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EXPERT ANALYSIS

International Employers Beware: Common Compliance Pitfalls in Managing International Workforces

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U.S. employers who have — or who contemplate having — employees in multiple countries face a terrific challenge complying with the different and often conflicting laws related to their workforce. While U.S. employers are typically familiar with the varying employment regulations at the federal, state and even local levels within their own country, the variety of public policies and statutes affecting employment in other nations can come as a surprise.

One country's views on employee privacy, safety, entitlements or protections may be entirely opposite another's policies on the same issues. For example, the U.S. doctrine that allows employers to terminate employees for almost any reason is wholly contrary to Mexico's policy that prohibits termination except for certain just causes defined in the Mexico federal labor law. The policies of Brazil or the Netherlands that mandate various employee entitlements differ significantly from Singapore's more employer-friendly statutory scheme.

Some laws, such as the United Kingdom's bribery laws, even have extraterritorial application. Companies that fail to take into account the employment differences in the multiple jurisdictions in which they operate may find themselves in violation of the law and subject to inadvertent sanctions, including penalties and fines. They may also damage their brand or reputation.

Given the above, compliance with international employment and human resource regulations is — or should be — a primary focus of multinational employers. Limited time and resources force employers to prioritize their audit and compliance efforts to those areas that present the largest or most imminent risks. Moreover, what is a high-risk area for one company may not be the same for another.

Nevertheless, the following represent some of the most common pitfalls every employer should consider and review.

COMPLYING WITH CORRUPTION AND BRIBERY LAWS

Corruption and bribery laws nearly always top the list of a multinational corporation's compliance priorities for several reasons. Countries around the globe prohibit bribery and corruption to one degree or another. Thus, companies are legally bound to ensure that their employees understand the applicable laws and related obligations. In addition, most companies' ethics policies mandate compliance with relevant laws and prohibit unfair or corrupt practices.

A violation of a country's corruption and bribery laws risks damaging the company's brand and tarnishing its reputation as an ethical business. Next, laws like the U.S. Bribery Act and the U.S. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2, have extraterritorial application and impose civil or criminal penalties for incidents that occur even outside their borders. Finally, bribery and

corruption issues have garnered significant public interest and increased enforcement in a number of countries, resulting in enormous penalties and fines.

For example, in 2013 alone, the U.S. Department of Justice announced charges against both individuals and companies for violations of the FCPA, including bribes to foreign officials in numerous foreign jurisdictions and false reports of such bribes as legitimate expenses. In fact, the Justice Department has reported settlements with corporations involving millions and even hundreds of millions of dollars for alleged violations of the FCPA in the last few years alone.

A primary difficulty for international employers, of course, is how to address the differing cultural views on what is or is not a "corrupt" practice within their own international workforce.

In some countries, payment to government officials or other individuals as a way to gain business opportunities may be seen as "the way things are done" rather than as corruption. But companies subject to the extraterritorial application of the FCPA or U.K. Bribery Act (which prohibits corruption even more broadly than the FCPA) generally will not be protected simply because local leaders tolerate or expect corrupt payments. Moreover, trying to excuse bribery because "everyone else is doing it" weakens — or obliterates — a company's reputation as an ethical and fair business.

Finally, even countries traditionally viewed as allowing corruption may be changing their practices. For example, China's current president, Xi Jinping, pledged earlier this year to crack down on corrupt government officials and to strengthen China's anti-corruption laws.[1]

Companies that fail to take into account the employment differences in the multiple jurisdictions in which they operate may find themselves in violation of the law and subject to inadvertent sanctions.

Maintaining a clear no-corruption policy and training the workforce, regardless of location, on such policies should be considered an essential part of a multinational employer's compliance effort.

MINIMIZING MISCLASSIFICATION CLAIMS

In an effort to manage costs, explore new markets or obtain specialized skills, multinational corporations regularly hire independent contractors to perform services in foreign countries. In such arrangements, the true independent contractor — not the multinational corporation — typically bears responsibility for the burdens and costs of employment regulations, local taxation and corporate filings.

To be a truly independent contractor, the contractor must control its own work and how the work is done; bear the risks associated with profits and losses; provide its own equipment, office space and personnel; and assist multiple customers or clients, among other things.

However, the fundamental characteristics of independent contractor status are frequently sacrificed for business expediency.

Multinational employers may require individuals treated as independent contractors to work certain hours, use particular forms, perform services according to the company's expected processes or abide by various employment policies. In addition, the multinational employer may provide the independent contractor with business or travel reimbursements, office space, equipment, business cards with the company's logo, or other benefits.

As a result, upon termination of the relationship or because of an independent audit by foreign government authorities, the independent contractor may be deemed a misclassified employee.

Depending on the jurisdiction, the multinational company may be ordered to pay amounts that can exceed $500,000 or even $1 million because of unpaid taxes, wages, benefits, and associated penalties and fees if the contractor worked for the company for several years. In some jurisdictions, the law would require the company to reinstate the contractor as an employee and pay all employment-related obligations, including contributions to the pension or social welfare funds.

Typically, each independent contractor relationship falls somewhere between true employment and true independent contractor status; liability is determined on a case-by-case basis. Nevertheless, compliance programs should, of necessity, consider and review the independent contractor relationships to ensure that the multinational employer has taken appropriate steps

to minimize inadvertent misclassification liability, including understanding who may or may not be considered an independent contractor from one jurisdiction to another.

ADHERING TO RELEVANT EMPLOYMENT SCHEMES

Companies operating in multiple jurisdictions are generally plagued by competing or conflicting employment regulations. The policies regarding the nature of the employment relationship typically differ from one jurisdiction to another.

Nowhere is this difference more pronounced than as between the U.S. at-will employment scheme and the policies adopted by most of the rest of the world. Specifically, an employer in the United States may generally terminate an employee for any reason, at any time, with or without notice (*i.e.*, "at will") except for reasons that are unlawful, such as for discriminatory or certain retaliatory reasons. On the other hand, the vast majority of countries eschew the at-will doctrine and instead limit an employer's right to terminate its employees.

Countries such as South Korea and Mexico preserve by statute the employment relationship unless there is just cause to terminate the employee. Other countries, such as Canada, allow for terminations without just cause if the employer gives sufficient prior notice. Some countries, such as the United Arab Emirates, require both prior notice and end-of-service gratuities or severance.

Failure to comply with a foreign jurisdiction's termination requirements can result in reinstatement of the employee, back wages, or other penalties and fines.

There is also wide variation regarding mandatory leave, benefits and compensation requirements for employers. Employers in the U.S. are relatively free to provide paid leave, benefits and other compensation as they choose. But outside the U.S., employers may be required to provide paid vacation, sick leave, retirement benefits, annual or semiannual bonuses, housing allowances, profit sharing, or other benefits.

Failure to anticipate the cost of such mandatory programs can affect the profitability of a company's operations and increase the risk of liability that may arise from noncompliance.

APPROPRIATE EMPLOYMENT CONTRACTS

While all countries have regulations related to the paperwork and documentation associated with a person's employment, the specific requirements can vary widely from country to country. An employer must apply the local jurisdiction's requirements in order to be compliant.

The use and contents of a written employment contract may be mandated by statute. In the United States, written employment contracts are relatively rare. But other jurisdictions require a written employment agreement that comports with specific regulatory requirements.

For example, China's employment contract law[2] requires a written employment contract and penalizes an employer if that contract is not signed. Chinese law may also require payment of up to twice the employee's salary for each month the written employment contract is not signed.[3] The law expressly identifies the minimum provisions that must be included in the employment contract. Failing to include such provisions may result in liability for any resulting losses to the employee.[4]

In addition, employers that wish to discipline or terminate an employee for violations of company policy may be surprised to learn their handbook or global codes of conduct are unenforceable in some jurisdictions. For example, unless the employer obtained consent of the employees or employee representatives, or unless the employer submitted a copy of the relevant rules to the local labor authorities, the employer may be prohibited from disciplining or terminating an employee based on those rules.

Simply publishing the rules on a company website or providing the employee with a copy of the handbook may be insufficient.

Maintaining a clear no-corruption policy and training the workforce on such policies should be considered an essential part of a multinational employer's compliance effort.

DATA PRIVACY AND RECORDKEEPING

There are few laws in the United States that govern the privacy of an employee's personal information. These are typically limited to the privacy of an employee's medical information, Social Security number or financial information. Outside the United States, a number of countries have taken significant steps to protect the confidentiality of employee data.

The most notable data privacy law is the European Union Data Protection Directive,[5] which became effective in October 1998. The directive covers virtually all processing of personal data. Personal data include any individually identifiable information about a natural person or from which a natural person could be identified. The directive regulates the collection, use and transfer of individually identifiable personal information. Employers fall within the directive because they process personal information about their employees for performance, compensation, and health or medical benefits. The directive also requires special care in the processing of "sensitive" data, such as a person's racial or ethnic origin, trade union membership, political or religious beliefs, or health.

A particular challenge for employers relates to the transfer of personal information outside the European Union. For example, the directive restricts the transfer of personal information from the European Union to third countries unless the third country has been found to provide an "adequate" level of protection. EU member states have assessed millions of dollars in fines for violations of their data protection laws. One employer was fined about $900,000 by Spanish authorities.

Given the risks of liability and the potential interruptions to the business operations that could result from noncompliance with data privacy laws, each multinational employer should thoroughly review its data privacy processes. Employers need to ensure compliance with laws regarding the protection, maintenance and destruction of an employee's personal information.

COLLECTIVE BARGAINING

Most countries recognize an employee's right to association. Indeed, collective bargaining is generally considered a fundamental right of employees although its application differs from one jurisdiction to the next.

In the United States, collective bargaining is governed by the National Labor Relations Act, which grants the National Labor Relations Board sole authority to hear and adjudicate its provisions. A majority of employees must consent to representation by a union before the union can become the employees' representative at the company. However, U.S. companies that open operations in other jurisdictions may be surprised to find themselves bound not only to company-level agreements, but also to collective bargaining agreements issued at the national level for entire industries.

In some European countries, an employer must also work with works' councils, which are representatives of employees with rights to be notified of various employment actions or, as in Germany, the right to co-determine certain actions. Multinational corporations that operate in these jurisdictions must ensure they abide by the provisions of all relevant agreements as well as the consultation or co-determination rights of other employee representative bodies.

GLOBAL MOBILITY

The expatriate workforce of international employers poses significant compliance challenges. The most obvious challenge relates to obtaining and maintaining the relevant work and residence visas and permits. But the question of which employment laws apply is a tricky one.

Typically, an expatriate maintains his or her employment relationship with the home entity while on a temporary assignment in a foreign jurisdiction. Such a structure raises the risks of dual employment or the application of both countries' laws to the employment relationship.

Other common pitfalls in an expatriate program include mandatory withholdings and deductions, local paid-time-off requirements, and managing frequent business travelers who may become inadvertent expatriates. In light of such pitfalls, companies should carefully consider the ramifications of the multiple layers of relevant and multi-jurisdictional laws and comply accordingly.

CONCLUSION

Since employment law is locally governed, employers with employees in multiple jurisdictions face the challenge of complying with differing, and at times conflicting, employment and labor regulations. Failure to devote time and resources to appropriate compliance efforts can result in unanticipated and, in some cases, immense liabilities. Each company should prioritize its compliance risks and methodically address each risk until appropriate protocols and processes are in place to minimize the liabilities for noncompliance as well as the associated — and likely — damage to a company's reputation and brand. WJ

NOTES

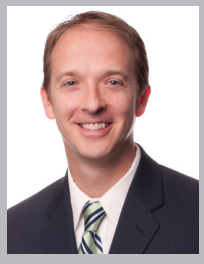
[1] Choi Ci-yuk, *Xi Jinping vows to crack down on corrupt officials in China*, S. China Morning Post, Jan. 23, 2013.

[2] China Employment Contract Law, art. 10.

[3] China Employment Contract Law Implementing Regulations, arts. 6-7.

[4] China Employment Contract Law, arts. 17, 81.

[5] European Parliament and Council Directive 95/46/EC of Oct. 24, 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281 of 23.11.1995).



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