EXTRATERRITORIAL APPLICATION OF U.S. EMPLOYMENT LAWS AND THEIR POSSIBLE CONFLICT WITH APPLICABLE FOREIGN LAWS

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Imagine you're a company operating outside the United States. You're incorporated outside the United States. Your employees don't work in the United States. In fact, they've never been to the United States. All of this makes it all the more remarkable to you when one day you receive a lawsuit brought by one of those employees against you in a U.S. court, asserting a violation of that employee's supposed rights under U.S. employment law. You think to yourself, ''This can't be.'' But as set forth below, you're wrong: it can.

This article summarizes the circumstances under which U.S. employment laws apply outside the United States, i.e., the ''extraterritorial'' application of U.S. employment law. Specifically, it addresses the U.S. employment laws that expressly apply to U.S. citizens who are employed by companies operating outside the United States, which employees are covered by those laws, which employers are subject to those laws, and possible defenses available to foreign companies when they are sued for allegedly violating one or more of those laws.

After explaining the mechanics of extraterritorial application, we examine the additional challenges of complying with U.S. employment laws abroad when those laws conflict with the applicable employment laws of the host country. To illustrate, we draw upon our experience in Qatar to examine briefly the possible conflicts between U.S. and Qatari employment law.

What U.S. Job Laws Apply Abroad?

U.S. law presumes that its statutes do not apply beyond its borders.[2] "Absent clear evidence of congressional intent to apply a statute beyond our borders, the statute will apply only to the territorial United States.''[3] Thus, the best evidence that Congress intended a statute to have extraterritorial effect is the plain language of the statute.[4] Currently, three major U.S. employment laws have extraterritorial application: Title VII of the 1964 Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.[5]

Title VII[6] bars discrimination in employment based on race, color, national origin, religion, and sex.[7] A successful plaintiff can recover damages for back pay, future loss, emotional distress, pain and suffering, inconvenience, mental anguish and loss of enjoyment of life, and attorneys' fees. A court also may order equitable relief, such as reinstatement. In cases where intentional discrimination is found to have occurred, a court may impose punitive damages against the employer.[8]

The ADA prohibits discrimination based on disability, or perceived disability, and requires employers to provide a ''reasonable accommodation''[9] where necessary to enable a qualified employee or applicant with a disability to perform the essential functions of a job.[10] The ADA provides remedies identical to those available under Title VII.

The ADEA makes it unlawful to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment because of such individual's age. It applies to persons who are 40 years of age or older. Remedies include back pay, front pay, and attorneys' fees. In cases of intentional discrimination, liquidated damages (i.e., a doubling of actual damages) may be assessed.

Each of these three laws also makes it illegal for an employer to retaliate against an employee because the employee exercised rights under the statute.[11] Retaliation is a separate legal claim and occurs when an employer, employment agency, or labor organization takes an adverse action, such as firing, demoting, or reducing compensation,[12] against a covered individual because he or she engaged in a protected activity such as complaining of discrimination or aiding in the investigation into a complaint of discrimination.[13]

Who's Covered?

A U.S. citizen employed outside the United States is covered. If the employee is not a U.S. citizen, [14] the laws do not apply.[15] Thus, U.S. resident aliens working outside of the U.S. are not covered.[16]

Not all foreign employers that employ U.S. citizens outside of the United States are subject to these U.S. employment laws. The initial question is: How many employees are employed by the employer? Each of these three laws has a numerical minimum.[17]

Under the ADEA, a company must have ''twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year'' to qualify as an ''employer.''[18] Both Title VII and the ADA require 15 or more employees for the same time period.[19]

An employer that meets the numerical threshold still must fall into one of the following categories to be subject to these U.S. employment laws:

1. An employer incorporated in the United States. An employer-company incorporated in the United States is deemed to be a U.S. company and thus is subject to U.S. law.[20] A foreign branch of a U.S. company also will be considered a ''joint employer,'' subjecting the foreign branch to extraterritorial application of these U.S. employment laws.

2. An employer not incorporated in the United States but having sufficient contacts with the United States. An employer incorporated outside of the United States, or not incorporated (e.g., a partnership), still may be regarded as a ''U.S. employer'' based upon its ''totality of contacts'' with the United States. The three principal factors that U.S. courts use in determining ''totality of contacts'' are (1) the entity's principal place of business, (2) the nationality of dominant shareholders and/or those holding voting control, and (3) the nationality and location of management—officers and directors.

3. A non-U.S. firm "controlled" by a U.S. company. To determine whether a non-U.S. company is sufficiently ''controlled'' by a U.S. company to be subject to these U.S. employment laws, a court will examine four factors: [21](1) the degree of interrelated operations between the foreign employer and the U.S. company; (2) the extent of common management between the foreign and U.S. companies; (3) the degree of centralized control of labor relations; and (4) the extent of common ownership or financial control.[22]

Possible Defenses to Liability?

An employer subject to the extraterritorial application of these U.S. employment laws may defend any lawsuit by invoking the defenses available to U.S. employers operating within the United States. A discussion of those defenses is beyond the scope of this article. But in addition to those defenses, there are certain affirmative defenses that only apply in lawsuits involving the extraterritorial application of these laws.

Foreign Law Defense. An employer of U.S. citizens outside of the United States may have an affirmative defense to liability under Title VII, the ADA, or the ADEA if compliance with any of these laws would require the employer to violate the laws of the foreign country. To invoke this ''foreign law'' defense, an employer must establish that the action affects an employee in a workplace in a foreign country, that compliance with the applicable U.S. law would cause the employer to violate a ''law'' of the foreign country, and that the workplace is located in that foreign country.

The second factor—that compliance with the U.S. law would cause the employer to violate a ''law'' of the foreign country—involves two issues: whether there is a violation of a foreign law and whether compliance with the U.S. employment law causes the employer to violate such law.

What is a ''law'' under the foreign law defense? It is not an employer's internal rules, regulations, or policies. Currently, there is little case law to provide guidance on this issue. However, courts are likely to construe broadly the definition of a ''law'' for purposes of the foreign law defense analysis.[23] For example, in *Mahoney v. RFL/FL*, 47 F.3d 447 (D.C. Cir. 1995), a federal appellate court was asked to decide whether the foreign law defense applied in a situation where U.S. citizens were forced to retire at age 65 from an American employer located in Germany, pursuant to the express language of the collective bargaining agreement existing between the parties. The court held that the foreign law defense applied because the union contract, and the German labor practices it incorporated, were German ''laws'' that would be violated were defendant forced to comply with the ADEA. The decision has been criticized as stretching the concept of what qualifies as a foreign ''law.'' *See e.g.*, 23 Brooklyn J. Int'l L. 655, Comment: The Erroneous Interpretation of the Foreign Compulsion Defense in the ADEA: *Mahoney v. RFE/RL, Inc*.

The foreign law defense creates the spectre of interesting and difficult issues in countries where the line between civil and religious law is unclear. For example, in *Kern v. Dynalectron Co*., 577 F. Supp. 1196 (N.D. Tex. 1983), a U.S. company operating in Saudi Arabia was permitted to deny employment as a helicopter pilot to a non-Muslim because, under Saudi law, non- Muslims flying into Mecca are beheaded, making Muslim status a bona fide occupational qualification—the ''BFOQ defense''—under Title VII. In *Abrams v. Baylor Coll. of Med.,* 805 F.2d 528 (5th Cir. 1986), the court rejected a medical school's attempt to use the BFOQ defense in denying employment to Jewish doctors in Saudi Arabia due to their difficulties in obtaining Saudi visas. These cases are of questionable relevance to the foreign law defense because they were decided before Title VII was amended to allow for its extraterritorial application.

Foreign Sovereign Compulsion Defense. Another possible affirmative defense to liability based on the extraterritorial application of a U.S. employment law is the foreign sovereign compulsion defense. This defense may be available if the alleged violation of U.S. law was compelled by a foreign sovereign. For example, a U.S. citizen employed outside the United States by a U.S. engineering and construction firm was terminated at the request of the foreign sovereign for being ''too old.'' A California state court determined that the company did not violate the ADEA because it merely was complying with the sovereign's order and the foreign sovereign had no duty to observe U.S. anti-discrimination laws.[24]

Where Can You Be Sued in United States?

After wondering how you could be sued under a U.S. employment law by an American employee working for you outside the United States, your next question may well be: How could I be sued in this particular U.S. court? How could a court in [name any state] have jurisdiction over a dispute involving an employee working for us outside the United States?

Although this article is not the place for an extended analysis of the law of jurisdiction, in summary a U.S. court may have ''personal jurisdiction'' over a company operating outside the United States. In a case involving extraterritorial application of a U.S. employment law, the plaintiff's assertion of the jurisdiction of a U.S. court likely will be based on the defendant's minimum contacts with the forum state. Such a plaintiff must demonstrate that sufficient ''minimum contacts'' exist to satisfy due process requirements—as established by the 14th Amendment to the U.S. Constitution—and the requirements of the particular state's ''long-arm statute'' are met.[25] When any of those elements is present, the court's ''long arm'' reaches out and exercises jurisdiction.

One example of a court finding sufficient minimum contacts occurred when a California state court exercised its long-arm jurisdiction over a defendant parent corporation headquartered in California, even though the alleged acts of discrimination occurred in Saudi Arabia and the unlawful acts allegedly were conducted by employees of a Saudi Arabian-owned subsidiary.[26] Another example occurred when a District of Columbia federal court exercised its long-arm jurisdiction to allow suit against a nonprofit organization that was incorporated in the state of Delaware and funded by the federal government, but which had its principal place of business in Munich.[27] Even if personal jurisdiction can be established pursuant to a state's long-arm statute, a defendant still may seek dismissal under the doctrine of forum non conveniens, by which a court, in the exercise of judicial discretion, may determine that the balance of interests and convenience of the parties favors adjudication in another forum.

American Employers in Qatar

A U.S. employer employing U.S. citizens abroad must be aware not only of applicable U.S. employment laws but also of applicable local laws that might create possible conflicts. Here are a few examples that the growing number of U.S. employers operating in Qatar have to face:

Preference to employ Qatari nationals. To serve the interests of the state of Qatar in increasing the knowledge and skills of Qatari nationals, the Labour Law No. 14 of 2004 (as amended)(the ''Labour Law'')(Art. 18) requires that Qatari nationals be given priority in employment. Non-Qataris may be employed ''in case of need.''

Qatari nationals are a small portion of the workforce in Qatar, so this provision does not necessarily affect every U.S. company doing business in Qatar. Our experience is that it is most likely to apply in industries such as oil and gas and banking and finance.

This statutory preference sets up a conflict. Strict application of Title VII would prohibit discrimination against an applicant on the basis of national origin. In other words, compliance with Title VII would require violation of Qatari law because the Qatari-national-preference statute effectively requires discrimination against non-Qataris in certain circumstances. As a result, the foreign law defense should protect a U.S. employer from a Title VII claim by a U.S.

citizen in this circumstance because the foreign (i.e., Qatari) law compels the U.S. employer to prefer the Qatari national.

***Specific laws relating to employment of women**.* An entire section of the Labour Law (Part Nine, Arts. 93 to 98 inclusive) is dedicated to the employment of women. One provision of interest to U.S. employers is that women shall not be employed in ''dangerous, arduous works, works detrimental to their health, morals or other works to be specified by a Decision of the Minister.''

We are not aware of any guidance from Qatari courts as to how this provision is to be applied. Violation carries significant penalties, including imprisonment for a period not exceeding one month and a fine of not less than 2,000 Qatari Riyals (see Art. 145). U.S. employers beware: this provision appears to conflict squarely with *International Union, UAW v. Johnson Controls Inc.*, 499 U.S. 187, 55 FEP Cases 365 (1991), in which the Supreme Court held that a policy excluding fertile women from a workplace made dangerous by the presence of lead violated Title VII. Again, it would appear that the foreign law defense would protect a U.S. employer from such a Title VII claim by a U.S. citizen whose employment opportunities are curtailed in Qatar pursuant to this statute.

Mandatory maternity and nursing leave. Part Nine of the Labour Law (Arts. 96 and 86) creates rights to paid maternity and nursing leave for women who have been employed for one complete year. There is no equivalent requirement for men.

Although U.S. law does not require such paid leave for women, it does prohibit discrimination based on gender. In this situation, neither the foreign law defense nor the foreign sovereign compulsion defense would apply, because compliance with U.S. law does not require violation of Qatari law, and compliance with Qatari law does not require violation of U.S. law: an employer required by Qatari law to grant paid leave to women can comply with U.S. law by also granting paid leave to men.

'What Should I Do With This Information?'

With what may be your new-found realization that you are subject to these three U.S. employment laws while operating abroad, the logical question is: What should our company be doing to minimize our potential liability?

Describing a full-blown program of compliance with these U.S. employment laws is beyond the scope of this article. But here are some of the basic components of such a compliance program:

***1. Establish written policies of nondiscrimination**.* You should have written policies, applicable to your employees who are U.S citizens, that prohibit discrimination and retaliation under these three U.S. laws. Such policies ordinarily are set forth in employee handbooks that are distributed to employees.

2. Set up complaint-handling mechanisms. Your policies should provide covered employees with a way to report a complaint of discrimination or retaliation to human resources or another appropriate company official. Many such disputes with employees can be resolved internally, without the employee filing an actual lawsuit.

***3. Investigate complaints**.* Take employee complaints seriously and, where appropriate, investigate them internally. If you determine that the complaint has merit, take appropriate disciplinary action.

***4. Review employment agreements**.* If you have written employment agreements with covered employees, you should review them to determine if they comply with these U.S. employment laws.

5. Train. Your executives, managers and supervisors who are responsible for your covered employees must be aware of the applicability of these U.S. employment laws and trained on how to carry out their responsibilities.
Such training may include a review of the substance of these laws and how they should respond if they believe an employee's rights are being violated. Those tasked with investigating employee complaints should be trained on how to conduct such an investigation.

Prudent companies will be aware of the U.S. law implications of their employment practices outside the United States. That awareness should extend to establishing the kinds of policies and procedures that prudent employers within the United States implement to minimize the risk of employment-related liability.

FOOTNOTES

[1] This article was prepared with the additional assistance of Michael Palmer, an associate with Patton Boggs.

2 *Small v. United States*, 544 U.S. 385, 388-89, 125 S. Ct. 1752, 161 L. Ed. 2d 651 (2005).
3 *United States v. Gatlin*, 216 F.3d 207, 211-12 (2d Cir. 2000) (internal quotation marks omitted).
4 *Ofori-Tenkorang v. American Int'l Group Inc.*, 460 F.3d 296, 301 (2d Cir. 2006) (27 EDR 251, 8/30/06). If the plain meaning of the statute does not provide a clear indication of whether the statute is to have an extraterritorial application, review all available information about the meaning of the statute, including its structure and legislative history. *Gatlin*, 216 F.3d at 212 (internal quotation marks omitted).
5 While these three U.S. employment laws expressly were amended to have extraterritorial application, there also are several laws that have been found not to apply extraterritorially. Such laws are: (1) 42 U.S.C. § 1981(a), which grants all persons within the jurisdiction of the United States the right to make and enforce contracts, sue, be parties, give evidence, and the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens; (2) the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, which protects an employee who reports his employer's misconduct from retaliation or other discrimination; and (3) the National Labor Relations Act, 29 U.S.C. § 158(a)(1), which it makes it unlawful for an employer to interfere with, restrain, or coercee employees who choose to engage in activities to promote self organization or engage in activities that relate to their terms and conditions of employment.
6 In *EEOC v. Arabian Amer. Oil Co*., 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274, 55 FEP Cases 449 (1991), the U.S. Supreme Court held that Title VII, as amended, does not apply extraterritorially to regulate the employment practices of U.S. employers who employ U.S. citizens abroad. *Id*. at 246, 111 S. Ct. 1227. Under that decision, employers are not liable under Title VII for employment discrimination occurring against U.S. citizens outside of the United States. However, by year's end, Congress declared its contrary legislative intent with the enactment of the 1991 Civil Rights Act, amending Title VII to expressly include extraterritorial application.
7 EEOC Compliance Manual, Sec. 15, Race & Color Discrimination, No. 915.003 (April 19, 2006).
8 *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 79 FEP Cases 1697 (1999).
9 ''In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.'' *See* 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).
10 It should be noted that an employer does not have to provide a reasonable accommodation if doing so would cause an ''undue hardship'' to the employer. *See* 29 C.F.R. pt. 1630 app. § 1630.15(d) (1996). According to EEOC, ''[g]eneralized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.'' EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002).
11 EEOC Compliance Manual, Sec. 8, Retaliation, No. 915.003 (May 28, 1998).
12 The Supreme Court recently held that the ''adverse action'' element of a Title VII retaliation claim requires a plaintiff to show ''that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'' *Burlington N. & Santa Fe Ry. Co. v. White*, ___ U.S.___, 126 S. Ct. 2405, 2415, 98 FEP Cases 385 (2006) (26 EDR 786, 6/28/06).
13 EEOC Compliance Manual, Sec. 8, Retaliation, No. 915.003 (May 28, 1998).
14 A ''foreign country'' excludes the 50 states, the District of Columbia, Puerto Rico, and any other U.S. territory. *See* 29 U.S.C. § 630(g) & (i); 42 U.S.C. § 2000e(g) & (i); 42 U.S.C. § 12102(3); *see also* Policy Guidance: Analysis of the Sec. 4(f)(1) 'Foreign Laws' Defense of the ADEA of 1967, No. 915.046 (Dec. 5, 1989). *see also* EEOC Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States, No. 915.002 (Oct. 20, 1993).
15 *See* 29 U.S.C. § 630(f); 42 U.S.C. § 2000e(f); 42 U.S.C. § 12111(4); *Iwata v. Stryker Corp*., 59 F. Supp.2d 600 (N.D. Tex. 1999).
16 *Shekoyan v. Sibley Int'l*, 409 F.3d 414 (D.C. Cir. 2005) (24 EDR 719, 6/15/05).
17 When counting company employees, it is important to count all employees of the company *and* its branches. A U.S. branch of a foreign company can subject the entire foreign company to liability under U.S. anti-discrimination employment laws.
18 29 U.S.C. § 630(b).
19 42 U.S.C. § 2000e(b); 42 U.S.C. § 12111(5)(A). ''Counting employees'' must be done in accordance with the applicable statute, and thus is beyond the scope of this article.
20 *See, e.g.,* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1987) (''For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.'').
21 Note that all four factors are not required to find that the non-U.S. entity is ''controlled'' by the U.S. company. U.S. courts consistently place importance on whether the companies have centralized control of labor relations.
22 A company not controlled by a U.S. company that employs U.S. citizens abroad is not subject to extraterritorial application of the ADA, the ADEA, or Title VII. *See Denty v. SmithKline Beecham Corp*., 109 F.3d 147, 150, 73 FEP Cases 423 (3d Cir. 1997) (''[The ADEA] does not apply to foreign companies which are not controlled by U.S. firms.'').
23 Note that EEOC's guidance on the foreign law defense takes a narrower view than current case law. Also note that it is likely that a foreign law enacted after an alleged violation of a U.S. employment law will not provide a defense.
24 *See West v. Bechtel Corp*., 117 Cal. Rptr. 2d 647, 88 FEP Cases 724 (Cal. Ct. App. 2002).
25 Although ''long-arm statutes'' vary from state to state, generally such a statute will provide a court with jurisdiction over a nonresident entity when that entity: (1) transacts any business within the forum state or contracts anywhere to supply goods or services in the state; (2) commits a tortious act within the state; (3) commits a tortious act without the state causing injury to personal property within the state; or (4) owns, uses, or possesses any real property situated within the state.
26 *West*, 117 Cal. Rptr. 2d 647.
27 *Mahoney*, 47 F.3d 447.