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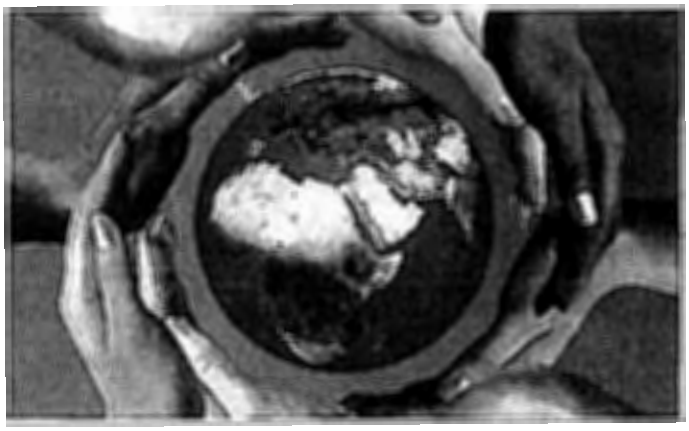
Different Cultures, Different Legal Approaches

In this Employment Issues column, Philip Berkowitz and Hironobu Tsukamoto write: Effective communication is key to being a good lawyer. But one cannot communicate effectively if one does not have a sense of the listener's values. And this may be particularly true when implementing codes of conduct across borders.

By **Philip Berkowitz and Hironobu Tsukamoto** | May 09, 2018



Effective communication is key to being a good lawyer. Whether addressing a client or a court, an adversary or a witness, or drafting an employment or business agreement, an email or a brief, the communication and its meaning must be clear.

But one cannot communicate effectively if one does not have a sense of the listener's values. And this may be particularly true when implementing codes of conduct across borders.

Culture and Communication

Culture is a key part of effective communication. Whether in a personal meeting or drafting a document, the lawyer needs to consider how the message will be received; and the cultural orientation of the message's recipient may be key.

Imagine, for example, that you are meeting with executives of a corporate client. You have spent an entire day hashing out a strategy for an ongoing or anticipated transaction. Indeed, this is not the first meeting on the topic; there have been a number of calls and meetings over a period of days, but this was the one that would finally bring it all together.

At the end of the day, all attendees feel that they have a settled on a reasonable way forward, including a legal strategy. The strategy is communicated to senior executives at headquarters, who indicate that they approve and will move forward on that basis.

You and your key contact, another senior executive at the client, then go out for dinner. At the dinner, you say, "I've been thinking about what we decided today, and I'm not sure that it gives sufficient consideration to a few important issues. I think I have another approach we should consider."

What is your client's likely response? Will she welcome your further insights? If she finds your new proposal and thoughts reasonable, is she likely to suggest that the team reconvene and discuss them? Would you expect your client to be grateful for these late-night ruminations, even if they indeed reflect a better approach?

Would your answer be different if you knew what country the client and its executives are from? For example, what if your client is an American company—or a Japanese company? Should this make a difference? Or would you expect it to make a difference?

Of course, your client may well wish that it had the benefit of your revelations earlier in the day, particularly before she transmitted the earlier strategy to headquarters. However, ideas do not always arrive in a linear fashion. Experience dictates that Americans and Westerners in general may welcome new and different points of view, and may be prepared to change direction and act on them quickly.

What if the client is Japanese? Experience in this case dictates that a Japanese company may be reluctant to consider a different approach once the matter has been run by and seemingly approved by senior executives. Generally speaking, Japanese companies' decision-making occurs in stages, with meetings and documentation aimed at reaching a consensus, from bottom to top; and once the top level approves, the decision is likely to be final. Moreover, the decision-making process is likely to take much longer than in the United States—if the U.S. key players have met for a period of days, the Japanese players have probably met over a period of weeks.

That does not mean the Japanese players do not work diligently, but their style is different from our style.

What Is Culture?

Many organizations now employ a head of culture. This position may be in the area of human resources—but it is not necessarily designed to consider issues such as diversity, or gender equality, or discrimination. Responsibilities would normally include driving successful culture transformations, such as growth or integration of different companies across different regions or countries, communication and branding.

Should "cultural fit" be a legitimate criterion for hire or advancement in an organization? This term could be charged indeed. Presumably, one does not want to screen candidates based on race or ethnicity, or on their acceptance of a culture built on questionable values. On the other hand, an organization may properly look for employees who work well independently, or cross-functionally, and are agile in an organization used to frequent change.

The Dutch social scientist and former IBM executive Geert Hofstede has famously articulated what he describes as four dimensions of societal behavior that dictate or predict differences in business culture. He points to "power distance," or a society's acceptance of power differentials among individuals; "uncertainty avoidance," or a society's aversion or propensity to risk; individualism versus collectivism," i.e., its

propensity to remain in groups; and finally, what he terms a culture's masculine or feminine traits—whether a culture may be considered to be principally aggressive or competitive, as opposed to cooperative, modest or passive.

One may quarrel with these constructs, but they are an example of studies given to the idea that people communicate differently, hear differently, and behave differently, in part depending on the society in which they reside.

There are other, perhaps less obvious behaviors, that may affect the way a client perceives colleagues, receives information, and makes a decision. What impression is sent if one is late to a business meeting? Whether one shakes hands firmly or weakly? The answer often depends on one's country of origin.

What about bowing? Should a non-Japanese attempt to bow to a Japanese host? Should the answer to this question differ depending on whether the meeting is taking place in the United States or Japan? (The answer probably is that if the non-Japanese person is comfortable with bowing, and knows how to do it properly, and is not mocking the Japanese individual, that is fine; but there should be no pressure to do this, and the Japanese individual probably does not expect this gesture.)

In France, colleagues at work often greet each other with a couple of kisses on the cheeks. This is far less likely to be acceptable behavior in Japan, or in China, or indeed in the United States, particularly in the wake or midst of the #MeToo era.

Culture and Codes of Conduct

Issues of culture must be considered when implementing codes of conduct. Societies have differing views of behaviors that Americans view as settled. The problem may not be so much the content, but the way the code is structured and implemented.

Communication, again, is key. Without effective communication and consideration of other cultures, the effort to create a stronger commitment to shared core values and behaviors throughout the group may inadvertently have the opposite effect.

Implementing a code across borders without attention to these considerations may strengthen the divide between "us" and "them."

For example, the simple requirement that a code be signed may be viewed as reflecting a lack of trust in the recipients.

Even more fundamentally, the code may be perceived as reflecting an assumption that people do not take responsibility for their actions or that they lack common sense. Employees may perceive the rules to be self-evident, calling into question the need to write them down.

Dozens of pages of ethical rules, expressed in the lecturing style, may be resented in certain cultures. They may be read like instructions for assembling furniture rather than as guidance for appropriate behavior, and local supervisors may be concerned that they will lose their credibility with local employees if they impose them on their subordinates.

There may also, of course, be substantive divides. For example, policies encouraging employees to blow the whistle on colleagues who are behaving badly may not go over well in countries where whistleblowing is perceived as a deplorable denunciation of colleagues. However, in recent years, thanks to the progressive introduction of U.S. codes of ethics and increasing legislation, this notion is more familiar and accepted as a notion.

And while it is true that most multi-national companies now implement strict rules prohibiting sexual harassment, nevertheless, local laws may remain quite restrictive when it comes to condemning employees for this conduct.

In many countries, the uniquely American system of employment-at-will is not the norm. While the Code may reflect the company's values, an assessment of whether a breach is sufficient reason for a fair dismissal is left to the courts. So the company's attempt to standardize certain incorrect conducts can be frustrated, given that the labor courts will have the last word.

Conclusion

Effectively implementing a code of conduct requires effective communication skills, which in turn requires an appreciation of different cultures. While a Code of Conduct should reflect the values of the company, there must also be room for the receiving culture's values.

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IN-DEPTH DISCUSSION

DOL Flip-Flop: SOX's Anti-Retaliation Provisions Apply to Overseas Conduct After All

BY PHILIP M. BERKOWITZ ON SEPTEMBER 15, 2017

In a late-August decision with potentially far-reaching implications for foreign and multinational employers, the United States Department of Labor Administrative Review Board (ARB) held that the Sarbanes-Oxley Act's (SOX) whistleblower provisions have extraterritorial application—in apparent contradiction of appellate court and indeed prior ARB case law.

In *Blanchard v. Exelis Systems Corp.*,[1] the complainant security supervisor had a contract with the U.S. Department of Defense (DOD) at Bagram Air Force Base ("Bagram") in Afghanistan. His duties included assessment of Afghanis and "other country nationals" (OCNs) who sought access into Bagram. The complainant claimed that his supervisors violated DOD security policy by attempting to cover up the fact that another employee had allowed an OCN to enter Bagram without proper credentials, because they were concerned that the security breach would reflect badly upon the contractors. He also claimed that a supervisor had falsified the number of hours he worked, amounting to alleged mail and wire fraud.

The complainant reported these alleged violations to one of his supervisors and to Human Resources. He also filed a whistleblower complaint with the DOL's Occupational Safety and Health Administration (OSHA), claiming that he suffered unlawful retaliation—he was interrogated, threatened, demoted and held against his will.

OSHA investigated the complaint but concluded that SOX § 806 did not cover adverse actions occurring outside the United States because of the presumption against extraterritorial application of the law. An Administrative Law Judge affirmed this ruling—but on appeal, the ARB reversed and remanded the matter to the ALJ for further proceedings.

The ARB held:

> it is unlikely that Congress intended to limit enforcement of § 806 to U.S. companies and exempt the misconduct of foreign issuers of securities in the U.S. financial market. Such a result would not only give unfair advantage to foreign issuers, it would significantly undermine the twin goals of SOX to protect both shareholders of publically-traded companies as well as the integrity of our increasingly global and interconnected U.S. financial system.

The Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Report and Consumer Protection Act of 2010 provide private causes of action for whistleblowers who suffer retaliation. Both statutes require a plaintiff asserting a whistleblower claim to show that he engaged in protected activity, that he suffered an adverse employment action, and that the adverse action was causally connected to the protected activity.

To have a claim, a whistleblower plaintiff must show that he reasonably believed that the defendant's conduct constitutes mail fraud, wire fraud, bank fraud, securities fraud, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders.

Dodd-Frank's amendments to the Securities Exchange Act provide a "bounty" to some whistleblowers—if an individual voluntarily provides original information to the SEC, which leads to an SEC enforcement action and recovery of more than $1 million, the whistleblower can collect a monetary award ranging between 10 and 30 percent of the monetary sanctions collected.

In September 2014, the SEC awarded $30 million to a foreign national who submitted to the SEC from overseas evidence of his employer's alleged unlawful conduct, which occurred entirely overseas. The SEC stated its view that there exists "a sufficient U.S. territorial nexus [to justify a bounty award under Dodd-Frank] whenever a claimant's information leads to the successful enforcement of a covered action brought in the United States, concerning violations of the U.S. securities laws, by the [SEC]."

Villanueva

The ARB held in 2011 that § 806 did not have extraterritorial effect. In *Villanueva v. Core Labs. NV, Saybolt de Colombia Limitada,*[2] the ARB affirmed a decision dismissing a whistleblower complaint, even though the alleged retaliatory decision occurred in the United States, because the complaint involved a foreign citizen who alleged violations of foreign law by his foreign employer. In dismissing the complaint, the ALJ relied in part on the Supreme Court's then-recent decision in *Morrison v. National Australian Bank, Ltd.,*[3] where the U.S. Supreme Court engaged in a two-step process to resolve any extraterritoriality issue.

In one step, the adjudicative body determines the extraterritorial reach of the relevant statute. The other step is deciding whether the essential events occurred extraterritorially and, thus, outside of the statute's domestic reach.

Applying *Morrison*'s first step in *Villanueva*, the ARB held that SOX's whistleblower provision, § 806(a)(1), has no extraterritorial application. The ARB reasoned that Congress's silence as to § 806's extraterritorial application conclusively establishes Congress's intent to withhold its application outside the borders of the United States.

As for *Morrison*'s second step, the ARB considered whether the essential parts of the alleged fraud occurred domestically or whether they triggered extraterritorial application. Here, the ARB focused on the locus of the fraudulent activity being reported and stressed that the inquiry should consider the "location of the protected activity, the location of the job and the company the complainant is fired from, the location of the retaliatory act, and the nationality of the laws allegedly violated that the complainant has been fired for reporting ...."

The ARB further noted that even if the complainant's allegation that a publicly traded American company controlled all aspects of the overseas company were true, it would "not change the fact that the disclosures involved violation of extraterritorial laws and not U.S. laws or financial documents filed with the SEC." Thus, despite the allegation that the retaliatory decision was made in the United States, the ARB held that, pursuant to *Morrison*, "some domestic contact will not convert an extraterritorial application to a domestic one."

Blanchard

In finding that SOX has extraterritorial effect, the ARB in *Blanchard* relies almost entirely on its view of Congress's intent in addressing whistleblower conduct when it passed SOX, and on the Supreme Court's more recent decision on extraterritoriality, *RGR Nabisco, Inc. v. European Community*.[4] There, the Supreme Court applied the two-step process developed in *Morrison* to hold that the Racketeer Influenced and Corrupt Organizations Act (RICO) applies extraterritorially.

The Court in *RGR Nabisco* found that RICO incorporates a number of criminal offenses (or predicate acts) that apply to foreign conduct. The Court held that such an indication will suffice to overcome the presumption against extraterritoriality, and that an "express statement of extraterritoriality is not essential."[5]

Similarly, in *Blanchard*, the ARB noted that § 806's substantive prohibitions contain clear indications of extraterritorial intent on the part of Congress. The ARB noted the application of § 806 to all companies with a class of securities registered under § 12 of the Securities Exchange Act of 1934, which by definition includes "foreign private issuers" that are subject to U.S. security laws because they elect to trade in the United States.

Perhaps more significantly, the ARB noted that § 806's "context, structure, and legislative history" indicate that it should be applied extraterritorially. The ARB noted that while Congress did not state expressly that the law applies in foreign countries, its target, "publicly traded companies that engage in specified misconduct",... unequivocally includes both domestic and foreign companies (as well as their employees, contractors and agents)."

The ARB noted, "it is unlikely that Congress intended to limit enforcement of § 806 to US companies and exempt the misconduct of foreign issuers of securities in the US financial market."

The ARB emphasized that Congress's focus, in adopting SOX, was "a backdrop of corporate misconduct conducted on a global arena."

The ARB concluded that its prior ruling in *Villanueva* was "suspect in light of the Supreme Court's holding in *RGR Nabisco*." Nevertheless, the ARB stopped short of finding *Villanueva* to be in error. This is because the ARB concluded that *they did not need to determine that § 806 applies extraterritorially to find that the conduct at issue violated SOX.*

Here, then, is the one saving grace of the decision. The ARB held that § 806 does not cover all foreign conduct of publicly traded foreign companies. Instead, "the misconduct of a foreign issuer/employer under the statute must still 'affect in some significant way' the United States." The ARB held that the complaint in *Blanchard* did allege significant domestic connections.

The ARB noted that in *Villanueva*, it found that the alleged fraud and or law violations involved Colombian laws, with no stated violation or impact on U.S. securities or financial disclosure laws. In *Blanchard*, the complainant based his claims "*solely* on violations of US law," despite that the majority of the conduct at issue occurred overseas.

Indeed, the ARB rejected the *Villanueva* tribunal's conclusion that key to whether the conduct should be protected are the locus of the alleged illegal conduct, the discovery of the alleged illegal conduct, the protected activity, the efforts to address the alleged illegal conduct, and of the retaliation. While "these factors may be a relevant to an extraterritorial assessment under § 806, they are neither individually nor cumulatively dispositive."[6]

Conclusion

Most U.S. multinationals with a concern about potential application of whistleblower law, whether of the United States or another country, are not necessarily parsing their preventive activities by determining whether the conduct at issue involves U.S. laws or the laws of any other jurisdiction.

Some foreign companies, though, may have taken a less leery view of such conduct, expecting that U.S. whistleblower laws will not touch them. *Blanchard* undoubtedly will change this. It greatly expands the risk of U.S. whistleblower claims to all multinationals, to the extent that the conduct at issue could be considered to violate U.S. law. If there are additional connections to the United States, the risk is heightened.

Multinationals, then, must consider this potential liability in formulating policies and directing internal enforcement.

[1] ARB Case No. 15-031, ALJ Case No. 2014-SOX-020 (Aug. 29, 2017), reported at https://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/15_031.SOXP_slip_op.pdf#search=exelis.

[2] ARB Case No. 09-108 (ARB Dec. 22, 2011).

[3] 130 S. Ct. 2869 (2010).

[4] 136 S. Ct. 2090 (2016).

[5] *Id.* at 2012.

[6] However, even if the statute does apply extraterritorially, the ARB noted that "the authority to reach certain foreign conduct might nevertheless be constrained by principles of international comity or avoidance of conflict of laws."

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Investigations Guidance for Multi-Nationals

MAY 10, 2017

Multinational companies should have in place well considered protocols for investigating claims of alleged internal wrongdoing. Claims of misconduct are often multi-faceted. For example, a claim of unlawful retaliation may also require a review of whether the employee has a reasonable basis for believing that the employer is engaging in wrongful or perhaps illegal conduct. This may, in turn, require an investigation into whether the alleged wrongdoing that is the subject of the complaint actually occurred.

Investigation protocols therefore should provide guidelines that assign investigation roles and responsibilities among various key stakeholders, which may include the general counsel, the chief compliance officer, chief risk officer, head of human resources, and others.

Oversight and Principles

Investigation protocols need to be guided by the company's code of conduct, policies, and workplace rules. They should indicate that they are intended to promote the highest ethical standards of the business and proper behavior of employees.

The guidelines should centralize oversight of investigations in a predetermined and identified investigations team, in order to enable investigations that promote consistency and independence, preserve the attorney-client privilege, and properly evaluate and address legal risk. At the same time, guidelines should not be considered as inflexible or mandatory steps for every investigation. Rather, the guidelines should be tailored through professional judgment to the circumstances of each investigation.

Some general principles: Guidelines need to recognize that country-wide and local laws—especially those governing employee rights and data privacy—may impact the proper approach to an investigation. They should recognize as well the employer's commitment to take appropriate steps to maintain the confidentiality of investigation information.

Guidelines should prohibit retaliation against an employee for raising good faith concerns of misconduct, or for participating or assisting in investigations of such matters. They should make clear that the employer does not prohibit anyone from electing to report concerns, make lawful disclosures, or communicate with any governmental authority about conduct believed to violate laws or regulations, nor does it require disclosures interfering with those rights.

Investigation Intake and Triage

The guidelines should designate a lead officer for identifying the proper team to conduct the investigation. As indicated above, in some circumstances, this may be human resources. In others, it may be the compliance department. And in many circumstances, it may be a combination of different resources who will need to work together to carry out the investigation and formulate remedial measures.

This team will first analyze the nature and significance of the concern and develop or modify a response plan based on, among other things, the nature, severity, scope, and complexity of the allegations; whether there were prior or similar allegations; the past history of personnel involved; the level and role of personnel involved; whether there is a need for escalation; and, critically, the potential financial, legal, reputational, business, contractual, customer, and compliance risks.

Concerns should initially be segregated by type and level of anticipated risk into ethics and compliance concerns and human resources concerns. Teams are then formed based upon the assessment of the type of concern. The team may include internal and external counsel, human resources investigators, forensic accountants or technology professionals, an independent third party, and combinations of the above.

However, certain concerns normally should be brought first to the attention of the individual leading the investigation, or escalated appropriately with senior leadership, the audit committee, external auditors and outside legal counsel. This would be the case where, among other things, an individual has hired counsel or mentioned litigation, the matter may attract press attention, there exists potential criminal liability or a regulatory fine or exposure to a consent decree, allegations of bribery, questionable accounting, accounting controls or auditing matters, alleged misconduct of an executive, officer, or a member of the Board of Directors, a complaint reported to an outside government agency or a threat to do so, or a threatened or actual government agency investigation.

Other concerns that should be elevated would include allegations of illegal, corrupt, or fraudulent activity, internal controls deficiencies, physical harm, retaliation, or an expense or other personal fraud or theft that exceeds a fixed amount, e.g., $50,000.

Matters should normally be shared with senior business leadership only where the business leader is outside the scope of the alleged misconduct, and where the business leader has a legitimate and significant business reason to be notified.

External Counsel, Legal Privilege

As a general rule, absent supervision by an attorney, internal legal investigations will not be protected by the attorney-client privilege. Depending on the nature of the matter, counsel may choose to structure the investigation to utilize or disclose the factual results and process steps in subsequent litigation. Further, certain issues may raise legal questions that require the prompt opinion of counsel. These issues may guide the investigation and related communications.

Of course, the privilege is often waived. And significantly, overseas law and culture may not support application of the privilege; to the contrary, doing so may be greeted with hostility by local law enforcement authorities. Outside the United States, the law generally does not recognize application of the privilege to in-house counsel's communications.

Initial Responses, Internal Steps

A prompt initial response to the reporting party should generally acknowledge receipt of the allegation, reinforce the employer's commitment to investigating all concerns in a fair, prompt, thorough and appropriately confidential manner, reinforce the anti-retaliation policy, provide a contact for further communications, encourage the reporting party to provide any further information, and provide some information about timing and resolution, which normally will depend on the circumstances.

The team needs to consider the rights of the reporting party and the subject. This may include reviewing employment policies or agreements relevant to the review of data, employee interviews, or employee-related remedial measures (e.g., works council rights); considering interim employment measures necessary to a proper investigation (e.g., for the subject of the investigation or for the reporting party); and informing supervisors or other management personnel in an appropriate way.

The team needs to take steps to identify key witnesses and data custodians. It must consider data privacy issues (including cross-border transfer of data), particularly where an investigation involves cross-border transfer of data. The team must consider whether a litigation hold is necessary. It must be sure to preserve relevant electronic data and other physical information, determine the need for and availability of third-party interviews and information, and address the logistics of data formats, foreign language documents, and distant witnesses.

Conducting the Investigation

Obviously, every investigation is unique. The facts and circumstances will affect the specific investigation steps taken. In any case, the investigator should develop an investigative plan, which should consider the chronology of events, appropriate data to capture and review, appropriate search terms, an approach to obtaining data, the identities of witnesses and timing with regard to approaching them, the involvement of counsel, applicable standards from the company's code of conduct and policies, potential legal issues, development of interview questions, and appropriate communications to interviewees and counsel.

Documentation

Normally, the company will prepare an appropriate investigation report, unless legal considerations suggest a different approach. The report should focus factually on the alleged conduct, information gathered during the investigation, and whether the conduct runs counter to the company's applicable policies. Reports normally should not make legal conclusions or contain personal opinions or speculation. They should be shared only with appropriate personnel who have a legitimate need to know, and in a manner that preserves the attorney-client privilege where applicable.

Drafts of the report should normally be reviewed with counsel prior to finalizing.

Remediation and Closure

At the close of the investigation, appropriate internal groups should consider steps forward, including the possibility of disciplinary action, communications to subjects, following up with the reporting party, notifying business personnel with a legitimate need to know, informing other parties, determining whether there should be business process, internal control, or ethics and compliance program enhancements.

Disciplinary action should normally be made by independent personnel and implemented consistently based on standard considerations that include past precedent, level of intent, company risk, and compliance with law. These recommendations should be documented in such a manner as to describe the employee's conduct (or failure to act), how it did or did not comply with the Company's policies, and recommended disciplinary action.

Other Key Issues

This article necessarily provides only the barest outline of an investigation protocol. We would normally also provide, among other things, templates of questions for investigators, lists of appropriate contact points and action items, templates for correspondence with complaining parties and other third parties.

Many other questions must be considered. For example, when should the company permit the employee's counsel to be present during a witness interview, and what role, if any, should the employee's counsel play? As noted below, another important question is whether the investigation should be carried out in a manner designed to maintain the attorney-client privilege, how the privilege can be maintained, and whether the company should waive the privilege.

When matters involve criminal law, it is important to coordinate with competent criminal counsel and to consider whether witnesses may decline to cooperate or insist on having counsel present, and whether they require separate representation.

In some countries, local law may require that the investigation be carried out in the local language. The role of counsel in carrying out an investigation is also important to consider, particularly in countries where counsel's role may be limited by bar association or ethics rules.

Timing can also be critically important. In some countries, the employer may be unable to discipline the employee if too much time passes. In that case, the investigation may curtail the employer's right to discipline the employee, but nevertheless it may fulfill other possibly more important functions such as determining whether the employer is in compliance with the law.

It is critically important that human resources, compliance, the general counsel, and external counsel of all stripe cooperate and communicate with regard to all aspects of an investigation.

And finally, investigation protocols must be pushed out to key stakeholders. Advance training in implementing these and carrying out an investigation is essential.

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EXPERT ANALYSIS

International Employers Beware: Common Compliance Pitfalls in Managing International Workforces

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U.S. employers who have — or who contemplate having — employees in multiple countries face a terrific challenge complying with the different and often conflicting laws related to their workforce. While U.S. employers are typically familiar with the varying employment regulations at the federal, state and even local levels within their own country, the variety of public policies and statutes affecting employment in other nations can come as a surprise.

One country's views on employee privacy, safety, entitlements or protections may be entirely opposite another's policies on the same issues. For example, the U.S. doctrine that allows employers to terminate employees for almost any reason is wholly contrary to Mexico's policy that prohibits termination except for certain just causes defined in the Mexico federal labor law. The policies of Brazil or the Netherlands that mandate various employee entitlements differ significantly from Singapore's more employer-friendly statutory scheme.

Some laws, such as the United Kingdom's bribery laws, even have extraterritorial application. Companies that fail to take into account the employment differences in the multiple jurisdictions in which they operate may find themselves in violation of the law and subject to inadvertent sanctions, including penalties and fines. They may also damage their brand or reputation.

Given the above, compliance with international employment and human resource regulations is — or should be — a primary focus of multinational employers. Limited time and resources force employers to prioritize their audit and compliance efforts to those areas that present the largest or most imminent risks. Moreover, what is a high-risk area for one company may not be the same for another.

Nevertheless, the following represent some of the most common pitfalls every employer should consider and review.

COMPLYING WITH CORRUPTION AND BRIBERY LAWS

Corruption and bribery laws nearly always top the list of a multinational corporation's compliance priorities for several reasons. Countries around the globe prohibit bribery and corruption to one degree or another. Thus, companies are legally bound to ensure that their employees understand the applicable laws and related obligations. In addition, most companies' ethics policies mandate compliance with relevant laws and prohibit unfair or corrupt practices.

A violation of a country's corruption and bribery laws risks damaging the company's brand and tarnishing its reputation as an ethical business. Next, laws like the U.S. Bribery Act and the U.S. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2, have extraterritorial application and impose civil or criminal penalties for incidents that occur even outside their borders. Finally, bribery and

corruption issues have garnered significant public interest and increased enforcement in a number of countries, resulting in enormous penalties and fines.

For example, in 2013 alone, the U.S. Department of Justice announced charges against both individuals and companies for violations of the FCPA, including bribes to foreign officials in numerous foreign jurisdictions and false reports of such bribes as legitimate expenses. In fact, the Justice Department has reported settlements with corporations involving millions and even hundreds of millions of dollars for alleged violations of the FCPA in the last few years alone.

A primary difficulty for international employers, of course, is how to address the differing cultural views on what is or is not a "corrupt" practice within their own international workforce.

In some countries, payment to government officials or other individuals as a way to gain business opportunities may be seen as "the way things are done" rather than as corruption. But companies subject to the extraterritorial application of the FCPA or U.K. Bribery Act (which prohibits corruption even more broadly than the FCPA) generally will not be protected simply because local leaders tolerate or expect corrupt payments. Moreover, trying to excuse bribery because "everyone else is doing it" weakens — or obliterates — a company's reputation as an ethical and fair business.

Finally, even countries traditionally viewed as allowing corruption may be changing their practices. For example, China's current president, Xi Jinping, pledged earlier this year to crack down on corrupt government officials and to strengthen China's anti-corruption laws.[3]

Companies that fail to take into account the employment differences in the multiple jurisdictions in which they operate may find themselves in violation of the law and subject to inadvertent sanctions.

Maintaining a clear no-corruption policy and training the workforce, regardless of location, on such policies should be considered an essential part of a multinational employer's compliance effort.

MINIMIZING MISCLASSIFICATION CLAIMS

In an effort to manage costs, explore new markets or obtain specialized skills, multinational corporations regularly hire independent contractors to perform services in foreign countries. In such arrangements, the true independent contractor — not the multinational corporation — typically bears responsibility for the burdens and costs of employment regulations, local taxation and corporate filings.

To be a truly independent contractor, the contractor must control its own work and how the work is done; bear the risks associated with profits and losses; provide its own equipment, office space and personnel; and assist multiple customers or clients, among other things.

However, the fundamental characteristics of independent contractor status are frequently sacrificed for business expediency.

Multinational employers may require individuals treated as independent contractors to work certain hours, use particular forms, perform services according to the company's expected processes or abide by various employment policies. In addition, the multinational employer may provide the independent contractor with business or travel reimbursements, office space, equipment, business cards with the company's logo, or other benefits.

As a result, upon termination of the relationship or because of an independent audit by foreign government authorities, the independent contractor may be deemed a misclassified employee.

Depending on the jurisdiction, the multinational company may be ordered to pay amounts that can exceed $500,000 or even $1 million because of unpaid taxes, wages, benefits, and associated penalties and fees if the contractor worked for the company for several years. In some jurisdictions, the law would require the company to reinstate the contractor as an employee and pay all employment-related obligations, including contributions to the pension or social welfare funds.

Typically, each independent contractor relationship falls somewhere between true employment and true independent contractor status; liability is determined on a case-by-case basis. Nevertheless, compliance programs should, of necessity, consider and review the independent contractor relationships to ensure that the multinational employer has taken appropriate steps

to minimize inadvertent misclassification liability, including understanding who may or may not be considered an independent contractor from one jurisdiction to another.

ADHERING TO RELEVANT EMPLOYMENT SCHEMES

Companies operating in multiple jurisdictions are generally plagued by competing or conflicting employment regulations. The policies regarding the nature of the employment relationship typically differ from one jurisdiction to another.

Nowhere is this difference more pronounced than as between the U.S. at-will employment scheme and the policies adopted by most of the rest of the world. Specifically, an employer in the United States may generally terminate an employee for any reason, at any time, with or without notice (*i.e.*, "at will") except for reasons that are unlawful, such as for discriminatory or certain retaliatory reasons. On the other hand, the vast majority of countries eschew the at-will doctrine and instead limit an employer's right to terminate its employees.

Countries such as South Korea and Mexico preserve by statute the employment relationship unless there is just cause to terminate the employee. Other countries, such as Canada, allow for terminations without just cause if the employer gives sufficient prior notice. Some countries, such as the United Arab Emirates, require both prior notice and end-of-service gratuities or severance.

Failure to comply with a foreign jurisdiction's termination requirements can result in reinstatement of the employee, back wages, or other penalties and fines.

There is also wide variation regarding mandatory leave, benefits and compensation requirements for employers. Employers in the U.S. are relatively free to provide paid leave, benefits and other compensation as they choose. But outside the U.S., employers may be required to provide paid vacation, sick leave, retirement benefits, annual or semiannual bonuses, housing allowances, profit sharing, or other benefits.

Failure to anticipate the cost of such mandatory programs can affect the profitability of a company's operations and increase the risk of liability that may arise from noncompliance.

APPROPRIATE EMPLOYMENT CONTRACTS

While all countries have regulations related to the paperwork and documentation associated with a person's employment, the specific requirements can vary widely from country to country. An employer must apply the local jurisdiction's requirements in order to be compliant.

The use and contents of a written employment contract may be mandated by statute. In the United States, written employment contracts are relatively rare. But other jurisdictions require a written employment agreement that comports with specific regulatory requirements.

For example, China's employment contract law[2] requires a written employment contract and penalizes an employer if that contract is not signed. Chinese law may also require payment of up to twice the employee's salary for each month the written employment contract is not signed.[3] The law expressly identifies the minimum provisions that must be included in the employment contract. Failing to include such provisions may result in liability for any resulting losses to the employee.[4]

In addition, employers that wish to discipline or terminate an employee for violations of company policy may be surprised to learn their handbook or global codes of conduct are unenforceable in some jurisdictions. For example, unless the employer obtained consent of the employees or employee representatives, or unless the employer submitted a copy of the relevant rules to the local labor authorities, the employer may be prohibited from disciplining or terminating an employee based on those rules.

Simply publishing the rules on a company website or providing the employee with a copy of the handbook may be insufficient.

Maintaining a clear no-corruption policy and training the workforce on such policies should be considered an essential part of a multinational employer's compliance effort.

DATA PRIVACY AND RECORDKEEPING

There are few laws in the United States that govern the privacy of an employee's personal information. These are typically limited to the privacy of an employee's medical information, Social Security number or financial information. Outside the United States, a number of countries have taken significant steps to protect the confidentiality of employee data.

The most notable data privacy law is the European Union Data Protection Directive,[5] which became effective in October 1998. The directive covers virtually all processing of personal data. Personal data include any individually identifiable information about a natural person or from which a natural person could be identified. The directive regulates the collection, use and transfer of individually identifiable personal information. Employers fall within the directive because they process personal information about their employees for performance, compensation, and health or medical benefits. The directive also requires special care in the processing of "sensitive" data, such as a person's racial or ethnic origin, trade union membership, political or religious beliefs, or health.

A particular challenge for employers relates to the transfer of personal information outside the European Union. For example, the directive restricts the transfer of personal information from the European Union to third countries unless the third country has been found to provide an "adequate" level of protection. EU member states have assessed millions of dollars in fines for violations of their data protection laws. One employer was fined about $900,000 by Spanish authorities.

Given the risks of liability and the potential interruptions to the business operations that could result from noncompliance with data privacy laws, each multinational employer should thoroughly review its data privacy processes. Employers need to ensure compliance with laws regarding the protection, maintenance and destruction of an employee's personal information.

COLLECTIVE BARGAINING

Most countries recognize an employee's right to association. Indeed, collective bargaining is generally considered a fundamental right of employees although its application differs from one jurisdiction to the next.

In the United States, collective bargaining is governed by the National Labor Relations Act, which grants the National Labor Relations Board sole authority to hear and adjudicate its provisions. A majority of employees must consent to representation by a union before the union can become the employees' representative at the company. However, U.S. companies that open operations in other jurisdictions may be surprised to find themselves bound not only to company-level agreements, but also to collective bargaining agreements issued at the national level for entire industries.

In some European countries, an employer must also work with works' councils, which are representatives of employees with rights to be notified of various employment actions or, as in Germany, the right to co-determine certain actions. Multinational corporations that operate in these jurisdictions must ensure they abide by the provisions of all relevant agreements as well as the consultation or co-determination rights of other employee representative bodies.

GLOBAL MOBILITY

The expatriate workforce of international employers poses significant compliance challenges. The most obvious challenge relates to obtaining and maintaining the relevant work and residence visas and permits. But the question of which employment laws apply is a tricky one.

Typically, an expatriate maintains his or her employment relationship with the home entity while on a temporary assignment in a foreign jurisdiction. Such a structure raises the risks of dual employment or the application of both countries' laws to the employment relationship.

Other common pitfalls in an expatriate program include mandatory withholdings and deductions, local paid-time-off requirements, and managing frequent business travelers who may become inadvertent expatriates. In light of such pitfalls, companies should carefully consider the ramifications of the multiple layers of relevant and multi-jurisdictional laws and comply accordingly.

CONCLUSION

Since employment law is locally governed, employers with employees in multiple jurisdictions face the challenge of complying with differing, and at times conflicting, employment and labor regulations. Failure to devote time and resources to appropriate compliance efforts can result in unanticipated and, in some cases, immense liabilities. Each company should prioritize its compliance risks and methodically address each risk until appropriate protocols and processes are in place to minimize the liabilities for noncompliance as well as the associated — and likely — damage to a company's reputation and brand. WJ

NOTES

[1] Choi Chi-yuk, *Xi Jinping vows to crack down on corrupt officials in China*, S. China Morning Post, Jan. 23, 2013.

[2] China Employment Contract Law, art. 10.

[3] China Employment Contract Law Implementing Regulations, arts. 6-7.

[4] China Employment Contract Law, arts. 17, 81.

[5] European Parliament and Council Directive 95/46/EC of Oct. 24, 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281 of 23.11.1995).

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Insight

IN-DEPTH DISCUSSION

SEPTEMBER 13, 2017

The Next HR Data Protection Challenge: What U.S. Multinational Employers Must Do To Prepare for the European Union's Impending General Data Protection Regulation

BY PHILIP L. GORDON

With summer holidays over and only eight months remaining in the two-year enforcement grace period, U.S. multinational employers and their European Union (EU) subsidiaries have little time to spare before starting to address compliance with the EU's General Data Protection Regulation (GDPR or the "Regulation"), the EU's new data protection framework. By May 25, 2018, the corporate group will need to implement new policies, procedures, and practices to address the GDPR's many new requirements for handling EU employees' personal data.

Because the GDPR was drafted with the primary intention of protecting consumers who participate in the "digital economy," determining how the GDPR's new requirements apply to HR data can be challenging. To assist in that effort, this Insight describes 10 practical steps that U.S. multinationals can take to address the Regulation's provisions with the greatest impact on managing a global workforce.

While the late May 2018 deadline may translate into a "back-burner issue" for many, delay is not a real option. Several of the steps towards compliance will require months to complete. Moreover, developments since the Snowden leaks in June 2013 have left EU employees far more demanding about data protection. Employees' complaints to EU data protection regulators of alleged non-compliance could snowball into a significant administrative enforcement action. The GDPR empowers data protection regulators to levy administrative fines of up to 4% *of a corporate group's worldwide gross annual revenue* for most violations. In addition, because EU regulators are authorized to bar data processing at the EU subsidiary and to suspend data transfers to the parent corporation, noncompliance could ultimately result in severe disruption of EU operations.

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Ten Practical Steps To Implement The GDPR

1. Determine Who Will "Own" The GDPR Implementation Process

Given the large number and wide range of steps required to implement the GDPR, U.S. multinational employers likely will need to build a team to execute a project plan. That team typically will include at least five groups: (a) HR professionals responsible for global workforce management and their in-house legal counsel; (b) information technology (IT) employees, especially those responsible for information systems used to manage HR data; (c) HR professionals with regional or local responsibilities for EU-based employees; (d) payroll personnel; and (e) personnel on the procurement team responsible for vendor contracting. For many U.S. multinationals, the U.S. parent corporation often will need to lead the implementation effort because EU subsidiaries will not have the HR and in-house legal support to undertake the implementation effort. This is particularly likely to be true for those organizations engaged exclusively in business-to-business (B-to-B) commerce.

For many organizations, this team approach likely will be preferable to appointing a data protection officer (DPO), *i.e.*, an executive or third-party contractor specifically designated to oversee GDPR implementation and on-going compliance. Contrary to popular perception, the GDPR does not mandate the appointment of a DPO. Instead, the Regulation requires organizations to appoint a DPO only in limited circumstances. Guidance issued by EU regulators confirms that these limited circumstances do not include the routine handling of HR data.[1] The regulators also take the position that organizations that voluntarily appoint a DPO must comply with all of the Regulation's requirements regarding DPOs.[2] These requirements could be onerous, especially for smaller EU subsidiaries. They include, for example, minimum (and high) levels of knowledge and expertise, on-going training, independent authority, direct reporting to senior management, and substantial protections against adverse employment action.[3] However, the regulators also have clarified that none of these requirements apply to a person to which an employer voluntarily assigns GDPR-related responsibilities, as long as the organization does not refer to that person in any compliance documentation as the "data protection officer."[4]

U.S. multinational employers should be aware that while individual EU countries have no authority to vary most provisions of the GDPR, EU countries are authorized to supplement the circumstances requiring organizations to appoint a DPO. Germany, for example, recently did so in legislation implementing the GDPR.

2. Identify All Systems Used To Process EU Employees' Personal Data

U.S. multinationals increasingly rely on cloud-based human resources information systems (HRIS) to manage their workforce globally. Because of the wide scope and volume of HR data maintained in these databases, employers typically should focus their compliance efforts on the HRIS. Nonetheless, employers should not neglect other systems where they collect and maintain the personal data of EU applicants and employees. Given the GDPR defines "personal data" broadly to include any individually identifiable information about a natural person or from which a natural person could be identified,[5] the relevant systems likely will be numerous and far-reaching. They may include, for example, learning management systems, digital timekeeping systems, and online surveillance systems.

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1 [illegible]

2 [illegible]

3 [illegible]

4 [illegible]

5 [illegible]

3. Determine The Permissible Purposes For Processing Employee Data

In contrast to U.S. law, which allows employers to use employee data for almost any purpose unless specifically prohibited by law, the Regulation—following prior law—establishes the exact opposite rule, *i.e.*, employers can lawfully "process" employee data only if the Regulation specifically permits the processing. The definition of "process" is broad. The Regulation defines "processing" to cover any operation during the course of the information life cycle, from initial collection to final destruction.[6] If it engaged in any of these activities without a permissible purpose, an EU employer would violate the GDPR.

Only three of the permissible purposes for processing personal data identified in the Regulation are likely to apply in the employment context. First, the Regulation permits processing if "necessary for the performance of a contract" with the data subject, *i.e.*, an employee.[7] Under prior law, EU regulators construed the term "necessary" narrowly, and they likely will continue to do so under the GDPR. Consequently, this ground may be interpreted to cover only processing with a tight nexus to the employment contract, such as the payment of compensation and benefits or processing requests for sick leave or vacation.

Second, the GDPR permits the processing of employee data to comply with "a legal obligation to which the data controller [*i.e.*, the employer] is subject."[8] This ground will justify a wide range of HR data processing required to comply with local employment and labor laws, such as mandatory fitness-for-duty exams, processing trade union membership to deduct union dues from payroll where legally required, and reporting compensation information to tax and social security authorities.[9] Importantly for U.S. multinationals, the "legal obligation" must be imposed on the EU employer by local law. This ground, therefore, would not permit the U.S. parent corporation to process EU employees' personal data to comply with legal obligations emanating from U.S law, such as responding to a subpoena issued in civil litigation in the U.S.[10]

Third, the Regulation permits processing that is necessary to achieve the "legitimate interests" of the employer or a third party, such as the parent corporation. However, an entity cannot rely on this ground unless it (a) balances its legitimate interest against the employee's rights and determines that those rights are not overriding; and (b) notifies the employee, in writing, of the legitimate interest pursued and of the employee's right to object to the processing.[11] Applying this balancing test, an employer likely would be able to justify processing of employee data that is not particularly sensitive where there is a tight nexus to the employment relationship, such as the EU employer's using business contact details to arrange business travel or the parent corporation's reviewing performance appraisals for global succession planning.

While the GDPR recognizes consent as a permissible ground for processing personal data in most circumstances, EU regulators have emphasized that EU employers generally cannot rely on employees' consent because such consent cannot be "freely given" as required by the GDPR.[12] In the words of the regulators: "Employees are almost never in a position to freely give . . . consent given the dependency that results from the employer/employee relationship. . . . [E]mployees can only give free consent . . . when no consequences at all are connected to acceptance or rejection of an offer."[13]

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6 See GDPR Art. 4 (2).

7 GDPR Art. 6(1)(b).

8 GDPR Art. 6(1)(c).

9 For a detailed discussion of GDPR's impact on payroll administration, see Philip L. Gordon and Rosaleen A. Appelgate, [illegible] Littler Insight (Sept. 7, 2017).

10 GDPR Art. 6(3).

11 GDPR Art. 6(1)(f).

12 GDPR Art. 6(1)(a).

13 Article 29 Working Party Opinion 2/2017 on Data Processing at Work, 17/EN WP 249 (June 8, 2017) at 6.

4. Apply The Principles Of Privacy By Design And Privacy By Default

The GDPR embraces the principles of privacy by design and privacy by default.[14] These principles mean that privacy should be built into the design of information systems and that default settings should favor more privacy rather than less.[15]

Applying these general principles to an HRIS database and other HR information systems can be challenging, especially because employers often are relying on "software-as-a-service" (SaaS) solutions and have limited or no control over the software's design. However, many of these solutions contain some features that permit employers to implement the principles of privacy by design and by default. For example, data entry fields for an HRIS database or for an online employment application, designed primarily for the broad data collection permitted under U.S. law, could be locked when data is entered about EU employees or job applicants to prevent the entry of data that the EU employer does not have a permissible purpose to collect. As another example, the database may permit the creation of detailed access lists that not only restrict access by employee category but also by data type within a category of employees.

The GDPR implementation team can best implement privacy by design and privacy by default by first obtaining a comprehensive understanding of the functionality of the HR systems that they, or a vendor, will be implementing. They can then look for ways to use the technology to implement the principles. Importantly, the Regulation recognizes that implementation of these principles may take into account "the state of the art, the cost of implementation, and the nature, scope and context of the processing" as well as the likelihood and severity of the risk to individuals' data protection rights.[16] In other words, U.S. multinational employers and their EU subsidiaries should have a reasonable amount of flexibility when applying the principles.

5. Update Data Processing Notices

As with prior law, The GDPR requires that data controllers distribute to individuals, when personal data is first collected from them, a notice of data processing that describes how the personal data will be handled. For EU employers, this means providing a notice to job applicants concerning the processing of their data during the application process as well as a notice to new hires, typically during the onboarding process, explaining how their personal data will be processed during the employment relationship.

The Regulation substantially expands on the basic notice requirements under prior law, such as the categories of data collected, the purposes for the collection, recipients of the data, a description of data protection rights, and whether the data will be transferred outside the EU.[17] For example, EU employers that rely on the "legitimate interests" ground for processing (described in Step 3, above) must now describe those legitimate interests. As another example, data processing notices must now include information about the period for which employee data will be retained. This requirement highlights the importance of developing data retention schedules for each EU subsidiary that align with local employment and labor laws. EU regulators have not yet opined whether employers will be required to issue to current employees updated notices that address all GDPR requirements if the employer previously provided those employees with a notice that complied with prior law.

6. Ensure Employees Can Exercise Their Data Protection Rights

The GDPR confers on individuals the same rights to access, correct, and object to the processing of, their personal data that existed under prior law and adds two new rights: the right of data portability and the

14 See generally GDPR Art. 25

15 See GDPR Art. 25(2)

16 GDPR Art. 25(1)

17 See generally GDPR Art. 13

right to be forgotten. The application of these new rights to HR data likely will be narrow. For example, the right of data portability, which provides data subjects with the right to move digital data from one entity to another, applies only to personal data provided by the employee and does not apply to personal data that the employer is required by law to collect.[18] Consequently, the right would not apply, for example, to performance appraisals prepared by supervisors.

Application of the "right to be forgotten" to HR data likely will be similarly narrow. For example, while this right allows employees to request deletion of files that no longer are necessary for the purposes for which they were collected, employers are not required to delete any employee data necessary to establish, pursue or defend legal claims, or that the employer is required by local law to retain. These exceptions likely will provide a valid basis for rejecting erasure requests until the relevant statutes of limitations or legal retention period expires.

Unfortunately, the limited scope of these two new rights will not relieve EU employers of the need to maintain policies and procedures for responding to requests exercising these rights. The procedures will need to address the timing for responses; when the deadline can be extended; the circumstances where requests can be denied; and the amount of the fees, if any, the employer can charge to recover the cost of responding.[19] Developing standardized forms and tracking logs can greatly facilitate implementation of these requirements and tracking of compliance with them.

7. Develop A Written Information Security Program And A Security Incident Response Plan

The GDPR introduces mandatory security breach notification to all EU countries and requires administrative and technical safeguards for personal data to reduce identified risks and to prevent data breaches. The Regulation, however, does not prescribe specific measures that organizations must take; instead, it establishes only general mandates, such as requirements to ensure the confidentiality, integrity and availability of personal data and to implement disaster recovery capabilities.[20]

Many U.S. multinational employers have responded to mandatory breach notification and information security requirements under a variety of state and federal laws by implementing a comprehensive written information security program that applies to all corporate data, including HR data globally. The policies composing this information security program should be extended to the personal data maintained by EU subsidiaries. To adequately modify corporate policies to local conditions, corporate IT staff or external consultants may need to assess risks specific to the EU subsidiaries.

The GDPR establishes a standard for breach notification similar to that of many U.S. breach notification laws, but requires notification far more quickly.[21] An organization that experiences a data breach generally must notify the relevant data protection authority (DPA) *within 72 hours* of discovering the breach unless it "is unlikely to result in a risk" of harm.[22] Notification to individuals is required if and when ordered by the DPA or, "without undue delay," if the breach is "likely to result in a high risk" of harm to affected individuals.

Given the newness of breach notification to most EU countries[23] and the expedited timeline for notification to the DPA, U.S. multinational employers should ensure that their EU subsidiaries have developed a security incident response plan and have trained all employees on the plan's key elements. The incident response plan should designate a security incident response team of local employees, and where necessary, supplemented

18 *See* GDPR, Art. 20.

19 *See generally* GDPR, Art. 12.

20 *See generally* GDPR, Arts. 32-34.

21 GDPR, Art. 4(12).

22 GDPR, Art. 33(1).

23 A few countries such as Australia, Germany, and the Netherlands have already enacted data breach notification laws.

by U.S. resources, with responsibility for HR data. This team should be responsible for investigating, mitigating, and remediating the breach and for communicating about the breach with the DPA, employees, and where necessary, law enforcement.

8. Vet Vendors That Will Receive Employee Data And Negotiate Vendor Agreements That Meet The Regulation's Requirements

U.S. multinational employers and their EU subsidiaries commonly share the personal data of EU employees with a wide range of service providers. For example, even smaller EU subsidiaries often use local payroll companies to administer payroll for local staff. At the same time, U.S. parent corporations increasingly retain a wide range of cloud-based service providers to collect and manage HR data globally. These vendors may include HRIS database providers, online performance appraisal platforms, and expense reimbursement solutions.

The GDPR requires vetting of service providers before they are retained to confirm the provider's ability to comply with the Regulation. The Regulation also specifies a long list of matters that must be addressed in service agreements. The list includes, for example, a detailed description of the data processing to be undertaken by the service provider and requirements the service provider (a) process personal data only subject to the employer's instructions; (b) implement required security measures; and (c) assist the employer in fulfilling its obligations to respond to requests by employees to exercise their data rights.

While the list of mandatory provisions is extensive, it is not complete. For example, if the vendor is located outside the EU, the vendor agreement must ensure that the vendor will provide an "adequate level of protection" for the transferred personal data (see Step 9, below). In addition, because of the significant enforcement and litigation risks associated with data breaches, the vendor agreements should address at least the specifics of breach reporting by the vendor, responsibility for notification to the DPA and affected employees, and indemnification for claims by employees arising from the data breach.

9. Implement A Mechanism For Lawful Cross-Border Transfers Of Employee Data

The Regulation's overall scheme for cross-border data transfers is materially the same as that under prior law. This scheme generally prohibits transfers of HR data outside the EU unless the EU subsidiary-employer ensures that the recipient — typically the parent corporation but sometimes also other non-EU members of the corporate group or a service provider — will ensure an adequate level of protection for the transferred personal data.

The EU employer-subsidiary satisfies this adequacy requirement if the European Commission (the "Commission") has determined that the receiving country ensures an adequate level of protection for the transferred data. The Commission has issued such a determination for the EU-U.S. Privacy Shield Framework, which went into effect on August 1, 2016. Thus, EU subsidiaries can transfer their employees' personal data directly to U.S.-based members of the corporate group and to U.S.-based service providers that have certified to the U.S. Department of Commerce that they will handle transferred personal data in accordance with the Privacy Shield's requirements.[24]

U.S. multinationals and service providers not certified to the Privacy Shield generally will need to rely on one of the other data transfer mechanisms identified in the Regulation. These mechanisms include the standard contractual clauses (SCCs), approved by the Commission, as well as binding corporate rules (BCRs). The SCCs are a form agreement between the data exporter (the EU subsidiary-employer) and the data importer (the U.S. parent corporation, any non-EU affiliate that receives EU personal data and any non-EU service providers). BCRs are legally binding policies applicable to all members of a corporate group, whether located

[illegible] Littler Insight (July 15, 2016)

within or outside the EU, and are enforceable by employees as third-party beneficiaries. To date, fewer than 100 U.S. companies have implemented BCRs as compared to almost 2,500 that have certified to the Privacy Shield Framework.

U.S. multinationals should note that both Privacy Shield and SCCs currently are subject to some uncertainty. Both mechanisms are the subject of litigation in the EU, meaning the Commission's adequacy determination for each mechanism could ultimately be reversed by the EU's highest court, the European Court of Justice. In addition, U.S. and EU officials will meet later this month (September 2017) for the first annual review of the Privacy Shield. This review is particularly significant because (a) the Commission's initial adequacy determination was based on prior law, not the GDPR; (b) the Privacy Shield has been subject to heavy criticism by EU regulators, members of the EU Parliament, and EU privacy advocates; and (c) this will be the first review since the change in U.S. administrations.

10. Periodically Review GDPR Implementation And Maintain Required Records Of Data Processing

U.S. multinationals' and their EU subsidiaries' handling of HR data is continuously in flux, so GDPR implementation needs to be just as dynamic. When information systems are modified, or new information systems are brought online, the change likely will trigger a wide variety of compliance tasks. By way of illustration, the modified or new system should be scrutinized with privacy by design and privacy by default in mind. The EU employer should confirm that it has a permissible purpose for all new categories of data that will be collected and for all new uses and disclosure of that data. Data processing notices may need to be revised or drafted. Information security policies may need to be modified. Vendor agreements may need to be amended or entered for the first time.

In light of the evolving nature of HR data processing, the implementation team should oversee the organization's data protection efforts on an on-going basis after initial implementation. The team could conduct annual reviews of the overall implementation program. These periodic reviews could be supplemented by reviews before existing systems are materially modified and before new systems are implemented.

This on-going compliance effort should assist the U.S. multinational in maintaining on-going compliance with the GDPR's mandatory record-keeping requirements. The Regulation requires that employers maintain detailed records of their data processing. The information to be recorded includes: (a) contact information for the employer; (b) the purposes of the processing; (c) the categories of data subjects and of personal data processed; (d) the categories of recipients, including those in third countries; (e) the third countries to which personal data will be transferred and the instrument, e.g., SCCs or BCRs, used to provide an adequate level of protection; (f) where possible, the envisaged retention periods for different categories of employee data; and (g) a general description of the security measures for employee data. These records must be provided to the DPA upon request.

Conclusion

Implementing a GDPR compliance program for HR data, "operationalizing" the program, and maintaining on-going compliance will require a multi-disciplinary team, typically led by corporate headquarters. The program likely will impact all of the organization's policies, procedures, and processes involving the handling of EU employees' personal data. Some of the steps required to achieve compliance, such as amending vendor agreements, could take several months to complete. Given the breadth of the undertaking and the lead time needed to compete it before the May 25, 2018 enforcement deadline, the time to get started is now.

On September 28, 2017, Littler will conduct a complimentary webinar: Meeting The Next HR Data Protection Challenge: What Multinational Employers Must Do Before The EU's Upcoming General Data Protection Regulation (GDPR) Takes Effect. Click here for more information.

This article first published in the IAPP's Privacy Tracker blog.

November 2017

How to Know Which Jurisdiction's Employment Laws Reach Border-Crossing Staff: *A Comprehensive Guide to International Choice-of-Employment-Law and -Forum*

By Donald C. Dowling, Jr.

Littler

For the vast majority of employment relationships around the world, choice-of-law analysis is a non-issue that we rarely ever think about. Obviously (for example), a Paris-resident baker working locally for a French bakery is protected only by French employment law. A Buenos Aires-resident banker working locally for an Argentine bank is protected only by Argentine employment law. And so on. Choice-of-law (also so-called "conflict of laws") analysis in plain-vanilla domestic employment scenarios is so simple, so intuitive and so uncontroversial that it almost never comes up.

But choice-of-employment-law becomes a hot issue—sometimes fiercely contested in expensive litigation—in *cross-border* employment relationships, for example:

- international business travelers (employed in one country, temporarily working in another)
- expatriates and international "secondees"
- foreign hires (recruited in one country to work in another)
- international commuters (living in one country but working in another)
- foreign correspondents and overseas teleworkers (working in one country for an employer in another)
- employees with international territories (working in several countries at the same time)
- mobile or "peripatetic" employees (with no fixed place of employment—sailors, flight crews, international tour guides and the like)
- international co-/dual-/joint-employees (staff split-payrolled by, or simultaneously employed by, two employer affiliates in different countries)
- former employees accused of having breached a post-term restrictive covenant in a jurisdiction other than the final place of employment

These scenarios implicate employment across borders, and surely the most common question in cross-border employment law is: *Which country's employment laws reach border-crossing staff?* Plus there are the follow-on questions: *Which country's courts can adjudicate disputes between border-crossing staff and their employers?* And: *To what extent is a choice-of-law provision enforceable when it appears in an employment agreement, expatriate assignment letter, employee benefits program or compensation plan?*

These three questions get asked—or, certainly, they *should* get asked—when an employer recruits, hires, employs, rewards and dismisses an employee in any cross-border employment arrangement. These questions get asked when a multinational employer structures a mobile job, an expatriate posting, an overseas "secondment" or even a long international business trip. These questions get asked when a multinational drafts cross-border employment policies and international benefits or equity plans. These questions get asked as to restrictive covenants and employee intellectual-property assignments with cross-border territorial scope. Indeed, these questions even come up when an organization contracts with an overseas independent contractor (because of the risk of misclassification as a *de facto* employee). And these questions become vital when an employer needs to dismiss border-crossing staff, because these questions implicate "forum shopping"—and it has been said that employees who can "forum shop" wield "powerful ammunition in negotiations over compensation."[1]

The full answer to these three questions is, at the same time, both simple and complex. A simple general rule applies most of the time, but that general rule is subject to nuances, refinements, strategies, exceptions and purported exceptions. To lay out the full answer to these questions requires a rather detailed discussion analyzing three topics: (1) the general rule on the territoriality of employment protection laws, (2) nuances and refinements to the territoriality rule, and (3) contractual choice-of-law and choice-of-forum provisions and the territoriality rule. We address all three topics here.

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1 P. Frost & A. Harrison, "Company Uniform," *The Lawyer* (London), Dec. 11, 2006 at 21.

Part 1: The General Rule on the Territoriality of Employment Protection Laws

The U.S. Army used to run an English Channel ship repair center in Hampshire, England. Back in 2006, "for strategic reasons" the Army closed the shipyard.[2] But in shutting it down, the Army ignored an English labor law that prohibits layoffs of 20 or more workers within 90 days unless the employer first "consult[s]" or negotiates "about the dismissals" with the employees' representatives—even if they are not unionized.[3] An English accountant called Mrs. Nolan sued the Army for laying her off without first consulting, but the Army fought back in court, arguing English labor law does not reach an overseas U.S. Army post engaged in activities that are *jure imperii* and are not *jure gestionis* (sovereign immunity concepts)—and besides (the Army argued), in the international public-sector context, UK and European Union labor laws are *ultra vires* (lacking authority).[4]

The case adjudicating these rarified legal defenses dragged on for nine years, going all the way up to the UK Supreme Court. In 2015, the Supreme Court issued a 45-page opinion that upheld for Mrs. Nolan the profoundly simple rule that local (here, English) labor law applies locally (here, in England) to protect employees who work locally (here, Mrs. Nolan).[5] The UK Supreme Court's *Nolan* decision is just one of thousands of employment cases around the world reinforcing the basic, obvious, intuitive and uncontroversial general rule that underlies all choice-of-employment-law: *Employment protection laws are territorial to the place of employment.* That is, the employment-protection laws of the place where you work protect you. It took the UK courts nine years to affirm that even Latin-denominated concepts as esoteric as *jure imperii, jure gestionis* and *ultra vires* do not override such a fundamental principle.

The corollary or inverse or outbound prong of this "territoriality" rule is that employment protection laws of all jurisdictions *other than* the current place of employment—even the place of an employee's citizenship, the place of hire or (as in the *Nolan* case) the place of the employer's headquarters—generally do *not* reach into overseas jurisdictions (unless expressly drawn in by an agreement between the parties). That is, if you work in jurisdiction *X*, then not only do jurisdiction *X*'s employment-protection laws protect you, but jurisdiction *Y*'s employment-protection laws do not.

In short, when contemplating which jurisdiction's laws apply in a cross-border employment scenario, always begin with this basic, presumptive "territoriality" rule. Always assume, as a starting point, that employment protection laws are territorial to the place where the employee now works. Not only does the law of the place of employment control, but (per the rule's corollary, inverse or outbound prong), employment laws of other jurisdictions do not also apply. And remember that this rule applies to all employees, vulnerable low-wage laborers as well as high-compensated executives.

This said, the territoriality rule of employment protection law is just a strong general rule or presumption that applies most of the time—there are very rare deviations where a court flatly holds the general rule does not apply.[6] In addition, though, there are lots of nuances, refinements, strategies, partial exceptions and purported exceptions to the general rule, which we discuss in detail here. Because our discussion here grows out of the fundamental rule of the territoriality of employment protection laws, we begin by explicating the core rule itself, addressing: (A) examples of how the territoriality rule works—including United States examples and expatriate examples, (B) public policy behind the rule, and (C) the "employment protection" law concept.

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2 *USA v. Nolan*, [2015] UKSC 63.

3 That British labor law is the UK Trade Union and Labour Relations (Consolidation) Act 1992, as amended in 1995, § 188. (If the employees are not unionized and so do not have any standing team of worker representatives, English law requires they be allowed to designate representatives for purposes of consulting over the lay-off.)

4 *Nolan, supra* note 2 at ¶ 12.

5 *Nolan, supra* note 2.

6 *E.g., Sabd-Krutz v. Quad Electronics,* US DC ED Cal. case no 2.15-cv-0021-MCE-AC, op. of July 7, 2015 (non-compete enforceable under foreign state's law where employee was hired out-of-state, does "99%" of work out-of-state and moved in-state only for personal convenience).

A. Examples of how the territoriality rule works

As an example of how the general rule on territoriality of employment protection laws works, imagine a hypothetical 14-year-old legally employed for a while in her home country, who then moves to a new country with a minimum child labor age of 16. Even if a guardian consents to applying this child's home-country employment law, obviously this girl is too young to work in the new jurisdiction. As another example, imagine an employer with staff in a state that imposes a high minimum wage. This employer obviously cannot legally pay personnel below the state minimum—even if it can lure in workers from another state with a lower minimum wage who agree, contractually, to apply home-state law. Yet another example is health and safety law: No jurisdiction will compromise its workplace health and safety laws, even for an employee inpatriate from another jurisdiction with laxer health/safety laws who is willing to apply home-country rule.

- ***United States examples.*** When U.S. employers branch out overseas, they often want to export employer-friendly U.S.-style employment-at-will principles (at least to U.S. expats relocating abroad). U.S. organizations often chafe at the general rule on the territoriality of employment protection laws—Americans often see the rule as heavy-handed and they often speak of it as a quirk of hyper-protective foreign regimes hostile to employment-at-will. But a frustrated U.S. employer should at least acknowledge: *We impose this very rule ourselves.*

  The employment protection laws of a *U.S.* place of employment almost always apply in the face of less-protective regulations from some other jurisdiction, even if the parties had contractually selected foreign law. In the words of the U.S. Court of Appeals for the Ninth Circuit, laws that "seek to protect...workers" are "protective legislation" constituting public policy so deeply "fundamental" that employers and employees cannot opt out of or contract around them.[7] Under the framework of the American Restatement (Second) of Conflict of Laws § 187(2)(b), an employee's current place of employment has "a materially greater interest" in applying the "fundamental policy" of its employment protection laws than does a foreign jurisdiction—even a jurisdiction that an employer and employee may have contractually selected.

  Imagine hypothetically a Pakistani technology company transfers an entry-level Karachi programmer (Pakistani citizen with U.S. work visa) to its branch in Palo Alto. Imagine the programmer signs a contract calling for the law of her and her employer's home country—Pakistan. Pakistan obviously has a strong nexus to this particular employment relationship, so under commercial principles, this choice-of-law clause would be presumptively enforceable.[8] But imagine that after the programmer's place of employment shifts to California, she continues to earn a Pakistani wage less than the U.S. minimum, she gets sexually harassed, she suffers an injury because of a workplace safety violation and she gets disciplined for using social media to criticize her boss. The Pakistani programmer might file claims with the U.S. Department of Labor, the EEOC, OSHA, the NLRB and California state agencies, and she might file a California state workers' compensation claim. In defending against these charges, the employer could invoke the affirmative defense of the contractual choice-of-Pakistan-law clause. But few American lawyers would bet on that defense prevailing. America's federal and California's state public policy void most prior waivers of employment protection laws—including waivers in the guise of foreign choice-of-law clauses.[9] Just as an agreement to work for less than minimum wage would be void under the U.S. Fair Labor Standards Act, and just as an advance waiver of workplace safety law would be void under OSHA, a contractual selection of Pakistani wage law will be void if Pakistan's minimum wage is below the FLSA minimum, and a contractual selection of Pakistan's workplace safety law will be void if Pakistani health and safety standards are below U.S. OSHA standards. Any court holding otherwise would push this California-based employee out of the safety net of American and Californian employment protection laws.

7 *Ruiz v. Affinity Logistics*, 667 F. 3d 1318 (9th Cir. 2012), *later proceeding* 2014 U.S. App. LEXIS 11123 (9th Cir.).
8 Restatement (Second) of Conflict of Laws § 187(2)(a).
9 *Ruiz, supra* note 7.

- ***Expatriate examples.*** Of course, the general rule on the "territoriality" of employment protection laws often arises in—and usually applies to—the *expatriate* context. A business expatriate is an employee originally hired in (and originally working for) an employer in a *home* country who later moved to, and who now works for that same employer (or an affiliate) in, a new *host* country. The territoriality rule dictates that the employment protection laws of an expatriate's new host country (the new place of employment) protect the expatriate, even where both the expatriate and the employer are from the same foreign home country. For example, the French Supreme Court has held that New York employment law, not French law, covers French citizens who work in New York even for French-owned employers.[10] As another example, the Ontario Superior Court of Justice rejected an employment claim invoking Canadian law of a Canada-hired Canadian who got transferred to New York and then fired.[11]

  The rule in these cases becomes particularly significant when an American employee leaves the United States, because of America's employment-at-will doctrine. As mentioned, the territoriality rule dictates that an American whose place of employment shifts abroad almost always steps out of employment-at-will and into the safety net of host country employment protections—the "indefinite employment" regime of vested rights, caps on hours, mandatory vacation, severance pay and termination protections.

B. Public policy behind the rule

The general rule on the territoriality of employment law emerges from a strong underlying public policy: Employment protection laws tend to be strands in the legal safety net that each jurisdiction erects to protect people who work inside its territorial borders. If some jurisdiction's employment safety net fails to catch certain people who work locally—for example, if the employment protection laws of some country exempted foreign citizens working in-country (say, immigrants, "inpatriates," or those working for foreign-headquartered organizations), then employers might withhold the jurisdiction's minimum labor protections under its "mandatory rules." From a public policy point of view, the issue becomes exploitation: Just because some worker happens to be an immigrant, an inpatriate or an employee of a foreign organization should not give the employer an excuse to pay less than local minimum wage, to flout local health and safety regulations or to violate any other local employment protection law, be it a discrimination law, a restrictive covenant law, a severance pay law or any other employment law.

And the corollary of the general rule on the territoriality of employment law (the inverse or outbound prong) also emerges from a strong underlying public policy: Jurisdictions are poorly positioned to police compliance overseas with their domestic workplace regulations. And under the principle of sovereignty, each jurisdiction has the primary and keenest interest in regulating workplaces on its own soil, protecting workers working on its own soil. A jurisdiction's employee-protection laws generally should not reach outside its territorial boundaries.

C. The "employment protection" law concept

Under this territoriality rule, *employment protection* laws of a jurisdiction are mandatory rules applicable locally by force of public policy. Employment protection laws tend to include most all of a jurisdiction's rules regulating the employment relationship—its laws regulating, for example, pay rate, payroll, overtime, workplace health/safety, child labor, payroll contributions, mandatory benefits, caps on hours, rest periods, vacation/holidays, labor unions/collective representation, discrimination/harassment/bullying/"moral" abuse, employee-versus-contractor classification, and restrictive covenants/non-competes/trade secrets/employee intellectual property. In addition, employment protection laws also include the full suite of laws that regulate *dismissals*—laws on "good cause" for firing, dismissal procedures, pre-dismissal notice periods, mandatory retirement, severance pay and severance releases. In the employment context, mandatory rules also include data protection (privacy) laws, which are not even employment laws.

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10 French Sup.Ct. dec. 10-28.563 of Feb. 2012 (many French choice-of-employment-law cases involve so-called "French employment contracts," which—as we discuss *infra* part 3(B)—generally compel a different result; this case did *not* involve "French employment contract").

11 *Sullivan v. Four Seasons Hotels*, 2013 ONSC 4622 (2013).

And so a given jurisdiction's "employment protection" laws or "mandatory rules" that apply by force of public policy tend to include all its local laws regulating local workplaces, except for (maybe) certain rules on the structure of executive compensation, equity/stock options and non-mandatory benefits. But that said, in some jurisdictions even laws regulating compensation and equity plans are also "mandatory rules." In short, the body of the employee-protection laws of a jurisdiction tends to include most all of its labor and employment (and data protection) laws. Only a tiny subset of a country's labor and employment law does not qualify as employee-protection law.

Part 2: Nuances and Refinements to the Territoriality Rule

The territoriality rule of employment protection laws almost always controls, except for some rare deviations where a court flatly holds against the rule.[12] But while court decisions rejecting the territoriality rule are quite rare, this rule itself is subject to six nuances, refinements, strategies, partial exceptions and purported exceptions. That is (rare exceptional cases aside), courts around the world tend to decide choice-of-employment-law disputes consistent with the territoriality rule *only after the rule has filtered through six layers of nuances or refinements.* These nuances and refinements can get complex and can compel careful legal analysis.

We might characterize the nuances and refinements to the general "territoriality" rule of employment protection laws as: (A) disputed "place of employment," (B) wage/hour and health/safety laws, (C) Communist and Arab deviations, (D) extraterritorial reach, and (E) affirmative defenses arising from the international context. We discuss those five nuances and refinements here, in part 2. Then in part 3 we address the sixth and most significant nuance or refinement: choice-of-law and choice-of-forum provisions in employment agreements.

A. Disputed "place of employment"

While the general rule on the territoriality of employment law almost always applies, *which country* is the territory whose law controls sometimes gets disputed. That is, which country is a given employee's current "place of employment" is sometimes unclear—a disputed fact question that can get complicated.

In assessing which jurisdiction's employment laws reach a given cross-border employment relationship, the first step is identifying that employee's (current) place of employment. *Place of employment* is a legal concept analogous to "residence" and "domicile." Every employee is generally held to have just one place of employment at a time. Assessing a given mobile employee's current place of employment is sometimes hard, and is sometimes disputed.

Fortunately, on a per-employee basis, questions about what is a given employee's place of employment are rare, because the place of employment of the vast majority of the world's workforce is obvious and uncontested. Usually a given worker's place of employment is, simply, the address on his business card, email signature and paycheck stub. It is the place where his office phone rings or where his work computer gets docked. But the place of employment of a small minority—the mobile workforce—gets questioned. What is the place of employment of a "peripatetic employee" like a flight steward, pilot, sailor or salesman with international territory? What about a so-called "international commuter" living in one country but with an office in another? What about an expatriate who mostly works in one country but whose assignment documentation purports to base him elsewhere? What about a so-called "stealth expatriate" who works out of an overseas hotel or at a location unknown to the employer? What about an employee whose boss tolerates working remotely from a home in a jurisdiction away from the office? Where do we draw the line between someone working temporarily abroad on a very long business trip versus an expatriate on a very short term overseas posting? What is the place of employment of a reassigned expat who worked in a home country for decades—but who moved to a new host country only yesterday? Determining "place of employment" in situations like these turns on the facts—and can be complex. According to one article:

> The most contentious issue [in choice-of-employment-law analysis under U.S. law] that

12 *E.g., Sabd-Krutz, supra* note 6

> has arisen...in recent years seems like a final exam question in a philosophy class: Was the plaintiff even employed overseas? Routinely, plaintiffs [invoking U.S. employment law] assert that their overseas assignment was only temporary or that their work should otherwise be viewed as U.S.-based. There is no consensus test for determining where the employee was actually employed. Most courts focus on the "primary work station" test which typically results in finding overseas employment, while others opt for a "center of gravity" test, which can produce some surprising results in holding workers, who are in fact overseas, to be constructively employed stateside. Under either test, courts may look at factors such as the location of the employee's desk or work station, what the employee's business card says, and the duration and amount of any overseas work.[13]

Inevitably in these scenarios, someone always asks: *How long does an employee have to work in a place before it becomes the place of employment?* There is no answer, because time worked in a given workplace is only one factor in assessing place of employment. Italy is the place of employment of a secretary who was hired just yesterday to work a local job at an office in Rome—but Italy is not the place of employment of a Tokyo-based banker who has been working in Milan for the last two months, closing a deal on a long business trip.

Having said "place of employment" is a legal concept analogous to residence and domicile, understand that different jurisdictions apply different iterations of this concept—sometimes using different labels. For example, U.S. immigration law looks to whether a worker is a "U.S. employee." Europe's Rome I Regulation on conflict of laws looks to which jurisdiction is "habitually" a given employee's place of "work"[14] and English case law considers which jurisdiction has the strongest "connection" to an employment relationship.[15] While a U.S. court will analyze the "place of employment" of (for example) a pilot, sailor or expatriate, the EU Court of Justice case might assess that pilot's, sailor's or expat's "habitual place of work" while an English employment tribunal might analyze which jurisdiction has the strongest "connection" to that pilot's, sailor's or expat's job. Speaking comparatively, these legal concepts do not always align perfectly. Our discussion here generally speaks to "place of employment," while recognizing that some jurisdictions impose analogous but subtly different legal concepts.

B. Wage/hour and health/safety laws

In most all jurisdictions of the world, *wage/hour and workplace health/safety* laws tend to be mandatory rules that reach everyone rendering services locally—even an incoming business traveler or guest worker only temporarily working in a host country (an employee with an overseas place of employment and employment relationship otherwise governed by home country law). That is, laws regulating minimum wage, overtime, caps on hours and worker health/safety tend to protect even inbound business travelers and guest workers who otherwise ostensibly retain a different home-country place of employment and who are otherwise subject to home country employment law on other topics—unionization, workplace privacy, employee benefits, vacations, discrimination/harassment, dismissal and the rest. In the European Union this issue falls under the controversial "Posted Workers Directive" which extends wage/hour, health/safety (and for that matter other host-country employment protections) to incoming guest workers.[16] In the United States, wage/hour law kicks in after a visiting employee has been on U.S. soil for just 72 hours, and health/safety laws may apply to everyone working stateside even for just an hour.[17]

The policy here as to *wage/hour* laws is straightforward: If an incoming business visitor were exempt from host-country wage/hour law because of a foreign place of employment, then a temporary short-term guest worker from a jurisdiction with looser wage/hour laws could come in and undercut locals. For example, a St. Louis employer cannot bring in a temporary guest worker from Guatemala (even with a guest-worker visa) and pay Guatemala's minimum wage—undercutting and

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13 K.Connelly & L.Chopra, "Extraterritorial Application of U.S. Discrimination Laws," Law 360 online (Aug. 21, 2012) (paragraph breaks omitted).

14 *Cf.* Europe Rome I Regulation, EU Reg. 593/2008/EC (6/17/08) at arts. 8, 21.

15 *E.g., Lodge v. Dignity & Choice in Dying*, UK EAT/0252/14(2014).

16 EU Posted Workers Directive, 96/71/EC, at art. 1 (focusing on place "where the work is carried out").

17 U.S. Dep't of Labor Wage & Hr. Div. Field Operations Handbook (5/16/02) at §10e01(c) (U.S. Fair Labor Standards Act covers guest workers after 72 hours in U.S.).

presumably displacing a local from St. Louis.[18] The policy here as to *health/safety* laws is different but equally straightforward: It would be seen as cruel if an employer could withhold otherwise-mandatory health/safety protections from a worker who happens to be a business visitor or guest worker. For example, imagine a U.S. OSHA regulation requires that employers provide hand guards on buzz saws, and imagine a Kansas City employer gives a buzz saw missing the hand guard to an engineer visiting for the week from Germany. If the German accidentally cuts off his hand, "victim visitor status" is probably a loser defense to the inevitable OSHA charge.

C. Communist and Arab deviations

A handful of exceptional jurisdictions—mostly the five remaining Communist countries (China, Cuba, Laos, North Korea and Vietnam) but also including Indonesia and a few others—actually impose national employment laws to protect their local citizens at the expense of immigrant foreigners. Or, at least, these jurisdictions let non-citizen "inpatriates" opt out of their national employment regulations. These jurisdictions want their domestic employment protection laws to protect their local citizens, but do not seem to care whether their local employee-protection safety net stretches to protect non-citizen inpatriates (who are likely to be well-compensated and well-protected, anyway). So law in these jurisdictions either does not reach non-citizens or at least is hospitable to employment-context choice-of-foreign-law arrangements with non-citizen staff.[19]

Similarly, some employment laws in some Arab countries reach only local citizens, or at least accommodate choice-of-foreign-law provisions—for example: minimum wage laws in the UAE; social security rules in the UAE and Saudi Arabia; Saudi employment protections for Saudi citizens and end-of-service gratuities in a handful of Arab jurisdictions. These exceptions, though, are rare even in the Arab world.

D. Exceptional extraterritorial reach

We said that under the territoriality rule of employment protection law, a host country's employment protection laws protect even inpatriates and immigrants whose place of employment shifts into the host country, and under the corollary or inverse or outbound prong of this rule the employment laws of a given jurisdiction tend *not* to follow workers who emigrate to go off and work abroad. But this corollary/inverse/outbound prong is merely a presumption or general principle—and is subject to some important exceptions. A handful of jurisdictions actually impose "sticky" employment protection laws that attach to certain local citizens, local residents or local hires, following them after they move away. These sticky employment laws are said to have an "extraterritorial" reach, reaching beyond the home territory.

Someone working in an overseas host country can enforce an extraterritorial home country employment-protection law (usually asserting that claim in a home-country forum) even though he simultaneously enjoys the full protection of host-country employment law. That is, the analysis here is cumulative, not "either/or": Where employment laws reach extraterritorially, a hapless employer has to comply with *two jurisdictions'* sets of workplace laws at the same time, and must always meet the *higher* of the two jurisdictions' employment protections. (We can put aside the scenario of a host-country employment law that *compels an employer to violate* an extraterritorial-reaching home country mandate, because that situation almost never happens in the real world. Where it does, follow host-country law.)

The United States, Canada, England, Australia and some South American countries offer examples of exceptional jurisdictions that presume to extend at least some employment protection laws extraterritorially in at least some situations. And then there are *emigration* laws, which have a similar effect:

- ***U.S. discrimination and whistleblower retaliation laws.*** In 1991, the U.S. Congress swiftly reversed a 1991 Supreme Court decision[20] by passing the Civil Rights Act of 1991.[21] Since then,

18 At least not after the Guatemalan is stateside for over 72 hours. *Supra* note 17.
19 As discussed in part 3, *infra*, this differs from how *other countries* treat choice-of-foreign-employment law provisions.
20 *EEOC v. Aramco* (499 U.S. 244).
21 Pub. L. 102-166.

the major U.S. federal discrimination laws have reached U.S. citizens who work abroad for U.S. "controlled" multinationals[22] —even as host-country discrimination laws usually apply simultaneously as mandatory rules that employers and employees cannot contract around.[23] That said, the Genetic Information Nondiscrimination Act of 2008 does not reach abroad.[24]

As to how the extraterritorial reach of U.S. discrimination laws works in practice, imagine a hypothetical 42-year-old U.S. citizen office manager formerly working in, but now fired from, the Brussels office of a Silicon Valley tech company. This U.S. expatriate could simultaneously bring both a Belgian labor court unfair dismissal or discrimination claim and a U.S. gender, race or age discrimination charge—regardless of any choice-of-law provision in her employment contract and even if her employer's human resources department categorized her as a "local hire" rather than a company expatriate on assignment in Belgium. Damages might (perhaps) get offset, but the Belgian and American claims are independent causes of action. This scenario is not just theoretical: For decades now, American multinationals have been defending the occasional double-barreled, two-country dismissal claim.

This said, just because the major U.S. discrimination laws *can* reach extraterritorially to protect U.S. citizens working overseas for U.S.-controlled multinationals does *not* guarantee a U.S. remedy in U.S. courts. Under recent case law, even a U.S. citizen whose place of employment is overseas and who works for a U.S.-controlled employer might *not* be able to assert a U.S. discrimination law claim in a U.S. forum either if the U.S. is deemed an inconvenient forum (*forum non conveniens*) or if the employee had selected host-country law or a host country forum:

- *Forum non conveniens*. In 2015 the Ninth Circuit Court of Appeals affirmed the dismissal of an American citizen employee's Title VII and ADEA lawsuit alleging a Dutch subsidiary had discriminated against her.[25] The American sued both the Dutch subsidiary and U.S. headquarters in an Oregon federal court, but the Ninth Circuit affirmed a complete dismissal: U.S. courts had no personal jurisdiction over the Dutch subsidiary and exercising U.S. jurisdiction over headquarters was inappropriate on *forum non conveniens* grounds because the Dutch-working employee had an adequate remedy under local Dutch employment discrimination law. Because most countries now prohibit employment discrimination in some respects, expect other lawsuits in U.S. courts invoking the extraterritorial reach of America's discrimination laws to be subject to dismissal on these grounds.

- *Choice of host-country law or forum*. Later we discuss the effect of contractual choice-of-law and choice-of-forum clauses in cross-border employment.[26] One effect of those clauses is that they can waive the extraterritorial reach of U.S. discrimination law. For example, in 2014 a U.S. federal appeals court dismissed a U.S. citizen's London-arising extraterritorial claim under U.S. discrimination law because that expat had, previously, signed a contract selecting English law and English courts to adjudicate any later-arising employment dispute.[27]

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22 The principle here is that the employer is "controlled" from the United States. Generally, any U.S.-headquartered multinational will be held to be U.S.-controlled, and even certain overseas operations of non-U.S.-headquartered multinationals may be held to be U.S. "controlled" if they report up to a U.S. regional center. Several U.S. case opinions, law review articles and provisions of "EEOC Enforcement Guidance" explicate the scope of the so-called "control test" in this context.

23 *Cf.* 29 USC §§623(h) (ADEA abroad); 42 USC §§2000e-1(a), (c), 2000e-5(f) (3) (Title VII abroad); 42 USC §§ 12111(4), 12112(c) (ADA abroad). *See generally* Connelly & Chopra, "Extraterritorial Application of U.S. Discrimination Laws," *supra* note 13.

24 Pub. L. No. 110-233, 122 Stat. 881.

25 *Ranza v. Nike Inc.*, 793 F.3d 1059 (2015).

26 *Infra* part 3.

27 *Martinez v. Bloomberg LP*, 740 F.3d 211 (2014). One factor in the *Martinez* court's decision was that English substantive law also prohibits the alleged discrimination. If a choice-of-law clause were to select a forum that does not prohibit the alleged discriminatory act, the result might be different.

While U.S. discrimination laws tend to reach "extraterritorially," *other* American employment laws including the FMLA, FLSA, OSHA and WARN do not extend overseas.[28] This is because U.S. labor/employment laws (other than discrimination laws) tend to be silent on whether they reach abroad—and no federal statute in the entire U.S. Code reaches abroad unless its statutory text "clearly expresse[s]" that it does.[29] That said, though, sometimes an international employment fact scenario arises in which an American state or federal court applies American domestic state or federal employment law not because that particular law reaches extraterritorially, but because that court decides a domestic American employment law controls that dispute. That is, the court reasons it is adjudicating a domestic American employment matter that happens to involve some incidents overseas. These cases turn on the legal question of whether the particular dispute at issue arises under domestic American law—and, of course, on the relevant employee's place of employment. One complex line of these cases is the evolving body of law on the overseas reach of the Sarbanes-Oxley whistleblower retaliation statute, SOX § 806—which courts have held is not an employment law, and which does not necessarily conform to choice-of-employment-law analysis. Some but not all extraterritorial § 806 cases let overseas plaintiffs invoke rights under § 806. Some but not all of those cases expressly hold that § 806 reaches extraterritorially. But the cases that extend § 806 abroad tend to anchor the specific dispute in acts done or decisions made domestically in the United States.[30]

- *England.* English employment protection statutes tend to follow the general territoriality rule and are confined to employment on English soil. And so an Englishman who works outside England for an English-controlled employer rarely gets to invoke English employment protection laws, such as under the Employment Rights Act 1996. Indeed, even an employment contract that expressly invokes "English law" in a workplace outside England usually fails to export English employment statutes, because that English law clause itself is supposed to be governed by the English common law of contracts and English choice-of-law principles, and these confine English employment protection statutes to employment physically within England.[31]

  English case law, though, carves out increasingly intricate exceptions. For example, English employment law reaches abroad into "enclaves" of Britons who work abroad directly servicing U.K. domestic entities like British foreign correspondents writing for London newspapers and Britons stationed in U.K. embassies, on U.K. military bases or at other foreign outposts—and including telecommuters working abroad from home on English business. Cases construing this exception turn on their facts; the English court decisions closely analyze specific nuances at issue in each particular scenario, significantly narrowing the precedential value of these decisions.[32] The English cases adjudicating the outer limits of the exception keep evolving, although the exception remains narrow, at least in theory.

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28 FMLA does not extend abroad: 29 U.S.C. § 2611(2)(A0; 29 C.F.R. § 825.102, 825.105(b). FLSA does not extend abroad: 29 U.S. C. § 213(f); *see Cruz v. Chesapeake Shipping*, 932 F.2d 218 (3d Cir. 1991) (FLSA does not extend abroad); *Wright v. Adventures Rolling Cross Country*, case no. C-12-0983 EMC., U.S. D.C. N.D. Cal., Order of 5/3/12 (FLSA and California wage/hour law do not reach abroad); U.S. Dept. of Labor Wage & Hr. Div. Field Operations Handbook, *supra*, at §10e02 (FLSA does not reach U.S.-based workers working an entire workweek or more abroad). OSHA does not extend abroad: 29 U.S.C. § 653(a). WARN does not extend abroad: 20 C.F.R. § 639.3(i)(7).

29 *RGR Nabisco v. Euro. Cmt'y*, 136 S.Ct. 2090 (2016) ("clearly expressed" at pgs. 2102-03); *Morrison v. Aust. Nat'l Bank*, 561 U.S. 247 (2010); *EEOC v. Aramco*, *supra* note 20.

30 *See Carnero v. Boston Scientific*, 433 F.3d 1 (1st Cir. 2006), *cert. den.* 548 U.S. 906 (2006) (SOX § 806 does not reach abroad); *O'Mahoney v. Accenture Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008) (SOX whistleblower in France states a retaliation claim where alleged retaliation occurred in the U.S.); *Blanchard v. Exelis Syst. Corp.*, U.S. Sec'y of Labor Administrative Review Board [ARB], case no. 15-031 (Aug. 29, 2017) (SOX § 806 extends abroad where the claim is anchored in acts done or decisions made domestically in the United States); *Villanueva v. Core Labs*, ARB, case no. 2009-SOX-006 (Dec. 22, 2011), *aff'd on other grounds* 743 F.3d 103 (5th Cir. 2014) (SOX § 806 does not reach abroad under facts alleged).

31 *Cf. Ravat v. Halliburton*, [2012] UKCS 1 at §§32-33.

32 *E.g., Seahorse Maritime Ltd. v. Nautilus Int'l*, UK EAT/0281/16/LA (2017); *Olsen v Gearbulk Services et al.*, UK EAT/0345/14 (2015); *Lodge v. Dignity & Choice in Dying*, UK EAT/0252/14 (2014); *Dhunna v. Creditrights* [2014] IRLR 953; *Ravat v. Halliburton*, *supra* note 31; *Duncombe v. Sec'y of State for Children, Ministry of Defense v. Wallis & Anr*, [2011] ICR 495; *Blouse v. MBT Transport Ltd*, [2007] UK EAT/0999/07 & EAT /0632/07; *Lawson v. Serco*, [2006] ICR 250; *Saggar v. Ministry of Defence*, [2005] EWCA Civ. 4133. *See* Sarah Ozanne, "Recent Developments in the Territorial Scope of UK Employment Law," 16 IBA BUSINESS LAW INT'L 265 (2015).

- ***Australia.*** Whether Australian employment statutes reach extraterritorially turns on the facts involved and on the employment law invoked. Generally an Australian citizen hired in Australia but now working abroad for an Australian employer entity can invoke protections under Australian employment statutes, but Australian hires who get "localized" on foreign assignments—working abroad for non-Australian-incorporated affiliates—cannot.[33]

- ***South America.*** Some but not all South American countries expressly extend their employment protection laws abroad, at least under certain scenarios in certain circumstances. Colombia, much like the England, extends its employment protection laws extraterritorially only where an overseas-working employee reports directly into management in Colombia, "subordinated" to Colombian control.[34] At the other extreme, Venezuelan extends most Venezuelan employment protection laws outside Venezuela to protect Venezuelan expatriates originally hired in Venezuela but now working abroad.[35]

  Brazil extends Brazilian employment protection laws extraterritorially to protect Brazilians temporarily posted overseas.[36] This doctrine is vital whenever a U.S. company calls up someone from its Brazil facility to come work in the United States. Usually Brazilian employment law attaches only to temporary foreign assignments, not permanent moves. Depending on the judge, though, Brazilian courts may apply this rule only for Brazilian citizens or only to those originally hired in Brazil. Brazilian courts aggressively enforce this rule. In one case, a Brazilian who had worked as a mason in Angola won overtime pay, severance pay and other benefits due under Brazilian law for work performed in Angola.[37] In another case a Brazilian court awarded "moral damages" under Brazilian law to a Brazilian who had worked lots of hours on a job in Angola—even though he had properly been paid for the overtime.[38]

- ***Emigration laws.*** While all countries regulate immigration, some countries that export lots of laborers actually impose restrictions on *emigration*—these jurisdictions regulate employers that recruit locals to go work abroad or that post locals overseas as expatriates. Emigration restrictions act as extraterritorial employment laws that extend certain employment protections overseas. While emigration laws are meant to protect *low-wage* locals lured to work overseas positions in countries where there is a perception of worker abuse (for example, Filipino domestic servants and construction laborers lured to work in the Middle East), emigration-protection laws usually reach cross-border white-collar recruitments and postings. For example:

  - The Philippines regulates employers that recruit Filipinos to work abroad, requiring registrations and permits from two separate Filipino agencies and imposing standard form overseas employment agreements.

  - Guinea requires that employers pay both social security and tax withholdings on behalf of Guinean expatriates working abroad.

  - Liberia requires a license from the Liberian Ministry of Labor to recruit locals.

  - Ghana and Mozambique require paying expatriates' moving and repatriation expenses—including for families. Ghana also requires employers of Ghanaian expatriates dispatched abroad to contribute to the Ghanaian social security system, at least under some circumstances.

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33 Australia Fair Work Act 2009 §§ 13, 14, 34, 35(2)—but Australia Superannuation Guarantee legislation applies different standards.

34 *Méndez Nieto v. Techint Int'l Construction Corp.*, Colombia Sup.Ct. Justice/Labor Div., case no. SL14426-2014. (# 41948, r. 36)(Oct. 2014).

35 Venez. Labor Code art. 78.

36 Brazil Labor Code § 7062/82, art. 3(11).

37 *Elizeu Alves Correa v. Construtopic Construtora Ltda. et al.*, Brazilian Appellate Labor Court case # 02541- 69.2010.503.0091 (5/16/11).

38 *Maurício da Silva v. Construtopic Construtora Ltda. et al.*, Brazilian Appellate Labor Court, Third Region case # 01006-2011-091-03-00-0 BO (11/17/11).

E. Affirmative defenses arising from the international context

In certain rare scenarios, the cross-border employment context offers an employer an international-context affirmative defense to a worker's employment law claim. For example, in the *Nolan* (U.S. Army England shipyard) case, the Army waived a sovereign immunity defense that might have been available to it by virtue of its status as a branch of a foreign government. Sovereign immunity and diplomatic defenses apparently prevail sometimes, and lose sometimes, when Cuba sends government-employed doctors to work in Brazil (generating revenue for the Cuban government), and the doctors sue in Brazilian courts demanding to be compensated under Brazilian standards.[39] Another example is the "Friendship, Commerce and Navigation" [FCN] treaty affirmative defense to certain employment claims theoretically available to (but only very rarely upheld for) foreign-incorporated employers sued under host country discrimination law.[40]

Conceptually, these substantive affirmative defenses are unrelated to *choice-of-employment law* analysis. For example, if a Japanese employer convinces a U.S. court to dismiss a discrimination lawsuit on FCN treaty grounds, or if Cuba convinces a Brazilian labor court that a Cuba/Brazil bilateral agreement on dispatching doctors compels dismissal of a Cuban doctor's wage claim, those dismissals is are because a treaty or international agreement trumps a statute. They are not choice-of-law determinations under conflict-of-laws analysis.

Part 3: Contractual Choice-of-Law and Choice-of-Forum Provisions and the Territoriality Rule

In discussing the general rule on the territoriality of employment protection laws, until now we mostly assumed the employer and employee had not agreed to select a specified jurisdiction's law to control, or court system to adjudicate, if they later get in a dispute. But choice-of-law and choice-of-forum agreements are common in the cross-border employment context, often found, for example, in employment contracts, offer letters, expatriate assignment packages, restrictive covenants, and employee compensation, bonus, benefits and equity plans.

So we turn now to the final, and biggest, nuance or refinement to the general rule on the territoriality of employment protection law: *the effect of a contractual choice-of-law or choice-of-forum provision*. We first address (A) the general rule on contractual choice-of-employment-law provisions, and then we address a number of nuances, refinements, strategies, exceptions and purported exceptions to that general rule: (B) "national" and "hibernating" employment contracts, (C) Europe's Rome I regulation, (D) non-mandatory rules and "Global Employment Companies," (E) restrictive covenants, and (F) forum selection clauses and the Recast Brussels Regulation.

A. The general rule on contractual choice-of-employment-law provisions

The general rule on contractual choice-of-employment-law provisions is: These provisions successfully pull in the law of a contractually-selected jurisdiction that is not the place of employment, but these provisions are powerless to shut off the mandatory application of the employment protection laws of the host country place of employment. For example, consistent with a line of cases in France, a worker whose place of employment is France who signs a choice-of-law clause calling for the law of Andorra, Austria, Belgium, Italy, Texas or the U.K. simultaneously enjoys both a *contractual* right to invoke protections under Andorran, Austrian, Belgian, Italian, Texas or U.K.

39 *Nolan, supra* note 2 at ¶ 12; "'Slave Labor': Cuban Doctors Rebel in Brazil," New York Times, Sept. 29, 2017, at A1.

40 *E.g., Sumitomo Shoji v. Avagliano*, 457 U.S. 189 (1982); *Papaila v Uniden Am.Corp.*, 51 F.3d 54 (5th Cir. 1995); *Fortino v. Quasar*, 950 F. 2d 389 (7th Cir 1991).

law and a French *statutory* law right to invoke French employment protection laws.[41] The worker is positioned to "mix and match" or "cherry-pick" the more employee-protective rules between the two regimes.

- ***Policy behind the rule.*** We have already discussed the policy behind this rule. As discussed, the employment protection laws of a place of employment generally apply by force of public policy as "mandatory rules." Imagine (for example) if a worker in a jurisdiction that imposes a high minimum wage and tough workplace safety and discrimination laws signs an agreement purporting to agree to work for less than minimum wage and purporting to waive local workplace safety and discrimination laws. Obviously that waiver is almost surely void, because the jurisdiction's employment protection laws—here, its minimum wage, safety and discrimination laws—apply by force of public policy as "mandatory rules." And if that waiver is void, so is a choice-of-law clause *disguised* as a waiver: If this worker signed a choice-of-law provision selecting the law of some jurisdiction with a low minimum wage and with loose workplace safety and discrimination laws, that choice-of-law provision would have the effect of waiving host country minimum wage, safety and discrimination laws. The choice-of-foreign law clause would be a disguised waiver, just as void as an overt waiver.

  That said, we have mentioned some rare exceptions—some Communist and Arab-world jurisdictions enforce choice-of-foreign-employment law clauses in some contexts.[42]

- ***Choice of foreign law versus choice of host-country law.*** A choice-of-employment-law provision that simply selects the law of a host country place of employment does not raise this problem. That law already applies, anyway. A canny employer strategy in cross-border employment is to use a choice-of-law provision that affirmatively selects the law of the host country place of employment (either by naming that jurisdiction or by saying "the law of the place of employment applies"). Some courts—including at least one U.S. federal appeals court[43] —hold that a contractual selection of host country place-of-employment law actually shuts off otherwise-extraterritorial employment laws of foreign jurisdictions.[44] U.S. discrimination law has been held *not* to reach an American citizen working abroad for a U.S.-controlled employer who has contractually selected host-country law.[45]

  The rest of our discussion here on employment-context choice-of-law provisions addresses contractual selections of *foreign* employment laws. Provisions that select the law of a *host country* place of employment do not trigger the issues we discuss here.

The upshot of the general rule on contractual choice-of-law provisions in the international employment context is that a choice-of-foreign-employment-law provision often backfires on the employer that originally drafted it and insisted on it. This provision can force a hapless employer to comply with two employment law regimes simultaneously—all the employment laws of the contractually-selected foreign jurisdiction plus all the employment protection laws of the host country place of employment. Usually this employer would have been better off with no choice-of-law clause at all (at least then, only one set of employment laws would apply).

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41 *Cour de Cassation* (French Civil Supreme Court, Social Section) case no.14-18.566 (Jan. 13, 2016) (French employment law applies notwithstanding UK-law clause); *Cour de Cassation* case no. 14-16269 (Oct. 28, 2015) (French employment law applies notwithstanding Belgium-law clause); *Cour de Cassation* case no. 09-66571 (Feb. 9, 2012) (French employment law applies notwithstanding Texas-law clause); *Cour de Cassation* case no. 01-44654 (Mar. 12, 2008) (French employment law applies notwithstanding Italy-law clause); *Cour de Cassation* case no. 99-45821 (Nov. 12, 2002) (French employment law applies notwithstanding Austria-law clause); Grenoble Court of Appeal case no. 00-3363 (Mar. 24, 2003) (French employment law applies notwithstanding Andorra-law clause); Grenoble Court of Appeal case no. 3799-95 (Feb. 24, 1997) (French employment law o applies notwithstanding Texas-law clause).

42 *Supra* part 2(C).

43 *Martinez, supra* note 27 (2nd Cir. 2014).

44 On extraterritorial-reaching employment laws, see *supra* part 2(D).

45 *Martinez, supra* note 27 (2nd Cir. 2014). *See also generally New Zealand Basing Ltd. v. Brown*, CA12/2015 [2016] NZCA 525 (2016) (New Zealand Court of Appeal enforces a Hong Kong choice-of-law clause to dismiss claims under New Zealand age discrimination law brought by employee airline pilots residing in New Zealand without a New Zealand place of employment—opinion ¶ 21: "the majority of the pilots' work occurs outside of New Zealand airspace").

Not surprisingly, when employers that had inserted choice-of-foreign-law provisions into employment arrangements figure out how their provisions actually work, they sometimes scramble to impeach their own provisions. In one case a California employer argued its provision selecting California "regulations" that apply to a cross-border employment relationship somehow did not extend California law. The provision said: "You are considered to be a California resident, subject to California's tax laws and regulations," but the employer argued that clause somehow did not act as a choice-of-California-law clause.[46] In another case, a California corporation had inserted a provision into an agreement with a Denmark distributor saying the distributorship contract was to "be governed and construed under the laws of the State of California, United States of America." That company later argued—unsuccessfully—that this clause somehow did not export California's dealer-protection laws to protect its Danish dealer.[47]

Occasionally an employer succeeds in impeaching its own choice-of-foreign law provision, for example by showing applicable choice-of-law principles do not extend employment regulations extraterritorially, making the provision illusory. We already mentioned that choice-of-English-law clauses in cross-border employment arrangements do not usually extend English law abroad because English employment statutes tend to be domestic to England.[48] English employers sometimes argue their ill-considered choice-of-English-law clauses do not extend English law to overseas employment relationships, on this ground.

The point, however, is that no employer should stick a provision into its own employment contracts that it will later want to impeach. If employers simply omit choice-of-foreign-law provisions from employment contracts, or else if they contractually select host-country (place of employment) law, they will not later find themselves impeaching their own agreements.

Another drawback to choice-of-foreign-law provisions in cross-border employment agreements is the complication and expense of collateral litigation. These provisions almost always complicate cross-border employment disputes, imposing extra costs either when employers try to impeach them or when the clauses force judges to confront proof-of-foreign-law issues and solicit expert testimony and translations. Ultimately these cases tend to arrive at the predictable conclusion under our general rule, anyway (these cases almost always affirm that a contractual choice-of-law provision pulls in the contractually-selected jurisdiction's law without shutting off place-of-employment protection laws). For example, two landmark UK decisions explored whether a U.S. state choice-of-law clause (one case involved a New York law clause and the other a Maryland law clause) in executive compensation arrangements requires a UK court to defer to U.S. state law in interpreting a restrictive covenant to be enforced in the UK. After collateral proceedings and expert testimony to determine what foreign (U.S.) law required, at the end of the day both UK courts predictably ruled that UK, not U.S. state, public policy and "mandatory rules" control restrictive covenants enforced on UK soil, when the UK rules are more protective than the U.S. rules. If the employers in these cases had simply omitted foreign-law provisions from their employment documentation in the first place, they might have saved significant collateral litigation costs and ended up with essentially the same result.[49]

B. "National" and "hibernating" employment contracts

Having discussed the general rule on contractual choice-of-foreign-employment law provisions, we turn to various nuances, refinements, strategies, partial exceptions and purported exceptions to the rule. First among these is what we might refer to as "national" employment contracts. In some circles outside the United States, lawyers, human resources professionals and even rank-and-file workers talk about employment contracts as if they somehow acquire their own nationality or citizenship or passport. For example, a German employer might hire a German worker under what a German boss would call a "German employment contract" and might later transfer that worker to (say) Mexico, giving him what the boss would call a "Mexican employment contract." At that point

46 *Wright v. Adventures Rolling Cross Country*, case no. C-12-0983 EMC., U.S. D.C. N.D. Cal., order of 5/3/12).
47 *Gravquick A/S Trimble Nav. Int'l*, 323 F.3d 1219, 1223 (9th Cir. 2003) (for our purposes here, the dealer-protection laws in this case are analogous to employment protection laws, and the dealer relationship is analogous to an employment relationship).
48 *Ravat, supra* note 31.
49 *Duarte* case, [2007] EWHC 2720 (QB) (UK) (1/07); *Samenga-Turner* case, [2007] EWCA Civ. 723 (UK) (7/07).

the worker might claim to work, simultaneously, under both contracts, with the "German contract" subject to German law (whether it has an express choice-of-law clause in it or not), extending German employment protections into the Mexican workplace.

This scenario seems to arise particularly frequently with so-called "French employment contracts." Even though French statutory employment law does not otherwise reach abroad,[50] French employment law takes a particularly territorial view of employment contracts. So when a French expatriate originally hired under a so-called "French contract" sets off to work outside France—even if he signs a new host country employment agreement and even if his underlying "French contract" gets suspended or "hibernated"—French employment laws likely attach, which comes up, for example, if the employer later fires the expatriate during the assignment. Upon dismissal, the hibernating "French contract" springs to life and imposes French employee-protection laws as if by a choice-of-French-law clause (even if the "French contract" has no explicit choice-of-law clause). Of course, in these situations the territoriality of host-country employment law means that the employment protection laws of the place of employment also apply simultaneously. (The cleanest way to tidy up this situation is to structure overseas expatriate assignments as "localizations" and to cancel any underlying home country employment contract. An expatriate can resign from a preexisting home country employment arrangement and simultaneously sign onto a new one in the host country that extends retroactive service credit. Another solution is to amend the underlying home country contract to add an express choice-of-law clause selecting the law of the new host country place of employment.)

For our purposes here—analyzing the effect of contractual choice-of-law provisions in cross-border employment—the point is that what we might call a "national" employment contract is essentially an employment contract *with an express or implicit selection of the national employment law regime*. That is, what Europeans refer to as a "French employment contract" or a "German employment contract" essentially means an employment contract with an express or implicit choice-of-French-law or choice-of-German-law clause. Even when a home country national employment contract "hibernates" while the employee works abroad under a separate host-country employment arrangement, the national employment contract can impose home-country law because it acts as a contractual selection of home country law. (Again, a strategic employer can tidy up this situation.)

C. Europe's Rome I Regulation

When a conflict-of-employment-law question arises in Europe, European lawyers talk about "Rome." European Union member states are subject to a choice-of-law arrangement called the Rome I Regulation that "replaces" the earlier 1980 Rome Convention.[51] European lawyers are quick to argue that the general rule we have set out on contractual choice-of-foreign-employment law provisions does not apply in Europe, because the Rome regime trumps it. European lawyers talk about Rome I and its predecessor Rome Convention as if they somehow empower a choice-of-foreign law clause to block the mandatory application of host country (place of employment) protection laws.

For example, a March 2005 law firm news alert by German lawyers characterizes the Rome regime as leaving European workers "free to agree upon the law of the country that shall be applicable to the employment contract," and an October 2003 law firm news alert by French lawyers portrays the Rome regime as leaving "the parties to an employment contract...free to choose the governing law." Further, in 2008—when the Rome I Regulation replaced its predecessor 1980 Rome Convention—European lawyers claimed that the then-new Rome I Regulation, more than ever, ratifies and empowers contractual selections of foreign employment law to divest the law of a host country place of employment.

But no, this is not how the Rome regime works. In fact, the Rome regime merely codifies the general rule we have set out on contractual choice-of-foreign-employment law provisions. The texts of both the original 1980 Rome Convention and now the 2008 Rome I Regulation affirm that "overriding mandatory provisions of the law of the forum" (place of employment) trump any choice-

50 *See* French Supreme Court case no. 10-28.537 (Feb. 2012).
51 Rome I Reg. art. 24.

of-foreign-law clause or foreign employment contract.[52] Rome I defines "overriding mandatory provisions" as laws "the respect for which is regarded as crucial by a country for safeguarding its public interests."[53] Rome I requires that a contractual choice-of-employment-law provision not "deprive[e] the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable."[54] And under Rome I, a choice-of-foreign-law clause cannot override the law of any "country" "more closely connected with" the "circumstances [of employment] as a whole."[55]

This means that in Europe, just as in most of the world, an employee lucky enough to get a contractual selection of foreign employment law (or to have what we called a "national" employment contract of a foreign country) usually gets to "mix and match" or "cherry-pick" the more favorable employment protection laws of either the contractually-selected jurisdiction or the host country place of employment "in which the employee habitually carries out his work"[56] —or both. Consistent with this, as mentioned, a worker whose place of employment is France who signs a choice-of-law clause calling for the law of Andorra, Austria, Belgium, Italy, Texas or U.K. simultaneously enjoys both a *contractual* right to invoke protections under Andorran, Austrian, Belgian, Italian, Texas or U.K. law and a French *statutory* law right to invoke French employment protection laws.[57]

In short, in discussing contractual choice-of-foreign-employment law provisions, expect Europeans will claim that because of Rome I, an "individual employment contract" is "governed by the law chosen by the parties." The best response to this argument is: *Yes, this is indeed consistent with the first sentence of Rome I article (8)(1). But that same provision's second sentence then goes to impose the general rule on territoriality of employment protection laws of a host country place of employment even in the face of a contractual selection of foreign law.* To that point, the European may fall back and point out that under the Rome regime, an employer and employee are indeed free to choose an employment law regime other than that of the host country place of employment as long as, when a dispute later arises, both parties reaffirm that their selected jurisdiction's law applies. This certainly is true—but *so what?* When an employment dispute erupts that a worker realizes he can win if he invokes laws of his host country place of employment law, assume he will.

D. Non-mandatory rules and "Global Employment Companies"

We already said that the general rule on the territoriality of employment law applies to *employment protection* laws ("mandatory rules").[58] This principle also applies to our general rule on contractual choice-of-employment-law provisions. That is: Choice-of-law provisions in the international employment context pull in the law of a contractually-selected jurisdiction that is not the place of employment; however, these provisions are powerless to shut off the mandatory application of the *employment protection* laws or "mandatory rules" of a host country place of employment. But that said, a choice-of-foreign-law provision might indeed shut off host country employment laws that do *not* amount to mandatory employment protection laws. This means that parties to a cross-border employment relationship might select home-country laws that govern discretionary human resources topics like, for example: equity plan rules, executive compensation doctrines, and some (but not all) regulation of non-mandatory benefits like rules on voluntary pensions, medical insurance plans, certain tax and social security totalization treaties, and some (but not all) rules applicable to discretionary bonuses. There is U.S. case law authority dismissing a U.S.-based employee's claim contesting terms in a restricted share plan because that plan contained UK choice-of-law and UK choice-of-forum provisions.

Because choice-of-foreign-law clauses can be enforceable as to non-mandatory topics mostly relating to compensation and benefits plans, choice-of-home-country-law clauses are common, and often effective, in international compensation/benefits plans and equity plans, particularly those for

52 Rome I Reg. arts. 34, 37; *compare* Rome Convention articles 3(3), 6, 7.
53 Rome I Reg. at art. 9(2) (1); *cf.* art. 21 (choice-of-law clause cannot override any rule "manifestly incompatible" with "public policy" of "forum" court).
54 Rome I art. 8(1).
55 Rome I arts. 8(1), (4).
56 Rome I Reg. art. 8(2).
57 *Supra* note 41.
58 *Supra* part 1(C).

highly compensated executives. This principle grounds "Global Employment Companies" (GECs), subsidiary entities that a multinational sets up to employ a corps of career expatriates working around the world. This said, in designing a cross-border compensation/benefits plan, equity plan or GEC, remember that the contractual selection of home country law tends to be enforceable only as to topics that do not amount to "mandatory rules." Even a choice-of-law clause in a bonus plan, equity award agreement, compensation arrangement for highly compensated executives or GEC constitutional charter will not divest host-country "mandatory rules" like, for example, laws on vacation, sick leave and dismissals. Neither cross-border compensation plans nor GECs get an exemption from the general rule on the mandatory application of host-country *employment protection* laws.

E. Restrictive covenants

Restrictive covenants—non-compete agreements, customer and employee non-solicitation agreements and confidentiality agreements—as well as employee invention/intellectual property assignments raise special challenges in cross-border employment. Laws that enforce restrictive covenants tend to be "mandatory rules" (employment protection laws) that apply by force of public policy, so the restrictive-covenant interpretation rules of a host country place of employment tend to apply by force of law. For example, never expect a California court to defer to a contractual provision selecting New York or English law to enforce an employment-context non-compete against a worker whose place of employment is California (in California, employment-context non-competes are void).[59] It works the same way in reverse—English courts almost never defer to foreign (say, New York or Maryland) choice-of-law clauses when enforcing restrictive covenants on staff who work in England.[60]

When enforcing a post-term restrictive covenant after an employee has left the job, the practical issue usually comes down to complying with the restrictive covenant rules and public policy of the jurisdiction where the original employer seeks enforcement, which often ends up being *the place where the employee has gone off to breach the covenant*, and may be neither the home nor host country during employment.

- ***Example.*** Imagine an employee originally hired in Paris had signed a Europe-wide non-compete containing a French choice-of-law clause who then got transferred to work for a while in Florida. Later, this employee quit, moved to London, and started working for an English competitor, flagrantly violating the non-compete. If the original employer now tries to enforce the non-compete, which jurisdiction's law applies? France's? Florida's? Or England's?

  As a strategic matter, to win an enforceable remedy, the original employer here is probably best advised to try to enforce the non-compete in London under English law, ready to show the provision complies with English non-compete public policy. (In this example the original employer might have to convince a London court that the non-compete complies with *both* British and French law, because of the choice-of-French-law clause—which show this employer would have been better off omitting that pesky clause in the first place.)

  Theoretically there might be other litigation approaches possible, and there might be arguments that any of these three jurisdictions' laws apply. But in the real world, if the original employer wants fast specific performance (a quick, binding injunction) or an enforceable money judgment (in a place where the employee has assets), the best strategy very likely will be for the employer to frame a restrictive covenant enforcement action under the law of the place where the employee has gone off to breach—and to sue in that jurisdiction's local courts.[61]

F. Forum selection clauses and the Recast Brussels Regulation

59 *E.g. Ruiz* (9th Cir. 2012), *supra* note 7, *but see Sabd-Krutz* (US DC ED Cal. 2015), *supra* note 7.

60 *Duarte* (UK 2007), *supra* note 49; *Samengo-Turner* (UK 2007), *supra* note 49.

61 *See, e.g., Digicel v. Carty*, [2014] JMCC Comm 14 (Jamaica Sup.Ct. Judicature) at ¶¶ 36, 78 (Jamaican court asked to enforce restrictive covenant against employee who had been employed in the United States—the covenant covered competition across "the Caribbean or Central America" and the plaintiff employer saw the breach occurring in Jamaica).

We have been addressing choice-of-law clauses that invoke a legal regime other than the law of the place of employment. The follow-on issue is the enforceability of an employment-context agreement that calls for private arbitration[62] or for adjudicating disputes in a foreign court—that is, the enforceability of a contractual choice-of-foreign-*forum* provision that purports to require the employer and employee resolve any disputes in their contractually-selected forum and not in the local labor courts of the host country place of employment. (We are not addressing the scenario of a worker subject to a forum selection clause who *voluntarily* brings a claim in a previously-agreed forum, nor are we addressing the scenario of an employer and employee embroiled in a dispute who mutually agree on a forum to hear their claim. And of course we are not dealing with forum-selection provisions that choose the local labor courts of the host country place of employment. None of those scenarios present enforceability problems.[63])

Employment-context forum-selection provisions that call for a forum other than host country (place of employment) labor courts tend to be unenforceable abroad, because outside the United States, special-jurisdiction labor courts tend to assert mandatory jurisdiction over employment disputes with staff who work locally (whose place of employment is in-country). This principle is familiar even in the otherwise-arbitration-friendly United States, because certain U.S. worker-rights agencies (for example, state workers' compensation agencies, unemployment compensation agencies, equal employment agencies, the EEOC, OSHA and the NLRB) can have mandatory jurisdiction over certain employment disputes. When they do, an arbitration or choice-of-foreign-forum provision may be unenforceable.

Outside the United States, a provision in an employment or expatriate agreement (or compensation plan) that purports to select arbitration or to empower some forum other than local host-country labor courts tends not to block the mandatory jurisdiction of labor tribunals in the place of employment. In London today, for example, many U.S. financial services expatriates are working under arbitration and U.S.-court clauses of dubious enforceability. If an American expat working in London has signed an arbitration or U.S.-courts clause but nevertheless sues the employer in an English Employment Tribunal, the employer might not expect to win a dismissal by invoking the forum-selection clause.[64] That said, a few rare jurisdictions are exceptions. Malaysia enforces employment-context arbitration agreements, for example. And in 2017 Brazil amended its labor code and now purports to allow arbitration agreements in employment contracts.[65]

In employment-context choice-of-forum scenarios, Europeans invoke articles 20, 21 and 22 of the so-called "Recast Brussels Regulation" on employment-context choice-of-forum clauses within Europe.[66] These provisions of this EU Regulation merely codify our general rule that employees outside the United States rarely have to litigate employment disputes outside their host country place of employment, even if a choice-of-foreign-forum clause purports to require otherwise. In a 2015 decision, the UK Court of Appeals invoked the Recast Brussels Regulation to block a choice-of-Massachusetts-courts clause in a U.S.-headquartered employer's equity plan.[67]

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62 The references here to *private* arbitration distinguish the *court-mandated* alternate dispute resolution procedures under certain countries' labor courts.

63 Indeed, a provision that selects the labor courts of the host country place of employment can be an excellent employer strategy, because it might divest the jurisdiction of foreign courts that otherwise could adjudicate "extraterritorial" employment claims. *E.g., Martinez, supra* note 27 (2nd Cir. 2014); *New Zealand Basing Ltd, supra* note 45 (New Zealand 2016).

64 *E.g., Petter v. EMC Europe Ltd & Anor*, [2015] EWCA Civ 828 (UK Court of Appeal grants "anti-suit injunction" to block choice-of-Massachusetts-courts clause in U.S.-headquartered employer's "share incentive scheme" equity plan).

65 Brazil CLT (Consolidated Labor Laws) *revised* 2017, at art. 507-A: "For employees [earning at least double minimum wage], employer and employee are free mutually to agree on a binding arbitration clause, as provided under the Law 9.307/96 [Brazil arbitration law]."

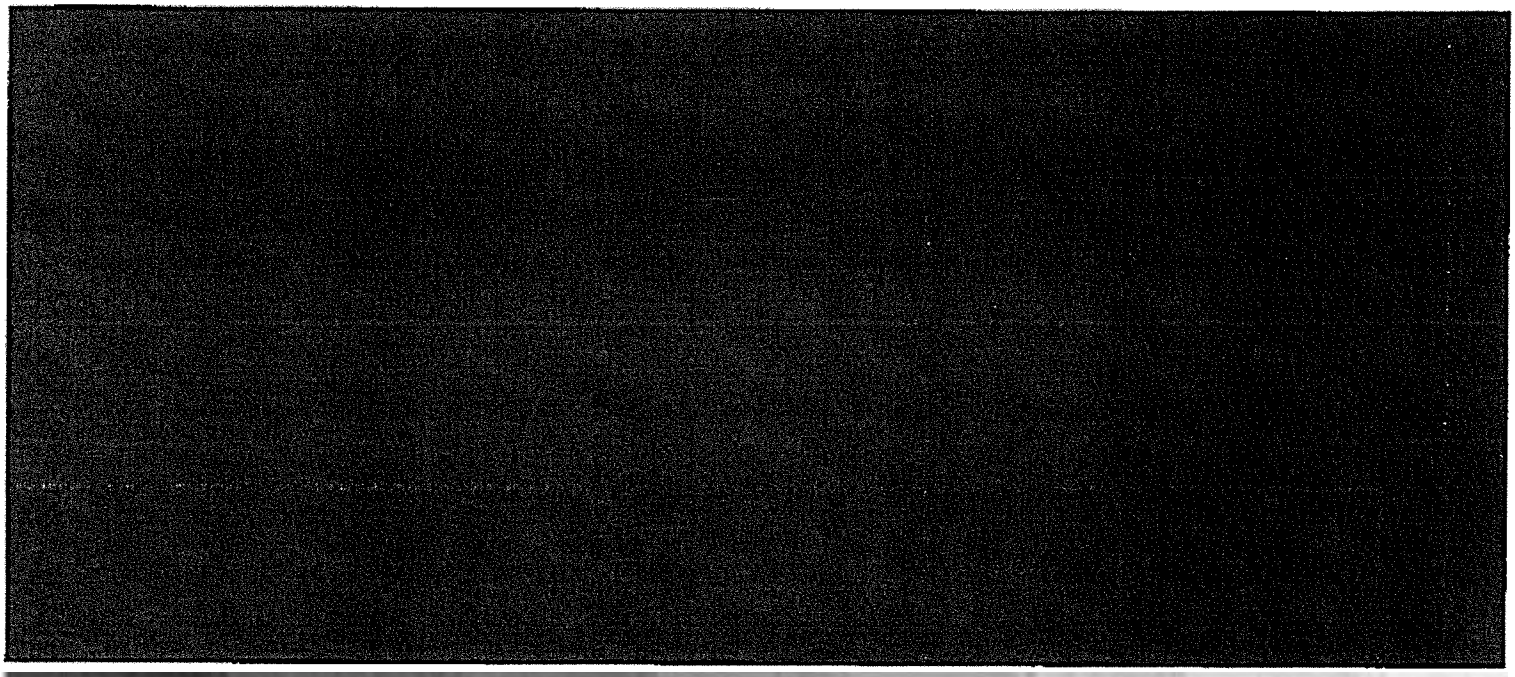
66 EU Regulation No. 1215/2012 *repealing* Regulation 44/2001.

67 *Petter, supra* note 64.

Conclusion

Which jurisdiction's employment laws reach border-crossing staff? Because employment protection laws are "mandatory rules" applicable by force of public policy, host-country employment protection law—the law of the current place of employment—usually controls. In addition but not instead, *home*-country workplace rules rarely but occasionally also apply simultaneously, such as where a home-country statute has "extraterritorial" reach or where an employer and employee have contractually selected home-country law. While these general principles usually prevail, international choice-of-employment-law and -forum issues can get complex.

Work through these situations strategically, accounting for the various nuances, refinements, strategies, exceptions and purported exceptions. When drafting cross-border employment agreements, benefits plans or expatriate arrangements, the best drafting strategy might be either to omit any choice-of-law or forum-selection provision entirely, or else simply to select the law and courts of the place of employment.



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RECENT DEVELOPMENT

How Well Do Your Anti-Harassment Tools Work Overseas?

BY DONALD C. DOWLING, JR. ON DECEMBER 7, 2017

The 2017 tsunami of high-profile sex harassment allegations against politicians, entertainers and news reporters has employers rethinking their approach to eradicating workplace harassment. And this issue is global—the news stories splash across media outlets worldwide and the conversation is everywhere.

Overseas, eradicating workplace sex harassment is just as urgent as it is stateside. Anti-harassment laws abroad can be strict. Costa Rica, India, Korea and other countries impose specific rules for sex harassment policies and training. France, Egypt, India and other countries criminalize sex harassment—harassers can actually go to jail and can implicate their employers.

Multinational employers stand exposed to harassment claims outside the United States unless they have implemented tough and effective measures to protect against workplace harassment globally. Fortunately, U.S. employers have spent decades refining sophisticated tools for fighting workplace harassment—anti-harassment policies, reporting requirements for co-worker dating, internal complaint systems, "love contracts," and workplace training.

But U.S. employers engineered these tools for the highly-evolved U.S. legal environment, accounting for rarified concepts such as the "tangible employment action" requirement for imposing vicarious liability, the "unreasonable failure to take advantage of preventive or corrective opportunities" affirmative defense to harassment claims, a "severe and pervasive requirement" for hostile environment harassment, and claims of "implicit quid pro quo third-party harassment."

Before the current flood of sex harassment allegations, U.S.-headquartered multinationals may have assumed their U.S. anti-harassment toolkit was state-of-the-art. They may have exported the U.S. approach to combatting workplace harassment, assuming it a sensible practice worldwide. But because U.S. anti-harassment tools were engineered for the well-evolved, highly-refined—but purely domestic-U.S.—environment, simply exporting these tools does not always work. Law and culture overseas may differ substantially, which often compels a different compliance approach.

For that matter, all the high-profile sex harassment accusations against U.S. politicians, entertainers and reporters leave many wondering how effective U.S. approaches to eradicating workplace harassment have been, all along. Overseas, news reports portray sex harassment as an *American* compliance challenge. For example, one Chinese newspaper suggested that the type of sexual harassment widely reported in recent months could never happen in China because of its cultural traditions.[1]

In this environment, multinationals should revisit, and sharpen, their tools for fighting workplace harassment outside the United States—their anti-harassment policies, reporting procedures, internal complaint systems, "love contracts" and training. An approach honed in the U.S. makes a great starting point, but it may need to be refined and adapted for the very different environment overseas. Consider:

- *Vehicle*: What is the best vehicle for imposing an anti-harassment rule across worldwide operations—a single company-wide global anti-harassment policy, a harassment provision in the global code of conduct, aligned local-country anti-harassment policies, or some combination?
- *Protected group harassment*: Does the company's global approach to fighting harassment export the default U.S. model based on gender and protected-group status? If so, does it comply in countries that prohibit *non-status-linked* workplace bullying, "mobbing," psycho-social harassment and "moral harassment"? For that matter, does the listing of protected groups in the anti-harassment policy and training align with legally-protected categories overseas?
- *Local compliance*: Does the company's global approach account for local mandates and nuances abroad? For example, countries from Costa Rica to India to Korea impose specific requirements for sex harassment policies and training. Do the global anti-harassment materials comply? Do they account for laws in France, Egypt, India and elsewhere that criminalize harassment?
- *Cultural appropriateness:* Is the company's global approach to disclosing co-worker dating and "love contracts" too rooted in U.S. cultural norms? Does it work in environments hostile to these concepts, like Continental Europe and Latin America?
- *Reporting system*: Does the company's reporting and grievance system comply abroad, consistent with Europe's data protection regulation of whistleblower hotlines and overseas employment doctrines that can invalidate mandatory reporting rules?

A U.S.-based company's tools for fighting workplace harassment might need sharpening even domestically, after all the recent attention. Internationally the issue is yet more complex, because U.S. approaches to eradicating workplace harassment need reengineering for the overseas environment.

For a full discussion of globalizing an approach to fighting harassment, see part five (pages 23-29) of our discussion of global discrimination/harassment/diversity policies.

[1] The China Daily said harassment is less common in China compared with western countries. Benjamin Haas, "Anger as Chinese media claim harassment is just a western problem," *The Guardian* (Oct. 17, 2017).