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At Home Abroad — Americans working outside the country often benefit from the extraterritorial application of U.S. anti-discrimination laws

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Employment Law

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It is estimated that 300,000 American corporate employees work outside the country, with thousands more working abroad for themselves or for foreign corporations. These expatriates are, of course, generally protected by the employment laws of the host countries, but in many circumstances, those working for American companies also benefit from certain protections afforded by U.S. federal anti-discrimination and labor laws.

The basic statutory framework for federal protection against workplace discrimination consists of three critical statutes and the accompanying regulations: Title VII of the Civil Rights Act of 1964, (42 U.S.C. 2000e et seq.), (29 C.F.R. 1604 et seq.); the Americans with Disabilities Act (42 U.S.C. 12101 et seq.), (29 C.F.R. 1630 et seq.); and the Age Discrimination in Employment Act (29 U.S.C. 621 et seq.), (29 C.F.R. 1625 et seq.).

Supplemented by state and even local statutes, (not discussed here), these laws and the case law interpreting them form the core protections against employment discrimination for Americans, both domestically and abroad.

Title VII prohibits employees from basing employment decisions on an individual's race, color, religion, sex or national origin. The ADA, in essence, bars an employer from discriminating against any "qualified disabled person" in its employment decisions and requires employers to make reasonable accommodations to disabled individuals. The ADEA is intended to prevent employees from discriminating against individuals 40 years of age and older.

Nationality of the Employer

Naturally, these statutes apply to any corporation employing an American citizen inside the territory of the United States, even where the employer is a foreign company, subject to certain narrow treaty-imposed limitations. The threshold issue for an American employee abroad seeking to enforce the rights protected by these statutes is the nationality of the employer.

In 1993, the Equal Employment Opportunity Commission issued EEOC Guidance No. 915.002, Oct. 20, 1993, which requires a court to decide the issue of employer nationality on a case-by-case basis, taking into consideration various factors including, but not limited to:

Place of incorporation: Typically, an entity incorporated in the United States is considered an American employer under the theory that a company seeking the benefits of being incorporated here subjects itself to concomitant obligations. By contrast, for a company incorporated outside the United States that nonetheless has numerous contacts with the United States, the EEOC will review the totality of the company's contacts with the United States to determine nationality.

Principal place of business: The court or EEOC will consider the place of the company's primary factories, offices or other facilities.

Contacts within the United States.

Nationality of dominant shareholders or those holding voting control.

Nationality and location of management, such as the location of the entity's officers and directors.

The above list is illustrative only, and the EEOC has made clear that no one factor is to be considered determinative.

Control Is Key

However, even if the entity located outside the United States manages to avoid being deemed an American company under the above criteria, it can still be covered, and its expatriate American employees protected by U.S. anti-discrimination laws, if it is considered controlled by a U.S. entity. Title VII, the ADA and the ADEA follow an identical scheme for determining control. As with the EEOC's guidelines, these statutes list a group of factors to be considered, with none viewed as predominant or controlling. They are:

- interrelationship of operations;
- common management;
- centralized control of labor relations;
- common ownership and financial control of the employer and the dominant corporation.

These factors are well-known to American companies, since they are identical to those relied on by the EEOC to determine whether two entities can be treated as an integrated enterprise or a single employer for liability and jurisdictional purposes. As in cases dealing strictly with American companies, all four factors need not be present in order for Title VII, the ADA or the ADEA to be extended to both entities and their employees.

One case, *Lavrov v. NCR Corp.*, 600 F. Supp. 923 (S.D. Ohio 1984), discussed the concept of the integrated enterprise in the context of a Title VII claim. Relying on the four factors identified above, it held that there was enough evidence of interrelatedness between the U.S.-based parent corporation and the foreign subsidiary to warrant a trial on this issue.

The court noted that the American parent implemented corporatewide personnel policies, that certain personnel decisions involving individual employees required approval of the American company and that the foreign subsidiary was not authorized to change any remuneration plans, benefits or operating conditions without the approval of the American parent.

In addition, the court considered it relevant that the American parent appointed the management members of the board of directors of the foreign subsidiary. This, combined with the basic function of the foreign company to market products designed by the parent company, was held as proof of the commonality of management and the interrelationship of the operations of the two companies.

Neither Title VII, the ADA nor the ADEA applies to the foreign operations of foreign companies not controlled by an American entity. Similarly, if an integrated enterprise is controlled by a foreign company, the American anti-discrimination laws do not apply. See *Robins v. Max Mara, U.S.A., Inc.*, 914 F. Supp. 1006, 1009 (S.D.N.Y. 1996).

By contrast, foreign affiliates or subsidiaries of American companies are treated as U.S. employers if they are, in fact, controlled by the American company. This rule prevents American employees from evading U.S. anti-discrimination laws by employing U.S. workers through foreign subsidiaries.

It is important to recall that the extraterritorial reach of the federal anti-discrimination statutes applies only to American citizens employed abroad by U.S. companies or by foreign entities controlled by U.S. companies. Foreign citizens employed outside American territory, whether for an American entity, subsidiary, affiliate or in any other respect, are not protected. See *Reyes-Gaona v. North Carolina Growers Assn.*, Inc., 2001 WL 539437 (4th Cir May 22, 2001) (ADEA held not to protect foreign nationals who apply in foreign countries for jobs in the United States).

As a result, an American company will not be held in violation of the U.S. anti-discrimination laws by hiring only American citizens for work abroad, even if this results in discrimination against citizens of the host country.

U.S. Statutes and Acts Abroad

Until 1991, the language of Title VII offered no guidance whether the statute applied beyond the territorial boundaries of the United States. In view of this silence, the Supreme Court, in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), held that Congress had the power to authorize application of its laws outside the United States but it had chosen not to do so. Under this rationale, state employment laws have generally been held inapplicable overseas. *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147 (3d Cir. 1997).

In response, Congress amended Title VII to make clear that American citizens employed in a foreign country by a U.S. employer or by a U.S.-controlled employer in effect carry their legal protections with them in their luggage on the way to their new assignment.

To protect against any claim of violation of sovereign immunity, Congress formulated the amendment to provide that illegal discrimination engaged by an American company overseas or a company controlled by an American corporation would be presumed to have been engaged in by the U.S. employer.

The ADA has the same extraterritorial application as Title VII (EEOC Enforcement Guidance N-915.002). As originally drafted, the ADEA incorporated by reference an extraterritorial exemption in the Fair Labor Standards Act which specifically provides that it does not apply to employees whose services during the workweek are performed in a workplace within a foreign country.

However, in 1984, Congress amended the ADEA to protect American citizens employed abroad by American employers or their subsidiaries, except where application of the ADEA would violate the law of the host country, as discussed below.

Other Employment Statutes

The extraterritorial application of U.S. employment statutes is by and large limited to anti-discrimination statutes, which constitute only part of the framework of federal employment law. Thus, for example, the National Labor Relations Act, 29 U.S.C. 151 et seq., which covers trade union activity, extends only to workplaces located in the United States and its possessions.

The seminal statute covering pensions and other employee benefit plans, the Employee Retirement Income Security Act of 1974, has no specific provision authorizing its enforcement or extending its coverage beyond the territory of the United States. The logic of the Supreme Court decision that had barred extraterritorial application of Title VII prior to

its amendment by Congress would appear to require the same result for ERISA. However, there has been no definitive Supreme Court pronouncement on this issue.

In fact, an argument can be made that ERISA contemplates some extraterritorial application because it exempts from coverage "any plan ... which is established and maintained outside the United States primarily for the benefit of individuals substantially all of whom are nonresident aliens." (29 U.S.C. 1321 (b)(7)).

Naturally, this raises the question whether a plan maintained outside the United States to benefit American citizens working abroad would be covered. Interested persons will need to await further judicial guidance on this issue, but the most recent decision in this area, *Maurais v. The Guardian Life Insurance Co. of America*, 2000 U.S. Dist. LEXIS 13818 (E.D. Pa. Sept. 14, 2000), held that ERISA could not be applied extraterritorially without a clear mandate from Congress.

Two other employment-related statutes do not come into play past the proverbial water's edge. The Occupational Safety and Health Act, 29 U.S.C. 653, applies only to employment performed within the United States and its possessions. Similarly, the Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101-2109, which imposes certain restrictions on employers desiring to close a factory or other facility, does not apply to foreign sites of employment. However, American citizens working at such sites are counted in the company's employee population to determine if the employer's U.S. operations fall within the coverage of the WARN Act.

The Equal Pay Act, 29 U.S.C. 201-219, does not apply abroad, and, as mentioned above, neither does the FLSA, 29 U.S.C. 201 et seq., which addresses a wide array of labor standards, including minimum wage and entitlement to overtime pay. The only extraterritoriality issues that arise in connection with these statutes occur when an employee spends work time both inside and outside the United States. The few courts that have been called on to consider this issue have held that it is the employee's base of employment that is determinative.

The Family and Medical Leave Act, 29 U.S.C. 2611 et seq., has little or no extraterritorial effect. Under the FMLA, non-American employees at the American site of a foreign company are not included in the census of employees required to determine whether the employee is subject to the FMLA.

The Foreign Law Defense

Employers have expressed concerns about trying to reconcile conflicting laws and complying with inconsistent legal obligations, particularly where application of U.S. anti-discrimination law would violate the law of the country where the American is employed.

To resolve this concern, the 1991 amendments to Title VII, the ADA and the Civil Rights Act of 1991, which specified that the anti-discrimination laws would have extraterritorial effect, created a foreign law exemption for American companies employing Americans overseas.

Pursuant to this rule, an employer is allowed to take actions that might constitute unlawful employment discrimination in this country, but only if necessary to avoid violating a law of the host country and only in limited circimstances. Specifically, the employer must show that:

- the action was taken concerning an employee in a workplace outside the United States or its territories;
- compliance with the anti-discrimination law would necessarily result in the employer's violating the law of the host country; and
- the law at issue is that of the specific country where the employee's workplace is located.

The definition of law in this sense is narrow, at least in the view of the EEOC. The commission's guidelines on this subject, Guidance No. 915.002, specifies that it does not regard as law for purposes of the foreign laws:

- the corporate charter of the company that is registered with a foreign governmental agency;
- a bill passed by only one house of the host country's legislature where the country's constitution requires approval of both houses before the bill is given the force and effect of law;
- the employer's rules, regulations and employment practices; and
- preferences and customs of the host country.

Although not spelled out, it is clear that the EEOC recognizes that certain international treaty obligations can constitute law justifying conduct that would be considered discriminatory under U.S. law.

The District of Columbia Court of Appeals recently illustrated the conundrum that employers can face and the analysis employed by the courts when faced with this situation. In *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995), an American corporation with operations in Germany terminated the employment of U.S. citizens working in Munich based on a clause in the collective bargaining agreement with a German labor organization that specified a mandatory retirement age of 65.

When the employee sought relief under the ADEA, the company defended itself by claiming that the collective bargaining agreement and the German labor practices that it incorporated were considered to be law in Germany. The appeals court ordered the action dismissed, holding that since collective bargaining agreements are considered to be law under German legal principles, this particular agreement constituted a foreign law and the company's reliance on the foreign law exemption was justified.

The court expressed its recognition that if the employer had retained the plaintiff despite the agreement, the company would have been held in violation of German law that supported such contracts, as well as a decision of the Munich Labor Court.

Clearly, determining what is and is not law is not always clear and may often turn on expert testimony concerning the legal system of the country involved. When it is not apparent if the principle at issue is, in fact, a law, or if the foreign entity is subject to personal jurisdiction in the American court, the tribunals will often allow pretrial discovery to go forward.

The difficulties are illustrated in two cases involving Saudi Arabia. In *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986), the Fifth U.S. Circuit Court of Appeals rejected the argument of a medical school that said

it should be allowed to discriminate against Jewish doctors because Saudi law made it difficult to obtain visas on their behalf.

The court held that there was no evidence of actual compulsion on the part of the Saudi government that would bring the matter within the foreign law exemption. By contrast, in *Kern v. Dynelectron Co.*, 577 F. Supp. 1196 (N.D. Tex. 1983), the employer prevailed in a case in which a helicopter pilot employed by an American company in Saudi Arabia claimed religious discrimination. The company required pilots to convert to Islam because Saudi law required the beheading of non-Muslims flying into Mecca.

There does not appear to be a foreign law exemption with respect to federal government contractors, even if the work is to be performed abroad. Only where the hiring takes place outside the United States can contractors take these factors into consideration. A similar rule applies to disability-based discrimination. 41 C.F.R. 60-1.5(3), 60-1.10 and 60-741.4(a)(4).

In sum, the following analytic framework is useful when trying to determine whether a company may be liable for discrimination based on conduct occurring in its overseas operations.

First, determine if the nationality of the employer is American.

Second, if the employer is a foreign corporation, determine whether it is sufficiently controlled by an American corporation as to be identical under employment law principles.

Third, assess the nationality and citizenship of the employee claiming discrimination.

Fourth, determine whether the foreign law exemption is available.

Obviously, this analysis is useful only in determining whether the conduct in dispute is subject to review under the U.S. statutes and does not deal with the substance of the claim. Foreign human resources managers and attorneys often express surprise that for all the dynamism of the American legal system, its employment laws are often interpreted more favorably toward the employer than would be the case in Europe or Asia.

Nonetheless, the availability of jury trials, attorneys' fees awards and punitive damages for employment cases makes these claims inherently dangerous for employers. For these reasons, foreign companies that are arguably controlled by an American entity, and foreign subsidiaries of U.S. companies, need to be cognizant of the requirements of American employment discrimination law. These companies may wish to consider implementing arbitration and other risk-reducing programs.

Similarly, American companies operating abroad must be careful not to assume that their employment decisions will be judged only by the standards of the host country. Hirings, firings, assignments and promotion decisions involving their expatriate American workers can trigger legal review under the U.S. law and litigation in American courts.