under the MWA to recover unpaid wages, costs of the action, necessary expenses of prosecution, and reasonable attorneys' fees (19 *Del. C.* §§ 911(a) and 1113(c)).

The Delaware Wage Payment and Collection Act ("WPCA") requires private employers to designate regular pay periods and paydays, which must occur at least once every calendar month (19 *Del. C.* § 1102(a), (b)). This act also includes the Delaware Equal Pay Law, in which employers are prohibited from discriminating in the amount of wages paid based solely on sex (19 *Del. C.* § 1107(a)). Under this act, an employee may file a civil action to recover unpaid wages and liquidated damages in the amount of 10% of the unpaid wages for each day the employer fails to meet its obligations (19 *Del. C.* §§ 1103(b) and 1113(a)).

The Delaware Department of Labor administers the WPCA and MWA, and may bring legal action if necessary to collect unpaid wages (19 *Del. C.* §§ 903(a), 911(b), 1111(a), and 1113(b)). An employer that hinders an investigation, violates any provisions of the acts, or discharges or discriminates against an employee who files a complaint may be subject to a civil penalty for each violation, of USD1,000 to USD5,000 (19 *Del.C.* §§ 910(a), (b) and 1112(a), (b)). An employer cannot rely upon an agreement with the employee to circumvent any provision in these acts as a valid defense (19 *Del. C.* § 911(a)). In other words, an employee cannot waive his or her right to be paid at the minimum wage, nor to be paid on time.

Other possible wage and hour claims may arise due to failure to pay overtime or prevailing wages. Delaware has no state

overtime law and does not impose any additional obligations beyond those required by the federal Fair Labor Standards Act; however, certain employers engaged in state government contracts are required to pay the state prevailing wage rate for work completed under the contract (29 *Del. C.* § 6960(a)). Employees that are paid less than the prevailing rates may bring civil actions against the employer for treble the difference between the prevailing rate and the actual amount paid (29 *Del. C.* § 6960(f)).

6.3 Whistleblower/Retaliation Claims

Employers should be aware of whistleblower and retaliation claims that may arise under the Delaware Whistleblowers' Protection Act (WPA) or other statutes that contain specific anti-retaliation provisions. Under the WPA, an employer is not permitted to discharge, threaten or discriminate against an employee who has reported or plans to report a violation that has occurred or is about to occur (19 *Del C.* § 1703). The WPA is designed to protect reporting violations of two types of laws:

- health, safety and environmental laws; and
- financial management and accounting standards (19 *Del. C.* § 1702(6)).

An employee may file a civil action under this act to seek appropriate declaratory relief, actual damages or both (19 *Del. C.* § 1704(a)). Relief may include reinstatement, unpaid wages, costs of litigation and attorneys' fees (19 *Del. C.* § 1704(d)).

Retaliation claims may be brought by an employee who was discharged or discriminated against by the employer for engaging in protected activities related to minimum wage (19 *Del. C.* § 910(b)), wage payment violations (19 *Del. C.* § 112(b)), workers' compensation (19 *Del. C.* § 2365), child labor (19 *Del. C.* § 509(c)), meal breaks (19 *Del. C.* § 707(b)), discrimination (19 *Del. C.* § 711(f)), handicapped employee protections (19 *Del. C.* § 726), nursing facility employees (16 *Del. C.* § 1135), contractor whistleblowers (29 *Del. C.* § 6960(k)), campaign contributions (19 *Del. C.* § 1703), hazardous chemicals (16 *Del. C.* § 2415(b)), false claims (6 *Del. C.* § 1208(a)), lie detectors (19 *Del. C.* § 704(f)), personnel files (19 *Del. C.* § 735(b)) and smoking statutes (16 *Del. C.* § 2907(b)).

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6.4 Dispute Resolution Forums

If the parties wish to avoid resolving employment disputes in a judicial forum, there are several alternative dispute resolution options available in Delaware. For example, the Department of Labor offers a voluntary, confidential and non-binding mediation program for employment discrimination disputes after a charge has been filed with the department (19 *Del. Admin. Code* § 1311-5.0 (2018)). This process is free and may be useful for quick, non-complex charges filed against the employer in lieu of the traditional investigative process conducted by the agency.

The Uniform Arbitration Act provides that written agreements between employers and employees to submit controversies to arbitration are valid, enforceable and irrevocable (10 *Del. C.* § 5701). If the agreement is broadly drafted, courts have deferred to arbitration on any issues that touch on contract rights or performance (*Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155 (Del. 2002)). Employment disputes are not likely to be resolved pursuant to the Delaware Rapid Arbitration Act because employees are arguably more like "consumers," defined as "an individual who purchases or leases merchandise primarily for personal, family or household purposes," and consumers are precluded from the proceedings due to their vulnerable contracting position (10 *Del. C.* § 5803).

6.5 Class or Collective Actions

Class action waivers are not addressed in state statutes, and Delaware courts look to federal law for guidance on this issue.

7. Extraterritorial Application of Law

Generally, there is a presumption against the territorial application of Delaware law (see *Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), relying on *Hilton v. Guyot*, 159 U.S. 113, 163 (1894)). Furthermore, certain statutory laws have expressly prohibited the territorial application of Delaware law. Delaware's Wage Payment and Collection Act ("WPCA"), for example, provides that an employee is anyone employed under an employment contract either made in Delaware or to be performed wholly or partly therein (11 *Del. C.* § 1101). When interpreting the WPCA, the Delaware Court of Chancery held that Delaware cannot regulate the wages of an individual working in another state (*Klig v. Deloitte LLP*, 36 A.3d 785, 798 (Del. Ch. 2011)). Additionally, Section 705 of Title 19, which provides noticing requirements for employers monitoring telephone and internet usage, expressly applies to only employers and employees within Delaware (see *In re Info. Mgmt. Servs., Inc. Derivative Litig.*, 81 A.3d 278, 292 (Del. Ch. 2013)).