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How to Launch an Employment Discrimination, Harassment, Diversity or Affirmative Action Initiative on a Global Scale

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Equal employment opportunity initiatives—human resources policies, handbook and code of conduct provisions, compliance standards, training modules and dispute resolution procedures that address discrimination, harassment and diversity—have long been vital to U.S. employers. In the global economy, the equal employment opportunity issue has gone global. As American-headquartered multinationals align an ever-increasing list of human resources policies and “offerings” internationally, cross-border efforts at promoting workplace fairness have become increasingly vital, but also increasingly complex.

Domestically within the United States, staking out a “zero tolerance” stand against illegal workplace discrimination and harassment can be an aggressive, tough and compliant approach to assuring equal employment opportunities. And proactively championing workplace diversity is a good practice. But outside the U.S., laws and cultural attitudes regarding workplace discrimination and harassment vary widely. In many countries workforce diversity is not much of a priority, and equality of employment opportunities overseas lags on many countries’ national HR agendas. As one example, in Egypt—where 76% of men but only 26% of women work—gender discrimination is so severe that one woman, Sisa Abu Daooh, has lived as a man since the 1970s, just to be able to maintain subsistence-level employment.¹

Cultural differences like these complicate the EEO initiatives that American multinationals are inclined to launch across their global operations. This means that U.S. employers’ homegrown domestic EEO initiatives, when exported, can prove culturally inappropriate and legally problematic. Multinationals eager to fight discrimination and harassment and to champion diversity on a global scale therefore need subtlety, nuance, strategy and finesse. A one-size-fits-all American-style approach to EEO compliance simply cannot work internationally, because American laws and cultural attitudes on discrimination, harassment and diversity are unique.

Here we address how a U.S.-based multinational can expand or improve its EEO (discrimination, harassment, diversity, affirmative action) initiatives outside the United States, regionally or around the world. We discuss how U.S. headquarters will need to adjust U.S.-crafted EEO strategies and policies when driving a top-down global compliance initiative—a global policy, code of conduct provision, compliance standard or training module—that would impose internal rules banning workplace discrimination and harassment or that would affirmatively promote workplace diversity.

Part one of our discussion addresses global *discrimination* programs generally. Parts two, three and four focus on the particularly troublesome discrimination sub-topics of global *age* discrimination compliance, global *disability* discrimination compliance and global *pay* discrimination compliance. Part five addresses global initiatives for combating workplace *harassment*. Finally, part six addresses global workplace initiatives promoting *diversity and affirmative action*.

Part One: Fighting Workplace Discrimination on a Global Scale

Discrimination law in the United States is more evolved than in any other country on Earth. The leading treatise on U.S. employment discrimination law runs to two volumes and 3,500 pages; no other country has a discrimination law treatise so long.² By now, decades after America’s civil rights movement gave rise to tough, groundbreaking workplace discrimination laws, American jurisprudence has refined discrimination law concepts more complex than analogous discrimination-law doctrines overseas. In the United States, employment discrimination disputes implicate legal concepts as esoteric as (for example) “gender stereotyping,” “third-party retaliation,” “sex plus” discrimination against a protected “sub-class,” “differential,” “single-group” and “situational” validity in statistical adverse-impact analysis and the requirement of a causal connection between an adverse employment action and a claim of “retaliatory animus.” Workplace discrimination law in other countries is not this nuanced.

¹ J. Malsin, “A Woman’s Secret Life Posing as a Man in Egypt,” *New York Times*, Mar. 16, 2015.

² BARBARA T. LINDEMANN, PAUL GROSSMAN & C. GEOFFREY WEIRICH, *EMPLOYMENT DISCRIMINATION LAW* (5th ed. 2012).

In response to these increasingly rarified American discrimination law doctrines, U.S. employers have engineered sophisticated compliance tools to help eradicate illegal discrimination from their workplaces. U.S. employer practices for fighting discrimination include, for example: imposing tough work rules against workplace discrimination; offering comprehensive discrimination training; implementing detailed reporting and whistleblowing mechanisms; requiring romantically involved staff to declare relationships; separating alleged targets from alleged discriminators; running statistical adverse-impact analyses; and project-managing internal investigations into specific allegations of discrimination.

With American anti-discrimination tools like these having evolved to such an advanced level, a U.S. multinational might assume its kit of state-of-the-art anti-discrimination tools is ready for export to countries with simpler, less-evolved employment discrimination rules. After all, these days most countries impose at least rudimentary laws banning workplace discrimination, even if enforcement of discrimination laws in many countries may be less than rigorous, by American standards. One query to an online human resources forum by someone calling himself “Tokyo-Based HR Consultant” points out that “we know companies are not supposed to” discriminate in Japan—but “in reality, everybody knows...that such discriminatory practices exist here.”³

A carefully thought-out and robust American-style approach to fighting workplace discrimination might seem to be a good practice everywhere around the world. Prohibiting illegal workplace discrimination is of course a vital and valid objective in every country in the world (other than perhaps the very few with no discrimination laws). Common-law jurisdictions, in particular, impose sophisticated laws banning employment discrimination in ways reminiscent of our U.S. approach.⁴ Even civil law jurisdictions, particularly the Continental European states subject to EU anti-discrimination directives, impose tough workplace discrimination laws that in some respects are even stricter than corresponding American employment equality laws (if less frequently invoked). For example, a French law requires employers of 50 or more staff to implement written gender equity action plans.⁵ In 2015, Mexico issued a broad non-discrimination law standard, the Mexican Standard on Equal Employment Opportunities and Non-Discrimination.⁶ As another example, age discrimination law in Europe is broader than in the United States—it protects everyone, even those under age 40, and it protects even the young from employer actions favoring the old.⁷

The challenge in exporting American anti-discrimination practices and policies to places with different equal employment opportunity doctrines is that discrimination statutes and cultural perspectives outside the U.S. differ in their particulars from the U.S. domestic approach. These differences can render an American multinational’s sophisticated anti-discrimination toolkit, when exported, inappropriate and even suspect. We might compare sending U.S. discrimination compliance tools to foreign workplaces to a watchmaker bringing his watchmaking equipment along on a campout: Overly refined tools can be useless in a less-nuanced environment.

When adapting U.S.-honed anti-discrimination tools for use abroad or globally, account for three issues: *Context*, *protected status* and “*extraterritorial*” effect.

A. Context

The first step in exporting or “internationalizing” any American-style workplace discrimination initiative is to adapt the U.S. approach to the very different discrimination contexts or environments overseas. We have discussed how workplace discrimination laws loom unusually large in the U.S. context. The other side of that coin is that overseas, discrimination laws tend to be less central in day-to-day human resources. Adjust accordingly. Be willing to dial down a strident “zero tolerance” American approach. Be sensitive to local context and culture. Keep overseas discrimination compliance in perspective. Three issues specific (if perhaps not unique) to the U.S. environment help

3 “Ask HR: Discriminations, Diversity and Inclusion in Japan,” *HR Agenda* magazine online, Dec. 13, 2010.

4 See, e.g., Australia Disability Discrimination Act 1992 (cth) (DDA); South Africa Promotion of Equality and Prevention of Unfair Discrimination Act, Act no. 4 of 2000).

5 *Loi* 2011-822 of 7 July 2011 *de portant réforme*.

6 NMX-R-025-SCFI-2015.

7 EU Council Dir. 2000/79, J.O. 2000 (L 303) 16.

explain why discrimination compliance tends to be less of a priority outside the United States than it is stateside: *employment-at-will, demographics and history*.

- **Employment-at-will.** The U.S. is the world's only notable employment-at-will jurisdiction. American employment law tends not to offer unfairly fired workers any viable cause of action for wrongful discharge outside the labor union context and outside the state of Montana. (Montana is unique in that it is the only state that gives fired employees a cause of action for dismissal "without good cause."⁸) American-style employment-at-will is in essence a legal vacuum, and nature abhors a vacuum. What rushed in to fill this particular vacuum is U.S. discrimination law. Indeed, American employment lawyers have argued that American discrimination law now amounts to a sort of de facto wrongful termination regime. That is, there is a view in the United States that the employment-at-will doctrine fuels discrimination litigation in the employment dismissal context. As support for this thesis, look east to Bermuda or north to Canada: Bermudian and Canadian human rights laws, on paper, are quite similar to U.S. employment discrimination statutes, but the percentage of contested and litigated Bermudian and Canadian employment dismissals that lead to "human rights" claims is small when compared to the percentage of American employment dismissal charges asserting a discrimination theory.⁹ For a fired Bermudian or Canadian, having to meet the burden to prove a human rights or discrimination claim is much tougher than merely establishing wrongful dismissal/inappropriate notice. For this reason, dismissed Bermudians and Canadians tend to sue for wrongful dismissal much more often than they allege *discriminatory* dismissal. The U.S. Department of Labor once made this very point in the Mexico context when it cited "Mexican government officials" as explaining that in Mexico, "labor discrimination complaints are under-reported, in part, ... because workers are sometimes encouraged to file discrimination cases under more general labor law provisions, such as the ban on unjustified firing, since *discrimination cases are hard to prove.*"¹⁰
- **Demographics.** America's unusually heterogeneous population has created broad racial diversity in U.S. job applicant pools and workplaces. In the U.S. context, diverse demographics elevate workplace diversity and laws against racial and ethnic employment discrimination. Legislative history shows that the U.S. Congress adopted discrimination laws to "stir" the American "melting pot." But many other countries have homogeneous populations—there is no racial "melting pot" in many countries in Asia, Africa, Europe and Latin America. Nations from Finland to Haiti to Paraguay to Mali to China, Japan, Korea and beyond are essentially just one race.¹¹ Race discrimination in these countries tends to be correspondingly less of a social problem. Fighting workplace race discrimination in these countries is often a low human resources priority.
- **History.** America's unusually troubled past with its overt racial and ethnic discrimination—slavery, lynchings, displacements, massacres of indigenous people and racial internments during wartime—is a scar on American history that led to the U.S. civil rights movement and gave rise to America's complex employment discrimination laws: "America's statutory harassment [and] discrimination [law] is rooted in its history of African American slavery."¹² Indeed, "U.S. judges, activists and academics have theorized extensively about how the struggle for African Americans' civil rights shapes U.S. law prohibiting discrimination against other groups."¹³

8 MONT. CODE ANN. §§ 39-2-901 *et al.* (2014).

9 Canadian Human Rights Act, R.S.C. 1985, c. H-6; Laws of Bermuda, *Human Rights Act 1981*, Title 2 Item 23, s. 13; compare HUMAN RIGHTS COMM'N, 2011 ANNUAL REPORT HUMAN RIGHTS COMM'N BERMUDA 17 (2011) and CANADIAN HUMAN RIGHTS COMM'N, 2013 ANNUAL REPORT TO PARLIAMENT 18 (2014) with *Charge Statistics*, Equal Employment Opportunity Comm'n.

10 U.S. Dep't Labor, "[Mexico Labor Discrimination Project](#)" *Initial Funding Opportunity Announcement*, Oct. 14, 2014 (emphasis added).

11 See discussion of U.S. Central Intelligence Agency demographic data, *infra* part six.

12 Sarah Morris, "Tackling Workplace Bullying in Tort: Emerging Extreme and Outrageous Conduct Test Averts Need for a Statutory Solution," 31 ABA JOURNAL OF LABOR & EMPLOYMENT LAW, 257, 265 (2016).

13 Katherina Linos, "Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union," 35 YALE J. INT'L L. 115, 116 (2010).

But American history is unique to the U.S. The historical underpinnings of American discrimination laws are simply not an issue abroad. Meanwhile, history and culture in other countries can steer the concept of employment discrimination in directions completely unexpected to a U.S.-based employer looking at employment discrimination through the lens of U.S. history. For example, in 2015 the UAE passed a comprehensive “Discrimination and Hatred” law that imposes tough criminal sanctions.¹⁴ But the UAE “discrimination” statute focuses almost exclusively on enumerated acts of religious heresy for the most part unrelated to the U.S. concept of employment discrimination. It criminalizes the “discriminat[ory]” acts of: shedding doubt on the “Divine Entity”; interrupting “licensed religious ceremonies”; assaulting “heavenly books”; disparaging the prophets and their wives; damaging tombs; arousing “tribal differences”; and showing contempt for prophets, religious “messengers,” “holy books” and “houses of worship.” Meanwhile, the UAE “discrimination” law is mostly silent on conduct prohibited by U.S.-style employment discrimination laws.

The point is that American employment-at-will, American demographics and American history all make American discrimination laws uniquely vital in a uniquely American way to the American workplace. But unique American issues are not particularly relevant abroad. And so workplace discrimination (as Americans understand it) may carry correspondingly less baggage overseas. Discrimination compliance may play only a peripheral role in overseas human resources administration. Or else (as with the 2015 UAE law), discrimination concepts overseas may veer off in their own particular, different direction. American multinationals operating abroad should therefore consider ratcheting down, or at least culturally adapting, U.S.-crafted discrimination law compliance strategies.

B. Protected Status

Protected status is central to any well-drafted discrimination policy or provision. Remember that while *illegal* employment discrimination is wrong, employment discrimination per se is ubiquitous—every employer discriminates every day against applicants and employees in *non-protected* groups. Compliant employers have standards that are “discriminating” in hiring and terms of employment without being illegally discriminatory. Employers regularly and legally discriminate against (for example): poor performers, criminals, smokers, current drug users, graduates of non-elite schools, those with poor grades and low test scores, those with bad credit, the lazy, the incompetent, the chronically tardy, chronic procrastinators, the uneducated and undereducated, the illiterate, and countless other non-protected categories. All that law prohibits, of course, is discrimination against people because they belong to one of a dozen or so specifically protected categories, groups, traits, classes or statuses. Even the U.S. Equal Employment Opportunity Commission (EEOC) does not declare *all* employment discrimination illegal, only saying “it is illegal to discriminate against someone (applicant or employee) *because of* that person’s” membership in one of just eight EEOC-listed protected categories.¹⁵ This core principle of employment discrimination law applies in most other jurisdictions, as well. For example, the EU Court of Justice concedes that employment discrimination against the obese in Europe is not per se illegal because “obesity” is not among the enumerated protected categories under European law.¹⁶

This is why carefully drafted discrimination policies and provisions almost always list the specific protected categories against which the employer prohibits discrimination. In the U.S., usually the listed protected categories include gender, race, national origin, religion, disability and age, and often also veteran status, genetic predisposition, sexual orientation and workers’ compensation filing status. The EEOC lists the eight U.S. federally protected categories as: “race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.”¹⁷ That is, U.S. employers’ lists of protected categories in anti-discrimination policies usually track the categories protected under American federal, state and municipal law.

¹⁴ UAE Federal Law No. of 2015 on Preventing Discrimination and Hatred.

¹⁵ [“Prohibited Employment Policies/Practices”](#) on eeoc.gov webpage (emphasis added).

¹⁶ *Fag og Arbejde v. Kommunernes Landsforening*, EU Court of Justice case C-354/13 at ¶ 35 (Dec. 18, 2014).

¹⁷ [“Prohibited Employment Policies/Practices”](#) on eeoc.gov webpage.

Listing the protected categories in a discrimination policy or provision is so important in the domestic U.S. context because *failing* to list protected categories would result either in an over-broad policy that prohibits discrimination on every conceivable ground, or in an inscrutable policy that forces staff to go research which categories are, and are not, “protected by applicable law.” But the logic behind listing protected categories in the text of a discrimination policy gets murkier in the international context, because protected categories differ significantly by jurisdiction. The threshold challenge to drafting a cross-border workplace anti-discrimination rule (like a global anti-discrimination policy or an anti-discrimination provision in a global code of conduct) is accounting for the huge differences among different jurisdictions’ employment discrimination protected categories.

Most jurisdictions protect gender, religion, disability and some form of race or ethnicity—under different countries’ laws, “race” goes by various terms including “color,” “skin color,” “racial origin,” “racial affiliation,” and “ancestry” and often overlaps with or includes the similar concept of “nationality,” “national origin,” “ethnic origin,” “ethnicity” and (at least in Cyprus) “community.” Beyond these few core protected categories, though, jurisdictions diverge wildly in what they actually protect. Some examples:

- According to a jurisdiction-by-jurisdiction comparative chart in a 2016 European Commission paper:¹⁸
 - Austria protects “disability of a relative.”
 - Bulgaria protects “property status” and “wealth and social class.”
 - Finland protects “family ties.”
 - France protects “last name,” “mores” and “place of residence.”
 - Hungary protects “mother tongue” and “paternity.”
 - Ireland and Northern Ireland protect “Traveller” community status (the ancestrally homeless, as opposed to those homeless because of their own personal circumstances).
 - Lithuania protects “intention to have a child” (not necessarily including the intention to adopt).
 - Portugal protects “ideological convictions,” “education” and “economic situation.”
 - Romania protects “non-contagious chronic disease” and “HIV-positive status” (but not necessarily contagious chronic diseases other than HIV).
 - Spain protects “use of official languages in Spain” (but apparently not use of non-official languages) and “family ties with other workers in a company” (but apparently not family ties outside the workplace).
 - Turkey protects “class.”
- Increasingly, jurisdictions have come to protect “sexual preference” and (as of August 2013 in Australia) “gender identity and intersex status.”¹⁹
- “Family status” is protected in Hong Kong.²⁰
- “HIV-positive” status is specifically protected—beyond any general protection for disabilities—in many places including Brazil, Honduras and South Africa, and “infectious-disease-carrier status” is protected in China.²¹

¹⁸ [“A Comparative Analysis of Non-Discrimination Laws In Europe 2015”](#) (at pgs. 12-14).

¹⁹ See Aust. Hum. Rights Comm’n [webpage on sexual orientation, gender identity and intersex status](#).

²⁰ H.K. Family Status Discrimination Ordinance L. N. 552 of 1997.

²¹ Brazil Law 12, 981 (2014); Decree No. 147-99 of 9 Sept. 1999 (Honduras); HIV/AIDS Code cl. 7.2.1 (S. Afr.).

- “Rural [versus urban] origin” is protected in China.²²
- “Caste” is protected in India, at least in the public sector, as well as in some contexts in the UK.²³
- *Al akhadam* (low-caste, dark-skinned servants) are protected in Yemen.
- “Political opinion,” “views” or “beliefs” are protected in Argentina, the European Union, El Salvador, Mexico, Montenegro, Norway, Panama and many other countries.
- Short-term “illness” or “health condition” (well beyond long-term disability) and “language” are protected in countries including Guatemala, Peru and Macedonia.
- “Economic circumstances” or “economic situation” are protected in many countries including Guatemala, Mexico, Portugal and Turkey.
- “Source of income” is protected in Alberta, Canada.²⁴
- “Looks” are protected in Argentina.²⁵ In one case, an Argentine successfully sued a U.S.-based employer that had discriminated against him because he looked like Osama bin Laden.
- Reining in employers’ power to conduct pre-employment criminal record checks, “criminality or other anti-social activity” is protected in Slovakia and “criminal record” is protected in jurisdictions including British Columbia, Canada.²⁶
- European Union countries protect “part-time” status—which of course is a job category conferred by the employer, not a personal trait brought to the workplace by the employee.²⁷

Meanwhile, the U.S. and its states protect some quirky traits that few other jurisdictions protect—chiefly veteran status, workers’ compensation filings and genetic predisposition.²⁸

In some jurisdictions, whether certain traits are protected can depend on the facts and circumstances of a specific case—for example, in England, “caste” is sometimes but not always protected.²⁹ And there are actually jurisdictions—Argentina, Belgium, Cyprus and Turkey are examples—that let claimants and courts invent their own protected groups, on an ad hoc basis. In Argentina this doctrine comes from the constitution’s article 16, which says: “All inhabitants are equal before the law and eligible for employment with no requirement other than their skills.”

The point is that all the world’s many disparate protected categories, groups, traits, classes and statuses complicate the drafting of any cross-border anti-discrimination rule. Indeed, whether or how to list protected categories is the central challenge in drafting any cross-border discrimination policy or provision. Different multinational employers tackle this problem in different ways, resolving in different ways the inherent questions:

- Which protected traits or statuses merit explicit mention in a multinational’s global discrimination policy?
- Which traits or statuses can a multinational afford to omit from mentioning explicitly?
- What are the ramifications of a cross-border discrimination policy that expressly lists some protected groups without naming all relevant protected groups, tacking on the common catch-all clause “...and any other category protected by applicable law”?

22 Article 19 of the *Jiuye Fuwu yu Jiuye Guanli* Guiding [Regulations on Employment Services & Employment Administration], promulgated by Ministry of Labor & Social Security, Nov. 5, 2007.

23 India Regulations on Employment Services & Employment Administration, art. 19, promulgated under INDIA CONST. art. 15; e.g. O.Bowcott, “[Woman Awarded £184,000 in UK’s First Caste Discrimination Case.](#)” *The Guardian* (UK), Sept. 22, 2015.

24 Alb. Hum. Rights Act art. 7(1).

25 Arg. Law 23,592.

26 B.C. Hum. Rights Code, R.S.B.C. 1996, c. 210.

27 EU directive 97/81/EC.

28 U.S. Employm’t and Reemploy’t Rts. of Members of the Uniformed Svcs., 38 U.S.C. §§ 4301-4335 (2012); Genetic Info. Nondiscrim. Act of 2008, Pub. L. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 29 and 42 U.S.C.); e.g. 820 ILCS 305/4(h)(Ill.)(state law prohibiting the discrimination against filing a workers’ compensation claim).

29 *Chandhok v. Tirkey*, UK EAT/0190/14/KN (2014).

There are no easy answers. The most common approach among U.S.-headquartered multinationals is to list just the U.S. protected categories and then to add that ubiquitous catch-all (“...and any other category protected by applicable law”). But the catch-all does not satisfactorily resolve the drafting problem here. In fact, the catch-all introduces into a cross-jurisdictional discrimination policy three serious shortcomings—a catch-all clause is simultaneously *too vague, too narrow and too broad*:

- **Too vague.** Listing some protected traits in a non-discrimination policy or code of conduct clause and then sticking in the catch-all clause can be vague, impractical and insensitive because the catch-all both downplays the importance of local law and forces employees reading the policy to research what “applicable law” is. The catch-all signals the employer’s lack of patience with local rules. In Australia, for example, a global anti-discrimination policy that fails to address Australian local discrimination law has been held inadequate.³⁰
- **Too narrow.** At the same time, sticking the catch-all clause into a global discrimination policy can restrict the policy because the clause is too narrow. It demotes all the unnamed protected groups (falling under the catch-all) to a second-class tier of protection. Invoking the canon of construction *expressio unius est exclusio alterius*—to express one thing is to exclude another—a court might reason that the catch-all demotes unnamed protected categories below the expressly named ones.³¹

Imagine, for example, a U.S. age discrimination lawsuit against a hypothetical U.S. employer whose anti-discrimination policy for some reason prohibits discrimination only on the grounds of “gender, race, disability, religion, genetic predisposition, veteran status and any other ground protected by applicable law.” A U.S. age discrimination plaintiff’s lawyer would surely argue this policy’s conspicuous omission of “age” (from its list of protected categories) betrays the employer’s ambivalence toward eradicating age discrimination. For this employer to have left “age” out of its policy’s listing of protected categories (even though, yes, the employer included a generic catch-all clause) allows for the argument that the omission evidences the employer’s animus against members of the omitted group. For this reason, U.S. employment lawyers would likely caution against drafting a U.S. discrimination policy that names some but not all of the key protected categories. An employer listing some protected categories in a discrimination policy should go ahead and include them all.

Now extend this analysis abroad. Imagine for example an Irish employment lawyer representing an aggrieved fired “Traveller” (or a British Columbia lawyer representing a rejected felon, or a Hong Kong lawyer asserting “family status” discrimination). These lawyers might argue the omission of “Travelers” (or “criminals” or “family group”) from the text of the discrimination policy evidences employer animus against employees in the omitted category, even notwithstanding the catch-all clause.

- **Too broad.** While a catch-all clause in a global discrimination policy may be too narrow, at the same time that same clause might simultaneously be too broad, or go too far, because the listing-some-categories-plus-catch-all approach extends the named protected groups into jurisdictions where they are not otherwise protected or even appropriate. For example, many U.S.-headquartered multinationals include in their global anti-discrimination policies and codes of conduct “veteran status” and “genetic” predisposition because U.S. law protects those two categories. But those particular categories make no sense to protect broadly outside the U.S.—few other countries protect them, and indeed, staff in many jurisdictions may not consider those categories analogous to the more familiar protected classes. Similarly, to include “age” in a global anti-discrimination provision raises real problems in jurisdictions where the employer imposes mandatory retirement or age ranges in staffing certain positions.³²

30 *Richardson v. Oracle Corp. Aust. Pty. Ltd.*, [2013] FCA 102 (Aust.) at ¶¶ 163, 164 (Australia-specific “elements were absent from [a multinational’s] global online [discrimination/harassment] training package..., the omission of these important and easily included [Australia-specific provisions in the multinational’s] statements of its own policies is a sufficient indication that [the multinational] had not...taken all reasonable steps to prevent sexual harassment”).

31 Cf. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 107-11 (2012).

32 See discussion *infra* part two.

There is no “magic bullet” solution here—no foolproof way to address protected status in a border-crossing anti-discrimination provision. Each multinational needs to think hard about whether or how to list protected traits internationally, and then select one of the less-than-ideal possible approaches. There are three of them:

- **Catch-all clause.** Use the catch-all clause approach, notwithstanding the shortcomings addressed above.
- **Separate policies/riders per jurisdiction.** List protected categories separately for each jurisdiction. But of course this approach requires crafting separate local discrimination provisions (or separate riders or appendices to the discrimination policy or code of conduct), undercutting the advantage of a single global policy.
- **Invoke “applicable law.”** Keep the global anti-discrimination policy silent as to *all* protected groups, and simply prohibit “illegal” discrimination that violates “applicable law,” using a clause saying something to the effect of: “*We provide equal employment opportunities among all groups, of whatever classification, protected by applicable law. We prohibit all illegal discrimination on any grounds whatsoever that are prohibited by applicable law.*” But this approach yields a vague policy that forces employee readers to do their own legal research.

C. Extraterritorial Reach of U.S. Discrimination Law

America’s major federal (and some state) discrimination statutes reach abroad to a limited extent: They prohibit a U.S. “controlled” (such as U.S.-headquartered) employer from discriminating, on grounds protected by American law, against American citizens who work outside the U.S., whether they work overseas as local hires or as expatriates.³³ U.S.-based multinationals should factor this mandate into their global anti-discrimination strategy and policies. But be careful not to let the “tail wag the dog” here, as this issue is deceptively narrow. Most American-headquartered multinationals employ relatively small percentages of Americans among their overseas staff (although there are exceptions like U.S. companies providing niche services such as overseas security under U.S. government contracts or subcontracts).

Think about whether extending a full-blown U.S.-style anti-discrimination policy to all staff working outside the U.S., only so as to cover a tiny percentage of American citizens in the organization’s foreign workplaces, might be overkill. Consider a more nuanced approach. Focus on complying with U.S. discrimination laws in a way targeted to the overseas *managers* of U.S. citizens working abroad—remember that the goal here is not necessarily to educate the protected American citizens themselves about their U.S. law rights; rather, the goal is simply to protect American citizens who happen to work abroad from illegal discrimination.

Part Two: Fighting Workplace Age Discrimination on a Global Scale

The toughest single issue in crafting an international EEO compliance strategy can be deciding how to address *age* discrimination. Merely mentioning the three-letter word “age” in a global antidiscrimination policy, code of conduct clause, compliance standard or training module raises complex challenges that multinationals too often overlook.

As mentioned, U.S. multinationals’ international EEO statements tend to prohibit discrimination against applicants and employees who fall into specifically listed categories, groups, traits, classes or statuses, and when a multinational spells out what those protected categories are, the categories-lists typically include at least gender, race, national origin, religion, disability...and *age*. As discussed, the general challenge here is reconciling the policy’s one-size-fits-all listing of specific protected categories with all the varied protected categories under the laws of the jurisdictions at issue. In addition to that general challenge is the specific challenge of complying with the policy’s age discrimination clause. This seemingly narrow but surprisingly intractable problem breaks into three parts: the *problem* (widespread age discrimination around the world), the *challenge* (enforcing a

³³ 29 U.S.C. §§ 623(h) (ADEA abroad); 42 U.S.C. §§ 2000e-1(a), (c), 2000e-5(f)(3) (Title VII abroad); 42 U.S.C. §§ 12111(4), 12112(c) (ADA abroad).

cross-border age discrimination provision) and the *solution* (bringing a global age discrimination policy into compliance).

A. The Problem: Widespread Age Discrimination Around the World

While the United States may impose the world's toughest and most intricate laws against employment discrimination, most other countries now have employment discrimination laws, too. While U.S. discrimination laws differ from discrimination laws overseas in significant ways, perhaps the starkest difference is how *age* discrimination laws work. The U.S. Age Discrimination in Employment Act, passed in 1967, is the world's most robust, best-developed and frequently-invoked age discrimination law.³⁴ The ADEA has few if any real counterparts overseas. Many countries still have not gotten around to banning age discrimination in employment, and there are actually jurisdictions with laws that *require* age discrimination. For example:

- **Mandating age clauses in work contracts:** Laws in Bahrain, Oman and many other countries force employers to give all staff written employment agreements that designate employee date of birth.³⁵
- **Prohibiting employing the old:** In Bangladesh, a “worker...shall...retire from employment ipso facto upon completion of the fifty-seventh year of age.”³⁶

Even among the growing group of jurisdictions that now purport to outlaw age discrimination, by U.S. standards these foreign age laws can look poorly conceived, lightly enforced and riddled with exceptions. One almost-universal exception to age discrimination laws outside the U.S. actually allows the most blatant possible act of age discrimination—firing employees because of their old age (most countries' age discrimination laws allow mandatory retirement).

Age discrimination laws outside the U.S. tend to be broad but weak. They broadly prohibit discrimination against the young; they prohibit employers from favoring the old over the young; and they do not impose a minimum protected age. Laws in what we might call these “every-age-protected” regimes protect, for example, a 20-year-old as much as a 40-year-old as much as a 70-year-old.³⁷ The U.S. ADEA, by contract, narrowly prohibits discrimination only against older people; it lets employers favor older staff over younger; and it imposes a floor or minimum age of 40.³⁸ While every-age-protected laws are technically broader than the U.S. ADEA, in practice their breadth significantly weakens them. After all, everyone is some age. In any given age discrimination dispute, everyone, young and old alike, gets to claim equal protection. If (say) a long-serving 68-year-old gets passed over for promotion by a newly-hired 32-year-old, the employer can affirmatively defend the promotion arguing that the younger candidate was legally protected, and to have selected the older candidate could have been illegal age discrimination. After all, to favor seniority is legally suspect in an every-age-protected regime because of the adverse impact against the young.

These broad overseas age discrimination laws have unexpected consequences that seem contrary to what an age discrimination law should be meant to do. Every-age-protected regimes ostensibly forbid employers from granting older staff seniority-enhanced benefits like those American employers commonly offer—service-enhanced pension benefits, severance pay and vacation benefits, and age-plus-service-based early retirement offers.³⁹

Yet the global trend is in the direction of increasingly protecting older employees. Common law countries including Australia, Canada and New Zealand implemented tough age discrimination laws some years ago, and an ever-increasing pool of civil law jurisdictions including Costa Rica, Israel, Mexico and all the Continental states of the European Union now purport to outlaw age discrimination. In Europe, EU Directive 2000/78 bans discrimination based on age as well as on four

³⁴ 29 U.S.C. §§ 621-634.

³⁵ Bahrain Labour Law for the Private Sector, Law no. 36 of 2012, art. 37; see Henrietta Newton Martin, *Dismissal of Employee*, OMAN LABOUR LAW BLOG (Nov. 19, 2014).

³⁶ Bangladesh Labour Code 2006 § 28(1).

³⁷ *E.g.* Colombia Law 931 of 2004; Cyprus Equal Treatment Law 58(1)/2004.

³⁸ 29 U.S.C. § 631; *General Dynamics v. Cline*, 540 U.S. 581 (2004).

³⁹ See *Rainbow v. Milton Keynes Council*, [2008] UK EAT/1200104/07; *MacCulloch v. Imperial Chemical Indus, PLC* [2008], UK EAT/0119/08).

other grounds (article 1), and each EU state was supposed to have passed an age discrimination law by December 2006 (article 18). In Mexico, a series of rulings in May 2015 from the Supreme Court of Justice/First Chamber shows a tougher stance against workplace age discrimination.

Still, in practice even countries with age discrimination laws on the books tend to tolerate what to Americans look like blatantly ageist practices, including in particular mandatory retirement, targeting old workers for lay-offs, and age caps in recruiting:

- **Mandatory retirement.** The United States, Australia, Canada, New Zealand and some other countries ban mandatory retirement because firing an employee *because of* advanced age is surely the most blatant act of age discrimination. But most other countries with age discrimination laws on their books rationalize mandatory retirement (or ratify employer rationalizations for it) in many contexts. For that matter, overseas trade unions often buy in and enshrine mandatory retirement in collective bargaining agreements. Take, for example, Europe, Israel and Japan:
 - **Europe.** Mandatory retirement is legal in most all of Europe despite the “age” discrimination prohibition in EU directive 2000/78. It may be falling under increased scrutiny and it may be hard to justify logically, but in Europe mandatory retirement remains common, widely legal and enshrined in countless collective bargaining agreements. The European Commission openly concedes that “most [EU states] have mandatory retirement ages for particular sectors or professions.”⁴⁰ The EU Court of Justice, the Italian Supreme Court, the UK Supreme Court and Germany’s Federal Labor Court all expressly allow mandatory retirement under many circumstances.⁴¹ In Ireland, under a 2016 statute, “it shall not constitute discrimination” for an employer to “fix different ages for [mandatory] retirement (whether voluntary or compulsory)” as long as “objectively and reasonably justified.”⁴²
 - **Israel.** Israel has a law that purports to ban age discrimination.⁴³ And in Israel, mandatory retirement is falling under increased scrutiny and seems increasingly hard to justify logically. But Israeli case law continues to empower bosses to dismiss staff for celebrating a birthday at age 67 or above.⁴⁴
 - **Japan.** Mandatory retirement is extremely common in Japan. Japan’s Act Concerning Stabilization of Employment of Older Persons lets employers set mandatory retirement age as low as 60. Employers are supposed to bargain with worker representatives over in-house “Employment after Retirement Systems” setting up procedures for retirement-age staff to request (but not necessarily to get) exemptions to keep working.
- **Targeting old workers for lay-offs.** Italy, Germany, Spain, Turkey and many other countries actually let employers use the fact that an older worker has vested in social security (“state pension”) to justify a dismissal, layoff or “collective redundancy.” That is, the law lets employers explicitly target older workers for dismissal under so-called “social selection criteria.”⁴⁵
- **Age caps in recruiting.** In addition to mandatory retirement, another pervasive and sometimes perfectly legal ageist practice overseas is imposing age caps in recruiting. Employers abroad actually pay websites to post openly ageist job ads along the lines of “Wanted: Brand Manager age 30-35” or “Seeking trainees up to age 28.” According to one human resources manager, “it is perfectly legal, and not uncommon, [in Dubai] for a company to post a position

40 Declan O’Dempsey & Anna Beale, EUROPEAN COMMISSION, AGE AND EMPLOYMENT, at pg. 5 (2011).

41 See *Rosenblatt v. Oellerking*, Eur. Ct. Justice case C-45/09 (12 Oct. 2010); *Georgiev v. Tehnicheski*, Eur. Ct. Justice case C-250/09 (18 Nov. 2010); *Poste Italiane SpA*, Itl. Sup. Ct. decision #10985 (9 May 2013); *Seldon v. Clarkson Write & Jakes*, [2012] UK Sup. Ct. 16 (25 April 2012); German Fed. Labor Court ruling of 5 Mar. 2013.

42 Ire. Equality Miscellaneous Provisions Act 2015, §11.

43 Israel Retirement Law, 5764-2004, SH No. 2192 p. 46.

44 See e.g. *Gavish v Knesset*, HCJ 9134 (Apr. 2016); *Weinberger v. Bar-Ilan Univ.*, Israel Labor Appeal case 209-10 (6 Dec. 2012); *Zozal v. Prison Authority*, HCJ 1268/09 (Aug. 2012).

45 E.g. Germany, Termination Protection Statute, section 1(1)-23(1); Spain Const. Court dec. STC 66/2015 (Apr. 2015); Turkey Labor Law, No. 1475.

which is open to ‘male, Arabic speaker only’ or ‘Indian, female, age 28-35.’”⁴⁶ In Europe, recruiting age caps are technically illegal, but even the European Commission concedes that “minimum and maximum age requirements [in jobs] are...extensively used across virtually all reporting States.”⁴⁷ According to one expert, in “Italy, between 60 and 70% of public recruitment ads for jobs contain an upper limit of 35-40 years. This is true also of recruitment ads for public administration, including Italian Parliament—despite the fact that it is against the law.”⁴⁸

That said, this practice might be in decline. In some countries openly ageist help-wanted ads are less common than they used to be. A 2014 case from Mexico’s Supreme Court of Justice struck down age caps in recruiting.⁴⁹ Denmark’s Board of Equal Treatment strikes down these ads.⁵⁰

Culturally, in the U.S., mandatory retirement, targeting old workers for lay-offs and age caps in recruiting are blatantly ageist and therefore inappropriate.⁵¹ But when thinking about these practices internationally, remember the *cultural* component. Overseas we encounter very different social concerns for alleviating chronic youth unemployment and crediting generous “social safety nets” under public retirement systems:

- **Chronic youth unemployment overseas:** In Europe and elsewhere, alleviating chronic youth unemployment is so vital a social policy that opening up jobs by forcing retirements does not seem too harsh as long as society (social security or “state pensions”) offers a viable safety net. According to a report not too long ago, Europe suffers from “historically high unemployment rates—in excess of 50 percent among youths—[which] in countries like Greece, Italy and Spain [are] discouraging young people from having children.”⁵²
- **Generous “social safety nets” under public retirement systems overseas:** In many countries outside the United States, the social security replacement rate of final average pay is high enough that workers eagerly anticipate the day their benefits will vest so they can finally stop working. Even the European Court of Justice recognizes a worker’s vesting in social security benefits as a legitimate ground that might justify firing old people.⁵³

Another justification for mandatory retirement commonly heard abroad is that it serves as a sort of pressure-release valve on tough overseas rules against no-cause firings—it offers employers a way legally to dismiss long-time underperformers with “dignity.”

By American standards, these apologies for mandatory retirement and other widespread age discrimination overseas look weak. In particular, to justify mandatory retirement on the ground that firing old people helps alleviate chronic youth unemployment seems bizarre—defending discrimination because discrimination discriminates, just like the old sexist argument for rejecting a woman for a job that could go to a man heading a household. That said, Americans should remember that as recently as the late 1980s, the U.S. ADEA had a (now-repealed) cap permitting mandatory retirement.

B. The Challenge: Enforcing a Cross-Border Age Discrimination Provision

Complying with the age discrimination laws of any one given jurisdiction may be fairly straightforward for local management in that jurisdiction, but multinationals face a complex *cross-border* age-discrimination compliance challenge in crafting and enforcing a single workable international age discrimination provision like a multinational discrimination policy, code of conduct

46 SHRM Global Web Board posting of Feb. 6, 2015.

47 O’Dempsey & Beale, *supra* note 40, at 6.

48 Louise Richardson, Vice President of AGE Platform Europe, presentation at UNOEWG (22 Aug. 2012) *available at* www.docstore.com.

49 *Mexico case reported in* N. Gonzalez Elizondo, “Employment Discrimination on the Basis of Disability and Age,” International Law Office Newsletter, Mar. 11, 2015.

50 See two Denmark BET rulings of 11 April 2012.

51 See e.g., Michael Winerip, “Set Back by Recession, and Shut Out of Rebound,” N.Y. Times, Aug. 27, 2013; Alina Tugend, “Unemployed and Older, and Facing a Jobless Future,” N.Y. Times, July 27, 2013.

52 Suzanne Daley & Nicholas Kulish, “Germany Fights Population Drop,” N.Y. Times, Aug. 14, 2013.

53 See *Rosenblatt v. Oellerking*, Eur. Ct. Justice case C-45/09 (12 Oct. 2010); *Georgiev v. Tehnicheski*, Eur. Ct. Justice case C-250/09 (18 Nov. 2010).

clause, compliance standard or training module that mentions the word “age.” Enforcing the “age” component of a global discrimination policy is tough for the reasons already discussed (different age discrimination laws abroad and different cultural perspectives on age discrimination abroad) and particularly because multinationals’ own overseas affiliates might perpetuate mandatory retirement, age caps in recruiting and other ageist practices.

Multinationals that promulgate global policies against discrimination on grounds including “age” should not assume they are already in substantial compliance. Countless multinationals have a disconnect between idealistic headquarters-drafted anti-ageism pronouncements and entrenched ageist practices persisting in pockets of their far-flung overseas operations. A little secret in global human resources administration is that even the overseas operations of many multinationals still impose mandatory retirement and still cap job eligibility at specified ages, where this is a legal and common practice. Some overseas affiliates actually still post age-capped help-wanted ads. In the mid-2000s, a German employment lawyer estimated that more than 90% of American employers in Germany write mandatory retirement clauses into their local German employment contracts (although surely this practice is at last declining). Beyond Europe, many multinationals continue to impose mandatory retirement across their operations in Africa, Asia, India, Latin America and the Middle East. Three examples are China, India and Japan, countries where mandatory retirement remains a strong default presumption.

Indeed, multi-jurisdictional polices banning age discrimination raise risks even in jurisdictions without age discrimination laws. Overseas, internal policies tend to be enforceable as part of an employee’s employment contract (outside employment-at-will, a so-called “employment-at-will disclaimer” written into a personnel policy is essentially unenforceable). A multinational with an international policy against age discrimination could get sued for breaching its own in-house rule. In one case some years ago a group of Chinese forced-retirees sued in a Chinese labor court alleging that while their separations conformed to Chinese *statutory* law, their employer had forcibly retired them in breach the “age” clause in its own internal global discrimination policy.

Ageist practices abroad could also implicate the entirely separate danger of complicating a *U.S. domestic age discrimination lawsuit*. What if a U.S. ADEA discrimination plaintiff trying to prove systemic age bias (such as in a U.S. class action) tried to convince an American judge to order discovery, or to admit evidence, about the multinational defendant’s overseas mandatory retirements or age-capped recruiting—on the theory that if the defendant violates its own global discrimination policy by forcibly retiring its own overseas staff or by disqualifying overseas applicants from jobs because of their ages, it more likely harbors ageist animus?

C. The Solution: Bringing a Global Age Discrimination Policy into Compliance

A multinational that has promulgated a global anti-discrimination policy listing “age” as a protected category can comply with its own internal rule by taking four proactive steps:

- **Step 1: Audit ageist practices abroad.** Human resources professionals and employment lawyers at a multinational’s headquarters may have little idea that, or to what extent, their own organization discriminates on age abroad. Do an internal audit to flush out whether overseas affiliates impose ageist practices like mandatory retirement, targeting old workers for lay-offs and age-capped recruiting. Expect the audit to reveal some unwelcome information. Some progressive multinationals have made headway stamping out age discrimination internationally, but entrenched ageist practices remain pervasive in workplaces around the world.
- **Step 2: Align the global prohibition with actual practices.** Where the internal audit uncovers overseas ageist practices violating the organization’s global discrimination policy or training (even if the practices do not violate local foreign law), select one of five possible alignment (gap-closing) strategies to get into compliance:
 - a. Stop ageist practices abroad.** Stamp out mandatory retirement, targeting old workers for lay-offs, age-capped recruiting and other non-compliant practices worldwide by better

policing overseas affiliates.

- b. Carve out ageist practices that are legal abroad.** Write an express exception into global discrimination policies and training modules that excludes ageist-but-locally-legal practices like mandatory retirement and targeting old workers for lay-offs—recognizing that this exception all but swallows up the global anti-age-discrimination rule.
 - c. Remove “age” protection from global policies.** Delete from a global discrimination policy’s list of protected traits all express reference to “age.” Align discrimination training modules accordingly.
 - d. Stop listing all protected categories in discrimination policies.** Delete the entire listing of protected categories from all policies and training on discrimination—thereby also deleting references to “age.” Replace the protected-categories listing with a commitment to prohibiting discrimination illegal under applicable law. (“*We provide equal employment opportunities among all groups, of whatever classification, protected by applicable law. We prohibit all illegal discrimination on any grounds whatsoever that are prohibited by applicable law.*”)
 - e. Separate policies/riders per jurisdiction.** Replace the global discrimination policy with tailored local-country policies or riders which, where appropriate and legal, omit reference to “age” discrimination.
- **Step 3: Police supply chain.** Many multinationals have contractually bound their overseas suppliers and outsource service providers to supply chain codes of conduct separate from their internal codes of ethics and internal discrimination policies. Check whether the anti-discrimination clause in any *supply chain conduct code* expressly prohibits “age” discrimination. Many supplier codes do. Audit whether outsource partners actually comply. Likely they do not. (That is, a supply chain audit likely will uncover overseas suppliers imposing mandatory retirement and age-capped recruiting.) Either police and discipline suppliers violating the “age” clause of the supply chain labor code or else edit the code to eliminate the reference to “age.” Also, be sure the supply chain code’s treatment of age discrimination is no stricter than the organization’s internal global discrimination policy.
 - **Step 4: Ensure practices abroad comply with local age discrimination laws.** After buttoning down compliance with internal discrimination policies, get into compliance with overseas age discrimination laws. Again, most overseas age laws prohibit discrimination against the young, prohibit employers from favoring the old over the young, and impose no minimum protected age. Again, unexpected consequences result—“every-age-protected” regimes can prohibit employers from granting older staff seniority-enhanced benefits like service-enhanced pension benefits, severance pay and vacation benefits, and age-plus-service-based early retirement offers. Audit overseas practices to comply with surprisingly-broad foreign age discrimination laws.

Part Three: Fighting Workplace Disability Discrimination on a Global Scale

Like age, another protected category, group, trait, class or status that raises special challenges for any cross-border discrimination initiative is *disability*. A global anti-discrimination policy that specifically lists the category of “disability” requires a strategy addressing four complications unique to this particular protected category: definition of “disability”; prohibitions against dismissal/protections against layoffs; reasonable accommodation; and quotas.

1. Definition of “disability”: Who belongs to most protected categories is usually easy to determine—consider, for example, gender, race, national origin, religion, age, sexual orientation and veteran status. But who is and is not “disabled” constantly gets disputed. Different countries define disability in different ways, and some countries even impose different definitions of disability for different purposes. For example, a morbidly obese alcoholic may qualify as disabled for

discrimination law purposes in a country but not for quota or social security purposes. Even someone with an extreme disability, a blind paraplegic, for example, may not necessarily meet the definition of “disabled” under all countries’ laws in all cases—in Italy, for example, even a blind paraplegic is not legally disabled if he has not gotten a government disability certificate. At the definitional margins are the usual debated conditions—morbid obesity, alcoholism, mental illness, drug addiction, diabetes, asymptomatic HIV infection, a broken leg and the rest.⁵⁴ What about someone legally blind who sees perfectly when he puts on glasses? What about someone with mild skin cancer? Someone missing four fingers? Most jurisdictions’ definitions of “disability” turn on two key concepts, *degree* and *length* of impairment. A minimal impairment like a missing toe and a short-term impairment like a case of the flu are not properly disabilities—although under many countries’ broad definitions, even these conditions might be argued to qualify.

How does a multinational drafting a global discrimination initiative like an international discrimination policy, global code of conduct, compliance standard or cross-border HR training module account for the differing local definitions of disability across jurisdictions? Actually, multinationals can often sidestep the disability-definition issue. Because the definition of disability differs both across and within jurisdictions, a multinational’s global pronouncements about disability discrimination have to remain flexible enough to align with local variations as to what qualifies as a disability. A common practice is for the global initiative to use the word “disability” without defining it, leaving the definition to local law.

2. Prohibitions against dismissal/protections against layoffs: While many multinational discrimination policies and many countries’ laws prohibit *discriminating* against the disabled, some countries’ laws go further and flatly prohibit *dismissing* disabled staff for most any reason—even if the dismissal has nothing to do with discriminatory animus. In some places, law prohibits an employer from laying off a disabled worker even where there is a demonstrable lack of work. Employers do not always have the power to fire even a disabled worker who flagrantly violated a work rule that would justify a for-cause dismissal of an able-bodied staffer.

These disability-dismissal-protection laws usually offer some narrow exceptions and sometimes feature various quirks or loopholes. In Austria, for example, disabled workers do not qualify for dismissal protection until they have worked for their employer for a full four years.

A separate disability-in-employment protection beyond mere discrimination prohibitions is “social selection criteria credit.” In Italy and other countries, law requires an employer doing a layoff to protect disabled workers over similarly-situated able-bodied staff.

This point relevant to a global discrimination initiative is that usually the employer’s cross-border policy and training address “disability” merely to the extent of committing not to discriminate on that ground. That statement is fine; the policy and training need not say any more. But the employer should be aware that, under law in many jurisdictions, disability protections may go well beyond merely prohibiting discrimination on the ground of disability. Comply with these extra protections.

3. Reasonable accommodation: The premise behind most discrimination laws is that being in a protected class is not a legitimate job-related criterion and so employers should not discriminate on that ground. But disability is different. In its extreme, discrimination on disability inarguably becomes *necessary*. Someone with a 100% disability (brain-dead in a coma, for example) is ineligible to work precisely *because of* the disability. This unique aspect of disability status means that disability discrimination laws and rules have to leave employers free to refuse to hire, and to fire, staff precisely because of certain disabilities. Accordingly, laws around the world that purport to ban workplace disability discrimination actually reach only disabilities moderate enough that the disabled can still perform their jobs.

This dynamic inevitably leads to the concept of *reasonable accommodation*: Where a particular disability might render someone unemployable for a given position as currently structured, but where offering certain reasonable workplace adjustments would enable that person to perform, then

⁵⁴ See *Fag og Arbejde v. Kommunernes Landsforening*, EU Court of Justice Case C-354/13 at ¶135 (Dec. 2014) (obesity is sometimes but not always a disability under EU law).

the employer must make adjustments not prohibitively expensive or burdensome. The reasonable accommodation concept has evolved significantly in the United States under the Americans with Disabilities Act⁵⁵ as well as in other countries with mature disability discrimination laws (the concept is called “adjustments” or “adaptations” in England).⁵⁶ In some countries, the state steps in and helps pay for the accommodation. Of course, reasonable accommodation inherently comes down to local law—an accommodation that one jurisdiction deems reasonable and therefore mandatory might be unreasonably burdensome, and so not mandatory, somewhere else.

This point relevant to a global discrimination initiative is that although the employer’s cross-border policy may address “disability” without mentioning reasonable accommodations, complying with the policy, and designing any cross-border training, might implicate reasonable accommodations.

4. Quotas: Disability is the only protected status on which many countries impose actual employment quotas in the private sector. (An increasing number of jurisdictions impose gender quotas on board of director seats, not employment.) Austria, Brazil, Italy, Germany, Spain and quite a few other jurisdictions force non-government employers to hire a fixed percentage of disabled staff, while other countries like India and Uruguay impose disability quotas in *government* employment only. These are hard quotas, not aspirational disability-hiring guidelines like the 7% disabled workforce goal urged on U.S. federal government contractors.⁵⁷

These disability quota percentages vary by country, usually falling in the 2% to 5% range. Often these laws impose quotas only on employers over a certain size—25 employees in Austria, for example, and 100 in Brazil.

Like all quotas, disability quotas affirmatively require discrimination—in this case, they force employers to discriminate against the able-bodied. Because the able-bodied are not a protected class, an able-bodied applicant or worker passed over when an employer needs to meet a disability quota tends not to have any viable discrimination claim. The able-bodied person might be a clear victim of discrimination, but not *illegal* discrimination.

Finding qualified disabled staff can be hard, and so disability quotas tend to be tough to meet. Where a country imposes a disability quota, the issue immediately becomes the sanction or penalty for a violation. Many countries fine employers that fail to meet disability quotas. German law essentially offers employers the choice of meeting the quota or paying the fine. Where fines are low, as they are in Germany, the quota becomes like a tax; in Germany about 80% of employers are said to opt to pay the fine and ignore the quota. German bosses justify non-compliance by reasoning that fines collected fund social programs for the disabled. In other countries, though, the quota-versus-fine dynamic is murkier. Brazil and Italy, for example, let employers that fall short of the quotas challenge the fines by proving there are too few qualified disabled candidates, or by making procedural arguments. Drawn-out administrative proceedings are common. That said, even in these countries employers often choose just to pay the fine and move on.

A central issue in disability-quota disputes comes down to the question of the definition of disability for quota purposes. Countries’ laws tend to lower the definitional bar for disability *discrimination* claimants but then to raise the bar back up for *quota compliance*. Can an employer point to everyone on staff with morbid obesity, alcoholism, mental illness, diabetes and missing fingers, and count them toward the quota? Usually no. Some jurisdictions that impose disability quotas require a government disability certificate (Italy, for example). Germany requires a doctor’s finding of 50% disabled for the quota—but has no minimum disability threshold for discrimination claims.

Complying with disability quotas is mostly a local law issue, but these quotas do raise problems for anyone drafting an international discrimination policy, global code of conduct, compliance standard or training module. Be sure to account for how the organization addresses disability quotas in those countries that impose quotas. For example, consider avoiding unqualified global

55 Pub. L. No. 101-336, 104 Stat. 328 (1990).

56 Cf. *Nano Nagle School v Daly* [2015] Ireland IEHC 785) (scope of reasonable accommodation in Ireland).

57 41 CFR parts 60-741.

pronouncements of offering “equal employment opportunities” if the organization in some countries openly, if legally, discriminates against the able-bodied to meet quotas. And if in countries like Germany the organization pays fines instead of meeting disability quotas, avoid saying in a global policy that the organization is committed to total compliance with equal employment opportunity laws. (Paying a fine imposed as a punishment for non-compliance is not a form of compliance.)

If as part of a global compliance audit headquarters looks into the organization’s compliance with disability discrimination quota compliance, ask four questions:

- **Where?** Which of the countries where we employ staff impose hiring quotas? Of those, what is the minimum employee population that triggers the quota requirement?
- **What?** What is the quota—what percentage of workers must be disabled? How does an employer count *part-time* disabled staff?
- **How to comply?** What is the definition of “disability” for quota purposes? What documentation does the country require to establish compliance (proving it employs enough disabled staff to meet the quota)? And how can an employer request, collect and process this documentation consistent with data protection laws that categorize “health” as “sensitive data”? How can the employer ask not-yet-hired job applicants if they are disabled, so as to meet the quota, without violating discrimination and data protection laws?
- **Is a buy-out available?** Does the country’s law offer a buy-out or a fine for an employer that does not meet the quota? If so, how much is it, how is it paid—and are there any other penalties for failing to meet the quota?

Part Four: Fighting Workplace Pay Discrimination on a Global Scale

Like age and disability, a third protected category, group, trait, class or status that raises special challenges for any cross-border discrimination initiative is *pay* discrimination. A consultant at Norfolk Mobility Benefits, David Bryan, once said that as “[t]oday’s multinational employer [evolves] into the transnational of tomorrow...[t]here appears to be more centralization of core corporate functions” such as “benefits professionals implementing global benefits strategies.”⁵⁸ Indeed, at many multinationals the push to globalize the human resources function begins with aligning certain aspects of compensation and benefits across borders—like implementing global executive rewards initiatives, regional commission plans and sales incentive programs, broad-based global incentives/bonuses, and global stock option/equity awards. In addition, occasionally a one-time event like a merger or restructuring spawns special global offerings like retention bonus plans and severance pay plans. And multinationals that conduct global employment law compliance audits sometimes export American tools like statistical adverse impact analysis to verify their compensation systems do not discriminate.

Multinationals launching cross-border rewards programs and compliance audits need to comply with targeted pay-related discrimination laws in each affected country. This can be tricky for U.S.-headquartered multinationals that do not understand foreign concepts of pay discrimination. Because the United States imposes such sophisticated employment discrimination laws, U.S. multinationals may assume that they enjoy a big head start in complying with discrimination mandates worldwide. But in this specific context, pay/benefits discrimination, this assumption is wrong. Foreign laws on pay and rewards discrimination can be surprisingly different from—and significantly broader than—analogue American concepts. Overseas, watch for unexpected doctrines like comparable worth, local citizenship discrimination, job category or colleague discrimination (called “equal treatment” abroad), and even job category comparable worth discrimination. We examine here the range of issues that a cross-border rewards offering or compliance audit might trigger as to pay discrimination compliance abroad. At the broadest level, our analysis splits into two categories, protected group pay discrimination and job category pay discrimination.

58 D. Bryan, “Creating a Global Benefits Strategy,” INT’L HR FORUM (Nov. 25, 2009).

A. Protected Group Pay Discrimination

As discussed, most every jurisdiction imposes general employment discrimination laws that prohibit employers from discriminating based on specified categories, groups, traits, classes or statuses.⁵⁹ These laws tend to reach hiring, firing and terms of employment. One vital term of employment is *compensation and benefits*. Therefore, to compensate employees who fall into protected categories less (or to give them lower benefits) can be actionable discrimination. We might call this conceptually simple concept “protected group pay discrimination.”

While protected group pay discrimination is conceptually simple, in the international context it raises seven issues: Adverse treatment; disparate impact and statistical “regression” analyses; local protected groups; gender; “comparable worth”; local citizenship; and geographic equal pay.

1. **Adverse treatment.** Because rewards like pay, benefits, bonuses, commissions and equity grants are vital terms of employment, any employer that discriminatorily rewards its employees by favoring members of certain protected groups at the expense of others almost always runs afoul of protected group employment discrimination laws. This is the adverse treatment analysis (called in Europe “direct discrimination”). Pay and benefits should not directly discriminate on protected group status.

2. **Disparate impact and statistical “regression” analyses.** Many countries’ general employment discrimination laws not only prohibit straightforward adverse treatment discrimination, but they also reach “disparate impact” discrimination (called in Europe “indirect discrimination”). This means that even facially neutral compensation systems may illegally discriminate if they disadvantage employees in a protected group. For Americans this analysis is straightforward, because disparate impact law in the United States is as evolved as it is anywhere. Disparate impact law tends to be more developed in common law jurisdictions like Australia, Canada, New Zealand, South Africa and the UK, but, by U.S. standards, disparate impact analysis is not well developed beyond the common-law world.

Therefore, some of the subtler disparate impact scenarios that are actionable stateside are far less likely to draw notice overseas—for example, the American government position that discriminating against convicted criminals has an illegal disparate impact against “African American and Hispanic men.”⁶⁰

Outside of common law countries, employers rarely launch American-style statistical adverse impact “regression” analyses to verify that employees’ pay and rewards comply with gender discrimination laws. These statistical analyses are virtually unknown in China, Japan, Germany, the Czech Republic, Hungary and for that matter most other civil law countries. That said, statistical-adverse-impact-on-pay analyses do get run, on occasion, in Australia, Canada and the UK (in the UK these are called “Job Evaluation Schemes”). But overseas, those statistical pay analyses that do get run are more common in the public sector, because in some jurisdictions equal pay claims arise mostly in the public sector. In some provinces in Canada, though, statistical adverse impact analyses of pay/rewards are increasingly common among nongovernment employers.

3. **Local protected groups.** In auditing compliance with local rules on both adverse treatment (“direct”) and disparate impact (“indirect”) discrimination, check that rewards systems fairly compensate members of each locally protected category. As discussed, each jurisdiction imposes its own list of protected categories; while there are some near-universal protected categories (gender, race, religion, disability and increasingly age and sexual orientation), individual jurisdictions protect quirky groups not normally protected elsewhere. We mentioned that in Europe alone, examples of quirky protected groups include “disability of a relative” (Austria), “wealth and social class” (Bulgaria); “last name” and “mores” (France); “Traveller” community status (Ireland and Northern Ireland); and “intention to have a child” (Lithuania).

59 See e.g. Brazil constitution art.7 items XXX-XXXI; EU Equal Treatment Directives 76/207/EC and 200/78/EC; South Africa Employment Equity Act 55/1998; Spain labor code arts. 4.2 (c), 17.1; U.S. Title VII/ADEA/ADA.

60 EQUAL EMP’T OPPORTUNITY COMM’N NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS (2012).

Complying with protected group pay discrimination rules means ensuring no discriminatory compensation disparities among members of any protected groups, even local, quirky protected groups. In Argentina, for example, to pay ugly employees less than beautiful ones could be argued to be illegal protected group pay discrimination on the grounds of “looks.”⁶¹

4. **Gender.** Having said that discrimination against any protected category in compensation and benefits is illegal, in the specific context of pay and benefits discrimination the most vital protected category is inevitably *gender*. Employees and government enforcers are particularly likely to look for gender discrimination when analyzing the “equal pay” compliance of employer rewards systems. Many jurisdictions including the EU, Bangladesh, Cyprus, Ontario, Quebec, France, Spain, UK and the U.S. impose targeted gender discrimination laws specific to the pay/benefits/equity context.⁶²

Plus, some countries impose gender-specific general employment discrimination laws like Korea’s Gender Equality Employment Act and Japan’s Act on Securing Equal Employment Opportunity and Treatment of Men and Women in Employment (as amended in 2014), laws that reach—but are not specific to—compensation.

5. **“Comparable worth.”** Some targeted gender pay discrimination laws impose what in the United States is called “comparable worth” analysis—and in Cyprus, the UK and elsewhere is called “work of equal value.” Comparable worth/equal value laws require equalizing or “validating” pay *across different job categories* traditionally worked by one gender or the other. For example, an employer’s secretaries might argue they contribute as much comparable worth/equal value as the company’s truck drivers—and therefore deserve the same pay rate, even if the employer has completely different pay scales for its mostly female secretaries and its mostly male truck drivers. Decades ago, U.S. workers’ rights advocates and law professors championed comparable worth as a possible extension of U.S. equal pay law. But the U.S. Supreme Court rejected the comparable worth idea; in the United States, “[t]he ‘comparable worth’ theory, pursuant to which plaintiffs have asserted that courts should infer an intent to discriminate based on the employer’s practice of setting dissimilar salaries for jobs deemed to be of comparable worth, in reliance on market rates, has consistently been rejected since the Supreme Court’s 1981 decision in *County of Washington v. Gunther* [452 U.S. 161].”⁶³ Indeed, it might be argued that comparable worth is un-American in its core assumption that experts can somehow “validate” pay rates across distinct job categories: Perhaps the comparable worth concept is inconsistent with the basic Chicago-school free market capitalist principle that the wage differential between any two jobs is our free market economy’s inherent reflection of those two jobs’ relative contributions to society. To a free marketeer, market wage rates, by definition, already fully reflect the “worth” or value of a given job. Airplane pilots earn more than cab drivers because society values pilots more—which also explains why pilots earn more than, say, flight attendants. Do Americans really want to open the comparable worth Pandora’s box and unleash industrial workplace experts pontificating on relative values of dissimilar jobs without regard to those jobs’ actual market pay rates?

But this is a parochial American view (or at least a capitalist, free market or libertarian view). Comparable worth mandates thrive in certain jurisdictions outside the United States, imposing real burdens on employers’ compensation systems, particularly but not exclusively in the public sector. In February 2012, for example, Fair Work Australia (an adjudicatory body) issued a sweeping comparable worth decision under Australia’s Fair Work Act 2009 that boosted pay for a class of more than 200,000 women in Australia’s “Social and Community Services Sector.”⁶⁴ Fair Work Australia held: “[F]or employees in the SACS industry, there is not equal remuneration for men and women workers for work of equal or comparable value with comparison with workers in state and local government employment.” Similarly, Ontario’s Pay Equity Act requires employers affirmatively to run comparable worth/equal value analyses—and Ontario’s increasingly proactive Pay Equity

61 Arg. Law 23,592.

62 E.g. EU treaty article 141 and EU equal pay directive 75/117; Bangladesh Labour Code of 2006 § 345; Cyprus Act # 38(1) of 2009 Amending the Act Providing for Equal Pay for Men and Women for Equal Work or Work of Equal Value; Ontario and Quebec Pay Equity Acts; France Act of Mar. 23, 2006 on Equal Pay Between Men and Women; Spain Law for the Effective Equality Between Men and Women of 2007; UK Equal Pay Act of 1970; U.S. Equal Pay Act of 1963.

63 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 1281 (4th ed. 2007 & Supp. 2007).

64 Fair Work Australia, [2012] FWAFB 1000.

Commission launches unannounced enforcement audits at *nongovernment* employers.⁶⁵ The Quebec Pay Equity Act is just as strict; Quebec's pay equity law is designed "to redress systemic wage discrimination, which was seen to be the result of long-standing stereotypes and social prejudices, the undervaluation of women's jobs and the professional segregation of women in [Quebec] society."⁶⁶

Where a multinational's operations include comparable worth jurisdictions, be sure to comply with comparable worth mandates, however strict.

6. Local citizenship. Moving beyond gender and other groups protected under general employment discrimination laws, one group subject to special scrutiny under some countries' compensation-specific discrimination laws is *local citizenship*. Some developing countries prohibit employers from compensating aliens more generously than locals, pushing back against those multinationals that "parachute in" expatriates and reward them better than locals who work every bit as hard. For example, Bahrain labor law article 44 mandates that "wages and remuneration" of "foreign workers" not exceed pay for local "citizens" with "equal skills" and "qualifications" unless necessary for "recruitment."⁶⁷ Brazil labor code article 358 requires that "salary" of a local citizen not be "smaller" than pay of a "foreign employee perform[ing] an analogous function."⁶⁸ Comply with foreign laws like these when structuring expatriate packages.

7. Geographic equal pay. Beyond local citizenship, another group that might be protected under pay-specific discrimination laws is *geography*. Under an equal pay law doctrine in the Czech Republic, employers operating across the country must pay their employees working similar jobs equal pay rates regardless of job location (irrespective of protected group status). The Czech geographic pay equity rule causes headaches for employers operating across the Republic because (not surprisingly) cost-of-living and market pay rates in the Prague area significantly outstrip pay rates in the Czech countryside. Czech unions push employers to live up to "geographic equal pay" and Czech employers actually do run internal analyses to ensure compliance.

B. Job Category Pay Discrimination

So far we have discussed pay discrimination laws that are conceptually similar to U.S. employment discrimination principles in that they get triggered only if an employer disadvantages a discriminatee based on protected-group status. Moving now beyond protected-group discrimination laws, many countries outside the United States actually impose job category or colleague pay equality laws—in France, called either "wage discrimination" or "equal work equal pay" laws, and in Poland and elsewhere called "equal pay for equal work" or the "equal treatment" doctrine. Under this rule, every employee enjoys a legal right to be rewarded the same as similarly situated colleagues in equivalent jobs, *even if both discriminatee and comparator belong to all the same protected groups*.⁶⁹

In a sense, perhaps, job category or colleague pay equality doctrines transcend discrimination law, because they are not grounded in the fundamental discrimination law concept of protected group status. Or another way to look at these doctrines is to say they elevate job category to a protected class of its own.

As applied to a single job, job category or colleague, pay equality is broad but conceptually simple: Two colleagues working the same position enjoy a legal right to equal pay and benefits (and severance pay) packages even if both are identical twins (or even if, say, both are white 45-year-old Christian men originally from Sweden or both are black Muslim 26-year-old women originally from Yemen). To pay different wages or benefits to two similarly situated colleagues working similar jobs is illegal, regardless of protected group status. The lower-paid colleague has a legal right to "equal treatment" or "equal pay for equal work."

65 Pay Equity Act, R.S.O. 1990, c. P.7 (2009).

66 Pay Equity Act, R.S.Q. c. E-12.001 (2009); L. Granosik, "Shouldn't a Secretary Earn the Same Salary as a Truck Driver? What is the Value of a Job?," 15 DISCRIMINATION LAW NEWSLETTER, no. 1 (Int'l Bar Ass'n), July 2012).

67 LABOUR LAW art. 44 (BH).

68 Art. 358 of law No. 5,452, de 1 May 1943, CONSOLIDACAO DAS LEIS DO TRABALHO [C.L.T.] (Braz.).

69 *E.g.*, Polish Supreme Court dec. no. iii PK 136/13 (Sept. 2014); French Supreme Court Social Chamber dec. no. 13-25.821 (May 6, 2015).

Going further, a rarified version of job category or colleague pay equality address irregular—particularly part-time and contractor—status.⁷⁰ Under the so-called “equal treatment” and “agency workers” directives, every European Union member state expressly prohibits pay discrimination on the basis of part-time status and outsourced-labor status. This means that European employers cannot legally pay their temps and outsourced workers lower wages or stingier medical insurance or retirement benefits. This same principle can even force European employers to credit part-time service as full-time for calculating years-of-service requirements.⁷¹

From a U.S. perspective, this job category or colleague pay equality concept is a “game changer”: American employers almost universally deny American part-timers and outsourced labor the full package of benefits available to regular full-timers. And American employers often pay part-timers and outsourced labor lower hourly wages than regular full-timers. In some sectors in the U.S., irregular employees can work in a distinct lower-compensated class or tier (for example, adjunct faculty at universities and contract lawyers at law firms). In Europe, this practice could constitute illegal pay discrimination under job category or colleague pay equality doctrines. Beyond Europe and some provinces in Canada, two countries that impose job category or colleague pay equality rules of one type or another include Brazil and China:

- **Brazil:** Brazil labor code article 461 mandates equal pay among employees who perform “identical” work of the “same value.” The text of article 461 purports to link this mandate to protected group status—“sex, nationality or age”—but Brazilian courts completely decouple the equal pay mandate from protected group status and interpret article 461 as an equal treatment job category discrimination law.⁷² A 2007 case explains that “what is relevant for the purpose of [Brazilian] equal pay [analysis] is whether the identical tasks were performed by the claimant and comparable colleagues with the same quality and productivity”—*regardless of sex, nationality or age*.⁷³
- **China:** China’s Employment Contract Law (articles 11 and 18) mandates that “the principle of equal pay for equal work shall be observed” (absent a union agreement to the contrary), without linking “equal pay” to gender or other protected group status.⁷⁴ Implementing regulations are silent on equal pay and Chinese law on this point remains underdeveloped. But by its plain wording, Chinese law appears to impose a job category or colleague pay equality mandate.

These job category or colleague pay equality laws get even trickier where they enter the rarified realm of *comparable worth/equal value*—equating different jobs that purportedly contribute equal value to an organization without linking the analysis to comparators’ protected-group status. For example, France’s job category or colleague pay equality laws allow for comparable worth/equal value theories subject to employer defenses based on different lengths of service or different performance and responsibilities, and subject to affirmative action/“positive discrimination” for nationality.⁷⁵ In one landmark French case a lawyer won a daily lunch subsidy that the employer law firm had granted only to non-lawyer staff, on the theory that the law firm could not legally favor employees in a lower professional category.⁷⁶

In a June 2009 decision under the Finnish Employment Contracts Act 2001, Finland’s Supreme Court mandated equalizing employee benefits across two very different job categories.⁷⁷ In that case, a construction company had enrolled its clerical workers in a generous medical insurance plan that had excluded its construction workers, so the construction workers sued for the medical insurance under an equal treatment job category (not gender-linked) comparable worth/equal value

70 Directives 97/81/EC and 2008/104/EC.

71 Cf. *Lapouge v. Assoca. ADAPEI*, France Cour de Cassation, Chambre Sociale, May 7, 2008, # 07- 40.289.

72 Art. 461 de Lie No. 5,452, de 1 May de 1943, CONSOLIDACAO DAS LEIS DO TRABALHO [C.L.T.] (Braz.).

73 *Fisch v. Unibanco*, 2d App. Trib. #00530-2007-201-02-00-4.

74 Employment Contract Law promulgated by the Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008.

75 See *15 Employees v. Renault*, Cour de Cassation, Chambre Sociale, October 29, 1996, # 92- 42.291.

76 *Meier v. Alain Bensoussan*, Cour de Cassation, Chambre Sociale, Feb. 20, 2008, # 05-45.601, affirmed in *Pain v. DHL*, Cour de Cassation, Chambre Sociale, July 1, 2009, # 07-42.675, expanded in *Cour d’appel de Montpellier*, Cour de Cassation, Chambre Sociale, Nov. 4, 2009, # 09/01816 (equalizing benefits between *cadre* [executive] and non-*cadre* employees).

77 Finland Sup. Ct. case # KKO:2009:52.

theory—and won. The employer argued, but failed to prove, that each clerical worker contributed greater value. The employer also argued that the clerical workers’ union had bargained for the medical insurance in collective bargaining—if the construction workers wanted the medical plan, their union should make concessions to get it. The court nevertheless ordered the employer to give the construction workers the insurance benefit because the clerical workers go it.

These comparable-worth-context job category or colleague pay equality cases, of course, require experts “validating” allegedly comparable jobs. Not all jobs claimed to be comparable are actually comparable. One French court ruled that a human resources job is not functionally comparable to—and therefore does not merit the same pay as—positions of “project manager” and “commercial manager.”⁷⁸

* * *

In complying with pay discrimination laws internationally, be prepared to wade into water deeper even than America’s otherwise-robust body of employment discrimination law. Any multinational offering cross-border rewards schemes should verify that its cross-border (and foreign local) pay, bonus, benefits, commission and equity programs comply with each affected jurisdiction’s prohibitions against both “protected group” and “job category” pay discrimination. Global human resources compliance audits that reach pay discrimination should factor in the various theories in play here, including “comparable worth” discrimination, local citizenship discrimination and job category or colleague pay equality laws. At the extreme, jurisdictions like France, Finland and Québec actually impose mandates requiring “job category comparable worth” validations, prohibiting pay discrimination across distinct job categories regardless of claimants’ and comparators’ protected group status.

Part Five: Fighting Workplace Harassment on a Global Scale

Having discussed a multinational’s international initiatives against *discrimination*, we now turn to cross-border efforts to eliminate workplace *harassment*. These topics are closely related from a U.S. point of view, because almost all U.S. employers proactively ban workplace harassment by tying their harassment rule closely to their prohibition against workplace *discrimination*. But the workplace harassment law landscape outside the U.S. differs substantially, and overseas the legal concepts of harassment and discrimination often diverge significantly. In fact, workplace harassment laws overseas can be far broader than U.S. harassment law. An increasing number of jurisdictions outside the U.S. impose laws against *abusive workplace behavior* that are unrelated to workplace discrimination law.

To be effective, a global anti-harassment rule, policy, compliance initiative or training module must factor in the significant differences among workplace-harassment-law regimes. Here, we first contrast workplace harassment law in the U.S. with workplace harassment law overseas. Then we set out seven issues to account for when designing a cross-border workplace harassment initiative.

A. Workplace Harassment Law in the United States Versus Workplace Harassment Law Abroad

Over the past several decades, American workplace harassment law has evolved into the most intricate body of harassment jurisprudence in the world. U.S. federal and state court harassment decisions construe concepts as esoteric as (for example) a “tangible employment action requirement for vicarious liability” in workplace harassment, an affirmative defense of “unreasonable failure to take advantage of preventive or corrective opportunities,” a “severe and pervasive requirement” for hostile environment harassment and claims of “implicit *quid pro quo* third-party harassment.”

These rarefied American harassment law doctrines evolved in court decisions even though the texts of American statutes tend not even to prohibit workplace harassment. U.S. federal prohibitions against workplace harassment are almost exclusively judge-made extensions of statutes that nominally prohibit only *discrimination*. Even the U.S. EEOC defines “harassment” as “a form of

⁷⁸ *Fornasier v. Sermo Montaigu*, Cour de Cassation, Chambre Sociale, June 26, 2008, # 06-46.204.

employment discrimination.”⁷⁹ Harassing behavior in the American workplace tends to be actionable only to the extent it is discriminatory; illegal workplace harassment in the U.S. is *status-based* harassment motivated by the victim’s membership in a protected category. Non-discriminatory or so-called “status-blind” harassment in the U.S.—sometimes referred to as bullying, pestering, abusive work environment or equal opportunity harassment—tends to be perfectly legal stateside. A Washington State Department of Labor & Industries publication issued in 2011 to combat abusive workplace behavior candidly concedes that “[b]ullying in general is NOT illegal in the U.S. unless it involves harassment based on ‘protected status.’”⁸⁰

- **Exception.** The exception under American law is that rare scenario where the harassment is so extreme it amounts to “intentional infliction of emotional distress” and the harasser’s conduct is attributable to the employer under the doctrine of *respondiat superior*.⁸¹

Around the world, awareness of the need to combat workplace harassment has grown significantly. A January 2013 article in the German press, for example, is called “Wake Up Germany, You’ve Got a Serious Sex Harassment Problem.”⁸² But the legal landscape for remedying the problem of workplace harassment differs greatly from country to country. Some examples:

- **Laws linking harassment to discrimination.** Some common-law countries impose tough anti-harassment rules broadly consistent with the U.S. model, also linking illegal harassment to protected group category or status as the U.S. does. In England, for example, “[b]ullying itself isn’t against the law, but [status-based] harassment is.”⁸³
- **Status-blind harassment laws.** Many countries impose a far broader concept of illegal workplace harassment, expressly prohibiting what we might call status-blind harassment unrelated to the victim’s membership in any protected group. This broad harassment concept is called either workplace “bullying” or it goes under local-law labels like “pestering,” “mobbing” “psycho-social harassment,” “moral harassment,” “psychological violence” and “violence at work.” According to one study, examples of jurisdictions that impose bullying statutes include Belgium, France, Quebec and Sweden, while Germany, Spain and the UK “protect [bullying] victims with other legal sources.”⁸⁴ More specifically:
 - **Argentina.** Argentine Law 1225 bans “mobbing” and defines workplace harassment without linking to protected group status: “acts and omissions by people... in the workplace who harass an employee... on a systematic, frequent basis.”
 - **Belgium.** A Belgian law of June 2002 prohibits workplace “pestering.”⁸⁵
 - **Brazil.** “Moral harassment” has become a common claim in Brazil, in all sorts of workplace disputes.⁸⁶ Even Brazilian employers that legally assign and pay overtime have faced “moral harassment” litigation from overworked employees arguing that extra hours amount to a form of bullying. In addition, in 2015 Brazil separately prohibited workplace “bullying” and “cyber bullying.”⁸⁷
 - **France.** Workplace bullying is illegal in France, and a French law of June 2010 criminalizes “psychological violence.”⁸⁸

79 See “[Harassment](#)” page on EEOC.gov website.

80 WASH. STATE DEP’T OF LABOR & INDUS., REP. NO. #87-2-2011, WORKPLACE BULLYING AND DISRUPTIVE BEHAVIOR: WHAT EVERYONE NEEDS TO KNOW (2011).

81 Sarah Morris, “Tackling Workplace Bullying in Tort: Emerging Extreme and Outrageous Conduct Test Averts Need for a Statutory Solution,” 31 ABA JOURNAL OF LABOR & EMPLOYMENT LAW, 257, 262-64 (2016).

82 A. Borchardt & T. Rest, WORLD CRUNCH.

83 “[Harassment](#)” page on gov.uk website.

84 Morris, *supra* note 81, at 264-65.

85 MONITEUR BELGE [M.B.] [Official Gazette of Belgium] June 11, 2002 and Belgium Anti-Discrimination Act, M.B. May 10, 2007.

86 See Maria Cristina Cescatto Bobroff & Julia Trevisan Martins, “Assédio Moral, Ética e Sofrimento no Trabalho,” 2013 Rev. Bioet. (Impr.). 249.

87 Brazil law 13, 185 of Nov. 2015.

88 Code du Travail arts. L 1152-1 to -6; see Steven Erlanger, “France Makes ‘Psychological Violence’ a Crime,” N.Y. TIMES, June 29, 2010.

- **Italy.** A 2015 Italian Supreme Court case sets out a broad definition of “mobbing” in the workplace.⁸⁹
- **Luxembourg.** A Luxembourg law of June 2009 prohibits “bullying and violence at work.”⁹⁰
- **Venezuela.** Venezuela’s 2005 “Organic Law on...Work Environment” prohibits “offensive, malicious and intimidating” conduct in the workplace including “psychological violence” and “isolation.”
- **Tough anti-harassment laws on paper, not in practice.** Countries like China and Russia ban workplace harassment on paper but tend not to offer harassment victims tough precedents or readily enforceable remedies. (That said, there are exceptions; in February 2013, Chinese “[m]ilitary prosecutors indicted a one-star general on charges of sexually harassing a military officer.”⁹¹) Mexico purports to ban sex harassment in theory under Federal Labor Law article 47, but according to one Mexican labor lawyer, it is “surprising...to learn that such conduct [is] not punished in Mexico, from a labor standpoint, even when the incidence of sexual harassment [is] extremely high in Mexico.”⁹²
- **Anti-harassment laws not consistently supporting discipline of harassers.** Enlightened countries like the Netherlands and Luxembourg impose tough-seeming bans against workplace harassment—but confounding case law in these jurisdictions tends to enable proven sex harassers, because local labor judges can be quick to hold dismissal too severe a punishment for a proven sex harasser, particularly a long-serving executive with a relatively clean prior discipline record. In a “number of cases” in Thailand, courts have held dismissals of sex harassers to be “‘without cause’ and the employer has been required to pay severance.”⁹³
- **Tough laws specific to sex harassment.** In 2013, India passed a tough sex harassment law, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act of 2013, and eradicating sex harassment (as opposed to other forms of workplace harassment) has become a high-profile social issue in India. Similarly, the sex harassment provisions of Cyprus’s Law for the Equal Treatment of Men and Women in Employment and Vocational Training are particularly tough.⁹⁴ These countries tend not to impose equally strict laws against workplace harassment on other grounds.
- **Workplace harassment as a crime.** France and Egypt have criminalized certain types of harassment, including workplace harassment—France reenacted its sex harassment criminal law in 2012.⁹⁵ Under a 2006 Algerian law, anyone who “exert[s] pressure to obtain sexual favors” in Algeria faces two to twelve months in prison plus a fine of up to 200,000 dinars (U.S.\$2,540).⁹⁶ These days even Shari-ah law can get interpreted to criminalize workplace sex harassment. In October 2010 a judge in Arar, Saudi Arabia sentenced a sex harasser to *death*. The Saudi harasser had tried to blackmail a government employee at her workplace with revealing photographs, but she denounced him to the Saudi Virtue Police.⁹⁷ That said, a survey in Saudi Arabia found that “80 percent of people questioned in a national survey blamed the scourge of sexual harassment plaguing the country on the ‘deliberate flirtatious behavior’ of women.”⁹⁸

89 Italy Sup. Court doc. 158/2016.

90 See VITTORIO DI MARTINO ET AL., PREVENTING VIOLENCE AND HARASSMENT IN THE WORKPLACE 64 (2003).

91 Joseph Yeh, “One-Star General Indicted for Sexual Harassment,” THE CHINA POST, Feb. 26, 2013).

92 E. Velarde- Danache, “Mexico: Sexual Harassment in the Workplace,” IBA *The Int’l Employment Lawyer*, Oct. 20, 2014.

93 S.Sangrunjang & V. Sucharitkul, “Thailand: Sexual Harassment and the Workplace,” IBA *Discrimination & Equality Law News*, Oct. 2014 at pg. 15.

94 Cyprus Law 205(1)/2002.

95 Loi 2012-954 of 7 Aug. 2012, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.].

96 Algeria code art. 341 *bis*.

97 See Deccan Herald, India, *deccanherald.com*, Oct. 23, 2010.

98 C. J. Williams, “Saudi Survey: ‘Flirtatious’ Women to Blame for Sexual Harassment,” Gulf News.com, Aug. 8, 2014.

- **No harassment law.** Singapore imposes no specific laws banning workplace harassment.⁹⁹

As countries around the world get more serious about eradicating workplace harassment, their harassment laws mutate into new forms, sometimes becoming even broader (if blunter and less nuanced) than American workplace harassment doctrines. The challenge is that as harassment laws evolve in isolated legal environments, state-of-the-art American tools and training for weeding out the U.S. variety of workplace harassment become less helpful overseas. A multinational trying to impose a single global anti-harassment rule, policy, compliance standard or training module needs subtlety, nuance, strategy and finesse. Reflexively globalizing a rigid American “zero tolerance” approach to discrimination-based workplace harassment will not succeed.

B. Seven Issues to Account for When Designing a Cross-Border Workplace Harassment Initiative

A multinational pursuing a global approach to eliminating harassment from its worldwide workforces by crafting a global anti-harassment rule, policy, compliance initiative or training module needs to account for the international context and the very different concept of workplace harassment in many countries around the world. Factor in seven issues: alignment; protected status; affirmative mandates; enforceable cross-cultural provisions; launch logistics; communications/training; and investigations.

1. **Alignment.** A multinational should align any global approach to preventing workplace harassment with its own initiatives against discrimination and promoting equal employment opportunity and diversity. A global harassment rule or policy and any international training module or enforcement initiative should dovetail with the multinational’s global initiatives on discrimination and diversity. If nothing else, any listing of protected categories should be consistent—how the organization addresses protected group status should align among global discrimination, harassment and diversity policies. Any discussions of whistleblowing/reporting should also be consistent.

2. **Protected status.** We need to back up and ask the threshold question of whether or how to address protected categories in a global harassment provision at all. We discussed that bullying (status-blind harassment) tends to be perfectly legal stateside. There was a trend a while back at the state government level to try to outlaw so-called “abusive work environments,” but “[d]espite twelve years of lobbying, advocates have failed to gain passage of a statutory cause of action for workplace bullying in any [U.S.] jurisdiction.”¹⁰⁰ Accordingly, American employers’ harassment rules and training tend to link the harassment concept to a victim’s membership in a protected category—sex harassment, race harassment, disability harassment, age harassment, religious harassment, even theoretically veteran status harassment and genetic harassment. American employers typically avoid the huge step of imposing tough and enforceable workplace rules banning status-blind harassment—bullying, pestering, equal opportunity harassment or hostile work environments.

But we mentioned the worldwide trend of tough status-blind laws against workplace bullying, like the doctrines in, for example, Argentina, Belgium, Brazil, France, Germany, Italy, Luxembourg, Quebec, Spain, Sweden and Venezuela. In theory, anti-bullying laws are far broader than status-based harassment, because abusive behavior for any conceivable reason is infinitely broader than harassment motivated only by animus against a dozen or so protected traits.

For a multinational employer, the drafting challenge here is how to account for broad overseas bullying laws in crafting a workable global anti-harassment rule or policy, compliance standard or training module. Expanding a narrow U.S.-style (status-based) workplace harassment initiative to account for foreign bullying prohibitions requires exponentially increasing the scope. This makes American employers uncomfortable—especially if the broadened policy and training will reach into U.S. workplaces or other jurisdictions with laws that ban only status-based harassment. Some multinationals downplay this conflict and simply issue narrow international policies against only status-based harassment, but this approach leaves a huge gap—in some jurisdictions, a harassment prohibition like this addresses only a corner of the universe of illegal workplace bullying.

⁹⁹ See Employment Act § 2(1).

¹⁰⁰ Sarah Morris, *supra*, at 290-91.

Another drafting challenge as to a global harassment initiative that also relates to protected status—but that comes from the opposite direction—is the outsize importance of sex harassment. In countries like Costa Rica, Cyprus, India and Korea, workplace harassment law focuses on sex harassment, pushing employers to tailor their workplace harassment initiatives specific to that one single protected status. Some multinationals even globalize detailed discussions of rarified sex harassment concepts under U.S. law like the distinction between *quid pro quo* and hostile environment sex harassment. But sex harassment is only one kind of workplace harassment even in jurisdictions that ban status-based workplace harassment (and particularly in jurisdictions that impose broad laws against workplace bullying). That said, tailored communications on the sub-topic of sex harassment might be important to get across important messages.

3. Affirmative mandates. Every law against workplace harassment imposes a negative prohibition banning employers (and often co-workers) from committing illegal harassment. In addition, some jurisdictions' laws go significantly further and impose affirmative employer duties or mandates to take affirmative steps to comply with harassment law. For example:

- **Written policies.** Chile, Costa Rica, India, Japan and other countries affirmatively require employers to issue written sex harassment policies.¹⁰¹
- **Training.** California, Costa Rica, South Korea and other jurisdictions affirmatively require employers to offer periodic training on sex harassment.
- **Claims procedures.** Costa Rica requires employers to institute sex harassment claim procedures and to report each sex harassment claim to the Ministry of Labor Inspection Department. A 2006 Japanese regulation imposes similar affirmative mandates.¹⁰²
- **Investigations.** The Austrian Supreme Court requires employers affirmatively to investigate complaints of sex harassment, as do statutes in countries including Chile, Costa Rica, India, Japan, South Africa and Venezuela.¹⁰³

In addition, workplace harassment laws like China's Special Provisions on Occupational Protections for Female Employees of April 2012 affirmatively require that employers provide a "harassment-free workplace." But in practice a mandate of a harassment-free workplace is the same as a negative prohibition against harassment.

Multi-jurisdictional harassment initiatives (policies, training, enforcement) need to account for these affirmative mandates. A global policy or code of conduct provision that merely bans illegal harassment may fall short in jurisdictions where employers must take affirmative harassment compliance steps. That said, the text of a global harassment provision might not have to discuss all these affirmative mandates explicitly.

4. Enforceable cross-cultural provisions. In drafting a multinational's cross-border anti-harassment initiative, the mandates imposed actually need to work overseas. Reject American-style prohibitions that may be unworkable abroad. Define key terms cross-culturally and ensure the policy's explicit prohibitions are enforceable in each affected jurisdiction:

- **Defining key terms cross-culturally.** Workplace harassment policies implicate concepts particularly susceptible to getting misconstrued abroad. Be clear. For example, the common harassment policy terms "inappropriate" behavior and "improper" touching get interpreted very differently depending on cultural context—certain behaviors obviously "inappropriate" or "improper" in Atlanta, Roanoke and Milwaukee may not seem so out of line in Athens, Riyadh

101 Chile Law No. 20,607, Aug. 8, 2012, DIARIO OFICIAL [D.O.]; Japan Equal Employment Opportunity Law of 1986 art. 11; Costa Rica "*Contra el Hostigamiento Sexual en el Empleo y la Docencia*," *La Gaceta*, 3 Marzo 1995, num. 45, pages. 1-2.

102 MHCW notification No. 415.

103 Austria Supreme Court decision 9 ObA 131/11x, Nov. 26, 2012; Costa Rica Law No. 20,607, Aug. 8, 2012, DIARIO OFICIAL [D.O.]; Costa Rica "*Contra el Hostigamiento Sexual en el Empleo y la Docencia*" *La Gaceta*, 3 de Marzo de 1995, num. 45, pags. 1-2; South Africa (Equal Employment Opportunity Law of 1986 art. 11; Labour Relations Act of 1995 § 203(2) (containing the Code of Good Practice on the Handling of Sexual Harassment Cases); Venezuela *Ley Organica de Prevencion, Condiciones y Medio Ambiente de Trabajo*.

or Mexico City. “Kissing,” expressly prohibited by many American harassment policies and training modules, usually implies romantic mouth-kissing without distinguishing the cheek-kissing ubiquitous among co-workers in France, Netherlands and many other countries. Even the term “harassment” itself takes on very different meanings abroad. In Brazil, “harassment” (*assédio*, in Portuguese) is understood to mean overt and abusive acts like bullying and *quid pro quo* harassment not understood to reach “hostile environment” harassment.¹⁰⁴ For that matter, do not expect staff abroad to understand or care about basic U.S. harassment terms of art like *quid pro quo* and hostile environment harassment.

- **Making explicit prohibitions enforceable in each affected jurisdiction.** A harassment policy’s specific restrictions may raise legal issues abroad. Be sure policy prohibitions are enforceable overseas. For example, again we have the “kissing” problem: The common U.S. harassment policy provision prohibiting on-job “kissing” is unworkable in places like France where men and women co-workers kiss one another every morning as a greeting. And restrictions against co-worker dating (even requirements to disclose co-worker sexual relationships) raise serious employment and privacy law issues and spark human resources challenges overseas, especially in countries like Germany and Switzerland where birth rates are low and a third to half of married couples are believed to have met in the workplace. Society in these countries may actually see workplace romance as vital to sustaining the local population base; local employees and even local courts push back hard against American-style co-worker dating restrictions—or, at least, passive-aggressively ignore them. In one extreme case a Russian judge confirmed a worker’s sex harassment allegation as factually true but then denied her claim, reasoning that “if we had no sexual harassment, we would have no children.”¹⁰⁵ In these jurisdictions even a workplace rule that merely requires dating co-workers to disclose their relationships almost always offends, and gets flouted in practice.

5. **Launch logistics.** While every workplace harassment policy purports to impose a discipline or termination sanction, we mentioned that case law in many jurisdictions is surprisingly lenient toward proven harassers whom employers try to fire for good cause. And because co-worker dating disclosure provisions in harassment policies can be particularly unpopular, they can be tough to enforce overseas. So a harassment policy and its penalty provisions need to stick. Implement any global policy consistent with local procedures in affected jurisdictions, as necessary informing and consulting local worker representatives (do not forget health-and-safety committees). Align a global harassment policy with any written local work rules. Be sure any policy that imposes a mandatory disclosure rule—such as requiring dating co-workers to disclose their relationship—complies with local employment and data privacy laws.

6. **Communications/training.** Think about the most effective way to communicate any global harassment policy to staffers worldwide and how to structure any global harassment training module. Remember that effective discussions of harassment are necessarily intertwined with local law and local cultural issues.

- **Sex harassment.** Communications and training about sex harassment in particular raise notorious problems where harassment remains poorly understood. Years ago workers abroad, male and female alike, were known openly to mock U.S.-generated sex harassment and gender-sensitivity training. Overseas employees forced to sit through harassment training may still see this as a puritanical American exercise out of touch with their local environment. In Africa, the Arab world, Asia, Latin America and Eastern Europe, a workforce may still openly scoff at harassment training seen as too awkward, too “politically correct” and too insensitive to the local environment. At one February 2013 sex harassment training session at a leading Chinese manufacturer, an “18-year-old female worker” was “often”—during the sex harassment training session itself—“subjected to obscene gestures and sexual harassment from three male colleagues.”¹⁰⁶

104 See generally Maria Cristina Cescatto Bobroff & Julia Trevisan Martins, *supra* note 86.

105 Liz McKenzie, “Sex Harassment Good for Procreation: Russian Judge,” *LAW360* (Aug. 8, 2008).

106 Ma Yujia, “Foxconn Employees Suffer Sexual Harassment,” *CHINA.ORG.CN*, (Feb. 22, 2013).

Some “dos and don’ts” as to cross-border harassment training:

- **Globalize U.S.-crafted training modules.** Never directly export unedited U.S. online or live harassment training modules. Tone down U.S.-style messages likely to ruffle feathers abroad. Be sure global harassment training accounts for the threshold distinction between U.S.-style status-based harassment and illegal bullying abroad.
- **Localize.** On a country-by-country level, tailor global anti-harassment communications and training for each local audience. Win local-management buy-in. Before training, learn about any harassment problems in the local workplace and adjust accordingly. In the training, make the case for why workplace harassment is actually a local problem, not an American export. Show how harassment compliance actually improves local conditions.
- **Comply with local harassment training mandates.** Align the training with any local training requirements. In Costa Rica, Korea and any other jurisdiction that requires harassment training, check that any global training module meets local requirements, or align the global module with any local training.

7. Investigations. U.S. employers understand the importance of thoroughly investigating credible harassment complaints, allegations and denunciations received both informally and through reporting channels like hotlines. As mentioned, law in countries including Austria, Chile, Costa Rica, India, Japan, South Africa and Venezuela affirmatively *requires* employers to investigate allegations of sex harassment. But even in these countries an aggressive American-style workplace harassment investigation can trigger push-back and unexpected legal issues. Adapt overseas harassment investigations (and discipline for proven harassers) to comply with host-country rules and culture.

* * *

Design a strategy to extend any U.S.-crafted harassment policies, tools, compliance efforts or training internationally. A U.S. organization proclaiming “zero tolerance” for workforce harassment will be understandably reluctant to tolerate any inappropriate harassment in its overseas operations. But because the specific behaviors that constitute inappropriate or at least *illegal* harassment change significantly from country to country, a multinational’s global harassment rule, training or compliance initiative needs to be flexible enough to address harassment on unexpected protected grounds, in very different social environments, and based on broad concepts of status-blind harassment. (In sharp contrast to U.S. harassment law being a sub-set of discrimination law, workplace harassment and discrimination overseas can be two separate legal concepts.)

Part Six: Promoting Workplace Diversity and Affirmative Action on a Global Scale

Having addressed multinationals’ global initiatives as to discrimination and harassment, the final plank of an international EEO initiative might be a cross-border diversity or even affirmative action program, if it that might be viable. As discussed, equal employment opportunity and diversity play a huge role in domestic American human resources administration and in U.S. employment law compliance (surely a bigger role than in any other country except perhaps South Africa). So it might seem that, when it comes to promoting workplace *diversity* globally, American multinationals enjoy a clear head start. But very different demographics abroad make this would-be head start less advantageous than it may at first appear. In some contexts overseas, too much experience with U.S. diversity initiatives might actually be a *drawback*.

How, specifically, can a multinational driving international EEO compliance foster workplace diversity across jurisdictions? U.S. EEO and diversity tools were originally honed for the atypical, rarified environment of U.S. discrimination, harassment and affirmative action law and for the unique demographics of the United States, responding to uniquely American historical and social issues. So American diversity tools do not always work well abroad, at least not without significant retrofitting. This is particularly true as to rigorous American diversity programs engineered to increase demographic representation in the workplace through *recruiting and retention* (as opposed

to softer diversity training programs meant to enhance *respect and tolerance* among co-workers already in a workforce).

Any diversity recruiting/retention initiative will fail if the employer cannot measure its success. And no employer can measure the success of a diversity program without consensus around the meaning of the core term “diversity.” Employers promoting diversity across borders must therefore begin by confronting an uncomfortable but central question: What do we mean when we say we want workforce “diversity”? Very-different demographics and “core diversity dimensions” overseas mean that the answer will not be the same abroad as it would be domestically within the U.S.

A. The U.S. Understanding of “Diversity”

In addressing diversity, the U.S. Supreme Court has adopted the increasingly popular “big tent” view, saying “[m]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse *people, cultures, ideas and viewpoints*.”¹⁰⁷ This all-encompassing approach sees diversity as far more than the three narrow but well-defined “diversity dimensions” that U.S. government statisticians track via America’s mandatory employer-diversity reporting form, the [EEO-1](#): gender, “Hispanic or Latino” ethnicity and “race” defined as “White,” “Black or African American,” “Asian,” “American Indian or Alaskan Native” or “Native Hawaiian or Other Pacific Islander.” U.S. diversity experts these days expand their efforts well beyond the three EEO-1 categories of gender, Hispanic/Latino ethnicity and race. Modern diversity experts, along with the Supreme Court, speak broadly (if vaguely) of “diversity of backgrounds,” “diversity of opinions” and “diversity of experiences.” Diversity professionals also cultivate diversity among age groups, sexual orientations, the “differently abled” and other groups, legally protected and non-legally protected alike. To a modern U.S. diversity expert, confining a corporate diversity initiative just to the three EEO-1 categories would be far too narrow.

That said, though, the fact remains that domestically within the U.S., the *sine qua non* of a “diverse” workforce *actually is* rooted in our three old-school U.S. EEO-1 categories. To Americans, those three “diversity dimensions” stand alone in their own tier, with other categories less important. After all, no American would consider a workplace of all white, non-Hispanic men as “diverse”—even if the Anglo white guys came from various cities, were alumni of various schools, voted for various political parties, cheered for various sports teams and were of various religions, ages, sexual orientations and physical abilities. On the other hand, we would all have to concede that a workforce is indeed quite “diverse” if made up of half men/half women and big percentages of Hispanics, blacks, Pacific Islanders, Asians and Native Americans—even if it somehow turned out that this gender- and race-balanced workforce included only middle-aged able-bodied, heterosexual American-born Christians who were all registered Democrats. In fact, among our three EEO-1 “diversity dimensions” (gender, Hispanic ethnicity, race), one category—race—stands above the others. As mentioned, “America’s statutory harassment law, premised on avoiding discrimination, is rooted in its history of African American slavery.”¹⁰⁸ And “U.S. judges, activists and academics have theorized extensively about how the struggle for African Americans’ civil rights shapes U.S. law prohibiting discrimination against other groups.”¹⁰⁹

B. The International Understanding of “Diversity”

For years the importance of “diversity” has been growing outside the U.S. According to a 2006 report from the Conference Board, “demographic changes in Europe, combined with . . . regulations, are . . . pressur[ing European] companies to increase the diversity of their workforces.”¹¹⁰ A study by the Lee Hecht Harrison firm found that two-thirds of employers *worldwide* see employer diversity programs as key retention tools. Some countries now actually mandate specific diversity initiatives: South Africa requires workplace diversity plans, for example, and as discussed, Brazil, Germany and

¹⁰⁷ *Grotter v. Bollinger*, 539 U.S. 306, 330 (2003) (emphasis added).

¹⁰⁸ Sarah Morris, “Tackling Workplace Bullying in Tort: Emerging Extreme and Outrageous Conduct Test Averts Need for a Statutory Solution,” 31 ABA JOURNAL OF LABOR & EMPLOYMENT LAW, 257, 265 (2016).

¹⁰⁹ Katherina Linos, “Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union,” 35 YALE J. INT’L L. 115, 116 (2010).

¹¹⁰ Sandra Lester, CONFERENCE BOARD, EXECUTIVE ACTION SERIES #175, DIVERSITY AND PROFITABILITY: MAKING THE CONNECTIONS (2006).

other countries require affirmative action for the disabled. European jurisdictions are requiring gender equity on corporate boards of directors, and some Japanese companies are pushing to put Westerners on their boards of directors.¹¹¹ India imposes caste diversity rules in the public sector.

In today's diverse, multi-cultural world markets, all multinationals—regardless of where headquartered—should be thinking about how to foster inclusion and equality of employment opportunity within workforces worldwide, and how to recruit and retain diverse workforces. But propagating a diversity program abroad raises our definitional question of metrics: Internationally, what do we mean by “diversity”? Like plugs on our American electrical appliances, our U.S. EEO-1 metrics of gender, Hispanic ethnicity and race just do not fit overseas. In fact, our American understanding of race and ethnicity is so uniquely our own that even the U.S. Census struggles—recent immigrants misconstrue American census forms because peoples from other cultures do not “get” how Americans categorize ourselves:

The pattern of race reporting [to the U.S. Census] for foreign-born Americans is markedly different than for native-born Americans.... For example...a majority born in the Dominican Republic and El Salvador, who are newer immigrants, described themselves as neither black nor white.... Among all who identified themselves as Asian-Americans, which is often understood to mean born [in the U.S.], 67 percent were, in fact, foreign born.... [According to] Elizabeth M. Grieco, Chief of the Census Bureau's immigration statistics staff,... “it's a part of not knowing where they fit into how we define race in the United States.”¹¹²

This disconnect between what Elizabeth Grieco calls “how we define race in the United States” and how other countries define race (and ethnicity) explains why workforce demographic diversity programs hatched from U.S. EEO-1 metrics are bound to fail if transplanted overseas. Consider, for example, these specific challenges:

- **Hispanic/Latino:** The “Hispanic/Latino” EEO-1 ethnicity category is unique to the U.S., is misunderstood outside the U.S., and is meaningless where there are virtually no Hispanics/Latinos—countries from Albania to Zimbabwe—as well as where there are virtually nothing but Hispanics/Latinos—Spanish-speaking Latin America, Spain, Equatorial Guinea and parts of the Philippines.
- **The “race” construct:** Concepts of race differ abroad. “Race is seen differently in the Caribbean as people describe themselves by various degrees of mixed races or colors such as *moreno*, *trigueno*, and *blanco-oscuro*, but few will use the term ‘black.’”¹¹³ In England, “Asian” includes Indian/Pakistani and does not necessarily include peoples of the Far East (who may be called “Orientals”). South Africa's diversity-promoting EEA-2 form distinguishes “Whites,” “Indians” and “Africans” from “Coloureds”—a mixed-blood category that looks offensive to Americans. At the same time, of course, the U.S. category “African-American” can be offensive (or at least inapplicable) in the many countries of the world with big populations of “Africans” who are not “American.”
- **Demographics:** Labor-pool demographics make racial diversity statistically impossible in much of the world. The U.S. Central Intelligence Agency [World Factbook](#) reports that Japan is 98.5% Japanese and more than 99.4 % Asian. The CIA says Korea is all Korean (“except for about 20,000 Chinese”). Finland is 94.3% Finnish and Swedish (with many of the other 5.7% Russian and other Northern European). Paraguay is 95% “mestizo” and Mali is more than 99.2% “Malian” and other African tribal. Even the increasingly heterogeneous UK remains 87.2% “white.”
- **Differing “diversity dimensions”:** Overseas, the three American EEO-1 categories are too coarse to account for the granular demographic distinctions necessary abroad. In India, caste status is legally protected (in the public sector)—but in EEO-1 terms, all Indians are “Asian.” In Africa, tribal ancestry is critical—but in EEO-1 terms, all tribal Africans are “black.” In Spain,

111 L.Hu, “Foreigners Fill Japan Job Gaps,” Wall St. Journal, Aug. 31, 2015.

112 Sam Roberts, “Census Figures Challenge Views of Race and Ethnicity,” N.Y. Times, (Jan. 21, 2010).

113 E.M. Borich, “‘Anti-Haitianismo’: From Violence to a Tragedy of Justice in the Dominican Republic,” 28 N.Y. INT’L L. REV. 61, 63–64 (2015).

Basques and Catalans speak their own languages and promote separatism—but in EEO-1 terms, all Spaniards, Basques and Catalans are “Hispanic/Latino whites.” In Canada, French Canadians are culturally distinct—but in EEO-1 terms, they are, like most Canadians, “non-Hispanic/Latino whites.” Hong Kong imposes a 28-page discrimination law specific to “family status” and so family status diversity is an important metric there, but is a characteristic invisible to EEO-1 metrics.¹¹⁴

- **Gender diversity challenges:** Even workplace gender diversity can be impossible abroad. In Saudi Arabia, just five percent of the workforce is female and local law requires segregating women workers from men—law imposes a fine of 1,000 riyals for failing to provide segregated facilities plus a fine of 5,000 riyals for failing to post written instructions requiring female staff to wear face veils.¹¹⁵

According to *HR Magazine*, over ten years ago U.S. “HR directors [were] finding that one-size-fits-all [diversity] programs” as launched overseas “will not work and might not even be understood.”¹¹⁶ Andrés Tapia, then serving as Chief Diversity Officer at Hewitt Associates (now AON Hewitt), once said “we’re beginning to see an increasingly resentful backlash against the American version of diversity abroad.”¹¹⁷ Outside the U.S., the complaint Tapia heard most often was that “this diversity thing is an American thing.” It is this tension with cross-border diversity initiatives that forces U.S. multinationals to confront what “diversity” means in the *cross-border context*.

C. Three Viable Cross-Border Diversity Initiatives

Because U.S. diversity metrics and the American understanding of “diversity” do not travel well, any U.S.-headquartered multinational should think hard before deciding to launch, across regional or worldwide operations, a robust diversity initiative focused on recruiting and retention. Resist the urge to transplant the domestic U.S. approach. Retool an American diversity initiative for recruiting and retention by using internationally appropriate metrics and a global understanding of “diversity.” A multinational might select one of three alternate designs for transforming a made-in-the-U.S.A. diversity initiative into a viable international program: (1) cross-cultural understanding, (2) gender inclusion and (3) local racial/ethnic diversity.

1. **Cross-cultural understanding.** International project teams with members from different countries can run into misunderstandings because of deep-rooted cultural differences. Even within a region as well-integrated as Western Europe, work styles differ and underlying assumptions and attitudes diverge across a team of, say, Britons, Dutch, French, Germans and Italians. Cross-cultural understanding sessions might address these problems with training focused on attitudes. But soft training programs focused on changing attitudes are so distinct from hard demographic diversity initiatives focused on recruiting and retention metrics that using the “diversity” label here is perhaps disingenuous. One human resources manager, Suzanne Bell of Toyota Financial Services, once suggested keeping the distinction clear by labeling this training “Global Cultural Competence” or “Global Cultural Awareness” programs—eschew the word “diversity” entirely, because after all, even a workforce with excellent cross-cultural understanding is not necessarily diverse.

2. **Gender inclusion.** Homogeneous racial demographics in many overseas markets may block efforts at racial diversity, but gender equity is good everywhere—except in Saudi Arabia, where law requires segregating the genders in the workplace and requires female staff wear face veils.¹¹⁸ Women are underrepresented, especially in leadership roles, in many overseas workforces. Gender inclusion has become a hot issue in Europe, which is requiring gender balance on corporate boards of directors. Some U.S. multinationals therefore focus their overseas diversity efforts on promoting gender inclusion while reserving race, ethnicity and other “diversity dimensions” for their domestic U.S. diversity programs. According to *HR Magazine*, as far back as the early 2000s, several Fortune

114 Hong Kong Family Status Discrimination Ordinance L.N. 552 of 1997.

115 KSA Labor Law *as amended by* Ministerial Resolution Number 4786 (12 Oct. 2015).

116 DeeDee Doke, “Shipping Diversity Abroad,” *HR MAG.*, Nov. 11, 2003.

117 Donald C. Dowling Jr., “Cross-Border Diversity Initiatives for Recruiting and Retention,” 42 *INT’L L. NEWS* no. 2, 2013.

118 KSA Labor Law *as amended by* Ministerial Resolution Number 4786 (12 Oct. 2015).

500 companies were testing gender diversity programs in Latin America.¹¹⁹ But avoid referring to gender-equity initiatives as “diversity” programs, because a gender-balanced workforce is not necessarily truly diverse. Gender equity is a sub-species of diversity, but it is not the same thing.

3. Local racial/ethnic “diversity dimensions”: Bold multinationals that take international workplace diversity seriously enough to confront the irrelevance of our three U.S. EEO-1 categories in the global context might promote racial/ethnic inclusion by tailoring overseas diversity metrics to the very different “core diversity dimensions” of their overseas workforces. Just as it makes no sense to track caste diversity in, say, Scandinavia, it makes no sense to track the “Hispanics” and “African-Americans” within a workplace in, say, Belgium, China, Chile, India, Russia or South Africa. Ask instead: *Which “diversity dimensions” and demographic categorizations are locally appropriate in each of our various overseas locations?* Then implement meaningful demographic benchmarking metrics on a localized basis. Does your Mexico City executive suite reflect Mexico’s Indian/Mestizo majority? Does your Dominican Republic operation respect employees and applicants from the victimized underclass of Dominican Haitians? Is your Brussels facility equally inclusive of both Flemish and Walloons? Does your Zurich branch welcome Switzerland’s French and Italian-speaking minorities? Do your Tokyo office policies fight Japan’s entrenched discrimination against ethnic Koreans, ethnic Brazilians, Ainu and Ryukyuan? Do local taboos—and data privacy laws—prevent you from learning the status quo, taking action and measuring success? And beyond racial/ethnic categories, how can a global diversity program cultivate diversity among age groups, sexual orientations and disabilities? Bold cross-border diversity initiatives that actually focus on locally relevant racial and ethnic distinctions remain rare, but they may be the next frontier.

D. Global Affirmative Actions Plans

The next step beyond a global diversity initiative is a hard international affirmative action plan that imposes concrete goals, quotas or metrics requiring the workforce get into demographic balance. While laws mandate affirmative action plans in a few places—for example, under South Africa’s Employment Equity Act and among federal government contractors operating in the United States under Executive Order 11246—no general legal obligation forces any multinational to implement affirmative action (called “positive action” in Europe) across *international* operations. And so global affirmative action plans remain rare. Even so, certain multinationals committed to firming up diversity initiatives by imposing hard affirmative quotas, goals or metrics see a business case for launching affirmative action across borders.

Are global affirmative action plans legal? Statutory law in most jurisdictions tends neither to require nor prohibit affirmative action plans in private (non-government) workforces. Rather, affirmative action plans are most likely to spark disputes under *employment discrimination law*. Therefore, the central legal issue with global affirmative action plans is whether these plans offer employers an affirmative defense to discrimination claims.

Imagine a multinational launches a hard global affirmative action plan and then—to meet its plan metrics—rejects or refuses to promote a well-qualified white man to make room for a black woman who might be argued to be less qualified. If the rejected white man sues alleging gender and race discrimination under a theory of “reverse discrimination,” does the affirmative action plan give the employer a defense? Sometimes yes, sometimes no. The result varies significantly by jurisdiction:

- ***Plan is a defense:*** In some jurisdictions (including Australia, parts of Canada, Japan, Poland, South Africa), yes, an affirmative action plan can offer an affirmative defense to a reverse-discrimination claim—although in some of these countries the plan must first have been filed with and approved by a government agency.
- ***“Reverse discrimination” is legal:*** Some jurisdictions (including Argentina, Costa Rica, Egypt, South Korea, Taiwan) have not recognized reverse discrimination claims under their case law—these countries understand their employment discrimination laws to support disenfranchised minorities and women. Affirmative action plans are viable in these jurisdictions because employers are unlikely to see reverse discrimination claims.

¹¹⁹ Doke, *supra* note 116.

- ***Affirmative action is illegal:*** But in many jurisdictions (including Brazil, France, Hong Kong, Peru, the Netherlands), a rejected applicant or an employee passed over because of an affirmative action plan would likely have a viable discrimination claim. In fact, the affirmative action plan itself could be “Exhibit A” supporting the claim, because the plan openly declares the employer’s intent to discriminate.
- ***Discrimination in hiring is legal:*** This said, there are countries (including Bahrain, Malaysia, Thailand, Turkey, UAE) where an affirmative action plan used in *hiring but not promotion* could not possibly trigger employment discrimination claims, because these countries’ discrimination laws do not reach not-yet-employed job applicants.

* * *

“Core diversity dimensions” and the very idea of what it means to be “diverse” differ widely from one country to the next across our increasingly homogeneous “global workforce.” Any multinational launching cross-jurisdictional work rules, international HR policies, global code of conduct provisions or other border-crossing initiatives that champion diversity in overseas recruiting and retention should modify its existing U.S. domestic diversity policies and offerings—or else completely start over abroad.

Conclusion

Equal employment opportunity plays a bigger role in U.S. human resources administration and U.S. employment law compliance than in perhaps any other country (with the possible exception of South Africa). And so, U.S.-headquartered multinationals often place more emphasis on EEO issues than do multinationals based elsewhere. There are excellent business, humanitarian and corporate social responsibility reasons why all multinationals should strive to equalize employment opportunities across their workforces worldwide. But the EEO tools that American multinationals originally developed in the atypical and rarified environment of U.S. discrimination, harassment and diversity laws do not work well abroad without modification. Any multinational launching cross-jurisdictional work rules, international HR policies, global code of conduct provisions, cross-border compliance standards, multi-country training modules or other border-crossing initiatives to address workplace discrimination, harassment, diversity or affirmative action should adapt these offerings strategically to account for the special context of the global workforce.

