

Employment: North America 2021



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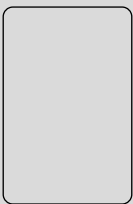
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Employment: North America

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Lexology Getting The Deal Through is delighted to publish the second edition of *Employment: North America*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Iowa.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise.



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United States – Maine

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STATE SNAPSHOT

Key considerations

- 1 Which issues would you most highlight to someone new to your state?

Maine is the northeastern-most state in the United States. Part of Massachusetts during the Colonial and Revolutionary War periods in American history, it became a separate state as part of the Missouri Compromise in 1820.

Maine's largest city is Portland, on the southwest coast. Greater Portland accounts for nearly half of the State's economic activity. Maine's population is stable at approximately 1.3 million. Maine's economy has long been based primarily on natural resource extraction and manufacturing industries, including forest products, fishing, farming and textiles. All of these industries have declined over the last 70 years, textiles nearly to the point of extinction. Maine has morphed into a services-based economy, led by tourism and healthcare with an emerging technology sector in animal health and financial services. Maine is often characterized as having "two Maines" – a northern two-thirds that is very rural, has few major employers, is losing population because of the decline noted above, and is more politically conservative; and a southern one-third that is more densely populated, economically vibrant, slowly gaining population in technology and professional services, and more politically liberal.

Maine's workforce is regarded as hardworking and loyal, but as Maine undergoes a pronounced demographic shift the workforce is aging and employers struggle to find skilled workers at almost all levels, a challenge that has become more acute in the aftermath of the covid-19 pandemic. Employment opportunities abound for younger workers interested in a high quality of life and access to diverse outdoor resources, arts, fine dining and quality private and public education.

Maine law regulates employment broadly. On the labor front, Maine regulates public sector unions at the state and local government level. The public sector workforce is about 35 per cent unionized, in contrast to private sector unionization of under 7 per cent. Maine sets its own standards for wages, work hours, discrimination, harassment, retaliation, public sector workplace safety, and employee leave. These standards sometimes coincide with federal law (where the latter exists), but often exceed federal standards. For example, the Maine Human Rights Act prohibits discrimination on the basis of sexual orientation, a protection recently recognized by the U.S. Supreme Court, but not expressly provided by federal statute. Maine requires employers to post notices in the workplace so that employees are aware of their legal rights.

Maine is at least nominally an employment-at-will jurisdiction (allowing for termination at any time for any lawful reason), but specific legal protections or contractual arrangements often make employment-at-will an unreliable basis for termination. Maine does not generally

recognize "common law" wrongful termination claims, but the State's Supreme Judicial Court has left the door open to doing so. The State's Whistleblowers Protection Act affords broad protection to employees who report unsafe or illegal practices or conditions. Most employees do not have employment agreements. They may have "offer letters" that typically outline the general parameters of employment including job title, pay and benefits, but make it clear that their employment is at-will. Employers typically hold their workers accountable by utilizing employee handbooks, personnel policies, and codes of conduct, all of which must be compliant with federal, state, and local laws. Because 99 per cent of businesses in Maine have fewer than 500 employees, and most are much smaller than that, there are many employment situations in which there is little or nothing in writing purporting to govern the employment relationship. Maine limits the use of non-competition agreements and requires mandatory paid leave.

Employment disputes can be litigated in either federal or state court, depending upon the claims asserted. As a general rule, employment disputes are tried in front of juries. Some employers have elected to require their employees as a condition of employment to agree to use private arbitration instead of court action to address and resolve legal disputes, but these agreements are not widely used in Maine. The Maine Human Rights Commission, which has a work-share agreement with the EEOC, considers the vast majority of discrimination claims before they go to court, but it can only make probable cause ("reasonable grounds") findings and cannot award any relief. The MHRC has the authority to bring claims on behalf of individual employees, but rarely does so. The Maine Department of Labor has the authority to prosecute certain wage disputes. The Maine Labor Relations Board oversees public sector labor matters.

- 2 What do you consider unique to those doing business in your state?

Maine's supply of workers is constrained. Its employers tend to be very resourceful and practical but Maine's economy is a challenging place to grow a business. Maine requires numerous permits and approvals to do business, administered at both the state and local level, and there is poor coordination among governmental entities, increasing the time and complexity relating to starting up or expanding a business. Employers should note that like many states Maine has a statute requiring employers to provide employees a copy of their personnel file; what is unusual is the very broad definition of what constitutes a personnel file – "any formal or informal employee evaluations and reports relating to character, credit work habits, compensation and benefits and nonprivileged medical records ... that the employer has in the employer's possession." 26 M.R.S.A. § 631. Plaintiffs' employment counsel often try to use this statute as a means of free discovery before deciding whether an employee has a claim worth filing. Managers must therefore be very careful about what they put in

writing to the extent it relates in any way to an employee's "character" or "work habits."

3 | Is there any general advice you would give in the labor/employment area?

Maine's workforce has become increasingly litigious over the last several decades except during times when the economy is providing abundant opportunity for alternative employment. Whistleblower and disability claims tend to predominate at the Maine Human Rights Commission, and employers must be proactive about their prevention efforts.

Emerging issues

4 | What are the emerging trends in employment law in your state, including the interplay with other areas of law, such as firearms legislation, legalization of marijuana and privacy?

Maine is a right to carry state, so there is no requirement for individuals to have a valid concealed weapons permit in order to carry a concealed firearm. Employers can forbid firearms on their premises, except when locked out of sight in the employee's vehicle. Maine has also legalized marijuana for both medicinal and recreational uses. The market and regulatory scheme for recreational use are evolving. Employers must be alert to the limits the law places on their ability to take action against employees who use marijuana outside of the workplace.

Proposals for reform

5 | Are there any noteworthy proposals for reform in your state?

Maine has been a regular battleground for citizen-initiated referenda relating to employment, such as minimum wage and increased top marginal tax rates for funds dedicated to public education and home care, in recent years. The constraints created by the covid-19 pandemic curtailed such activity on the state level but it is likely to continue. There have also been initiated referenda within the City of Portland pushing similar issues, and these are likely to continue.

EMPLOYMENT RELATIONSHIP

State-specific laws

6 | What state-specific laws govern the employment relationship?

5 Maine Revised Statutes Annotated (M.R.S.A.) § 4571 *et seq.*, 26 M.R.S.A. § 591 *et seq.*, and 26 M.R.S.A. § 1041 *et seq.* are the major employment-related statutes.

The Maine Human Rights Commission (MHRC) enforces 5 M.R.S.A. § 4571 *et seq.*, and the Maine Department of Labor (MDOL) enforces 26 M.R.S.A. § 591 *et seq.* and 26 M.R.S.A. § 1041 *et seq.*

7 | Who do these cover, including categories of workers?

The laws governing the employment relationship generally apply to all employees, unless otherwise provided therein. Statutes addressing leave may have applicability thresholds in the number of employees. Wage-related statutes include numerous industry-specific provisions.

Misclassification

8 | Are there state-specific rules regarding employee/contractor misclassification?

Yes. Generally, services performed by an individual for remuneration are considered to be employment unless the individual is free from the essential direction and control of the employing unit, both under

the individual's contract of service and in fact, and the employing unit proves that the individual meets all of the criteria in section (1) and at least three criteria in section (2) below. In order for an individual to be considered an independent contractor:

1 The following criteria must be met:

- the individual has the essential right to control the means and progress of the work except as to final results;
- the individual is customarily engaged in an independently established trade, occupation, profession or business;
- the individual has the opportunity for profit and loss as a result of the services being performed for the other individual or entity;
- the individual hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and
- the individual makes the individual's services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted.

2 At least three of the following criteria must be met:

- The individual has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the individual to complete the work.
- The individual is not required to work exclusively for the other individual or entity.
- The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work.
- The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work.
- Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual.
- The work is outside the usual course of business for which the service is performed.
- The individual has been determined to be an independent contractor by the federal Internal Revenue Service. 26 M.R.S.A. §1043 (11)(E).

Contracts

9 | Must an employment contract be in writing?

No. Like most states, Maine recognizes the employment at-will doctrine. Thus, employment for an indefinite period is terminable at the will of either party, unless the parties have clearly stated their intention to restrict the common law at-will rule, and subject to any applicable common law or statutory protections. *Larrabee v. Penobscot Frozen Foods*, 486 A.2d 97, 99 (Me. 1984). Many employers can and do enter into employment contracts, most of which entail straightforward contract principles.

Terms and conditions of employment are generally found in offer letters, written policies, rules, benefit plans, and employee handbooks. The mere issuance of an employment handbook, however, does not limit the employer's right to terminate its employees for any lawful reason, absent clear language to the contrary. *See Taliento v. Portland West Neighborhood*, 705 A.2d 696, 699 (Me. 1997) (language in an employee handbook "providing a method of discharge, and implying that discharge of an employee will only be for cause, is insufficient to restrict the employer's common law right to terminate the employment), *citing Libby v. Calais Regional Hospital*, 554 A.2d 1181, 1183 (Me. 1989).

10 | Are any terms implied into employment contracts?

Employment contracts entail straightforward contract principles. Maine, however, does not recognize the implied covenant of good faith and fair dealing in employment contracts. *Bard v. Bath Iron Works Corp.*, 590 A.2d 152, 156 (Me. 1991). In addition, Maine has not recognized a tort of wrongful discharge in violation of public policy. *Id.* at 155-56.

11 | Are mandatory arbitration agreements enforceable?

Maine has adopted the Uniform Arbitration Act. 14 M.R.S.A. § 5927 et seq.

12 | How can employers make changes to existing employment agreements?

If employment is at will, an employer may change the terms and conditions of employment within its discretion. If employment is subject to a written employment agreement, the provisions of such agreement will govern how changes can be made to any terms of employment set forth in the agreement.

HIRING

Advertising

13 | What are the requirements relating to advertising open positions?

There are no state-specific requirements, except that hiring practices (including job advertisement) are subject to the Maine Human Rights Act (MHRA), which prohibits employment discrimination based on protected class.

Background checks

14 | (a) Criminal records and arrests

Generally, employers in Maine may condition offers of employment on the satisfactory completion of a criminal history record check. For instance, criminal background checks are required before hiring school personnel. 20-A M.R.S.A. § 6103. Effective October 18, 2021, Maine's newly enacted "Ban-the-Box" law will prohibit employers from including criminal history questions in an application. Employers are allowed to engage in such inquiries during an interview or once they have determined that the applicant is otherwise qualified for the position. See An Act Relating to Fair Chance in Employment.

Maine has adopted the Fair Credit Reporting Act, which parallels the Federal Fair Credit Reporting Act. 10 M.R.S.A. § 1306 et seq. Maine has not clarified whether an employer checking references has to comply with the requirements of the Maine Act.

15 | (b) Medical history

Maine law prohibits employers from requiring an applicant for employment to pay for a medical examination that is required by the employer. 26 M.R.S.A. § 592. It is also unlawful for an employer to assess a fee to a prospective employee for filing an application for employment. 26 M.R.S.A. § 594.

16 | (c) Drug screening

Tests of an employee's or applicant's urine, blood, or other bodily materials for drugs or alcohol are covered by the Maine Drug Testing Law, which makes all such tests unlawful unless the employer has a policy approved by the Maine Department of Labor. 26 M.R.S.A. § 681 et

seq. However, "any employer subject to a federally mandated drug and alcohol testing program . . . and its employees, including independent contractors and employees of independent contractors who are working for or at the facilities of an employer who is subject to a federally mandated drug and alcohol testing program," are not subject to the Act. 26 M.R.S.A. § 681(8).

Employers with over 20 full-time employees must have an Employee Assistance Plan approved by the Office of Substance Abuse before implementing a testing program for employees. 26 M.R.S.A. § 683(1). Substance abuse tests for existing employees must be administered by a qualified testing laboratory; however, employers can administer their own screening tests to applicants if the employer's facilities comply with the statutory requirements for testing laboratories. 26 M.R.S.A. § 683(6).

17 | (d) Credit checks

Maine does not have any restriction on an employer's ability to inquire into certain credit history questions during the hiring process, as long as all requirements under the federal and state Fair Credit Reporting Acts have been met (e.g., obtaining written authorization from the applicant; making certain required disclosures and notifications, etc.).

18 | (e) Immigration status

The Maine Department of Labor does not issue work visas or conduct certification for employers seeking to bring foreign workers to the United States. MDOL, Hiring Foreign Workers. All employers must comply with federal law on this topic.

19 | (f) Social media

Maine employers are prohibited from requesting or requiring that applicants or employees disclose their social media passwords, access their social media accounts in the employer's presence, disclose any personal social media account information, add anyone to a list of contacts associated with a personal social media account, or alter settings to permit the employer view a personal social media account. 26 M.R.S.A. § 616. The statute similarly prohibits discrimination or retaliation based on an employee or applicant's refusal to do any of these things. *Id.*

20 | (g) Other

Maine law prohibits employers from inquiring about an applicant's salary history. 5 M.R.S.A. § 4577. Maine law also prohibits employers from requesting social security numbers from prospective employees on job applications or during the application process, except in the context of an approved drug testing program or as necessary to conduct a pre-employment background check. 26 M.R.S.A. § 598-A. There is no Maine law requiring Maine employers to keep social security numbers confidential.

WAGE AND HOUR

Pay

21 | What are the main sources of wage and hour laws in your state?

The majority of wage and hour laws in Maine are contained in 26 M.R.S.A. Chapter 7. The most significant subchapters are:

- hours of employment, 26 M.R.S.A. § 601, *et seq.*;
- wage and medium of payment, 26 M.R.S.A. § 621-A, *et seq.*; and
- minimum wages, 26 M.R.S.A. § 661, *et seq.*

22 | What is the minimum hourly wage?

As of January 1, 2021, the minimum wage is \$12.15 per hour. 26 M.R.S.A. § 664(1). Every year it increases by CPI-W as measured the previous August. If the federal minimum wage rate is increased in excess of the minimum wage in effect in Maine, the minimum wage in Maine is automatically increased to the same amount, effective on the same date as the increase in federal minimum wage, and then subject to any further increases thereafter required under Maine law. *Id.*

The minimum wage for tipped employees is 50 per cent of the minimum hourly wage in effect in Maine. 26 M.R.S.A. § 664(2). If an employee demonstrates that the actual tips received, combined with the direct wages, total less than the minimum hourly wage in effect in Maine, the employer must increase the wages to offset the difference. *Id.*

23 | What are the rules applicable to final pay and deductions from wages?

Under Maine law, every employee leaving employment must be paid in full no later than the next payday. 26 M.R.S.A. § 626. This law applies whether or not the employee leaves employment voluntarily. *Id.* Whenever the terms of employment include provisions for paid vacations, earned but unused, vacation pay on cessation of employment has the same status as wages earned. 26 M.R.S.A. § 626.

The employer may withhold from a final paycheck certain "overcompensation" and any loan or advance against future earnings or wages if evidenced by a statement in writing signed by the employee. 26 M.R.S.A. § 626. An employer cannot deduct wages when an employee has damaged or lost the employer's property. *Id.* Nor can the employer withhold payment because the employee allegedly owes the employer money. *Id.*

Employers cannot require a person, as a condition of securing or retaining employment, to work without monetary compensation or have any agreement that a part of the employee's compensation is to be returned to the person for any reason other than the payment of a loan, debt or advance, for the payment of any merchandise purchased from the employer, for sick or accident benefits, life or group insurance premiums (that an employee has agreed to pay), or for rent, light or water expense of a company-owned house or building. 26 M.R.S.A. § 629. A "debt" is defined to mean a benefit to the employee, and does not include items incurred by the employee in the course of the employee's work or dealing with customers on the employer's behalf, such as cash shortages, inventory shortages, dishonored checks, dishonored credit cards, damages to the employer's property in any form or any merchandise purchased by a customer. *Id.* The term "debt" also does not include uniforms, personal protective equipment or other tools of the trade that are considered primarily for the benefit or convenience of the employer. *Id.* "Uniforms" is defined to mean shirts or other items of clothing bearing the company name or logo. *Id.*

Hours and overtime

24 | What are the requirements for meal and rest breaks?

In the absence of a collective bargaining agreement or other written employer-employee agreement providing otherwise, an employee may be employed or permitted to work for no more than six consecutive hours at one time unless the employee is given the opportunity to take at least 30 consecutive minutes of rest time, except in cases of emergency in which there is danger to property, life, public safety or public health. This rest time may be used by the employee as unpaid mealtime, but only if the employee is completely relieved of duty. 26 M.R.S.A. § 601.

The above requirement does not apply to any place of employment where: (a) fewer than three employees are on duty at any one time; and (b) the nature of the work done by the employee allows the employee

frequent paid breaks of a shorter duration during the employee's work day. *Id.*

25 | What are the maximum hour rules?

In Maine, employers are prohibited from requiring employees to work more than 80 hours of overtime in any consecutive two-week period, although there are several exceptions to this requirement. 26 M.R.S.A. § 603(2).

26 | How should overtime be calculated?

Under the Maine overtime law, an employer cannot require an employee to work more than 40 hours in a week unless the employee is paid one-and-a-half times his or her regular hourly rate for all hours worked over 40 in one workweek. 26 M.R.S.A. § 664(3).

Compensatory time off in another workweek, even if awarded at time and one half, does not relieve the employer in Maine from overtime obligations for covered employees for the week in which the employee works more than 40 hours. 26 M.R.S.A. § 664. Furthermore, employers are prohibited from requiring employees to work more than 80 hours of overtime in any consecutive two-week period (with exceptions). 26 M.R.S.A. § 603(2).

27 | What exemptions are there from overtime?

Maine law creates exemptions from minimum wage and overtime requirements, as follows:

- individuals employed in a bona fide executive, administrative or professional capacity paid on a salary basis;
- employees whose earnings are derived in whole or in part from sales commissions, and whose hours and places of employment are not substantially controlled by the employer;
- individuals employed as taxicab drivers;
- counselors, junior counselors, and certain other employees at summer camps for boys and girls;
- individuals employed in certain aspects of the fishing and marine products industry;
- switchboard operators in a public telephone exchange with fewer than 750 stations;
- home workers engaged in certain types of work who are not subject to any supervision or control;
- members of the family of the employer who reside with and are dependent on the employer;
- individuals employed in agriculture, as defined in the Maine Employment Security Law and the Federal Unemployment Insurance Tax Law, except when that individual performs services for or on a farm with over 300,000 laying birds; and
- sentenced prisoners, other than those employed by a private employer, participating in a work-release program, in a program established under a certification issued by the United States Department of Justice, or employed while in certain community confinement programs. 26 M.R.S.A. § 663(3).

Maine law also creates exemptions from overtime requirements only as follows:

- automobile mechanics, automobile parts clerks, automobile service writers and automobile salesmen;
- mariners;
- public employees, except those employed by the executive or judicial branch of the State;
- the canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment, or distribution of (1) agricultural produce, (2) meat and fish products, and (3) perishable foods;

- a driver or driver's helper who is subject to Section 31502 of Title 49 of the United States Code, if the driver or driver's helper is paid overtime pay "reasonably equivalent" to that required by this section (26 M.R.S.A. § 664(3)) for all hours worked in excess of 40 per week;
- a driver or driver's helper who is not paid hourly and is subject to Section 31502 of Title 49 of the United States Code, who is governed by the applicable provisions of federal law with respect to payment of overtime;
- a driver or driver's helper who is represented, for purposes of collective bargaining, by a labor organization certified by the National Labor Relations Board, which is party to a collective bargaining agreement that dictates the hourly rate of pay to be paid a driver or driver's helper; and
- a driver or driver's helper who is employed by an entity that is party to a contract with the federal government, or its agency, that dictates the minimum hourly rate of pay to be paid to a driver or driver's helper. 26 M.R.S.A. § 664(3).

Record keeping

28 | What payroll and payment records must be maintained?

Maine employers are required to keep daily records of time worked by non-exempt employees, as well as records showing the date and amount paid to each employee. 26 M.R.S.A. § 622.

DISCRIMINATION, HARASSMENT AND FAMILY LEAVE

What is the state law in relation to:

PRIVACY IN THE WORKPLACE

Privacy and monitoring

29 | What are employees' rights with regard to privacy and monitoring?

Given the common law right to privacy, employers should not search employee property brought onto company premises without disseminating written policies stating that the employer can search all property on its premises at its discretion.

Federal and state laws on electronic monitoring, or the so-called "wiretap" laws, may grant special rights to prevent monitoring telephones or e-mail messages without "consent." Under Maine law, monitoring is permissible as long as one party consents – it is not necessary to obtain consent from both parties. 15 M.R.S.A. § 709(4). Maine's anti-wiretap statute is similar to the Federal Act, but there are some noteworthy differences. 15 M.R.S.A. § 709 *et seq.* First, the Maine Act exempts only "extension telephones," and does not have a business purpose exception. 15 M.R.S.A. § 709(3). Thus, the ability to intercept may turn on the nature of the intercepting device. Second, the consent exception would appear to be more limited under the Maine Act than under the Federal Act. Under the Maine Act, there is exemption only when an interceptor has been "given prior authority by the sender or receiver" of the communication. 15 M.R.S.A. § 709(4).

30 | Are there state rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?

Maine employers are prohibited from requesting or requiring that applicants or employees disclose their social media passwords, access their social media accounts in the employer's presence, disclose any personal social media account information, add anyone to a list of contacts

associated with a personal social media account, or alter settings to permit the employer view a personal social media account. 26 M.R.S.A. § 616. The statute similarly prohibits discrimination or retaliation based on an employee or applicant's refusal to do any of these things. *Id.*

Bring your own device

31 | What is the latest position in relation to bring your own device?

Currently, Maine does not have a law that specifically addresses this matter. Therefore, employers may generally establish a Bring Your Own Device (BYOD) policy.

Off-duty

32 | To what extent can employers regulate off-duty conduct?

Maine employers may not require, as a condition of employment, that an employee or applicant for employment refrain from using tobacco products outside the workplace, nor can an employer discriminate against any person for using tobacco products outside the workplace. 26 M.R.S.A. § 597.

Maine has also enacted the Maine Medical Use of Marijuana Act. 22 M.R.S.A. § 2421 *et seq.* Under the Act, an employer "may not refuse to . . . employ . . . or otherwise penalize a person solely for that person's status as a qualifying patient or a primary caregiver unless failing to do so would put the . . . employer . . . in violation of federal law or cause it to lose a federal contract or funding." 22 M.R.S.A. § 2430-C. A business may prohibit the smoking of marijuana for medical purposes on the premises of the business if the business owner prohibits all smoking on the premises and posts notice to that effect on the premises *Id.* However, the Act does not permit (1) a person to act while under the influence of marijuana if doing so would constitute negligence or malpractice, (2) the smoking of marijuana in any public place, or (3) the operation of a vehicle while under the influence of marijuana. 22 M.R.S.A. § 2426.

Gun rights

33 | Are there state rules protecting gun rights in the employment context?

Employers may not prohibit an employee who has a valid permit to carry a concealed firearm from keeping a firearm in the employee's vehicle as long as the vehicle is locked and the firearm is not visible. 26 M.R.S.A. § 600. Employers are provided with immunity from suit for damages, injury or death resulting from or arising out of another person's actions involving a firearm or ammunition transported or stored pursuant to this statute. However, this immunity does not affect Workers' Compensation, meaning that an employee who uses a firearm kept in his/her vehicle could create workers' compensation liability if he/she uses the firearm against another employee. *Id.*

TRADE SECRETS AND RESTRICTIVE COVENANTS

Intellectual Property

34 | Who owns IP rights created by employees during the course of their employment?

Like the majority of other states, Maine generally recognizes an employer's IP rights on works created by employees in the course of employment or related to the employer's business. Such "works for hire" are generally considered the employer's property. Maine has also adopted the Uniform Trade Secrets Act, which prohibits the misappropriation of trade secrets. 10 M.R.S.A. § 1541 *et seq.*

Restrictive covenants

35 | What types of restrictive covenants are recognized and enforceable?

Maine's highest court has not specifically addressed the enforceability of non-solicitation agreements, but has upheld nondisclosure provisions when reasonable. *Bernier v. Merrill Air Engineers*, 770 A.2d 97, 103-04 (Me. 2001). Maine's recently enacted statute governing non-competition agreements (discussed below) does not purport to regulate agreements prohibiting the solicitation of employees and customers, but it does expressly recognize what employers may seek to protect through such agreements: trade secrets, confidential information that does not qualify as trade secrets, and goodwill. Employers may read this provision as a tacit approval of restrictive covenants addressing non-disclosure/confidentiality and customer non-solicitation. Note that the statute independently prohibits agreements between two or more employers that prohibit or restrict one employer from soliciting or hiring the other's employees or former employees. 26 M.R.S.A. § 599-B.

Breach of a corporate officer's fiduciary duty is a cause of action in Maine. *Thompson's Point, Inc. v. Safe Harbor Dev. Corp.*, 862 F. Supp. 594, 599-600 (D. Me. 1994). Maine has not recognized a claim for breach of duty of loyalty for employees who are not officers who, for example, defect to competitors and recruit other employees to join them, or take advantage of what would be corporate opportunities for themselves.

Non-compete

36 | Are there any special rules on non-competes for particular classes of employee?

Maine has a statute governing the use of non-compete agreements entered into on or after September 19, 2019, which provides that such agreements are enforceable only to the extent they are reasonable, sweep no more broadly than required, and are necessary to protect an employers, trade secrets, confidential information, or good will. 26 M.R.S.A. § 599-A. Employers are prohibited from entering into a non-compete agreement with an employee earning wages at or below 400 per cent of the federal poverty level, and are required to inform candidates that they will be required to sign a non-compete prior to making an offer of employment. *Id.* Employers are further required to provide prospective employees and employees with a copy of the agreement at least 3 business days before they require the agreement be signed. The penalty for entering into a non-compete agreement with a low wage earner and for failing to adequately disclose or provide a copy of the non-compete in advance of the offer or required signature is a fine of at least \$5,000.

Non-compete agreements in Maine may not take effect until one year after the employee is hired, or six months after the date of the agreement, whichever is later, except a non-compete agreement between an employer and a licensed physician may take effect immediately. *Id.*

Covenants not to compete entered into prior to September 19, 2019 are enforceable in Maine "to the extent that they are reasonable and sweep no wider than necessary to protect the business interest in issue." *Lord v. Lord*, 454 A.2d 830, 834 (Me. 1983). The reasonableness of a non-competition agreement will depend on the duration, geographic scope, and the business interest sought to be protected by the agreement. See *Sisters of Charity Health System, Inc. v. Farrago*, 21 A.3d 110 (Me. 2011); *Chapman & Drake v. Harrington*, 545 A.2d 645, 647 (Me. 1988). Restrictive covenants that are broader than the Uniform Trade Secrets Act are valid and enforceable, if reasonable. See *Bernier v. Merrill Air Engineers*, 770 A.2d 97, 103 (Me. 2001). Liquidated damages clauses in a non-competition agreement are enforceable if it would be "very difficult to estimate the damages caused by the breach accurately"

and "the amount fixed in the agreement . . . [is] a reasonable approximation of the loss caused by the breach." *Farrago*, 21 A.3d at 115 (inner citations omitted).

LABOR RELATIONS

Right to work

37 | Is the state a "right to work" state?

Currently, Maine is not a right-to-work state.

Unions and layoffs

38 | Is the state (or a particular area) known to be heavily unionized?

In general, Maine is not heavily unionized in the private sector. However, public employees are unionized. Maine has enacted the Municipal Public Employees Labor Relation Law ("MPELRL") to govern collective bargaining for public employers, which closely tracks the NLRA. 26 M.R.S.A. § 961 *et seq.* The major difference between the MPELRL and the NLRA is that the MPELRL prohibits strikes and, instead, provides for dispute resolution through bargaining, fact-finding, mediation, and binding arbitration. 26 M.R.S.A. §§ 964, 965.

39 | What rules apply to layoffs? Are there particular rules for plant closures/mass layoffs?

Mandatory notice periods

Any person proposing to close a covered establishment must notify employees, as well as the municipal officers of the municipality where the plant is located, in writing not less than 90 days prior to the closing. 26 M.R.S.A. § 625-B(6-A). A "covered establishment" is any industrial or commercial facility that employs or has employed 100 or more persons at any time in the preceding 12-month period. 26 M.R.S.A. § 625-B(1)(A). Any person violating this provision commits a civil violation subject to a civil forfeiture of not more than \$1000 per employee, unless the relocation is necessitated by a physical calamity, the final order of a federal, state or local government agency, or if the failure to give notice is due to unforeseen circumstances. 26 M.R.S.A. § 625-B(6-A), (9).

In addition, any employer laying off 100 or more employees at a covered establishment is required to report to the Maine Bureau of Labor Standards, within seven days of the layoff, the expected duration of the layoff and whether it is of a definite or indefinite duration. 26 M.R.S.A. § 625-B(6).

Severance pay

Maine law establishes certain limitations on an employer's right to lay off employees. Any employer who relocates or terminates a covered establishment must pay severance pay to eligible employees at the rate of one week's pay for each year of employment (including partial pay for partial years worked), in addition to any final wage payment to the employee. 26 M.R.S.A. § 625-B(2). The severance payment must be made within one regular pay period after the employer's last day of work. *Id.* A "covered establishment" is defined as any industrial or commercial facility, or part thereof, that employs or has employed 100 or more persons at any time in the preceding 12-month period. 26 M.R.S.A. § 625-B(1)(A). A "closing" is defined as the permanent shutdown of industrial or commercial operations at a covered establishment. 26 M.R.S.A. § 625-B(A-1). A "relocation" is defined under the statute as the removal of all, or substantially all, industrial or commercial operations in a covered establishment to a new location, within or without the State of Maine, 100 or more miles distant from its original location. 26 M.R.S.A. § 625-B(1)(F). In order to be eligible to receive severance pay under

the statute, an employee must be employed by the employer for at least three years. 26 M.R.S.A. § 625-B(3)(D). The severance pay statute contains several exemptions or exclusions. 26 M.R.S.A. § 625-B(3). Rules have been promulgated by the Maine Department of Labor interpreting the severance pay provisions. <http://maine.gov/sos/cec/rules/12/chaps12.htm>.

Benefits

Employers are required to notify employees of Consolidated Omnibus Budget Reconstruction Act ("COBRA") coverage. 24-A M.R.S.A. § 2809-A(1-B). For employers with group health policies that are not subject to COBRA coverage, the employers must offer continuation coverage to employees who have been employed for at least six months and (1) are temporarily laid off, (2) are permanently laid off and are eligible for premium assistance pursuant to federal law providing premium assistance for laid-off employees who continue coverage under their former employer's group health plan, or (3) lose employment because of a work-related injury or disease. 24-A M.R.S.A. § 2809-A(11). There are some exceptions to this requirement. *Id.*

DISCIPLINE AND TERMINATION

State procedures

40 | Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

Maine has no specific law on this issue that is applicable to private employers.

At-will or notice

41 | At-will status and/or notice period?

Like most other states, Maine recognizes the at-will employment doctrine. In the absence of an employment contract for a definite term, at-will relationship may be terminated by either the employer or the employee at any time for any reason not prohibited by law, with or without notice. Requiring employees to provide any specified amount of notice resignation would be considered inconsistent with the at-will doctrine.

42 | What restrictions apply to the above?

Employees in Maine are protected from termination for engaging in the following protected conduct:

- making a claim of discrimination based on sex, sexual orientation (defined to include gender identity and expression), age, race, color, religion, national origin, ancestry, or physical or mental disability, the applicant's previous assertion of a claim or right under former Title 39 or Title 39-A (Workers' Compensation Act), or previous actions taken by the applicant that are protected under Title 26, chapter 7, subchapter 5-B (Whistleblowers' Protection Act). 5 M.R.S.A. §§ 4572, 4633;
- taking time off from work for family or medical reasons (including family military leave). 26 M.R.S.A. § 843 *et seq.*;
- reporting a violation of a State or federal law or rule, a health or safety risk, refusing to perform an illegal act, or reporting a deviation from a standard of patient care. 26 M.R.S.A. § 831 *et seq.*;
- filing for workers' compensation benefits. 39-A M.R.S.A. § 353;
- taking time off work to attend court proceedings, receive medical treatment, or obtain necessary services to remedy a crisis caused by domestic violence, sexual assault, or stalking. 26 M.R.S.A. § 850;
- choosing to participate in substance abuse treatment after the first instance of testing positive on an employer-administered substance abuse test. 26 M.R.S.A. § 685;

- taking time off from work to fulfill duties as a legislator. 26 M.R.S.A. § 821 *et seq.*;
- taking time off from work to participate in National Guard or reserve training or service, or taking time off work when a spouse, domestic partner or child is deployed for extended active military service. 26 M.R.S.A. §§ 811, 814;
- taking time off from work for jury duty. 14 M.R.S.A. § 1218;
- taking a break from work to express breast milk for a nursing child for up to three years following childbirth. 26 M.R.S.A. § 604; and
- using accrued paid time off to care for a family member that is ill. 26 M.R.S.A. § 636.

Final paychecks

43 | Are there state-specific rules on when final paychecks are due after termination?

Under Maine law, every employee leaving employment must be paid in full no later than the next payday. 26 M.R.S.A. § 626. This law applies whether or not the employee leaves employment voluntarily. *Id.*

Whenever the terms of employment or the employer's established practice includes provisions for paid vacations, earned, but unused, vacation pay on cessation of employment has the same status as wages earned. 26 M.R.S.A. § 626.

Similarly, when the terms of employment or the employer's established practice includes provisions to pay the balance of unused earned paid leave at the time of separation, earned paid leave on cessation of employment has the same status as wages earned. 26 M.R.S.A. § 637; Maine DOL, Rules Governing Earned Paid Leave, Section III, E. If there are no terms of employment or an established policy or practice addressing payout of unused earned paid leave, the Maine Department of Labor will look to the terms of vacation policy or practice. Maine DOL, General Earned Paid Leave FAQs.

The employer may withhold from a final paycheck certain "over-compensation" and any loan or advance against future earnings or wages if evidenced by a statement in writing signed by the employee. 26 M.R.S.A. § 626. An employer cannot deduct wages when an employee has damaged or lost the employer's property. *Id.* Nor can the employer withhold payment because the employee allegedly owes the employer money. *Id.*

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