

Sources of Legal Protection for American Workers Overseas

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I. Introduction

As the economy continues its steady march toward globalization, more companies are becoming multinational, and more Americans are working overseas. American employers are increasingly sending U.S. workers on *ex patriate* assignments to explore new markets, oversee the construction of foreign facilities, negotiate with overseas suppliers or manage outsourced functions. If they are employed by a U.S. owned or controlled company, American citizens continue to be covered by U.S. anti-discrimination laws while working overseas, and they may also be protected by the national law of the host country, by international law and by labor agreements or voluntary codes of corporate conduct. Americans working abroad need to be aware of these multiple sources of protection and their right to pursue claims if they encounter a problem on an overseas assignment.

II. Extraterritorial Application of U.S. Law

The three major U.S. anti-discrimination laws expressly protect American employees working overseas if they are employed by U.S. companies or foreign entities controlled by a U.S. corporation. Title VII of the Civil Rights Act of 1964 (“Title VII”)², the Age Discrimination in Employment Act (“ADEA”)³ and the Americans with Disabilities Act (“ADA”)⁴ extend protection to American citizens working anywhere in the world for American companies or foreign employers controlled by a U.S. corporation.⁵

However, these laws do not protect foreign nationals working abroad, and Congress provided a “foreign laws” exception where an otherwise discriminatory action is necessary to avoid violating the laws of a foreign country in which the workplace is located.⁶ For example,

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² 42 U.S.C. § 2000e, *et seq.* (prohibiting discrimination and harassment on the basis of race, sex, religion and national origin)

³ 29 U.S.C. § 621 *et seq.*

⁴ 42 U.S.C. § 12101 *et seq.*

⁵ *See Denty v. SmithKline Beecham Corp.*, 109 F.3d 147 (3rd Cir. 1997), *cert. denied*, 118 S. Ct. 94 (1997).

⁶ *See* 42 U.S.C. §§ 2000e-1(b), 12112(c)(1); 29 U.S.C. § 630(f)(1). *See also* EEOC Enforcement Guidance, N-915.002.

an employer will not be held liable for violating the ADEA if compliance would have required the employer to violate a local statute imposing a mandatory retirement age. In one case, an employee lost his age discrimination claim because the court held that a mandatory retirement provision in the employer's German labor contract trumped enforcement of the ADEA.⁷ The "foreign laws" exception is narrowly construed and requires the employer to prove that complying with U.S. discrimination laws will *inevitably* violate the national law of the host country.

Congress also specifically limited application of U.S. anti-discrimination law to cover only foreign entities that are controlled by an American employer.⁸ Whether a foreign entity is "controlled" by a U.S. corporation depends on whether the two entities share interrelationship of operations, common management, centralized control of labor relations and common ownership and financial control.⁹ This is essentially the same test used by the EEOC to determine whether two or more entities should be considered a "single employer," and courts tend to put the most emphasis on the extent of centralized ownership and control of labor relations.

The U.S. Supreme Court has held that Congress has the authority to regulate employers of U.S. citizens abroad, but that such coverage must be explicitly provided in the statute.¹⁰ As a result, other federal employment protections do not share the extraterritorial reach that Congress granted to Title VII, the ADA and the ADEA. For example, the National Labor Relations Act ("NLRA"), the Occupational Safety & Health Act ("OSHA"), and the Worker Adjustment & Retraining and Notification Act ("WARN Act") apply only to workplaces within the United States and its possessions. Similarly, only employees based in the U.S. are protected by the Family Medical Leave Act ("FMLA"), the Equal Pay Act ("EPA"), the Fair Labor Standards Act ("FLSA"), the Equal Pay Act ("EPA") and the whistle-blowing provisions of the Sarbanes-Oxley Act ("SOX"), none of which apply abroad. Employees working outside the United States are not counted for determining coverage for purposes of the FMLA, but *are* counted for determining whether an employer is subject to the WARN Act.¹¹

⁷ See *Mahoney v. RFEFL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 181 (1995). The EEOC takes a different position-- that discriminatory labor agreements are not the equivalent of foreign statutes, and cannot be the basis of a foreign law defense, because they are discriminatory arrangements to which the company voluntarily agreed. See EEOC Enforcement Guidance at 2313-27.

⁸ See 42 U.S.C. §§ 2000e-1(c)(2), 12112(c)(2)(B).

⁹ See 42 U.S.C. §§2000e-1(c)(3), 12112(c)(2)(C); 29 U.S.C. § 623(h)3); *see also* EEOC Policy Guidance: Application of ADEA and EPA to American Firms Overseas, Their Overseas Subsidiaries, and Foreign Firms, No. N-915.039 (March 3, 1989).

¹⁰ See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991). The same appears to be true with respect to extraterritorial application of state law. See *Torrico v. International Business Machines*, 213 F.Supp.2d 390 (S.D.N.Y. 2002) (extending protection of New York anti-discrimination law to New York resident working in Chile). Examples of courts applying state law to protect workers outside the U.S. are still rare.

¹¹ See 29 C.F.R. §825.105; 20 C.F.R. 639.3(1)(7)

III. Application of Local Foreign Law to U.S. Citizens Working Overseas

The employment laws of most countries apply to employees lawfully working in that country, regardless of citizenship, and Americans working abroad are likely to be protected by the employment laws of the country where they work. Because of this dual protection, Americans working abroad for U.S. companies or U.S.-controlled companies may be able to pursue legal claims under both American and foreign law and in both American courts and foreign labor tribunals.¹²

European Union member states are in the process of implementing Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation. Member states are charged with adopting legislation to prevent and remedy discrimination on the basis of, for example, age, gender, and disability and are wrestling with implementing protections against “lifestyle” discrimination, sexual orientation discrimination, and other issues. These protections generally address both direct discrimination (disparate treatment) and indirect discrimination (similar to disparate impact analysis in the U.S.).

In some cases, U.K. and European job protections may be more extensive than those provided under U.S. law. In the U.K., unlike the U.S., age discrimination protection has been defined to protect both older and younger workers, *i.e.*, it is illegal to discriminate against an employee because the employee is either perceived as too old or because the employee is perceived as too young. In addition, Germany, for example, imposes quotas requiring employers with at least 20 employees to ensure that at least 5% of the workforce is composed of disabled employees and provides for additional days off for disabled employees.

In other areas, the anti-discrimination legislation adopted by EU member states may provide less protection than U.S. law. For example, France has implemented legislation outlawing so-called *quid pro quo* sexual harassment, but has been resistant to recognizing a claim for hostile environment sexual harassment. Furthermore, the general acceptance of mandatory retirement statutes has complicated efforts to impose and enforce age discrimination protection in many EU countries.¹³

In addition to the extent of legal protection, the burden of proof may be different under foreign law. For example, American practitioners familiar with the three-step *McDonnell-Douglas* burden-shifting framework for discrimination claims may be surprised to learn that in

¹² One issue that occasionally arises is whether the U.S. citizen is actually “working” in the country or is there only for a temporary assignment. For example, an American assigned to an overseas office for a short project or who is present in a foreign country solely to attend a conference or trade show is unlikely to be protected by the anti-discrimination laws of that country. The issue is determined by the national law of the host country.

¹³ The national law of many countries also provides protection against “unjust dismissal.” Even absent unlawful discrimination, an employee terminated without just cause or with insufficient notice can, under such laws, recover mandatory severance payments or other statutory damages.

most European jurisdictions there is no third step permitting the employee to prove pretext once the burden has shifted to the employer to prove a legitimate business justification for the challenged action.

Employment discrimination claims in European and British Commonwealth countries are typically adjudicated by a specialized labor tribunal, often presided over by a panel comprised of a neutral administrative judge, an employer advocate and an employee advocate. Although not accustomed to awarding significant punitive damages, tribunals routinely award economic damages and compensatory damages for emotional distress to victims of illegal harassment or discrimination. There is no bar to an employee pursuing claims in both a foreign tribunal and U.S. courts.

IV. European and International Human Rights Law

Increasingly, employment rights and the right to be free from discrimination in employment is recognized internationally as a basic human right. Where violation of employment rights is so egregious that it rises to the level of human rights abuses, claims can be brought in the International Criminal Court.

The European Court of Human Rights is also empowered to hear employment-related civil rights claims. An eleven-judge court in Brussels, the European Court of Human Rights has jurisdiction over violations of the European Union Constitution, which incorporates the Charter of Fundamental Rights. The Charter of Fundamental Rights prohibits slavery and forced labor, as well as employment discrimination on the basis of race, gender, national origin, disability, religion, sexual orientation, language, political opinions and genetic features. Although the European Court of Human Rights has jurisdiction over any employer doing business in an EU member state, it is not clear whether non-EU citizens have standing to bring an employment claim before the court.

The United Nations has also established conventions prohibiting forced labor and other human rights abuses, and the International Labor Organization (“ILO”) has adopted 176 conventions relating to international labor standards. However, the conventions are not binding unless ratified by member countries, and to date the United States has not adopted any significant ILO conventions except for the convention outlawing forced labor.

V. Labor Agreements and Corporate Codes of Conduct.

Employment rights may also be protected through voluntary agreement. Historically, the principal source of employment protection for workers outside the U.S. has been legally binding labor agreements, and many countries still require an employer to have such an agreement, enforceable under local law, before an employer is allowed to do business in that country.

In addition, multinational employers have been pressured to adopt corporate codes of conduct that guarantee a safe and healthy workplace, freedom from discrimination, minimum wages, reasonable limitations on work hours, the right to engage in collective bargaining, and prohibition on child labor or forced labor. These codes of conduct can be given greater reach if an employer insists, as a condition of doing business, that suppliers and subcontractors also adhere to the same standards.

Examples of corporate codes of conduct include the U.S. Model Business Principles announced by the Clinton Administration and the U.S. Department of Commerce in 1996, the Universal Business Principles issued by the American Chamber of Commerce in Hong Kong, the Organization for Economic Cooperation Development's Guidelines for Multinational Corporations, and the Global Sullivan Principles, which were developed by noted human rights activist Rev. Leon Sullivan. The ethical standards embodied in these codes share a general commitment to nondiscrimination, prohibition of forced labor and child labor, and the right to fair employment practices. Industry-specific standards have also emerged, such as the Apparel Industry Partnership Agreement and the Worldwide Responsible Apparel workplace code of conduct.

Employers who meet minimum standards in nine areas, including employee health and safety, nondiscrimination, collective bargaining rights and prohibition of forced labor and child labor, can be certified by Social Accountability International as meeting its Social Accountability 800 standard. However, adherence to corporate codes of conduct and most international labor standards is still entirely voluntary and extremely difficult to judicially enforce.

VI. Conclusion

U.S. citizens may feel vulnerable to exploitation when working overseas. It is therefore extremely important to educate Americans sent on *ex patriate* assignments that they are protected by U.S. anti-discrimination laws. Such employees should also consider whether they are covered by the national law of the foreign country in which the workplace is located, as well as labor agreements or corporate codes of conduct. Similarly, employers need to be cognizant of their obligation to comply with both American anti-discrimination laws *and* applicable local laws with respect to their American employees. As more and more workers cross borders, so too will employment law claims.