

The UK Startup's Guide to US Employment



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US employment is a business topic that is truly foreign to many UK entrepreneurs.

Employment matters in the States are best addressed by proactively seeking to avoid problems, and a careful and competent setup can mitigate most risks and deter many disputes. Don't take our word for it; we regularly hear experienced UK entrepreneurs cite US employment pitfalls when answering the question "what do you wish you had done differently when expanding to the US."

In the spirit of trying to change the answer to that question, here are some of the most common hiring-related employment issues for companies expanding to the US:

1. Jettison the long UK employment agreements for shorter US offer letters

UK employees typically receive their employment terms in multi-page contracts. These contracts are uncommon for US employees outside the C-suite and may be perceived as overwhelming. Rather, US employers usually provide employees with a 1-2 page letter that offers employment, states compensation parameters, and briefly sets out standard employment terms. Most US employers also will require newly-hired non-administrative employees to sign a separate agreement containing key employment covenants, including confidentiality and invention assignment provisions. Separating the offer letter from the employee agreement is not only customary, it's prudent; in some states, there is a risk of losing key protections (e.g., noncompetition covenants) if the employer materially changes compensation terms, job titles, or job duties set forth in the same agreement.

2. Align your employment terms with the US labor market

UK employee compensation and benefits packages often are more generous than in the US, and UK companies can right-size overhead costs for US employees by adapting to US market norms. Additionally, many employment terms are handled differently in the US than in the UK; UK employers would be wise to ask US legal counsel for a typical employee handbook to better understand usual US employee policies. For example, post-termination noncompetition periods in the US are typically unpaid. Also, US employers offer many different types of leaves to employees – some voluntarily and others required by law.

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3. Properly classify your workers as employees or contractors

An employer's decision as to whether a US worker is a contractor or an employee is a very common area of potential dispute. The employee/contractor characterization informs whether payroll taxes are withheld from paychecks and if the worker is covered under laws protecting employees, including wage and discrimination laws. The test for worker classification primarily involves an analysis of how much control the company wields over a worker. A rule of thumb is that all workers are employees unless they are working on a short-term, discrete project unrelated to the company's core business and retain control over how and when the project is performed.

4. Properly classify your employees as exempt or nonexempt from overtime laws

The employer's decision as to whether or not an employee is exempt from overtime laws also is a common source of disputes. This determination informs whether the employer must track the employee's weekly hours worked and whether a premium payment is due to the employee for hours worked over 40 in a workweek. The test for overtime exemption involves an analysis of whether the relevant employee fits within certain limited statutorily defined "white collar" or outside sales jobs. Companies new to the US should recognise that it is very rare for US businesses not to have at least some nonexempt employees – usually secretaries, front desk, assistants, inside sales, and entry-level workers.

5. Carefully draft commission plans

Commission disputes in the US can have tremendous downside – if you lose, you are stuck paying for your own legal fees, the employee's legal fees, the owed commission compensation, and an additional damages amount that can equal the owed compensation. Thus, a small commission dispute can quickly become a financial nightmare. US commission plans require a very clear description of how commissions are earned when they are paid, and how they are calculated. Unfortunately, in our experience, UK commission plans rarely describe these required terms adequately for the US market.

6. Recognise that each state is different

US employment law is a combination of federal and state laws. Federal employment law applies to employers in all states and provides a baseline of obligations. State and city employment law only applies to the employees working in the relevant state or city. Thus, employers with a geographically dispersed workforce are confronted with similar yet not identical rules for their US employees. If your UK company's US affiliate will have employees across multiple states, it's crucial to be taking employment advice from US counsel with experience in those states. For example, the State of New York requires that all employers provide newly hired employees with very specifically worded forms detailing their salaries and other compensation information; the State of California requires a verbatim recitation of a statute in employee agreements or else your invention assignment provisions will be voided; and the Commonwealth of Massachusetts

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(and soon the City of New York) forbids employers from soliciting past salary history from candidates. You need to ensure you're taking appropriate advice and obtain properly drafted from employee agreements for each state in which you hire employees.

After you hire your employees, there are a few day-to-day considerations US employers should keep in mind:

7. Employment discrimination claims are common and expensive

In the US, all employees are theoretically employed “at-will” by default, meaning that employers can hire or fire US employees for any reason or no reason. However, in practice, nearly all employees are able to identify as part of a “protected category” (e.g., race, religion, nationality, etc.) that can make a claim of discrimination under US law if they believe they've been treated inappropriately. That's why US employers must be knowledgeable regarding HR practices, or proactively partner with US employment counsel, when handling employee disputes and complaints. A mistake in how an employer addresses an employee dispute can result in significant legal expenses (which typically cannot be recovered from the employee if the employer prevails in the dispute) and substantial lost man-hours. However, carefully coordinated responses to employee disputes, coupled with well-drafted employee agreements, can mitigate much of this litigation risk.

8. Employee medical leave is complicated

The US has a thicket of overlapping military, family, and medical leave laws that may permit employees paid or unpaid leave and give employees rights to reinstatement into the same position upon return. Navigating these laws is complicated and delicate. It requires working with employees to obtain doctor's notes and other authorizations (which are rarely easily handled due to dilatory doctor's offices and ill-feeling employees) and managing your internal workforce to ensure that absences do not hinder the business.

If the employment relationship turns sour, US employers need to proceed carefully when separating employees from employment:

9. Termination meetings should be scripted

Employee termination meetings need to be carefully scripted to avoid additional liability and smoothly transition employment. Departing employees, once notified that their employment is being terminated, can become very hostile or desperate. Perhaps this reaction is universal and not restricted to US departing employees, but the additional risks in the US are unique. To state a claim of discrimination, a former employee must offer evidence of an “inference of discrimination,” which can take many forms. One such form is often how the employer articulates the reasons for termination. Phrases like “you are a bad culture fit,” “you can now spend more time with your kids,” “we need people with more energy,” or “we are diversifying our workforce” may seem innocuous (or not) but have proven to lead to claims of discrimination

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on the basis of (respectively) national origin, parental status, age, and race. Employers at these meetings must carefully choose their words to be sensitive from a human perspective and judicious from a legal perspective. Also, having a witness attend the meeting is important from a future evidentiary standpoint.

10. Terminating employment trigger various obligations under state laws

Termination of employment triggers payment and other notice obligations under various state laws. For example, in California and Massachusetts, an employee must be paid all earned wages, including payment for accrued but unused vacation, on the final day of employment. Thus, most employers in these states arrange to give paper checks to their employees on their termination date. California law also requires employers to provide a host of additional forms and notices related to unemployment insurance and other topics. Failing to timely provide a final paycheck or required notices can result in steep penalties in many states. For example, in California, an employer is liable for a penalty equal to the employee's daily wage for every day that final wages are not completely paid, up to a maximum of 30 days.

11. Poorly planned layoffs may trigger costly notification laws

Mass layoffs typically require employers to give employees advance notice or payment in lieu of notice. Under the federal WARN Act and most state versions of the WARN Act, the notice is 60 days. The most common way to trigger the federal WARN Act is to terminate 50 or more employees at a facility in a 30-day period that comprises 33% of full-time employees at the facility. State laws, however, are more stringent. In California, the state version is triggered if 50 employees at a facility lose their employment irrespective of the percentage of persons affected at the facility. In New York, mass layoffs involving only 25 employees at a facility require notification if those affected workers make up at least 33% of all the workers at the facility.

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