

# THE 2011 GLOBAL EMPLOYER:

Highlights of Littler's Fourth Annual Global Employer Institute

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**IMPORTANT NOTICE**

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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# THE 2011 GLOBAL EMPLOYER:

## Highlights of Littler's Fourth Annual Global Employer Institute

### INTRODUCTION

In November 2011, Littler Mendelson conducted its Fourth Annual Global Employer Institute (GEI) in Washington, D.C. Attorneys and human resources professionals from 13 countries participated in the GEI. Regions represented included North and South America, Europe, Africa and Asia, including rapidly expanding markets such as Brazil, India and China.

Each year we highlight and discuss some of the most challenging issues facing global employers. Topics featured at the 2011 GEI included:

- The Globalization of Employment and Labor Law: Breaking Developments, Trends, and Practical Compliance Initiatives for 2012
- International Security: Keeping Employees Safe in Dangerous Locales
- Best Practices for Cross-Border Employment Agreements
- Corruption: A Practical Approach to the Foreign Corrupt Practices Act and the UK Bribery Act
- Out of the Financial Crisis "Frying Pan" and into the Compliance "Fire": What Multinationals Need to Know About New Financial Reforms
- Global Labor Relations: Global Union Federations, International Labor Standards and Human Rights
- Bullies at Work: Solutions from Different Lands
- Africa: A Wealth of Business Opportunities in an Unfamiliar Legal Landscape
- The Evolving Labor Relations and Labor Law Picture in the People's Republic of China
- International Employment Law Update: 2011

We also held a workshop on "Investigating Employee Misconduct Across Borders" and presented a special panel on corporate social responsibility in the mining industry in Latin America.

This Publication is intended to highlight many of the topics from Littler's 2011 GEI. We hope you find it to be a useful resource.

Garry G. Mathiason

Peter A. Susser

**Littler Mendelson, P.C.**

## I. THE GLOBALIZATION OF EMPLOYMENT AND LABOR LAW: BREAKING DEVELOPMENTS, TRENDS, PRACTICAL COMPLIANCE INITIATIVES FOR 2012

Employers increasingly work across borders. At the same time, employers must maintain employment and business practices that meet standards of legal compliance, ethics and transparency. With increasing public scrutiny of employment and business practices, multinational employers face significant challenges.

The United Nations designated October 31, 2011, as the date when our population around the globe reached seven billion.<sup>1</sup> Along with this growth, business is becoming more global and interconnected. Internet user growth, which reached 30.4% around the world as of June 2011, best illustrates such globalization. With the Internet and global media, business and employment practices that are challenged in an isolated location can reverberate around the globe. Based on such developments, employers should anticipate increased efforts toward global employment law standards.

Discussed below are eight global employment and labor law “hot topics” that relate to trends Littler has been monitoring for the last five to ten years. This introductory section is intended to paint these topics with a broad brush, and the subsequent sections of this publication discuss many of these trends in greater detail.

### Hot Topic #1: Dangerous Workplaces

There is no question that the world is still a place of potential treachery. About 10% of US expatriates are assigned to countries and situations that would be classified as dangerous. The potential legal ramifications for employers need to be considered.

A recent lawsuit highlights the potential risk to employers in making certain foreign assignments. In December of 2009, two Scottish oil workers were kidnapped in Nigeria. The workers had previously complained that there was poor security. Significantly, the employer failed to make a risk analysis prior to the overseas assignment. The lawsuit that followed was brought on a theory that works in most countries – breach of the duty to provide a safe workplace.<sup>2</sup>

A “dangerous workplace” can pose risks ranging from terrorism or kidnapping to lack of infrastructure, lack of medical facilities, or extreme physical conditions. A detailed Littler Report,<sup>3</sup> which provides both a legal and practical guide to dealing with international employee assignments, recommends developing a comprehensive strategy that includes consideration of factors such as: (1) determining the assignees’ access to health care and health insurance; and (2) having an international assignment policy and agreement. Because of the significant issues raised, this topic is discussed in greater detail below in Section II.

### Hot Topic #2: Social Media and Global Privacy

More than a decade ago, email and the Internet redefined the workplace. Now, there is a compliance challenge regarding social media with the line between one’s private life and work life becoming increasingly more difficult to define. New policies have to be written and enforced.

There has been an explosive growth of social media. One year ago, Facebook had 500 million users. Today, Facebook has 800 million users. Half of them log in daily, and 75% of the users are outside of the United States. If you add LinkedIn, you have a revolution, not just in the Middle East, but literally across the world.

One challenge is whether access to social media should be viewed as an “entitlement.” A 2010 poll conducted for the BBC World Service found that almost four in five people around the world believed that access to the Internet is a fundamental right.<sup>4</sup> Finland recently became the first country in the world to adopt a statute that made broadband Internet access a civil right. France already has essentially recognized

1 See *Los Angeles Times*, *World Population Hits 7 Billion on October 31, or Thereabouts*, L.A. TIMES, available at <http://articles.latimes.com/2011/oct/31/world/la-fg-seven-billion-baby-20111031>.

2 See *Oil & Gas Financial Journal* (Sept. 1, 2011).

3 See *February 2011 Littler Report: Managing the Global Workforce- A Legal and Practical Guide to Dangerous International Employee Assignments*, by Phillip M. Berkowitz and Michael G. Congiu, available at: <http://www.littler.com/publication-press/publication/managing-global-workforce-%E2%80%93-legal-and-practical-guide-dangerous-intern>.

4 *Internet access is 'a fundamental right'*, BBC NEWS, Mar. 8, 2010, <http://news.bbc.co.uk/2/hi/8548190.stm> See also Billy Hallowell, *Should the Federal Gov't Consider Internet Access a 'Civil Right?' At Least One Faith Group Says "Yes."* THE BLAZE, Aug. 15, 2011, <http://www.theblaze.com/stories/should-the-federal-govt-consider-internet-access-a-civil-right-at-least-one-faith-group-says-yes/>.

this right in its Constitution, and in the United States, the Federal Communications Commission is considering making Internet access a recognized right.

Regardless of the legal structure or whether access to the Internet is viewed as an entitlement, a related trend affecting employers involves employees bringing their Internet connection gadgets (e.g. smartphones, tablets) to work with them. According to a report in *The Economist*, a survey of 3,000 workplaces indicates that in 2010 approximately 30% of the Internet devices used for work were personal devices, and this increased to 40% in 2011.<sup>5</sup>

This trend has had an impact on employer policies, as best illustrated by IBM which, as of October 2011, announced that employees were going to be permitted to bring their personal smartphones and tablets to work, and further stated that it would assist employees to configure such devices to support workplace applications.<sup>6</sup> Employers must take care, however, in developing policies permitting employees to bring such devices into the workplace.<sup>7</sup> Such policies need to take into account local differences. For example, laws in China and South Korea make it a criminal offense to send out a “kill command” (i.e. destroy electronic information) to an employee’s personal device.

Employees’ use of social media for professional purposes also has impacted privacy protection laws. For example, while reliance by employers on social media for hiring purposes may be a source of potential liability in some jurisdictions, a draft law in Germany would permit background checks using social media: (1) if the information is publicly available; and (2) if the social network is designed for professionals (e.g. LinkedIn). The caveats under the proposed law are that the employer must notify the applicant in advance and cannot rely on social media activity other than what is intended to be professional (e.g. Facebook activity is off limits).<sup>8</sup>

### Hot Topic #3: Whistleblowing and Overcoming Business Corruption as a Priority

Employers in the United States have become more sensitized than ever to issues surrounding employees’ allegations of corrupt business practices, and these issues remain in the forefront for government agencies. For example, in November 2011, the US Department of Labor’s Occupational Safety and Health Administration announced that it would be seeking public comment to planned amendments to the whistleblower provisions of the Sarbanes-Oxley (“SOX”) Act. The proposed changes include the right of an individual to complain orally in any language about financial fraud or corruption.<sup>9</sup>

In the United States, and increasingly around the world, there is a fundamental change taking place, transforming the whistleblower from the “snitch” to the ethical hero. For example, the number of retaliation charges filed with the US Equal Employment Opportunity Commission hit record levels in Fiscal Year 2011.<sup>10</sup> In dealing with Dodd-Frank and whistleblowers, there recently was a 15 second advertisement in every movie theatre in the New York Tristate Area in which plaintiffs’ lawyers promised potential whistleblowers a significant “return” on their “investment.”

Outside the United States, European efforts to strengthen whistleblower protection are in full gear. In July 2011, the European Court of Human Rights (ECHR) issued a major decision holding that an employee’s filing of a criminal complaint alleging substandard treatment of nursing home patients was justified and in good faith, and that the employee’s dismissal was disproportionately severe.<sup>11</sup> The ECHR stressed the importance of whistleblowing in the fight for accountability and against corruption, and invited EU member states to review their legislation concerning whistleblower protection.

5 *Personal technology at work: IT's Arab spring*, THE ECONOMIST, Oct. 8, 2011, available at <http://www.economist.com/node/2153112>.

6 See Matt Hamblen, *IBM opens up smartphone, tablet support for its workers*, COMPUTERWORLD, Oct. 31, 2011, available at [http://www.computerworld.com/s/article/9221289/IBM\\_opens\\_up\\_smartphone\\_tablet\\_support\\_for\\_its\\_workers](http://www.computerworld.com/s/article/9221289/IBM_opens_up_smartphone_tablet_support_for_its_workers).

7 Littler has developed comprehensive guidelines that should be considered before permitting employees to bring personal devices into the workplace. See *Managing Employees' Use of Personal Smartphones and Tablets for Work*, Littler Workplace Privacy Counsel Blog, Apr. 26, 2011, at <http://privacyblog.littler.com/2011/04/articles/data-security/managing-employees-use-of-personal-smartphones-and-tablets-for-work/>.

8 See *As Germany Considers Restrictions on Use of Social Media for Recruiting, Multi-National Employers Need to Start Thinking About Social Media Policy 2.0*, Littler Workplace Privacy Counsel Blog, Sept. 10, 2010, at <http://privacyblog.littler.com/2010/09/articles/social-networking-1/as-germany-considers-restrictions-on-use-of-social-media-for-recruiting-multinational-employers-need-to-start-thinking-about-social-media-policy-20/>.

9 See Phillip Berkowitz, Katherine Franklin and Shannon Morales, *OSHA's Interim Final Regulations Clarify the Whistleblower Complaint Investigation Process and Define Available Remedies*, Nov. 15, 2011, at <http://www.littler.com/publication-press/publication/oshas-interim-final-regulations-clarify-whistleblower-complaint-invest>.

10 See <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

11 See *Heinisch v Germany*, ECHR (July 21, 2011).

The UK Bribery Act, which went into effect on July 1, 2011, has been described as the FCPA's "second cousin." The Act is similar to the FCPA in that it bans companies with ties to Britain from paying bribes overseas.<sup>12</sup> Robert Amaee, former Head of Anti-Corruption and Proceeds of Crime Unit at the UK Serious Fraud Office, has described the new law as "giving the prosecutors an extended reach." According to Amaee, the prosecutor for the Bribery Act has come out and said that they "will be looking to make it a priority to go after foreign companies that disadvantage British business interests overseas."<sup>13</sup>

In reviewing an employer's compliance obligations under the UK Bribery Act, employers should pay special attention to the provision assigning potential criminal liability for a company's failure to prevent bribery. As further discussed below in Section IV, this provision clearly indicates that an employer must have a program and system in place that ensures complaints will be raised and investigated, a valid code of conduct, a compliance procedure, and associated training.

#### Hot Topic #4: The New Face of Discrimination

A report recently issued by the International Labour Organization (ILO) identified the various challenges around the globe in dealing with workplace discrimination.<sup>14</sup> According to the report:

[R]apid advances have been made with legislation to prohibit discrimination on the basis of disability and age. Race and sex continue to be the two grounds of discrimination which are specifically included in almost all legislation for equality and against discrimination at work. However, less progress has been made in obtaining explicit mention of other grounds for discrimination, such as national extraction, social origin and political opinion.

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Around the world, new laws have been introduced or existing legislation amended to eliminate discrimination based on age, maternity and marital status, disabilities, lifestyle and genetic predisposition.

The ILO report highlighted newer areas, such as potential discrimination against migrant workers that have been particularly affected by the economic crises with "reduced employment or migration opportunities and increased xenophobia, a deterioration in working conditions and even violence." Another area less defined involves discrimination on the basis of social origin, particularly in regions where rigid social stratification prevails. The ILO Report used the example of caste-based discrimination in South Asia.

In the United States, there also are new trends to closely monitor, and one trend found nowhere else in the world involves "unemployment discrimination." In November 2010, 54 members of Congress submitted a letter of concern to the EEOC's Chair, urging the EEOC to investigate whether discrimination on the basis of being unemployed has an adverse impact on minorities. In February 2011, the EEOC held hearings on this issue, and a spokesman made it clear that although there is no provision within Title VII to protect the unemployed as a protected class, minorities are more likely to be unemployed. Further, the EEOC considers the exclusion of unemployed job-seekers from applicant pools to be an "emerging practice."<sup>15</sup>

12 See <http://blogs.wsj.com/law/2011/07/01/u-k-s-harsh-new-bribery-law-goes-live/>.

13 The interview of Robert Amaee was broadcast on a Russian television news program on July 1, 2011.

14 *Equality at work: The continuing challenge*, International Labour Conference, 100th Session, 2011 at [http://www.ilo.org/ilc/ILCSessions/100thSession/reports/reports-submitted/WCMS\\_154779/lang-it/index.htm](http://www.ilo.org/ilc/ILCSessions/100thSession/reports/reports-submitted/WCMS_154779/lang-it/index.htm).

15 See *EEOC Holds Public Hearing on Unemployment Discrimination*, Washington DC Employment Law Update, Feb. 17, 2011, at <http://www.dcmemploymentlawupdate.com/2011/02/articles/eec-1/eec-holds-public-hearing-on-unemployment-discrimination/>. In December 2011, the Senate Committee on Health, Education, Labor and Pensions held a hearing to discuss barriers that the unemployed face in the job market. During the hearing, Committee Chairman Tom Harkin (D-IA), along with other Democratic senators, promoted legislation that would prohibit discrimination against job applicants based on their unemployment status. *Senate Committee Hearing Examines Hiring Barriers for the Unemployed*, Washington DC Employment Law Update, Dec. 8, 2011, at <http://www.dcmemploymentlawupdate.com/2011/12/articles/discrimination-in-the-workplac/senate-committee-hearing-examines-hiring-barriers-for-the-unemployed/>.



Legislation recognizing unemployment as a protected category could be gaining momentum. New Jersey recently adopted a statute prohibiting any job listing that current employment is a requirement for job consideration.<sup>16</sup> Other states, such as New York,<sup>17</sup> may soon follow, and this type of prohibition was included in President Obama's Jobs Bill submitted to Congress. While similar legislation may not yet be on the horizon in other countries, it may come in as part of social origin discrimination.

Finally, one area that has gained increased visibility in the United States and around the globe involves bullying in the workplace. Legislation banning such harassing behavior has gained a foothold in various countries around the globe and is a topic of increased discussion in the United States. For that reason, Section VII below is devoted to this topic.

### Hot Topic #5: Arbitration and the Rise of "Soft Law"

Contracts, international framework agreements, and codes of conduct create a whole host of issues that are going to actually equalize business standards and employment practices across the world, and arbitration agreements are increasingly becoming an important part of this equation.

In discussing contractual obligations, arbitration agreements have come front and center in the United States. There were three US Supreme Court decisions in 2010 supporting arbitration,<sup>18</sup> two of which Littler litigated. In 2011 there was another critical decision, *AT&T Mobility v. Concepcion*, which ruled that a written arbitration agreement waiving class action lawsuits is enforceable under the Federal Arbitration Act.<sup>19</sup> While the *Concepcion* ruling potentially remains under challenge by the NLRB, most of the legal impediments to arbitration have fallen, which clearly indicates that many employers not currently relying on arbitration agreements to resolve individual employee disputes may seriously consider doing so.

In an international context, assume you have an arbitration agreement as a company policy, and you send somebody to Indonesia, or to Brazil. What is going to happen to your arbitration mechanism? Is it going to be supported? First, there is the UN Convention on honoring arbitration awards.<sup>20</sup> While arbitration agreements generally are enforced under the UN Convention, if enforcing the agreement involves waiving a statutory right and/or diverting it to an arbitration forum, it may be subject to challenge, and enforcement may vary from country by country.<sup>21</sup>

Turning next to employment contracts, while this is too broad a topic for a summary discussion, employment contracts are absolutely critical, mandated in several countries, and may be essential for global mobility, tax and benefit issues.<sup>22</sup>

Finally, labor organizations have united worldwide by industry in order to advocate for uniform and fair labor standards. Global Union Federations (GUFs) are worldwide federations of unions who represent employees working in a specific industry, craft or occupation. Recently, GUFs have increased pressure on multinational companies to enter into International Framework Agreements (IFAs) or international codes of conduct.<sup>23</sup> The IFAs or codes of conduct commit a company to respecting minimum labor standards in its operations around the world. Typically, such agreements offer commitments on trade union rights, collective bargaining rights, information and

16 See N.J. STAT. ANN. § 34:8B-1, prohibiting discrimination against the unemployed, which became effective June 1, 2011, banning any job listing that current employment is a requirement for job consideration.

17 In May 2011, similar legislation was introduced in the New York State legislature. See [http://newsandinsight.thomsonreuters.com/New\\_York/News/2011/05\\_-\\_May/New\\_York\\_bill\\_would\\_ban\\_unemployment\\_discrimination/](http://newsandinsight.thomsonreuters.com/New_York/News/2011/05_-_May/New_York_bill_would_ban_unemployment_discrimination/).

18 *Rent-A-Center v Jackson*, 130 S. Ct. 2772 (2010); *Granite Rock Co. v Teamsters*, 130 S. Ct. 2847 (2010); *Stolt Nielsen v Animal Feeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

19 *AT & T Mobility v Concepcion*, 131 S. Ct. 1740 (2011).

20 The United Nations Convention on the Recognition and Enforcement of International Arbitral Awards requires signatories to recognize written agreements in which the parties have agreed to arbitrate their disputes. The Convention defines a *written agreement* as one that includes "an arbitral clause ... signed by the parties or contained in an exchange of letters." If an agreement meets this requirement, a court is required to refer the parties to arbitration unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

21 See, e.g., *Vedachalam v. Tata America Int'l Corp.*, No. 08-15521 (9th Cir. July 31, 2009). In an unpublished opinion, the US Court of Appeals for the Ninth Circuit in *Vedachalam* denied a multinational employer's request to compel arbitration and have its employees' claims heard by an arbitrator in Mumbai, India pursuant to the United Nations Convention on the Recognition and Enforcement of International Arbitral Awards. The court found there was *no mutual agreement* between the employees and the employer to arbitrate disputes in India. For a detailed discussion of the case, see *Littler ASAP, Blocks in the Road to Enforcing Foreign Arbitration Clauses in the United States*, by John C. Kloosterman and Sarah R. Nichols (Aug. 21, 2009), available at <http://www.littler.com/publication-press/publication/blocks-road-enforcing-foreign-arbitration-clauses-united-states>.

22 Section III below discusses cross-border agreements in greater detail.

23 For a review of the more active GUFs in various industries, see <http://www.global-unions.org>.

consultation, equal opportunities, safety and health, minimum wage standards, and the banning of child labor and forced labor. Employers with global operations need to take care before adopting IFAs due to the obligations they may create, some of which may not even be anticipated at first blush. Employers should anticipate that the pressure to adopt IFAs will become more prevalent in the coming years.<sup>24</sup>

### Hot Topic #6: The Rise of the Contingent Workforce Worldwide

The rise of the contingent workforce worldwide, a trend we have been following and commenting on for several years, accelerated in 2011. Recent developments demonstrate that employers must carefully review applicable law in the jurisdictions in which they operate.

Unexpected developments have arisen based on the use of contingent workers, as best illustrated by implementation of the UK Agency Workers Regulations of 2010, which took effect on October 1, 2011. Under these Regulations, a temporary worker who works for an employer longer than twelve weeks must be paid on a comparable basis to a regular worker.<sup>25</sup> Court decisions abroad have created similar risks for employers. Again, using the United Kingdom as an example, a UK Superior Court recently reviewed the independent contractor agreements between a car cleaning service and its car valet (auto detailing) staff, and when the court looked into the actual substance of the relationship, the court deemed it to be an employment relationship. The court thus converted the independent contractor agreements into employment contracts and gave full rights to the individuals as employees.<sup>26</sup> This is part of a war that is being fought all over the world, and the focus essentially involves tax revenue being sought by the applicable government entity. Similar results have arisen in the United States, as illustrated by a new California law, imposing significant penalties for misclassification of workers.<sup>27</sup>

Regardless of the risks posed by reliance on contingent workers, employers need to embrace the trend because it will continue. Enterprises now exist that gather hundreds of thousands of "virtual" independent contractors and match them with employers all over the world.<sup>28</sup> The proportion of contingent workers in the United States now has just crested above 25%. The actual number of contingent workers may not even be obvious to many companies because they may be billed by purchase orders and a record is thus not kept concerning the number of contingent workers relied on by the organization.

The upshot is that employers need to determine all areas in which they may benefit from contingent workforce arrangements and savings. At the same time, care must be taken in dealing with this potential legal minefield, closely reviewing applicable law in the jurisdictions where employers rely on contingent workers.

### Topic #7: Global Mobility

Another trend truly demonstrating that business is becoming more global and interconnected involves global mobility. Approximately 3% of the world's 7 billion people live outside their country of origin.<sup>29</sup> This trend has been accelerating almost non-stop over the last 20 years, and it is a trend that has continued during a recession.

Among developed countries, between 8 and 10% of the workforce is generally in the migrant or expatriate category. On the other hand, some countries, such as Switzerland, Dubai and the Emirate Republics are significantly higher, approaching 70%.<sup>30</sup>

When considering having employees work across borders, employers need to take care in drafting employment agreements affecting such workers, including outlining tax-related issues in advance. Because of the complexities involved, a separate section in this publication addresses best practices for cross-border agreements. Notwithstanding, one practical consideration in assigning workers to work outside the

24 To prepare for dealing with IFAs, employers will need to learn about the International Labour Organization (ILO), ILO conventions and the relevance that they have outside the United States, which is coming back to the United States, often in the form of IFAs. Due to the importance of this issue, Section VI below is devoted to global union federations, international labor standards, and human rights.

25 Based on the regulations, while pay includes general compensation, breaks and rest periods and annual leave, it excludes sick pay, maternity pay and pensions. Strong penalties apply to the extent that employers attempt to circumvent the law. See *The Agency Workers Regulations 2010*, at <http://www.legislation.gov.uk/ukxi/2010/93/regulation/6/made>.

26 *Autoclenz Ltd v Belcher and others* [2011] UKSC 41 (July 27, 2011), available at <http://www.bailii.org/uk/cases/UKSC/2011/41.html>.

27 See GJ Stillson MacDonnell and Alison Hightower, *New California Law Discourages Independent Contractors and Sole Proprietorships by Potentially Penalizing Businesses that Use Their Services*, Oct. 31, 2011, available at <http://www.littler.com/publication-press/publication/new-california-law-discourages-independent-contractors-and-sole-propri>.

28 See, e.g., David Schepp, *More Jobs Being Created Online, Report Says*, Nov. 10, 2011, *jobs.aol.com* at <http://jobs.aol.com/articles/2011/11/10/report-suggests-more-jobs-being-created-online/>. Examples of online services that match freelance workers with opportunities include oDesk and Elance.

29 See, e.g., United Nations Population Fund, at <http://www.unfpa.org/pds/migration.html>.

30 See, e.g., *Key Statistics on migration in OECD countries*, at [http://www.oecd.org/document/30/0,3746,en\\_2649\\_37415\\_48326878\\_1\\_1\\_1\\_37415,00.html](http://www.oecd.org/document/30/0,3746,en_2649_37415_48326878_1_1_1_37415,00.html).

United States on a temporary basis is bringing them back to the United States prior to terminating the employment relationship. Otherwise, the employer inadvertently may expose itself to the country's laws and regulations where the employee is temporarily assigned.

### Hot Topic #8: Third-Party Funding of Litigation

A final topic that most likely will gain visibility in the next couple of years, and is revolutionary in nature, involves third-party funding of employment litigation. Such funding can change the entire dynamics of litigation. While employers typically envision litigation being solely between the employer and employee (or former employees) and their counsel, additional sophistication and expenses can be injected into the litigation with third party funding. This phenomenon also is becoming more global in nature.

On December 21, 2007, history was made when a small announcement appeared in the *Times of London*. It involved a public offering for Juridica Investments, Ltd. on the London Stock Exchange's Alternative Investment Market. The investment was primarily in American litigation and the equivalent of \$160 million was raised.<sup>31</sup> This was followed by Burford Capital and by early 2010, six offerings (public and private) had been made in three countries with investments in American litigation.<sup>32</sup> Numerous banking institutions, private companies, and hedge funds have subsequently created divisions for the purpose of funding US-based litigation.

The types of claims financed by third parties also continue to expand. For example, Oasis Legal Finance lists on its website the types of claims it will finance, and workplace discrimination claims are included.<sup>33</sup> Whistleblowers are also finding support, and several hedge funds are trolling for potential clients that they can underwrite.<sup>34</sup> Imagine the impact on such litigation if an employee, who is relatively unsophisticated, makes a whistleblowing complaint and retains an attorney who secures several hundred thousand dollars of financing and very sophisticated additional legal counsel to bring the action against the employer.

Twenty-nine states in the US allow some form of "champerty" (*i.e.*, a proceeding by which a person not a party in a suit bargains to aid in or carry on its prosecution in consideration of a share of the matter in suit). Around the world, based on preliminary findings, many countries are either silent or permissive with regard to champerty. In evaluating this trend, from an employer perspective, there is Employer Practice Liability Insurance (EPLI) to protect the employer. Under the circumstances, it is not particularly surprising that having a form of financial assistance for the plaintiff is going to be supported. Even so, there may be significant resistance by the courts in supporting this trend in dealing with class actions — there is no way the "class" can consent in advance to such financing.<sup>35</sup>

While employers may not be inclined to speak up publicly and oppose third-party funding of litigation, employers are encouraged to closely monitor this trend and work within their respective associations to challenge such funding. In any litigation, potential third-party funding should be explored in discovery. And, because such funding makes the threat of litigation significantly higher, the return on investment of a strong compliance program is further enhanced.

### Final Comments

While this publication focuses on a series of labor and employment law compliance and related issues faced by global employers, all of these factors need to be put into perspective. Business is undergoing an attack and a change that is going to redirect the way social policy is handled by institutions and employers that are built primarily on an economic foundation.

As we look around the world, we are witnessing widespread discontent. 2011 started with the uprising in Tunisia. This was followed by the Syrian uprising in late January 2011. By the fall of 2011, there were protests outside the London Stock Exchange and over 200,000 protested in Rome, aside from widespread protests against the financial community by Occupy Wall Street in the United States, from Oakland

31 See Juridica Investments Ltd.'s website, <http://www.juridicainvestments.com/about-juridica.aspx>.

32 See Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571 at 572-73 (2010), available at <http://www.uclalawreview.org/wordpress/?p=1467>.

33 Oasis Legal Finance website, [http://www.oasislegal.com/civil\\_rights\\_lawsuit\\_funding](http://www.oasislegal.com/civil_rights_lawsuit_funding) (last visited Jan. 25, 2012).

34 See Ed Silverman, *Wall Street Wants to Bet on Pharma Whistleblowers*, *Pharmalot.com*, Jan. 6, 2011, available at <http://www.pharmalot.com/2011/01/wall-street-wants-to-bet-on-pharma-whistleblowers/>.

35 See US Chamber Inst. for Legal Reform, *Selling Lawsuits, Buying Trouble: The Emerging World of Third-Party Litigation Financing in the United States*, 2009, available at <http://www.instituteforlegalreform.com/doc/selling-lawsuits-buying-trouble-the-emerging-world-of-third-party-litigation-financing-in-the-un>.

to New York City. This led to protestors holding a day of coordinated action in cities across the world.<sup>36</sup> The movement is worldwide, sharing the complaint that business does not care about people and demanding that business be more ethically responsible and subject to more regulations. These developments foreshadow the fact that business is going to be global, and, as a consequence, there is going to be a push to bring employment law standards into a common environment. Littler's Global Employer Institute and this publication is part of the ongoing dialogue to address these issues.

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<sup>36</sup> See, e.g., Justin Elliott, *Occupy Wall Street Goes Global: 900 Protests Around the World, Thousands in Times Square*, *AlterNet*, Oct. 16, 2011, at [http://www.alternet.org/story/152752/occupy\\_wall\\_street\\_goes\\_global%3A\\_900\\_protests\\_around\\_the\\_world\\_thousands\\_in\\_times\\_square?akid=7722.6311.9XfHTj&rd=1&t=16](http://www.alternet.org/story/152752/occupy_wall_street_goes_global%3A_900_protests_around_the_world_thousands_in_times_square?akid=7722.6311.9XfHTj&rd=1&t=16).

## II. INTERNATIONAL SECURITY: KEEPING EMPLOYEES SAFE IN DANGEROUS LOCALES<sup>37</sup>

### A. Introduction — 2011: A Year of Tumult and Transition

2011 was a year of dramatic political and historical significance by any measure. The world saw a wave of popular uprisings throughout the Middle East and North Africa. The final chapters to these events have yet to be written. It is impossible to predict the effect on the political and social infrastructures of the “Arab Spring.” Also in 2011, Japan endured a devastating tsunami that led to a tragic and extensive loss of life and property. The political and historical significance of these events highlights that employees of multinational companies stationed or traveling abroad may be in positions of unexpected personal risk.

This GEI session addressed the critical and often overlooked need to prepare and implement a thoughtful and comprehensive plan for employees working in, or traveling to, volatile locales. The panelists shared experiences that ranged geographically from Latin America and the Middle East to Africa. They focused their discussion on both the legal context and practical solutions.

### B. International Security — The Legal Perspective

The US Occupational Safety and Health Act, which generally governs workplace safety, does not apply to extraterritorial job assignments. However, several states’ workers’ compensation acts<sup>38</sup> contain coverage for “traveling employees” that may, depending on the nature and duration of a particular assignment, extend to cover employees injured while working abroad.<sup>39</sup> This doctrine may, for example, apply to an employee who is injured or killed on a brief overseas assignment, but it ordinarily will not apply to an employee stationed overseas for an extended period of time.

An additional source of potential liability to employers under US law arises under negligence theories. In *Hicks v. Waterman Steamship Corp. & Maersk Line, Ltd.*,<sup>40</sup> for example, a cargo-ship steward claimed that his employer negligently placed him in harm’s way. Taken hostage by Somali pirates, the steward sued in Texas, alleging that his employers “knowingly sent their employees ... into pirate-infested waters rather than taking safer routes.” He alleged that they were negligent in that they allegedly failed to “furnish him a safe place to work and a seaworthy vessel.”<sup>41</sup>

Employers’ liability may also extend to non-employees, such as employees contracted with a foreign subsidiary. In *Curtis v. Beatrice Foods Co.*,<sup>42</sup> a manager contracted to handle the operations of a Beatrice Foods (“Beatrice”) subsidiary was kidnapped on assignment in Colombia. The manager was held for eight months, and was eventually freed, but only after Beatrice paid approximately \$500,000 in ransom. Among other claims, the manager sued in New York under a negligence theory, claiming that Beatrice should have transferred him out of harm’s way. The district court declined to hold Beatrice liable, in part because the manager was fully aware that the area in which he was to live “was in a state of great unrest.” He had been warned by the US embassy about kidnapping threats against him, and had received training from a security consultant. This case therefore illustrates how having a plan in place to handle the risks associated with international assignments can benefit companies in litigation.

37 This session was led by Littler Shareholder Philip Berkowitz. The panel also included Littler Shareholders John Kloosterman and Juan Carlos Varela, as well as Vivian Osayande, Senior Associate, Templars (Nigeria) and John Imhoff, who is Director, Office of Firm Security with Ernst & Young, LLP. Littler also very much appreciates the valuable insights and contributions of attendees.

38 Workers’ compensation coverage offers significant benefits, both to employees and employers. First, workers’ compensation coverage normally provides the injured employee with a guaranteed remedy. And second, coverage generally *precludes* the employee from bringing a civil lawsuit against the employer for injuries suffered on assignment, and limits the damages to defined statutory limits. Companies may also consider purchasing Foreign Voluntary Workers’ Compensation Coverage, which provides coverage for overseas injuries that would not fall under a statutory workers’ compensation scheme. Although these products may be useful, they likely will not bar a civil lawsuit.

39 See, e.g., *Khan v. Parsons* 428 F. 3d 1079 (D.C. Cir. 2005) ; *S. Motor Lines Co. v. Alvis*, 104 S.E.2d 735 (Va. 1958); *Leonard Van Stelle, Inc. v. Indus. Accident Comm’n*, 59 Cal. 2d 836, (1963); *Markoholz v. Gen. Elec. Co.*, 193 N.E.2d 637 (N.Y. 1963); *Capizzi v. S. Dist. Reporters, Inc.*, 459 N.E.2d 847, 849-50 (N.Y. 1984); *Voight v. Rettinger Transp., Inc.*, 306 N.W.2d 133, 138 (Minn. 1981); *Epp v. Midwestern Mach. Co.*, 208 N.W.2d 87, 89 (Minn. 1973).

40 See *Hicks v. Waterman Steamship Corp. & Maersk Line, Ltd.*, Cause No. 2009-26129 (Harris County, Texas, 270th Jud. D. (filed Apr. 9, 2009)); see also T. Weidlich, *Maersk Cook Sues Over Job in ‘Pirate-Infested’ Waters*, BLOOMBERG (Apr. 27, 2009), at <http://bloomberg.com/apps/news?pid=20670001&sid=aAkA04yh88to> (last visited Jan. 12, 2011).

41 The merits of this case have not been decided. After being remanded to Texas State Court, the most recent published decision dismissed one of the defendants for lack of personal jurisdiction. *Waterman S.S. Corp. v. Ruiz*, 2011 Tex. App. LEXIS 6881 (Aug. 25, 2011).

42 481 F. Supp. 1275 (S.D.N.Y. 1980).



In addition, many countries have developed duty-of-care laws that inform employers' legal obligations to employees on overseas assignment.<sup>43</sup> Under UK law, for example, employees can pursue criminal claims under the Corporate Manslaughter and Corporate Homicide Act of 2007 for deaths that occur within the United Kingdom. There is some question, however, as to whether a duty of care under UK common law applies extraterritorially.<sup>44</sup>

## C. International Security — The Practical Perspective

Managing assignments to dangerous places is a significant challenge. Careful planning and sound policies are necessary to mitigate risks and to ensure a successful assignment.

### 1. Initial Considerations

Any company planning to assign an employee to a foreign country should have an understanding of the legal requirements of their own country and the host country, including an understanding of the applicable workers' compensation and occupational health and safety laws, and whether those laws apply extraterritorially.

Employers should gauge the specific threats posed in the host country, and develop a plan based on those specific risks. The existence of war or civil insurrection brings with it different challenges than a risk of natural disaster, and overall strategies should be informed by the specific risks posed in the host country. As one panelist noted during the session, planning for specific risks can be benchmarked, and consulting with security professionals or experienced legal counsel may be necessary.

Identifying the appropriate individual for the international assignment is also critical. This decision should be based on the individual's professional and technical competence, as well as personal traits, including cultural flexibility, language skills, and constitution. As one panelist noted, it may be advisable to choose an assignee who has volunteered for the assignment.

Employers may wish to consult a cultural consultant to help identify the best candidates for the assignment. Once the candidate is chosen, the value of properly training that candidate to be responsible for his or her own health and safety cannot be overstated. The panelists noted that simply knowing how to keep a low-profile, particularly in locales where foreign workers are targeted, can be crucial.

### 2. Developing a Comprehensive Plan

Each international assignment is unique, and the considerations detailed below provide merely a starting point for analysis.

It is important to involve, whenever appropriate, an assignee's family in the process of exploring whether the proposed assignment is a good fit and training the assignee on the risks associated with the assignment. This can include, for example, communicating with assignees and their families prior to the assignment about the appropriate lines of communication and the anticipated response strategy in the event of a crisis.

A panelist noted that establishing an emergency protocol and communication plan is crucial. This may include:

- Formalizing and communicating country or regional contact points and phone numbers.
- Defining a protocol for assigning "critical" status to crisis situations. Companies should develop local sources to ensure that their assessment of the situation is valid and current.
- Ensuring that employee emergency contact numbers, as well as home and office phone numbers, are on record with the home office and the country contact person.
- Conducting emergency evacuation briefings upon assignment and at updates during assignments, particularly in areas of potential risk or conflict.
- Creating a hotline for assignees' families to contact to learn up-to-date information on the safety and whereabouts of the employees.
- Equipping employees with GPS tracking devices to help locate them in an emergency.

<sup>43</sup> For a more detailed analysis of the legal requirements under US and other countries' law, see Philip M. Berkowitz and Michael G. Congiu, *Managing the Global Workforce — A Legal and Practical Guide to Dangerous International Employee Assignments* (Feb. 2011), available at, <http://www.littler.com/PressPublications/Lists/Littler%20Reports/DispReport.aspx?List=f832dc0b%2Dc3fc%2D48f0%2D84ca%2Dbf8526069f24&ID=35>.

<sup>44</sup> *Longworth v. Coppas Int'l Ltd.*, 1985 SLT 111 (dismissing UK widow's claims arising from husband's death in Iraq because death was caused by act of war that employer had no legal duty to protect against, and without indicating whether UK common law duty of care applied extraterritorially).

The prevalence of medical emergencies was also addressed. Although international health insurance is recommended, employers should ensure that their benefits scheme does not run contrary to local laws regarding compulsory coverage. Local regulatory regimens can be restrictive or exclusive, and may be tied to the employee's expected length of stay in the country. (For example, Singapore requires that all employers purchase and maintain insurance for the medical expenses of foreigners working in the country.)

Beyond navigating the insurance regimes of local jurisdictions, employers should consider the following:

- Determine the appropriate strategy for medical care while on assignment. To what extent will the employee use a company doctor? Under what circumstances will the employee be allowed to return home to receive medical care?
- Will medical crisis evacuation to the home country or a nearby country be available?
- Ensure that the assignee has all necessary vaccinations prior to assignment.
- Ensure that the assignee has been briefed on the risks, and signs, of dangerous insect, food and water borne illnesses.
- Determine availability of psychological or other mental-health services.

### **3. Developing the Appropriate Documents**

Finally, employers should not overlook the importance of having a carefully drafted international assignment policy, as well as an individual international assignment agreement for each employee. These help create a basic road map for all parties, and to define the particular assignment in terms of compensation, benefits, and health and other insurance.

Enhanced compensation is one reason why employees will consider accepting international assignments, and compensation and benefits become even more critical when employees are asked to accept assignments in dangerous locales. Most companies sending employees to dangerous locations pay allowances that will compensate the employee for extreme living conditions and/or danger — usually an extra 10% to 25% of the base salary, depending on location. Other benefits, such as bodyguards, secure housing, and guaranteed and secure access to healthcare, should also be considered.

Another consideration that should be incorporated into an assignment agreement involves the assignment's structure, including its term. Beyond the assignment's term, employers should consider rotating the assignment between time on location and vacation, or amongst different assignees.

Whatever plan or assignment documents are created, employers must be proactive. Doing so protects employers from liability, and helps ensure that their international assignees are safe and focusing on successfully completing their assignment.

### III. BEST PRACTICES FOR CROSS-BORDER EMPLOYMENT AGREEMENTS<sup>45</sup>

A typical scenario for an in-house employment counsel is for a senior manager to call (usually on a Friday afternoon) saying something to the effect that: “I flew this person in California over to Brazil last week, and now we need to get something in place so that they can stay there for three years. Can you get this sorted out this afternoon please?” So, proactive planning often is not the immediate concern for counsel; rather, the focus is on quickly identifying what needs to be addressed in drafting the documentation. But there are certain essential factors that should be considered and which will bear on whether the assignment will be a success or failure, and whether there may be legal complications later on.

#### A. Selecting the Right Person for the Assignment

Even when a manager already has identified a specific employee to send on an overseas assignment, consideration of the following issues may reveal significant unexpected costs, that the individual is not the best choice for the assignment, or other issues that need to be resolved:

- Skills, experience, language capability
- Passport status, visa eligibility
- Tax issues
- Family circumstances
- Cultural adaptability
- Disclosures regarding conditions of life and local business environment

Tax issues may be the most significant of these in many cases. When sending a US citizen globe-trotting, in most circumstances he or she will inevitably be taxed in two different countries. Tax domicile must be determined, as well as the cost of any tax equalization that the company may need to provide. The cost of obtaining tax advice for the company and the employee in two different countries also should be factored into the incidental real cost of the assignment.

Regarding work authorization issues, as unemployment rates have remained high worldwide, many countries have implemented stricter requirements for work visas. For example, although American companies had been accustomed to having their employees easily qualify for work visas when they are transferred on assignment to the United Kingdom, in order to qualify now under the intra-company transfer category, such employees must have been working for the US company for at least a year prior to the transfer unless they can otherwise qualify under the UK points system. So, hiring someone in the United States with a view to sending them right away to the London office will not turn out as expected. Similarly there may be different restrictions or caps on visas for citizens of certain countries that are more problematic than those for citizens of the United States, so assumptions should not be made about the nationality of an employee who may have work authorization in the United States but is not a US citizen.<sup>46</sup>

Family status issues could include whether parents or dependent adult children will be allowed residency, whether partners or companions who are not legally married to the employee to be transferred will be allowed residency or the right to work based on the employee's work visa.

There also considerations as to how the company will define “family members” for purposes of relocation costs and size of housing. Employers of mobile employees should have some internal guidelines to follow to ensure consistency and compliance with applicable non-discrimination laws in how relationships will be handled. Residency or work visas for non-married relationships or other family members may not be granted, or may require proof of the longevity of the relationship.

Cultural and business environment issues away from the home country may involve tricky issues of gender or race discrimination that could adversely impact the employee's personal experience and professional success, and require advance discussion or strategies to

<sup>45</sup> This session was led by Littler Shareholder Elizabeth Lalik. The other panelists were Matt Forsyth (Sapient Corporation); Andrew Matz (Reed Elsevier, Inc.); Roselyn Sand (Ernst & Young Societe d'Avocats—France); Tahl Tyson (Littler Shareholder); and Baba Zipkin (IBM).

<sup>46</sup> Employees who are going through the naturalization process in the United States or have an accompanying family member who is doing so, should be encouraged to consult with their own immigration counsel to ensure that they understand any impact their assignment out of the country might have on their application status.



address them. Standards of what is considered inappropriate or offensive behavior in the workplace also vary greatly, and an employee who has expectations based on US legal and cultural norms may be offended by behavior considered acceptable elsewhere. Conversely, an assumption that someone who is otherwise qualified for what may be a career enhancing opportunity will not be successful because of their race or gender in such a different environment may be wrong, and denying them the opportunity on this basis may even be illegal under applicable discrimination laws. Whether this becomes a legal issue or not, may depend on how these issues are addressed at the front end.

## **B. What Are the Most Common Structures for Cross-Border Employment Agreements, and What Are the Advantages and Disadvantages of Each?**

The first thing to consider in approaching the “nuts and bolts” of a cross-border employment agreement is what entity will be the employer. If it is a new market entry, for example, and there is no hiring entity in place in the assignment country, there are various approaches to consider:

- Hire by foreign entity
- Secondment
- Dual employment with the home and foreign entity
- Open a branch office of the home entity and transfer the employee there
- Set up a new entity to serve as the employer for all expatriates

The legality of hiring by a foreign entity (the original employer or some other subsidiary elsewhere) varies from country to country and could have Permanent Establishment (“PE risk”) tax implications for the foreign entity. Whether this is an acceptable risk depends on the entity used and is usually best determined by the company’s tax or finance departments.

There are also a host of other things that would need to be dealt with in the absence of any local business entity, including the mechanics of how the employee will get paid, how they will be provided benefits, and what if any support they will be provided locally for practical assistance. If there is only one individual it is usually not worth creating a local entity, so it is important to ascertain the business strategy and whether there is a plan to grow the business and hire more employees in that location. If not, other options can be considered, such as creating one entity to serve as the employer for all expatriates.

Secondment to the assignment country is also an option, if there is an agency (or even a willing vendor or client) in the assignment country that can accept the employee as a secondee, sponsor them for a work visa, and handle all of the administrative tasks.

Where there is an existing entity in the assignment country, additional options may include seconding the employee to that entity, having dual employment, or terminating employment in the home country and then hiring the assignee in the assignment country.

Certain potential obligations will have to be considered, such as a requirement in some European countries to consult with the works council before filling an open position with a foreign employee (it will be very awkward if the employee has already moved and the works council takes a strong position against the decision), or whether there is a cap on the percentage of foreign workers permitted to be employed by an entity, as there is, for example, in Thailand.

No matter how the entities and agreements are structured, however, courts in most jurisdictions will look at the actual facts to determine the employment relationships for purposes of employment law, tax, immigration, etc. The factors that courts will typically look at include who is actually directing the work, and which entity is benefiting from it.

## **C. What Are the Best Practices for Creating a Good Cross-Border Employment Agreement?**

### **Who are the stakeholders involved, and what expertise is needed?**

Best practice for putting together a cross-border agreement starts with having a mobility process and team in place. This will, at a minimum, include individuals responsible for corporate tax, possibly finance and facilities depending on the situation, employment law, immigration, compensation and benefits, payroll, and an HR business partner to interface with the manager(s) and the employee. And perhaps most important of all is to involve a project manager, to track the flow of information and how the moving pieces and responsibilities

fit together. This can be very time consuming, and require a high level of specialized project management skills including the ability to effectively work with individuals across a number of departments. Increasingly, companies that rely on a mobile workforce are creating mobility specialist positions or entire departments.

### **What facts should be gathered before starting the negotiation and drafting?**

- Nature and purpose of the job
- Nationality of employee
- Immigration issues

Accurately defining the nature and purpose of the job is important not only for good communication, but also because it may be very relevant to visa requirements, whether a works council needs to be consulted, and employment law issues in the assignment country. Nationality of the employee may bear significantly on the cost of the assignment, for example, if the employee's country of citizenship taxes its citizens even when they live and work exclusively outside the country (*e.g.*, the United States), or if citizens of a particular country have a lower visa cap than for citizens of the country where the employee was working prior to the assignment.

In drafting the agreement, a single template will not work globally (unless it is extensively modularized to the point where it may be difficult to use or it applies only to a few countries). There may be mandatory or best practice language that needs to be included in secondment agreements for employees coming from certain countries, particularly in the European Union. There may also be relocation policies that exist within the company or that can be drafted, which address various aspects that might be desirable to have in the agreement and can simply be incorporated by reference.

Additional standard items to consider in a cross-border agreement include:

- Cost of living equalization
- Pension and social security obligations
- Insurances
- Potential needs of employee's family
- Local regulations regarding working conditions and terms of employment
- Duration of assignment
- Local conditions, including safety
- Housing
- Automobile
- Shipments of household goods
- Repatriation, including costs and placement of employee on return

### **What contingencies should be anticipated before starting the negotiation and drafting?**

The planning phase should address adverse contingencies, and whether and how they might be addressed contractually and practically. Such contingencies include:

- Possible changes of circumstances (*e.g.*, political or business climate changes, company reorganization)
- Disappointing performance by employee
- Misconduct by employee
- Clash with persons in local office environment
- Problem with employee family member
- Evacuation in emergency

- Illness or injury and workers' compensation coverage
- Risks of terminating the employee in another country

A contract cannot cover all possible eventualities so a realistic approach is required. Also, there must be a balance in the document between trying to protect the company and at the same time not intimidating an employee (whom the business may be trying to persuade to accept the assignment).

**What disparities might the arrangement create between the employee and local employees, and what are the consequences of these disparities?**

Generally, disparities in pay and benefits are concerns normally addressed in the HR realm, but a variety of legal issues can come up. For example, some countries require analysis and reporting of pay disparities between men and women. An expatriate employee's pay package might need to be included in such statistics and create an imbalance that would have to be explained. Another common situation is a disparity in maternity leave benefits. An assignee from a country with more generous maternity leave benefits will often be entitled to that leave even if she is paid and provided benefits through the host entity in the assignment country.

## IV. CORRUPTION: A PRACTICAL APPROACH TO THE FOREIGN CORRUPT PRACTICES ACT AND THE UK BRIBERY ACT<sup>47</sup>

### A. Introduction

Corruption across the globe has been a longstanding crisis. The Organisation for Economic Co-operation and Development (OECD) indicates that, globally, corruption costs around \$2.6 trillion a year, and that it “adds up to 10% to the total cost of doing business globally, and up to 25% to the cost of procurement contracts in developing countries.”<sup>48</sup> Many countries have anti-corruption laws, but a common problem is long-standing lack of enforcement.<sup>49</sup> But the world has changed: in the past few years there has been significant attention focused on anti-corruption efforts.<sup>50</sup> Recently, the US government has been fiercely cracking down on US companies who do business abroad and who engage in corruption.<sup>51</sup> The fines are astronomical,<sup>52</sup> and criminal sanctions, including jail time, are at stake for not only companies but also for corporate executives. The United Kingdom focused its anti-corruption efforts in 2011, with its new bribery act that took effect July 1. Other countries such as Russia, China, Australia, and the United Arab Emirates have also starting implementing and enforcing anti-corruption laws. Anti-corruption is a front and center global issue.

In reaction to the global epidemic of corruption, the new laws and the rise of corporate responsibility, many companies have been increasingly implementing robust compliance programs aimed at preventing bribery and corruption in business transactions. It is imperative in today's world, in an effort to join the battle against corruption and protect company reputation and minimize liability, that every multinational implement a compelling compliance program to fight corruption.

Yet, in spite of this all attention, many organizations and employees who work across the globe report that they continue to face demands for bribes as they conduct business and sometimes these demands constitute extortion.<sup>53</sup> Solicitation and extortion remain challenges for many businesses sectors and can in fact hugely interfere with business efforts. A common complaint from employees remains, “Our competitor is giving bribes,” “We won't even be considered for the business if we don't pay bribes,” or “We have been doing this for years.” But the reality is that many former practices such as lavish gifts, paid vacations and expensive entertainment, which may have been acceptable or overlooked for years, today may actually violate the law or code of business ethics and can cost a company huge fines and reputational damage.

This section outlines the Foreign Corrupt Practices Act and the UK Bribery Act and suggests practical solutions for fighting corruption and minimizing liability. Both the UK and US laws are structured in ways that take into account the steps a company has taken to prevent corruption and to support compliance. See Appendix A for a side-by-side comparison of the Foreign Corrupt Practices Act and the UK Bribery Act. It is vital for employers to understand how to most effectively take these steps.

47 Katherine Cooper Franklin, Earl (Chip) M. Jones III and Jaffe Dickerson (all Shareholders with Littler) collaborated in writing this article. Ms. Franklin and Mr. Jones focus their practices on Global Ethics and Compliance, and Mr. Dickerson led the 2011 Global Employer Institute panel on avoiding corruption. Mr. Dickerson's panelists were Amit Bhasin (Partner with Bhasin & Bhasin Associates—India); David Deitchman (Hewlett-Packard Company); Eric Savage (Shareholder with Littler); Ellen Temperton (Partner with Lewis Silkin—United Kingdom); and Oscar De la Vega (Shareholder with Littler De la Vega y Conde—Mexico).

48 OECD, *Joining Forces Against Corruption: G20 Business & Government (Opening Remarks)* (Apr. 27, 2011), available at [http://www.oecd.org/document/32/0,3746,en\\_21571361\\_44315115\\_47726560\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/32/0,3746,en_21571361_44315115_47726560_1_1_1_1,00.html).

49 There are 38 countries that are part of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and each of these countries either have recently, or are currently in the process of, implementing anti-corruption legislation. A listing of these 38 countries, along with a summary of their legislative efforts can be found here: [http://www.oecd.org/document/30/0,3343,en\\_2649\\_34859\\_2027102\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/30/0,3343,en_2649_34859_2027102_1_1_1_1,00.html).

50 E.g., International Chamber of Commerce, Transparency International, United Nations Global Compact and World Economic Forum Partnering Against Corruption Initiative.

51 Over 70 individuals and over 85 enterprises have been held accountable, either criminally or civilly, for transactional bribery since 2002. See [http://www.oecd.org/document/33/0,3746,en\\_21571361\\_44315115\\_46223073\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/33/0,3746,en_21571361_44315115_46223073_1_1_1_1,00.html).

52 Since 2002, more than \$3 billion in criminal and civil penalties and fines, criminal forfeiture, and civil disgorgement were recovered in FCPA-related cases. <http://www.sec.gov/news/press/2010/2010-200.htm>. In fiscal year 2010 alone, the DOJ's Criminal Division's Foreign Corrupt Practices Act unit imposed \$1 billion in penalties, the largest amount in the history of FCPA enforcement.

<http://www.justice.gov/opa/pr/2011/January/11-crm-085.html> The DOJ has recently substantially increased the number of prosecutors in its FCPA unit; there are now over a dozen attorneys whose only job is to prosecute FCPA cases.

<http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html> As Assistant Attorney General for the Criminal Division Lanny Breuer stated, “FCPA enforcement is stronger than it's ever been — and getting stronger.” (Id.) At the same time, Director of the SEC's Division of Enforcement, Robert Khuzmi, warns that “[w]ord is getting out that bribery is bad business, and we will continue to work closely with the business community and our colleagues in law enforcement in the fight against global corruption.” at <http://www.sec.gov/news/press/2010/2010-200.htm>.

53 United Nations Global Compact, *Resisting Extortion and Solicitation in Internal Transactions*, 2011.

## B. Anti-Corruption Laws — What Do They Prohibit and What Are the Penalties

Our discussion will focus on the UK Bribery Act and the US FCPA. The two laws share many similarities, but a significant difference is that the UK Bribery Act not only prohibits bribery of a government official but also prohibits bribery in private sector transactions. Set forth below is a summary of both laws, followed by some practical steps organizations can take to reduce risk of corruption in their business practices and thereby reduce and mitigate liability.

### Overview of the Foreign Corrupt Practices Act (FCPA)<sup>54</sup>

Since 1977, the FCPA has imposed upon US companies conducting business with foreign governments and officials the obligation to refrain from bribing foreign officials for the purpose of obtaining or retaining business.<sup>55</sup> The statute is intended to frustrate the efforts of companies looking to secure favorable legislative action or seeking the discharge of certain ministerial duties by inducing a political *quid pro quo*.<sup>56</sup> Failure to comply with the FCPA may bring about civil and criminal fines and/or imprisonment, and the disgorgement of any resulting profits. To avoid violations of the Act, it is essential that US companies doing business abroad implement rigid and monitored compliance programs that will alert executives to any improper payments made by employees or third-party agents.

In 2010, there was continued heightened FCPA enforcement activity by the Securities and Exchange Commission (SEC) and the US Department of Justice (DOJ). It was a year of the highest penalty for a US company and the most individuals prosecuted. The recent cases reflect the following trends:

- New investigative techniques to generate new cases;
- A focus on senior corporate executives;
- Continued imposition of jail terms for individuals found guilty of criminal FCPA violations; and
- Prosecution of foreign officers.

### Elements of an Offense

There are five principal elements, each of which must be present to establish an infringement of the FCPA:<sup>57</sup>

1. *Agent Acting on Behalf of an "Issuer" or Corporation of "Domestic Concern."* The SEC and the DOJ may assert jurisdiction over "issuer" corporations and corporations that qualify as "domestic concerns."<sup>58</sup> Issuers and domestic concerns are liable for unlawful acts committed both within, and outside of, United States territory, if such acts are made in furtherance of a corrupt payment to a foreign official using the US mails or other means or instrumentalities of interstate commerce.<sup>59</sup> Additionally, several categories of individuals can be held liable under the statute including officers, directors, employees, or agents of the firm, or any stockholder acting on the firm's behalf.<sup>60</sup> Liability also operates in the derivative: it is unlawful for any of these parties to order, authorize, or assist other individuals or foreign subsidiaries in their efforts to violate the Act.<sup>61</sup>

<sup>54</sup> 15 USC. §§ 78dd-1 *et seq.*

<sup>55</sup> Other statutes may also apply to such conduct, including the mail and wire fraud statutes, 18 USC. sections 1341, 1343, and the Travel Act, United States Code title 18, section 1952, providing for federal prosecution of violations of state commercial bribery statutes. Additionally, in an effort towards multilateral cooperation in the fight against corruption, in 1997 the OECD adopted its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. As of February 2011, 38 countries (including the United States) had ratified the Convention and enacted implementing legislation. See [http://www.oecd.org/document/21/0,3343,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,000.html](http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,000.html).

<sup>56</sup> The FCPA lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

<sup>57</sup> For a basic understanding of the FCPA, consult the US DOJ's "Lay-Person's Guide to FCPA," at <http://www.justice.gov/criminal/fraud/fcpa/>.

<sup>58</sup> An issuer is a corporation that has issued securities registered in the United States, or a company that is required to file periodic reports with the SEC, while a domestic concern is "any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States." 15 USC. § 78dd-2(h)(1).

<sup>59</sup> See 15 USC. §§ 78dd-1(a), 78dd-2(a).

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

2. *Corrupt Intent*: Liability will result only where the individual making or authorizing an illicit *quid pro quo* possesses a corrupt intent. More specifically, the payment must be intended to induce the recipient to exploit his or her official position in order to direct business to any party.<sup>62</sup>
3. *Payment*: Pursuant to the Act, companies and their agents may not furnish, offer to furnish, or promise to furnish, a foreign official with money, gifts, or anything of value.<sup>63</sup>
4. *"Foreign Official"*: Entities are prohibited only from engaging in corrupt transactions where the recipient is a foreign official, foreign political party, or candidate for foreign political office.<sup>64</sup> The term *foreign official* means "any officer or employee [or any other person acting on behalf] of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization . . ." <sup>65</sup>
5. *Business Purpose*: The FCPA contemplates only those payments made "to assist [an] issuer in obtaining or retaining business for or with, or directing business to, any person."<sup>66</sup> The DOJ broadly interprets "obtaining or retaining business" to include within its ambit the exchange of benefits of many different types and degrees.

Moreover, the FCPA compels companies with securities listed in the United States to comply with various accounting provisions set forth in the US Code.<sup>67</sup> These provisions require employers to maintain books and records that accurately and fairly reflect corporate transactions, and to put into place a system of internal accounting controls.<sup>68</sup>

Finally, the Act prohibits the making of payments to third parties, "while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office," for corrupt purposes.<sup>69</sup> It should be noted, however, that the Act contains an exception for facilitating payments for "routine governmental action"<sup>70</sup> and endorses two affirmative defenses, one permitting payments that are lawful under the written laws of the foreign country and the other endorsing the payment of "reasonable and bona fide expenditure[s]" for promotional activities, such as travel and lodging expenses incurred by a foreign official, political party, or candidate.<sup>71</sup>

## Prevention and Mitigation

Individuals and corporations subject to the FCPA must take certain internal measures to protect against liability under the Act. US employers should create, implement, and disseminate to corporate subsidiaries, managers, employees (where appropriate), agents, and other affiliated entities, whether overseas or domestic, FCPA compliance programs that will help insulate their companies from prospective liability. Such policies might entail new corporate procedures, require various levels of training, incorporate other company materials or handbooks, and set forth mechanisms for record keeping and enforcement. Most importantly, any compliance program should include a voluntary disclosure policy. A company that proactively investigates and exposes its own violations to the proper administrative agencies may receive substantial mitigation of the penalties assessed against it.<sup>72</sup>

## Third Party Agents

To avoid being held derivatively liable when transacting with a third party, a company must use due diligence in ascertaining the integrity and legitimacy of the organization. This may include an investigation into the business's reputation and the extent to which it has

62 See *US v. Rigas*, 490 F.3d 208, 231 (2d Cir. 2007), cert. denied, 128 S. Ct. 1471 (2008).

63 15 USC. §§ 78dd-1(a), 78dd-2(a).

64 *Id.*

65 *Id.* §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A).

66 See, e.g., 15 USC. §§ 78dd-1(a)(1).

67 *Id.* § 78m.

68 *Id.* § 78m(b)(2)(A).

69 *Id.* §§ 78dd-1(a)(3), 78dd-2(a)(3). A person acts in a "knowing" capacity when he or she is aware, or has a firm belief, that such conduct will occur or is substantially certain to occur. *Id.* §§ 78dd-1(f)(2)(A), 78dd-2(h)(3)(A).

70 *Id.* §§ 78dd-1(b), 78dd-2(b).

71 *Id.* §§ 78dd-1(c), 78dd-2(c).

72 See, e.g., *In re Oil States Int'l, Inc.*, Exchange Act Release No. 53,732 (Apr. 27, 2006) (SEC accepting respondent's Offer of Acceptance and declining to assess fines, after emphasizing that the company had taken prompt remedial measures, self-reported its violations, and cooperated fully in the Agency's investigation), available at <http://www.sec.gov/litigation/admin/2006/34-53732.pdf>



connections to government personnel. The DOJ recommends that US companies be on alert for the following “red flags:” any unusual patterns of money transfer, a history of corruption, the refusal of a business affiliate to contractually certify that it will comply with provisions of the FCPA, abnormally high commissions, and a lack of transparency with regard to financial records.<sup>73</sup>

## Overview of the UK Bribery Act

The UK's Bribery Act of 2010 became effective on July 1, 2011, and has a major impact on US employers with business operations in the United Kingdom. The Act sweeps away antiquated and piecemeal British bribery laws to create a regime of criminal offenses described by the Director of the Serious Fraud Office as “the toughest bribery legislation in the world.” Despite this, the UK government has emphasized that compliance with potentially stringent legislation should be a matter of common sense: a mixture of risk assessment and proportionality.

### The Special Relationship — Why US and Other Foreign Companies Need to Pay Attention

Imagine you are a manager of a US distribution corporation with a branch office in London. The corporation employs a Managing Director in London, who is regularly required to pay “inspection fees” to import inspectors in the destination country of Nigeria, before the corporation's goods are let into that country. The fees are allegedly required to be paid before the import inspectors will issue a certificate of inspection and facilitate import clearance. However, these payments are increasing in frequency and amount. You are suspicious and do not believe the payments are required under Nigerian law. However, it is necessary to ensure the corporation's goods are distributed to African customers. As a result, for the last six months you have been approving these payments.

If a payment which is not authorized under the written law of Nigeria has been made, the US corporation could be guilty of the offense of failing to prevent bribery under the UK Bribery Act 2010. One could also be personally liable of an offense and face jail or a fine for one's part in what the Act would consider to be bribery.

Unless the corporation can show it had adequate procedures in place designed to prevent the Managing Director from engaging in this conduct, it could be liable, upon prosecution, for an unlimited fine. Conviction could lead to debarment from international procurement exercises.

Such is the reach of the Bribery Act 2010. It is therefore imperative for US organizations and other multi nationals that carry on any business in the United Kingdom to ensure that their anti-bribery procedures are robust enough to meet the challenges of the Act.

## UK Bribery Act — Key Provisions

### Bribery Offenses

Given that the Act will apply to many US employers, understanding its key elements is crucial. Under the new Act, there are four key criminal offenses.

#### 1. Bribing Another Person

A person is guilty of a crime if he or she “offers, promises or gives a financial or other advantage to another person” intending that advantage to “induce the person to perform improperly a relevant function or activity” or to reward a person for such behavior. It is important to note that this provision applies to both public and *private sector* transactions.

A function or activity is “performed improperly” if it is performed in any way other than the manner in which a reasonable person in the United Kingdom would expect it to be performed. Of particular note to US employers, even if the performance of the function or activity takes place outside the UK, any local custom or practice must be disregarded unless it is expressly permitted by the written law applicable to that country.

Following business concerns that corporate hospitality would fall foul of this offense, non-binding government guidance was issued stating that reasonable and proportionate hospitality, as part of a public relations exercise designed to cement good relations or enhance knowledge in the organization's field, is unlikely to be prosecuted.

<sup>73</sup> US Dep't of Justice, *Lay-Person's Guide to FCPA, Antibribery Provisions*, at <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>.

## 2. Being Bribed

A person is guilty of this offense if he or she requests, agrees to, receives or accepts a financial or other advantage intending that, as a consequence, a relevant function or activity should be performed improperly.

## 3. Bribing a Foreign Public Official

This provision prohibits a person from offering, promising or giving a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. To be unlawful, the person must intend by doing so to obtain or retain business or an advantage in the conduct of business. Importantly, there is no violation where the official is permitted or required by the applicable local written law to be influenced by the advantage.

A *foreign public official* is one who holds a legislative, administrative or judicial position of any kind in a country or territory outside the United Kingdom. The definition can also include those who perform public functions for foreign governments or public agencies in foreign countries, and officials or agents of public international organizations, such as the United Nations.

## 4. Failure of a Commercial Organization to Prevent Bribery

The fourth and perhaps the most significant offense is the strict liability offense of failure of a commercial organization to prevent bribery.

A commercial organization will be liable for prosecution if a person “associated with it” bribes another person, intending to obtain or retain business or an advantage in the conduct of business for that organization.

The definition of “commercial organization” is broad. A body or partnership that is incorporated or formed in the United Kingdom, irrespective of where it carries on business, will be included in the definition, as will be an incorporated body or partnership which carries on a business or part of a business in the United Kingdom (irrespective of where it was incorporated or formed). It does not matter whether the business is charitable, educational, public or private: if it is incorporated or a partnership and engages in commercial activities, it will be included in the definition.

Similarly, the definition of “associated” persons is also very broad. It will include a person (whether an individual or an incorporated or unincorporated body) who “performs services” for or on behalf of a commercial organization. An “associated” person includes employees, agents and subsidiaries and even suppliers who are providing services for the organization (except suppliers who are simply acting as the resellers of goods). A joint venture could also be included in the definition if it is performing services for the commercial organization.

This broadly cast net may cause US organizations to look closely at who can be said to be performing services on behalf of the UK entity and whether existing policies and procedures adequately address the risks they may pose. Processes must be put into place so that a company is not criminally liable for failing to prevent bribery. In reviewing an employer’s compliance obligations under the UK Bribery Act, employers should pay special attention to this provision assigning potential criminal liability for a company’s failure to prevent bribery. This provision clearly indicates that an employer must have a program and system in place that, among other things, ensures complaints will be raised and investigated, a valid code of conduct, a compliance procedure, and associated training.

## Facilitation Payments

Facilitation is prohibited under the UK Act, but before deciding whether to prosecute, prosecutors will consider carefully whether a prosecution is in the public interest.

This is a difference between UK and US law, and this should be an area of interest for global compliance programs and Codes of Conduct. Although the FCPA contains an explicit exception to the bribery prohibition for “facilitating payments” for “routine governmental action” and similarly provides affirmative defenses which can be used to defend against alleged violations of the FCPA, it is best practice and strongly recommended that companies (even those not subject to the UK Act) have a process whereby any payment to a government official must be authorized and approved by legal counsel, a local (and highly educated) executive or the ethics and compliance officer. The line between a facilitation payment and a bribe can be very grey. It is far too fine a line for a supervisor or manager to make his/her own decisions, as such payments alone can create liability. All companies should include this approval process in their Codes and procedures. If possible, a person in each location should be educated as the “point person” for authorizing facilitation payments. All such payments should always need approval *before* being paid.



## Penalties

Individuals or organizations convicted of the offenses of bribing another, being bribed or bribing a foreign public official can be liable on conviction to unlimited fines, and individuals can receive a jail sentence of up to ten years. An organization can be convicted for failure to prevent bribery with the penalty being an unlimited fine.

No one can be prosecuted in England and Wales, however, unless one of the two most senior prosecutors (the Director of Public Prosecutions or the Director of the Serious Fraud Office) is personally satisfied that conviction is more likely than not and that prosecution is in the public interest. Factors taken into account will include whether the organization reports an incident of bribery using the organization's procedures, and the organization's willingness to make full disclosure and cooperate with an investigation under the Act.

A potentially more damaging impact of the conviction of the organization lies outside of the remedies specifically enumerated in the Act. For example, an organization convicted under the Act may be debarred from taking part in European Union procurement exercises.

### "Adequate Procedures"

As mentioned above, an organization does not violate the offense of "failing to prevent bribery" if the organization can show that it had adequate procedures in place. Government guidance makes it clear that adequacy of procedures will depend on the risks of bribery faced by the organization. In practice, this means that a risk assessment should be undertaken that takes into account a number of factors that will affect risk, including the size of the organization, the countries in which the organization carries out business, the business sector and the value and duration of the work.

The UK Government guidance sets out a non-exhaustive list of the topics that bribery procedures may cover, which includes: involvement of top-level management in the commitment to prevent bribery; risk assessment and due-diligence procedures; provision on promotional and hospitality expenditures; governance of business relationships; financial and commercial controls; transparency of transactions; procedures for the reporting of bribery; sanctions and disciplinary procedures for breaching anticorruption rules; training and communication of policies and procedures; and ongoing monitoring, evaluation and review.

Bribery prevention procedures should be proportionate to the bribery risks faced. For example, if the organization operates in overseas markets where fraud is perceived to be more commonplace, then more may need to be done. The procedures should also be clear, practical, accessible, effectively implemented and enforced.

## C. Best Practices for Preventing Bribery and Corruption and Minimizing Liability

### Lead — Assume responsibility

It is critical to any effective anti-bribery program that senior-level management of an organization should be committed to a culture of integrity in which bribery is unacceptable. A formal internal and external statement appropriately communicated by senior management can be effective in establishing an anti-bribery culture and the statement should be drawn to employees' attention on a regular basis and be generally available on an organization's intranet and Internet sites. Such statements should include: a commitment to carry out business fairly and openly; zero tolerance towards bribery and solicitation; clear consequences for breaching the policy; an explanation of the business benefits of rejecting bribery; pointing to resources employees can use to obtain help or have questions answered; an explanation of how prevention procedures are being implemented; and identification of those involved in development and implementation of procedures. A robust Code of Business Ethics is an essential ingredient to any anti-corruption program.

When conducting business in high risk areas of the world, top-level executives and managers should be trained in-person in a live meeting and should be personally involved in developing and implementing anti-corruption procedures and making critical decisions. It is standard practice that the organization's governing authority shall be knowledgeable about the content of the operation of the compliance ethics program and exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

Leadership needs to set the example, and anti-corruption efforts and practice should be part of the business plan. The elephant in the room needs to be discussed by top management: If standard business practices require bribing a government official or any business partner to get work, should we take the work? The answer must come down from the top, and the bottom line needs to be clear: we don't pay bribes to get business.

## Inspect — Assess risk

All organizations should periodically assess the risk of criminal or unethical conduct and take appropriate steps to design and implement systems to reduce the risk of unethical or corrupt conduct. Bribery and corruption risks should always be a prominent focus during the enterprise risk assessment.

Every organization's risks are different and unique to their business. An organization's exposure to risk should be assessed in terms of external and internal risks. Some examples of analyzing risks include:

- *Country risk*: Perceived high levels of corruption and an absence of implemented bribery legislation in the countries in which the organization does business.
- *Sector risk*: Examples of high-risk sectors include the extractive industries (mining), energy and large-scale infrastructure sectors.
- *Transaction risks*: There may be higher risks in making charitable or political contributions, in obtaining licenses and permits, importing or exporting mission critical equipment or supplies, or in transactions relating to public procurement.
- *Business opportunity risk*: This may involve projects not undertaken at market prices or that do not have a clearly legitimate objective.
- *Business partnership risk*: For example, using intermediaries in transactions with foreign public officials, consortia or joint-venture partners, or where a politically exposed person or public officials are involved.

An internal risk assessment is a necessary tool to examine the extent to which internal structures or procedures add to or decrease the risk level.

## Investigate — Have a Process and Follow It

An effective anti-corruption program requires an effective investigation program. The first step is to decide who is best suited to investigate alleged corruption—ideally, a person with relevant training and experience in investigations. It is also critical to have a robust incident management system, and such a system cannot occur without an effective investigation process. In order to receive from prosecutors or judges any credit for self-reporting and/or taking appropriate corrective remedial action, an entity's investigations must be well done, prompt and extremely detailed and thorough.

A common investigations challenge is when employers ask questions such as: "What do I do if I discover corruption, bribery, or other criminal conduct? Do I have an obligation to report criminal or other unethical activities? Will the company get credit from the government when it self-reports? When does it do so? How to do so before someone else does?" Answering each of these questions is extremely fact specific and deliberations should always be protected by attorney-client privilege.

The stakes are high so make sure your investigators are well-prepared and trained at the outset.

## Third-party agent management

A common challenge for multinationals continues to be monitoring the conduct of its third-party agents/consultants. To avoid derivative liability for the criminal conduct of third-party agents or consultants, a company must engage in robust due diligence in ascertaining the integrity and legitimacy of the third-party agent. Steps to consider are:

1. *An extensive background check into the agent's integrity, reputation and business practices* — This should happen at the country and market or local level, if possible. Crucial questions include: Who has done business with the third party? Have there been problems with those business activities? There are vendors who conduct due diligence background checks but, in addition, individual checks by a country manager or other high-level employee are strongly recommended.
2. *Site checks* — Country managers should go on-site to see if the third party actually exists and what the business looks like. Is there an actual storefront or is it simply a post office box?
3. *Code of Conduct* — Require that the third party sign your Code of Business Conduct or a third-party vendor code of conduct. If the agent refuses, that is a red flag.

4. *Training* — In high risk areas, third-party agents should go through extensive customized training on anti-corruption and sign off and acknowledge that they have participated in the training and understand what kind of conduct is prohibited.
5. *Ask for itemized invoices* — One should do their homework and inquire into the costs of the services, whether it is customary for the country and whether it meets the fair market value of the services.
6. *Monitor and review* — When working with third-party agents, you should consistently and regularly monitor the third party's work. Be sure to check the records, and highlight and discuss any red flags immediately upon discovery. Don't be afraid to stop work or cancel a contract if inappropriate behavior is occurring.

Employers must know the third-party agents, monitor their work, and never allow a third-party agent to engage in conduct that employees would not be permitted to do.

### **Teach and Train — Policies and Procedures and How to Make Decisions**

Policies and procedures setting out the basis on which the organization does business should be communicated to all employees and others who will be providing services. Anti-corruption training (which is proportionate to risk) could be mandatory for employees as part of an induction (orientation) process, but customized training is critical for those involved in higher-risk functions, for example: purchasing, contracting, distribution and marketing, and those working in high-risk industries.

Training should be scenario-based and customized to the industry. Employers going into a foreign country should know how to handle a request for a bribe, a payment, a fee or an extortion. Employees should understand the company's procedure for dealing with a request for a "facilitation" payment. Who should they call? What should they say? What are the preemptive steps they can take? What is the backup plan?

Before moving into a new country, do your homework: know the rates of the taxes, licenses, customs fees, etc. It is important to learn local laws but also local customs. Figure out ahead of time what issues may arise and plan on how employees should handle them.

Gifts and entertainment in a foreign country can be very tricky. Training should focus on what is an appropriate gift and what is permissible under the law and culturally acceptable. Employees should know the kinds of gifts and entertainment that the laws consider to be a bribe. Employees should also learn about what is customary in the country and discuss ahead of time how to balance local customs with the company's code of ethics.

Bottom line, all individuals — including executives, managers, and third-party vendors — should learn what is appropriate and what is not under the anti-corruption laws and the company's Code of Conduct. They also need to learn that it is their right and responsibility to report and how the reporting procedure works.

### **Launch — Roll Out Mitigation to Reduce Risk**

As part of an overall compliance program, organizations should identify clear steps that it will take or internal controls that it will implement to reduce the risk that its employees or agents will engage in bribery or get caught up in a corrupt business environment. For example, consider having internal auditor review third-party invoices and payments on a random basis. If a consultant contends that he or she paid cash to a local law firm to process license applications, then go to the law firm and seek verification. As mentioned above, having a process to conduct background checks of a prospective agent may be necessary in high-risk markets. The type and nature of mitigation initiatives should be designed to meet the level of the risk to the business.

### **Evaluate — Assess Performance, Hold Stakeholders Accountable**

Risks may change over time, perhaps through acquisition, leadership changes, or the opening of new markets. There should be regular monitoring of the effectiveness of an organization's anti-bribery procedures and a review of procedures when any particular change to bribery risks occurs. If an employee is leaving the business, it is important to conduct exit interviews to determine whether the employee has witnessed misconduct that he or she had been unwilling to report in the past.

Culture surveys, questionnaires and feedback from training can also provide a source of information on the effectiveness of procedures. Allowing employees opportunities to report anonymously what they are experiencing at work and whether their managers are building a culture consistent with the company's values is an important method to obtain leading indicators of potential misconduct.

## Reporting Systems and Retaliation Protection and Prevention

For a compliance program to be truly effective, an organization must have a reporting system that works.

In the United States, publicly traded companies have anonymous hotlines or helplines. Some companies use third-party hosted intake centers that allow employees to call or make anonymous reports through the Internet. Regardless of the size of the business, it is important that employees have a method to report observed misconduct in a safe and protected environment.

Even though there are laws in the United States that require anonymous reporting programs, according to the Ethics Resource Center, only 3% of employees use hotlines, and the majority of complaints go to managers.<sup>74</sup> In doing business outside the United States, it is essential to do homework and research what kind of reporting system will work in the culture where the organization has worksites. Multinational companies should have anonymous hotlines (in countries where it is legal) but it is most important to establish a culture of trust where employees believe that it is their right and obligation to report crimes and corruption and that they will not be subject to retaliation if they do so. Establishing a “speak up culture” is critical and challenging. “Speak up” training, cultural surveys and management training are extremely helpful tools to meet this extremely difficult challenge.

No reporting system will ever work if employees are subjected to retaliation if they make reports about corruption or bribery. Bad news travels fast. It is extremely important to review the company's whistleblower/anti-retaliation policy and to consider whether it adequately accounts for the local business culture and provides multiple mechanisms for persons to complain and effectively articulates protection for employees against retaliation. A key component of an effective compliance program is to teach managers and executives about whistleblower protection and make certain to set up systems aimed at preventing retaliation. It is also important to review incident management system to make sure it is well equipped to detect and prevent retaliatory acts.

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74 Ethics Resource Center, *Blowing the Whistle on Workplace Misconduct*, December 2010.

## V. OUT OF THE FINANCIAL CRISIS “FRYING PAN” AND INTO THE COMPLIANCE “FIRE”: WHAT MULTINATIONALS NEED TO KNOW ABOUT NEW FINANCIAL REFORMS<sup>75</sup>

### A. Introduction — Financial Crisis Leads to Heightened Oversight

The financial crisis that started in 2008 created louder and more frequent calls for greater regulation of executive pay, especially for those working in financial institutions. Governments across the globe have been providing shareholders of publicly traded companies with a greater say in the amounts that executives should be paid. They are also passing legislation attempting to regulate the amount of pay received by executives and to cut back on pay received in connection with what could be characterized as risky behavior. Lastly, regulations seek to put certain executive pay at some risk by mandating that it cannot be received until years after it is awarded.

### B. US Imposes Unprecedented Changes in Pay Practices

In 2011, the Securities and Exchange Commission adopted final rules implementing the shareholder advisory votes on executive compensation required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). This law applies to most US publicly traded companies and not only to financial institutions. A centerpiece of this legislation is mandated non-binding shareholder votes on the pay of top executives. The legal danger to US corporations stems from the fact that even though so-called “say-on-pay votes” are non-binding, where the majority of shareholders votes “no,” the corporation puts itself at risk of inviting a shareholder derivative lawsuit against the Board of Directors if the shareholder mandate is not followed.

#### Shareholder Advisory Votes

As Bruce McNeil described during the session, the Dodd-Frank Act mandates that corporations which are SEC-registered issuers provide shareholders at least once every three calendar years with a non-binding say-on-pay vote regarding the compensation of the company’s named executive officers. This includes the chief executive officer, the chief financial officer, and the company’s three other most highly compensated officers. The legislation specifies that the advisory vote is required only when proxies are solicited at an annual or other meeting of shareholders for which the SEC’s proxy solicitation rules require compensation disclosure. The company thereafter must include a statement in the Compensation Discussion and Analysis (the CD&A) of the proxy indicating whether — and, if so, how — its compensation policies and decisions have taken into account the results of the most recent shareholder say-on-pay vote.<sup>76</sup>

Mr. McNeil also discussed a separate Dodd-Frank provision that requires SEC-registered issuers to provide shareholders at least once every six calendar years with a non-binding vote regarding the frequency of the say-on-pay vote. In the frequency vote, shareholders must be given the ability to provide an advisory vote on whether the company’s say-on-pay vote will occur every one, two, or three years.<sup>77</sup>

#### Shareholder Litigation

Importantly, Mr. McNeil informed the participants in the session that the Dodd-Frank Act expressly provides not only that the shareholder vote be non-binding, but also that a negative shareholder say-on-pay vote could not be construed to: (1) create or imply any change in director’s fiduciary duties; or (2) create or imply any additional director fiduciary duties.

However, this has not stopped shareholders from bringing claims against the boards of directors following negative say on pay votes. In late 2011, a Georgia state court and an Ohio federal court issued the first two decisions addressing motions to dismiss shareholder derivative complaints based on negative say-on-pay votes. The courts reached different conclusions. The complaints generally alleged that: (1) the board breached its fiduciary duty of loyalty by approving executive compensation not in the best interests of shareholders and not in conformity with written company pay-for-performance policies; (2) any executive compensation consultant retained by the company aided and abetted the breach; and (3) any recipient of the compensation was unjustly enriched.

<sup>75</sup> This session was moderated by Littler Shareholder Steven Friedman; the panelists were Littler Shareholder Bruce J. McNeil; Raquel Florez, Partner at Freshfields (Madrid, Spain); Ellen Temperton, Partner at Lewis Silkin (London, UK); and Donald Barth, Assistant General Counsel at Munich Reinsurance, Inc. (Princeton, NJ).

<sup>76</sup> Although mandatory CD&A disclosure is limited to company consideration of the results of the most recent say-on-pay vote, consideration of the results of earlier say-on-pay votes should be addressed if material to compensation policies and decisions. The rule does not require particular language for say-on-pay resolutions, but the company must indicate that the shareholder say-on-pay vote is to approve any executive compensation disclosed pursuant to Item 402 of Regulation S-K. The compensation of company directors is not subject to a shareholder advisory vote.

<sup>77</sup> To facilitate the say-on-frequency voting, the rule provides that proxy cards provided by management to shareholders must include four choices for the say-on-frequency vote: every one year, every two years, every three years, or abstain.



In *Teamsters Local 237 v. McCarthy*,<sup>78</sup> a Georgia state court applying Delaware law dismissed a shareholder derivative suit because, among other things, a negative say-on-pay vote failed to create a reasonable doubt that the challenged compensation decisions were valid exercises of business judgment. The plaintiff's central allegation was that the Board of Directors of Beazer Homes acted disloyally by approving 2010 executive pay challenged as "excessive" in view of the company's 2010 net losses. The plaintiff claimed that the rejection of the executive pay by a majority of shareholders rebutted the business judgment rule's presumption that the compensation decisions of the Board of Directors were proper exercises of discretion. Noting the substantial discretion Delaware substantive law affords directors on executive compensation matters, the court recognized that the Dodd-Frank Act preserved that discretion and made say-on-pay votes non-binding. The court concluded that the negative shareholder vote did not require that the challenged pay be rescinded.

In *NECA-IBEW Pension Fund v. Cox*,<sup>79</sup> an Ohio federal court applied Ohio substantive law in reaching the opposition conclusion. The court ruled that a pre-suit demand on the Board of Directors of Cincinnati Bell was not required<sup>80</sup> and declined to dismiss a derivative suit against the Board of Directors brought after 66% of the company's voting shareholders voted against the 2010 executive compensation package. In this case, the plaintiff alleged that the negative shareholder vote was evidence that the decision of the Board of Directors to approve 54% to 83% increases in the pay of senior executives, despite a \$63 million decline in the company's net income and a negative annual shareholder return of 18%, was not in the best interests of shareholders, and incompatible with the company's express pay-for-performance compensation policies. The court acknowledged the established principle that informed decisions on compensation rendered by disinterested directors are presumed to be the product of a valid business judgment, but accepted the argument by the plaintiff that the shareholder vote presented evidence sufficient to overcome the presumption.

### C. Continental Europe Regulates the Financial Industry

Ms. Florez noted that shareholder approval of remuneration packages was already commonplace in continental Europe prior to the 2008 financial crisis. The approval is not the compensation of specific employees but rather of the overall compensation policy which should be followed when setting compensation. In some countries such as Spain there is a "say on pay" regime which provides employees with the power to approve the compensation of the board of directors.

There is also a move to a stronger linkage between compensation and performance in the financial sector, according to Ms. Florez. One principle that is gaining currency is that the amount of base compensation should be reasonable and that variable pay should not be payable unless it is earned. Although there have long been compensation guidelines in Europe for companies to follow, new guidance has created greater regulation than ever before. Different rules are relevant in different countries so there is no one size fits all solution in Europe; however, greater restrictions on the freedom of corporate entities to act is almost universal.

Ms. Florez also discussed two concepts that affect variable compensation in Europe known as "malus" and clawbacks. Both are found in European compensation directives.

*Malus* is an arrangement where a portion of variable compensation is held back from an executive and it is not "vested" or earned until certain performance metrics are met. If the performance criteria are not met, the compensation may never be payable to an executive. Different countries establish different criteria and terms for payout. European regulations promote the concept that 40% of remuneration for certain executives should be deferred for a minimum of three years. In France, a 40% threshold should be established for certain executives and 60% withheld for others. In Germany, the deferral is on at least 40% for three to five years. In Italy, although regulations are pending, the central bank has approved a 40 to 60% deferral regime. In the Netherlands the deferral must apply to a material portion of the compensation. Spain's rules require deferral of between 40 and 60% of compensation.

*Clawbacks* were adopted in the United States under the Dodd-Frank Act and require certain executive officers to return incentive-based compensation (including stock options awarded as compensation) received by the officer if the compensation was based upon erroneous data contained in a filing which is required to be restated under securities laws due to material noncompliance under those laws. The US clawback rules apply to incentive-based compensation (including stock options awarded as compensation) during the 3-year period preceding the

78 Civ. Action No. 2011-cv-197841, Slip Op. (Sup. Ct. Fulton Co. Ga. Sept. 16, 2011).

79 2011 WL 4383368 (S.D. Ohio Sept. 20, 2011).

80 The pre-suit demand for the directors to sue themselves was not required because the court concluded that they were the same individuals who approved the pay increases and bonuses.

date on which the employer is required to prepare the restatement, in excess of what would have been paid to the executive officer under the accounting restatement. In Europe, clawbacks are only likely to be implemented in certain countries and only where the executive has actually acted fraudulently. Ms. Florez stated that in many European countries, clawbacks could not be implemented on account of the protections afforded to pay which have been provided to executives. Rather, in certain countries, such as Spain, executives could perhaps be sued based on their fraudulent conduct.

#### **D. UK Regulations Under the Financial Services Authority**

Similar to the regulations passed in the US that seek to reduce the amount of excessive risk undertaken by financial industry executives, Ms. Temperton discussed the United Kingdom's efforts to provide similar assurances that ensure that incentives are not tied to imprudent behavior. One new law in the United Kingdom makes incentive pay performance related, by prohibiting guaranteed bonuses. There is also a move in the United Kingdom to provide a deferral of incentive pay, with a vesting schedule providing that the pay will not be received in full until after three to five years from the date that is awarded.

Clawbacks are now required in certain contracts entered into in the United Kingdom where employee misbehavior leads to financial reporting misstatements. UK companies are now under pressure from regulators to prove that there is the correct balance between base pay and variable pay, with an emphasis on deferral to promote long-term performance over behaviors which lead to short term results.

#### **E. Practical Measures to Address New Global Policies**

In both the US and Europe, compensation practices must change for companies that are subject to government regulation. The financial crisis spurred regulators to address a perceived lack of accountability. Consequently, companies must assure that their policies address the new realities of prudence and accountability. Overall, there needs to be an understanding that pay now has been put under a microscope and is being examined now more than ever before.

It can be difficult to predict which compensation policies should be adopted in order to minimize risk in advance of a failure of a particular sector of the financial system. However, some general recommendations include:

- Companies must assure that they are adopting policies which will be viewed as prudent by regulators and shareholders. Companies should evaluate their compensation standards and decisions on executive compensation with the benefit of independent legal and compensation consultant advice and with a careful examination of the 2011 negative shareholder votes for any patterns.
- Where possible, remuneration policies which reward long term results should be adopted in favor of short term fixes.
- Policies should address shareholders concerns so that votes will favor management's compensation designs.
- In those countries where variable pay is under attack, companies may wish to examine the balance of base pay and variable pay.





## B. CSR — A Historical Perspective and Primer

As Brian Burkett described during the session, the concept of CSR is not new. There are several historical antecedents that led to the key CSR instruments that exist today.

The conclusion of the Second World War led to the creation of the World Bank, the International Monetary Fund, and the International Trade Organization (ITO). Although the ITO contemplated provisions for the protection of investment and the control of restrictive business practices, including those dealing with labor standards, international labor practices remained essentially unregulated for several decades.

In 1974, the United Nations passed its code of conduct on transnational corporations. In 1976, the OECD published a declaration on international investment and multinational enterprises. These early instruments, however, were entirely voluntary and ineffective. In the 1990s, however, there was a growing recognition that a social deficit had become embedded in globalization. A turning point occurred in 1996, when the World Trade Organization (WTO) was formally recognized and, perhaps more importantly, the WTO identified the International Labour Organization (ILO), as the international organization responsible for the social dimension of globalization.<sup>84</sup>

The foundation for the key CSR instruments and the driving force behind legislating international labor rights to this day is the ILO. The ILO has published more than 150 Conventions. Eight of the conventions are identified as defining the fundamental rights of workers and two are at the heart of labor and other groups' efforts to regulate corporate conduct:

### Freedom of Association

- ILO Convention No. 87: Freedom of Association and Protection of the Right to Organize
  - Recognition of right to organize, right to organize without corporate authorization, establishment and choice of labor organizations, international affiliation with other organizations
- ILO Convention No. 98: Right to Organize and Collective Bargaining
  - Prevention of anti-union discrimination, protection from interference by other unions, establishment of national enforcement body for violations

These ILO principles are complemented by the OECD Guidelines for Multinational Enterprises, which were recently updated and provide another set of global CSR principles.<sup>85</sup>

To date, however, the U.N. Guiding Principles on Business and Human Rights ("U.N. Guiding Principles") represent the most significant framework for use in defining corporate social responsibilities with respect to human rights. The U.N. Guiding Principles place obligations upon corporations that meet and arguably exceed the obligations of sovereign states to enforce and promote human rights

Developing the U.N. Guiding Principles was six years in the making, and was spearheaded by Harvard Professor John Ruggie. Issued in final form on March 21, 2011, the U.N. Guiding Principles comprise three pillars:

- Clarifying the existing role of states to promote and protect human rights;
- Ensuring that business entities respect human rights; and
- Ensuring the proper access to remedies for human rights violations.

The U.N. Guiding Principles are rooted in what is commonly referred to as a "know and show" set of principles that instruct companies to increase awareness of the human rights impact of their operations and to demonstrate, through transparent due-diligence mechanisms, that all available and reasonable steps are being taken to avoid or mitigate any adverse human rights impact from their operations. Finally,

<sup>84</sup> The ILO, founded after WWI, is the only tripartite U.N. agency with government, employer, and worker representatives. According to the ILO, "This tripartite structure makes the ILO a unique forum in which the governments and the social partners of the economy of its 183 Member States can freely and openly debate and elaborate labour standards and policies." See <http://www.ilo.org/global/about-the-ilo/who-we-are/lang-en/index.htm> (last visited Dec. 14, 2011).

<sup>85</sup> One unique component to the OECD guidelines is the OECD's use of National Contact Points (NCP) to mediate disputes regarding a particular entities' compliance with the OECD guidelines. The use of NCPs by labor and other groups to criticize entities' operations — as well as the group's corresponding efforts to publicize these proceedings — is one of the methods by which labor and other groups have pressured companies to further their own agendas.

where such human rights issues are revealed, the U.N. Guiding Principles provide that a remedy be available through a credible and verifiable grievance mechanism.

The role of companies to promote and respect human rights is defined very broadly. U.N. Guiding Principle 11 states:

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil [sic] their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

Thus, Principle 11 instructs companies to promote and protect human rights regardless of applicable national law and places companies (rather than states) directly responsible for protecting human rights. Importantly, this principle applies throughout a company's supply chain. To that end, the U.N. Guiding Principles instruct that companies must develop transparent policies and mechanisms to ensure respect for human rights throughout their operations, and, when necessary, effectively and timely remediate any adverse human rights impact. The U.N. Guiding Principles acknowledge that there is no "one-size-fits-all" approach. Rather, a company's obligations under the U.N. Guiding Principles are directly related to the size and complexity of its operations.

### C. Emerging Trends — How Will Companies Be Pressured?

International instruments that define corporations' social responsibilities, including the U.N. Guiding Principles, are not binding in the traditional sense. Although the OECD has dispute mechanisms through which claimants can seek redress from multinationals, and the ILO has its Committee on Freedom of Association that has been used to publicly criticize multinationals, neither body can compel companies, labor groups or governments to alter their behavior.

NGOs and labor groups nonetheless use these CSR instruments to effectuate change in a manner that furthers their agendas, and routinely do so in ways that damage the company's brand and operations.

#### Framework Agreements

As one example, the U.N. Guiding Principles lend themselves conveniently to the expanding efforts of labor groups and NGOs to pressure multinational corporations to agree to a uniform standard for employee rights throughout the company regardless of applicable national law — a key component of global framework agreements. Indeed, the U.N. Guiding Principles specifically reference the global framework agreement as one example of how parties can address the "remedy" component under the framework.

Since 1998, over 80 framework agreements have been entered into between global union federation and multinational corporations.<sup>86</sup> Although some corporations may see these agreements as a media-friendly extension of their existing codes of conduct, unions view them as both a step towards global collective bargaining and enforceable grants of union rights.

Companies need to understand that agreeing to certain ILO principles in an international framework agreement can have unintended labor-relations consequences, such as a labor group's perceived right to access the employer's workplace to organize employees without any show of employee support for the union. Although the legal enforceability of these agreements is questionable,<sup>87</sup> this reality is beside the point. Even without detailed enforcement mechanisms, framework agreements have been sufficient to compel companies to make business decisions in accord with the union's interpretation of the agreement's terms. Moreover, such agreements, once signed, become tools to further advance the labor union's agenda with the public.

#### Global Corporate Campaigns

Along similar lines, and as was discussed by the panelists, the U.N. Guiding Principles and other CSR instruments set the foundation for characterizing local disputes over local labor issues as international human rights issues. A particular labor group's inability to establish a foothold in a particular company or facility are blamed — correctly or incorrectly — on the company's failure to promote or protect its employees' "human" rights to collectively bargain and freely associate with union representatives. For organizations with consumer-facing

<sup>86</sup> Brian W. Burkett, *International Framework Agreements: An Emerging International Regulatory Approach or a Passing European Phenomenon?*, 16 CANADIAN LABOUR & EMPLOYMENT J. 81 (2011).

<sup>87</sup> *Id.* at 92-94.

brands, these allegations are particularly problematic.

These characterizations made up a large part of the Human Rights Watch Report, *A Strange Case*, discussed above. The Report criticized a number of European-based multinational companies in this fashion without noting that several of the criticized companies have been the target of corporate campaigns. Indeed, the Report publicized many of the same anecdotal examples of purported labor law violations that have been highlighted to support the corporate campaigns against those same European-based multinationals. Commonly referred to as “top-down organizing,”<sup>88</sup> corporate campaigns are typically designed to pressure a target company by attacking its brand and operations to facilitate its organizing campaign. The concessions pursued may include the target’s agreement to grant the particular labor union access to its employees in the workplace, and to remain silent, otherwise referred to as “neutral,” with respect to its opinions about unionization.<sup>89</sup>

The broad principles embodied in CSR instruments — particularly certain ILO principles and the U.N. Guiding Principles — provide the framework for labor and other groups to criticize a company’s commitment to abiding by international labor standards as a means to gain leverage in a union organizing drive. This trend is expected to grow.

#### **D. Practical Considerations: Responding Through Thoughtful and Comprehensive Self-Regulation**

Several conclusions were reached at the GEI in discussing global labor relations, global labor federations, international labor standards and human rights.

First, the U.N. Guiding Principles reflect the growing consensus that companies must consider and account for the human rights impact of their operations. Every company has employee-relations disputes. The growing prevalence of CSR instruments, including the U.N. Guiding Principles, create a foundation for labor and other groups to characterize a local employee-relations or labor dispute as a human rights issue or to more broadly attack a company’s brand or operations. As one commentator noted, social media’s prevalence can accelerate and broaden the impact of these attacks and heighten the need for a company to have proactive measures in place.

Second, while employers may prefer self-regulation, such an approach is not without some risk:

- Standards may be vulnerable to manipulation by critics;
- Standards may conflict with local laws;
- Standards may not be realistically enforceable; and
- Standards may inadvertently benefit competitors who are not sharing the costs of these aspirational labor practices.

Third, despite the risks, there are compelling reasons to self-regulate:

- Companies that thoughtfully self-regulate may better protect their brand and operations from attack;
- Companies that thoughtfully self-regulate may lessen the potential for NGOs or labor groups to play an active role in regulating fundamental aspects of their operations; and
- The U.N. Guiding Principles represent a paradigm shift in the area of CSR, and strongly suggest that companies that do not self-regulate will be vulnerable to attack.

Finally, the decisions of whether and how to implement internal CSR principles and mechanisms are complex and should be undertaken with the most senior levels of company management and with experienced legal counsel. Beyond weighing the relative risks of self-compliance above, the following considerations should be made:

- Whether and how to develop a corporate code of conduct that addresses human rights?
  - The challenge lies in defining the company’s commitment without enabling NGOs and labor groups to use the company’s expressed commitments to further their own agendas.
- Whether and how to develop an internal compliance mechanism that covers human rights?

<sup>88</sup> See, Jarol B. Manheim, *Trends in Union Corporate Campaigns — A Briefing Book*, US Chamber of Commerce at 23 (2005), quoting Joe Crump, *The Pressure Is On: Organizing Without the NLRB*, LABOR RESEARCH REVIEW (1991/92).

<sup>89</sup> *Id.* at 7.

- ✧ Consider involving external stakeholders to develop and administer this process to demonstrate transparency and legitimacy.
- ✧ Ensure that the process contemplates and sets standards for all links in the company's supply chain.
- ✧ Ensure that the process involves a mechanism to effectively and transparently rectify problems.

Companies need to be ahead of any efforts by labor groups or NGOs. The U.N. Guiding Principles provide companies with a good deal of latitude to develop their own internal mechanisms to establish a framework to address human rights. Companies should therefore take the initiative to define their response and its validity, before it is defined for them. Potential grievance mechanisms should be identified, and resources allocated towards these initiatives and their management. It may be advisable to create an internal committee — with sufficient expertise of the company's supply chain, policies and existing corporate governance systems — dedicated to compliance with the Guiding Principles.

Companies have now been expressly charged with certain fundamental social responsibilities, and their failure to embrace them will subject them to substantial criticism and adverse public opinion. However, embracing such initiatives without a complete understanding of these concepts and their implications creates the potential for far greater problems. As such, it is imperative that multinationals proceed in a cautious and informed manner.

## VII. BULLIES AT WORK: SOLUTIONS FROM DIFFERENT LANDS<sup>90</sup>

### A. Around the World, Bullying Is Not Uncommon in the Workplace

The workplace has always had bullies, and they are not always bosses. Bullying behaviors often involve the difficult blurring of boundaries between the personal and the professional. The spread of social media has created new opportunities for bullying. According to a survey sponsored by the Workplace Bullying Institute in 2010, 35% of US workers experienced or witnessed bullying. Sixty-two percent of the bullies are men; 38% are women. Women are 58% of the targets; men 42%. However, men bully men more frequently than they do women (55.5%), and women usually bully other women (80%). Workers ages 30 to 49 are the most frequent targets.<sup>91</sup> A 2010 survey in Australia provided even more startling statistics, finding that 94.5% of survey respondents had been bullied, with the usual bully a woman, rather than a male.<sup>92</sup>

In the last few years, much has been written about bullying at work, and there have been stories about high-profile bullies. The costs of bullying are being studied, and these costs alone are a call to action for employers. Bullies are very expensive. Loss of productivity is one immediate consequence.<sup>93</sup> Victims of bullying are more likely to suffer from anxiety, depression, burnout, and even symptoms of post-traumatic stress disorder.<sup>94</sup> Other illnesses associated with bullying are: anxiety disorders, including panic attacks, sleep disturbances, digestion problems, and possibly fibromyalgia.<sup>95</sup> Absenteeism is the predictable consequence of workplace stress, and is a major cost for US employers — about \$300 billion annually.<sup>96</sup> A 2007 study in England estimated the annual cost of bullying as £13.75 billion.<sup>97</sup> Studies of bullying outside the United States have demonstrated very high costs to business.<sup>98</sup> A Stanford University professor has created a checklist that HR professionals can use to identify the damage caused by bullies.<sup>99</sup>

### Anti-Bullying Laws

Bullying is against the law in some countries, where bullying behaviors have been identified as contrary to the idea of dignity at work.<sup>100</sup> The Charter of Fundamental Rights of the European Union provides that “every worker has the right to working conditions which respect his or her health, safety and dignity.”<sup>101</sup> Several European countries have created legal theories to make bullying at work illegal. In 1993, Sweden was the first country in the EU to define bullying as “Victimization at Work” posing a threat to occupational safety and health.<sup>102</sup> In 2002, the European Parliament passed a resolution calling on the EU countries to pass anti-bullying legislation.<sup>103</sup> France adopted a law

90 This session was led by Littler Shareholder, Margaret Hart Edwards, and arose from research done for her article *A Compact Guide to Dealing with Workplace Bullies*, published in July 2011 by SHRM. The other panelists were Raquel Flórez, Partner, Freshfields Bruckhaus Deringer (Madrid, Spain); Pascal Lagoutte, Founding Partner, Capstan Avocats (Paris, France); Ellen Temperton, Partner, Lewis Silkin (London, England); and Matt Forsyth, Vice President and Assistant General Counsel of Sapient Corporation. The author thanks the panelists for their valuable contributions.

91 <http://www.workplacebullying.org/research/WBI-Nat/Survey2010.html>.

92 *Survey Report: Extent and Effects of Workplace Bullying*, May 30, 2010 by KNOWBULL! (Australia) to support Workplace Bullying Awareness Month, available at <http://www.know-bull.com>.

93 See Loreleigh Keashly and Joel H. Neuman, *Bullying in the Workplace: Its Impact and Management*, 8 EMPL. RTS & EMPLOY. POL'Y J. 335 (2004).

94 *Id.*

95 Washington State, Dep't of Labor and Industries, *Workplace Bullying: What Everyone Needs to Know*, Report # 87-2-2008 (Apr. 2008).

96 University of Massachusetts Lowell, available at <http://www.uml.edu/centers/cph-new/job-stress/financial-costs.html>.

97 Sabir I. Giga, Helge Hoel, and Duncan Lewis, *The Costs of Workplace Bullying*, published online by the Dignity at Work Partnership (May 2008) available at [www.unitetheunion.org](http://www.unitetheunion.org).

98 See, e.g., Hoel, Sparks and Cooper, *The cost of violence/stress at work and the benefits of a violence/stress-free working environment*, International Labour Organization, Jan. 1, 2001, available at [http://www.ilo.org/safework/info/publications/WCMS\\_118190/lang--en/index.htm](http://www.ilo.org/safework/info/publications/WCMS_118190/lang--en/index.htm).

99 Robert I. Sutton, *THE NO ASSHOLE RULE: BUILDING A CIVILIZED WORKPLACE AND SURVIVING ONE THAT ISN'T* 49-51 (Warner Business Books, New York 2007).

100 Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 249 (2003).

101 2000 O.J. (C 364) 15 (2000), available at [http://www.europarl.eu.int/charter/pdf/text\\_en.pdf](http://www.europarl.eu.int/charter/pdf/text_en.pdf).

102 Ordinance on Victimization at Work 1993, available at <http://www.av.se/dokument/inenglish/legislations/eng9317.pdf>.

103 European Parliament Resolution on Harassment at the Workplace 2001/2339 (INI), arts. 1,3,6,8,12, 2002 O.J. (C77) 138 (EC), at <http://eurlex.europa.eu/LexUriServ.do?uri=OJ:CL:2002:077E:0138:0141:EN:PDF>.



against “moral harassment.”<sup>104</sup> Belgium also passed a law prohibiting bullying, as a form of forbidden harassment,<sup>105</sup> and the UK courts ruled that “mobbing” is prohibited under its general anti-harassment law.<sup>106</sup> Germany developed a common law theory.<sup>107</sup> New Zealand, the state of South Australia, and the provinces of Quebec, Saskatchewan, and Ontario in Canada also have adopted laws.<sup>108</sup> While there is no convention on workplace bullying from the International Labour Organization (part of the United Nations), the ILO has issued a code of practice for workplace violence that attempts to address the phenomenon.<sup>109</sup> Scholars studying the phenomenon abroad suggested that bullying should be addressed in the United States.<sup>110</sup> In the last several years, the Workplace Bullying Institute has advocated for laws against workplace bullying in 18 states, but none of the states has passed a law.<sup>111</sup> Chambers of Commerce have labeled the proposed laws “job killers,” and there is a deep concern that law and etiquette are two separate things, and bullying is a matter of bad manners.

## B. What Is Bullying and How Is It Legally Addressed?

Bullying behaviors are legion, but some of the most common examples are:

- False accusations of errors not actually made, or of insubordination
- Staring, glaring or other non-verbal demonstrations of hostility
- Excluding a person by refusing to communicate or leaving them out of activities
- Yelling, screaming or humiliating the target, often in front of others
- Making up arbitrary standards, that the bully does not follow, or that do not apply to others
- Encouraging others to turn against the target
- Stealing credit for work
- Retaliation after a complaint is filed
- Imposing unrealistic demands/deadlines
- Sabotaging the target person's work<sup>112</sup>

## C. Latest Developments in a Sampling of Jurisdictions

### France

Pascal Lagoutte relates that, in France, bullying is called “moral harassment,” a term arising from the work in the late 1990s of psychiatrist Marie-France Hirigoyen. “Moral harassment” is broadly defined by the French Labor Code as “repeated acts which, intentionally

104 Modernization of Employment Act of 17 January 2002, Social Modernisation Law no. 2002-73, available at [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr). See Article L-122-46 of the Code du Travail.

105 Belgium: *Loi relative à la protection contre la violence et le harcèlement moral ou sexuel au travail of 11 June 2001*, Moniteur Belge, June 22, 2002, pp. 28521-24. In Spain, the 1978 Constitution of Spain guarantees the worker's right to dignity in Part I, Section 10.

106 Protection from Harassment Act, 1997, c. 40.

107 German law prohibits “mobbing,” a group form of bullying, and this theory is a common law theory based on the recognized right to protect one's personality, meaning to be free from insult. Art. 2, Section 1 of the German Basic Law (Grundgesetz). German law also provides that a person's right to dignity is inviolable. Art. 1 Section 1 German Basic Law.

108 Only South Australia has a workplace bullying statute, Occupational Health, Safety and Welfare Act 1986 (SA) section 55 A(1). Other Australian states and territories require the employer to provide a safe place to work, but do not mention bullying. In Canada, Quebec: Act Respecting Labour Standards R.S.Q. ch. N-1.1 as amended by S.Q. 2002, ch. 80, arts. 47, 68 in force in 2004; Saskatchewan: Occupational Health and Safety (Harassment Prevention) Amendment of 2007, S.S. 66 (2007); Ontario: Bill 168, Occupational Health and Safety Amendment Act (violence and Harassment in the Workplace) Chapter No. S.O. 2009 C. 23.

109 Int'l Labour Organization, Programme on Safety & Health at Work and the Environment (SafeWork) (2004), <http://www.ilo.org/public/english/protection/safework/violence/index.htm>.

110 See, e.g., David C. Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEORGETOWN L. J. 475 (2000).

111 See <http://www.healthyworkplacebill.org>.

112 Workplace Bullying Institute, available at <http://www.workplacebullying.org/research/WBI-Nat/Survey2010.html> For a study attempting to develop a definition of bullying, see Paula Saunders, Amy Huynh, and Jane Goodman-Delahunty, 30 IJLPY (International Journal of Law and Psychiatry) 4-5, 340-354 (2007), in which the authors found that the key ingredients of bullying behavior are: perpetuation of negative behavior, a harmful effect on the target, unprofessional conduct, intent, a power imbalance, and persistence/frequency.

or unintentionally, trigger a degradation of an employee's working conditions, likely to infringe on his or her rights or dignity, or alter his or her physical or mental health, or jeopardize his or her professional future." An identical definition is also used in the Penal Code. Moral harassment does not include legitimate and justifiable criticism of an employee's behavior or job performance that is conducted in an appropriate matter. It need not be related to a protected category. Employees who complain of moral harassment are protected from retaliation. Actions constituting moral harassment may also create a right to social security benefits where there is an impact on a victim's health, emotional distress, or if there is a suicide that appears to be work-related.

On April 30, 2009, the *Cour de Cassation* (French Supreme Court) adopted a highly protective stance regarding employees who report moral harassment, ruling that if the complainant presents evidence that moral harassment occurred, this creates a presumption of moral harassment, and the courts will consider the facts as a whole to determine if the presumption applies. This interpretation has, in effect, created a right to the protection of mental health at work. On November 10, 2009, the same court ruled that moral harassment could occur even if there is no malicious intent and that certain management methods were moral harassment *per se*.

Notwithstanding these rulings, there has been limited litigation. On the individual and group level, most bullying situations are resolved internally, through collective action, working with employee representatives. If there is a harassment situation, the staff delegate, whose employment receives the highest protection, will conduct an inquiry with management, issue a report, and positive action must be taken to resolve the situation based on that report. For example, a bullying manager may receive coaching. One complication is that the expectation that the staff delegate has the jurisdiction to investigate and resolve bullying incidents may conflict with a code of conduct instructing employees to bring bullying incidents to a compliance officer.

## Spain

Panelist Raquel Flórez explained that Spain adopted the concept of moral harassment, *acoso moral*, from France. However, in Spain there has been more frequent litigation, particularly in cases involving employees who worked in public administration, where the difficulty of discharging employees can lead to using harassment to force out unwanted workers. Indeed, in public administration, 32% of employees believe that they have been harassed. The courts have evolved a definition of bullying which is widely applied: serious and negative behaviors against an employee, that occur in the workplace, that are systemic and methodical, repeated for a period that lasts at least six months, and are willful and have the aim of destroying a person's communications with others, attacking his or her dignity or forcing a resignation. Short-term conflicts at work and sporadic mistreatment (even if a breach of other duties) does not qualify. The most common bullying behaviors are: denying a person's right to speak or be heard, cutting off sources of communications or communications media, isolating a person or alienating the person's peers from the person, denigrating the person in front of his/her peers through jokes or negative comments, discrediting the person's professional abilities, stealing credit for his/her work, or giving the person work far below or far above their qualifications, or engaging in conduct that compromises the person's health.

Employees may commence an action, while still employed, to terminate employment with compensation for economic and moral damages for the bullying suffered, including remedies such as publication of the judgment so that the victim's honor is restored. The employer may also be fined €3,000 to €90,000 if it is responsible for or tolerates bullying. If the victim is incapacitated, he or she may claim social security benefits. Bullying may also be a criminal offense, carrying a penalty against a bully of imprisonment from six months to two years.

One example of a civil case involved a female store manager who went on sick leave for stress after new procedures were imposed in her store by a new HR manager. Upon return from leave, she was assigned to a different store under the supervision of someone with lower qualifications, and was asked to do heavy manual work outside her job description. She had an argument with her new manager, who grabbed her violently (an offense for which he was sentenced by the Criminal Court). Rather than investigate the situation, the company put her on trial status to see if she would adjust to the new conditions of the job. She again went on sick leave. On return, she was assigned to yet another store, where she had a similar experience. The court agreed that this was a clear case of bullying, and agreed that the employee had a right to terminate her employment with compensation.

An example of a criminal conviction for bullying involved a furniture store manager who was fired by the general manager. She successfully challenged the termination in court and was reinstated. However, on reinstatement, the general manager assigned her to a dirty small room, without ventilation and isolated from all employees, with a single table, chair, pen, and piece of paper, and no duties. After a

month, she had an anxiety attack and went on sick leave. The general manager's conduct was ruled a criminal offense against her integrity, and he was sentenced to six months of imprisonment and loss of his right to vote for that period.

## United Kingdom

Panelist Ellen Temperton explains that in England and Wales, there is no specific prohibition of bullying, but that bullying behavior is covered by other legislation, such as the Equality Act 2010, which prohibits discriminatory harassment and discriminatory victimization. The law also imposes a duty of care on employers to prevent psychiatric injury where it is reasonably foreseeable that it may be caused by bullying. Employees may also make claims for unfair dismissal under the Employment Rights Act if they demonstrate that their resignation was provoked by untenable working conditions and thus that they were constructively dismissed. In addition to the general legislation prohibiting harassment UK employees have also invoked anti-stalker legislation, the Protection from Harassment Act 1997, to address repeated conduct. Under this law, there is no need to link the bullying behavior to a protected characteristic. The United Kingdom has seen considerable litigation about bullying, so employers are striving for compliance with standards of behavior that are appropriate, dignified, respectful, and non-intimidating.

As noted above, bullying may be illegal harassment under the broadly defined prohibitions against harassment in the Equality Act 2010 on the basis of a protected characteristic (*e.g.* age, sex, race, religion or belief, gender reassignment, sexual orientation, pregnancy, maternity, etc.) *Harassment* is unwanted conduct, of a sexual nature or related to a relevant protected characteristic, which has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive working environment (taking into account the perceptions of the worker, the other circumstances, and whether it is reasonable for the conduct to have the effects which may have occurred). Notably, discriminatory harassment may be a one-off incident, a situation where the employee has put up with conduct without complaining that it was unwanted, or the employee has participated in the banter as a coping strategy. While the conduct must be related to a protected category, this is widely construed. For example, there was a case involving a man who was not gay, and his colleagues knew he was not gay. However, he lived in an area in Brighton known to have a large population of gay people, so his colleagues teased him about being gay. Even though he was not gay, and everyone knew that, and he knew that they knew that, he was offended and successfully sued for harassment.<sup>113</sup>

In the UK, bullying can also arise by association. Mocking a person as if he had a speech impediment when that person has a child with that disability may give rise to a claim of harassment. Recent cases have involved harassment using social media outside work where the relationship arose at work, giving rise to the duty to protect the employee. There is also a duty to protect employees from harassment by third parties.

In one notable case, *Helen Green v. DB Group Services (UK) Limited*,<sup>114</sup> the High Court of Justice, Queen's Bench Division in London, heard a bullying case over an 11-day period. The court took testimony from over a dozen witnesses who testified about the tiny details of workplace interactions involving Ms. Green and the persons she accused of bullying her. In a 191-paragraph opinion, the court recounted the evidence about how Ms. Green, who was psychologically vulnerable to abuse because of abuse as a child, had worked her way through school and achieved a position of Company Secretary Assistant, where she received good reviews for her work, and was well compensated. She claimed that she was continually harassed by three lower-level female office staff members who stared at her, excluded her from conversations, waited until she walked by and then burst out laughing, removed her name from distribution lists, hid her mail, moved things on her desk, made raspberry noises when she walked by, and engaged in other childish behaviors. Ms. Green also complained about the conduct of an ambitious male coworker who used vulgar language with her, took credit for her work, seized assignments that would get him attention, and answered calls intended for her, telling callers he would have "her get right on it," thereby giving the impression he was her supervisor. She complained that another older, higher ranking male coworker shouted at her, insulting her work. When she complained to HR, she was told the man would apologize. Instead of apologizing, he told her she should watch who she was talking to, and that he would write a letter to have her removed if she did not drop her complaint. Ms. Green became clinically depressed, was hospitalized for a period, and was never able to return to work at the firm. Instead, she took a lower-paying academic position. She won her case, and was awarded approximately £828,000 (approximately US \$1.6 million).

113 *English v Thomas Sanderson Ltd* [2008] EWCA Civ 1421 (Dec. 19, 2008), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2008/1421.html>.

114 [2006] EWHC 1898 (Q.B.).



## The United States

US courts have repeatedly ruled that anti-discrimination laws are not “laws of etiquette,” and that rude behavior is not the province of the courts.<sup>115</sup> Defining bullying is a big part of the challenge in creating any law against bullying. The definition often used by advocates for legislation is broad indeed —“repeated health-harming mistreatment ... that takes one or more of the following forms: verbal abuse, offensive conduct/behaviors ... which are threatening, humiliating, or intimidating”, or sabotage that interferes with work.<sup>116</sup> Legislatures have been concerned that bullying cases would flood the courts. While this has not happened in countries with anti-bullying laws, their procedures for litigating employment claims do not offer the same potential rewards for filing suit.

Right now, being a workplace bully is not against the law in the United States, unless: (1) the bullying behaviors happen to also be illegal discrimination or harassment based on sex, race, age, disability, or the like; (2) the behavior meets the legal definition of assault; or (3) is so serious as to be intentional infliction of emotional distress not preempted by state workers' compensation law. Thus, victims of bullying must rely on existing legal theories for redress, which can include workers' compensation claims for stress, or even violations of state anti-stalking laws, where these laws are sufficiently broad.<sup>117</sup>

An Indiana case provides an example of how bullying cases can work under existing law. A hospital operating room perfusionist (operates the heart/lung machine during surgeries) sued a cardiovascular surgeon for intentional infliction of emotional distress and assault after a verbal altercation in which the surgeon advanced on the perfusionist with clenched fists, beet-red face, popping veins, swearing and screaming. The perfusionist backed against a wall, putting his hands up to protect himself, believing he was about to be hit. The surgeon then stopped, and told the perfusionist, “you're finished, you're history.” The perfusionist became ill and was unable to return to work at the hospital. The Indiana Supreme Court upheld the award of \$325,000 to the perfusionist on the assault claim, which was the only claim to survive the trial. At trial, there was expert testimony that the incident was an example of workplace bullying. The court found that testimony was not error, as workplace bullying is a general concept that could be part of a claim for assault or intentional infliction of emotional distress.<sup>118</sup>

An example of a bullying case based on conventional discrimination theory involved a female quality assurance manager who was bullied by three men working in the engineering department who did not report to her. They were rude, made offensive remarks related to her gender, stared at her, laughed at her, gave her dirty looks, smirked at her, tampered with her computer, bumped into her repeatedly, stapled her business cards together, drew a mustache on a picture of her grandson in her cube, put shredded paper in her desk, and falsely accused her of giving obsolete specs to a coworker. The manager made a claim of gender harassment, claiming a hostile working environment. The court declined to dismiss the claim, relying on a number of previous cases where courts had found that non-sexual conduct could be illegal sex-based harassment where it can be shown that but for the employee's sex, she would not have been the subject of harassment.<sup>119</sup>

Another case applying sex discrimination law to address a workplace bully is *EEOC v. National Education Association*,<sup>120</sup> where the court found that a male workplace bully, who used profanity, shouted, and shook his fist at employees of both sexes engaged in gender-based harassment. The court found that the subjective effects of the behavior were more severe for women victims, and there was some evidence that the bully engaged in more severe forms of intimidation with women and did so more frequently than he did with men. Notably, there were more women than men in the workplace available as targets for the bully.

115 See *Oncala v. Sundowner Offshore Services, Inc.*, 523 US 75, 80 (1998), where the US Supreme Court said that Title VII is not a general civility code for the workplace and does not prohibit all employment-related verbal or physical harassment.

116 See Workplace Bullying Institute, <http://www.workplacebullying.org/targets/problem/definition.html>. For a narrower definition proposed by advocate David C. Yamada, see *Crafting a Legislative Response to Workplace Bullying*, 8 EMPL. RTS & EMPLOY. POL'Y J. 475 (2004).

117 Michigan's anti-stalking law prohibits a “willful course of conduct involving repeated or continuing harassment of another that would cause a reasonable person to feel terrorized, intimidated, threatened, harassed or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested,” and defines “harassment” as conduct directed toward the victim that is repeated or continuing that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress, but is not constitutionally protected conduct or conduct that serves a legitimate purpose. MICH. COMP. LAWS §750.411h(1) (2007).

118 *Raess v. Doescher*, 883 N.E.2d 790 (Ind. S. Ct. 2008).

119 *Pappas v. J.S.B. Holdings, Inc.*, 392 F. Supp. 2d 1095 (D. Ariz. 2005).

120 422 F.3d 840 (9th Cir. 2005).

## D. Employers Should Take Practical Steps to Prevent Bullying

The panelists agreed that employers should be prepared to address the bully at work. This is often hard to do, as the bully at work frequently manages to intimidate managers, and even HR professionals. If the bully is a senior executive, addressing the behavior may be complex. A 2011 study demonstrated that men who were more aggressive and less agreeable are paid more than agreeable men and disagreeable women. Men who are cold, critical and even show anger are perceived as more competent.<sup>121</sup> A 2005 study by British psychologists who administered personality tests to high-level British executives and compared their profiles to those of criminal psychiatric patients at a UK hospital, concluded that certain personality disorders were more common among the executives than the criminals, such as: (1) histrionic personality disorder, where the person is superficially charming, insincere, egocentric and manipulative; (2) narcissistic personality disorder, where the person is grandiose, has a lack of empathy for others, and is exploitative; and (3) obsessive-compulsive personality disorder, where the person is a perfectionist, rigid, dictatorial, and excessively devoted to work.<sup>122</sup> If bullies do have personality disorders (and it seems unlikely that they all do), it is important to remember that personality disorders may be covered by the definition of disability under the Americans with Disabilities Act. This means, as a practical matter, that the employer may have to engage in reasonable accommodation. Whether such accommodation would include tolerating bullying behavior may be a subject of controversy, as some case law suggests that troublesome behavior that is the result of a disability may have to be the focus of reasonable accommodation efforts, if the behavior is not otherwise illegal.<sup>123</sup> Of course, there is the need to distinguish bullies from corporate leaders, sometimes described as “the great intimidators,” who achieve great success with a highly abrasive style that pushes others to accomplish a goal (rather than tear others down to make themselves feel good).<sup>124</sup>

Panelist Matt Forsyth pointed out that as more people enter the workplace who have received training on bullying in school, workplace mores are likely to change. In the United States the defense used in some discrimination cases of “equal opportunity harasser,” otherwise known as the “son-of-a-bitch defense,” may disappear. A critical part of prevention is to establish a respectful workplace culture, where bullying is not tolerated. The culture must be such that a victim of bullying will be confident that if he complains, there will be corrective action.

Employers should look at bullying as a hazard to health, and a potential form of illegal harassment. Thus, they should take steps to be able to use the defense that they took all reasonable steps to prevent bullying, and that they offered avenues of redress that employees unreasonably failed to use. The following are eight basic steps that employers should consider taking to prevent and address workplace bullying:

1. Adopt a policy prohibiting bullying behaviors, listing examples of the types of behaviors that should not occur at work. If there is a policy regarding workplace violence, the bullying policy should be added to this policy. Publicize the policy to employees. Consider bullying a workplace safety and health issue to include in safety monitoring programs.
2. Add a ban against bullying behavior to the code of conduct. Make sure all employees see the code of conduct.
3. Provide a written reporting process for incidents of bullying that offers multiple avenues for reporting bullying behavior. The employer should make sure that employees are on notice of this process. The process should account for local practices of collective bargaining, works councils, and staff delegates. Anonymous reporting mechanisms are often unacceptable outside the United States.
4. Make sure that reported incidents are actually investigated thoroughly and follow-up remedial action is taken in a timely fashion. The investigations and follow up should mirror the process followed for sexual harassment and discrimination claims.
5. Persons who complain about bullying should be protected from retaliation. This means that the person accused of bullying must be counseled specifically to avoid engaging in behaviors that would be reasonably perceived as retaliatory. There should also be follow up with the victim to make sure that unreported retaliation is not occurring.
6. Bullies must be disciplined and, if appropriate, terminated.

121 Timothy A. Judge, Beth A. Livingston, and Charlice Hurst, *Do Nice Guys — And Gals — Really Finish Last? The Joint Effects of Sex and Agreeableness on Income*, J. OF PERSONALITY AND SOCIAL PSYCH. (Nov. 28, 2011).

122 B.J. Board and Katarina F. Fritzon, *Disordered Personalities at Work*, 11 PSYCH., CRIME AND L. 17 (2005).

123 See, e.g., *Gambini v. Total Renal Care*, 486 F.3d 1087 (9th Cir. 2007); *McKenzie v. Dovala*, 242 F.3d 967 (10th Cir. 2001); *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001).

124 Roderick M. Kramer, *The Great Intimidators*, 84 HARV. BUS. REV. 88 (2006).

7. Train HR professionals and managers both to recognize bullying behaviors and to develop techniques to address bullies. Notably, the results in several cases and studies of workplace bullying teach the lesson that poorly informed HR professionals and managers have made bullying worse by appearing to excuse the conduct, or minimizing its importance. The training by multinational employers should provide examples of cultural differences that may be perceived as bullying. Cultural differences in the way workplace instructions are given, deadlines are set, or negotiations are conducted may lead to perceptions of bullying by those unfamiliar with local practices. HR should be alert to the misuse of appraisals as a tool for bullying, and should use employee surveys to detect bullying environments.
8. Provide an employee assistance program with confidential counseling.

## VIII. AFRICA: A WEALTH OF BUSINESS OPPORTUNITIES IN AN UNFAMILIAR LEGAL LANDSCAPE<sup>125</sup>

### A. Introduction — Modern Day Africa

Africa's place in the global economy has radically changed in the last 20 years. In the early 1990s, *Time* published an article posing the question of whether Africa would have the formidable economic presence that the "Asian tiger" countries had developed. The article pessimistically concluded that Africa was not the next "tiger," its countries would not develop economies the scale of which would rival Asia, and added a rather snide comment to the effect that "as we all know, Africa has no tigers."

Contrary to *Time's* prediction, which by the way neglected to mention Africa's lions, Africa has become home to some of the fastest growing economies in the last 10 years. Africa has also experienced a cultural revolution, and there is a growing sense that African countries and their people can achieve endless possibilities. This growing optimism is reflected in a statement by late Nobel Laureate, Dr. Wangari Maathai, of Africa's need to change its perception of what it can achieve before the rest of the world changes its perception of Africa.<sup>126</sup> Business school guru and noted author Vijay Mahajan captures the growing optimism about Africa and the endless business opportunities the Continent offers in his recent book that is aptly titled *Africa Rising — How 900 Million African Consumers Offer More Than You Think*.<sup>127</sup> Similar to the optimism America experienced in the 1960s with the lunar landing, Nigeria, one of the largest economies and most populous countries in Africa, aspires to have a lunar landing by 2030 and to become one of the top 20 global economies by 2020. The combination of these socio-economic changes, the growth in the number of young consumers who have a keen appetite for education and modern amenities, and the increasing modernization of African governments elevate the interest of investors and foreign corporations in the African Continent. Employers and entities that have operations and employees in Africa should be aware of African labor laws to ensure compliance in an unfamiliar legal territory.

To understand Africa's changing employment landscape, one must first examine the key demographics that differentiate Africa from other regions in the global economy. With this foundational understanding, foreign entities are better prepared to tackle the unique challenges they will face establishing and maintaining business presences in African countries.

### B. Background

The legal system of each country in Africa has a strong link to its colonial past. Britain, France, Portugal and Belgium are the former empires that had a number of colonies on the African Continent. Based on its colonial past, Africa can be divided into a number of regions. Northern Africa (the Arabic region) and the western portion of Africa were heavily influenced by France, and have civil law codes. The eastern and western coasts of southern Africa are the former Portuguese colonies, also with civil law codes. The southern and eastern regions of Africa are former British colonies with common law legal systems. The eastern regions around the Equator and Nigeria are also former British colonies, but they have also been influenced by the principles of Islam. These historical influences provided the foundation of each country's legal system, but the evolution of each country's legal culture and employment laws is distinct.

### Demographics

Africa is home to over one billion people — comprising one-seventh of the world's population. Africa's population is rapidly expanding, with 36 births per 1,000 people. This birth rate is much higher than the United States' rate of 14 births per 1,000 people, the European Union's rate of 10.6 births per 1,000 people, China's rate of 12 births per 1,000 people and even India's rate of 23 births per 1,000 people.<sup>128</sup>

<sup>125</sup> This session was led by Littler Shareholder and US Practice Co-chair of Littler's International Employment Practice Group, Johan Lubbe. Panel participants were Vivian Osayande, Senior Associate, Templars (Lagos, Nigeria); Jan Snyman, Chief Legal Advisor, SASOL (South Africa); and Johnny Wilson, Senior Attorney, The Nature Conservancy (Washington DC). This article is based in part on the panel discussion, with the section on the employment relationship researched and written by Littler to supplement the discussion.

<sup>126</sup> After winning the Nobel Peace Prize in 2004, Dr. Wangari Maathai was interviewed by CNN and stated: "I really don't think that Americans will change their perception about Africans until Africans change their perceptions about themselves...what we really need is to encourage ourselves and rely on ourselves, because we have a lot of resources." See VIJAY MAHAJAN, *AFRICA RISING: HOW 900 MILLION AFRICAN CONSUMERS OFFER MORE THAN YOU THINK* 27 (2009).

<sup>127</sup> *Id.*

<sup>128</sup> See Eurostat, EU Crude Birth Rate, available at <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tps00112> (European Union) (last visited Jan. 23, 2012); The World Bank, Birth Rate, Crude (per 1,000 people) (2009), available at <http://data.worldbank.org/indicator/SP.DYN.CBRT.IN> (US, China and India 2009) (last visited Jan. 23, 2012); UN data, Crude Birth Rate, from *World Population Prospects: The 2010 Revision*, available at <http://data.un.org/Data.aspx?d=PopDiv&f=variableID%3A53> (Africa, 2005-2010) (last visited Jan. 23, 2012).

Africa's median age, at 19.7 years, is also much younger as compared to the United States (36.9 years) and the European Union (40.9 years).<sup>129</sup> Africa's high birth rate is one factor that draws its median age toward the younger end of the spectrum. The HIV and AIDS epidemic is another. South Africa's HIV infection rate for females ages 15 to 24 is 13.6%, and for males of the same age range, it is 4.5%. In Botswana, the HIV infection rate is 11.8% for females and 5.2% for males. In contrast, the prevalence of HIV in the United States is substantially lower: 0.2% for females and 0.3% for males.<sup>130</sup> As a result of the prevalence of HIV, political and civil unrest and a dearth in medical care, the life expectancy in many African countries is between 50 and 60 years, while the life expectancy at birth for the United States is 78.3 and the European Union is 76.5.<sup>131</sup>

## Economics

African countries' economic indicators show the vast disparity between the size of the population and economic potential. GDP at purchasing power parity for Nigeria, a country with a population of 155 million, is \$217 billion; for Botswana, with a population of 2 million, it is \$14 billion; while for the United States, with a population of 313 million, it is \$14.66 trillion.<sup>132</sup> Although the United States has a significantly higher purchasing power parity, the GDP growth rate for African countries outpaces the growth rate for the United States. For example, Nigeria's GDP growth on an annual basis is 8.4%, Botswana's is 8.6%, and the United States' is only 2.8%.<sup>133</sup>

Unemployment statistics are a common indicator of economic health in industrialized countries. Unemployment rates in many African countries are high. In 2008, the unemployment rate in Namibia was estimated at 51.2%, while the unemployment rate in South Africa was estimated at 24.9% in 2010.<sup>134</sup> In contrast, the US unemployment rate in 2011 was approximately 8.95%.<sup>135</sup> The unemployment rate, however, only considers the formal sector of the economy. It is estimated that about 48% of all job opportunities across Africa are in the informal sector.

African countries are actively working to grow their formal economies. Starting a business in Africa is becoming easier as its countries streamline their startup procedures and make it faster to register new businesses. From 2006 through 2010, the United States consistently required six startup procedures to register a business. During the same period, the number of startup procedures in Nigeria decreased from nine to eight and in Mozambique, the number of startup procedures decreased from thirteen to nine.<sup>136</sup> African countries are also reducing the time required to start a business, as they realize that making their startup procedures easier will encourage foreign businesses to start operations and also encourage local business growth. From 2006 through 2010, Nigeria reduced the time required to start a business from 43 to 31 calendar days. In Mozambique, despite the country recovering from a decade long civil war, the number of days to start a business has decreased from 113 to 13.<sup>137</sup> Comparatively, during the same period, it took six calendar days to start a business in the United States.

129 UN data, Median Age (years), from *World Population Prospects: The 2010 Revision*, available at <http://data.un.org/Data.aspx?q=age+&d=PopDiv&f=variableID%3A41> (Africa 2010) (last visited Jan. 23, 2012); Central Intelligence Agency — The World Factbook, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (United States) (last visited Jan. 23, 2012); Eurostat, Population on 1 January: Structure Indicators, available at [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=demo\\_pjanind&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=demo_pjanind&lang=en) (EU 2010) (last visited Jan. 23, 2012).

130 See The World Bank, Prevalence of HIV, female (% ages 15-24) (2009), available at <http://data.worldbank.org/indicator/SH.HIV.1524.FE.ZS?display=default> (last visited Jan. 23, 2012); The World Bank, Prevalence of HIV, males (% ages 15-24) (2009), available at <http://data.worldbank.org/indicator/SH.HIV.1524.MA.ZS?display=default> (last visited Jan. 23, 2012).

131 See Central Intelligence Agency — The World Factbook, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (United States) (last visited Jan. 23, 2012). For example, South Africa is 49.3 years, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (last visited Jan. 23, 2012); Botswana is 58 years, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html> (last visited Jan. 23, 2012); Nigeria is 47.6 years, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last visited Jan. 23, 2012); UN data, Life expectancy at birth, both sexes combined, (2005-2010) available at <http://data.un.org/Data.aspx?d=PopDiv&f=variableID%3A68> (European Union). Life expectancy in Africa is 52 years. See The World Bank, Africa, available at <http://go.worldbank.org/VJ7PSXVTP0>.

132 GDP at purchasing power parity (PPP) exchange rates is the sum value of all goods and services produced in the country valued at prices prevailing in the United States. This is the measure most economists prefer when looking at per-capita welfare and when comparing living conditions or use of resources across countries. See Central Intelligence Agency — The World Factbook, GDP (Purchasing Power Parity) (2010), available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html>.

133 GDP growth on an annual basis adjusted for inflation. See Central Intelligence Agency — The World Factbook, GDP — Real Growth Rate (2010), available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2003rank.html>.

134 See Central Intelligence Agency — The World Factbook, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html> (Namibia, last updated Nov. 10, 2011) (South Africa last updated Nov. 15, 2011).

135 See United States Department of Labor, Bureau of Labor Statistics, Economic News Release (last updated Jan. 6, 2012), available at <http://www.bls.gov/news.release/empfit.nr0.htm>.

136 The World Bank, Start-up procedures to register a business (number) (2006-2010), available at <http://data.worldbank.org/indicator/IC.REG.PROC>.

137 The World Bank, Time required to start a business (days) (2006-2010), available at <http://data.worldbank.org/indicator/IC.REG.DURS>.



Foreign direct investment represents one of the most significant economic developments in Africa in the last decade. India and China have both undertaken substantial projects in African countries and have benefited from increased trade and control over natural resources. China's trade with Africa has grown from \$2 billion in 1999 to \$120 billion in 2010. China has sponsored some of the continent's largest construction projects, such as airport terminals and football stadiums. Similarly, India's trade with Africa has increased from \$3 billion in 2001 to \$46 billion in 2010. India has also set a goal to increase trade with Africa to \$70 billion by 2015.<sup>138</sup> European countries and the United States have also increased their investment contributions across the continent.

## Technology

The prevalence of technology and reliable power sources are key elements that determine economic growth rates for African nations. In 2007, Nigeria lost 8.9% of sales due to electrical outages. Foreign entities recognize that there is a higher risk for lost profits in Africa due to inconsistencies in the power supply.

Reliable power sources also are essential for the growth of Internet usage and e-commerce. In 2009, 78.1 of 100 people in the United States had Internet access, while only 2.7 of 100 people had Internet access in Mozambique and 28.5 of 100 people in Nigeria.<sup>139</sup> Africa also has a limited number of secure Internet servers as compared with the United States. In 2010, the United States had 1,446 secure Internet servers per one million people, while Nigeria only had one and South Africa had 63.

One of the biggest technological growth areas is in mobile phones. Mobile phone usage in Africa increased fivefold between 2005 and 2010, to over 500 million subscribers. Mobile phones not only improve communication but they facilitate business. Africans use their phones to share information, barter air time, and for banking purposes. Communication is so important to Africans that many own multiple phones and seek out the latest versions of cellular phones upon their release into the market. African governments and companies continue to invest in mobile phone technology and infrastructure with the goal of expanding local businesses and attracting foreign corporations.

## C. Conducting Business in Africa

Before establishing business operations in one of the 54 African countries, companies must examine the practical aspects of creating a presence and running a business. Partnering with local counsel and business advisors will ensure that entities comply with legal requirements and set up favorable employment relationships. They will also broker relations with the proper government officials to create harmonious working arrangements and avoid costly operational mistakes.

### Trade Unions

Overall, unionization rates in African nations are similar to those of other industrialized nations. Sub-Saharan African countries tend to have the highest unionization rates. In South Africa 25% of workers belonged to a trade union in 2010, as compared to only 13.1% in the United States.<sup>140</sup>

Trade unions exert power over the economies and governments of most African countries. Unions gained popularity in some countries because they led the fight against oppressive governments. In Nigeria, unions provided the voice for citizens to protest military rule and led to the establishment of democracy, and Nigerians generally believe that unions represent the good of people and equality. In South Africa, after the recommendations of the Wiehahn Commission in 1982 led to an amendment of the labor law legalizing trade union membership by African employees, the labor unions provided an institutional structure for advancing the freedom struggle of workers. Many trade union leaders emerged as political leaders and members of the first ANC government after the democratic elections of 1994 in South Africa.

In African countries, union membership is voluntary, but unlike in the United States, no union obtains status as the "exclusive" bargaining representative. Multiple labor unions may represent employees in the same bargaining unit. Companies are quietly launching union avoidance campaigns to ensure that labor disputes will not shut down operations. In Nigeria, the strongest unions are in the oil and gas industries,<sup>141</sup> which have the power to shut down the country.<sup>142</sup>

138 The Indian Prime Minister, Manmohan Singh, announced in May 2011 that India would offer \$5 billion in new loans to help Africa meet its development goals, \$700 million for new institutions and training programs and a \$300 million line of credit for a new rail line between Ethiopia and Djibouti.

139 The World Bank, Internet users (per 100 people), available at <http://data.worldbank.org/indicator/IT.NET.USER.P2>.

140 See Unionstats.com, Union Membership and Coverage Database from the CPS, available at <http://www.unionstats.com/> (posted Jan. 21, 2011).

141 Nigeria, which produces 2.4 million barrels of oil a day, is the fifth-largest oil exporter to the United States.

142 In January 2012, the Nigerian labor unions launched a nationwide strike in protest against the government's decision to abolish fuel subsidies. President Goodluck Jonathan's government abandoned subsidies that kept gasoline prices low on January 1, 2012, causing prices to spike by more than 106% from \$1.70 per gallon (45 cents per liter) to at least \$3.50 per gallon (94 cents per liter).



In other African countries, unions operate in partnerships with the government. In South Africa, unions play an official role in the formulation of labor policy and the passing of workplace laws. The National Economic Development and Labour Council (NEDLAC)<sup>143</sup> provides the vehicle by which government, labor, business and community organizations cooperate, through problem solving and negotiation, on economic, labor and development issues, and related challenges facing South Africa. Many government officials came to their position through trade union ranks. This creates a dynamic where former trade unionists are criticized when they become government officials for not catering to trade union demands, and unrest follows.

While the power of trade unions in South Africa, like many other African countries, is decreasing, the prevalence of strikes is increasing. In 2010, South Africa lost 14.6 million strike-induced work days. The impact of strike activity increased in 2011 by 22% to 17.8 million lost work days.<sup>144</sup> South Africans have yet to determine why this is the trend and how to curb the prevalence of strikes. Similarly, in Ghana, the legislature established a National Tripartite Committee with equal representation by government, labor unions, and employers' organizations.<sup>145</sup> The Committee's objectives include to "advise on employment and labour market issues, including labour laws, international labour standards, industrial relations and occupational safety and health."<sup>146</sup>

Companies that embark into Africa would be well served to obtain a good understanding of the socio-political role of local labor unions, the institutional structures through which labor unions operate and their agenda. The Western model of industrial relations does not necessarily apply.

### **Ensure Compliance with Local Laws**

Employers that enter the African market often make critical mistakes in conducting business and hiring employees. First, employers frequently assume that African countries have laws that mirror their former colonial power or their neighboring countries. This is simply not true. African countries may have strong legal influences from their former colonial nations, but they have developed their own legal culture and practices. Accordingly, US decision-makers cannot assume that familiarity with the laws of European member countries will ensure an understanding or compliance with the laws of the African country in which they have operations.

Second, employers often assume that they can impose the laws of the country in which their corporate office is located on their African operations. As in Europe, each African country must be viewed as a sovereign nation with its distinct set of laws and varying levels of sophistication. Respecting local laws and complying with different regulations that may not be as desirable as the home laws is essential to establishing and maintaining successful and harmonious business relations in African countries.

Third, workplace law has developed to varying degrees in each African country. Some African countries have modern well-developed workplace law (such as South Africa and Botswana), with Kenya and Nigeria with developing law and other jurisdictions, such as Zimbabwe, with good "black letter" law but hardly any enforcement. In Kenya and South Africa, for example, employees can only be terminated for good cause and employees terminated for economic or technical reasons are by law entitled to severance (retrenchment) pay. No such protections exist in Nigeria. These nuances mandate that companies with operations in Africa investigate local practices and do not assume that "best practices" for the entity in its country of origin will be sufficient to govern African operations.

Fourth, entities must be aware that African workplace laws are constantly evolving. Keeping apprised of legal changes can be as important as understanding the existing framework when establishing and maintaining operations on the African Continent.

Entities can avoid these pitfalls by developing standard operating procedures (SOPs) to which they can refer to before establishing operations in a new country or expanding existing operations. The SOPs can be customized to the organization or to the specific employment role. SOPs should address legal requirements and should include social and economic concerns, registration requirements, tax and reporting requirements and copyright and trademark issues, to name a few.

### **Government Enforcement of Local Law**

Establishing a presence in an African country requires compliance with local laws and coordination with government officials. African governments do their best to check on newly established entities and foreign-owned entities to ensure that they have all of the proper

<sup>143</sup> NEDLAC was established in law through the National Economic Development and Labour Council Act, Act 35 of 1994.

<sup>144</sup> Adcorp Employment Index, July 2011 (released on Aug. 12, 2011), available at <http://www.adcorp.co.za/Industry/Pages/AEIAugust2011.aspx>.

<sup>145</sup> Ghana Labour Act of 2003, Section 112.

<sup>146</sup> Ghana Labour Act of 2003, Section 113(1)(b).

registrations and that they have paid the requisite fees. Labor officials are not the only government officials that will stop by a newly registered company — tax officials, social security representatives and other business regulators will ensure that the government is receiving the revenue it deserves under the particular business arrangement and under the law. Once an entity is established, and the government sees that the entity has been compliant, these officials will visit the business less frequently.

Some statutory protections, such as severance, are actively enforced by the government and employers must be careful to ensure that they are complying with these provisions. Noncompliance can be costly and can result in the business being subject to increased government scrutiny.

Labor officials who enforce African labor laws can be a useful tool for settling low level employment disputes between employees and employers. Although these officials often do not have the resources to police entities for compliance with local labor laws the same way that the US officials do, they will enforce local laws to the fullest of their ability.

### **Income Tax and Social Security Contributions**

Complying with African tax laws is one of the more complex challenges for entities conducting business in African countries. Employers often have tax responsibilities even if they do not have a legal presence in the African nation. The United States has signed tax treaties with only two African countries, Egypt and South Africa. As a result, the typical reduced income tax rates and exemptions that apply under model tax treaties are unavailable to US employers with employees in 52 of the 54 African countries.

Income tax issues also arise depending on the type of engagement a company has with its employees. Some companies in South Africa that do business in neighboring African countries, such as Mozambique, rotate seconded employees to ensure they are not present in the host country for more than 182 days per year. Keeping the period of presence less than 182 days prevents the application of local income tax law and avoids incurring substantial associated payroll cost. In other countries, such as Nigeria, it is more cost effective to work with staffing agencies.

Making social security contributions is another challenge. The United States has not signed a bilateral international social security agreement (Totalization Agreement) with any African country. As a result, US employees sent on international assignment to an African country must pay social security contributions in the host country.

### **Working with Government**

African governments expect to be partners with foreign companies in projects that will strengthen key industries or infrastructure. Mining, oil and transportation are key industries where the governments expect to be an equal or majority partner in the venture. Working in a joint venture with an African government requires that the company choose the right partner organizations to help set up and manage the joint venture. A partner organization should have a complete understanding of the relevant legislation and of the government's expectations. A reality of doing business in Africa and of partnering with governments is that bribery and corruption are rife. Most African countries have no legislation curbing bribery and corruption. Bribery and corruption are especially prevalent in Nigeria. Foreign entities operating businesses in Nigeria must remember, however, that working in Nigeria does not make them Nigerian companies. Global brands have reporting obligations under legislation like the Foreign Corrupt Practices Act and the UK Bribery Act that cannot be ignored when the company is operating in Nigeria. Foreign companies should set up anti-corruption units and train their employees on the company's position on corruption and bribery.

## **D. The Employment Relationship**

### **Hiring Employees**

Employers must be cautious when determining what kind of employment relationships to create in African countries. The use of agency workers, secondments and temporary workers may be common in other industrialized nations, but establishing these relationships can have unintended tax and legal ramifications in Africa.

Staffing agencies allow employers the flexibility of employing workers on a temporary basis; however, in several African countries, including Namibia and South Africa, stakeholders such as labor unions have been campaigning to eradicate staffing agencies. In South Africa,

labor unions argue that labor brokers and temporary employment agreements permit employers to undermine labor unions. Temporary work is not regarded as decent work because people are employed from the streets and are paid at a very low rate (often below the minimum wage). Labor unions also argue that once a temporary employee has been working longer than a certain period of time, such as a few weeks or a month, the person should be converted to a permanent employee and receive the benefits afforded to full-time regular employees.

In some countries, such as Angola, fixed-term employment contracts may be used only in limited circumstances prescribed by law, such as: replacement of a worker who is temporarily absent; temporary or exceptional increase in the employer's normal business activity; conducting occasional and *ad hoc* tasks that do not fall within the employer's regular activities; and seasonal work.<sup>147</sup> Further, in South Africa and Tanzania, if an employee under a fixed-term employment contract has a reasonable expectation that the employer would renew the employment contract, failure to do so constitute an unfair termination.<sup>148</sup>

### Forming the Employment Relationship

In most African countries the employment contract may be written or oral. In some countries such as Ghana, however, all employment relationships of six months or more must be in writing.<sup>149</sup> In other countries such as Angola, the employees must provide a written employment contract if the employee so requests.<sup>150</sup> Regardless of format, the local law will regulate the contract and the employment relationship.<sup>151</sup>

As in European member countries and a few states in the US, some African countries require that employers confirm in writing, shortly after the employment relationship starts, the basic terms and conditions of employment. For example, in Ghana, Kenya, Malawi, Nigeria, South Africa and Tanzania the employer must issue the employee with a written statement of particulars summarizing the basic terms such as the employer's name and address, the employee's job duties, and the applicable notice period. In Ghana the statement must be in a prescribed form.<sup>152</sup> The written statement of particulars must be issued "when the employee commences employment" (Tanzania), or within one month (Malawi), two months (Ghana and Kenya) or three months (Nigeria) after the employee starts working.<sup>153</sup>

Employers should also be aware of other requirements imposed by law in some African countries that are rather unique: in Nigeria, all new hires must be examined by a registered medical practitioner at the expense of the employer to determine whether the employee is medically fit for the job.<sup>154</sup> After the medical examination, the new hire must appear before a labor officer of the Nigerian Department of Labor who must certify that: the employee is fit to perform the work, the employment contract complies with the requirements of the Labour Act, and the employee understands the terms of the employment contract.<sup>155</sup> Also, in Kenya, if the employee is illiterate or cannot understand the language in which the contract is written, the employer must have the contract explained to the employee in a language that the employee understands.<sup>156</sup> Employees in Kenya may sign the employment contract either by signing their name or placing on the contract "an impression of [their] thumb or one of [their] fingers in the presence of a person other than [their] employer."<sup>157</sup>

### Basic Terms and Conditions of Employment

Most African countries do not mandate specific employment benefits beyond some paid vacation time and maternity leave. The main emphasis is on the payment of a minimum wage. Further, employees in Africa are more focused on improving their wages than receiving

147 Angolan *Lei Geraldo Trabalho de Angola* (General Labour Law) of 1981, Article 15(1) (listing 11 instances where the use of fixed-term employment contracts is permissible).

148 South African Labour Relations Act of 1995; Tanzanian Employment and Labour Relations Act of 2004.

149 Ghana Labour Act of 2003, Section 12(1).

150 Angolan *Lei Geraldo Trabalho de Angola* (General Labour Law) of 1981, Article 13(3).

151 For example, Section 14(2) of the Botswana Employment Act of 1982 states that the provisions of the statute — which regulates a wide array of employment issues from hiring, leave of absence, termination to severance pay — apply to all employment contract whether written or oral. Further, Section 38 prohibits parties from contracting out of the protections afforded under the statute. To this end, Section 38 states that if a contract "provides for conditions of employment less favourable to the employee than the conditions of employment prescribed by this Act, the contract shall be null and void to the extent that it so provides."

152 Section 13 of the Ghana Labour Act of 2003, Schedule 1 to that Act.

153 See Ghana Labour Act of 2003, Section 13; Kenya Employment Act of 2007, Section 10; Malawi Employment Act of 2000, Section 27(2)(b); Nigerian Labour Act of 1990, Section; South African Basic Conditions of Employment Act; and Tanzanian Employment and Labour Relations Act of 2004, Section 15(1).

154 Nigerian Labour Act of 1990, Section 8.

155 *Id.*, Section 33 (1) and (2).

156 Kenya Employment Act of 2007, Section 9(4).

157 *Id.*, Section 9(3).

fringe benefits conventionally enjoyed by their Western peers. And, due to the young median age of the African population and the lower life expectancy than their peers in industrialized countries, African employees are less concerned about retirement benefits.

Unlike in the United States, employees in Africa are by law entitled to a set minimum days of paid vacation time. The annual vacation leave entitlement, however, varies greatly between the different countries: the range is from a minimum of six days (Nigeria),<sup>158</sup> 15 working days (Botswana, Ghana and Malawi),<sup>159</sup> 21 consecutive days (South Africa),<sup>160</sup> 28 consecutive days (Tanzania),<sup>161</sup> 21 working days (Kenya),<sup>162</sup> and 22 working days (Angola).<sup>163</sup> Some countries prescribe paid sick time, such as Kenya (seven days of sick leave at full pay and an additional seven days at half-pay),<sup>164</sup> Botswana (14 days at full pay for each 12 months of employment),<sup>165</sup> Malawi (four weeks at full pay and an additional eight weeks at half pay),<sup>166</sup> and Tanzania (126 days for each 12-month period of which 63 days are at full pay and the remaining 63 days are at half pay).<sup>167</sup>

Local law also prescribe a minimum number of days of paid maternity leave, which varies from 12 to 14 weeks at 25% of regular pay in Botswana,<sup>168</sup> eight weeks at full pay in Malawi,<sup>169</sup> 12 weeks at full pay in Ghana,<sup>170</sup> 84 days at full pay (and 100 days if the employee gives birth to more than one child) in Tanzania,<sup>171</sup> to three months in Kenya.<sup>172</sup> Moreover, in some countries, such as Botswana, Nigeria and Tanzania, female employees may not perform any work during the six-week period after the date of child birth (meaning employers may not permit them to return to work before the period has passed).<sup>173</sup>

In some of the African countries, employers have a few obligations not imposed on employers in industrialized countries, which unique obligations reflects the peculiar socio-economic and cultural environment in those countries. For example, in Botswana, if the employee's regular workplace is an area of the country that lacks medical facilities, the employer must provide "reasonable medical facilities" for the employee and for every member of his family who the employer has agreed may accompany him.<sup>174</sup> In Kenya, employers must provide a "sufficient supply of wholesome water for the use of [their] employees at the place of employment,"<sup>175</sup> and also provide employees "reasonable housing accommodation ... either at or near to the place of employment" or add to the employees' wages a "sufficient sum" as rent for such reasonable accommodation.<sup>176</sup> In Nigeria, employers who require employees to live on site must permit employees to have their family accompany them to the place of work, and "family" includes up to two wives and all their children under the age of 16.<sup>177</sup>

### Terminating the Employment Relationship

In most African jurisdictions (including Botswana and Nigeria), the employer may terminate the employment relationship merely by giving the employee notice, and the minimum notice period is prescribed by law. The prescribed minimum notice period varies

158 Nigerian Labour Act of 1990, Section 18(1)(a).

159 Botswana Employment Act of 1982, Section 99(3); Ghana Labour Act of 2003, Section 20(1); and Malawi Employment Act of 2000, Section 44(1).

160 South African Basic Conditions of Employment Act, Section 20.

161 Tanzanian Employment and Labour Relations Act of 2004, Section 31(1).

162 Kenyan Employment Act of 2007, Section 28(1).

163 Angolan *Lei Geraldo Trabalho de Angola* (General Labour Law) of 1981, Article 37(1).

164 Kenyan Employment Act of 2007, Section 30(1).

165 Botswana Employment Act of 1982, Section 101(1).

166 Malawi Employment Act of 2000, Section 46(1).

167 Tanzanian Employment and Labour Relations Act of 2004, Section 32.

168 Botswana Employment Act of 1982, Section 117(5).

169 Malawi Employment Act of 2000, Section 47(1).

170 Ghana Labour Act of 2003, Section 57(1).

171 Tanzanian Employment and Labour Relations Act of 2004, Section 33(6). The number of paid maternity leaves that an employer has to give each employee is also capped at four in Tanzania. *Id.*, Section 33(8).

172 Kenyan Employment Act of 2007, Section 29(1).

173 Nigerian Labour Act of 1990, Section 54(1)(b); Botswana Employment Act of 1982, Section 117(2); Tanzanian Employment and Labour Relations Act of 2004, Section 33(3) (but in Tanzania the employee may return to work earlier if a medical practitioner certifies she is medically fit to do so).

174 Botswana Employment Act of 1982, Section 36(1).

175 Kenyan Employment Act of 2007, Section 32. In Botswana, employers who have employees reside on premises controlled by the employer, must similarly provide access "to adequate and easily accessible supply of wholesome water for drinking, washing and other domestic purposes." Botswana Employment Act of 1982, Section 129(1).

176 *Id.*, Section 31(1).

177 Nigerian Labour Act of 1990, Section 34(1).



greatly between the jurisdictions and depends on the employee's years of service or the intervals that the wage is paid, or a combination of wage payment intervals and years of service.<sup>178</sup> If an employee is illiterate, the employer must orally explain the termination notice to her in a language that the employee understands.<sup>179</sup> Further, the employer may have to explain the reason for the termination to the employee in a language the employee understands and permit the employee representation by either a union official or a co-worker at the termination meeting.<sup>180</sup>

In some jurisdictions (Ghana, Kenya, Malawi, South Africa and Tanzania), employees are also protected against unfair termination, which means the employer must have a substantively fair reason<sup>181</sup> — just cause — to discharge the employee *and* follow fair procedure (e.g., a disciplinary hearing in case of alleged misconduct or unsatisfactory performance, or consultation with the employee in case of termination for economic or operational reasons).<sup>182</sup>

Local laws increasingly protect employees against workplace discrimination. Local law either prohibits discrimination in laws similar to the anti-discriminations laws in the United States,<sup>183</sup> or declares as an “unfair” termination the discharge of an employee for a discriminatory reason. For example, under Kenyan law an employee's race, color, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability “do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty.”<sup>184</sup> In many African jurisdictions, the prohibition of discrimination includes protected categories not covered by US law, such as social origin (Kenya), place of origin (Botswana), language (Angola), property (Malawi), tribe (Botswana, Kenya and Tanzania), political opinion or affiliation (Botswana, Kenya), social, political or economic status (Ghana), station in life (Tanzania), and family responsibilities (Malawi and South Africa).

Employees will by law be entitled to severance pay (more commonly called “retrenchment” or “redundancy” pay) in the event their employment is terminated their employment for economic or organizational reasons.<sup>185</sup> Frequently, local law does not provide a formula to calculate the severance pay; rather, the employer must “use best endeavors to negotiate” with the employee and/or labor union the amount of severance pay.<sup>186</sup> In some countries, the minimum severance pay is prescribed in local law, and varies from seven<sup>187</sup> to 15 days' pay for each completed year of service.<sup>188</sup>

Besides requiring the payment of minimum severance pay, local law may also prescribe the selection criteria employers should apply when deciding which employees to terminate due to economic or organizational reasons. In Botswana and Nigeria, employers must apply the principle of “last in, first out” but the employer may take into account “all factors of relative merit, including skill, ability and reliability” (Nigeria)<sup>189</sup> or “the need for the efficient operation of the undertaking in question, and the ability, experience, skill and occupational

178 In Nigeria the minimum statutory notice period depends on the employee's length of service and ranges from one day to one month. Nigerian Labour Act of 1990, (Section 11(2). In Kenya, the minimum statutory notice period depends on the intervals of wage payment: employees who are paid daily must receive a minimum of one day's notice, and employees who are salaried and paid monthly, must receive at least 28 days' notice. Kenyan Employment Act of 2007, Section 35(1). However, the Kenyan law expressly states that despite the notice, employees may still challenge the lawfulness or fairness of their termination. *Id.*, Section 35(4). In Botswana, the notice period is primarily determined based on the intervals of the wage payment but years of service also factor in for employees who are paid weekly or biweekly: such employees must receive notice of at least two weeks (if their years of service is between two and five years), or four weeks' notice (if their years of service is between five and ten years), or six weeks' notice (if their years of service is more than ten years). Botswana Employment Act of 1982, Section 18(2).

179 See Kenyan Employment Act of 2007, Section 35(3).

180 See Kenyan Employment Act of 2007, Section 41(1).

181 See Ghana Labour Act of 2003, Sections 62 and 63.

182 See Kenyan Employment Act of 2007, Section 45; Malawi Employment Act of 2000, Section 57. In Ghana, the consultation process must start when the employer “contemplates” introducing “major changes in production, programme, organization, structure or technology of an undertaking that are likely to entail terminations of employment of workers in the undertaking.” Ghana Labour Act of 2003, Section 65(1).

183 See South African Employment Equity Act of 1998.

184 Kenyan Employment Act of 2007, Section 46(g). See also Botswana Employment Act of 1982, Section 23(d); Tanzanian Employment and Labour Relations Act of 2004, Section 37(2).

185 In Nigeria, redundancy is defined very broadly as any “permanent loss of employment caused by an excess of manpower.” Nigerian Labour Act of 1990, Section 20(3).

186 See Nigerian Labour Act of 1990, Section 20(1)(c).

187 South African Basic Conditions of Employment Act, Section 41(2); Tanzanian Employment and Labour Relations Act of 2004, Section 42.

188 Kenyan Employment Act of 2007, Section 40(1)(g).

189 Nigerian Labour Act of 1990, Section 20(1)(b).

qualifications of each employee concerned” (Botswana).<sup>190</sup> Kenya, on the other hand, has a more flexible standard requiring employers to give “due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy.”<sup>191</sup>

Some countries require that the employer issue the employee a certificate upon termination of employment, and in some countries the law restricts what the employer may state about the terminated employee. For example, in Botswana, the certificate “shall contain nothing unfavorable to the employee”<sup>192</sup> and in Malawi the employer may only include the reason for termination or an evaluation of the employee’s work if the employee expressly so requested.<sup>193</sup>

## E. Conclusion

African economies will continue to expand and attract substantial foreign direct investment. A wave of “we can do” optimism will continue to build momentum in Africa and expand the consumer market, and business opportunities will grow exponentially for foreign business and non-profit entities. Business expansion and attendant staffing bring challenges for employers who are not familiar with the socio-political and legal landscape of Africa.

African legislatures are steadily reacting to the modernization of their economies and passing workplace laws to regulate the employment relationship. In the absence of specific local workplace regulation, employers should use comprehensive employment contracts to fully describe the terms and conditions of the employment relationship. No default legislative framework exists in many African countries to fall back on. Further, the legal landscape is dynamic and changes frequently. Employers, therefore, should ensure they have the updated version of the local law to ensure compliance.

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<sup>190</sup> Botswana Employment Act of 1982, Section 25(1).

<sup>191</sup> Kenyan Employment Act of 2007, Section 40(1)(c).

<sup>192</sup> Botswana Employment Act of 1982, Section 24(2).

<sup>193</sup> Malawi Employment Act of 2000, Section 31.



## IX. THE EVOLVING LABOR RELATIONS AND LABOR LAW PICTURE IN THE PEOPLE'S REPUBLIC OF CHINA

### A. Introduction

For decades, the allure of the market potential in the People's Republic of China (PRC) has drawn immense foreign investment, particularly given the comparatively inexpensive cost of labor. However, no comprehensive national legislation governing labor or employment existed until 1994 with the passage of the Labor Law of the PRC ("Labor Law"), effective January 1, 1995. Until that time, legislation was scattered across hundreds of policies, rules and regulations at the national, regional and local levels. It was also relatively easy for employers to dictate the terms and conditions of an employment relationship — another historical incentive for foreign investment.

Recent developments and trends — particularly in the last few years — have significantly impacted the PRC employment law landscape. These include the promulgation of the Employment Contract Law (ECL) effective January 1, 2008; an increased volume of collective labor actions and work stoppages; the release of new regulations regarding expatriate employees in the PRC; and an increased number of claims being brought by employees relating to social security, overtime and wages.

The panel introduced and discussed these trends, in an effort to assist employers, especially foreign investors, to address and plan for the current and future labor environment in the PRC.<sup>194</sup>

### B. Labor Law in China — A Historical Perspective

The PRC first opened its doors to investment from the West approximately 32 years ago. One important and common investment structure was the Sino-foreign joint venture ("JV"). Looking at a typical JV agreement highlights at least two areas of significant change in the Chinese labor market:

First, the employment-related provisions of most JV agreements were quite short. They might include three to four lines to identify, among other things, the employees' basic welfare, benefits, and the allocation of trade union funds as well as preserve the JV's right to autonomously hire and fire employees. This abbreviated treatment of labor occurred largely for a couple of reasons. Initially, until the Labor Law, there was no single source that referenced employment-related issues, although there were various scattered regulations. In addition, although the Labor Law contains a number of protections for employees (such as provisions related to employment contracts, work hours, wages, job safety, labor disputes, social insurance and welfare), the specific provisions relating to employment contracts are limited and not nearly sufficient to protect either employers or their employees.

Second, Chinese parties to many JVs objected (often emphatically) to the inclusion of "strikes" or "industrial action" in the definition of a *force majeure* event. Such challenges were based on the fact that collective action rarely took place in the PRC, and it was therefore unnecessary to refer to them in a *force majeure* clause. For the first three decades of foreign investment in the PRC, this statement would prove correct. However, in the past two years, China has seen a significant increase in collective labor actions, in the form of work stoppages or slowdowns (*i.e.*, strikes),<sup>195</sup> and other forms of protests. It is therefore now relatively common to include such actions as a type of *force majeure* in JV contracts.

### C. Emerging Trends

There are several ongoing trends that continue to shape employment law in China. These trends are discussed below.

#### Continuing Effects of the ECL

The 2008 ECL has had a tremendous impact on employment relationships under PRC law. To wit, it is a rigid and pro-employee law that contains not only a clear set of obligations for employers, but also serious legal consequences for failure to comply with them.

<sup>194</sup> The panel was led by Robert Millman, a senior shareholder and board member at Littler Mendelson. Other panelists were Mr. Shicheng Zhang, Deputy Director of the Legislative Affairs Office of the National People's Congress (the only PRC government agency with the right to interpret the law) and Dr. Isabelle Wan, leader of the employment law practice at the Chinese firm TransAsia Lawyers. The authors would like to thank Dr. Wan for the valuable insight and guidance she provided with this section. Littler and TransAsia Lawyers are strategic affiliates.

<sup>195</sup> Dr. Wan pointed out that, in China, the word "strike" is not used. Rather, in Article 27 of the *PRC Trade Union Law*, the term used for such incidents is a "work stoppage" or "work slowdown." This article uses all three terms interchangeably.

One significant effect of the ECL is increased compliance by employers with the ECL's provisions mandating written employment contracts. Specifically, the ECL states that an employer must generally conclude a written employment contract with each of its full-time employees within one month after they are hired, and in any event no later than one year after that one-month grace period. Otherwise, the employer must pay double wages to the employee for every month that it has failed to sign a contract. While the Labor Law also provided that employees must have a written labor contract, many small or private enterprises simply refused to enter into such contracts in order to evade their legal obligations. Since the ECL was introduced, nearly 97% of large companies in China had signed written employment contracts by the end of 2010.<sup>196</sup>

Another notable effect of the ECL has been to encourage employers to adopt a longer term for employment contracts, so as to regulate the length of the underlying employment relationships. Prior to the ECL, many employers provided short-term employment contracts, in order to avoid legal obligations such as social security contributions and severance pay.<sup>197</sup> The ECL addressed this issue by stipulating that certain employees are entitled to request an open-ended contract after they have worked for the same employer under two consecutive fixed-term contracts, unless: (1) the employee still wishes to enter into a fixed-term contract; or (2) the employer has legal grounds not to sign the open-ended contract. As a result, whereas one-year contracts previously accounted for 70% of all employment contracts, they now account for only 10%. Moreover, 80% of the employment contracts executed since the ECL entered effect are for three-year terms.

Finally, the ECL has decreased the inappropriate use of staffing firms. Employers in China often used these firms to hire employees on their behalf in order to save employment costs and to avoid legal liabilities in labor disputes. This kind of arrangement also enabled employers to exploit regional differences in the minimum wage or social security contribution rate, by hiring employees indirectly from areas of China with a relatively low minimum wage or contribution rate. For example, a corporation could hire an employee through a staffing firm in an under-developed area of China and pay the lower wages and social contributions mandated in that under-developed area, but then assign the individual to work in a developed area like Shanghai, with much higher wage and social security contribution standards.

To stop these practices, the ECL limits the circumstances and frequency with which staffing firms may be used. However, this aspect of the ECL has yet to be satisfactorily enforced. Some companies still hire as much as 50% of their employees through staffing firms. The Chinese authorities are currently reviewing ways to find a better solution to this issue.

### Increased Collective Labor Action

Perhaps the most significant trend to emerge over recent years is the increased willingness of workers in the PRC to engage in collective labor actions. Employees contend that it is only through collective action that they have the bargaining power to draw the attention of employers, the media and the government. Indeed, Dr. Wan described this trend not as the evolution of collective labor actions, but as a revolution.

PRC law allows employees to form trade unions and employee representative assemblies but omits detailed rules and procedures. In addition, each locality may have its own local requirements, which further complicates the compliance efforts of foreign investors. Furthermore, the law in the PRC is silent as to the legality of strikes. Accordingly, many companies and government-sanctioned unions are ill-prepared to deal with work stoppages and are often unable to determine whether a particular work stoppage is permissible. In fact, although trade unions are exhorted by law to mediate with management personnel on behalf of workers (but not necessarily to call strikes), many grassroots union representatives are still in the process of learning the relevant laws and regulations. This is in part due to the fact that, prior to the enactment of the ECL, grassroots trade unions generally handled only entertainment functions, such as outings or gatherings, rather than taking a role in upholding the employees' legitimate rights. In practice, the general consensus among lawmakers and trade unions alike is that if a group of employees are claiming legitimate rights, and there is no aggressive action or violence, a strike (work stoppage) will not be deemed to be illegal.

Beginning in mid-2010, an outbreak of work stoppages plagued the PRC:

- There was significant worker unrest after employee suicides occurred at the Foxconn Plant in Shenzhen, where the Taiwanese company produces electronics and components for technology companies. Foxconn employs over 800,000 workers in two

<sup>196</sup> According to statistics issued by relevant authorities in last quarter of 2011.

<sup>197</sup> Prior to the ECL, employers were not obligated to pay severance for contract expiration unless local government rules required it or the parties otherwise agreed.

factories. Conditions at one plant drew media attention and labor unrest after 17 employees attempted to commit suicide, with 13 of them succeeding.

- Workers at a Honda plant in Guangdong began a strike that halted the production of several Honda car models for as long as two weeks. This was noteworthy because work stoppages in the PRC normally last only a day or two. The stoppage inspired three other Honda plants to follow suit. After negotiations, the employees were awarded a 32.4% increase in wages.
- On the heels of the strikes at Honda, industrial action occurred at several other Japanese car-part manufacturers in Guangdong, similarly resulting in wage increases throughout the region ranging from 20% to 38.6%.
- Strikes also continued through 2011, with consistent demands for increased wages and severance.

The primary result of these work stoppages was to create bargaining leverage for the employees: the strikes led to a sharp increase in wages nationwide, and in many cases to improved working conditions and welfare and benefits. The stoppages also highlighted some of the difficulties with attempting to bargain collectively in the absence of clear regulatory guidance. Consequently, there have been increased calls for further reforms, and for the introduction of a nationwide collective bargaining system.

In addition to the work stoppages and slowdowns described above, there has been increased activity by China's largest union, the All-China Federation of Trade Unions (ACFTU). Legally speaking, the ACFTU is a social organization with legal person status. It was established to monitor workplace tranquility between managers and workers. Competing unions have not been allowed. Indeed, the grassroots trade unions nationwide have been criticized by the ACFTU as "dummy" trade unions or "employers' trade unions" which fail to represent the best interests of their members or the government.

The ACFTU has begun a huge drive to register companies in China and to ensure that substantially all of them set up trade unions by the end of 2013. These goals are set forth in three stages, as follows:

- 2011: more than 65% of Fortune 500 companies should have established trade unions;
- 2012: more than 78% should have established trade unions; and
- 2013: more than 90% should have established trade unions.

The overall target is to have the total number of legal persons in trade unions reach 6 million or more.

### **New Regulations Concerning Expatriate Employees**

In 2011, new regulations under Article 97 of the Social Insurance Law took effect, which require the expatriate employees of foreign companies assigned to work in China to participate in, and contribute toward, the PRC social insurance scheme. The Interim Measures for the Participation of Foreign Employees in the Social Insurance Scheme in China ("Interim Measures"), effective October 15, 2011, were subsequently adopted by the Ministry of Human Resources and Social Security and approved by the State Council.

The Interim Measures require expatriates<sup>198</sup> — both those with local and those with foreign employment contracts — to contribute to the PRC pension, medical care, maternity, unemployment, and workers' compensation schemes.

The Interim Measure has had a serious impact on multinationals in the PRC, regardless of whether they operate a JV, 100% subsidiary or representative office. Originally, expatriates did not have to participate in the PRC social insurance system if they were working in China under contracts signed directly with their employer overseas and governed by foreign law. Now, such contributions will be mandatory for all foreigners, and could thus create a double tax situation for all expatriates other than those from South Korea or Germany.<sup>199</sup>

Employees who maintain their employment in the United States, for example, will be required to contribute to both the US social security system and the PRC system, thereby creating a large additional cost for their company. The basis for contributions under the PRC system is three times the average salary of the relevant locality over the past three years ("Cap Contribution Amount"). The Chinese system also requires both the company and the employee to make contributions. Thus, if an American expatriate works in Beijing (where the

<sup>198</sup> It is important to note that "foreigners" or "expatriates" in this context does not include individuals from Hong Kong, Macau or Taiwan: they are regulated under a separate set of rules.

<sup>199</sup> This law does not affect citizens of South Korea or Germany, as both countries have signed separate tax-related treaties with China on these issues.

applicable Cap Contribution Amount is RMB 12,603), he/she would incur an additional US\$686 in corporate contributions per month under the Interim Measures. In Shanghai, where the Cap Contribution Amount is RMB 11,688, an American expatriate would incur an additional US\$642 per month in corporate social insurance premiums. The individual's own monthly contribution would be RMB 1,288 in Beijing (approximately US\$ 204.5) and RMB 1,285 in Shanghai (approximately US\$204), respectively. It is foreseeable that the expatriate would demand his/her employer to absorb the individual contribution amount.

Another impact of the Interim Measures is that they open the door for expatriates to sue their employers in the PRC for failing to contribute to, and/or to provide, social insurance benefits under the PRC scheme. Multinationals are also concerned that the application of PRC law will be extended further, beyond social insurance, to cover the termination of expatriates and other matters.

Article 8 of the Interim Measures provides that:

Where any foreigner participating in social insurance scheme in accordance with the law has any social insurance dispute with his employer or domestic work unit, he is entitled to file for mediation, arbitration and litigation. Where the employer or domestic work unit infringes upon the foreigner's social insurance interests, he may request the social insurance administration department or social insurance premium collection agency to deal with such infringement according to law.

This implies that any dispute concerning the participation of all foreigners in the PRC social insurance scheme — including foreigners seconded by foreign companies to China — must be governed by PRC law.

The Ministry of Human Resources and Social Insurance has indicated that Chinese law will apply to a dispute between a foreign employee and his/her employer which relates to his/her participation in the Chinese social insurance scheme - regardless of whether the employee in question has been seconded from an overseas corporation. In the case of seconded foreign employees, the foreign law agreed upon with the employer will still apply to all other types of disputes, including termination. Absent such an agreement, the law of the jurisdiction where the foreign employer is located will apply.

Fortunately for employers, the requirements under the Interim Measures are not yet compulsory in all jurisdictions around China. Some localities have not had time to upgrade their social insurance fund centers. For example, in Shanghai participation is not yet compulsory. Nonetheless, many local governments are actively trying to enforce the Interim Measures, and to create the necessary local rules to do so. The rationale behind this from the central level is to encourage more countries to sign bilateral treaties with the PRC — as South Korea and Germany have done.

However, as the Interim Measures lack implementing rules and details on many practical issues, international corporations remain hopeful that the enforcement and practical implementation of this new law will lead to further clarity.

### **Increased Liability for Overtime**

As indicated above, the PRC has seen a huge increase in labor disputes against employers. This is due in part to the ease with which employees can bring claims: arbitration is free, and litigation costs the employee only US \$1.50 to initiate. Of the claims brought by employees, close to 35% of the 1.28 million labor dispute cases are based on compensation violations, including failure to pay minimum wages or overtime.

Claims relating to overtime pay are the easiest for an employee to win. As a general principle, the law allows for recoupment of overtime up to two years within the statutory limitation. The employee must provide evidence, by testimony or otherwise, that he/she has worked overtime. The employer has the burden of proving otherwise. For example, Dr. Wan cited a recent case in which the employee — a mid-level technician — claimed that he had worked for a year and a half (500 days), from Monday to Friday, with three hours of overtime each day. He also claimed that he worked every Saturday and Sunday for six hours. The overtime was apparently due to the need for this employee to work with a team of colleagues in the United States and to be available for conference calls on US time. His claim amounted to USD\$100,000. The employee won the case easily because the company did not have a proper overtime management policy or a clock-in/clock-out system. The client had also failed to maintain any records proving that the employee did *not* work overtime. While USD\$100,000 may not seem like a significant amount, such a case could become a precedent for other employees at the same company, and could thereby

quickly trigger significant costs. This is especially critical where, on average, 85% of claims brought by employees in the PRC are adjudicated in the employees' favor.

#### **D. Practical Considerations**

Based on the above trends and concerns, employers in China should consider the following measures in order to successfully navigate the PRC employment law system:

- Review their employment contracts and human resources policies to confirm that they comply fully with the ECL;
- Try to become familiar with current employment law, including the provisions on collective wage bargaining, and be prepared to deal with both collective bargaining procedures and an increase in the minimum wages paid to their employees;
- Be prepared for potential work stoppages by establishing effective channels of communication with their employees and being ready to appoint an employee who can speak on behalf of any strikers;
- Be prepared for increased obligations and duties under collective bargaining and ensure that the company has a collective bargaining system in place by the end of 2013;
- Re-examine current assignment/secondment agreements with expatriates, in order to identify the extent to which expatriates might become liable for double social security schemes contributions; and
- Given the increase in litigation, particularly with respect to wage and overtime claims, seriously consider adopting time-clock procedures for any employees eligible for over-time that can be used to verify exactly when an employee is working.



## X. INTERNATIONAL EMPLOYMENT LAW UPDATE: 2011<sup>200</sup>

### A. Introduction

Across the globe in 2011, workplace legal disputes continued to be played out before courts, tribunals and arbitrators. This chapter provides a brief summary of some of the employment and labor law developments around the world in 2011. The summary is not exhaustive — no doubt many significant developments have been omitted. However, we have collected *thirty* new developments — a representative sampling of the sorts of claims and issues which continue to arise in the context of global labor and employment law. We have also endeavored to identify some decisions which are “quirky” and, perhaps, a bit amusing.

### B. Employment Discrimination

#### CANADA: What's that smell?

A Bengali-Canadian-Muslim woman decided to heat her lunch (some strong-smelling ethnic food) in the microwave in the employee lunchroom. Her coworkers complained about the odor. Over time, the employee and her employer were involved in a long and varied series of disputes including those relating to her microwaving smelly food. Her employment was eventually terminated, and among the reasons provided, the employer cited its policy regarding odors in the workplace. That policy asked employees to please refrain from or strictly limit the use of scented deodorants, perfumes, colognes, shampoos, etc. due to the allergies of others. It further asked employees to please refrain from or strictly limit the use of the microwave for food that presents offensive odors.

In reviewing the matter, the Human Rights Tribunal of Ontario found that the purpose of the policy was valid, but also found that the policy could have a discriminatory impact on employees based on their national origin because people's national origins are intimately tied to their ethnic diets. The tribunal found for the employee.

On appeal, the Ontario Superior Court of Justice noted that the food actually heated was not Bengali-Canadian-Muslim food but it was Tunisian ethnic food which was given to the employee by a Tunisian co-worker. Although the food gave off an offensive odor, it was an offensive Tunisian ethnic odor, not an offensive Bengali-Canadian-Muslim ethnic odor. Therefore, the appellate court reversed the prior holding and found for the employer. The court found that the ethnicity and ancestral rights of a Bengali-Canadian-Muslim could not have been adversely affected by her being prevented from reheating someone else's Tunisian food.<sup>201</sup>

#### UNITED KINGDOM: Who is the father?

An employee at a law firm in the UK had a relationship with one of the solicitors. She became pregnant, but did not realize this at the time of the firm's annual year end party. At the party, the firm had an open bar, and provided hotel rooms for the employees. This seemed like a good idea as it would help avoid employees driving home under the influence. However, after the official party concluded, a second impromptu party broke out in one of the hotel rooms. At this event, the employee started kissing another firm employee, the Information Technology Manager, and the two of them eventually retired together to a different hotel room.

At the start of the new year, the employee took some time off; she had some annual leave and sick leave which she utilized. Upon her return to work at the end of January she informed her manager that she was pregnant. Her manager informed the Human Resources Manager and shortly thereafter the rest of the firm knew and began openly speculating about the paternity of the baby — was the father the solicitor or was it the IT Manager?

Due to the rumors in the workplace, the employee asked for a different office distant from the HR Manager. This was accommodated for a short period of time, but eventually she was returned to her former work area. Rather than return to her former area, she filed a grievance and did not return to work. She eventually resigned, claiming that the employer had made it impossible for her to return to work. She filed a claim for constructive dismissal, unfair dismissal, sex discrimination and discrimination on the grounds of pregnancy.

<sup>200</sup> Littler Shareholder Bruce Sarchet (Sacramento, CA) moderated the panel. The panelists were: Morten Langer, Norrbom Vinding (Denmark); Sandro Garofalo, Target Corporation (Minneapolis, MN); Emma Neher, Littler Mendelson (Caracas, Venezuela); and Laurent Badoux, Littler Mendelson (Phoenix, AZ).

<sup>201</sup> *Audmax Inc. v. Ontario Human Rights Tribunal*, 2011 ONSC 315 (CanLII), available at <http://www.canlii.org/en/on/onsc/doc/2011/2011onsc315/2011onsc315.html>.



The employer argued that the employee's engaging in two separate consensual romantic relationships should be taken into account. However, the Employment Appeal Tribunal determined that the gossip about the paternity of the child was unwanted, had the effect of causing an intimidating, hostile, degrading, humiliating and offensive work environment and therefore constituted gender and pregnancy discrimination. The Tribunal concluded that the requirement for her to return to work at her former office constituted sex discrimination on the grounds of pregnancy and amounted to unfair constructive dismissal. The Tribunal also concluded that the employee had not shown any contributory conduct at the year-end party — it was not her conduct at the party as such but the discussions afterwards which were at issue in the case.<sup>202</sup>

### **CANADA: A close shave**

A Canadian restaurant waitress showed up one day to work with a shaved head. She had done this in support of her uncle who was battling cancer. She was informed by the restaurant manager that her new look did not meet the restaurant's dress code requirements and she was told not to come back.

The waitress filed a complaint with the Manitoba Human Rights Commission arguing that because men can shave their heads without facing termination her discharge amounted to a discriminatory application of the employer's dress code policy. The Commission declined to hear the waitress' claim, in part because she had voluntarily shaved her head.<sup>203</sup> Despite the ruling, employers are urged to use caution in this area — it is certainly possible that a different conclusion could be reached under slightly different circumstances or in a different forum.

### **SPAIN: Breastfeeding Leave for Fathers**

Under Spanish law, new mothers receive an hour off per day with pay until the baby reaches nine months of age. The purpose of the leave is for breast-feeding. Fathers are also entitled to this leave if both the father and the mother are employed. But what if the mother is *self-employed* and the father is employed — is the father still entitled to the leave?

The European Court of Justice held that fathers are still entitled to the leave when the mother is self-employed. The court reasoned that the leave was not only for the biological purpose of breast-feeding but also to help support the mother in the taking care of the infant during the first nine months. The court equated the leave more with parental leave than with breast-feeding leave.<sup>204</sup>

### **TAIWAN: Paternity leave**

In this case, a manager was employed by the international cooperation department of the Taiwan Foundation for Democracy, a nonprofit organization based in Taipei. The manager and his wife had a baby, and he took a six-month paternity leave. Upon returning, he found that he had been demoted to a non-management position.

He subsequently brought a claim with the Taiwan Department of Labor claiming the Foundation had violated his rights under the Gender Equality and Employment Act. The Foundation denied any wrongdoing, claiming it had merely implemented a staff restructuring and then went on to argue that the downgrade in position was simply a result of "administrative errors."

Ultimately, the Department of Labor found in favor of the employee and fined the Foundation NT\$50,000.<sup>205</sup>

### **GERMANY: Can WWII pilots still fly?**

Pursuant to a collective agreement, Lufthansa pilots were disqualified from flying after reaching the age of 60. Three pilots who were automatically terminated on their 60<sup>th</sup> birthdays believed they were still capable of flying and brought a claim for unlawful age discrimination. The German court referred the case to the European Court of Justice. The ECJ considered both German law and international law, which provided that pilots between ages of 60 and 65 could carry on flying duties as long as other members of the air crew were younger than 60.

202 *Nixon v Ross Coates Solicitors & Anor* [2010] UKEAT 0108\_10\_0608, available at [http://www.bailii.org/uk/cases/UKEAT/2010/0108\\_10\\_0608.html](http://www.bailii.org/uk/cases/UKEAT/2010/0108_10_0608.html)

203 *Winnipeg waitress fired for shaving head*, CBC News (Jan. 27, 2011), available at <http://www.cbc.ca/news/canada/manitoba/story/2011/01/27/mb-shaved-head-firing.html>.

204 *Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA* (European Court of Justice, C-104/09, Sept. 30, 2010), available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Submit&numaff=C-104/09>.

205 *Foundation fined NT\$50,000 after man was demoted for taking paternity leave*, CHINA POST (Oct. 1, 2011), available at <http://www.chinapost.com.tw/taiwan/national/national-news/2011/10/01/318430/Foundation-fined.htm>.

The ECJ concluded that a complete ban on pilots working after they had reached the age of 60 was a disproportionate measure, going beyond what was really needed to insure air traffic safety and protect the public health.<sup>206</sup>

### **UNITED KINGDOM: What's in a nickname?**

Many readers may be familiar with the actor Sacha Baron Cohen and a character he has created called Borat. A film and television comedy character, Borat is from Kazakhstan. Borat speaks very broken English and does not always act what you might call "appropriately." For example, from time to time at inappropriate situations he will say "I love you."

A Polish employee working in the United Kingdom was given the nickname "Borat" by his co-workers. He eventually brought more than a dozen claims against his employer, including race discrimination and sexual-orientation discrimination.

The tribunal considered but rejected most of the claims, finding him to be less than persuasive and indeed "less than honest." Nevertheless, the tribunal concluded that the employee had been subjected to racial harassment by being called Borat. Other individuals in the workplace would not have been given that same nickname because they had different national origins. The employee was given the nickname due to his Polish speech patterns, along with his general affectation and bearing. Someone who was not perceived to be of Eastern European descent would not have been similarly treated, and the Tribunal therefore concluded that direct discrimination had occurred.<sup>207</sup>

## **C. Workplace Privacy**

### **BELGIUM: Locker search**

In this case, an employer opened the locker of a janitor in the course of an investigation into the theft of company property. The property was, in fact, found in the locker, but the employee nevertheless brought a claim for invasion of privacy.

The tribunal in Brussels made a proportionality assessment, comparing the legitimate interests of the employer to investigate the disappearance of its property as compared to the employee's right of privacy. The Tribunal concluded that the means used by the employer were disproportionate in that the employee's locked closet gave her a reasonable expectation that others, including company representatives, would not have access to it. The tribunal found that there had been an invasion of the individual's privacy and ordered reinstatement of the employee.<sup>208</sup>

### **FRANCE: E-mail search**

A French employer reviewed one of its employees' e-mails, which were not marked "private," and found erotic photographs and intimate messages, some of which were sent to a coworker.

The employee was dismissed; he appealed and was eventually reinstated. The court concluded that, even though that employee had never marked any of the messages as private, and although they were stored on the employer's computer system, when the employer became aware that they were of a private nature, the employer had a duty to stop its review and refrain from taking any action based upon those particular communications.<sup>209</sup>

## **D. Wage and Hour Law**

### **UNITED KINGDOM: The devil's in the details**

A group of 20 valet staff (auto detailers) were characterized as independent contractors by a car cleaning company. They had signed written contracts identifying their independent contractor status. Nevertheless, they claimed that they were misclassified as contractors and instead should be treated as employees, entitled to minimum wage and statutory annual paid leave under the UK national minimum wage and working time regulations.

<sup>206</sup> *Prigge and others v Deutsche Lufthansa AG* (C-447/09) Sept. 13, 2011.

<sup>207</sup> *Ruda v Tei Ltd* ET/1807582/10 (2011).

<sup>208</sup> See *Clays & Engels, The Brussels Labour Court Rejects Evidence on the Basis of an Employee's Entitlement to a Reasonable Expectation of Privacy*, [www.GlobalEmploymentLaw.com](http://www.GlobalEmploymentLaw.com) (Aug. 1, 2011), available at <http://www.globalemploymentlaw.com/2011/08/regions/europe/belgium/the-brussels-labour-court-rejects-evidence-on-the-basis-of-an-employees-entitlement-to-a-reasonable/>.

<sup>209</sup> *GAN Assurance IARD v. M.X.*, Cour de Cassation No. 10-17284 (opinion released Aug. 25, 2011).

The tribunal reviewed many factors cited by both sides, including that the individuals paid their own taxes and purchased their own overalls. The tribunal noted that the individuals were subject to the direction and control of the company supervisors who were on site at all times. All equipment and materials except for the overalls were provided by the company. Invoices and other paperwork needed to perform the work were all prepared by the company as well. In conclusion, by looking at the realities of the working relationship, the tribunal found that, despite the recitations in the written contract, the valets were employees, not independent contractors.<sup>210</sup>

### **HONG KONG: Minimum wage**

In 2011, Hong Kong introduced, for the first time, minimum wage laws. The new laws provide for a minimum wage of HK\$28 per hour, which corresponds to about US\$3.60.

The new law is expected to benefit some 270,000 low pay workers. However, the new rules do not apply to the approximately 300,000 domestic helpers in Hong Kong. Domestic helpers can still be paid considerably less than the new minimum.<sup>211</sup>

## **E. New Statutes**

### **FRANCE: Gender quotas on corporate boards**

As of January 2011, qualifying corporations in France are subject to a “quota” of female board members. Within three years, boards must be composed of at least 20% female members, and within six years, the quota increases to 40%. In addition, as of January 2012, French companies with 50 or more employees will need a gender-equity action plan. The plan must be designed to rectify any pay-equity issues.<sup>212</sup>

### **AUSTRALIA: Discrimination laws amended**

In Australia, effective June 2011, the Sex Discrimination Act 1984 (SDA) was amended.<sup>213</sup> Under the SDA, “family responsibilities” was a protected category, but the law protected employees only against *discharge* based on family responsibilities. Now, the law prohibits any adverse employment action based on this category. In addition, breastfeeding is established as a separate protected category.

In the area of gender discrimination, the law has been amended to specify that sex discrimination protections apply equally to men and women. The definition of sexual harassment has been expanded. Significantly, harassment now includes the *possibility* that a person harassed would be offended, humiliated or intimidated.

### **TAIWAN: New labor organizing rules**

Effective May 1, 2011, Taiwan's Council of Labor Affairs revamped three Republic of China labor laws, with the result that it now is easier to form labor unions in Taiwan.

The new rules allow workers from different firms to organize a union on a cross-company basis. In addition, foreign nationals can now hold leadership positions in labor unions in Taiwan. Government subsidies will be made available to encourage the formation of national union blocks. Finally, certain classes of workers — for example, school teachers — who had been exempted from some of these protections in the past — will now also be able to form unions more easily.<sup>214</sup>

### **UNITED KINGDOM: Mandatory retirement age abolished**

Effective October 1, 2011, mandatory retirement at age 65 is no longer permissible in the United Kingdom. Compulsory retirement based on age can be justified, but only if the employer can demonstrate and objectively verify that the mandatory retirement program fosters a legitimate business goal and it is a proportionate means of achieving that goal.<sup>215</sup>

210 *Autoclenz Ltd v Belcher and others* [2011] UKSC 41 (July 27, 2011), available at <http://www.bailii.org/uk/cases/UKSC/2011/41.html>.

211 [http://www.legislation.gov.hk/blis\\_ind.nsf/WebView?OpenAgent&vwpg=CURALLENGDOC\\*60S\\*100\\*60S.1#60S.1](http://www.legislation.gov.hk/blis_ind.nsf/WebView?OpenAgent&vwpg=CURALLENGDOC*60S*100*60S.1#60S.1).

212 Decree No. 2011- 822 (July 7, 2011) [*Décret no. 2011-822 du 7 juillet 2011 relatif à la mise en œuvre des obligations des entreprises pour l'égalité professionnelle entre les femmes et les hommes*].

213 Sex and Age Discrimination Legislation Amendment Act 2011 (Cth), available at <http://www.comlaw.gov.au/Details/C2011A00040>.

214 Amendment to Labor Union Law [修正工會法] (issued June 23, 2010; effective May 1, 2011) *The Gazette of the Office of the President*, Issue Number 6928. See *Taiwan's labor law revisions take effect May 1*, TAIWAN TODAY (May 2, 2011), available at <http://taiwantoday.tw/ct.asp?xItem=162251&ctNode=420>.

215 Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, available at <http://www.legislation.gov.uk/uksi/2011/1069/contents/made>. See also Philip Berkowitz and Anita Vadgama, *The United Kingdom Abolishes its Default Retirement Age*, Jan. 2011, available at <http://www.littler.com/publication-press/publication/united-kingdom-abolishes-its-default-retirement-age>.

## F. Fraud

### AUSTRALIA: Recruiting promises

An individual had his own advertising and research consultancy business. One of his clients recruited him to become their strategic planning director. During the job interview and recruiting process, the client told the individual that the company was a financially successful agency and that its business was in a great position and likely to be financially successful in the future. The individual was also told that the recent layoffs at the company placed it in a very healthy position, and that the savings from these layoffs would improve the company's balance sheet. The individual eventually accepted the offer to become the company's strategic planning director.

Eighteen months later, the director was made redundant and laid off. He started up his former business again, but also initiated a claim for misrepresentation against his former employer.

The court concluded that the employee was unlikely to have accepted the job if he had known that he was going to be let go 18 months later. The court also concluded that misrepresentations from the employer lulled the director into a false sense of security. The court issued a significant monetary damage award based on lost commercial opportunity.<sup>216</sup>

## G. Workplace Climate

### FRANCE: French spoken here!

In this case, a sales director within a French company led a group of sales employees, many of whom spoke only English. The team was paid according to an incentive plan, which was put into writing, in English. The director himself also was proficient in English and able to read and understand the plan. Under the plan, he was entitled to a performance bonus of up to 40% of his base salary, depending on whether sales targets were met. The director was terminated from employment and brought a claim for the full bonus amount.

Pursuant to French law, employment agreements and many other communications relating to the employment relationship must be memorialized in the French language itself. Specifically, the *Loi Toubon* (Article L1321-6 of the Labour Code) states that any documents which specify employee obligations, or of which the employee must have knowledge in order to perform his or her job, must be written in French.

The director claimed that the compensation plan did not comply with the law, as it had not been written in French. The lower tribunal ruled that there was a violation, and awarded the terminated director the amount of the bonus he would have earned based on actual sales. Under this method, the director's bonus equaled about 4% of his base salary. However, the case proceeded to the Supreme Court of France, which awarded the director the full 40% bonus. Because the compensation plan was not written in French, the Supreme Court did not even consider whether the sales targets necessary for the full 40% bonus had been met.<sup>217</sup>

### AUSTRALIA: Planking on the job

An employee decided it would be fun to "plank" at his workplace. Planking is a current fad in which a person lies face down while a colleague takes a photograph in this position, and posts it on the Internet. In this case, however, the employee was lying face down on top of a smokestack 60 meters tall. He was terminated for engaging in unsafe conduct in the workplace.<sup>218</sup>

In another Australian case, two employees of a retail store were fined AU\$1,500 each for planking on the job, on meat grinders, display shelves, and one photo showing an employee planking on the tines of a raised forklift.<sup>219</sup>

<sup>216</sup> *Moss v Lowe Hunt & Partners Pty Ltd* [2010] FCA 1181 (Nov. 1, 2010), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2010/1181.html>.

<sup>217</sup> *Cass Soc* (June 29, 2011) 09-67492 [Supreme Court, Social Law Chamber].

<sup>218</sup> *Santos plant workers sacked for planking on smokestacks*, MINING AUSTRALIA (May 23, 2011), available at <http://www.miningaustralia.com.au/news/santos-plant-workers-sacked-for-planking-on-smokes>.

<sup>219</sup> *Plankers sacked by supermarket giant Woolworths*, DAILY TELEGRAPH (May 20, 2011), available at <http://www.dailytelegraph.com.au/news/sydney-nsw/plankers-sacked-by-supermarket-giant-woolworths/story-e6freuzi-1226059222615>.

## H. Arbitration

### BRAZIL: Enforceability of arbitration agreements

In Brazil, arbitration proceedings are regulated by Law 9.307/96, which restricts the application of pre-dispute arbitration agreements to cases involving “disposable” rights. Under Brazilian law, individual labor rights are non-renounceable — an employee cannot waive any such labor rights. The rationale is that the law considers that the employee is always at a disadvantage in relationships with his/her employer.

However, a recent Superior Labour Court decision has found that non-renounceable rights can be absolute or relative, depending on the nature of the right protected. The court held that non-renounceable rights are *absolute* when they qualify as a public order right, meaning that there is a “guaranteed minimum standard of civility” — minimum wages, and workplace safety and health. However, a non-renounceable right is *relative* when it does not guarantee a minimum standard of civility — such as an employee’s right to specific compensation.

In this recent case, the court upheld the waiver of the exclusive jurisdiction of the courts and allowed the matter to proceed to arbitration. The court concluded that “employees are grown ups” and can knowingly waive their rights.<sup>220</sup>

## I. Text Messages in the Workplace

### AUSTRALIA: Text message breakup (Part One)

In this case, an individual was hired as a seasonal employee in a clothing store — a high-end fashion boutique — to provide extra assistance as it geared up for the holiday shopping rush. The employee only worked part time and she had the option of declining work when it was offered. She was entitled to an extra “loading fee” of 20% as compensation for not earning any benefits.

On December 23, 2008 she worked a 15-hour shift ending at midnight and was obviously tired. She asked a co-worker, a junior employee, to swap shifts with her the next day which would allow her to report to work at 11 a.m. The next day — Christmas Eve — the employee apparently overslept and arrived at work at approximately 11:30 a.m. Her boss claims it was closer to noon. However, when she arrived the junior co-worker was there but had apparently not noticed that about 25 items were missing, with a total value of about AU\$5,000.

The shop is closed on Christmas day, but on the subsequent day, the employee receives a surprise text message from the store manager informing her that she is fired. The text message states: “I have let you go for two reasons; firstly you shouldn’t swap a shift without letting me know. Secondly you started one hour late knowing that we’ll be busy and leaving Ivana alone. That shows me you’re not taking me seriously or the work. You can pick up your pay tomorrow and drop the key. You don’t need to call me. Thank you for everything.”

The employee files a complaint for unfair dismissal with Fair Work Australia — the national workplace relations tribunal. FWA rules first as a procedural matter the employee is eligible to submit the claim despite being a casual employee. On the merits of the case, FWA found an unjust dismissal, based on the lack of a valid reason for termination, lack of fair notice to the employee, and lack of an opportunity to respond. The decision has been appealed.<sup>221</sup>

### AUSTRALIA: Text message breakup (Part Two)

In this case, an employee was responsible for ordering a key component in a manufacturing process. He failed to place the order, and allowed the manufacturing process to continue without including the key component. As a result, the company’s product failed and the company was forced to pay restitution to customers.

While the employee is on vacation, his boss sends him three text messages. First, he criticizes the employee for not ordering the component. Next, he indicates that the products are failing. Finally, he indicates that the employee is terminated.

The employee filed a claim, alleging that he did not have the opportunity to defend himself and that it was inappropriate to be terminated while he was on vacation.

Here, the termination was upheld. FWA held that termination by text is usually not proper, but that in this case, had there been a face-to-face meeting, the outcome probably would have been the same.<sup>222</sup>

<sup>220</sup> Appeal TST-RR-144300-80.2005.5.02+0040.

<sup>221</sup> *Sedina Sokolovic v Modestie Fashion Australia Pty Ltd* [2011] FWA 3063, available at <http://www.fwa.gov.au/decisionssigned/html/2011fwa3063.htm>.

<sup>222</sup> *Brett Martin v DecoGlaze Pty Ltd* [2011] FWA 6256, available at <http://www.fwa.gov.au/decisionssigned/html/2011fwa6256.htm>.



## AUSTRALIA: Textortion

In this case, a Brisbane woman had been working in a clerical position at her new job for about a month. She became unhappy with her job, and one day her boss makes an insulting remark towards her so she decides not to report to work the next day. Instead, she stays home and ingests a combination of alcohol and prescription medications. She then decides to start sending text messages to her boss, "I want fifty thousand dollars deposited in my bank account. If not I will tell the ATO [the Australian Tax Office] about paying staff out of the cash tin. I'm sure fifty thousand dollars is less than what the ATO would fine you." Two and a half hours later she sends another text: "If I don't get confirmation by Monday my lawyer will be in contact with you."

Rather than acceding to these demands, the boss calls the police. Eventually the employee pleads guilty and is sentenced to 12 months' probation and mandatory counseling.<sup>223</sup>

## J. Philosophical Beliefs

### UNITED KINGDOM: Philosophical belief in public television

This case involves a BBC employee who in his younger days had been a student leader, trade unionist and a journalist in South Africa during the apartheid struggle. Some of his reports actually had an impact on the movement — leading to police raids, for example. This experience apparently reinforced his belief that committed and concerned journalism is an essential component of democracy and that television news provides an effective space for enhanced citizenship. He formed a strong belief in the merits of public service television.

When he was dismissed from the BBC he filed a claim for unfair dismissal and discrimination on the grounds of his age. He also claimed discrimination on the basis of his philosophical belief: that public service broadcasting has a higher purpose of promoting cultural interchange and social cohesion.

The BBC argued that to recognize such a philosophical belief as a protected category would open the floodgates of claims by disconcerted employees. The Employment Tribunal nevertheless decided that the employee's views could be considered a philosophical belief and protected by anti-discrimination laws.<sup>224</sup>

### UNITED KINGDOM: Is opposition to fox hunting a philosophical belief?

This case involved a garden center employee who was a vegan and who also was an avid participant in animal welfare organizations. He claimed to have a strong belief in the sanctity of animal life, and was vocal about his opposition to fox hunting. After his employment was terminated he filed a claim alleging that he was terminated because of his anti-fox hunting beliefs.

The Employment Tribunal concluded that the employee was sincere in his beliefs and attempted to live his life in accordance with them. The employee's beliefs were truly philosophical within the ordinary meaning of the word and therefore were protected by the anti-discrimination laws.<sup>225</sup>

### UNITED KINGDOM: Was 9-11 a "false flag" operation?

In another case from the United Kingdom, an employee claimed he was discriminated against based on his philosophical beliefs. Here, the employee worked as an intelligence analyst with the South Yorkshire Police Authority. In this role he is asked to prepare a strategic risk assessment. In his report he expresses his general belief that 9/11 and 7/7 were "false flag" operations actually run by the US and UK governments in an effort to foster support for a "Supranational Fascist New World Order."

The employer believed that those beliefs were incompatible with the position of intelligence analyst and the employee was dismissed. The Employment Tribunal found that the employee's beliefs were indeed sincerely held but absurd. The dismissal was upheld.<sup>226</sup>

<sup>223</sup> *Textortion lands woman in court*, BRISBANE TIMES (Sept. 7, 2011) <http://www.brisbanetimes.com.au/queensland/textortion-lands-woman-in-court-20110906-ljvor.html>.

<sup>224</sup> *Maistry v BBC*, ET/1313142/10.

<sup>225</sup> *Hashman v Milton Park (Dorset) Limited t/a Orchard Park*, ET/3105555/2009.

<sup>226</sup> *Farrell v South Yorkshire Police Authority*, ET/2803805/10.



## K. Can You Get Fired for that?

### UNITED KINGDOM: No restraint!

At a hospital in the United Kingdom, a patient was having a severe fit and the staff needed to restrain the person. A nurse got up on top of the patient and did something that is described in the court papers as “sitting astride” him. She then made a humorous comment, “Well it’s been a few months since I’ve been in this position.” The nurse had no previous disciplinary record. The comment was heard only by her coworkers — the patient was incoherent. Nevertheless, the nurse’s employment was summarily terminated.

The Employment Tribunal held that the dismissal was unfair — while the comment could have been viewed as lewd, a large proportion of the population would have considered it to be humorous. However, this was reversed on intermediate appeal but reversed again on final appeal — because the incident was isolated and the comment was made in a joking fashion, the final finding was that this had been an unfair dismissal.<sup>227</sup>

### UNITED KINGDOM: *Not just between friends*

At a pub in the United Kingdom, a shift manager got into an argument with some long-time patrons. The daughter of those patrons telephoned the pub and told the manager that she should get ready, because the daughter was going to get her fired. The manager decided to make a posting on her Facebook account to report the incident, making a derogatory reference to the patrons. In fact, she called one of them a f\*\*\*ing moaning old hag.

Unfortunately, the manager’s Facebook “friends” included the daughter of the two patrons. She complained to the pub’s management, an investigation was conducted, and the employee was terminated. The termination was challenged, but upheld. The pub had a valid web 2.0 policy and the court determined that the employee was fully aware that she was endangering her job by making the postings on her Facebook page.<sup>228</sup>

### CHINA: Drinking binge

A top executive of a large Chinese oil refining company had purchased some liquor, with company funds, for internal company use. However, the purchases were somewhat extravagant, including 480 bottles of Moutai, an expensive Chinese liquor traditionally consumed at state banquets. Some of the individual bottles cost almost CNY 12,000 each, which is far more than an average Chinese worker earns in a month. The total bill came to CNY 1.6m (USD 245,900).

Word of the binge somehow leaked out, and the matter went viral on the Internet. The executive was demoted and fined, and ordered to re-pay USD 20,000 to compensate for the liquor which he and his associates had already consumed.<sup>229</sup>

### UNITED KINGDOM: Facebook friends, part two

An employee worked at company A, leading a team that handled complaints on behalf of Company B, which also is customer of company A. The employee uses her Facebook account to vent a little bit about her workplace. She states: “I think I work in a nursery and I don’t mean working with plants.” One of her Facebook friend responds, and the employee then posts: “Don’t worry it takes a lot for those to grind me down. LOL.” Her friend replies: “Yeah you do work with a lot of planks though.” The employee replies: “Too true. xx.”

Some of the employee’s other Facebook friends, who also work at company A, tell their supervisors about the exchange, and the employee is terminated. The employer stated that the exchange could disrupt the relationship between company A and its customer (company B). The employee counters that the posting was done on her own time.

At the proceeding before the tribunal, no evidence was offered from the customer (company B) indicating that the exchange had any adverse impact on the relationship, and therefore the employee was found to have been unfairly dismissed.<sup>230</sup>

<sup>227</sup> *Bowater v Northwest London Hospitals NHS Trust* [2011] EWCA Civ 63 (Feb. 3, 2011), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2011/63.html>.

<sup>228</sup> *Preece v JD Wetherspoons plc* ET/2104806/10.

<sup>229</sup> *Top executive demoted after booze binge*, REUTERS (April 25, 2011), available at <http://www.reuters.com/article/2011/04/25/us-sinopec-drinks-idUSTRE73O3VX20110425>.

<sup>230</sup> *Whitman v. Club 24 Ltd. (t/a Ventura)*, ET 1810462/2010 (24 May 2011).

## L. Cat's Paw Liability

### UNITED STATES: Military leave and the cat's paw

In the United States, “cat's paw” liability is one of the more intriguing recent developments in employment discrimination law. The terminology comes from the fable of the monkey and the cat, popularized by the French fabulist Jean De La Fontaine in 1679. In the fable, a monkey and a cat are in a room, a fire is burning in the fireplace, and chestnuts are roasting in the fire. The monkey convinces the cat to swoop the chestnuts out of the fire, using his paw. The monkey tells the cat: “I'll share them with you as we go along.” But every time the cat swipes a chestnut out of the fire, his paw is burned and he is delayed, and the monkey then gobbles up the chestnut in quick order, leaving the cat with none. The fable brings us the English idiom “the cat's paw,” which is used to describe situations where one uses another to do his dirty work.

Courts have used this idiom to describe a theory of liability in a few recent employment discrimination cases. In one such case, a hospital technician is serving in the US military reserves. He commits one weekend a month and two weeks per year to military training and duty. However, this is not received well in his workplace. His supervisor uses a colorful phrase to describe his military duties (“bull\*\*\*\*”) and assigns him to extra shifts because everyone else is “having to bend over backwards to cover for him.” Another manager uses the same term to describe the military service and also states that the employee's reserve service is a waste of taxpayers' money.

Meanwhile, the employee is having work performance problems. He is given a corrective action memo; his problems on the job are all well documented. Eventually his supervisors recommend his termination for violating the terms of the corrective action memo. A human resources manager conducts an independent investigation. She reviews all of the facts and considers the recommendations of the supervisor and, eventually, she makes the decision to terminate based on the employee's job performance issues. She does not even consider the employee's military reserve service.

The employee files a claim for violation of USERRA, the US statute which protects the rights of veterans and those in military service. The dispute made it all the way to the US Supreme Court.

The Court concluded that, even though the human resources manager acted independently, the bias of the supervisors below could have impacted her decision. The Court found that this could have been a motivating factor even though there was a completely independent actor who made the decision to terminate.

Applying the teachings of the fable, the human resources manager here was the “cat” — doing the dirty work of the supervisors and getting burned.<sup>231</sup>

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231 *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011).

## XI. APPENDIX A — US FCPA vs. UK BRIBERY ACT: KEY DIFFERENCES FOR US EMPLOYERS

The UK Bribery Act has a glancing similarity to the FCPA. Indeed, the two Acts cover many of same subjects. Yet, there are many differences, the most striking of which is the UK law's scope, which covers domestic and foreign bribery to representatives of private and public entities. Indeed, one can think of the UK Act as a combination of the FCPA, federal, state, and common bribery statutes and rulings, and common law.

Another surprise for US employers is that is the UK Act imposes strict liability for failing to prevent bribery. Further, while the FCPA has set caps on monetary liability, the UK Act has none. With these differences in mind, US employers that may be covered by the UK Act should pay close attention to the following outline of key differences.

PROVISION	FCPA	BRIBERY ACT
Jurisdiction	US companies and citizens, foreign companies listed on US stock exchange, or any person acting while in the United States	<p>General</p> <ul style="list-style-type: none"> <li>Prohibited acts or omissions committed in the United Kingdom - no other UK ties required</li> <li>Prohibited acts or omissions committed anywhere in the world, by <ul style="list-style-type: none"> <li>Individuals that are UK citizens or ordinarily resident in the United Kingdom;</li> <li>Entities that are incorporated in the United Kingdom.</li> </ul> </li> </ul> <p>Corporate Offense — Failing To Prevent</p> <ul style="list-style-type: none"> <li>Prohibited acts or omissions do not have to take place in the United Kingdom.</li> <li>Non-UK corporations are covered by the Act if they have a UK office or do business in or via the United Kingdom</li> </ul>
Who can be bribed?	Only bribery of "foreign official" is prohibited. However, a host of other federal and state statutes and case-law, many of which are industry specific, may apply to bribery of other US officials and private persons.	Prohibits bribes offered, promised or given to any person to induce them to act "improperly" (not limited to foreign officials)
What advantage must be obtained?	Payment is made "to obtain or retain business"	Focus is on intention to induce or award a person to perform function or activity rather than being limited to the business nexus (except in case of strict corporate liability)
"Active offense" vs. "passive offense"	Only the act of payment, as opposed to the receipt/acceptance of payment, is prohibited	Two offenses: (1) active offense of bribing another; and (2) passive offense of being bribed
Intent	Evidence of corrupt intent required.	<p>General Offenses: Intention to induce or reward improper performance. Relevant expectation is that of a reasonable person in the United Kingdom.</p> <p>Foreign officials: Evidence of intention to influence the official and to obtain or retain business or an advantage in the conduct of business.</p>
Corporate strict liability	Limited to the accounting provisions for public companies (failure to maintain adequate systems of internal controls)	A new strict liability corporate offense for the failure of a commercial organization to prevent bribery (subject to defense of having "adequate procedures" in place designed to prevent bribery)
Liability for Senior Officers	Conspiracy, aiding/abetting standards apply	Senior officers who consent or connive in an act of bribery committed by the corporation are guilty of that offense.
Business promotion expenditures	Affirmative defense for reasonable and bona fide expenditures directly related to the business promotion or contract performance	<p>No similar defense</p> <ul style="list-style-type: none"> <li>Reasonable and proportionate expenditures are not likely to be "improper" and therefore not a Bribery Act violation.</li> </ul>
Allowable under local law	An affirmative defense if payment is lawful under written laws/regulations of foreign country	<p>In cases of bribery of foreign public official, there is no violation if permissible under written laws of foreign country</p> <ul style="list-style-type: none"> <li>Otherwise a factor to be considered.</li> </ul>

PROVISION	FCPA	BRIBERY ACT
Facilitating payments	Limited exception for payment to a foreign official to expedite or secure the performance of a routine (nondiscretionary) government action	No facilitating payments exception.
Affirmative Steps to Prevent Bribery	No offense for compliance failures. However, taking such active steps will be considered in deciding to prosecute, the amount of fines, and settlement. See also Federal Sentencing Guidelines.	Strict liability for commercial organizations that fail to prevent bribery unless the corporation can demonstrate that it had "adequate procedures."
Civil/criminal enforcement	Both civil and criminal proceedings can be brought by DOJ and SEC	Criminal enforcement only by the UK Serious Fraud Office (SFO). The Director of the SFO and the Director of Public Prosecutions must give personal consent to a prosecution under the Act.
Potential penalties	<p>Criminal:</p> <ul style="list-style-type: none"> <li>• Bribery: for individuals, up to five years' imprisonment and fines of up to \$250,000; for entities, fines of up to \$2 million</li> <li>• Books and records/internal control violations: for individuals, up to 20 years' imprisonment and fines of up to \$5 million; for entities, fines of up to \$25 million</li> </ul> <p>Civil penalties also apply</p>	<p>Individuals: Up to 10 years' imprisonment and potentially unlimited fines; for entities, potentially unlimited fines</p> <p>Corporations — unlimited fines</p>

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