



Lex Mundi Global Employment Law Guide

USA, Delaware

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What are the different categories of employment status (for example, employee, worker, self-employed individuals, etc)?

Delaware recognizes the conventional relationship between an employer and an employee hired for an indefinite period of time, more readily known as "employment-at-will." Under this arrangement, and setting aside the potential applicability of a number of special laws, either the employer or the employee may terminate the employment relationship at any time. Employment at-will is generally presumed unless it is contractually eliminated by a specific length-of-time contractual provision. In addition to traditional at-will employees, many employers may use the services of temporary employees. When an employer hires an employee for a temporary period or for a season, the temporary employee is still an at-will employee of the employer. As a result, the same laws as those applicable to at-will employees govern the relationship; however, optional benefits, such as 401(k) plans, need not be offered to temporary employees.

Another employment category that is increasingly popular among businesses in the United States, including in Delaware, are independent contractors, such as consultants and freelance workers. Similar to temporary employees, independent contractors are usually hired on a short-term basis for specific projects. There are several advantages to this business model for an employer. 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. Nevertheless, under federal and Delaware state law, not every worker will be appropriately classified as an independent contractor, and there are adverse consequences for misclassification. 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.

<p>Are there different types of employment contracts (for example, fixed-term, indefinite)?</p>	<p>While it is not required or necessary to enter into an employment agreement with any employee, employers may wish to enter into written employment agreements with one or more employees, such as key management personnel. If an employer chooses to enter into an employment agreement with a particular employee, such agreements typically spell out the terms of employment (even if it is at-will), duties, compensation and circumstances under which the agreement may be terminated by either party. In addition, such agreements often contain provisions requiring key employees to keep the information confidential even after they leave employment and barring them from becoming employed by certain competing organizations for a limited period of time following termination. The provisions of any employment, confidentiality, or separation and release agreement, and whether any such agreement should be used, should be discussed and reviewed with counsel for legal requirements before they are presented to an employee or prospective employee.</p>
<p>What requirements need to be met in order for an employment contract to be valid?</p>	<p>The requirements for a valid employment contract are the same as the requirements for a valid general contract under Delaware law. In Delaware, all valid contracts must have mutual assent, supported by consideration. <i>Eagle Force Holdings, LLC. v. Campbell</i>, 187 A.3d 1209, 1212 (Del. 2018). See <i>Am. Homepatient, Inc. v. Collier</i>, 2006 WL 1134170, at *2 (Del. Ch. Apr. 19, 2006) (holding a non-compete agreement enforceable because it had “mutual assent and consideration”).</p>
<p>Are part-time employees afforded the same rights as full-time employees?</p>	<p>Although part-time employees may not be entitled to receive the same benefits as full-time employees pursuant to the employer’s benefits packages, part-time employees are generally afforded the same rights as full-time employees under Delaware law. Employees who work for employers with four or more employees have a right to be free from discrimination under Delaware’s anti-discrimination statutes. The Delaware Discrimination in Employment Act (DDEA) prohibits discrimination based on membership in a protected class. 19 Del. C. § 711. The protected classes are race, marital status, genetic information, color, age, religion, sex, sexual orientation, gender identity, national origin, volunteer emergency responder status, surviving sexual assault and/or domestic violence or stalking status. These restrictions apply to both public employers and private sector employers with four or more employees in Delaware, regardless of the employees’ status as part-time or full-time. In addition, for public employers, an employee’s criminal record, criminal history and credit score are also considered a protected class. 19 Del. C. §§ 710-719. Pursuant to the Handicapped Persons Employment Protections Act (HPEPA), it is unlawful to discriminate</p>

against a handicapped applicant or employee. 19 Del. C. §§ 720-728. The HPEPA applies to public and private employers with four or more employees and requires employers to provide reasonable accommodations for qualified handicapped persons. Further, under the Pregnancy Fairness Act, employers must provide reasonable accommodations for the known limitations of employees who are pregnant or have a pregnancy-related condition, as long as the accommodation does not constitute undue hardship for the employer.

Delaware also prohibits discrimination with regard to an employee's reproductive health decisions (19 Del. C. § 711(k)) and family responsibilities (19 Del. C. § 711(i)). Further, Delaware's Anti-Sexual Harassment statute protects employees, unpaid interns, joint employees and apprentices from unlawful sexual harassment in the workplace. (19 Del. C. § 711(A)).

Nevertheless, there are certain instances in which part-time employees may not be afforded the same rights as full-time employees, depending on the number of hours worked. For instance, employers must give employees who work for 7.5 or more consecutive hours a meal break of 30 minutes (which can be unpaid). 19 Del. C. § 707.

Can employment contracts be assigned?

A contract can be assigned unless the parties contract otherwise. Generally, an employment contract governed under Delaware law may be assignable. See e.g., *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219 (Del. Ch. Jan. 29, 2010) (holding that "contractual rights may be assigned unless that assignment is precluded by contract, is prohibited by public policy, or materially alters the duties of the obligor"). Typically, to prevent assignment, Delaware employers add a non-assignment provision to an employment contract, if one exists. As a practical matter, this issue does not typically arise in the employment context, but can in the independent contractor context.

What rights do employees have (to object, to severance), if any, when the company they work for is transferred as a going concern?

There is no severance requirement in Delaware, nor are there any rules regarding the manner of termination for at-will employees. The Delaware Wage Payment & Collection Act sets forth the requirements for final pay upon termination. 19 Del. C. § 1101 et. seq. Notably, a terminated employee's final wages are due on or before the next regularly scheduled payroll date, and employers must pay or provide benefits they are obligated to provide within 30 days. 19 Del. C. § 1109. Delaware law provides that an employer must post and maintain printed statements of unemployment regulations in places readily accessible to employees. 19 Del. Admin. C. § 1202-5.0.

Delaware law requires certain businesses doing business in the state to provide at least 60 days' advance notice of mass layoffs, plant closings or relocations. 19 Del. C. § 1901 et. seq.

Do you have statutory rights for employees on change of control of an employer? If so, please give the statute.

Generally, Delaware does not provide statutory rights for employees upon the change of control of an employer. However, in the event of a merger, consolidation, sale or other business combination, individuals that have engaged in employment in Delaware and have negotiated a labor contract through a labor organization, collective bargaining agent or other representatives cannot be terminated or have any other impairment to their labor contract prior to its expiration. 19 Del. C. §706.

In what circumstances can employers unilaterally change the terms of employment, and what remedies (if any) are afforded to an employee?

For at-will employees who do not have an employment agreement with agreed-upon terms, the employer can unilaterally change most, if not all, of the terms and conditions of the employee's employment without the consent of the employee by making changes to the employer's policies and procedures, which may be set forth in the employment handbook or other written document. With regard to employees who have entered into a written employment agreement, the employer may be able to change the terms of employment if such right is preserved in the contract, or the employee and employer can renegotiate mutually acceptable terms and conditions of employment either during (assuming proper consideration) or at the end of a contract prior to its renewal. Any changes to the terms and conditions of employment must not conflict with Delaware employment laws. If a collective bargaining agreement exists, in most instances the employer will be unable to unilaterally change the material terms and conditions of the employees' employment without the consent of the collective bargaining unit.

Is your jurisdiction an employment-at-will jurisdiction? What are the employer's termination rights?

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. Further, an employee cannot be terminated in retaliation for exercising

certain statutory rights, such as filing a worker's compensation claim against the employer or refusing to take a polygraph test (19 Del. C. § 2365 and 19 Del. C. §§ 701-709).

Also, Delaware case law has developed recognized exceptions to the at-will doctrine –specifically, when such termination would be a violation 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.

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 (e.g., the "term"), as well as the basis upon which the employer can terminate the agreement before the expiration of its term (e.g., "for cause").

Delaware law also preserves 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)).

Are there remedies for dismissal without cause or wrongful termination?

At-will employees can sue for wrongful termination if the employer fired them for illegal reasons, such as an employer's violation of public policy, an employer's breach of an implied contract for continued employment, or an employer's violation of the covenant of good faith and fair dealing. *Bunting v. Citizens Fin. Grp., Inc.*, 2007 WL 2122137, at *7 (Del. Super. Ct. June 29, 2007) (upholding a pecuniary award for wrongful termination for breach of the covenant of good faith and fair dealing and granting attorneys' fees).

An employee who is successful in a wrongful termination suit against his or her employer for discrimination or retaliation may be entitled to reinstatement with the employer, back pay, front pay (wages lost from the time of judgment until the employee is reinstated or finds new work), the costs of health insurance and other benefits the employee would have received if still employed, injunctive relief, compensatory damages (out-of-pocket expenses such as medical bills, pain and suffering or job search costs) and/or punitive damages. However, employees may have a duty to mitigate their damages by looking for a job elsewhere. Delaware employees can also look to the Delaware Discrimination in Employment Act (DDEA), 19 Del. C. § 711, the Handicapped Persons Employment Protections Act (HPEPA), 19 Del. C. §§ 720-728, the Anti-Sexual Harassment Act, 19 Del. C. § 711(A) and the Pregnancy Fairness Act (PDA), 19 Del. C. § 711(k)-(i), for remedies against

discrimination. The Delaware Department of Labor (DDOL) administers and enforces the DDEA, the HPEPA, the Anti-Sexual Harassment Act and the PDA. 19 Del. C. § 712. The DDOL's Office of Anti-Discrimination handles the intake and investigation of discrimination charges. Employees must file all complaints of discrimination with the DDOL within 300 days after the alleged discriminatory practice or its discovery. 19 Del. C. § 712(c).

Employees may file a civil action within 90 days of receipt of a right to sue notice with the Superior Court of Delaware after exhausting all administrative remedies before the DDOL and after receiving a Delaware Right to Sue Notice. 19 Del. C. § 714(b). In addition, employees who have an employment contract that specifies the reasons for which they can be terminated can sue their employer for breach of contract if they were fired for other reasons. If an employee is successful, he or she can seek lost wages and benefits under the contract for the remaining period.

Are there protections for whistleblowers?

Yes, Delaware has adopted the Delaware Whistleblowers' Protection Act (WPA). 19 Del. C. §§ 1701-1708. 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). Specifically:

- Reporting a violation of either (1) health, safety and environmental laws; or (2) financial management and accounting standards laws (or potential future violations) to either an appropriate public body or a supervisor. The employee must know or reasonably believe that the violation has occurred.
- Participating in a public investigation or hearing concerning a violation of either of these two types of laws.
- Refusing to commit a violation of either of these two types of laws.

When reporting violations, an employee may report the violation to an appropriate public body or to a supervisor. Employers are also required under the WPA to inform employees that they will not be retaliated against for whistleblowing. In addition to the whistleblower protection law, Delaware has enacted many anti-retaliation statutes to cover specific instances of retaliation. Employees may not be retaliated against (i.e., discharged or discriminated against) for engaging in protected activities (e.g., reporting violations) concerning minimum wage (19 Del. C. § 509(c)), wage payment violations (19 Del. C. § 2365), child labor (19 Del. C. § 509(c)), meal breaks (19 Del. C. § 711 (f)), handicapped employee protections (19 Del. C. § 726), nursing facility employees (16 Del. C. § 1135), contractor whistleblowers (29 Del. C. § 1208(a)), 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. § 74(f)), personnel files (19 Del. C. § 735(b)) and smoking statutes (16 Del. C. § 2907(b)).

Do employees have a right to privacy? If so, what are the remedies for a breach?

Generally, Delaware law recognizes the right of privacy. *Avallone v. Wilmington Med. Ctr., Inc.*, 553 F. Supp. 931, 938-39 (D. Del. 1982). Cf. *Barbieri v. News-Journal Co.*, 189 A.2d 773, 773 (Del. 1963).

In the labor and employment context, 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). Also, Delaware employers must notify employees in writing before monitoring employee telephone conversations, email and internet usage. 19 Del. C. § 705. In the event that an employer seeks permanently to dispose of records containing employees' personal identifying information (including but not limited to information that contains the employee's first name or first initial and last name in combination with social security number, passport number, driver's license or state identification card number, insurance policy number, financial services account number, bank account number, credit card number, debit card number, tax or payroll information or confidential health care information) within its custody and control, such employer shall take all reasonable steps to destroy or arrange for the destruction of each such record by shredding, erasing or otherwise destroying or modifying the personal identifying information in those records to make it unreadable or indecipherable. 19 Del. C. § 736.

Delaware law expands employee privacy protection to social media. Delaware employers are prohibited from requiring or 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. § 709A. Violation of these protections may result in fines of at least \$1,000 for the first offense and at least \$5,000 for subsequent violations. 19 Del. C. § 709B(h)(1). In addition, the statute provides a right of action for monetary damages. 19 Del. C. § 709B(h)(3).

Are employees afforded any anti-discrimination protection?

Employees who work for employers with four or more employees have a right to be free from discrimination under Delaware's anti-discrimination statutes. The Delaware Discrimination in Employment Act (DDEA) prohibits

discrimination based on membership in a protected class. 19 Del. C. § 711. The protected classes are race, marital status, genetic information, color, age, religion, sex, sexual orientation, gender identity, national origin, volunteer emergency responder status, surviving sexual assault, domestic violence or stalking status. These restrictions apply to both public employers and private sector employers with four or more employees in Delaware. In addition, for public employers, an employee's criminal record, criminal history and credit score are also considered a protected class. 19 Del. C. §§ 710-719. Pursuant to the Handicapped Persons Employment Protections Act (HPEPA), it is unlawful to discriminate against a handicapped person. 19 Del. C. §§ 720-728. The HPEPA applies to public and private employers with four or more employees and requires employers to provide reasonable accommodations for qualified handicapped persons. Further, under the Pregnancy Fairness Act—Delaware's Anti-Sexual Harassment statute—employers must provide reasonable accommodations for the known limitations of employees who are pregnant or have a pregnancy-related condition, as long as the accommodation does not constitute undue hardship for the employer. Delaware also prohibits discrimination with regard to an employee's reproductive health decisions (19 Del. C. § 711(k)) and family responsibilities (19 Del. C. § 711(i)). Delaware also requires public and private employers to prevent the unlawful sexual harassment of their employees, unpaid interns, apprentices and joint employees. (19 Del. C. § 712(A)).

Are there statutory rights to vacation, medical leave and parental leave? Have there been any changes to leave benefits in the past 12 months? Is there any proposed legislation that employers should be aware of that will impact leave benefits?

There are no statutory rights to vacation, medical leave or parental leave under Delaware law. However, employers must provide reasonable accommodations related to pregnancy and disability under the PDA and HPEPA (19 Del. C. § 711(i), 19 Del. C. §§ 720-728), which could include a medical leave of absence as a reasonable accommodation. Effective April 14, 2019, Delaware also provides paid medical leave to state workers. 14 Del. C. § 1333 (teachers); 29 Del. C. § 5120 (state employees).

Are restrictive covenants recognized and, if so, what are reasonable restrictions as to geography, duration and scope of activity?

Yes, reasonable restrictive covenants are recognized by Delaware courts, though restrictive covenants on physicians are explicitly prohibited. 6 Del. C. § 2707. The reasonableness of the covenant depends on the circumstances; generally, the covenant needs to be narrowly tailored to business needs and other particular circumstances. In Delaware, a non-compete restriction must meet general contract law requirements, be reasonable in scope and duration, advance a legitimate economic interest of the party enforcing the covenant, and survive a balancing of the equities. *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *5 (Del. Ch. Aug. 9, 2004); *Delaware Exp.*

Shuttle, Inc. v. Older, 2002 WL 31458243, at *11 (Del. Ch. Oct. 23, 2002).

The courts will look at and protect the legitimate economic interests of the employer if those interests outweigh the harm enforcement would do to the employee. *Elite Cleaning Co., Inc. v. Capel*, 2006 WL 1565161, at *3-4 (Del. Ch. June 2, 2006). Delaware courts will typically protect the employer's trade secrets, customer good will, customer lists and other proprietary information in which the employer has a legitimate economic interest. *Id.* However, the State maintains a strong public interest in favor of competition. *Elite Cleaning*, 2006 WL 1565161, at *4; *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *7 (Del. Ch. Apr. 5, 2005). For example, if an employer's client base is international, it may be reasonable for a high-level employee to be restricted from working for any direct competitor anywhere for a certain period of time (e.g., one year is usually reasonable, but it can be up to two in certain situations). Compare *Faw, Casson & Co. v. Cranston*, 375 A.2d 463, 467 (Del. Ch. 1977), *Singh v. Batta Envtl. Associates, Inc.*, 2003 WL 21309115, at *7 (Del. Ch. May 21, 2003) and *Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *3 (Del. Ch. Dec. 7, 2007) with *LewMor, Inc. v. Fleming*, 1986 WL 1244, at *1-*2 (Del. Ch. Jan. 29, 1986), *Gamble v. Walker*, 1994 WL 384617, at *3 (Del. Ch. July 18, 1994) and *Elite Cleaning*, 2006 WL 1565161, at *8-*9. Blue pencil provisions are generally advised, although Delaware courts have rewritten provisions to narrow the scope without specific language in the contract authorizing such. *RHIS, Inc. v. Boyce*, 2001 WL 1192203, at *7 (Del. Ch. Sept. 26, 2001); *Knowles-Zeswitz Music Inc. v. Cara*, 260 A.2d 171, 175 (Del. Ch. 1969). Delaware courts have also expressed a willingness to strike offensive non-competes in their entirety in an effort to encourage employers to only include reasonable terms. *Delaware Elevator, Inc. v. Williams*, 2011 WL 1005181, at *11 (Del. Ch. Mar. 16, 2011). The courts have found this helps to "equalize bargaining power up front" between an employer and employee. *Id.*

Can employees be terminated for refusing to sign a restrictive covenant? What serves as consideration for a restrictive covenant?

Yes, employees can be terminated for refusing to sign a restrictive covenant as a condition of their employment. See *RHIS, Inc. v. Boyce*, 2001 WL 1192203 (Del. Ch. Sept. 26, 2001). Delaware courts have found that the following are sufficient consideration for a restrictive covenant:

- Beginning an employment relationship, when the employee is offered employment (*All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *3 (Del. Ch. Aug. 9, 2004));
- A change in terms or conditions of employment, for example, a change from a probationary hire to permanent employment (*RHIS, Inc. v. Boyce*, 2001 WL 1192203, at*4 (Del. Ch. Sept. 26, 2001));
- Continued employment of an at-will employee (*All-Pro Maids*, 2004 WL 1878784, at *3); and

- Where the employee received compensation for his work (*O’Leary v. Telecom Res. Serv., LLC*, 2011 WL 379300, at *5 (Del. Super. Ct. Jan. 14, 2011)).

<p>Does your jurisdiction require contributions to a pension or retirement scheme?</p>	<p>Delaware does not have any requirements in this regard. However, employers should ensure they comply with the Employee Retirement Income Security Act (ERISA), a federal act that sets minimum standards for pension plans in the private sector. ERISA applies to private-sector employers offering a welfare benefit plan to their employees, such as health insurance or a retirement plan.</p>
<p>Are certain benefits mandated by your jurisdiction?</p>	<p>Yes, Delaware mandates unemployment, 19 Del. C. § 3315, and worker’s compensation benefits, 19 Del. C. § 2322, along with certain rights if an employee is terminated in connection with a mass layoff or site closing under the Delaware Workplace Adjustment and Retraining Notification Act (the DE WARN Act), 19 Del. C. § 1904, as defined by statute.</p>
<p>Is it permitted to have a mandatory retirement age in your jurisdiction?</p>	<p>There is no Delaware law on this issue. However, the Age Discrimination in Employment Act of 1967 (ADEA), which applies to employers who employ at least 20 employees, permits employers to implement a mandatory retirement age of 65 years old for bona fide executives or high policymakers, subject to other conditions. 29 U.S.C. § 631(c).</p>
<p>Is it possible to cease pension or insured benefits (income continuance/disability insurance, healthcare, life assurance, etc.) when work continues beyond retirement age?</p>	<p>Although Delaware law does not specifically address this issue, private employers should ensure they comply with the federal Employee Retirement Income Security Act (ERISA). ERISA applies to private-sector employers offering welfare benefit plans, such as a retirement plan, to their employees.</p>

Please be advised that the information set forth above is intended only as a general overview of the law. This entry is not intended to constitute legal advice or a tax opinion, and no conclusions may be inferred from or are implied by the statements or discussions contained herein. Readers requiring legal advice should not rely on this entry as an alternative to the engagement of local counsel and should consult with the Lex Mundi member firm in the relevant jurisdiction. Please note that this entry refers to laws and regulations in force on the date of submission by the contributing Lex Mundi member firm and is subject to change by future legislation.