THE LITTLER REPORT

THE 2012 GLOBAL EMPLOYER:

Highlights of Littler's Fifth Annual Global Employer Institute

February 2013

Littler™

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.

Table of Contents

INTRODUCTION

In November 2012, Littler Mendelson conducted its Fifth Annual Global Employer Institute (GEI) in Washington, D.C. Attorneys and human resources professionals from 14 countries participated in the GEI. Regions represented included North and South America, Europe and Asia, including rapidly expanding markets such as Mexico, Venezuela and China.

Each year we highlight and discuss some of the most challenging issues facing global employers. General topics featured at the 2012 GEI included:

- Sustainable Innovations for a Changing Global Workforce
- Forging a Global HR Team to Align with a Global Business: Transparency and Integration
- Developing an Effective Global Mobility Program
- Running with Scissors: What U.S. Employers Should Know Before Cutting Global Staff
- They're Not Your Employees, But It's Still Complicated: New Developments in the Field of Contingent Workers and Independent Contractors
- Opportunities and Challenges in Implementing a Responsible Supply Chain Management Program
- Preventing Workplace Harassment in a Global Workforce
- Out and About: LGBT Issues and the Globally Mobile Workforce
- Assuring Compliance with Anti-Corruption Policies and Requirements
- What Every Multinational Should Know About Bounty Hunters and Whistleblowers
- Preventive Measures Embassies, Consulate Offices and Other Foreign Sovereign Employers Should Take to Avoid or Minimize Their Exposure to Employee Claims in the U.S.

Similar to sessions in prior years, we also focused on unique issues faced in specific jurisdictions. In this year's GEI we included a specific discussion of some challenges faced by employers in Latin America and China and provided an overview of new and evolving employment law developments around the globe. The topics covered were:

- Protecting Your Operations in Latin America: Risks and Opportunities in the Region's Current Legal Landscape
- Tensions and Workplace Disruptions in China: Evolving Labor Challenges and New Rules on the Democratic Management of Enterprises
- Employment Law Challenges Facing Multinationals in Asia and Facing Asian Companies in the United States
- International Employment Law Update

This Report is intended to highlight many of the topics from Littler's 2012 GEI. We hope you find it to be a useful resource.

Garry G. Mathiason
Peter A. Susser

Littler Mendelson, P.C.

PART ONE: GENERAL TOPICS

I. SUSTAINABLE INNOVATIONS FOR A CHANGING GLOBAL WORKFORCE

A. Introduction

Littler's Global Employer Institute—now in its fifth year—commenced with a high-level overview of technological, economic and demographic trends that will influence workplaces around the globe.[1] Our starting point always has been to look at the most recent statistics on Internet use across the world. A fascinating feature of such data is the greatly accelerated curve over the past two years: from 1.97 billion users in 2010 to 2.4 billion users in 2012.[2] More than one-third of the world's population is connected by the Internet, and information no longer can be siloed. Be it in Syria, Egypt, or the most remote part of the globe, there is easy access to vast quantities of information.

Other data show a dramatic shift in the world's center of economic gravity, from the United States and Europe towards Asia and Latin America. A study by the McKinsey Global Institute looks ahead to the year 2025 and identifies what will be the most dynamic and vibrant cities, with the greatest growth, innovation and economic potential. And of the top 75 cities on this list, 41 are in Asia and eight are in Latin America.[3]

Below is an overview of six global topics and trends, many of which are covered in greater detail in other sections of this Report.

B. Key Global Topics for Consideration

Changing Face of Latin America—Employment & Labor Law Reform

The Latin American countries are endowed with abundant natural resources that will dictate the region's future. Looking at the region's economic and employment growth, the United States has been a major economic partner during the past several years. Between 1998 and 2009, U.S. trade with Latin America grew by 82%, making Latin America the fastest-growing U.S. regional trade partner. Mexico composed 11.7% of total U.S. trade in 2009 and is the largest Latin American trade partner.[4]

With respect to the Latin American workforce, a major issue is informal employment.[5] In Mexico, for example, almost 60% of economically active people are employed in informal jobs with no contract and few or no benefits. The number of Mexicans working informal jobs reached 29.2 million in 2012.[6] So a main economic challenge is how to generate formal jobs.

This challenge is one of the factors that led to Mexico's government enacting, in November 2012, major amendments to the Federal Labor Law (FLL). The debate about whether to amend the FLL centered on whether to be more rigid, or to be more flexible in order to attract more businesses and generate more jobs. The FLL had not been subjected to any substantial modifications since 1970. The reform represents a milestone towards the establishment of a more modern and competitive labor framework. Key aspects of the reform include: adding seasonal employment agreements and initial training agreements as new types of employment contracts; heightening the regulations on outsourcing (subcontracting); adding bullying and sexual harassment as new grounds for termination with cause; simplifying the notice of dismissal requirements; limiting the accumulation of back wages to 12 months; and implementing various changes that will promote union transparency and accountability.[7]

---

1 This chapter is based on the opening session of the 2012 Global Employer Institute, presented by Garry Mathiason (Chairman of the Board at Littler Mendelson, resident in the San Francisco office) with special guests Juan Carlos Varela (Office Managing Shareholder of Littler's Caracas office), Oscar De la Vega (Office Managing Shareholder of Littler's Mexico City office), Paul Weiner (Shareholder and National eDiscovery Counsel, resident in Littler's Philadelphia office) and Steve O'Brien (General Counsel, Gallup).

2 Internet World Stats, www.internetworldstats.com

3 Urban world: Cities and the rise of the consuming class, McKinsey Global Institute, June 2012, *available at* http://www.mckinsey.com/insights/mgi/research/urbanization/urban_world_cities_and_the_rise_of_the_consuming_class.

4 *U.S.-Latin America Trade: Recent Trends and Policy Issues* (Feb. 8, 2011), Congressional Research Service, *available at* https://opencrs.com/document/98-840/.

5 Some of the characteristic features of informal employment are: lack of protection in the event of non-payment of wages; compulsory overtime; layoffs without notice or compensation; and the absence of social benefits such as pensions, sick pay and health insurance. *See* International Labour Organization website, at http://www.ilo.org/global/topics/employment-promotion/informal-economy/lang—en/index.htm.

6 *Mexico: New report finds 2/3 of workforce has informal jobs, The Calgary Herald*, Dec. 11, 2012, http://www.calgaryherald.com/health/workforce+informal+jobs/7684433/story.html#ixzz2ExUCUNDB.

7 *Mexico Enacts Important Reforms to the Federal Labor Law*, Oscar De la Vega, Mónica Schiaffino, Eduardo Arrocha, and Liliana Hernandez (Nov. 30, 2012), Littler ASAP *available at* http://www.littler.com/publication-press/publication/mexico-enacts-important-reforms-federal-labor-law.

The debate about flexibility versus rigidity in the labor market extends beyond Mexico and is occurring across the South American continent:

- Venezuela reformed its labor law in May of 2012. As just one example of the amended provisions, there is now criminal liability in case of noncompliance with labor laws. Prosecutions have occurred in four cases to date—in one case, the company went bankrupt and the company's president received a jail sentence.
- In Colombia, certain legal provisions prohibit acts against unions, with criminal liability attached.
- Brazil is a massive developing market, and companies are scrambling to locate there. But it is a very expensive place to terminate employees, because it is not clear whether any statute of limitations applies, or whether rights are voided at the end of the employment relationship even with a release. It has become common place for an employee who leaves a company to file suit, since the statute allows employees to do so. Some companies have as many as 100,000 termination cases pending, and counting. So, litigation costs are increasing all the time.

Latin America is poised as the next region to experience growth on the scale of that seen in China, but companies must understand the various countries' complicated labor laws in order to be profitable and successful. For a more detailed discussion of this topic, see section **XII** below ("Protecting Your Operations in Latin America: Risks and Opportunities in the Region's Current Legal Landscape").

The Second Time Around: The Obama Administration's Impact on Global Employment and Labor Law

During President Obama's first term in office, Littler tracked the momentous changes that his administration brought about in the U.S. employment landscape, through increased enforcement, rulemaking and other agency activities.[8] It is expected that President Obama's second term will have an even greater impact on employment and labor law, both domestically and globally.

First, it is anticipated that Congress will make a real effort in immigration reform[9], and with a much higher probability of passing, given the critical role of Hispanics in the 2012 election and the desire to ensure that they are integrated into the political family, not just for the Democrats, but also for the Republicans.

Second, continued expansion of whistleblower protection and enforcement is expected through efforts of the Obama Administration and models that are being set up and followed all over the world. For a more detailed discussion of this topic, see section **X** below.

Third, is an expected surge in global unionization. Although the United States is seemingly removed from the major influences of organized labor, with union membership at about 7% of the private sector workforce,[10] unions are incredibly vibrant at the international level and have strong support from the Obama Administration. The number one financial contributor to Obama's reelection campaign, more than any of the "Super PACs," was the Service Employees International Union,[11] and the payback will be in things that might seem completely off the radar screen. For example, as part of the U.S./Colombia free trade agreement that was negotiated recently, the United States mandated that Colombian laws and regulations be revised to make it easier for unions to organize, and that government funding be provided to run advertising to promote unionization.[12]

In anticipation of hyper-active administrative creation and enforcement of regulations during Obama's second term, employers should consider conducting a global compliance audit as well as unionization vulnerability assessment and training.

Global e-Discovery: a Cross-Border "Catch 22"

It has been estimated that only 1% of the data existing in the world today is in hard copy format. Thus, 99% of it is in an electronic format.

8 *E.g., The Coming Regulatory Avalanche: Engineering Practical Employment and Labor Law Compliance Solutions* (Apr. 6, 2011), Garry G. Mathiason, Barry A. Hartstein, Ilyse W. Schuman, Littler Report *available at* http://www.littler.com/publication-press/publication/coming-regulatory-avalanche-engineering-practical-employment-and-labor; *see also The Littler Ten: Employment, Labor and Benefit Law Trends for Navigating the New Decade* (Sept. 30, 2010), Garry G. Mathiason, Margaret Hart Edwards, Scott D. Rechtschaffen, Paul D. Weiner, Littler Report *available at* http://www.littler.com/publication-press/publication/littler-ten-employment-labor-and-benefit-law-trends-navigating-new-dec.

9 Michael Lotito & Ilyse Shuman, *How Will the 2012 Election Results Impact Labor, Employment and Benefits Policy?*, Littler ASAP, Nov. 2012, *available at* http://www.littler.com/publication-press/publication/how-will-2012-election-results-impact-labor-employment-and-benefits-po.

10 Associated Press, *AFL-CIO Launches New Ad Campaign Highlighting Work of Unions*, Huffington Post, Jan. 17, 2012, *available at* http://www.huffingtonpost.com/2012/01/17/afl-cio-ad-campaign-unions_n_1211279.html#.

11 OpenSecrets.org, https://www.opensecrets.org/pres12/indexp_indiv.php?cycle=2012&id=N00009638.

12 *Labor in the U.S.-Colombia Trade Promotion Agreement*, Office of the United States Trade Representative, http://www.ustr.gov/uscolombiatpa/labor.

It has also been estimated that, as of 2007, over 295 Exabytes of electronic data existed worldwide. If this amount of data were stored digitally on CDs, the stack of discs would reach beyond the moon.[13]

In the U.S., there is a very expansive view of discovery that dictates what needs to be produced in litigation. In today's digital world, that means that incredible volumes of electronic data are implicated in cases large and small. For example, in *In re Fannie Mae Securities Litigation*,[14] even though a U.S. federal regulatory agency had hired 50 contract attorneys to review about 80% of the email of the entire agency and spent over $6 million or over 9% of the agency's annual budget to respond to a subpoena, a U.S. Court of Appeals affirmed a trial court finding of contempt against the agency reasoning that its discovery efforts were "too little, too late." In the U.S., in addition to traditional electronic data sources like documents and email, courts also allow discovery of more expansive data sources[15] like social media accounts,[16] instant messages,[17] text messages[18] and even GPS data.[19] Indeed, the Advisory Committee Note to Federal Rule of Civil Procedure 34, which governs the production of documents and electronically stored information in U.S. litigation, instructs that the rule "is expansive and includes any type of information that is stored electronically …" and is intended to be flexible enough to encompass "future developments in computer technology."[20]

The rest of the world takes a dramatically different approach to data production in litigation. In many countries outside of the United States, data privacy is a fundamental human right, and data privacy and blocking statutes prevent the production of data in litigation.[21] As one example, in a case where a French company was sued in the U.S., the company filed a motion for a protective order, arguing that French blocking and data privacy statutes prevented production (or disclosure) of data that were located in France. The U.S. judge denied the motion and ordered the company to produce the data within 30 days. In doing so, the court specifically rejected the defendant's argument that it would face criminal prosecution in France, holding that there was a low likelihood of actual prosecution. In response to the U.S. federal court order requiring the defendant to produce the information, a French lawyer who interviewed a witness was arrested, and the French Supreme Court ultimately upheld the criminal conviction and a €10,000 fine imposed on the lawyer.[22] Thus, cross-border litigants are oftentimes faced with a classic Catch-22[23] conflict in which they, on the one hand, are required by U.S. rules and judges to produce extensive information from a foreign jurisdiction for use in a federal lawsuit on the threat of sanctions,[24] but on the other hand, are prohibited by foreign blocking statutes, data privacy regulations and Data Privacy Commissioners from disclosing/producing that same information

13 *Global data storage calculated at 295 exabytes*, BBC News (Feb. 11, 2011), *available at* http://www.bbc.co.uk/news/technology-12419672.

14 2009 U.S. App. LEXIS 9 (D.C. Cir. Jan. 6, 2009).

15 *See generally*, *Electronic Discovery Special Report: Plaintiffs Have Their Own Duty to Preserve*, Paul Weiner, NAT'L L.J., Dec. 19, 2011, *available at* http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202536136818&slreturn=1 (last accessed Dec. 31, 2012).

16 *See, e.g.*, *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *3 (C.C.P. Jefferson County, PA Sep. 9, 2010) (ordering plaintiff to provide his Facebook and MySpace user names and passwords to counsel for defendants, rejecting plaintiff's argument that communications shared among one's "private" friends is somehow protected against disclosure in discovery and instructing "'no social network site privilege' has been adopted by our legislature or appellate courts.").

17 *See, e.g.*, *In re: Air Crash Near Clarence Center NY*, 2011 U.S. Dist. Lexis 146551 (W.D.N.Y. 2011) (directing plaintiffs to produce relevant electronic communications, including "social media accounts, emails, text messages, and instant messages").

18 *See, e.g.*, *Smith v. Café Asia*, 246 F.R.D. 19 (D.D.C. 2007) (court ordered plaintiff to preserve text messages stored on cell phone as they might bear on defendant's claim that plaintiff invited the alleged sexual harassment forming the basis for her claims).

19 *Morgan v. U.S. Xpress, Inc.*, 2006 U.S. Dist. LEXIS 36195 (M.D. Ga. June 2, 2006) (holding that defendant had a duty to preserve satellite positioning data maintained on its internal computer system).

20 *See, e.g.*, *The Sedona Conference© Framework for the Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy and e-Discovery*, Public Comment Version, The Sedona Conference, August 2008, *available at* https://thesedonaconference.org/publication/Framework%20for%20Analysis%20of%20Cross-Border%20Discovery%20Conflicts.

21 *See, e.g.*, *The Sedona Conference© Framework for the Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy and e-Discovery*, Public Comment Version, The Sedona Conference, August 2008, *available at* https://thesedonaconference.org/publication/Framework%20for%20Analysis%20of%20Cross-Border%20Discovery%20Conflicts.

22 *In re Advocat "Christopher X"*, Cour de Cassation, Chambre Criminelle [Criminal Chamber of Supreme Court], Paris, Dec. 12, 2007, No. 07-83228.

23 A "catch-22" is a paradoxical situation in which one cannot or is incapable of avoiding a problem because of contradictory constraints or rules. The term "catch-22" was coined by Joseph Heller in his novel *Catch-22*, and is based upon the explanation of the character Doc Daneeka as to why any pilot requesting a psych evaluation hoping to be found not sane enough to fly, and thereby escape dangerous missions, would thereby demonstrate his sanity. *See* http://en.wikipedia.org/wiki/Catch-22_(logic).

24 *See e.g.*, *Lyondell-Citgo Refining, LP v. Petroleos de Venezuela*, S.A, 2005 U.S. Dist. LEXIS 7907 (S.D.N.Y. May 2, 2005) (upholding adverse inference instruction against defendant/national oil company of Venezuela that declined to produce board minutes in response to a U.S. discovery order based upon an assertion that doing so would violate Venezuelan law that prohibited disclosure of Board of Director minutes).

on the threat of severe civil and criminal penalties. And, this dilemma extends well beyond Europe: for example, if the Chinese government declares certain information to be a protected governmental secret, then the data cannot leave the country.[25]

A few practical suggestions regarding global e-discovery are:

- In the context of U.S. litigation, be prepared to educate your adversary and judges, who can be very skeptical when a party states that it cannot produce data because it is located in a foreign country. One great resource for educational purposes is the Sedona Conference, which is the world's leading e-Discovery non-profit think tank that has published in-depth White Papers on these issues.[26]
- When foreign data are in play in U.S. litigation, start thinking about cross-border discovery issues very early in a case, including by looking for other sources of data located within the U.S. that may be equivalent to the data located outside of the U.S. and by putting procedural protections in place (*e.g.*, a protective order that limits disclosure of data that are subject to foreign data protection laws[27]) at the outset of the case.
- Be sure to educate foreign executives about discovery procedures in the U.S. and how they differ from the procedures they are most likely accustomed to. To illustrate the consequences of failing to appreciate the differences between a foreign and the U.S. legal system, one need only look to the recent case of *E.I. du Pont de Nemours v. Kolon Industries*.[28] In that case, the court entered e-Discovery sanctions in the form of an adverse inference instruction against the South Korean defendant-company because it failed to issue timely and proper litigation holds in accordance with U.S. e-Discovery standards. The resulting e-Discovery sanctions contributed to a $919 million dollar verdict against the South Korean defendant-company. [29]

Disappearing Borders: Global Mobility

The Gallup World Poll,[30] which covers 140 countries, measures opinions on topics such as individual well-being, government leadership, and perceived corruption. One question included in the poll is whether the respondent wants to relocate from his or her country. Fourteen percent of the world's population wants to move to another country, and the primary reason is to find jobs. About 19 million people are actively making plans to move abroad.[31] When respondents are asked where they would like to relocate to, North America and Western Europe are the leading responses.

---

25 *See e.g.*, *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992) (upholding contempt sanction against defendant that asserted that the People's Republic of China (PRC) secrecy laws prevented it from complying with a U.S. discovery order and that it would be subject to criminal prosecution if it disclosed such information, noting that even though the court explicitly accepted that defendant's contention that the PRC State Secrets Act barred disclosure of the information in question, "a foreign-law prohibition will not always excuse compliance with a [U.S.] discovery order" as the "PRC's admitted interest in secrecy must be balanced against the interest of the United States and the plaintiffs in obtaining the information.").

26 *See e.g.*, The Sedona Conference International Principles on Discovery, Disclosure & Data Protection: Best Practices, Recommendations & Principles for Addressing the Preservation Discovery of Protected Data in U.S. Litigation, European Union Edition Public Comment Version, December 2011, *available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20International%20Principles%20on%20Discovery%2C%20Disclosure%20%2526%20Data%20Protection (hereinafter "The Sedona Conference International Principles").

27 The Sedona Conference International Principles contains a "Model Protected Data Protective Order," that covers, *inter alia*:

- Directive 95/46/EC of the European Parliament and of the Council of 24 October 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. (L281/31) (European Union personal information);
- Data Protection Act 1998 (c. 29) (United Kingdom personal information);
- The German Federal Data Protection Act (Germany personal information);
- The Belgium Law of December 8, 1992 on Privacy Protection in relation to the Processing of Personal Data (Belgium personal information);
- Personal Information and Electronic Documents Act (PIPEDA), S.C. 2000, c. 5 (Canada personal information);
- The Federal Law on Protection of Personal Data held by Private Parties (July 5, 2010) (Mexico personal information); and
- The Personal Information Protection Act (Law No. 57 of 2003) (Japan personal information).

28 803 F. Supp. 2d 469 (E.D. Va. July 2012).

29 *See e.g.*, Breaking News: $919 Million Verdict for DuPont in Trade Secret Theft and e-Discovery Sanctions Case, e-Discovery 2.0, Sept. 15, 2011 *available at* http://www.clearwellsystems.com/e-discovery-blog/2011/09/15/breaking-news-919-million-verdict-for-dupont-in-trade-secret-theft-and-ediscovery-sanctions-case/ (last accessed Dec. 17, 2012).

30 http://www.gallup.com/poll/world.aspx?ref=logo.

31 *Nearly 50 Million Worldwide Planning to Migrate Soon*, Gallup World Poll (Feb. 24, 2012), http://www.gallup.com/poll/152951/nearly-million-worldwide-planning-migrate-soon.aspx.

The migration of highly skilled workers across national borders continues to build momentum. *The New York Times* recently reported that record numbers of China's highly educated population are migrating to other countries.[32] In 2010, 508,000 Chinese left for the 34 developed countries that make up the Organization for Economic Cooperation and Development, which is a 45% increase over 2000.[33]

It will be fascinating to watch what happens in the global contest to retain and attract highly skilled workers. And, multinational employers should be prepared to adjust their practices to leverage the advantages offered by an increasingly mobile workforce. For a discussion of best practices to keep in mind when structuring global mobility programs, see section **III** below.

The Whistle Heard Around the World—Retaliation in the Global Workplace

As estimated by the World Bank, bribery is a $1 trillion business.[34] Governments are acting to enhance their ability to prosecute those who engage in corrupt activities. Most visibly, the United Kingdom's Bribery Act of 2010, which took effect in July 2011,[35] swept away antiquated and piecemeal legislation to create a regime of criminal offenses described by the Director of the Serious Fraud Office as "the toughest bribery legislation in the world."

The crackdown on bribery brings with it some greatly enhanced incentives to report corrupt activity. *The Economist* designated 2012 the "year of the bounty hunter" and predicted that whistleblowing statutes will be adopted in multiple countries across the world.[36] The United States' Dodd-Frank Act provides that whistleblowers in Foreign Corrupt Practices Act (FCPA) and securities fraud claims can claim a 10% to 30% reward in enforcement actions where the penalties exceed $1 million,[37] resulting in a dramatic increase in complaints from whistleblowers. Indeed, during fiscal year 2012 the SEC received more than 3,000 whistleblower tips.[38] The IRS recently issued a record $104 million bounty to a banker-turned-whistleblower who served almost three years in prison for his role in a tax evasion scheme.[39]

Littler attorneys have experienced such an upsurge in retaliation-based litigation and claims, in that we formed a Whistleblowing and Retaliation practice group, to advise employers on the full range of issues, including conducting investigations and ensuring global compliance with anti-corruption laws. We also partner with NAVEX Global, which provides a comprehensive suite of technology-enabled solutions to manage governance, risk and compliance.[40]

Two sessions of the 2012 Global Employer Institute addressed corruption, whistleblowing and retaliation issues. For discussion of these topics, see sections **IX** and **X** below.

Personal Technology & Robotics in the Global Workplace

Employers face a wide range of challenges as more and more employees use personal devices to perform work, also known as the BYOD (Bring Your Own Device) movement. This challenge is not limited to the United States, and it continues to gain momentum. A worldwide study of 3,000 information workers and business executives in nine countries found that, in just one year (from 2010 to 2011), the percentage of workers using a personally owned device to access their employer's business applications increased from 30% to 40%.[41] For some companies, a BYOD policy may be the right response. But the adoption of BYOD policies will increase certain employment

32 *Wary of Future, Professionals Leave China in Record Numbers, The New York Times* (Oct. 31, 2012), http://www.nytimes.com/2012/11/01/world/asia/wary-of-future-many-professionals-leave-china.html?nl=todaysheadlines&emc=edit_th_20121101&_r=0.

33 *Id.*

34 *Six Questions on the Cost of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann, available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

35 *See, e.g., U.K. Bribery Act "On-Line" as of July 1 – U.S. Employer Impact*, Philip Berkowitz, David Goldman, and Ellen Temperton (Aug. 11, 2011), Littler Insight *available at* http://www.littler.com/publication-press/publication/uk-bribery-act-line-july-1-%E2%80%93-us-employer-impact.

36 *Year of the bounty hunter: Whistleblowing will become a global industry* (Nov. 17, 2011), from "The World In 2012" print edition of The Economist, *available at* http://www.economist.com/node/21537931.

37 *See, e.g., Dodd-Frank and The SEC Final Rule: From Protected Employee to Bounty Hunter* (July 1, 2011), John S. Adler, Edward T. Ellis, Barbara E. Hoey, Gregory C. Keating, Kevin M. Kraham, Amy E. Mendenhall, Kenneth R. O'Brien, Carole F. Wilder, Littler Report *available at* http://www.littler.com/publication-press/publication/dodd-frank-and-sec-final-rule-protected-employee-bounty-hunter.

38 *SEC Receives More Than 3,000 Whistleblower Tips in FY2012*, SEC Press Release (Nov. 15, 2012), *available at* http://www.sec.gov/news/press/2012/2012-229.htm.

39 *UBS whistleblower gets $104M from IRS for helping in Swiss bank probe, The Washington Post* (Sept. 11, 2012), http://articles.washingtonpost.com/2012-09-11/business/35494823_1_ubs-whistleblower-bradley-birkenfeld-report-tax-fraud.

40 http://www.navexglobal.com/.

41 Frank Gens, Danielle Levitas, and Rebecca Segal, 2011 Consumerization of IT Study: Closing the "Consumerization Gap", July 2011.

and labor law risks. A Littler Report published in May 2012 discusses these issues in great detail, including a comprehensive list of policy recommendations.[42]

In the 1960s smart phones were not envisioned, but robots were a popular futuristic dream. It was imagined that robots soon would help humans in many different ways, and even replace humans in performing some tasks. This revolution did not happen and decades passed. The complexity of the tasks and the difficulty of providing robots with necessary computing power became major roadblocks. Now, in the second decade of the 21st century, breakthroughs in artificial intelligence software and cloud computing have profoundly changed the landscape, allowing a small device to access massive computing capacity. Right now, the prediction is that within a year or two, a computer will have been built that is capable of doing what the human mind can do, and by 2025 computerized robots will be available that can each perform mental tasks that would require a thousand full-time professional employees.

There's no limit to where this movement is going, and it is already having profound effects today. Foxconn, which is one of China's largest private employers, plans to add up to one million industrial robots to its assembly lines within three years.[43] Two of Philips Electronics' factories, in China and the Netherlands, also serve as a dramatic example. In China, hundreds of workers use their hands, minds, and specialized tools to assemble electric shavers. In the Netherlands, 128 robot arms do the same work, as video cameras guide them through tasks "well beyond the capability of the most dexterous human."[44] One-tenth of the people, better quality construction, cheaper per unit construction everything thought about labor and cost of labor is changing. Now "high labor cost" countries have the potential to compete with countries that have dominated manufacturing with low cost labor.

In Europe, there already is a "RoboLaw" project ("Regulating Emerging Technologies in Europe: Robotics Facing Law and Ethics").[45] This is a European Commission-funded project to look at the ethical and legal guidelines governing robotic systems, and researchers are looking at issues ranging from privacy concerns to safety implications to the question of human displacement. Will the use of robotics create more jobs than it displaces? If displacement occurs, what are the legal regulations and restrictions? What about severance pay or ability to terminate? Is retraining an option? All of these are legal implications that employers will be dealing with. The results of this research project will be presented to the European Parliament in 2014 for potential adoption into comprehensive legislation. Comprehensive resources, such as the Robotics Business Review, already exist to provide more information about these issues.[46]

You might be thinking, "Robotics will never affect my job." But, the U.S. government has $70 million invested in this movement.[47] Robotics is literally redoing everything that we can think about in terms of the future because it is the future.

II. FORGING A GLOBAL HR TEAM TO ALIGN WITH A GLOBAL BUSINESS: TRANSPARENCY AND INTEGRATION[48]

More and more companies are becoming multinational, realizing that growth can only be sustained by operating in foreign markets. Companies can expand their business by opening subsidiaries or branch offices in new countries and growing them organically through hiring, or by acquiring or merging with existing foreign companies. Transforming such local organizations in disparate locations into an integrated and truly global business operation is a tremendous HR challenge, and includes creating a global HR team that can align with the objectives of the global business. But achieving this goal is not straightforward, and demands great sophistication in HR leadership as well as a significant commitment of resources and time.

42 T*he "Bring Your Own Device" to Work Movement*, Garry Mathiason; Michael McGuire; Gavin Appleby; Philip Berkowitz; Tanja Darrow; Helena Eldemir; Philip Gordon; Jacqueline Gruber; Ben Huggett; Stacey James; Sara Kalis; Henry Lederman; Chris Leh; Johan Lubbe; Cecil Lynn III; Suellen Oswald; Todd Ratshin; George Reardon; Mark Schneider; Paul Weiner; Dylan Wiseman; and Jennifer Youpa (May 10, 2012), Littler Report *available at* http://www.littler.com/publication-press/publication/bring-your-own-device-work-movement.

43 *Migrant Workers in China Face Competition from Robots* (Jul. 16, 2012), Christina Larson, MIT Technology Review, *available at* http://www.technologyreview.com/news/428433/migrant-workers-in-china-face-competition-from-robots/.

44 *Skilled Work, Without the Worker*, John Markoff, *The New York Times* (Aug. 18, 2012), *available at* http://www.nytimes.com/2012/08/19/business/new-wave-of-adept-robots-is-changing-global-industry.html?_r=1&adxnnl=1&pagewanted=all&adxnnlx=1355518840-VqYttxW7rZs7jP4iciql7A.

45 http://www.robolaw.eu/index.htm.

46 http://www.roboticsbusinessreview.com/.

47 *Developing the Next Generation of Robots*, White House—Office of Science and Technology Policy Blog (June 24, 2011), http://www.whitehouse.gov/blog/2011/06/24/developing-next-generation-robots.

48 This session was moderated by Littler Shareholder Adam Forman (Boston), and session speakers were: Littler Shareholder Tahl Tyson (Seattle); Eric Lombardo of TripAdvisor; Rebecca Holland New of Patheon; and Victoria Moore of ADTRAN.

This section considers the challenges, and identifies three important and practical lessons that HR leadership can use. First, it is important to understand local organizational history and "get the full picture" in order to assess how to introduce change. Second, HR leadership must create a strategic roadmap and then effectively communicate how it will implement change. Last, cultural awareness is paramount to ensure a balance is achieved between harmonizing practices, procedures, terms and conditions and adhering to local laws and norms.

A. Lesson One: Understand the Past

Transformation does not exist in a vacuum. It is important to step back and assess what has happened in the past. Understanding how and why a newly acquired company, for example, currently functions as it does, is essential for planning a roadmap to achieve an integrated global business. You cannot determine how to move people forward until you truly understand where they have been, and thus how they will view change. By reviewing and analyzing historical practices, global HR can determine what is important to its new employees and where it can expect resistance to change; what successes should be endorsed but at the same time what practices should be left behind. Depending on the information obtained, HR can more effectively determine what communication and training strategies it adopts.

So what do you do to understand how employees will experience change? It cannot be over-emphasized how important it is for leaders to conduct face-to-face visits as soon as possible in order to build immediate relationships and rapport with local employees. Developing trust is essential for open dialogue and candor, especially outside of the at-will environment in countries where the concept of "trust and confidence" is fundamental to the employment relationship and embedded in the entire structure of such countries' employment laws (*e.g.*, throughout the European Union). In addition, these visits will elicit information regarding all the important components that make up that the local company's history, such as: how it makes decisions, how it runs its day-to-day operations, and what terms are important to the employees. While there are financial and time commitments associated with making these face-to-face visits, they are outweighed by the significant benefits. Facilitating the company's ability to change in the future will ultimately save money, as it can avoid the costly effects of passive or active opposition, for example: inaction, delay, fostering discontent, legal claims and even industrial action. It is just as important to note that what has worked well for the local company is considered and that you do not need to fix "what isn't broken." Focusing on what a local operation does well, and even extending such practices to the global business, will optimize results as well as foster engagement.

Past practices and procedures of the local company are legally significant because they can become legally binding over time. For example, if employees have regularly received meal vouchers or car allowances over a substantial period of time, the provision of the benefit may have become a legally binding. Only by carrying out due diligence and, in particular, by asking questions about what employees receive over and above any written entitlements in their contracts of employment, will you know what can validly change with or without employees' consent. This kind of assessment or "inventory" can be conducted by legal counsel or internally.

And, if there is a works council, it is important to consider whether the local company has allowed the works council to negotiate areas beyond the normal scope of inclusion in a collective bargaining agreement. This practice may have become entrenched to the point that it is now a legal obligation to continue negotiating these areas. Therefore, when carrying out an HR inventory, it is worthwhile to look at past work council agendas to see what topics have been discussed, and read the meeting minutes to find out how issues have been resolved and if any legally binding terms have been created in this forum.

Understanding the past was important to one global technology company that recently acquired a German subsidiary. In an instant the acquisition increased the number of countries in which the company operates from 10 to 30. HR leadership initially attempted to start integration by conducting meetings with the new employees over the phone. Sensing a lack of trust, HR leadership decided to conduct face-to-face meetings on the ground in Germany, where the majority of new employees were located in four regional sites. Only by meeting its new employees personally was HR leadership able to significantly improve the channels of communication and understand what was important to its new employees. The face-to-face visits also allowed HR leadership to meet personally with the members of the works council, and consider some 147 agreements it had in force. By adopting a cooperative attitude, both sides were able to proactively discuss important terms and conditions but at the same time discard those that were not important. These personal visits created personal trust between key individuals at corporate headquarters and employees in the newly acquired business.

B. Lesson Two: Create a Strategic Roadmap

Without careful planning, change will inevitably be met by resistance. Employees may view change as threatening; they may be

mistrustful of the global business' motives; and they may have trouble understanding what is happening and why. These fears and mistrust can be allayed by developing and communicating a strategic HR plan for transformation and integration.

When creating a strategic plan, it is important to use what was learned about the past to inform the approach to be taken when devising and rolling out the plan. It is also beneficial to involve managers and employees of all levels and from different countries of the global business as well as create cross-functional teams to formulate policies and procedures that effect change and will pave the way for successful global business integration.

When implementing a strategic plan of change, ensure that there are effective channels of communication between corporate headquarters and the local employees by, for example, holding town hall meetings, sending out Q&A documents, leading discussion forums, or issuing a monthly newsletter. Works councils will also need to be involved in the implementation stage of any strategic plan and will require regular business information updates. That said, this does not mean that the global business has to disclose all its confidential business information in its strategic plan or in any updates to works councils.

As a real-life example, when a travel company acquired a Chinese subsidiary, an instrumental factor in achieving successful integration was the company's decision to create not only an HR transition team but also business transition teams, to ensure that all parts of the business were involved and working towards a common goal of transformation. This strategic plan not only fostered enthusiasm among local employees by involving them in the process, but also served to let the local employees know when the transition would be completed.

There are also legal challenges that global HR should be aware of when it puts together a strategy for change management. When building their teams, global businesses may have to prepare for limitations to its ability to effect change as far as reporting relationships. A global business' desired organizational structure may have cross-border teams where employees' immediate managers are employed by different group companies of the global business. However, some countries may only allow managers employed by the same corporate entity to execute important employment decisions for employees of that company. Therefore, global HR must ensure that new cross-border managers will have the support of the local managing director to move forward with certain formalities, such as taking disciplinary action or making termination decisions.

Consideration should also be given to data privacy implications when introducing HRIS (Human Resources Information Systems). When consolidating and processing personnel data from different countries in a central location or hub, local data privacy regulations that mandate what and how personal information should be collected, retained and even destroyed must be incorporated into company data compliance guidelines.

It is also prudent for a global business to plan for contingencies should integration not proceed as expected. Said differently, it is important to get your "pre-nup" right. A global business needs to understand the implications of implementing change that will be contested by its new employees. It will need to consider whether changes can be made unilaterally, and what the ancillary costs of change will be, such as separation packages, relocation, retention bonuses, new hire costs, etc. These are all important questions that should be considered when devising and implementing a strategic plan.

As an illustration of this point, a global pharmaceutical company learned an important lesson when it introduced a global bonus plan for its employees. HR leadership was not aware that local Italian HR had not followed the strategic plan for change and therefore communication to employees had broken down. Italian HR did not believe that it had to roll out the new global bonus plan until the local collective bargaining agreement was up for renegotiation in two years. The works council and employees were not happy that they were being treated differently than the rest of the global business. Once the situation was understood, HR leadership was able to work with legal counsel to effectuate a successful approach with the union. HR leadership had to force through greater transparency into the local situation and re-open the channels of communication to ensure that integration was being fully achieved.

C. Lesson Three: Understanding the Local Culture

Thus far, our emphasis has been on a company's desire to think and act globally, but the reality is that operations take place locally. Transformation cannot succeed if it does not take into account the influence of local culture. Different countries have different attitudes towards all aspects of work, including work/life balance, acceptable conduct in the workplace, formality versus informality, and decision-making. It is important to understand and respect these differences in order to implement a strategic plan that will be successful in each location of the global business.

For example, a common tension between U.S. companies and their European subsidiaries is their different attitudes towards being available 24/7. U.S. companies are proud that their managers and employees can respond immediately to business requests, no matter what the time of day or night it is, and whether they are on holiday or not. Conversely, European counterparts may not respond as swiftly and be available 24/7, as the work culture is more deferential to respecting a worker's right to take daily rest and vacation (sometimes for several weeks) without being interrupted by work requests. This can create tension and even resentment between employees when those in one region believe they are working harder than those in another region. However, there are ways of addressing such discontent. For example, employees might be encouraged to circulate their holiday schedules to members of their teams in other locations, so that colleagues can plan around their unavailability and be proactive in making their business requests. Ultimately, if a global business is truly global, it should be able to organize the work so that different parts of the world can take over the baton and thereby take advantage of the different time zones of its operations to provide a 24/7 service.

Examples of strategies to address cultural aspects of change management include providing training for local teams to ensure their understanding of new requirements and ensure their success in a new kind of organization. Although face-to-face training is ideal, it also can be done via technologies such as Skype or FaceTime. Whatever the method of training used, the aim is to tear down barriers between teams based on geographic location, and make them cross-functional with a common identity achieving the same business goals. Setting clear expectations from the outset is critical, namely, that the employees are responsible for working within a global, rather than geographic, business unit. Mobility programs can be very key elements of successful integration, providing opportunities for employees to visit and work in different regions of the global business.

At the same time, it is important to ensure that managers are aware of the different legal consequences that may arise from their decision-making. For example, some countries do not recognize performance issues as a legal basis to terminate an employee's employment, whereas in the U.S. employees are employed "at will" and can be terminated without cause and without notice.

Sometimes cultural differences will encourage managers to act in the local, rather than global, interest. This often comes to the fore when managers are asked to carry out a reduction in force (RIF) based on function rather than location. Often global HR leadership will be concerned that if they are not involved in the decision-making as to who stays and who goes, that decision-makers will simply try and avoid making their "own people" redundant and look to other locations for reductions in headcount. It is important to ensure that decision-makers and their local HR understand why it is necessary to implement a RIF, *i.e.*, what sales, revenues, head counts and profit margins are necessary to support the business moving forward. By establishing the business context, global HR can then ask decision-makers to make the same agreed percentage reduction of number of employees based on their business function at each and every location. If a manager decides to skew the results by increasing the number of redundancies in one location and offsetting it against another location where it prefers to retain more employees, these decision-makers should be held accountable. They should be asked to address this discrepancy by increasing the number of redundancies in the preferred location to the agreed percentage rate. It may be that the manager then has to make more redundancies than was asked, but to enforce differential treatment based on geographic location goes against the fundamental aim of achieving a global business. Also, when looking at cultural differences and RIFs, global HR should assess what the different legal ramifications are of making redundancies, for example there will be different costs incurred as a result of making termination payments and having to extend benefit coverage for different geographic regions.

D. Conclusion

Multinational businesses can purchase companies and create new subsidiaries, but there will be no global business organization without sophisticated, creative and visionary HR leadership. These lessons shared above provide some examples of how to approach and respond to this brave new world of integration and transformation.

III. DEVELOPING AN EFFECTIVE GLOBAL MOBILITY PROGRAM[49]

Employers are reassessing the way that they manage their global mobility programs, especially in the areas of immigration, taxes, and international employment law. This section identifies some of the trends emerging in the movement of both management and skilled labor

49 This session was moderated by Littler Shareholder Ian Macdonald. Panelists were Littler Shareholders Joni Andrioff (Chicago), Jorge Lopez (Miami) and GJ Stillson MacDonnell (San Francisco).

worldwide, and the recommended global mobility strategies for an increasingly globally inter-related workforce. Global mobility experiences representative of Asian, European and Latin American markets are highlighted below.

The sweep of global mobility for global employers is unprecedented in scale, complexity and importance. Increasingly, employers are shifting to globally integrated operating models, requiring them to design new organizational structures, governance models and business processes. In this transformation, HR will be a change agent.

An organized and comprehensive approach to global mobility is essential. By nature, global mobility programs are expensive – often resulting in labor costs two or even three times the costs of domestic employment. The result of an unfocused and piecemeal approach is an upward spiral in employer-wide international business travel costs and expenses.

The costs can be exacerbated, for example, when the expenditures for "stealth expatriates" are hidden in the budgets of several independently managed corporate departments and/or locations around the world, which generally result in senior management having little idea of the magnitude of the company's total global mobility expenditures. Further, "stealth expatriate" programs risk inconsistent compliance—or even a complete lack of compliance—with international immigration, tax and labor laws. An efficient and cost-effective solution to these issues requires a coordinated approach supported throughout the organization, providing a proactive framework for deploying and maintaining global resources.

All too often individual corporate departments deal with global mobility issues on an *ad hoc* basis and without coordination, even where inter-department issues are common. Employment laws, immigration, and personal tax issues often track independently from each other. From both efficiency and effectiveness perspectives, employers should consider a global mobility policy which integrates HR, tax, travel, payroll, finance, immigration and accounting considerations.

Critical to developing a managed global mobility policy is to first do an accounting—not only to identify the departments involved from a control and budgeting perspective, but also the workforce currently or historically deployed—by creating a database that identifies the employees who have been deployed and track their location, duration of assignment, business functions, compensation and benefits, as well as the effectiveness of the assignment. Capturing all of these factors would permit the employer to examine whether incentives being provided around the world are in line with the company's business plan and are actually producing results.

A. Immigration

Immigration requirements necessitate globally mobile employees to have proper visas and work permits. Immigration should not be a stand-alone issue, but must be closely integrated with tax and international employment law. Immigration issues are seldom subject to instant resolution. Visa violations can result in government audits, penalties and limits on the employer's ability to deploy employees when and where needed. For this reason, some multinational corporations have introduced a zero tolerance approach—driven by brand protectionism—to ensure a reduction in such liabilities.

In designing an integrated immigration approach, corporations need to examine tax treaties between the host country and countries in which corporate employees are working, in order to determine the tax exemption requirements. For example, the treaties may address whether a number of days of physical presence over a period of time will affect how an employee is taxed and other costs. Several European countries have judicially introduced the concept of an "economic employer," meaning that the country may consider whether there is a local alternate or agent of the employer with enough control to make an employee subject to local taxes. Further, the corporation must develop a method of accounting for such costs and charges, necessitating a system for tracking the travel of its global workforce.

B. Tax Compliance

As with immigration issues, tax considerations will require employers to develop administrative processes for tracking the travel of its employees. In the absence of tax treaties or totalization agreements, the employee and employer may be liable for income tax and social taxes in more than one country. For example, a U.S. citizen is subject to U.S. tax regardless of where the employee performs services or is paid, and, in the absence of a treaty, totalization agreement, or solution under the U.S. tax code, may be taxed by both the home and host countries.

Documentation is necessary to determine if benefits are subject to favorable tax treatment. For example, under the U.S. tax code, moving expenses may be excludable from income or deductible by the employee based on the duration of time worked in the host location.

The applicable rule[50] provides, in part, that no exclusion or deduction is allowed unless the taxpayer's new principal work place is at least 50 miles farther from his former residence than was his former principal work place, and the taxpayer is a full-time employee during the next 39 weeks. There are also repatriation considerations with regard to the 39-week test. These rules require a means of substantiating the qualified expenses incurred.

C. Other Legal Considerations

A number of legal issues may arise in the context of a global workforce. Issues include:

Legal enforceability of employment agreements in foreign countries. To cite just one example, many non-U.S. jurisdictions will refuse to enforce or apply U.S. law with respect to the enforcement of noncompetition provisions, even where the agreement contains a U.S. choice of law or venue provision. For this reason, "garden leave" has become a common practice in the United Kingdom in lieu of non-compete provisions.[51]

The application of the U.S. Foreign Corrupt Practices Act with respect to U.S. citizens working abroad. This may require corporations to review their corporate policies on corruption issues and increase oversight and training, as well as indemnification provisions. See Section **IX** below for a detailed discussion.

The selection or creation of an entity to employ the workers in a foreign jurisdiction. Often, the employer will establish a legal entity, such as a corporation, in the host country for the purpose of employing its assignees. It is also common to engage a Professional Employer Organization (PEO) in a favorable tax jurisdiction to handle the benefits and tax aspects. In this situation, however, care must be taken to make clear who actually employs the assignees – the employer or the Professional Employer Organization. Otherwise, worker classification issues may arise.

The manner in which the employee abroad will be paid. An employer may be required by the host country's law to pay the employee in the local currency or by use of a local payroll. It is important to check whether the host jurisdiction will allow a "shadow" payroll or split payroll.

U.S. employers must keep in mind that its U.S.-benefit programs may not provide the same tax advantages or benefits for an employee working outside of the U.S. Normally the time to consider changing an employee's benefits package is prior to effectuating a transfer. For example, a U.S. deferred compensation plan may be detrimental for employees working in any jurisdiction providing the employer a tax break for doing business in the host country. Equity programs may have drastically different taxation timing rules. Further, the employer may elect to adopt a global pension plan to ensure that an employee accruing pension benefits in various host countries ends up with a pension at least as beneficial as if he or she had continued to work in the United States. Employers should also be prepared for the employee to have a tax event when he or she returns to the United States with a vested pension benefit accrued in the host country.

Shareholder Activism and Corporate Governance. It is important to be aware of the various disclosure and corporate governance standards that apply around the world.

Europe

The challenges of assigning talent in Europe include:

- The application of European Union Directives affecting the enforcement of noncompetition provisions (resulting in "garden leave") and compensation levels of some executives.
- Immigration processes differ by country and may take anywhere from a couple of weeks to months to complete. For example, the United Kingdom's points-based immigration system is very complex and the consequences for noncompliance are significant.
- Application of the Economic Employer Concept, especially in Germany.
- EU benefit system regulations.

50 Int. Rev. Code §217.

51 An employee on garden leave remains employed during the period that a noncompete provision would otherwise apply, but, the employee is being paid to stay away from the office and not perform any services for the company, having a duty of loyalty not to compete with the employer. Garden leave may, however, create an issue under U.S. tax law where the employee is a U.S. taxpayer.

Asia

One example of the challenges of assigning talent to Asia can be illustrated in China, where issues may include:

- An insufficient understanding of local immigration and employment options and processes. The processes in China tend to be localized to the area where the assignment is to take place. As a result, the immigration process needs to be started very early.
- A misunderstanding of work authorization, which must be obtained by all foreigners before they can legally work in China.
- Not keeping up with legislative changes. For example, the Chinese Government is working on a biometrics program whereby anyone entering or exiting the country will be registered by his or her biometrics. Neglecting legal compliance and associated risks, such as civil penalties for companies and individuals, deportation and prohibition from entering China in the future. This can have extreme detrimental effects on workflow planning for many companies.

South America

The challenge of assigning talent in South America can be illustrated by Brazil, where issues may include the following:

- Companies have several options for sending assignees into Brazil depending on their duties, including a 90-day temporary business visa, temporary work visa and a permanent residence visa. These visas are obtained by first making an application by the corporation's Brazilian entity to the Labor Ministry in Brazil (which on average take eight weeks), and then making a visa application to the Brazilian consulate in the applicant's home country/country of legal residence (end-to-end process takes around four months). Brazilian immigration requires extensive documentary requirements to evidence skills and qualifications.
- Travelers in breach of their immigration conditions risk a daily fine, refusal of entry or an order to leave, and/or deportation (a legally effectuated removal).
- Salaries for expatriates cannot be lowered once quoted on the work permit. This is a particularly difficult issue when localizing expats. In Brazil employees are paid 13.3 salary installments per year and companies must deposit 8% of salary to the Government Severance Indemnity Fund per month. So, there is a need to check salary levels, especially upon localization.
- Employers in Brazil are required to maintain a Brazilian payroll, and the use of "shadow" payrolls is prohibited by law.

IV. RUNNING WITH SCISSORS: WHAT U.S. EMPLOYERS SHOULD KNOW BEFORE CUTTING GLOBAL STAFF[52]

Ending the employment relationship is never easy, and it often leads to a range of emotional, practical, cultural, organizational, financial, political and legal issues. When the workforce is multinational, with management spanning across borders, the degree of complexity expands exponentially. This section examines varying approaches to global terminations, providing an overview of the legal constraints at play in several jurisdictions and practical considerations and guidance for navigating the global termination process. The section concludes with a step-by-step procedure that may be tailored for use in any jurisdiction.

A. An International Framework—Factors Every Employer Must Consider Before Deciding On Specific Policies

A Global Approach?

Global employers face a threshold choice when it comes to termination procedures: Do they build policies from the assumption of common values company-wide or assume that cultural/legal differences are so wide that policies are built from the ground up, country by country?

There is no one right answer. Employers should begin by examining the cultural context of their organizations. An effective termination is one that benefits the employer by either eliminating a problem or providing a solution to improve company metrics while also safeguarding against liability and penalties. Terminations that are most likely to provide safeguards from legal issues are those that avoid offending cultural norms within the organization and meticulously meet legal requirements.

52 This session was moderated by David Goldman of Littler Mendelson (San Francisco). Panelists were: Russell Brimelow, Lewis Silkin (United Kingdom); Kim J. Dockstader, LyondellBasell; Steven Friedman, Littler Mendelson (New York); Javiera Medina Reza, Littler Mendelson (Mexico); and Tahl Tyson, Littler Mendelson (Seattle).

In some cases, the context calls for utilizing decision-making processes and implementation procedures that are consistent across the organization, ensuring uniformity throughout operations on different continents. Such an approach provides an inherent sense of fairness and predictability for employees and managers alike and prevents arguments and complaints regarding differential treatment. Other employers will adopt a silo approach to performance management and terminations, allowing local decision-makers a greater say in the termination process and providing more flexibility for the organization to adapt to local customs and legal requirements.

Either of these philosophies may be at play in an organization. Indeed, the development of these philosophies may be cyclical, with newly globalized operations defaulting to a silo approach, developing a globalized approach after establishing a sufficiently large global footprint, and then reverting back to a silo approach, though often a more sophisticated one, that is more sensitive and adaptive to the proclivities of local populations. In any event, the foundation of a legally (and culturally) defensible termination is a solid understanding of the cultural norms of the organization and, as appropriate, the locality where the termination is to occur.

Europe, Mexico, and the United States: More Alike Than Different?

While a detailed canvassing of the various laws that govern terminations across the globe is beyond the scope of this discussion, it is helpful, at least as a starting point, to generalize about some of the jurisdictions where global corporations do business.

At the most employer-friendly end of the spectrum lies the at-will employment atmosphere that is predominant in the United States. U.S. employers are free to terminate their employees at will, for any legal reason or for no reason at all, with or without notice. The U.S. approach is often referred to as "transactional" or *laissez-faire*. Of course, savvy human resources professionals know that due to many statutory constraints, such as anti-discrimination laws, the U.S. is an at-will jurisdiction in name only. The reality for U.S. employers is that, to avoid liability, termination decisions must be rooted in non-discriminatory reasons resulting from a fair, balanced, and rational decision-making process. And while U.S. laws do not require a particular procedure and do not specify the requisite documentation, avoiding or defending costly litigation requires that employers create and maintain evidence bolstering the termination decision and its root causes. The focus here is more on the reason for the termination rather than the way in which the termination was implemented.

U.S. employers operating in other countries, however, must recognize that the laissez-faire paradigm is the minority approach in the industrialized world. The rest of the industrial world all operates toward a social contract approach.

Continental Europe and Mexico lie at the other end of this spectrum. Here, termination decisions are process-driven and reflect a consultative, nuanced, and often time-consuming approach. The fact of the termination is oftentimes far less important than the ways by which the employer and the employee arrived at the termination. For example, many jurisdictions require that employers provide employees with not only meaningful notice of their deficiencies but also an opportunity to correct those deficiencies in a time-consuming attempt to avoid (or, as a practical matter, delay) termination. Further encumbering the process are notice provisions requiring that employers inform employee representatives and governmental authorities and engage in a lengthy consultation period of up to 180 days. In some cases, the protections afforded to the employee and the burdens foisted on the employer increase dramatically as the employee's length of service with the employer increases. The bases for termination may be proscribed by law and may be so narrow as to require that the employee commit gross negligence before a termination will be deemed warranted.[53] For example, beyond merely providing notice, employers in Mexico must obtain prior regulatory authorization for any collective dismissal. Also, a termination for cause must occur within thirty days after the employer learns of the employee's misconduct. In social contract jurisdictions, instantaneous terminations are practically unheard of except in the rare instance of very egregious conduct by the employee, in which case the onus is on the employer to act swiftly and in a manner that is duly reflective of the gravity of the employee's misconduct. The processes at play here are set forth not only by statute but also in an employer's own policy; perhaps the worst offense for an employer at this end of the spectrum is to fail to follow the letter and spirit of its own policies. Procedural unfairness claims are a trap for the unwary employer that dares to think that it is within the prerogative of the company to decide if and how to abide by the very procedures it created.

53 In Mexico, the recognized grounds for dismissal are as follows: (1) The use of false documentation to secure employment; (2) dishonest or violent behavior on the job; (3) dishonest or violent behavior against co-workers that disrupts work discipline; (4) threatening, insulting, or abusing the employer or his or her family, unless provoked or acting in self-defense; (5) intentionally damaging the employer's property; (6) negligently causing serious damage to the employer's property; (7) carelessly threatening workplace safety; (8) immoral behavior in the workplace; (9) disclosure of trade secrets or confidential information; (10) more than three unjustified absences in a thirty-day period; (11) disobeying the employer without justification; (12) failure to follow safety procedures; (13) reporting to work under the influence of alcohol or nonprescription drugs; (14) imprisonment; or (15) the commission of any other acts of similar severity. Notably, poor performance is not cause for termination in Mexico.

At either end of the spectrum, termination decisions will inevitably be subject to some level of scrutiny, whether by an administrative agency, a works council, or a plaintiff's attorney. Multinational companies, and even those doing business in the most employer-friendly jurisdictions, must develop processes and procedures that ensure and evidence a termination process that is, at a very minimum, fair, reasonable, and free of discrimination.

Wrongful Termination Risks

Part of the reason for different procedures in different countries is that there are vastly different risks if employers handle the situation poorly. The risk of getting it wrong when it comes to global terminations can take many forms. Of course, employers may be subject to claims for monetary damages consisting of back pay, front pay, lost benefits, and the like. The numbers vary widely. In the United Kingdom, unfair dismissal compensation is capped at GBP 72,000; that sum may be deceptively low in that it does not account for obligatory notice obligations (typically six to twelve months for senior executives) or the value of other claims (*e.g.*, whistleblowing, discrimination, etc.). By contrast, similar claims in Germany may cost an employer three, four, or even five years of salary. Mexico provides for a statutory severance of three months of an employee's aggregate[54] salary, 20 days of aggregate salary per each year of the employee's term of service with the employer, a seniority premium of twelve days per year of service or twice the minimum wage, whichever is less, and payment of fringe benefits (*e.g.*, vacation, vacation premium, Christmas bonus, unpaid salary) accrued as of the termination date. For employees on the works council, penalties may be significantly enhanced. In some jurisdictions, employers who do not properly implement their termination decisions may also be subject to criminal penalties and the obligation to reinstate the wrongfully-terminated employee.

Less tangible, but no less damaging, risks include loss of employee engagement and morale caused by employees' perception that the company does not handle terminations in a fair manner.

A Word on Data Privacy

An analysis of global terminations would not be complete without at least paying a nod to the role of ever-expanding data privacy protections. Terminations may require collaboration among departments and decision makers located in several jurisdictions. The sharing of personnel information across jurisdictions as part of the performance management or termination process implicates data privacy concerns.

To avoid running afoul of data privacy protections, employers should, at a minimum, invoke the safe harbor of the European Commission's 1995 Data Protection Directive (95/46/EC) by self-certifying compliance to the U.S. Department of Commerce and ensure that there are appropriate intercompany agreements in place providing for the protection of data privacy.

Data privacy issues are not unique to Europe. Mexico recently passed a new data privacy law that includes a requirement that employers provide notice of data privacy rights to employees and to any individuals from whom they gather personal information. Employees terminated in Mexico will likely piggyback data privacy claims with wrongful dismissal claims, potentially subjecting employers to very substantial fines. Employers must develop procedures to ensure compliance with data privacy procedures upon commencement of employment, throughout the employment relationship, and at termination.

The following exemplifies how data privacy issues arise: Assume the human resources department in Wisconsin asks the manager in France to provide documentation of the performance problems of the employee working in Germany to support a requested termination. The Wisconsin entity should self-certify its compliance to the U.S. Department of Commerce and should ensure that there are inter-company agreements between the Wisconsin entity and the French and German entities. If the documentation will include the German employee's company emails, there should also be a policy in place reserving to the company the right to monitor computer systems and electronic communications. The lack of such a policy may affect the company's ability to rely on the employee's email in defense of the termination and may subject the company to data privacy liability beyond a wrongful dismissal claim.

Global Terminations, Step-by-Step

In many jurisdictions, a mindful termination procedure is fundamental to avoiding and defending wrongful termination claims and withstanding regulatory oversight. The following framework can serve as a starting point for employers to develop either a global termination

54 In Mexico, an employee's aggregate salary is calculated based on the employee's total income during the last year of service for the employer, including both cash and in-kind benefits. The aggregate salaries of expatriates working in Mexico can be quite high, as such employees are commonly paid extra benefits such as housing, school, and car allowances.

policy or country-specific termination policies. These specific factors should be reviewed and should be used to navigate a termination decision in any jurisdiction.

1. Consider the statutory requirements:
   - What issue is motivating the termination decision, and is that issue a recognized ground for dismissal under the applicable statutes?
   - What disciplinary steps and procedures are required as prerequisite to termination?
   - How much notice must the employer provide the employee?
   - How soon after the issue arose must the employer provide that notice?
   - Is the employer required to provide notice to government officials, works councils, unions, or any other body?
   - What steps must the employer take to allow the employee an opportunity to correct the issue?
2. Consider the contractual constraints:
   - On what basis can the employee claim that the employer has breached its employment contract with the employee?
   - On what basis can the employee claim that the employer has "constructively dismissed" the employee?
   - What reasons for dismissal/termination does the contract permit?
   - What reasons for dismissal/termination does the contract prohibit?
   - What remedies does the contract provide to the employee?
3. Consider the company's internal policies:
   - Did the employee breach a code or policy provision?
   - If so, was the code or policy properly implemented?[55]
   - Is the code or policy enforceable?
   - Has the employer satisfied all conditions precedent to enforcement?
4. Carefully review all documents related to the employment relationship:
   - Job offer letter
   - Employment agreement
   - Secondment agreement, if applicable
   - Incentives agreement
   - Stock options agreement
   - All benefits paid to the employee during the last twelve months, whether in cash or in kind (concepts and amounts)
   - Powers of attorney granted to the employee by all companies pertaining to a group in order to include them in the release
   - Power of attorney of the employer's legal representative who will execute the termination agreement on behalf of the employer
   - Record of investigation and discipline
5. Consider the available alternatives and strategies:
   - What are the options short of termination?
   - What are the options for settlement?
   - What are the talking points for explaining the decision and negotiating any severance?

55 Some countries require that policies be translated into the native language in order to be enforceable. For example, in Mexico, a code of conduct is enforceable only if it is "tropicalized," meaning, at a minimum, that the policy was translated into Spanish and the employee signed a written acknowledgment. In addition, employers in Mexico are strongly advised to provide training on their codes of conduct and include the policy in their internal labor regulations.

V. THEY'RE NOT YOUR EMPLOYEES, BUT IT'S STILL COMPLICATED: NEW DEVELOPMENTS WITH CONTINGENT WORKERS AND INDEPENDENT CONTRACTORS[56]

Increasingly, companies are looking for ways to enhance their workplace flexibility and minimize costs. One way that a company can do this is by engaging the services of independent contractors and contingent workers rather than employing permanent workers.

Companies often feel that by engaging contingent workers, they have more flexibility to bring people on and then let them go as business needs fluctuate. For many years, employers treated contingent workers as temporary employees to whom they could avoid providing benefits. However, legal developments over the past 20 years, no doubt responding to the increased use of non-employee workers, have made doing this impracticable and full of pitfalls.[57]

Independent contractors are also often used to fill a void in situations where an employer has experienced difficulty filling a position. Engaging independent contractors is not without risk. Whether a worker is an employee or an independent contractor is defined by law, not by how the parties choose to describe their relationship. Because of this, misclassifying workers as independent contractors when they are legally employees can lead to problems, particularly in the cross-border context, and can end up being extremely costly. In most jurisdictions, there will be tax and social insurance implications, as well as employment law obligations, that will flow from misclassifying an individual as an independent contractor.

As noted above, merely calling someone an independent contractor and having them sign a contract to work as an independent contractor will not transform what is legally an employment relationship into a contractor arrangement. This is the case in every jurisdiction.

Notwithstanding the risks, there are a number of benefits to using independent contractors. Many companies elect to do so, for example, where they are trying to expand into new markets and decide to "test the waters" with one or two workers to market the company's products.

The trend of engaging independent contractors is likely to continue – no matter how often companies are advised of the potential risks, many decide, on balance, to take the risk. Problems arise, however, when companies fail to consider the manner in which such workers are engaged and merely adopt the same practices that they do with their employees. Should a company decide to use independent contractors, it can avert problems by following certain steps.

A. Defining Independent Contractors

In the United States, like many other jurisdictions, the courts and administrative agencies have developed a number of different tests to determine whether an individual worker is an employee or an independent contractor. There is the common law 20-factor test, the economic realities test and the ABC test, and these tests all have variations. Many other jurisdictions use similar variations on these tests.

The key factor in most of these tests is the concept of direction or control, *i.e.* who is really directing the individual's work? The various tests used in most jurisdictions share this common key factor and place great emphasis on it. This means that companies trying to determine whether an individual is properly classified as an employee or a contractor should utilize a realistic, practical approach rather than focusing on some of the minor factors used by each test. In a famous decision dealing with the definition of obscene materials, U.S. Supreme Court Justice Potter Stewart noted he may have a hard time trying to intelligibly define what constitutes obscene material but that, "I know it when I see it and the motion picture involved in this case is not that."[58] Practically, a similar test can be used for determining whether an individual is an employee or an independent contractor.

It can be difficult to define accurately an independent contractor from one jurisdiction to the next. But when considering the matter practically, it is easier to see what types of individuals are and are not independent contractors.

The paradigm example of an independent contractor around the globe is a plumber. If a pipe in our house bursts, we call a plumber, tell that person we have a plumbing issue, and hire them to fix the pipe. The plumber will tell you the approximate time he or she will arrive, then

56 This session was moderated by Littler Shareholder Eric Savage (New York). Panelists were: John Kloosterman, Littler Mendelson (San Francisco); Christoph Crisolli, Kliemt & Vollstadt; and Jeff Phelps, iWorkGlobal.

57 For a detailed discussion on issues involving contingent workers, please see Chapter 24 of Littler's The National Employer (LexisNexis 2012).

58 *Jacobellis v. Ohio*, 378 U.S. 184 (1964)(Potter J. concurring).

will diagnose the problem, and fix it with his or her own tools, knowledge and experience. If you try to "help" the plumber by looking over his or her shoulder while he or she is working, you may be asked to leave the room or may be informed there is an extra fee if you want to be "helpful." Once finished, the plumber will give you an invoice to pay. So while you have hired the plumber to perform work for you, you hired him or her as an independent contractor, not an employee. You did not direct the plumber's work and really had no involvement in it beyond asking that the work be performed.

On the other end of the spectrum is an individual hired by a company to perform a job that may also be performed by others who work for the company. The individual is told to work Monday through Friday from 9 a.m. to 5.30 p.m. and to take a lunch break between 12.30 p.m. and 1.00 p.m. The individual has a cubicle at the company's offices, uses a company-provided computer and has a supervisor who directs his or her work. The individual is paid by the hour and receives a pay check every two weeks along with all company employees. No matter the jurisdiction, this individual is just as likely to be an employee as the plumber is likely to be an independent contractor.

Unfortunately not all arrangements between a company and a worker can be so clearly identified. Often there are circumstances in which an arrangement may have characteristics of both an employment relationship and an independent contractor arrangement. It often comes down to a question of whether the person looks more like an employee who actually works for you or more like a contractor who performs work if and when you ask them to for a cost. A true independent contractor arrangement is a service contract relationship.

Another key factor that usually points towards an employment relationship as opposed to a contractor arrangement is the worker's source of income. If an individual is found to be financially dependent upon only one entity or individual, then they are more likely to be viewed as an employee, because most employees have a single source of income. An independent contractor, on the other hand, usually has multiple sources of income – your plumber is unlikely to work only for you.

B. Risks of Misclassification

The risks that flow from misclassification of workers include tax liability, financial penalties, and specific entitlements and protections that are provided to employees.

Tax issues are the biggest risks to consider with independent contractor arrangements. This is true in the United States and in most other jurisdictions around the world. Many countries generate revenue through a payroll tax on employers. Given the present state of the world economically, there are many jurisdictions that are focused on reviewing independent contractor arrangements as a way to generate further revenue by seeking out misclassification situations. This is the situation in states such as California and New York and in countries such as Australia, where the Australian Taxation Department has publically stated its intention to seek out and prosecute employers who are in breach of "sham contractor" legislation.

If an individual is reclassified as an employee, a company might have to pay anywhere from 60 to 65% of the employee's annual wages in employer taxes, employee taxes, penalties or fines and back payment of entitlements to overtime, loadings and leave entitlements. When multiple individuals are involved it can end up costing a company millions of dollars.

The U.S. Internal Revenue Service has recently implemented a Voluntary Compliance Settlement Program[59] that seeks to get companies to fix taxation-related issues voluntarily, including underpayment of payroll and Social Security taxes for employees. The programs provides employers which are accepted to participate with a "discount" on tax liability in exchange for the employer's prospectively treating a class or classes of workers as employees. No interest or penalties are payable on this tax, but the program extends the normal statute of limitations from 3 to 6 years.

In addition to tax considerations, local employment laws must also be considered. In EU member states, unless the worker is a sales agent, it can be said that there is really no such thing as an independent contractor in the workplace context. As a result, improperly classifying a worker as an independent contractor carries with it a higher risk that the worker will be deemed to be an employee who is subject to employment protection under European laws.

Outside the United States, the concept of at-will employment does not exist and employees have certain legal employment protections. Employees in some countries can be dismissed without cause in exchange for sometimes lengthy notice of dismissal, or payment in lieu of

59 http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Voluntary-Classification-Settlement-Program

such notice. In other countries, employees cannot be dismissed without justification or good cause, and often not before procedural fairness has been afforded to them. In contrast, a service contract that an independent contractor would have is usually terminable immediately or on short notice.

In situations where an individual who has been misclassified as an independent contractor is determined to be an employee, the individual will be afforded the same rights and protections that apply to employees: they will be entitled to bring actions against the company as employees. In fact, in some countries they will be entitled to claim back pay, leave entitlements and similar payments for the duration of the period of their employment. Also, financial penalties may also be imposed against the company for improperly classifying the worker. Therefore, when deciding to send workers to or engage workers in other countries, companies must always consider what the local laws and regulations are.

C. Considerations When Engaging Independent Contractors in Other Countries

Another issue that requires consideration is the enforceability of choice of law or choice of venue provisions contained in contracts between a U.S. company and an independent contractor engaged in another country.

The location where an individual is working may or may not be relevant in determining choice of law or venue questions should a dispute arise. It is important, however, to note that a worker cannot be classified as an independent contractor just because he or she is located in a location different from the remaining workforce.

As outlined above, a true independent contractor arrangement is a service contract. Generally, a service contract may contain a venue or choice of law provision that specifies the place where the contract is made or entered into by the parties. However, if the individual is legally an employee, in which case the contract at issue is not a service contract, then the applicable law and venue usually will be the law of the jurisdiction where the individual is actually working.

In EU member states, the Rome Convention regulates this type of situation and prevents a person from agreeing on choice of law provisions. Such provisions are replaced with the notion that the place where a person works and lives is the law to which they will be subject to if those laws are more favorable to the person than the laws of the state or country that is specified in the contract. In determining favorability, domestic rules are typically considered.

D. The European Model

In some respects the situation regarding independent contractors in European jurisdictions is somewhat different. First, as mentioned above, legally there really is little scope for true independent contractor arrangements. Instead, companies engage licensed staffing agencies to provide contingent employees. This type of arrangement is common: in 2010, Europe accounted for approximately 40% of the global agency work market by revenue with 250,000 permanent staff working in 50,000 agencies and placing over 3 million FTE agency workers. This equated to 1.7% of the working population in Europe who were agency workers.

To regulate these arrangements, the European Parliament introduced the European Union Temporary and Agency Workers Directive of 2008, which is now mirrored by national laws in most states of the European Union. As a result, European legislation provides for the principle of "equal pay". This means that companies are required to pay their contingent employees the same pay that their permanent employees receive. This also applies in the context of transnational agency worker postings. Consequently, the concept of agency work in Europe provides flexibility with regards to employment protection but little more.

Contingent employees are afforded a wide range of employment protections in Europe – the same equal treatment principle applies to:

- Equal pay
- Working time rules including overtime, work breaks, rest periods and night work
- Holiday entitlements
- Working conditions for pregnant women and nursing mothers
- Protection of children and young people at work
- Protection against discrimination on grounds of sex, race or ethnic origin, disabilities, religion, beliefs, age and sexual orientation

Collective bargaining agreements can provide companies with a loophole to the principle of equal pay for agency workers, but only for a certain period of time. Through a collective bargaining agreement, a staffing agency can lock in wage rates for the life of the collective agreement that will protect a company from having to pay the agency workers increased rates if, at any time during the life of the agreement, wage rates increase for equivalent permanent employees of the company. Minimum wages can also assist in this regard as permanent workers in many industries are subject to minimum wages across Europe while agency workers are not.

E. Avoiding Misclassification—Practical Tips

There are various steps recommended for companies so as to minimize the risks associated with engaging independent contractors. For example, a company should generally avoid engaging a former employee as a contractor to perform the same duties that he or she performed as an employee. This is a common situation that is nonetheless fraught with danger. It will often occur where an employee wishes to retire but still retain some type of role within the company for a period of time.

Similarly, it can be risky to engage any contractor who is performing the same tasks they performed with a prior employer, even if it was with a different entity. Not all situations like this, however, will amount to misclassification – a plumber could have been employed by a large plumbing contractor and is now self-employed.

It is also unwise to be a contractor's first customer or to convert a contractor into an employee as this may signal that the individual was in fact an employee from the start of the engagement.

As previously mentioned, it is important to consider the applicable local laws when seeking to engage workers in other countries. Often there will be various options for employers to consider that are permissible under the local laws. For example, some Canadian provinces have developed a hybrid-type arrangement called dependent contractors. *A dependent contractor* is a person who would meet the tests to be considered an independent contractor but who relies solely on one entity for all of his or her income. Dependent contractors must be provided with termination notice (severance) in the same way an employee would before a company can terminate the relationship.

Another option that is often available is for a company to use a third party to employ the individual and then effectively contract their services to the company through a services agreement.

To minimize exposure, companies should regularly review their contractor arrangements to determine whether the characterization of the arrangement has changed over time. An example is a person initially engaged for a short period as a contractor to work on a specific project. If the contract is rolled into other projects, eventually the person may end up working for the company indefinitely. At some point the nature of the relationship may have changed into one that is more akin to an employment relationship.

Similarly, if a company engages a contractor who performed similar duties as an employee at a different company, it is smart to analyze whether the individual—and any other contractors performing the same duties—really should be treated as an employee.

Companies may also consider implementing a policy limiting the amount of time that a person can be engaged as an independent contractor. While this will not necessarily minimize the misclassification risk, it will cap the period of time for which the company can be held responsible for any unpaid employment and Social Security taxes.

Implementing a program to manage a company's independent contractor arrangements makes smart business sense. To effectively manage the arrangements, however, executive support is necessary. Once a company starts making exceptions for one or two individuals, effective management begins to break down and risks increase. If a company decides to sell or change its structure in the future, the due diligence process will scrutinize the company's contractor arrangements. Unless contracts are in place and a company has appropriate management systems, it may send a warning signal to potential purchasers.

Signed contracts should be in place for all independent contractors that are engaged by a company. These contracts should consider and address all applicable local, state and federal laws and should be customized to cover the services and arrangements for each specific engagement.

VI. OPPORTUNITIES AND CHALLENGES IN IMPLEMENTING A RESPONSIBLE SUPPLY CHAIN MANAGEMENT PROGRAM[60]

A. Introduction

Global employers are increasingly scrutinized for their compliance activities and promoting corporate social responsibility. The sphere of global companies' responsibilities as "employers" is not limited to their direct employees. Global employers could also incur secondary liability for the employees of their supply chain providers.

This section examines the growing number of international guidelines and codes that impose a responsibility on global corporations to prevent violations of basic worker rights by their supply chain providers and the increased potential liability under local U.S. law for failures to do so. This section also examines the corporate compliance response and the development of effective supply chain management policies and processes.

B. Understanding the Applicable International Instruments

Since the early twentieth century, international organizations have issued a number of guidelines to ensure labor and employment rights for workers. Although not binding on private companies, over time these international guidelines have established the expectations for responsible supply chain management and have been voluntarily incorporated into agreements, such as international framework agreements, that are binding. Following is a summary of the applicable international instruments.

1. International Labour Organization Conventions:

The International Labour Organization (ILO) is the United Nations agency responsible for drafting and overseeing international labor standards. Since its founding in 1919,[61] the ILO has passed conventions that focus on employee rights and protections. In 1998, the ILO's Governing Body designated eight of the conventions as fundamental to the rights of people at work, which is now known as the ILO Declaration of Fundamental Principles and Rights at Work. The following eight conventions are sorted in four groups to constitute the four core labor standards:[62]

a. *Freedom of association and collective bargaining*
   - Convention No. 87: Freedom of Association and Protection of the Right to Organise (1948)[63]; and
   - Convention No. 98: Right to Organise and Collective Bargaining Convention (1949).[64]

b. *Equality*
   - Convention No. 100: Equal Remuneration Convention (1951); and
   - Convention No. 111: Discrimination (Employment and Occupation) Convention (1958).

c. *Abolition of forced labor*
   - No. 29: Forced Labour Convention (1930)[65]; and
   - No. 105: Abolition of Forced Labour Convention (1957).

60 This session was led by Littler Shareholder and US practice Co-Chair of Littler's International Employment Practice Group, Johan Lubbe (New York). Panel participants were Amit Bhasin, Senior Partner, Law Offices of Bhasin and Bhasin Associates (New Delhi, India); Traci Burch, Vice President Labor Relations and Employment Counsel, Rite Aid Corporation (U.S.); Zoe McMahon, Director of Social & Environmental Sustainability and Compliance, Hewlett-Packard (U.S.); and Stefan Marculewicz, Shareholder, Littler Mendelson (Washington, D.C.).

61 The ILO was originally created following World War I as part of the Treaty of Versailles. In 1946, the ILO was incorporated into the United Nations as a specialized agency. The history of the ILO is publicly available on the ILO website at www.ilo.org.

62 The United States has only ratified two of the eight conventions: Convention No. 105, the Abolition of Forced Labour; and Convention No. 182, Worst Forms of Child Labour.

63 Under Convention 87 "workers and employers may exercise freely the right to organise."

64 Convention 98 calls for "adequate protection against acts of anti-union discrimination" and "adequate protection against any [employer] acts of interference [in union matters]" and appropriate measures appropriate "to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

65 Convention 29 defines forced or compulsory labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."

d. *Elimination of child labor*

- No. 138: Minimum Age Convention (1973)[66]; and
- No. 182: Worst Forms of Child Labour Convention (1999).

In addition to the four core labor standards, the ILO conventions regarding occupational health and safety[67] and working hours[68] are frequently referenced as the type of standards that should be used in a responsible supply chain management program.

These ILO labor standards are only applicable to member states that have ratified[69] the conventions. The ILO Conventions, therefore, are recommendations or guidelines for national government to incorporate in domestic law. The ILO Conventions nonetheless set the tone of what minimum standards are expected of global employers. Although companies are not bound by the conventions, the ILO encourages companies to abide by and promote the core standards both internally and externally through responsible supply chain management. To this end, the ILO issued in 1977 the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[70] and in 2000 launched the Global Compact to promote socially responsible labor practices. The Global Compact is an effort to draw all of the actors into monitoring social responsibility along the supply chain. The Global Compact combines the ILO four core standards and adds a few additional voluntary guidelines for employers.[71]

2. Organisation for Economic Co-operation and Development (OECD)

Founded in 1961, the OECD is an international organization tasked with promoting social and economic development. To this end, the OECD has issued two major guidelines focused on responsible supply chain management. The first one, Guidelines for Multinational Enterprises (Recommendations for responsible business conduct in a global context), was published in 1976.[72] The OECD guidelines were revised in 2011 to include a chapter based on the United Nation's Ruggie Report, which is discussed *infra*.

The OECD, in August 2011, also issued the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[73] The Conflict Minerals Guidance provides specific recommendations for companies who mine or source minerals from conflict or high-risk areas on how to avoid violating human rights within their supply chain.

3. The United Nations and the Ruggie Report

In 2011, the UN's Human Rights counsel adopted the report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie ("the Ruggie Report"). The Ruggie Report, adopted as the U.N. Guiding Principles, is a comprehensive framework that incorporates several international instruments in an effort to standardize corporate social responsibility practices. Although not binding on private companies, the Guiding Principles encourage businesses to: (1) develop a human rights statement or policy; (2) strive to "do no harm;" (3) conduct due diligence through transparent human rights impact audits and analysis throughout a company's supply chain;[74] (4) prevent and mitigate any adverse human rights issues; and (5) establish an operational-level grievance mechanism that may be used by anyone adversely impacted by the business. The Ruggie

66 Convention 138 sets the age that children may be eligible to work as "not … less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years."

67 The ILO has adopted more than 40 standards specifically dealing with occupational safety and health, as well as over 40 Codes of Practice. Under the ILO's Portal for Responsible Supply Chain Management, the following four conventions are listed as of specific importance: Conventions No. 148: Working Environment (Air Pollution, Noise and Vibration) Convention (1977); No. 155: Occupational Safety and Health Convention (1981); No.174: Prevention of Major Industrial Accidents Convention (1993); and No. 187: Promotional Framework for Occupational Safety and Health Convention (2006).

68 Nine ILO Conventions are dedicated to the subject-matter of working hours: Conventions No. 1: Hours of Work (Industry) Convention, (1919); No. 30: Hours of Work (Commerce and Offices) Convention (1930); No. 47: Forty-Hour Week Convention (1935); No. 116: Reduction of Hours of Work Recommendation (1962); No. 14: Weekly Rest (Industry) Convention (1921); No. 106: Weekly Rest (Commerce and Offices) Convention (1957); No. 132: Holidays with Pay Convention (Revised) (1970); No. 171: Night Work Convention (1990); and No. 175: Part-Time Work Convention (1994).

69 Each Convention includes a standard clause that states "This Convention shall be binding only upon those Members of the International Labour Organization whose ratifications have been registered with the Director-General."

70 Accessible at http://www.ilo.org/empent/Publications/WCMS_094386/lang—en/index.htm.

71 More information about the work of the Global Compact is available on its website: http://www.unglobalcompact.org/.

72 The OECD Guidelines are accessible at http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/oecdguidelinesformultinationalenterprises.htm.

73 The OECD Conflict Mineral Guidelines are accessible at http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/46740847.pdf.

74 The Ruggie Report's concept of due diligence was incorporated into the 2011 revision of the OECD's Guidelines for Multinational Enterprises (Recommendations for responsible business conduct in a global context).

Report is evidence that the international business community is taking corporate social responsibility seriously and expecting companies to reach beyond their internal systems and ensure that human rights are being protected throughout the supply chain.[75]

C. Increased Legislative and Litigation Action in the United States

The international emphasis on responsible supply chain management has not been ignored in the United States. There has been legislative activity at both the state and federal level, as well as within the courts.

California Transparency in Supply Chains Act of 2010

California is the first state to pass legislation requiring companies to be responsible for human rights violations within their supply chain. The law applies broadly to any retailer or manufacturer with annual worldwide gross receipts exceeding 100 million U.S. dollars that does business in California. Rather than requiring affirmative performance, the law simply requires a covered entity to conspicuously disclose on its website the extent to which it does the following:

- Engages in third-party verification of its supply chains to evaluate and address the risk of trafficking and forced labor;
- Conducts independent, unannounced audits of its suppliers to evaluate their compliance with company standards for trafficking and forced labor in its supply chain;
- Requires suppliers to certify that materials incorporated into the product comply with local laws on trafficking and forced labor;
- Maintains internal accountability standards and procedures for employees and contractors failing to meet company standards regarding trafficking and forced labor;
- Provides training on trafficking and forced labor issues to employees with direct responsibility for supply chain management.[76]

In terms of penalties for non-compliance, the law may only be enforced by the California Attorney General. However, the law does not limit remedies available under other applicable state or federal laws.[77]

Executive Order – Strengthening Protections Against Trafficking In Persons In Federal Contracts

In September 2012, President Barack Obama issued an Executive Order entitled *Strengthening Protections Against Trafficking In Persons In Federal Contracts*.[78] The purpose of this Executive Order is to: (1) prohibit government contractors from engaging in specific human trafficking related activities such as misleading or fraudulent recruitment practices; (2) apply new compliance measures for large contracts performed abroad; (3) establish a process to identify industries with a history of human trafficking; and (4) augment training and heighten the ability of government agencies to detect and address trafficking violations. The significance of this executive order for all corporations is that, even though the United States has not ratified the ILO's Forced Labor Convention, the Executive Order covers the elements of this convention.

Litigation

As of December 2012, there are two lawsuits pending in the U.S. that specifically relate to responsible supply chain management. Each lawsuit takes a different approach and is telling of the types of future litigation companies may face.

The first action was filed in July 2012 and is a breach of contract claim by the University of Wisconsin against Adidas America, Inc. seeking a declaratory judgment.[79] The University alleges that Adidas has an obligation under its sponsorship and licensing agreements with the University to guarantee that its suppliers are providing legally mandated employee benefits.[80] Through a third-party monitoring agency,

75 For more information regarding the impact of the Ruggie Report and challenges for adherence, *see* Stefan Marculewicz's "Addressing Human Rights is More Than Having A Policy," Littler ASAP, January 2012. http://www.littler.com/publication-press/publication/addressing-human-rights-more-having-policy.

76 California Civil Code § 1714.43.

77 For more information regarding the California Transparency in Supply Chains Act of 2010, see John Kloosterman's "California Supply Chain Law Affects Large Retailers and Manufacturers Doing Business in California," Littler ASAP, December 2011. http://www.littler.com/publication-press/publication/california-supply-chain-law-affects-large-retailers-and-manufacturers-.

78 The full text of the Executive Order is available the White House website at http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe.

79 *Board of Regents of the University of Wisconsin System v. Adidas America, Inc.*, No. 12 CV 2775 (Wisc. Dane County, July 13, 2012).

80 As a prime example of the incorporation of labor codes into a supplier contract, according to the University, the sponsorship and licensing contracts specifically incorporate Labor Codes of Conduct.

the University discovered that one of Adidas suppliers in Indonesia had failed to pay workers' wages, mandatory minimum severance pay, and death benefits to employees' families. In total, the University alleged that 3.4 million U.S. dollars were owed in total compensation to the supplier's employees. The purpose of the lawsuit was to seek a declaratory judgment to rule that Adidas was obligated under the applicable contracts to pay the employment benefits that its supplier had failed to provide.

The second lawsuit was filed in November 2012 and is an action by the Louisiana Municipal Police Employees' Retirement System (LAMPERS)[81] against the Hershey Company in the Delaware Court of Chancery.[82] Taking a different angle from the *Adidas* case, LAMPERS brought its action based on an alleged failure by Hershey to honor LAMPERS' right, as a holder of shares of Hershey's common stock, to inspect certain corporate books and records. According to the LAMPERS Complaint there were grounds for belief that Hershey's Board of Directors caused or permitted the company to support the use of unlawful child labor in the cocoa industries of Ghana and the Ivory Coast.[83]

These cases demonstrate the various litigation avenues stakeholders could pursue to explore alleged labor rights violations by a company's global supply chain participants. Historically, these claims by stakeholders were brought pursuant to the Alien Tort Claims Act (ATCA). With the courts' steady chipping away of the validity of ATCA, these stakeholders are looking for other creative avenues to sue corporations, tarnish corporate brands and put public relations pressure on companies to take effective steps to monitor and enforce their supply chain corporate social responsibilities. Supply chain based litigation provides just such an alternative avenue.

D. Practical Implications of the California Transparency in Supply Chains Act of 2010

One panelist, who handles labor relations and serves as in-house counsel, shared the practical aspects of compliance with the California Transparency in Supply Chains Act of 2010. As way of background, the employer—with several thousand stores nationally and a number of domestic distribution centers—views itself as a covered entity under the California Transparency in Supply Chains Act of 2010.

When the California law came into effect, the company already had an established culture of compliance, which was an asset when what was viewed as a domestic corporation was required to consider its global supply chain under the new law. The company sources various products from China and other countries. Prior to the passage of the California law, the company had an active relationship with a third-party vendor who conducted rigorous audits of the company's suppliers. Once the California law was passed, the issue centered on how to publicly pronounce what was already being done and map out the company's requirements for an ethical sourcing code of conduct. In dealing with responsible supply chain management, the company found that partnerships across the organization were key. For example, the company has a very passionate chief compliance office that is an excellent business partner with the human resources and labor relations team. That partnership was beneficial as the company worked to comply with the California law.

In terms of creating the ethical sourcing code of conduct, the company found it simple to draft requirements prohibiting human trafficking and child labor. The challenge came with drafting the aspects of the code that addressed freedom of association and the right to collectively bargain. The company is highly unionized.. To add to the sensitivity of the code of conduct discussion, high ranking officials of labor unions with which the company has existing collective bargaining relationships had indicated that they are clearly looking at using international issues to try to garner more unionization in the United States. Originally, the compliance team drafted provisions that would have put the company in a position where it and its suppliers would be agreeing to terms that the company could not adhere to domestically. Consequently, there was an education process relative to the business partners to understand what the international standards for the company and its suppliers should be in order to ensure that what the company was saying publicly was more aspirational and did not provide a basis for the unions to attack the employer.

E. Developing and Implementing a Responsible Supply Chain Management Program

Another in-house representative, with responsibility for compliance activities, shared her experiences of developing and implementing a comprehensive supply chain management program. Historically, the company had conducted its own manufacturing until about ten years

81 According to the complaint, LAMPERS is a nonpartisan, nonprofit organization that provides pension benefits to the employees of municipal police departments in Louisiana.

82 *Louisiana Municipal Police Employees' Retirement System v. The Hershey Company*, No. 7996 (Del. Ch. Nov. 1, 2012).

83 Although the complaint is brought pursuant to Delaware Law and the right to inspect records, the Plaintiff used the complaint to identify other federal and state laws to which Hershey appeared to be in violation namely, The Trafficking Victims Protection Reauthorization Act of 2008 and the California Transparency in Supply Chain Act of 2010. (Complaint ¶¶ 49, 51).

ago when it started to outsource the global manufacturing. At the time of the manufacturing shift, the company found itself asking what was its obligation to the individuals who no longer were its employees following the outsourcing. There was pressure from stakeholders, non-governmental organizations, and customers to create a supply chain code of conduct; however, at the time there was not much regulatory pressure. Within this context, the company was one of the first within its industry (*i.e.*, electronics) to develop a supply chain code of conduct in 2002.[84]

The Electronic Industry supply chain code of conduct consists of four areas: business ethics, health and safety, labor rights, and environmental responsibility. The code contains careful references to the ILO's four core labor standards and accompanying conventions as well as reference to the ILO's standards on health and safety and working hours.

Compliance with the supply chain code of conduct required the creation of a supply chain management program. Today, the program includes reference to the code of conduct in contractual agreements with all direct materials suppliers (roughly 1,000 companies) and a system of auditing and assurance. In terms of transparency, the company was one of the first in the electronic sector to publish a list of suppliers. The idea behind the publication was to create leadership through transparency and to encourage good corporate behavior by showing that the company was proud to partner with these specific suppliers. One challenge the company discovered in the process was how to actually improve the performance of its suppliers. To this end, the supply chain management program offers a number of different health and safety, environmental, and labor rights training programs for suppliers. These training programs have been a means for the company to maintain a good and transparent relationship with non-governmental organizations and external stakeholders.

The California Transparency in Supply Chains Act of 2010 provided the company with the opportunity to review its code of conduct and strengthen what it was already doing. From a code perspective, the company's code of conduct already contained provisions addressing freely chosen employment, child labor avoidance, and the core ILO standards, issues raised by the California Act. Furthermore, the company was proud to disclose information about its auditing program pursuant to the law because the audits were constructed in a way to focus on the areas of highest risk even though the audits did not reach every supplier or every tier of the supply chain. The California Act gave the company the incentive to increase internal training for procurement and Human Resources on the risks of slavery and human trafficking. Ultimately, the California Act allowed the company an opportunity to disclose and be proud of what it was already doing, but also provided a chance to reevaluate and ensure that it was staying on top of the important issues.

This company also found that compliance to the code of conduct requires a great alignment with its internal partners. The procurement department must be on board in order to give teeth to the auditing regime when it comes to decision-making about to whom the company will be giving its business. The human resources and environmental health and safety departments are necessary to ensure that the labor and employment expectations the company has for its suppliers are consistent with its internal labor and employment policies.

In terms of broader application, the company saw a need to send a consistent message to suppliers. One of the reasons for outsourcing is that a company can benefit from a common supply chain that is used to provide goods for multiple brands. Some of the factories to which the company outsources produce exclusively for its brand, but for some of the more basic commodities, the suppliers produce for a number of brands. To remedy the challenge of sending a consistent message to suppliers who produce for a variety of brands (with a variety of ethical standards), the company successfully created an industry level supply chain code of conduct.

F. Considerations for American Decision-Makers

As noted above, a significant challenge in managing a company's supply chain is how to assist suppliers in order to ensure compliance and what to do when suppliers do not comply with the code of conduct. Panelist Amit Bhasin, a senior partner with New Delhi law firm Bhasin and Bhasin Associates, provided insight regarding compliance considerations from the suppliers' side, having assisted suppliers meet compliance requirements.

American decision-makers need to understand the reality of the pressures faced by suppliers. First there is the market pressure to produce at the lowest price. The challenges to compliance faced by suppliers are born out of price competitiveness—the price of paying minimum wage, overtime, and social security simply increase the price of production. The natural fallout is the exploitation of workers. It is important for decision-makers to be sensitive to price competitiveness and to realize that, if there is demand for a price cut, suppliers are likely going to meet the price demand by compromising on legal and ethical aspects.

84 The Electronic Industry Code of Conduct is accessible at http://www.eicc.info/eicc_code.shtml.

Suppliers also face pressure from employees to allow labor and employment violations. For example, in India, employees demand overtime hours to earn additional wages. If the supplier does not allow the requested overtime, there is a sufficient market for the employees to leave and go to a supplier who is willing to allow the overtime hours. This presents a huge disconnect between the company which instates a code of conduct that regulates overtime, the supplier, and the employee who seeks the overtime.

A final consideration that corporate decision-makers need to take into account is the effectiveness of audits. Corruption does infiltrate suppliers and often leads to a game of hide and seek between the company who is auditing the practices and records and the supplier who prefers to hide unfavorable practices. Audits should be performed regularly and by an auditor who is willing to raise red flags. Companies must also be willing to cease doing business with suppliers who choose not to comply.

G. Important Take Aways

The legal framework dealing with global supply chain corporate social responsibilities of global corporations is fast developing. Further, due to the potential substantial negative impact on a corporate brand because of compliance failures by supply chain providers, global companies should carefully plan and execute their compliance programs. The following should be borne in mind.

- Policies and codes should be carefully vetted. Understand what each term and cross-reference means. While the language used in some international guidelines can be helpful, corporations should guard against merely copying or incorporating the terms by cross-reference. Slavish acceptance of certain terms could have several unintended consequences, including interpretations that are inconsistent with U.S. labor law.
- Understand that even though the business is primarily local (*i.e.*, in the U.S.), global supply chain corporate social responsibilities may apply. In particular, note the transparency and disclosure requirements under the California Transparency in Supply Chains Act of 2010.
- Review, understand and comply with contractual commitments. Mean what is stated in the contract and do what was promised. Failure to comply with supply chain commitments could produce public accusations that the company is a "human rights violator," with attendant immeasurable negative impact on brand name.
- Involve all stakeholders in the compliance program. Traditionally, supply chain management has been the domain of the procurement department. With increased "corporate social responsibility" regulation of supply chain management, the human resources and legal departments are increasingly important stakeholders that should participate in formulating and implementing the compliance program.

VII. PREVENTING WORKPLACE HARASSMENT IN A GLOBAL WORKFORCE[85]

A. Introduction

One of the utmost priorities for companies operating around the globe is the development and successful implementation of appropriate anti-harassment policies. In most countries, the protection of the employee's wellbeing and dignity is paramount and a direct obligation of the employer. This section examines trends in Europe and Latin America, as well as best practices across the world for preventing and dealing with harassment in the workplace.

B. Emerging Trends in Europe

European legislation is moving towards broader definitions of discrimination and harassment. The European directives go beyond the classic categories of the U.S. legislation in addressing the issue of discrimination, which has led to a widening of the different categories of protection under discrimination law.

For example, under the French law, which is in continued evolution of employment laws and protection of employees, there are 17 categories protected from discrimination. These go beyond the basic categories of religion, national origin, race, gender, and age, to include religious convictions, union activities, personal appearance, political beliefs and sexual orientation, among others. In this regard, there is

85 This session was moderated by Littler Shareholder Margaret Hart Edwards. Panelists were: Reid Bowman, NAVEX Global; Mónica Schiaffino, Littler Mendelson (Mexico); and Roselyn Sands, Ernst & Young Société d'Avocats (France).

a trend towards developing the concept of *moral harassment* in the workplace (also referred to as mobbing or bullying). One of the most important concepts of the aforementioned legislation and source of many of the causes of action is the protection of the employee's dignity, which has been elevated to the category of a fundamental human right.

In the most *avant-garde* countries in Europe in relation to anti-harassment laws, such as France, the cause of action to claim for moral harassment requires three components: (1) a repeated action (as opposed to a single event); (2) the consequent degrading of someone's working conditions (intent to bring about these consequences is not required); and (3) a prejudice to the employee's mental health, physical health, or career advancement.

It should also be noted that, in Europe, moral harassment will not be necessarily be seen as a matter of personal liability and can be viewed as an institutional issue. Discrimination can be embedded as management practice or style, and there is a trend for these kinds of practices to be civilly and criminally sanctioned, beyond serving as the basis for constructive dismissal claims.

As an example, the 2006 European Directive that speaks of equality between men and women in the workplace cites sexual harassment as a type of discrimination. Harassment, as such, is considered to be an act committed against an employee because of their gender, whereas sexual harassment is, more specifically, considered a situation an employee can face that has a sexual connotation. This is criminally sanctioned by European courts.

Another example of the criminalization of the offense of harassment in Europe is the new sexual harassment criminal law of France, which is very specific in penalizing a "hostile environment" caused by repeated words with a sexual connotation and which are meant, again, to degrade the dignity or humiliate the individual or create a humiliating, offensive environment, or a serious form of pressure in order to obtain sexual favors.

C. Emerging Trends in Latin America

Most Latin American countries are in the early stages of developing an anti-harassment culture and appropriate legislation. General employment laws prohibit discrimination and usually include some protected categories, such as ethnic or national origin, sex, age, disability, social or economic condition, state of health, pregnancy, language, religion, opinions, sexual preference or marital status.

Despite these protections, discrimination laws are not as developed as in Europe or the U.S. For 42 years, Mexico labor laws did not mention harassment or sexual harassment. Recently the Mexican Federal Labor Law (FLL) was modified (as of December 1, 2012) and now it defines harassment as the exercise of power in a real-subordinate relationship of the victim with respect to the aggressor in the workplace, which is expressed either verbally or physically. The amended FLL defines sexual harassment as a form of violence that, while there is no subordination, consists of an abuse of power leading to a state of helplessness and risk to the victim, and, different from France's requirement of repeated acts, regardless of whether the abuse occurs in one or more events. Any act of harassment or bullying in the workplace is cause for termination of the employment relationship.

On the other hand, outside the typical employment causes of action, as in Europe, Latin American civil and criminal laws (which are independent from labor legislation and authorities) tend to sanction different types of discrimination or harassment. Civil law provides that people should receive financial compensation for "moral damage," which is defined as occurring when a person's freedom or physical or psychological integrity is violated or diminished. This can relate to a person's feelings, affections, beliefs, honor, reputation, private life, physical make-up or appearance, or the view that other people have of him or her. Moral damage may include harassment or sexual harassment, but is difficult to prove in practice. Moreover, harassment is an offense under criminal law in most jurisdictions and the harasser can be held personally liable.

Due to the lack of legislation, multinational companies operating in Latin American countries would be wise to implement well-developed policies to enforce their own anti-harassment culture.

D. Best Practices to Prevent Harassment in a Global Workplace

An effective and obvious prevention strategy is to train employees on matters of harassment. However, when dealing with multinational companies, this strategy faces important challenges, especially regarding the content of the training and the difficulties that arise from training overseas, such as differences in laws, languages, cultures and learner sensibilities.

In view of the above, when developing a multinational training strategy, the following should be born in mind:

Focus on deployment strategy over content: One of the main things to consider while conducting sexual harassment or harassment training is the fact that content suited for the United States will not necessarily work for other countries. Most employees working in the United States have been trained on harassment for decades, while in other jurisdictions this might be the first time that training in these important matters is given. It is therefore recommended to anchor the training to the policy. For this purpose, it is important to focus on deploying the training by working with and engaging the appropriate operational people overseas, instead of focusing on creating the content, which can be provided by outside sources.

Multiple policies: Harassment and sexual harassment policies are continuously modified and therefore it is important to locate and work on the last version. Companies operating in multiple jurisdictions should have the appropriate control tools to guarantee the policy that is chosen as basis of the training is the correct one.

Local language: An English version of the policy or training content might not suffice regardless of the fact that all of the employees speak English. Most jurisdictions require having any policy and training in the local language for it to be enforceable.

Posting obligations: In Europe and Latin America, prevention is recognized as an important obligation of the employer. The rules regarding harassment and sexual harassment, among other behavior policies, have to be posted in the workplace.

Additional legal requirements: Most countries have additional requirements to be met in order to enforce policies locally. Employers should seek advice as to whether a works council, employer-employee committee, labor inspector and/or occupational doctor needs to be involved. Another issue for advice is whether policies need to be signed in hard copy or filed with labor authorities to guarantee enforceability in the jurisdictions or if an electronic version will suffice.

Cultural differences: As mentioned above, since the development of harassment laws and enforcement mechanisms are completely different in various jurisdictions, it is virtually impossible to use a U.S. training course for other countries, as the same will not be effective. The company needs to address some of its core values in training overseas, while in the U.S. these core values are not usually part of the content (given the same are part of the legislation and country culture). Examples of these are certain protected categories as well as retaliation and whistleblower policies.

Consistency: Even when cultural differences need to be born in mind when developing the course, the same should not be an excuse for people or subsidiaries to opt out of the training overall or any of the policies. Concepts that might not be as important in Europe or Latin America but that are core in the United States should be part of the policy and training content.

VIII. OUT AND ABOUT: LGBT ISSUES AND THE GLOBALLY MOBILE WORKFORCE[86]

A. Introduction

As companies expand their global reach, short and long-term assignments abroad are becoming increasingly common for their workforce. But relocating Lesbian, Gay, Bisexual or Transgender (LGBT) employees can lead to new and novel problems due to, among other things, lack of legal protections for their orientation, social stigma and threats to personal safety.

Accordingly, many companies are taking a new look at the protocols in place when it comes to placing not just LGBT employees, but employees in general. Companies recognize the benefits associated with being able to place the right person in a particular position. But they are also recognizing that doing this can be a challenge on multiple fronts.

Littler presented this program using a panel presentation centered on a video scenario that consisted of five segments. The storyline follows Keith, a gay employee at a large corporation who had not yet come out to his coworkers. His supervisor approached him about leading for two years a project in Liberia. We chose Liberia because it is vehemently homophobic.[87] People found guilty for sodomy can face incarceration for up to a year. Accordingly, Keith's decision as to whether he can accept the assignment is rife with concerns.

86 This session was moderated by Littler Shareholder, Robert Conti (Orange County, Cal.) and session speakers were: Littler Shareholders Lee Schreter (Atlanta), Denise Visonti (San Diego) and Juan Carlos Varela (Venezuela), and Russell Brimelow from Lewis Silkin (United Kingdom).

87 *See Liberian President Ellen Johnson Defends Law Criminalizing Homosexuality*, *The Telegraph*, Mar. 12, 2012, *available at* http://www.telegraph.co.uk/news/worldnews/africaandindianocean/liberia/9153890/Liberian-president-Ellen-Johnson-Sirleaf-defends-law-criminalising-homosexuality.html.

As discussed below, LGBT employees, like Keith, who may be facing a transfer to a country like this would have clear concerns about, among other things, their personal safety, their ability to travel with their partners and children and other cultural aspects that would impact on their ability to be "out" while on assignment.

This section first presents the business reasons why accommodating LGBT employees with regard to foreign assignments makes sense. It then will detail the video scenarios and the takeaways from each. Finally, it provides our Top Ten Tips for LGBT employee mobility.

B. The Business Case for LGBT Inclusion

One of the axioms of corporate staffing is that an employer should be able to place the best person in the job. Accordingly, companies need flexibility both with regard to recruiting, promoting and transferring talented people, including those who are LGBT, as business needs require.

The talent pool for many positions may contain only a small number of top-notch candidates. Accordingly, a company's attitude toward LGBT diversity and inclusion in the workplace can prove to be a major factor when these kind of candidates consider potential employers. This is particularly true since in 29 states, an employee can be fired because of sexual orientation. Therefore, an employer that affirms that it will not discriminate against a person on the basis of, among other things, LGBT orientation, and affirming policies arising out of that policy, is essential to many.

For example, in one survey, 83% of respondents who identified as LGBT said that it was important to work for an employer that provided equal health benefits to all its employees.[88] Sixty-eight percent of those surveyed stated that they would prefer to work for an employer in a state where same-sex marriage is recognized compared to working at a company in a state where it was not.[89]

The benefits of attracting top-tier talent, including those individuals who identify as LGBT, include[90]:

- **Attracting, developing and retaining talented staff:** The ability to work abroad is attractive to many when choosing or deciding to remain with an employer. LGBT employees who know in advance that an employer has set up a framework designed to allow them those kinds of opportunities to work abroad will be more productive, satisfied and loyal.
- **Improved outcomes:** Global organizations need their staff to be able to operate on a global level. This is seemingly obvious, but when an LGBT employee finds that their ability to work on a global level lacks support from within the organization, that employee is limited in the ability to put forth their best work. Having structure in place that allows these employees to function as authentic individuals leads to better work product and outcomes.
- **Develop credibility on a global level:** Different rules in different places undermines an organization's credibility. Companies that are able to apply a consistent level of benefits and support can show to clients, competitors and employees that they take their values seriously.
- **Reputation:** Companies that support their LGBT employees are considered by many to be on the cutting edge of employment relations. Moreover, an increasing number of companies are looking to do business with companies that support diversity and inclusion that includes people who are LGBT.
- **Risk avoidance:** Some countries, such as the U.K., prohibit discrimination on account of sexual orientation. Sixteen states[91] and the District of Columbia also provide protection for employees based on their sexual orientation and gender identity. In addition to these 17 jurisdictions, five states prohibit discrimination based upon sexual orientation.[92] A company's conditioning advancement within the organization on employees' accepting foreign assignments may prove problematic if, for example, LGBT employees are passed up or refuse to take the assignment because they believe they would be put in a potentially harmful situation. Such a scenario could well lead to a viable claim for discrimination on account of sexual orientation.

88 Combs, *LGBT Inclusion & Diversity in the Workplace*, *Diversity MBA Magazine* , Aug. 22, 2012.

89 *Id*.

90 The following are summaries of bullet points contained in Stonewall Guides, *Global Working: Supporting lesbian, gay and bisexual staff on overseas assignments* (Ashworth, Lasko & Vliet, 2012).

91 California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Massachusetts, Maine, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont and Washington State, as well as the District of Columbia.

92 Delaware, Maryland, New Hampshire, New York and Wisconsin.

C. Video Scenarios Presented at the 2012 Global Employer

Denise Visconti, the Office Managing Shareholder for Littler's San Diego office, along Kevin O'Neill, a principal in the Littler Learning Group, developed a story line broken down into five different scenarios. The scenarios were videotaped and then shown during the conference with breaks after each one to encourage discussion.

Scenario One: Meet Keith, a rising young star who is tapped for a two-year overseas assignment to Liberia.

The first scene involves Keith, a rising young star who aced a recent project. His success got him noticed and his supervisor comes by to tell him he's been tapped for an exciting overseas project, in Liberia. The boss tells him he should not even bother thinking about whether to accept, but just take the assignment because if he does not, others will be ready to leap in. We then see Keith at his computer terminal doing a search about Liberia, a country that he knows nothing about. He then learns that the country has laws that criminalize homosexuality. We see him then slump into his chair.

The takeaways from this first video focus on what management should be doing when it offers an overseas assignment to an employee. Many companies are hiring mobility officers or creating positions within Human Resources that handle mobility issues. The first step that should be taken is to provide information about the country to which the employees may be assigned, rather than leaving it up to the employee to do an on-line search.

There are various resources that include the U.S. State Department's website that provide detailed country-by-country summaries about customs and potential dangers, including laws that criminalize certain behaviors, such as being out in the workplace. Accordingly, the information provided to the employees should be broad in scope as there may be issues for a given employee that are may not be known. For example, a person may not be "out" at work, or of a particular religious faith. Therefore, the more complete a picture the employer can provide, the better.

Scenario Two: Keith Goes to H.R. to Discuss the Offer and Reveals that He Is Gay.

The second scene shows Keith going to the Director of Human Resources to discuss the assignment. He tells the H.R. Director that he's excited about the possibility of the assignment, and that he knows it can further his career. But he then reveals that he is gay and has some important concerns about his safety. The H.R. Director fails to grasp what just happened, and said "you know that's not a problem here. We even have an LGBT affinity group." Keith tells her that he's "freaked out about going to a place for two years where I could wind up in prison or worse." The H.R. Director's advice? "Just keep a low profile."

This scenario highlighted several issues, but perhaps its overriding theme is the need for advance planning so the organization is ready when these kinds of issues arise. Again, information about the country where the assignment is located is essential. This scenario also showed that there are different ranges of how out at work people can be. Some are very closeted while others are very open about their sexual orientation. Accordingly, providing employees when they are offered the possibility of a foreign assignment with a full packet of information can develop a conversation between management and the employee.

Management's ability to engage in a meaningful dialog about these issues rarely comes naturally. Rather, it is derived from an institutional willingness to make diversity and inclusion a tenet of the organization. This means that there should be a top-down philosophy that supports these concepts.

Accordingly, relocation policies need to reflect this philosophy and it must also expand to include the employees' partners and children, because there are often immigration issues that are a problem in moving employees to other countries. While opposite-sex couples may not face any particular issues getting visas for their partners, spouses or children, the same frequently does not hold true to LGBT employees and their families.

Part of that philosophy must also accommodate employees who decline an assignment because, for example, safety concerns. It is important for employees to know that passing on a project for these kinds of concerns will not be a career-ender. But an employer must be careful. It may determine, for example, that it will not even offer to an openly gay person an assignment in, say, Liberia. That too can invite legal action, as these employee may claim that they were denied a career-advancing assignment due to a company's "benevolence." Therefore, information and communication are key.

Scenario Three: H.R. Speaks to Keith's Supervisor

In the third scenario, the company's H.R. Director speaks to Keith's supervisor. The Director hints around at why sending Keith to Liberia may not be a good idea. His supervisor is baffled at what she is trying to say until she just blurts out that "Keith is gay." "He is? You're kidding. Well, so what, our company moved out of the dark ages years ago." The Director replies, "We have, but others haven't." She then details concerns about criminalization of homosexuality and hate crimes committed against those who are either gay or perceived to be gay. The clip ends with the supervisor saying, "I had no idea. This is not a good idea at all."

This scenario shows several issues. First, we note that there are potential claims for denial of advancement on account of one's sexual orientation. In Europe, this can fall under the concept of "moral harassment," where people feel they are working in a hostile work environment consisting of either violence or extreme ill psychological treatment. In states, such as California, that prohibit adverse treatment on account of sexuality, an employer could face a disparate treatment lawsuit based on sexual orientation.

The possibility of these kinds of claims makes clear that employers need to engage in a form of risk assessment in order to make informed staffing decisions. As noted above, employees should be provided with a full spectrum of information and then asked whether there are any factors that the employee believes would put the person in harm's way. While in this clip, management recognized the problem, they are also making assumptions that Keith is now unsuitable for the position before even approaching him about concerns and potential accommodations. To put it another way, based on objective job performance and results, Keith was the clear choice to head up the new project. But now, blindsided by this news, management is assuming that it cannot let Keith take the project on.

Scenario Four: Keith's Boss Breaks the Bad News

In this scenario, Keith's boss approaches him and tells him first that "it's cool that you're, well, you know." But he continues, saying, "So we think you'll understand that we have to go in another direction." Keith does not understand at all, so his boss continues: "We need someone who would not be exposed to security concerns." Keith replies, saying that he's thought this out and he is willing to maintain "a low profile." But, his boss says, "The CEO has high concerns about not being able to provide adequate protection. Everyone's concerned for your safety, and everyone feels that you should pass this on up. We can't afford an international incident." Keith, dejected, said that he may, indeed, have to pass on the offer, and thanked his boss for considering him.

As in the third scenario, it appears that management decided to withdraw the offer without first engaging Keith any form of dialog. It also shows a severe disconnect between management and the employee. Management concluded that there are too many complications associated with placing Keith in Liberia. Keith, on the other hand, has thought about the situation and thinks that he could make it work.

The proper process is akin to the interactive process when determining potential accommodations for a disabled employee. There, management and employees sit down and have a good faith conversation about what, if any, reasonable accommodations can be provided that would allow those employees to perform their jobs' essential functions. Similarly, there should be this same kind of dialog under this situation. This process allows a conduit for solutions. Or, alternatively, it may lead to a mutual determination that no such accommodation exists, but at least the stakeholders were all part of the process.

If the conclusion is the latter, then it is again important to stress that there may be alternatives to the assignment, such as working on a project of equal value to the company either in employee's home country or in less hostile territory.

For example, IBM U.K.'s policy in this regard states:

> If a lesbian, gay or bisexual employee chooses to decline an international assignment for reasons related to their sexual orientation, for example due to unfavorable social or political conditions in an assignment country, IBM works to make sure it won't have a negative impact on the person's career and looks for alternate options for the employee. Where necessary, a human resources representative can speak to the employer's management about the situation and the reasons why the employee cannot accept the offer. If required, more specialized advice and support can be obtained from IBM's Global LGBT Program Manager.

There may be times when a specific individual, who is LGBT, is critical to the assignment, and there are no other suitable alternatives. Accordingly, management must discuss with the employee how it can ensure his or her safety. This will often include advising the in-country managers on how to support the LGBT staff. Often, these managers lack the necessary skill sets to support openly gay staff members coming from abroad. Again, training is key to meeting this goal.

Scenario Five: Keith Hits a Brick Wall

In the final clip, Keith is once again in the H.R. Director's office. He tells her that he really wants to take on the assignment but wondered what the company would do to ensure his, his partner's and their baby daughter's security. The Director advises that it can provide standard security but, when bidding on the job, did not anticipate having to provide heightened measures. Keith asked what issues exist for others who worked in Liberia, and is advised "nothing really." Also, in addition to wanting to avoid added security costs, the company is also concerned about image if something were to go wrong. Keith asks "So what does this mean? Am I just being kicked to the curb." The H.R. Director tells him that "this is new ground. These issues will get sorted out. Trust me."

This scenario demonstrates again the need for an assessment of risk that could exist in a particular work environment. What also became apparent was that the company did not just fail to perform a risk assignment for Keith, but for all employees travelling to Liberia. The Director's response, when asked about what issues others who travelled there faced, made clear that there was no debriefing in order to analyze what the company could be doing better.

Moreover, Keith had made clear, both to his manager in Scenario Four and to the Director in this clip that he wanted to take on the assignment. Accordingly, management should have engaged him in a conversation that examined and weighed the risks and collaborate on finding solutions. What kind of support would Keith and his family need? How do we prevent isolation issues? How can the company's LGBT resources group help? Are there issues with monitoring of internet activity and email and if so, must the company and the employee be guarded about what kind of content or discussions are exchanged electronically?

A potentially difficult subject for any such conversation would focus on a worst-case scenario. For example, despite all reasonable efforts to insure their safety, Keith and his family are still targeted for harassment or worse. In that case, the company would need to have developed in advance an extraction plan. But this, in truth, would be necessary for any employees, regardless of their orientation.

D. Top-Ten Tips List

The following top-10 list of tips was developed to incorporate the major takeaways from this presentation. The list provides a nutshell of major points and issues to be considered when dealing with global mobility issues for all employees.

1. **Apply policies globally:** Make it clear that anti-lesbian, gay, bisexual and gender identity discrimination and harassment will not be tolerated in any regions in which you operate, including in locations where it is not prohibited by law.
2. **Include sexual orientation and gender identity in any relocation policy:** Be clear that the company supports lesbian, gay, bisexual, and transgender staff when they take on overseas assignments. Provide assurances that staff will be brought home if they encounter problems.
3. **Train managers and relocation staff:** Train those involved in arranging overseas postings on any particular considerations that may need to be taken into account for lesbian, gay, bisexual, and transgender staff.
4. **Give staff enough information before they relocate:** Provide lesbian, gay, bisexual, and transgender staff with sufficient information about the country they are being posted to, beyond simply the laws and practices affecting sexual orientation and gender identity. Be clear about the level of support they will receive once they are abroad, so they can make an informed decision about taking on the assignment.
5. **Provide alternative opportunities:** Where possible, offer alternative postings or equivalent opportunities to lesbian, gay, bisexual, and transgender employees who decide an overseas assignment is not suitable because of their sexual orientation. Ensure staff will not suffer a detriment to their career if they feel unable to go.
6. **Offer same-sex partners equivalent benefits:** Support same-sex partners to accompany employees in exactly the same way as heterosexual partners, where immigration rules allow. Where local laws are restrictive, find alternative means of enabling the partner to enter the country or find ways to compensate accordingly.
7. **Support staff networks:** Make it possible for employees posted abroad to maintain contact with their staff network back home. Establish local chapters of your global network in as many countries as possible and promote collaborative working between them.

8. **Provide training to in-country managers:** Train managers in overseas offices about the organization's policies and the importance of equality at work, so they can support staff on international postings. Over time this will help to transform workplace cultures abroad.
9. **Offer global career development opportunities:** Establish formal mentoring relationships between lesbian, bisexual and transgender staff in different locations around the world to develop the next generation of leaders.
10. **Champion equality wherever you are based:** Use your influence as a global employer to promote messages of lesbian, gay, bisexual, and transgender equality worldwide. Support local organizations campaigning for equality abroad.

IX. ASSURING COMPLIANCE WITH ANTI-CORRUPTION POLICIES & REQUIREMENTS[93]

2012 continued the trend of increased legislation and enforcement in the area of international anti-corruption. Companies need to be aware of the growing risks around anti-corruption and of specific steps they can be taking to mitigate those risks. Companies can look at the past 12 months to identify important actions they can take to mitigate those risks.

A. Crackdown on Corruption Continues in the United States and Abroad

Recognizing the impact that unabated corruption can have on the economy, governments have continued to increase their efforts to eliminate the practice of corrupt payments to both government officials and private individuals.

In 2002, the U.S. government assessed $2.7 million in fines against companies for Foreign Corrupt Practices Act (FCPA) violations. Today that figure seems inconceivably small. From 2008 through 2011, FCPA penalties averaged over $900 million a year. The heavy fines continued in 2012, and with a handful of high-profile fines ranging from $22 million to $95 million.

Add on top of these fines the considerable costs of conducting internal investigations, remediation, monitors, civil suits from shareholders and reputational harm, the costs can be staggering to any company.

While the United States was for many years a lone voice in anti-corruption legislation and enforcement, the rest of the world is now catching up. While the United Kingdom's Bribery Act of 2010 received the most attention, other countries are moving in the same direction, notably those countries with growing economies where corruption serves as a continued deterrent to investment. For instance, Russia passed anti-corruption legislation in 2009 and quickly increased penalties under the law in May of 2011. In further efforts to improve its Transparency International Corruption Perceptions rating (where it ranked 133 out of 176 countries in 2012[94]), the Russian Federation ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, making it the 34th country to do so.[95] Brazil is considering legislation to strengthen its anti-corruption laws in response to recent prosecutions of senior government officials, including the largest prosecution in Brazil history, involving 39 public officials.

With the continued focus on anti-corruption by the U.S. authorities (and increased incentives for whistleblowers to report such conduct) and increased attention overseas, notably in desirable growth markets such as Russia and Brazil, avoiding the pitfalls of corruption charges is increasingly the focus of board rooms, the C-Suite, compliance departments, legal departments and human resource professionals. Companies need to understand the risks, and must coordinate their resources to prevent questionable payments from becoming part of any international transaction.

B. Third Party Risk and What to Do About It

There continues to be a common misperception that if a company directs a third party to actually make the bribe, or if the company can plausibly claim that it was unaware of a third party's conduct on its behalf, the company will somehow be insulated from liability under the FCPA. This, however, is simply not the case.

The FCPA expressly prohibits corrupt payments made through third parties. Specifically, the FCPA provides that payments made "to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly" to a foreign official are prohibited. The government takes a broad view of the definition of "knowing." The knowledge requirement is met

93 This session was moderated by Littler Shareholder Katherine Cooper Franklin (Seattle). Panelists were Jyotica Bhasin of Bhasin and Bhasin (India); Holly Laurent of Fidelity Investments; former U.S. Attorney John McKay; and Littler Shareholder Bradley Siciliano (New York).

94 http://cpi.transparency.org/cpi2012/results/.

95 http://www.oecd.org/daf/briberyininternationalbusiness/oecdantibriberyconvention.htm.

where a person is aware there is a "high probability" that their payment would be used for a corrupt payment to a government official. The "knowledge" requirement is also satisfied when a person "purposefully avoid[s] knowledge" of the potential for a corrupt payment. Companies should be on the lookout for "red flags" associated with third parties warranting further investigation such as:

- excessive commissions to third parties;
- large discounts to distributors;
- consulting agreements with vague description of services;
- the services contracted for are outside the third party's normal line of business;
- the third party is closely related to a government official;
- payment of fees to bank accounts in alternative jurisdictions.

It is important to note that while under the FCPA willful blindness will not be an acceptable defense to a third party's action on a company's behalf, the UK Bribery Act goes a step further and imposes liability for corrupt payments made on behalf of a company, truly without their knowledge, if the company did not perform adequate due diligence in retaining that third party. Consistent with that provision, and even though the FCPA still has the "knowing" requirement, the U.S. Department of Justice and the Securities and Exchange Commission are advising companies to engage in robust due diligence when retaining third parties to perform services for them in other jurisdictions.

The question becomes: What actions can companies take in performing third party due diligence? As every company has a finite amount of resources and thorough due diligence is neither possible nor even practical in every case, the first step companies need to take is to assess the risk profile of the particular transaction. If the transaction is taking place in Somalia (the lowest rated country in Transparency International's Corruption Perception Index), rather than New Zealand (the highest rated country in the CPI), a company will want to take extra precautions. The company will also want to look at the nature of service provided and whether there is a higher risk of corruption. For instance, those industries and services which require government permits for significant projects (*e.g.*, construction or energy) are going to require a higher degree of review than do less regulated, lower margin services (*e.g.*, cleaning services). Finally, a company needs to consider the depth of its relationship with the third party. Will it serve as the company's exclusive distributor in a country for the next several years, or will it be one of many distributors doing modest amounts of business? Once a company has sorted through these issues and determined its risk profile, the company can scale its due diligence and take some of the steps described below.

Background Checks

Background checks are the most basic step that can be taken to verify the credibility of a third party. While, historically, individuals would be very put off (and sometimes still are) by receiving a questionnaire for a background check, this practice is becoming very prevalent, and people are becoming more used to receiving the request. Frequently, they are employing background checks themselves.

Background checks should be performed on corporate entities, as well as the owners and senior management of a business. In some jurisdictions, "reverse director" searches are available in order to identify other companies with which directors have been involved. Needless to say, there are varying levels of background searches. Basic internet searches of companies and key individuals can often turn up valuable information, with the added benefit that there is no practical cost (arguably, given how easy it is, it would be negligent not to do some basic online searches so as not to miss something obviously publicly available). Some organizations, such as Trace International, provide basic background searches as a free benefit to members of the organization. These are often good basic steps to take. When these steps turn up questions, or the risk profile is extremely high, it will pay to engage an investigative firm for a deeper dive.

Strong Contractual Provisions

In addition to background checks, companies can work to limit their exposure through their contracts. As a basic internal control, companies should have policies requiring legal department review and approval of business transactions that meet certain criteria. Often there is a dollar threshold (*e.g.*, $100,000 and above). One of the criteria that should trigger legal department review is if the transaction has any foreign component. Once within the contract review process, the services should be described in adequate detail. This provides two levels of protection:

- it removes any potential ambiguity as to what the third party has been retained to do; and
- it better enables a company to assess whether the fees being charged match up to the goods or services being contracted for.

Investigators will look at these two factors in determining whether a company should have been on notice of potential corrupt conduct. In addition, a company will want to include specific representations as to past and future compliance by the third party with relevant anti-corruption laws. While a party willing to engage in bribery is likely willing to falsely represent its compliance, such representations are an important step in highlighting the importance of the issue to a company, reflecting its good faith efforts to ensure compliance with the law, and provide a potential cause of action in the event that a company discovers a third party has previously, or in connection with the company's contract, engaged in corrupt conduct.

Pushing Down Compliance

A third step that companies can take to mitigate anti-corruption risks from third party dealings is broadening its compliance program to include its distributors, vendors, suppliers and third-party service providers. The last decade has shown a steady increase in the use of third-party codes of conduct tailored to the nature of a third party's relationship to a company. Where there is a corruption risk, a vendor anti-corruption policy is an easy step to take and highlights the importance of the issue to your company. However, further steps can be taken beyond simply obtaining a sign off on an anti-corruption policy. Increasingly, companies are requiring their third party relations to go through anti-corruption training. This can be left to the third party to arrange, can be provided by an existing compliance and training vendor for standardized training, or could even be provided directly by the company. The greater the risk to a company, the deeper it will want its involvement to be in designing the training and insuring actual attendance by the third party's employees. Reflecting the importance of training in this field, the U.S. Department of Justice (DOJ) recently required a company, as part of a settlement, to conduct training for its third-party service providers in foreign countries.

Third-party conduct will continue to be an area of focus for government regulators, and while it is impossible to completely mitigate this risk, companies are on notice that basic steps need to be taken to protect themselves against the wrongful conduct of their vendors and suppliers, third-party service providers, distributors and agents.

C. Good News Out of Morgan Stanley?

Almost every compliance professional can tell you about the uphill battle they face in selling the business case to management for a robust compliance program. 2012 delivered what many in the compliance arena have been waiting for in the concrete benefits of an effective compliance program: the case of Morgan Stanley executive Garth Peterson.[96] In that case the SEC and the DOJ declined to bring any charges against Morgan Stanley, notwithstanding clear FCPA violations by Peterson. The government cited the soundness of Morgan Stanley's compliance program as the basis for not bringing any charges against Morgan Stanley. The question is whether the case in fact provides a roadmap to put a company "out of harm's way," or did it set a new high standard which companies must now reach in executing their compliance program?

In April of 2012, Peterson, a senior executive at Morgan Stanley, pled guilty to FCPA violations and settled civil claims with the SEC. Peterson admitted he engaged in a conspiracy to circumvent internal controls and paid bribes to Chinese officials to win business and obtain necessary licenses and permissions for Morgan Stanley. Peterson also set up a shell company and charged Morgan Stanley fictitious fees.

In deciding not to press charges against Morgan Stanley itself, the government concluded that Morgan Stanley:

- had a pre-existing, evolving, and effective anti-corruption program;
- enhanced its program further after the incident;
- spent a lot of time and resources training its employees regarding anti-corruption
- investigated the matter promptly and thoroughly, and dismissed the employee;
- voluntarily disclosed the matter to the DOJ and the SEC, and to its shareholders, and shared the results of the review with law enforcement and regulators.

Notably, Morgan Stanley, through a robust compliance program, frequently trained its employees, imposed a comprehensive payment-approval process designed to prevent bribery, and staffed a compliance department with a direct reporting line to the board of directors. In

96 *Morgan Stanley Ex-Official in China Sentenced to 9 Months in Prison* (Aug. 16, 2012), Chad Bray, *The Wall Street Journal*, http://online.wsj.com/article/SB10000872396390444508504577593950506343444.html.

addition, Morgan Stanley: (a) provided Peterson extensive FCPA training; and (b) conducted extensive due diligence on the transactions, the local government entity, and the third party involved in the transaction. Due diligence on the entity included reviewing Chinese government records; speaking with sources familiar with the Shanghai real estate market; checking the government entity's payment records and credit references; conducting an on-site visit and placing a pretextual telephone call to the entity's offices; searching media sources; and conducting background checks on the entity's principals. Morgan Stanley vetted the entity by obtaining a letter with designated bank account information from a Chinese official associated with the government entity; using an international law firm to request and review 50 documents from the entity's outside counsel; interviewing the attorney; and interviewing the entity's management.

This is the first time agencies have publicly credited a company's compliance program for a decision not to pursue enforcement, concluding that Peterson was in fact a "rogue employee" who was acting without authorization and contrary to company policy.

While many in the compliance field have hailed this matter as proof of the benefits of a robust compliance program, others have cautioned that the bar has been set exceedingly high by the Morgan Stanley case. They also caution that the case had the unique circumstance of Peterson perpetrating fraud against Morgan Stanley and taking deliberate steps to circumvent internal controls, strengthening the perception that Peterson was in fact a rogue employee.

D. Takeaways: How Do We Live Up to the Morgan Stanley Standard?

The Morgan Stanley case and the success its compliance program has achieved has brought many companies back to the threshold question of what their compliance program should consist of, particularly in the area of anti-corruption. The Morgan Stanley case, along with other events of 2012, provides a road map on what companies need to be doing to meet their compliance obligations.

Policies

Companies need to have clear policies in place addressing corruption. These policies need to cover, not only the FCPA and U.S. laws, but also the local laws which may be implicated by offshore business units and transactions. Thought needs to be given to whether a company wants a bright line policy of prohibiting facilitation payments, even though permissible under the FCPA, because they can lead down a slippery slope and are often illegal under other jurisdictions' laws in any case. Where possible, policies should be pushed down into third-party vendors, service providers and agents.

Education and Awareness

Having policies in place is simply not enough. Consistent and tailored training needs to be provided to relevant personnel. While online training can often be effective, companies need to identify high-risk personnel who should receive in-person, role-specific training as well as repeat training. Accommodations need to me made for local languages. Where appropriate, training should be provided to third party vendors, service providers and agents. Recommended steps include maintaining records documenting:

- the nature of the training;
- who was in attendance,
- questions asked during the training session; and
- certifications from attendees that they understood nature and scope of the training.

Tone at the Top

This has been a catch phrase for some time in the compliance world, but its importance has not diminished. It is not simply about senior management saying the "right thing;" rather, it is about conveying a commitment to an ethical and compliant organization and carrying through on it. Employees know when management is signaling an "anything goes" mentality, notwithstanding strong policies and appropriate public statements, and will follow management's lead into risky behavior. A key part of achieving this is making sure that both the Board of Directors and the C-Suite go through Code of Conduct and Ethics training like everyone else. It is arguably more important that these individuals participate in customized, in-person training around these issues to ensure they understand their importance and are better able to carry the compliance message in their day-to-day activities.

Conducting Risk Assessments

Companies are often reluctant to engage in formal risk assessments in creating their compliance programs. However, risk assessment on the front end of a program, and periodically across an organization, are critical to implementing an effective compliance program. A company's policies and training need to be tailored to its risk profiles. Moreover, internal testing and control systems should be focused on high risk areas of a business. All organizations have limits on resources and, if a company fails to conduct risk assessments, it runs the risk of applying those limited resources to areas where they are not needed.

Developing an Effective Incident Management System

No matter how thorough a company's policies and training are, or how committed its management is to compliance, some employees will inevitably engage in conduct which is either illegal or in violation of company code. Consequently, it is critical to have an Incident Management System ("IMS") in place to capture those instances and deal with them appropriately. Companies need to make sure their IMS:

- promotes an environment in which employees are comfortable in bringing compliance issues to management's attention;
- contains a system to receive these kinds of complaints, including a hotline and escalation guidelines;
- has established investigation protocols in place and are followed in response to complaints; and
- ensures that effective remedial steps are taken in response to findings of completed investigations.

Cross-Organizational Support

Territorial disputes can undermine the most well designed compliance program. It is important in the compliance area that groups across an organization work together in executing a compliance program. While a compliance department may "own" the process, cooperation and support from HR, internal audit, legal department, finance, and even the business units themselves will help an organization understand its risks better and respond to problems in a more effective way.

Third-Party Due Diligence

While this issue is addressed above in more detail, it is worth repeating—set up processes to vet third parties, whether they are vendors, agents or acquisition targets—because you may very well be held liable for their conduct.

E. U.S. Department of Justice and SEC Release Long Awaited Guidance on Foreign Corrupt Practices Act

On November 14, 2012, just days after the Littler's Global Employer Institute, the DOJ and the Securities and Exchange Commission ("SEC") released their long awaited guidance on the Foreign Corrupt Practices Act ("FCPA"). *A Resource Guide to the US Foreign Corrupt Practices Act*[97] (the "Resource Guide") is the most comprehensive guidance ever issued by the DOJ and the SEC, the two agencies with enforcement responsibilities, concerning the FCPA.

The Resource Guide summarizes federal laws and international conventions related to the FCPA, the FCPA's anti-bribery and accounting provisions, potential penalties and sanctions under the FCPA, and the ways in which such matters may be resolved.

The Resource Guide is intended to provide the public with detailed information about the government's FCPA enforcement approach and priorities. While the Resource Guide does not contain any major surprises or shifts in interpretation of the law, the 120-page document does identify important legal issues surrounding FCPA enforcement and provides detailed explanations of the agencies' approach to those issues, including examples of actual enforcement actions and declinations and extensive hypothetical scenarios to guide companies in ensuring their practices are not in violation of the act. We highlight some additional areas of importance not already covered by this chapter.

Mergers and Acquisitions

With reports that M&A activity will be on the rise in 2013, the Resource Guide highlights the importance of evaluating bribery and corruption risks before completing a merger or acquisition. and ferreting out potential FCPA violations during due diligence.

The Resource Guide identifies the following activities as appropriate steps to take in due diligence and integration of a new acquisition:

- conduct thorough risk-based FCPA and anti-corruption due diligence;
- quickly implement anti-corruption policies and procedures for the newly acquired business;

97 *Available at* http://www.justice.gov/criminal/fraud/fcpa/guidance/.

- train directors, officers, and agents of the newly acquired business on the FCPA and the company's ethics and compliance programs;
- conduct an FCPA-specific audit of newly acquired businesses as quickly as practicable; and
- disclose any corrupt payments discovered in due diligence.

If organizations take these steps, the DOJ and SEC may be more likely to "decline to bring enforcement actions" against acquiring issuers.

Acceptable Travel and Entertainment

The Resource Guide provides a number of hypothetical situations to highlight when an organization's entertainment of a government official may be considered a violation of the FCPA. In sum, entertainment that is only a "small component" of a legitimate business trip will not be considered a bribe.

Among other things, the Resource Guide provides additional examples of acceptable and unacceptable travel and entertainment expenses, including:

Acceptable

- promotional items given away at a trade show to all attendees;
- hosting happy hour with a "moderate bar tab" for current and prospective customers, including foreign government officials; or
- a moderately priced wedding present.

Unacceptable

- vacation for a buyer and his girlfriend;
- travel perks inconsistent with business norms;
- $10,000 spent on dinner, drinks and entertainment for a government official; or
- $1,000 "pocket money" associated with a sightseeing excursion.

While the Resource Guide identifies acceptable forms of travel and entertainment, the line between what is "bribery" and what is acceptable business is still not a bright one.

Parent Company Liability

The Resource Guide dispels any notion that the DOJ or the SEC will give a pass to the parent company of an entity engaging in conduct that violates the FCPA. While recognizing the general principles of limited corporate liability, the Resource Guide puts companies on notice that the government will be looking into the substance of transactions to determine the extent to which a parent company participated in any violative conduct.

Aiding and Abetting an FCPA Violation

A consistent theme of the Resource Guide is that the potential scope of criminal liability extends beyond just the covered person who pays a bribe directly. Staying within that theme, the Resource Guide makes clear that individuals and companies who assist another party in committing an FCPA violation can be found guilty of aiding and abetting criminal conduct. Going a step further, the Resource Guide suggests that foreign entities and individuals not subject to the provisions of the FCPA could still be prosecuted under aiding and abetting or conspiracy laws for acts in furtherance of another party's FCPA violation.

Guideline for Charitable Contributions

A "bribe" can come in many forms, and companies sometimes wade into dangerous areas without fully appreciating the consequences. Recognizing that charitable contributions can, under certain circumstances, be construed as a bribe, the Resource Guide offers recommendations to help companies steer clear of any potential FCPA liability when making a charitable gift. Specifically, the Resource Guide encourages companies to use thorough due diligence and controls, such as:

- requiring FCPA compliance certifications from recipients;
- confirming that none of the recipient's officers are affiliated with a foreign government;

- requiring the recipient to provide audited financial statements;
- obtaining confirmation that a valid and appropriate bank account is receiving the funds; and
- conducting post-contribution audits to ensure the funds were used as expected.

The Resource Guide also goes through examples of actual enforcement actions and declinations involving charitable contributions and provides a checklist of questions that companies should ask to help them ensure that their charitable contributions are not disguised bribes.

Facilitation Payments

The FCPA's anti-bribery provision contains an exception for certain "facilitation payments," meaning payments that are made in furtherance of routine governmental actions. Recognizing that this facilitation payment exception has caused a great deal of confusion, the Resource Guide attempts to provide some clarity in this often murky area. Noting that it is the *purpose* not the *size* of a payment that determines whether it a permissible facilitation payment, the Resource Guide illustrates this principle through hypotheticals—one involving a permissible facilitation payment to a clerk with no discretion to expedite the issuance of a permit and one involving an impermissible payment of a small sum of cash in exchange for approval of a permit for which all the requirements had not been met. The Resource Guide cautions that simply categorizing something as a "facilitation payment" does not in fact make it so. Companies are also warned that, while facilitation payments may be permissible under the FCPA, they are often illegal under local laws and should be avoided on that basis.

FCPA Accounting Provisions

In addition to discussing anti-bribery measures, the Resource Guide gives extensive attention to the often-overlooked accounting provisions of the FCPA. The accounting provisions require public companies to: (a) keep books and records in reasonable detail which accurately reflect the issuer's transactions and disposition of its assets; and (b) maintain internal controls to assure management control over the issuer's assets.

The Resource Guide emphasizes that the accounting provisions do not require that an issuer be perfect in the maintenance of its books and records. However, recognizing that bribes are typically characterized in some other manner, the accounting provisions are designed to combat mischaracterization of expenses to conceal their true intent. As with the record keeping requirement, perfection is not required in an internal control regime and no specific steps are required. Rather, the internal controls should be designed to fit the risk profile and operations of the company, providing "reasonable assurances" that they will deter and detect the kinds of manipulations of the issuers' books and records that often indicate unlawful conduct.

Hallmarks of Effective Compliance Programs

The Resource Guide provides some helpful insights into the aspects of compliance programs that the DOJ and SEC consider important, recognizing that companies should weigh a variety of factors when determining what is appropriate for their specific business needs. The Resource Guide explains that if designed carefully, implemented earnestly, and enforced fairly, a company's compliance program—no matter how large or small the organization—will help the company prevent violations, detect those that do occur, and remediate them promptly and appropriately. To help make this important point, the Resource Guide includes a case study in which a company with a robust compliance program promptly investigated the wrongdoing and self – reported to the government. In that case, the government declined to take enforcement action against the company, instead holding only an individual wrongdoer responsible.

The Resource Guide identifies certain components of an effective compliance program, while also emphasizing that, when it comes to compliance, there is "no one-size-fits-all" approach and that "check – the – box programs" are inefficient and ineffective. While some of these components were mentioned above as "takeaways" from the Morgan Stanley case, it is worthwhile to note the following additional compliance program components highlighted in the Resource Guide:

- **Oversight, Autonomy, and Resources:** In appraising a compliance program, the DOJ and SEC will consider whether a company has assigned respon¬sibility for the oversight and implementation of a com¬pany's compliance program to one or more specific senior executives within an organization. The Resource Guide noted that these individuals must have appropriate authority within the organization, adequate autonomy from management (including direct access to the organization's governing authority, such as the board of directors and/or audit committee), and sufficient resources to ensure that the company's compliance program is implemented effectively.

- **Incentives and Disciplinary Measures:** Significantly, the guidance emphasizes that *enforcement of the compliance program is fundamental to its effectiveness*. Specifically, in evaluating a company's enforcement of its compliance program, the government will consider whether appropriate and clear disciplinary procedures are in place, whether those procedures are applied reliably and promptly, and whether disciplinary measures are commensurate with the violation. The DOJ and SEC also recognized that positive incentives can drive compliant behavior. These incentives can take many forms such as personnel evaluations and promotions, rewards for improving and developing a company's compliance pro¬gram, and rewards for ethics and compliance leadership. It is critical that any such incentive, and any disciplinary measure, is fairly and consistently applied across the organization.
- **Confidential Reporting and Internal Investigation:** The Resource Guide reiterates that an effective compliance program should include a mechanism for an organization's employees and others to report suspected or actual misconduct or violations of the company's policies on a confidential basis and without fear of retaliation. Further, companies should "have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company's response…."
- **Continuous Improvement: Periodic Testing and Review:** The Resource Guide reiterates that a good compliance program should constantly evolve. A company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the standards of its industry. In addition, effective compliance programs will inevitably uncover compliance weaknesses and require enhancements. Consequently, the DOJ and SEC will evaluate whether companies regularly review and improve their compliance programs. A yearly review is prudent.
- **Mergers and Acquisitions:** Pre-Acquisition Due Diligence and Post-Acquisition Integration: As is described more fully above, a company should perform adequate due diligence prior to a merger or acquisition.

F. Conclusion

2012 was a year of major developments in the anti-corruption field, culminating with the publication of the Resource Guide. Companies are on notice that they must take proper precautions against corrupt activities by employees. Fortunately, 2012 has provided a detailed road map outlining many of the critical steps which companies can take to reduce their risk of corrupt activities occurring within their organization, and minimizing their liability when it does occur.

X. WHAT EVERY MULTINATIONAL SHOULD KNOW ABOUT BOUNTY HUNTERS AND WHISTLEBLOWERS[98]

A. Introduction – 2012: The Year of the Whistleblower

In the era of the "snitch" turned hero, global companies ignore the impact of significant expansion of U.S. whistleblowing laws and increased enforcement at their peril. The U.S. Sarbanes-Oxley Act ("SOX") and Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") constitute a comprehensive overhaul of the U.S. financial regulatory system and impose significant compliance obligations on covered entities. Portending the trend of potential liability exposure, the year began with the publication of a national survey that reflected increased levels of internal complaints and perceived retaliation,[99] brought the first award under the Securities and Exchange Commission (SEC) Dodd-Frank Whistleblower Program on August 21,[100] and ended with the SEC reporting a total of 143 enforcement actions resulting in sanctions exceeding $1 million in its November annual report.[101] During the first year of the Dodd-Frank Whistleblower Program, the SEC received 3,001 whistleblower tips from all 50 states and 49 other countries.[102]

This section analyzes current judicial and administrative enforcement of Dodd-Frank and Sarbanes-Oxley whistleblower claims, with a particular emphasis on the special concerns facing multinational companies in defending against these claims. The section also addresses

98 This session was led by Littler Shareholder Philip M. Berkowitz (New York). The other panelists were Michelle Miller (Vice President and Chief Counsel for Employment Law with Medtronic, Inc.); Edward Ellis (Littler Shareholder-Philadelphia) ; Philip Gordon (Littler Shareholder-Denver); and Gregory Keating (Littler Shareholder-Boston).

99 *See* 2011 National Business Ethics Survey, Ethics Resource Center. For a detailed discussion of the survey, *see Littler Publications, Increasing Levels of Workplace Retaliation Reported in National Survey*, by Kevin O'Neill and Earl (Chip) Jones III (Jan. 13, 2012), *available at* http://www.littler.com/publication-press/publication/increasing-levels-workplace-retaliation-reported-national-survey .

100 SEC Annual Report on the Dodd-Frank Whistleblower Program, Fiscal Year 2012 (Nov. 2012), *available at* http://www.sec.gov/whistleblower.

101 *Id*.

102 *Id*. at 4. The top leaders of foreign reports were the United Kingdom, Canada, India, China and Australia.

best practices in investigating cross-border whistleblower claims, data protection issues involved in these investigations, and the importance of coordinating activities across borders as well as across legal disciplines.

B. Legal Framework and Considerations

The 2002 Sarbanes-Oxley Act introduced sweeping corporate reforms. SOX's civil whistleblower provisions prohibit employer retaliation against employees of publicly traded companies (and their privately held subsidiaries) who provide information and/or assist in an investigation of an employer's violation of SOX, SEC regulations or securities fraud.[103] SOX is enforced by the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (DOL). Employees must first file their claims with that agency. The SOX complaint and administrative process includes initial investigation by an OSHA investigator, secondary review by an Administrative Law Judge (ALJ) upon request, and appeal of the ALJ Decision to the DOL Administrative Review Board (ARB). Any party adversely affected by final decision of the ARB may seek judicial review of its order within 60 days by filing a petition in the U.S. Court of Appeals in the circuit where the violation allegedly occurred or where the complainant lived at the time of the alleged violation.[104]

The Dodd-Frank Act constitutes a comprehensive overhaul of the U.S. financial regulatory system on several levels. The new provisions not only provide substantial monetary incentives to qualified whistleblowers, but also expand the scope of protected individuals and protected conduct under SOX's anti-retaliation provisions.

Dodd-Frank permits whistleblowers who voluntarily provide original information to the SEC, which leads to an SEC enforcement action and recovery of more than $1 million, to collect a monetary award ranging between 10% and 30% of the monetary sanctions collected,[105] and prohibits retaliation against whistleblowers who possess a "reasonable belief" that he or she provided information that "relates to a possible securities law violation."[106] Dodd-Frank expanded the statute of limitations for bringing whistleblower claims to up to ten years. Remedies for violations of Dodd-Frank may include reinstatement, double back pay plus interest, attorneys' fees, litigation costs and expert witness fees.[107] Dodd-Frank claimants may bypass the DOL and instead may file retaliation actions directly in federal court.[108]

Dodd-Frank also enacted Section 23 of the Commodity Exchange Act, which provides new whistleblower protections to individuals who report potential violations of the Commodity Exchange Act to the Commodity Futures Trading Commission (CFTC). Like securities whistleblowers, retaliation against commodities whistleblowers is prohibited, and the law provides a private right of action in federal court. There also is a "bounty" program for commodities whistleblowers. A reinvigorated CFTC has a 130-lawyer enforcement division and has been active in bringing charges in the past year.[109]

Dodd-Frank also created a new consumer protection entity, the Consumer Financial Protection Bureau (CFPB), which enforces new protections for whistleblowing employees in the financial services industry.

Bolstered Enforcement and Expansion of Rights

The Obama Administration's newly constituted ARB has transformed the once employer-friendly Department of Labor to an agency determined to make the administrative process more hospitable to complainants. The ARB has, in the process, overturned a decade of precedent that had significantly limited SOX whistleblower remedies.[110] Interpretations of critical aspects of SOX will likely be in flux for a time, with the Democratic-controlled ARB continuing to make decisions that broaden the scope and the remedies available to complainants.[111]

103 *See* 18 U.S.C. §§ 1513(e), 1514A (a) (2003).

104 29 C.F.R. § 1980.112(a)

105 17 C.F.R. § 240.21F-3.

106 *Id*. The report must go to the SEC to be eligible for a bounty. The whistleblower still counts as having given "original information" if he or she reports internally and then reports to the SEC within 120 days—even if another whistleblower comes forward before then. However, the tip must result in a successful SEC enforcement action in order to be eligible for the bounty, and so, must at some point be made to the SEC. 17 C.F.R. § 240.21F-2(a); 17 C.F.R. § 240.21F-9. Although Dodd-Frank contains no special provisions regarding retaliation claims by in-house counsel, it places limitations upon the ability of compliance professionals and company attorneys to collect bounty awards. 17 C.F.R. § 240.21F-2.

107 *Id*.

108 For a more detailed analysis of the impact of Dodd-Frank on foreign entities, *see* Philip M. Berkowitz and Steven Friedman, *Dodd-Frank for Foreign Financial Institutions and Publicly Traded Companies in the US: An Update* (Nov. 2012), *available at* http://www.littler.com/files/12_Dodd-Frank_Update_11-12.pdf.

109 *See* Jenna Greene, *Flexing New Muscles*, Corporate Counsel DC Watch at 55 (Jan. 1, 2013), *available at* http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202580943419&thepage=1.

110 *See* Edward T. Ellis, *Reconstituted ARB Expanding Sarbanes-Oxley Whistleblower Protections*, Bloomberg BNA Insights: Labor and Employment Law (Apr. 27, 2012).

111 *Id*.

Implications for Foreign Entities

Foreign subsidiaries and affiliates of U.S. public companies are now, after Dodd-Frank, subject to U.S. securities whistleblower actions, regardless of whether they are publicly traded. Whistleblowers can claim bounty awards based on monetary sanctions collected in *any* judicial or administrative action brought under the securities laws, with no exceptions for actions involving foreign private issuers. However, final regulations clarify that a whistleblower cannot collect an award based upon reports of a possible violation of foreign securities laws. Also, foreign government officers, members and employees are not eligible for whistleblower bounty awards.[112]

Extraterritorial Application

Neither Dodd-Frank nor the SEC's implementing regulations discuss whether Dodd-Frank's anti-retaliation protections apply extraterritorially. At least one U.S. District Court has held that they do not.[113] And, in a decision that provided some relief to apprehensive employers, the ARB held, in December 2011, that SOX does not apply extraterritorially, even after the Dodd-Frank Amendments.[114] The ARB dismissed the complaint, despite the fact that the alleged retaliatory decision occurred in the U.S., because the complaint involved a foreign citizen who alleged violations of foreign law by his foreign employer.[115]

Nevertheless, Dodd-Frank extended the extraterritorial reach of anti-fraud securities laws in enforcement actions brought by the SEC and Department of Justice, and Congress instructed the SEC to study whether extraterritorial application should be similarly expanded in private actions. In its April 2012 report to Congress, the SEC expressed its support for expanded extraterritorial application in private actions, but did not make a formal recommendation.[116]

Although these early decisions concluded that SOX and Dodd-Frank whistleblower protections do not apply extraterritorially, foreign companies are potentially at risk of whistleblower lawsuits if their U.S. subsidiaries or related entities engage in unlawful retaliation. In an increasingly mobile world, foreign nationals may be subject to violations of U.S. laws by companies with U.S. operations.

The Cultural Dimension

Section 301 of SOX requires that covered employers implement "procedures for … the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and … the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." These procedures often face significant cultural (and legal) resistance overseas.[117]

Countries outside of the EU may be more amenable to anonymous whistleblower hotlines and may place a greater value on whistleblowing as a means of monitoring corporations. For example, the Organization of American States, which includes 35 countries in North, South, and Central America, adopted the Inter-American Convention Against Corruption. The Inter-American Convention provides that members should consider establishing "systems for protecting public servants and private citizens who, in good faith, report

112 *See* Philip M. Berkowitz and Steven Friedman, *Dodd-Frank for Foreign Financial Institutions and Publicly Traded Companies in the US: An Update* (Nov. 2012), *available at* http://www.littler.com/files/12_Dodd-Frank_Update_11-12.pdf.

113 *Asadi v. G.E. Energy (USA)*, L.L.C., No. 4:12-345, 2012 U.S. Dist. LEXIS 89746 (S.D. Tex. June 28, 2012). The U.S. District Court for Southern District of Texas dismissed Asadi's Dodd-Frank claim on the ground that the Act *per se* does not protect whistleblowing activities that occur outside of the United States. *Id*. at *24. Asadi claimed he blew the whistle on bribery activity that he believed violated the FCPA and was terminated soon thereafter. *Id*. at *3-5. The court declined to address whether Asadi qualified as a whistleblower under Dodd-Frank. Instead, the court noted that although Dodd-Frank's anti-retaliation provision is silent regarding whether it applies extraterritorially, there is a presumption against such application. *Id*. at *16. Because Asadi lived in Jordan and was employed in Jordan, the court found that his whistleblowing activity occurred outside of the United States and was therefore not protected by Dodd-Frank. *Id*. at *22.

114 *Villanueva v. Core Labs. NV, Saybolt de Colombia Limitada*, ARB Case No. 09-108 (ARB Dec. 22, 2011). For a more detailed discussion, please refer to Practicing Law Institute's treatise, *International Corporate Practice: A Practitioner's Guide to Global Success*, Edited by Carole L. Basri, Corporate Lawyering Group, LLC, Chapter 21: International Labor and Employment Law, by Philip M. Berkowitz and Trent Sutton.

115 Gregory Keating, Philip Berkowitz, Trent Sutton, and Joseph Lazazzero, *DOL Confirms SOX Whistleblower Protections Do Not Apply Extraterritorially*, Littler ASAP (Jan. 24, 2012), *available at* http://www.littler.com/publication-press/publication/dol-confirms-sox-whistleblower-protections-do-not-apply-extraterritori.

116 *See* Philip M. Berkowitz and Steven Friedman, *Dodd-Frank for Foreign Financial Institutions and Publicly Traded Companies in the US: An Update* (Nov. 2012), *available at* http://www.littler.com/files/12_Dodd-Frank_Update_11-12.pdf.

117 From a cultural perspective, and particularly in the northern European Union states, instituting an anonymous reporting mechanism raises the specter of World War II and Nazi Germany and the former Soviet Union. *See* Gregory Keating, *Retaliation and Whistleblowing: A Guide for Human Resources Professionals and Counsel*, Lexis Nexis, 4th Edition, 2012.

acts of corruption, including protection of their identities."[118] South Africa has passed a Protected Disclosures Act,[119] which acknowledges that employees should disclose misconduct in the workplace and the need for protection of whistleblowers from retaliation. New Zealand enacted the Protected Disclosures Act 2000, which protects employees who disclose serious wrongdoing through their employer's internal procedures.[120]

These differing cultural perspectives provide an important foundation to understanding the various legal issues that arise with SOX compliance abroad.[121]

Relations Concerns

SOX and Dodd-Frank compliance abroad also raises significant labor relations concerns. In Europe especially, it is important to determine the extent to which SOX compliance will need to first be negotiated and, in some cases, consented to by relevant labor groups. In many European Countries, employers must inform and consult with the local works council regarding implementation of a SOX policy. For example, in Germany, where local law provides for broad rights for the "co-determination" of workplace rules,[122] any attempt to implement a reporting mechanism in compliance with section 301 must first be negotiated with a local works council.

Data Privacy Considerations

Any multi-jurisdictional investigation of complaints within the purview of SOX and Dodd-Frank requires careful consideration of applicable data privacy protections. While the United States relies on statutory protection from its local, state, and federal government, the European Union (EU) has a "constitutional-like right" to privacy that is contained in its Fundamental Charter, which mandates protection be provided by independent data protection agencies in each member country.

European Parliament and Council Directive 95/46/EC on the protection of individuals with regard to the processing of employees' personal data ("the Directive") sets strict limits on the collection and use of personal data, and mandates that each member state set up an independent national body responsible for the protection of personal employee data.[123]

The Directive's mandate that individual members states create their own bodies to comply with the Directive has led to some varied approaches among EU member states. Some member states, most notably France, have determined to more aggressively regulate the area of employee privacy and data protection as it applies to section 301 policies. These countries have regulated the extent and manner in which employee personal data may be utilized.[124] As a result, the issues related to SOX compliance have become very country-specific.

In some countries, employee data privacy regulations predate the Directive.[125] In 1978, France passed law No. 78-17 (French Data Protection Law) protecting employee personal data, and creating a French national data protection authority known as the Commission Nationale De L'Informatique et des Libertés (CNIL).[126] As part of its statutory duties, the CNIL provides formal opinions regarding whether certain workplace practices and policies comply with the French Data Protection Law.[127]

---

118 *See* Inter-American Convention Against Corruption, Mar. 29, 1996, *available at* http://www.oas.org/juridico/english/corr_bg.htm.

119 Protected Disclosures Act 26 of 2000, *available at* www.info.gov.za/view/DownloadFileAction?id=68192.

120 Elaine Kaplan, Special Counsel, U.S. Office of Special Counsel, *The International Emergence of Legal Protections for Whistleblowers*, The Journal of Public Inquiry, Fall/Winter 2001.

121 *See generally* Marisa Ann Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between US Corporate Codes of Conduct and European Privacy and Work Laws*, 28 BERKELEY J. EMP. & LAB. L. 375, 403-04 (2007); *see also* Ian L. Schaffer, Note: *An International Train Wreck Caused in Part by a Defective Whistle: When the Extraterritorial Application of SOX Conflicts with Foreign Laws*, 75 FORDHAM L. REV. 1829, 1852 (Dec. 2006) (noting that "[t]he French aversion to anonymous whistleblowing dates back to the French Revolution" when there existed a practice whereby individuals could be anonymously denounced and face execution).

122 *See generally* Works Constitution Act.

123 *See* Council Directive 95/46/EC on the protection of individuals with regard to the processing of employees' personal data (Directive), *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:NOT For a detailed analysis of the requirements imposed by this Directive, *see* Gregory Keating, *Retaliation and Whistleblowing: A Guide for Human Resources Professionals and Counsel*, LexisNexis (4th ed., 2012), section 10.4.3.

124 Gregory Keating, *Retaliation and Whistleblowing: A Guide for Human Resources Professionals and Counsel*, LexisNexis (4th ed., 2012), section 10.4.3.

125 Marisa Ann Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between US Corporate Codes of Conduct and European Privacy and Work Laws*, 28 BERKELEY J. EMP. & LAB. L. 375, 410 (2007).

126 Law No. 78-17 of Jan. 6, 1978, J.O. ("Official Gazette of France"), Aug. 7, 2004, p. 227, *amended by* Law No. 2004-801 of Aug. 6, 2004, and Law No. 2006-64 of Jan. 23, 2006.

127 *Id*. *See also generally* Marisa Ann Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between US Corporate Codes of Conduct and European Privacy and Work Laws*, 28 BERKELEY J. EMP. & LAB. L. 375, 410 (2007).

In 2005, the CNIL issued two formal opinions regarding the proposed ethics hotlines of McDonalds Inc. and Exide Technologies, and both formal opinions indicated that section 301 compliance may conflict with the French Data Protection Law.[128]

In the *McDonald's* case, the company attempted to implement a "professional integrity" plan that would have allowed French employees to report inappropriate conduct of the restaurants' management to the U.S. parent company. Among other things, the plan allowed suspected employees to be informed of their right to access and contest any reports made against them.[129] Exide Technologies, for its part, attempted to implement an "ethics hotline" to enable employees to report, among other things, accounting inaccuracies or irregularities and "possible violations of company principles" to a U.S. subcontractor. The proposed plan guaranteed the reporting employee's anonymity upon his or her request.[130]

The CNIL declared both proposed policies to be in violation of the French Data Protection Law, reasoning that the creation of an anonymous "ethics alert" would increase the "the risk of slanderous denunciations;" the benefits of such hotlines were outweighed by the risks of frivolous and potentially harmful accusations; and because employees were not immediately informed of complaints made against them, they might lack the necessary means to properly contest false claims.[131]

These decisions caused a stir amongst multinational employers listed on U.S. markets, who believed they were being placed in an untenable position of complying with both SOX and the French Data Protection Law.

In response, the CNIL issued a set of guidelines in November 2005 "to contribute to the implementation of whistleblowing systems which comply with the principles defined by [the French Data Privacy Law] and [the Directive]."[132]

These guidelines provided multinational employers with a rather specific set of considerations to utilize in designing a section 301 reporting mechanism that complies with French law.[133] Within a month after their publication, the CNIL issued additional guidelines.[134] The additional guidelines built upon and incorporated the November guidelines and, most significantly, allowed employers to implement whistleblowing hotlines without first securing the CNIL's "authorization," instead allowing employers to declare online to the CNIL that they have instituted a hotline in compliance with the CNIL's guidelines.[135]

This "self-certification" process, however, has been narrowed. In December 2009, France's highest court, the Court of Cassation, struck down the language in the guidelines that referred to an exception allowing companies to use self-certified hotlines for reporting things not on the limited list, if the company's vital interests or the moral or physical integrity of the employees were at stake. In that case, Dassault Systemes had expanded its standard whistleblowing system to require reporting sexual harassment and intellectual property violations. The

128 *Exide Techs.*, CNIL Decision No. 2005-111 (May 26, 2005) ("Exide Case"), *available at* http://www.theworldlawgroup.com/index.cfm?cm=Doc&ce=details&primaryKey=15239 (unofficial translation); McDonald's, CNIL Délibération No. 2005-110 (May 26, 2005) ("McDonald's Case"), *available at* http://www.theworldlawgroup.com/index.cfm?cm=Doc&ce=details&primaryKey=15241 (unofficial translation).

129 *McDonald's*, CNIL Délibération No. 2005-110 (May 26, 2005), *available at* http://www.theworldlawgroup.com/index.cfm?cm=Doc&ce=details&primaryKey=15241 (unofficial translation) *See also generally* Ian L. Schaffer, *Note: An International Train Wreck Caused in Part by a Defective Whistle: When the Extraterritorial Application of SOX Conflicts with Foreign Laws*, 75 FORDHAM L. REV. 1829, 1850 (Dec. 2006); Marisa Ann Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws*, 28 BERKELEY J. EMP. & LAB. L. 375, 410-12 (2007).

130 *Exide Techs.*, CNIL Decision No. 2005-111 (May 26, 2005), *available at* http://www.theworldlawgroup.com/index.cfm?cm=Doc&ce=details&primaryKey=15239 (unofficial translation).

131 *See Exide Techs.*, CNIL Decision No. 2005-111 (May 26, 2005), *available at* http://www.theworldlawgroup.com/index.cfm?cm=Doc&ce=details&primaryKey=15239 (unofficial translation); *McDonald's*, CNIL Délibération No. 2005-110 (May 26, 2005), *available at* http://www.theworldlawgroup.com/index.cfm?cm=Doc&ce=details&primaryKey=15241 (unofficial translation). Following these decisions, the Tribunal de Grande Instance de Libourne struck down a section 301 hotline implemented by BSN GlassPack after an employee works council and labor union challenged the hotline. The court struck down the hotline not based on French Data Protection Law principles, but based on French employment law and due process principles. *See* Marisa Ann Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws*, 28 BERKELEY J. EMP. & LAB. L. 375, 414 (2007); Comite d'Etablissament BSN Glasspack, Syndicat CGT du Personnel de BSN Glasspack C/ SAS BSN Glasspack, *available at* http://www.foruminternet.org/specialistes/veille-juridique/jurisprudence/tribunal-de-grande-instance-de-libourne-ordonnance-de-refere-15-septembre-2005.html?decoupe_recherche=BSN%20Glasspack (in French).

132 For a detailed discussion of the guidelines, please refer to Gregory Keating, *Retaliation and Whistleblowing: A Guide for Human Resources Professionals and Counsel*, LexisNexis (4th ed., 2012), section 10.4.3(a).

133 *See generally id*.

134 CNIL, *Autorisation unique no AU-004, Deliberation No. 2005-305 du 8 Decembre 2005 portant autorisation unique de traitements automatises*, O.J. no. 3, Jan. 4, 2006.

135 *Id*. The CNIL provided further guidance to employers in March, 2006, by posting answers to "frequently asked questions" on its website. *See* http://www.cnil.fr/english/topics/faqs-on-whistleblowing-systems/.

court ruled that self-certified hotlines could not be broadened to breaches beyond subjects of finance, accounting, or banking, and that to broaden beyond those areas requires explicit authorization by the CNIL.[136]

Thereafter, the EU body[137] that is responsible for data protection and privacy responded to France and other countries' detailed regulation in this context by issuing a non-binding "opinion" on the manner in which whistleblower hotlines can be properly implemented under the Directive. The guidelines of the Article 29 Working Party follow in the steps of France and others.[138]

The Article 29 Working Party's opinion has proven to be extremely influential, and has led several EU member states, including Belgium, Germany, Ireland, Luxembourg, the Netherlands, Portugal, and Spain to adopt similar data privacy protections related to the proper implementation of whistleblowing hotlines. Austria, Finland, and Sweden have also taken official positions on whistleblowing hotlines that appear to follow the Article 29 Working Party's opinion. In contrast, in Italy, the implementation of whistleblowing hotlines is unsettled. Hotlines have been denied because of the sensitive data being collected.[139]

Thus, although the regulations in this context are somewhat consistent across EU member states, enough notable differences exist to require a country-specific approach in every jurisdiction where a section 301 whistleblowing mechanism is being contemplated.

Many countries outside the EU have data protection laws similar to those cited by the CNIL in its opinion striking down anonymous whistleblower hotlines.

Although most of these other countries have not issued comprehensive guidelines regarding the implementation of anonymous whistleblower hotlines, the possibility remains that such hotlines could raise potential conflicts with domestic data protection laws and privacy norms.[140]

Attorney-Client Privilege in Cross-Border Investigations

Investigations of alleged misconduct may involve employees or witnesses located overseas. U.S.-based HR professionals and attorneys might expect that communications with counsel are privileged.[141] However, the broad protection afforded attorney-client communications in the United States may not be available in a foreign jurisdiction.

The attorney-client privilege in the United States is largely an outgrowth of our system of discovery, which requires disclosure in a litigation of virtually all relevant information. The attorney-client privilege generally protects requests for legal advice, as well as the content of that advice, from disclosure. However, in countries where discovery is not so intrusive, the attorney-client privilege has not developed in the same manner as in the U.S. Thus, laws outside the U.S. may not protect communications between counsel and client with the same vigor as does U.S. law. U.S. counsel with responsibility for overseas compliance need to be aware of the potential vulnerability to discovery of overseas communications, and take steps to try to bring those communications under the umbrella of U.S. protection.

The European Court of Justice held, in *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission*, Case 155/79, that in the context of European Union antitrust prosecution, the attorney-client privilege does not protect communications with in-house counsel. The court held that in-house counsels are not sufficiently independent from their employers for the privilege to apply. It is important that human resources professionals and U.S. in-house counsel who consult with overseas counsel not assume that their communications will be protected by U.S. privilege law. For this reason, when communicating about a matter with overseas counsel or employees, U.S.-based HR representatives and counsel must consider involving outside counsel, whose communications are more likely to be considered privileged, and otherwise to consult with counsel who are familiar with these cross-border issues.[142]

136 In response to the court's ruling, the CNIL intends to update its guidelines by removing the exception as reflected in a draft copy of CNIL's deliberation No. 2010-369 of October 14, 2010. Other changes include a guideline for properly destroying whistleblowing data that is determined to be irrelevant or its proper archival and a reference to compliance with the Japanese Financial Instrument and Exchange Act. *Id*.

137 The body responsible for this opinion, the EU Article 29 Data Protection Working Party ("Article 29 Working Party"), is an EU body generally responsible for ensuring data privacy and protection in the EU. *See* EU Guidelines, Art. 29 Working Party Opinion 1/2006, 00195/06 WP 117 (Feb. 1, 2006).

138 For a detailed discussion of the Article 29 Working Party, *see* Gregory Keating, *Retaliation and Whistleblowing: A Guide for Human Resources Professionals and Counsel*, LexisNexis (4th ed., 2012), section 10.4.3(b).

139 *Id*.

140 For a comprehensive summary of countries outside the EU that have potentially applicable data privacy laws, *see* Gregory Keating, *Retaliation and Whistleblowing: A Guide for Human Resources Professionals and Counsel*, Lexis Nexis (4th ed., 2012), section 10.4.3(b). P

141 Philip M. Berkowitz and Kristen O'Connor, *Attorney-Client Privilege and Cross-Border Investigations*, N.Y.L.J. (Jan. 13, 2011).

142 *Id*.

C. Practical Recommendations

The significant expansion of SOX's anti-retaliation provisions and bounty awards adds an entirely new dimension to multinational companies' design of internal reporting mechanisms. Following are recommended best practices to navigate the compliance maze:

- Develop procedures to account for Dodd-Frank's bounty provisions and encourage internal reporting. Some employers have implemented non-monetary reward systems that offer leadership recognition or promotion consideration. Others have responded by strengthening their internal training programs and communication channels for making complaints.[143]
- Develop alternative reporting mechanisms. A multinational corporation that operates in jurisdictions with specific sensibilities about privacy and the rights of employees accused of misconduct should consider how to manage these concerns. An alternative procedure that takes account of the CNIL decision discussed above can include:
  - Limit the subject matter of any anonymous complaints to those involving fraud and accounting matters covered by SOX.[144]
  - Institute a reporting scheme that *offers* anonymity, but does not require it (or perhaps discourages it).
  - Implement a policy of non-retention of files related to complaints that do not lead to any discipline or litigation.
  - Effectively oversee the operations of any third-party vendor that administers a whistleblower hotline.
  - Promptly disclose the details of a complaint to an accused employee, and provide that employee with the right to rectify and/or oppose the charges made.
  - Ensure that information received from a whistleblowing complaint is only used to investigate the complaint.
  - Maintain strict confidentiality regarding any complaints and/or investigations.
  - Insure compliance with EU data protection laws whenever transferring information to the United Stated or elsewhere.
  - Negotiate with works councils to establish the parameters of new ethics policies and complaint procedures.[145]
- When a complaint is reported, plan a comprehensive investigation protocol before taking initial action:
  - Determine the applicable law.
  - Identify team members, including outside counsel in the United States, a white collar expert conducting an independent neutral investigation, and foreign jurisdiction internal HR in multiple jurisdictions.
  - Identify the scope of investigation and all witnesses that need to be interviewed.
  - In the case of a high-level executive, involve the audit committee or other compliance mechanism and consider hiring outside counsel to conduct the investigation.
- Consider the following cross-border investigation best practices:
  - **Preserve the Attorney-Client Privilege:** Seek advice of counsel regarding the privileged nature of communications and take reasonable steps to assure communications are subject to measures that will protect their confidentiality.
  - **Be Sure that Local Bar Rules Permit the Investigations:** Pay careful attention to the laws, bar rules, and privilege customs of the local jurisdiction in which the investigation is being conducted. For example, the use of lawyers (whether in-house counsel or an outside firm) to conduct investigations may violate bar rules in some jurisdictions outside the United States. Some foreign jurisdictions prohibit outside counsel assistance when conducting a pre-dismissal meeting. Similarly, using a U.S.-based lawyer

143 Gregory Keating, *Retaliation and Whistleblowing: A Guide for Human Resources Professionals and Counsel*, LexisNexis (4th ed. 2012).

144 This may also include, perhaps, limiting the anonymous reporting requirements to only the following foreign employees: (1) attorneys; and (2) senior financial officers. See James R. Beyer & E. Johan Lubbe, *Clash of the Titans: Complying With US Whistleblowing Requirements While Respecting EU Privacy Rights*, 24 ACC DOCKET 22, 30 (2006) (reasoning that SOX's extraterritorial reporting requirements appear much clearer for senior financial officers and attorneys, and suggesting that internal hotlines abroad be limited to those two categories of employees).

145 For additional discussion on this topic, *see* Marisa Ann Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between US Corporate Codes of Conduct and European Privacy and Work Laws*, 28 BERKELEY J. EMP. & LAB. L. 375 (2007); James R. Beyer & E. Johan Lubbe, *Clash of the Titans: Complying With US Whistleblowing Requirements While Respecting EU Privacy Rights*, 24 ACC DOCKET 22 (2006).

to conduct the investigation may prejudice the client's ability to discipline the employee at issue. It is also important to consider protections individuals may have in the country where they are currently working.

- **Check Whether Discipline May Be Imposed Based on Investigation:** In some countries (France, for example), it is unlawful for an employer to impose discipline based on information obtained during an investigative interview. Where this restriction/prohibition exists, the interviewer must understand that an interview should be suspended if the witness volunteers information about wrongful conduct that may subject him or her to discipline. In such a case, statutory rules concerning representation (for example, by a union or a works council), as well as the legal prerequisites to imposing discipline, must be considered.
- **Determine Whether the Employee Is Entitled to Representation:** In some jurisdictions, the employee has the right to legal representation during an interview. It is sometimes advisable, once litigation commences, to permit an employee's lawyer to be present during an interview even if not legally required, in order to maintain the integrity of the investigation. Any such decision should be made only after consultation with legal counsel who is well informed about the requirements of the particular jurisdiction.
- **Consider Cultural and Language Differences:** Given the likelihood of a cultural divide and the potential for misunderstanding, lawyers and employees conducting interviews overseas should consider having the local HR representative or compliance employee conduct the questioning—at the very least, such employees should attend the interview. The same can be said regarding any questioner from a country other than that of the individual being questioned. The employer needs to be aware of potential cultural differences that can affect understanding on the part of the questioner and the interviewee. Also, employees whose first language is not English and who are not used to the U.S. method of questioning may require interpreters or "cultural liaisons" to be present during interviews.
- **Be Aware of Conflicts Issues:** In-house counsel and other employees involved in disciplining and meeting with the subject of an investigation may not be appropriate candidates to investigate that employee's alleged misconduct. Similarly, legal or compliance personnel who are familiar with the conduct under investigation because they previously played a role in reviewing or making decisions regarding the employee's duties should not actively participate in an investigation of that conduct. Those legal and compliance personnel are, at the least, potential witnesses who themselves may need to be interviewed. Separating them from the investigation team will help maintain the integrity of the investigation.
- **Ensure Coordination Between the Human Resources and Compliance Functions:** The employer's labor counsel and compliance counsel need to share essential facts with each other in conducting the investigation, as do the HR and compliance departments. If HR has information concerning an alleged whistleblower's wrongdoing, this information should normally be provided to compliance personnel. Sharing this information generally does not "taint" the compliance department's investigation. To the contrary, keeping facts away from investigators in the hope of assuring an impartial investigation could compromise the effectiveness of the investigation. Further, to help avoid compromising the employer's legal position, employment counsel and HR generally should coordinate their investigations with those of compliance counsel and compliance staff.
- **Be Aware of Data Privacy Issues:** Many countries regard the United States' celebration of whistleblowers as social heroes to be unacceptable, reflecting a "culture of denunciation" which is contrary to their own fundamental societal tenets. Data privacy permeates all aspects of an investigation carried out overseas or that involves transmission of data (whether electronic or hard copies) from overseas to the United States. Any efforts to search email, review personnel records, or transport records across borders, whether electronically or otherwise, must be considered in the context of local privacy law. Corporate procedures encouraging confidential disclosure of internal wrongdoing, such as whistleblower hotlines, must be reviewed for compliance with data protection and privacy laws. The consequences of violating these laws are severe, and may, for example, subject the company to government sanctions. Moreover, European "data subjects" have a private right of action for data law violations.

- **Consider the Consequences of Retaining Outside Consultants:** Retaining an outside consultant to conduct an investigation, even in the context of an otherwise "privileged" investigation conducted by counsel, may raise reporting requirements in the United States and other jurisdictions. The employer should consult with corporate and SEC or foreign corporate counsel to determine the scope of any such obligation. Of course, the employer must be sure to preserve the attorney-client privilege in the event it retains a third-party consultant.

- **Consider Retaining a Communications Expert:** Companies can benefit from the advice of experts in corporate communications in the event of a crisis or potential litigation. Particularly when a matter involves facts that put the employer's reputation at risk, such as high profile claims of wrongdoing, the employer and counsel can benefit by helping to frame the issues for the various potential audiences—the press, prosecutors and the general public. If a communications expert is retained, consider the potential privileged communication issues. The differences between U.S. and non-U.S. investigations are stark, and the consequences of failing to understand and take note of them can be devastating to an employer's interests.

XI. PROTECTING EMBASSIES AND CONSULATE OFFICES FROM PERSONNEL CLAIMS IN THE UNITED STATES[146]

Employers in the United States must comply with a myriad of federal and state employment and labor laws covering a broad spectrum of areas, such as wage and hour laws, employee benefit statutes, and laws that protect employees against discrimination, retaliation, whistleblowing activity, etc. Employers face significant monetary and other liability for violations of these laws.

Under certain circumstances, foreign sovereign employers such as embassies, consulate offices, and sovereign-owned companies located in the United States and employing personnel in the United States enjoy special immunity from the application of U.S. employment laws with regard to some or all of their U.S.-based personnel. Whether a foreign sovereign employer can avoid application of federal and state employment laws hinges on its ability to establish that it meets the immunity criteria set forth in the Foreign Sovereign Immunities Act (FSIA).

This section provides an overview and analysis of the FSIA, the applicability of U.S. employment and labor laws to foreign sovereign employers, the interplay between the FSIA and U.S. employment laws, and recommended plans of action to protect foreign sovereign employers against personnel-related claims in the United States.

A. The Foreign Sovereign Immunities Act

Until 1952, foreign sovereign entities engaged in governmental, business, trade or other related activities in the United States enjoyed almost absolute immunity from the jurisdiction of U.S. courts. As the U.S.-related activities of foreign sovereign governments became more commercial, however, private entities and individuals providing services or goods in the United States to foreign sovereigns challenged the notion of absolute immunity as inequitable because it deprived them of a forum to adjudicate their commercial disputes against foreign sovereign entities. In response, U.S. courts began to take a restrictive approach to sovereign immunity. Under this new approach, foreign states retained their immunity from the jurisdiction of U.S. courts for sovereign or public acts, but not for private or commercial activities. In 1976, the United States enacted the FSIA and adopted this restrictive approach to foreign sovereign immunity.

As codified, the FSIA grants all foreign sovereigns, their agencies, and instrumentalities immunity from suits in U.S. courts unless one of its limited exceptions is applicable.[147] The FSIA's scope is relatively broad, encompassing nationalized commercial enterprises, such as oil companies or airlines, within its definition of "agency or instrumentality."[148]

Once a foreign sovereign entity makes an initial showing of immunity (namely, that it is, indeed, a foreign state), a party seeking to litigate against that foreign sovereign entity in the United States has the burden of showing that an exception to immunity applies. The exception to immunity frequently claimed in employment-related lawsuits is that the employee is engaged in "commercial" activity, not in civil or diplomatic service.

A foreign sovereign's employment of personnel to perform commercial activities in the United States divests a foreign sovereign of immunity as to such personnel, thereby obligating the foreign sovereign to comply with U.S. employment laws, such as Title VII of the

146 This chapter is based upon a presentation by Littler Shareholder Rebecca Aragon (Los Angeles). For additional information on this topic, *see* two articles authored by Ms. Aragon—*Civil Servant or Support Staff? Navigating the Conundrum of U.S. Employment Laws and the Foreign Sovereign Immunities Act*, North American Free Trade & Investment Report, (Thomson Reuters, Jan. 15, 2012) and *Claim Protection*, The Latin Lawyer (vol. 11, issue 2 , Apr. 13, 2012), *available at* www.latinlawyer.com.

147 28 U.S.C. §§ 1602, *et seq*.

148 28 USC § 1603 (b). An agency or instrumentality is a separate legal entity, corporate or otherwise, which is an organ of a foreign state or a political subdivision, or an entity whose majority of shares or other ownership interest is owned by a foreign state or political subdivision, and which is neither a citizen of the U.S. nor created under the laws of any third country. Examples of agencies or instrumentalities of a foreign state include consulate offices, and certain trade and tourist offices.

Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Fair Labor Standards Act of 1938, the Equal Pay Act, and the Employee Retirement Income Security Act. In addition, depending on the state where a foreign sovereign employs personnel, it may also face liability for violation of certain state wage and hour statutes, employment torts (*e.g.*, negligent hiring or supervision, infliction of emotional distress, fraudulent misrepresentation, defamation), breach of contract, whistleblower protection statutes, and laws that protect employees from discrimination based on race, religion, sex, age, national origin, and disability.

Liability for violations of these statutes can include compensatory damages, back pay, benefits, attorneys' fees and costs, reinstatement of employment and, in the case of agencies and instrumentalities of the foreign sovereign, punitive damages. In addition to these court-ordered damages and sanctions, such suits can expose foreign sovereign employers to negative publicity and media coverage.

Claims for violation of many of these employment-related laws can be brought against both the foreign sovereign employers and individuals such as ambassadors, consulate officers, ministers or supervisory personnel working in foreign sovereign offices in the United States. Further, where appropriate, claims for violations of certain employment laws can be brought against sovereign employers as class or collective actions.

B. Determining Whether the Employer is Engaged in Commercial Activity

Whether the foreign sovereign employer is engaged in commercial activity (by virtue of its own activities or that of its personnel working in the United States) and, therefore, not immune from suit, is determined by "reference to the nature of the course of conduct or particular transaction or act," rather than by reference to such employer's purpose.[149] As the FSIA addresses the possibility that an entity may be engaged in both commercial and governmental activities, the analysis focuses on the specific activities at issue to determine if they are commercial. The character of each specific activity is determined by the nature of the act, rather than its purpose. In other words, the issue is whether the particular actions the foreign state performs (whatever the motive behind them) are sovereign activities or the type of actions engaged by a private party in "trade and traffic or commerce." For example, a foreign government's promulgation of laws affecting its foreign currency exchange is a sovereign activity because such action cannot be undertaken by private parties. However, contracting for goods or services, or employing clerical or other similar staff to work in the United States, are "commercial" activities because private entities or individuals are able to engage in such activities.

The legislative history of the FSIA provides some parameters on whether an employment relationship is commercial, stating "diplomatic, civil service, or military personnel" would not be considered commercial employees, but "laborers, clerical staff or public relations or marketing agents" would be. As applied to certain personnel working for sovereign employers in the United States, these descriptions are not as clear-cut as they may appear, particularly with regard to personnel classified as "civil servants." FSIA immunity exceptions are not determined based on classification or title alone. Rather, the person's job duties and his/her actual activities in performing those duties based on the nature and purpose of the position will determine whether an immunity exception applies.

Courts have the discretion, on a case-by-case basis, to determine what conduct constitutes commercial activity that results in a foreign sovereign's forfeiture of immunity under the FSIA's "commercial activity" exception. In making this case-by-case determination, U.S. courts have applied varying interpretations of "commercial activity." Two very similar cases underscore this point. These two cases involved women who were employed in foreign government offices in the United States that were responsible for promoting trade and commercial activities. Both women engaged in similar activities—providing information on investment, attending trade fairs, and promoting nation-specific products. Both women sued their respective foreign government employers for violations of U.S. employment discrimination laws. One court found that the FSIA commercial activities exception did not apply; however, the other court ruled that the employment relationship did fall within the very same FSIA immunity exception.

In the first case, *Yuka Kato v. Shintaro Ishihara, Governor*,[150] the Second Circuit applied a two-part test to determine whether the plaintiff's employment relationship was commercial in nature, examining first whether the activities of the office were commercial in nature and, if they were, whether the plaintiff's individual activities were commercial. The court concluded that the office's work in the general promotion of commerce was not commercial activity because a private person would not engage in such activity.

149 28 U.S.C. § 1603(d).

150 *Kato v. Ishihara*, 360 F.3d 106 (2d. Cir. 2004).

In the other case, *Holden v. Canadian Consulate*,[151] the Ninth Circuit relied on the distinctions between civil servants (for whom the FSIA immunity exception would apply) and other support personnel (for whom the FSIA immunity exception would not apply) to determine whether an employment relationship met the commercial activity exception. According to the court, determining whether an employee is a civil servant requires a review of the nature of the employee's actual activities. If, upon this review, the court determines that the employee is not a civil servant, then the employment relationship falls under the scope of the commercial activity exception. The court in Holden found the plaintiff was a not a civil servant or diplomatic staff member because she did not pass a civil service exam, receive tenure as a civil servant, or have the ability to act on behalf of the Canadian government. Although the employee's work made her part of the consulate staff, she was primarily responsible for marketing and promotion. The court rejected the Canadian Consulate's argument that the plaintiff's work was to promote trade and commerce generally, stating that its decision was based on the nature of her work rather than the purpose behind it. Based on these facts, the court concluded that the FSIA commercial activity exception applied and the foreign sovereign was, therefore, not immune from suit.

The *Kato* and *Holden* cases illustrate the varying interpretations, based on case-by-case analyses, which courts have applied in determining whether FSIA immunity applies in employment-related claims. Some courts, like the *Holden* court, have relied heavily on the distinctions between civil servants and other support personnel in deciding whether the commercial activity exception applies. Applying that analysis, courts have found the following personnel activities to be commercial in nature: an accountant employed in cultural attaché's office in the embassy of the United Arab Emirates in Washington, D.C.;[152] a marketing executive employed by the British Tourist Authority in New York;[153] a marketing agent for a Spanish national institute office, who was responsible for marketing Spanish wines in the United States;[154] and a chauffeur employed by the Taipei Economic/Cultural office in Texas.[155]

Other courts, like the *Kato* court, analyze other factors, such as the civil servant classification and/or the nature of the employee's work in the context of the foreign sovereign's activities. Again, applying this commercial activity interpretation in fact-intensive analyses of specific situations, courts have ruled the following personnel activity non-commercial: an employee hired to take notes at diplomatic meetings, conduct research, write memoranda and on one occasion speak on behalf of the Mission;[156] and a guard hired by a security company to guard the residence of the wife of the Saudi king in California while she was undergoing medical treatment.[157]

As seen from the variety of decisions from U.S. courts, the circumstances under which FSIA immunity protection is available in employment-related suits vary by case and by court.[158]

C. Best Practices

An effective strategy to protect foreign sovereign employers from employment-related claims should include both preventative measures and claim defense strategies, such as the following:

- **Equal Employment Opportunity and Harassment Prevention Training:** Because misunderstood cultural differences are often a source of litigation, all personnel (commercial and non-commercial) should receive cultural sensitivity training to avoid misunderstandings that can lead to claims of discrimination or harassment. Furthermore, a reporting system should, and in some cases must, be in place to receive and resolve complaints of discrimination and harassment.
- **Personnel Handbooks for Commercial and Non-Commercial Personnel:** To ensure compliance with applicable laws and to help protect themselves if employment-related claims arise, foreign sovereign employers should consider preparing and

151 *Holden v. Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996).

152 *El-Hadad v. United Arab Emirates*, 496 F. 3d 658 (D.C. Cir. 2007).

153 *Elliott v. British Tourist Authority, et al.*, 986 F. Supp. 189 (S.D.N.Y. 1997).

154 *U.S., Segni v. Commercial Office of Spain*, 835 F.2d 160 (7th Cir. 1987).

155 *Lian Ming Lee v. Taipei Econ. & Cultural Representative Office*, 2010 U.S. Dist. LEXIS 66969 (S.D. Tex. July 6, 2010).

156 *Hijazi v. Permanent Mission of Saudi Arabia to the UN*, 403 Fed. Appx. 631 (2d Cir. N.Y. 2010)

157 *Butters v. Vance Int'l*, 1999 U.S. Dist. LEXIS 23721 (E.D. Va. 1999).

158 Individuals are not protected by the FSIA as they are not considered agents or instrumentalities of a foreign state. In 2010, the U.S. Supreme Court ruled, in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), that FSIA immunity does not apply in suits against foreign officials. Previously, most federal courts interpreted the FSIA to cover foreign officials as "agencies or instrumentalities" of the foreign state. This ruling may result in foreign officials having to resort to other pre-FSIA sources of immunity, such as State Department immunity suggestions and judicial interpretations of State Department policy. Historically, the State Department supported immunity in individual official cases where individuals acted in the course of their official duties. In such cases, the State Department submitted its suggestions of immunity through the Department of Justice to the courts before which the claims against the individuals have been filed.

distributing employee handbooks to their commercial staffs. The handbooks should set forth policies concerning, for example, hiring procedures, compensation, benefits, performance evaluations, discipline, unlawful harassment and discrimination, holidays, paid time off, leaves of absences, security, and information systems usage. Separate handbooks should be distributed to civil servant personnel that set forth the policies applicable to them during the periods they work in the United States.

- **Civil Service Audit:** A civil service audit that examines the nature of personnel work activities can help a sovereign employer ascertain which laws apply to specific individuals. Such an audit would include a review of all job descriptions, job responsibilities, and actual activity performed by all staff that may arguably be serving a civil servant or diplomatic function. Periodic performance evaluations and clearly defined roles and responsibilities can also be used to better establish which of a foreign sovereign's personnel are engaged in civil service and which in commercial duties.
- **Wage and Hour Audit:** Compliance with state and federal wage and hour laws is one of the most significant areas of liability for U.S. employers. To help avoid liability in this area, sovereign employers should audit commercial support staff to ensure compliance with federal and/or state wage and hour laws. These audits should include a review of exempt/non-exempt classifications, overtime pay calculations, meal and rest period scheduling, etc.
- **At-Will Employment:** In the United States, most employment relationships are "at-will," meaning both the employer and the employee may terminate the employment relationship at any time with or without cause, except that an employer may not terminate an employee based upon a protected category, such as gender, sex, race, or national origin. Sovereign employers should avoid situations where they limit their ability to terminate commercial employees at will by, for example, creating contractual relationships with employees.
- **Compliance with Group Health Benefit Plans for Personnel:** Foreign sovereign employers that provide group health benefits to commercial and civil service personnel in the United States should ensure that they are complying with applicable group health benefit plan provisions to avoid possible liability. A federal court in New York found that a term in a group health benefits plan that stated that covered persons may have right to file suit to pursue a claim for benefits was sufficient to waive sovereign immunity, even though the plan did not constitute a contract and did not state against whom such suits could be brought.[159] The court further noted that the provision of health benefits in the United States under an ERISA insurance framework constitutes commercial activity, even where the "covered person" under the plan was not a commercial employee.
- **Compliance with FCPA to Avoid Whistleblowing Claims:** Foreign sovereigns should take steps to avoid violations of the Foreign Corrupt Practices Act (FCPA), which can carry significant penalties, as well as retaliation and whistleblower claims under the FCPA and other state and federal laws. Such compliance measures include appointing a senior level ethics officer and adopting a comprehensive code of conduct that contains policies specifically tailored to the sovereign employer's risk areas. Examples of these risk-targeted policies include conflicts of interest, anti-bribery and corruption, gifts and entertainment, and anti-retaliation policies. All personnel should be required to review and sign the code of conduct, and the sovereign should provide live training on ethics and compliance for high risk positions. The foreign sovereign should also take measures to ensure that personnel can report any complaints or concerns internally without fear of retaliation. Such measures include designating a person to contact with complaints, creating an anonymous hotline or other reporting mechanism, standardizing procedures for responding to complaints and establishing an anti-retaliation policy.
- **Arbitration Agreements with Class Action Waivers:** Sovereign employers should also consider entering into arbitration agreements with their commercial support staff only. Arbitration is usually a less costly and faster method of resolving employee disputes than traditional litigation. Also, arbitration proceedings can take place in a language other than English. In addition, although there may be limited public disclosure of an arbitration award, if any, arbitration offers a greater potential for privacy than the public courtroom. An important feature of an arbitration program is that the sovereign's counsel helps select the arbitrator who will decide the case. Arbitrators chosen by the parties are likely to be more predictable than courts. Further, in arbitration, sovereign employers avoid the risk of litigating in unfamiliar forums, and may be able to minimize certain of the due process limitations they may face in some U.S. courts. Finally, in light of the escalating numbers of employment-related class actions filed

159 *Embassy of the Arab Republic v. Lasheen*, 603 F.3d 1169, 1171 (9th Cir. 2010).

in the United States, sovereign employers are well-advised to include provisions in such agreements that preclude employees from commencing or participating in class actions. For foreign government employers, however, all arbitration agreements must be carefully drafted to apply only to commercial employees and should be coupled with a civil service audit because arbitration can be a separate exception to immunity under the FSIA. Of course, a careful examination of each foreign sovereign's policies, customs, personnel contracts and, if applicable, treaties with the United States, must be undertaken before implementing an arbitration agreement or the other preventative measures addressed in this article.

D. Conclusion

Foreign sovereign employers are frequently confronted with the challenge of determining which federal and state employment laws apply to the different classifications of personnel working for them in the United States. As the FSIA is not a guarantee of immunity, foreign sovereign employers employing personnel to work in the United States should implement preventative strategies to minimize potential claims and develop strategies to best defend themselves should employment litigation ensue.

PART TWO: UNIQUE ISSUES FACED IN SPECIFIC JURISDICTIONS

XII. PROTECTING YOUR OPERATIONS IN LATIN AMERICA: RISKS AND OPPORTUNITIES IN THE REGION'S CURRENT LEGAL LANDSCAPE[160]

A. Latin America: A Land of Opportunity and Attendant Risks

Latin America is a place of unparalleled opportunity. Even so, every business venture will be well advised to carefully navigate through the landmines peppered through each jurisdiction's labor law field. In many ways, Latin America's labor and employment laws reflect the political history, traditions and values of the respective country, and offer a landscape distinctly different from what businesses are accustomed to in the United States.

This section addresses some of the most significant evolutionary changes within the labor laws context recently experienced in Latin America, identifying the potential risks inherent in conducting business in the region.

B. Mexico: A Law Reform, and Not a Mayan Apocalypse, Drastically Changes Mexico's Labor and Employment Law Landscape[161]

Mexico is an emerging economy, with a population of over 114 million people and an unemployment rate of 5.12%.[162] Small and medium-sized companies represent 99.8% of all companies in Mexico and employ 72% of all remunerated personnel. Over 13.7 million people perform some form of work for companies but are not formally employed by them or protected under the laws. In an apparent effort to address these realities, Mexico's government enacted a labor law reform, effective December 1, 2012.

For 43 years, Mexico's Federal Labor Law (FLL) had not been subjected to any significant modifications. As a result, the FLL had become obsolete with regards to addressing many issues arising in the modern workplace. Indeed, the FLL represented an obstacle to growth and productivity in a variety of contexts. The labor law reform significantly overhauled the FLL, modernizing the labor relations model and bringing with it extensive implications for employers with operations in Mexico.

Current Legal Landscape Post Mexico's Labor Law Reform

A summary of some of the key provisions of the labor law reform is as follows:

- **Heightened regulation over outsourcing.** The new law provides a new definition of outsourcing and impacts virtually every employer that retains service providers to perform functions that are integral to the business. The reform also imposes various penalties, including profit-sharing obligations, for employers who are deemed to have outsourced their workforce.
- **New causes for dismissal.** In Mexico, there is no "employment at-will". Accordingly, to avert liability for termination, employees can be dismissed only with cause. The amendment to the FLL adds bullying, sexual harassment in the workplace, and wrongful treatment of the employer's customers/providers as new grounds for termination with cause.
- **Back wages capped to 12 months.** One of the issues of greatest concern to businesses, including small and medium-sized businesses, is the availability of back wages as potential damages given the prolonged duration of labor trials. Under the new law, once the 12-month period has concluded, a monthly interest rate of 2% will be generated on 15 months of the employee's monthly wage, capitalizable at the moment of payment and once the labor trial has concluded. The law also allows for sanctions to attorneys and Labor Board officers who intentionally prolong the labor trial procedure.
- **New wage payment methods.** Employers are now allowed to issue payment of wages through direct deposit and other electronic means.

160 This session was moderated by Littler Shareholder Stefan Marculewicz. The panelists were Littler Shareholders Oscar De la Vega (Mexico) and Juan Carlos Varela (Venezuela), and Francisco Salas Chaves, Partner, BDS Asesores (Costa Rica). Littler also very much appreciates the valuable insights and contributions of attendees.

161 The discussion concerning Mexico's labor laws was led by Littler Shareholder Oscar De la Vega (Mexico).

162 Based on a 2010 census, Mexico's National Institute of Statistics and Geography ("Instituto Nacional de Estadística y Geografía") reported that Mexico's population had reached 112,336,538 people. (This data is available at http://www.inegi.org.mx/Sistemas/temasV2/Default.aspx?s=est&c=17484). Trading Economics, which tracks economic indicators for over 200 countries, estimates that Mexico's population grew to 114.8 million people by the end of 2012. (This data is available at http://www.tradingeconomics.com/mexico/unemployment-rate).

- **Hourly rates allowed.** Work can now be paid at an hourly rate, as long as the payment is never lower than the minimum wage required under Mexico law.
- **New kinds of employment agreements.** Employers are now allowed to set a probationary period of 3-6 months for new hires. Employers can also enter into seasonal agreements and initial training agreements. The probationary period may permit employers to have flexibility when determining whether a new hire should be retained or dismissed, without the risk of incurring liability, as long as the employer complies with various obligations.
- **Union democracy, transparency and accountability.** The reform repealed the "Closed-Shop" Clause, both within the contexts of hiring and separation. The reform also heightened the regulations to promote union transparency and accountability, requiring unions, among other things, to disclose union registration information, make collective bargaining agreements available to the public, disclose internal work rules, and provide detailed accounts of their administration of assets.
- **Maternity and paternity leave.** The reform provides various leave protections for employees for the birth or adoption of a child.
- **Training and productivity.** The reform establishes new regulations to increase productivity, one of them being that capacity and productivity shall be considered above seniority for purposes of awarding promotions. The reform also creates new governmental agencies to oversee the areas of training and productivity.

Additional Practical Considerations

Although Mexico's labor law reform modernized various aspects of the labor law field, the new regulations also create new uncertainties for employers. Employers therefore should review their policies and practices to ensure that their operations are in full compliance with Mexico's new Federal Labor Law.

By way of example, the new outsourcing regulations are impractical in their application and will substantially impact employers whose corporate structures depend on service companies to provide specialized functions. The profit-sharing obligations imposed by the reform also will likely increase the cost of business for many companies that have engaged in subcontracting (outsourcing). Employers therefore should engage legal experts to carefully review their operations, to determine whether their operations may be deemed as "illegal outsourcing" under the new laws.

Likewise, the employer-union relationship continues to be a controversial topic even after the reform. The amendments to the FLL fell short of protecting employers and workers from illegal strikes called by unions to coerce employers into entering into collective bargaining agreements without the necessary support from the workers. Multinational companies and companies subject to international framework agreements would be wise to assess whether their operations in Mexico, including their suppliers, honor (in theory and in practice) workers' freedom of association, as required by Convention 87 of the ILO. A preventive plan should include unified statements and actions to manage radical unions' coercive practices at a global level.

Despite its shortcomings, the labor law reform represents great progress and new opportunities for employers. Panelist Oscar De la Vega predicts that, under Mexico's newly sworn-in president Enrique Pena Nieto's government, the energy industry will experience drastic reforms, opening the field to new investors in what currently is a tight monopoly.

C. Central America: Overview of Labor and Employment Law Landscape[163]

The labor and employment laws in the Central American region generally cover the major areas such as individual labor rights, collective bargaining rights, conditions of employment, contracts, the enforcement of wage payment and benefit laws, employment termination and dismissals, the administration of social and workplace benefits, and the labor court system. Still, most labor codes remain outdated and obsolete, with regards to various areas, as they have not undergone significant changes since their original enactment.

The end result is that employers operating in Central America deal with laws that have not kept in pace with the times. While the labor codes may be flexible with regards to some areas (such as outsourcing and terminations), the same do not adequately regulate other areas (such as work schedules or payment of overtime) or provide the necessary clarity for the proper management of a modern workforce.

163 This discussion concerning Central America was led by Francisco Salas Chaves, Partner, BDS Asesores (Costa Rica).

Labor Law Trends in Central America

Costa Rica's Labor Procedure Reform of September 2012

Costa Rica, as a relatively small country, is a thriving economy, home to a substantial number of major businesses in multiple industries, including ecotourism, information technology, pharmaceutical exports, medical devices and software development, among others. Since its enactment in 1943, Costa Rica's Labor Code has undergone substantial modification only twice: in 1993 and through the recent "Labor Procedure Reform," which though approved by Congress in September 2012 is still not in effect pending resolution of a presidential veto.[164] This recent bill, which aims to expedite the labor litigation procedure and strengthen bargaining and union rights, fails to address most of the common problems arising in a modern workplace.

El Salvador's Recent Changes to Its Labor Code

El Salvador is home to several major "call centers" and is experiencing continuing growth in that industry. El Salvador's Labor Code was enacted in 1972 and since then has been modified only in very limited part. In November 2011, the government enacted new laws for the prevention of work-related risks and accidents. In August 2012, a new law was enacted for the creation of new jobs to employ young people with no previous employment experience.

The general law for the prevention of work-related accidents established committees charged with the responsibility of preparing yearly plans to prevent and reduce the number of work-related accidents. The Ministry of Labor is charged with enforcing the regulations, and regularly conducts inspections of workplaces to monitor compliance. Multiple companies have reported that corrupt labor inspectors utilize these inspections as a coercive mechanism for personal gain.

The general law to promote employment for young people (mentioned above) grants tax benefits to companies that hire individuals who are between 18 and 29 years old and who have no previous job experience. This law is not well received by employers since qualifying for the tax credit requires extensive paperwork for a relatively small tax break. Even so, it is predicted that this law will benefit the "call centers" industry, which continues to grow significantly and typically hires young people.

Labor Law Trends in Costa Rica Compared to Other Countries in Central America[165]

Terminations Under a *Quasi* At-Will Employment Doctrine

Except for Costa Rica and El Salvador, labor laws in Central America generally do not allow much flexibility in the area of terminations. Unlike virtually the rest of Latin America, Costa Rica and El Salvador follow a variation of the employment at-will doctrine, where any employee can be terminated at any time, and any employee can resign at any time.

In contrast, in Panama and Honduras, employers are not allowed to terminate, unless just cause exists under the country's labor code. In cases of dismissals without cause, employers typically pay highly valuable consideration to enter into private agreements to compel a voluntary resignation and avoid liability.

The caveat to Costa Rica's *quasi* at-will employment doctrine is that the employer may be subject to liability when the cause of the termination is not recognized under the Labor Code. Accordingly, where the basis for the termination falls under one of the enumerated causes of termination with liability (termination with just cause), the employer will not be obligated to pay severance and/or give notice to the employee. If, on the other hand, the termination is without just cause, the employer may nonetheless proceed with the termination, but will be required to pay the employee severance and, depending on the case, pay for the notice period as well. Similarly, where the termination is based on a breach of contract, the employer must establish that the breach was serious and the penalty of termination was proportional to the alleged breach.[166]

164 Costa Rica's president vetoed a part of the bill that dealt with strikes in essential services industries, declaring that such provisions were unconstitutional. In the upcoming days, the government will decide which provisions of the reform initiative will be promulgated into law.

165 For a more detailed analysis of Costa Rica's labor laws, see the Costa Rica chapter of The Littler Mendelson Guide to International Employment and Labor Law (Third Edition).

166 In El Salvador, an employee who is discharged with cause will be owed any earned wages and prorated benefits, if any. Where the termination is without cause, the employee will be owed severance payment, in an amount mandated by law based on the employee's years of service.

Limit to Back Pay and Expedited Labor Proceedings

Once promulgated as law, Costa Rica's Labor Code reform will revamp the labor procedural system, converting it from one done on the pleadings to one handled entirely in an in-person hearing. The reform will also cap the back salaries at 24 months.

Additionally, the reform will establish an expedited procedure for claims of unfair dismissals. This new procedure will allow litigants to seek a reinstatement order from a judge through a special procedure, rather than proceeding with filing a formal lawsuit. These changes likely will reduce the litigation cycle from three years to approximately six to eight months.

Employers should brace for the possibility that litigation will dramatically increase as, under the reform, employees will be able to rely on a court clerk to draft their lawsuits. The expedited nature of the labor proceedings also will likely discourage employees from settling their disputes as they may prefer to wait for the resolution of their case.

Anti-Discrimination Laws

Despite Costa Rica's *quasi* at-will employment doctrine (discussed above), employers generally are prohibited from terminating an employment relationship on the basis of a recognized protected category. Additionally, some categories of employees (including pregnant or underage workers, union leaders, and employees claiming sexual harassment) cannot be terminated, unless the employer follows a special procedure establishing just cause for the termination.

Though lawsuits based on discrimination claims are not common, there has been an increase in this type of litigation. The Labor Code currently recognizes only some protected categories (including age, race, gender and religion). The courts have recently systematically expanded the reach of the anti-discrimination laws. Once signed into law, the reform will codify a series of important judicial decisions expanding the country's current anti-discrimination laws to include additional categories, such as sexual orientation, marital status, union affiliation, political affiliation, and social background.

Therefore, employers should avoid any practice that may generate discrimination claims. Additionally, employers are advised to review their company policies and practices to ensure that their employment decisions (including hiring, discipline and terminations) comply with the country's broad prohibition against discrimination in the workplace.

Unionization

One controversial aspect of the reform focused on the circumstances under which providers of essential services (such as hospital workers and the police force) may go on strike. Such controversy caused Costa Rica's president to veto a part of the reform that restricted the government's right to hire temporary staff to replace the striking workers. As a result, the whole reform initiative was returned to Congress for reconsideration. Whether the vetoed language will remain as part of the reform is unclear.

Regardless of the outcome of that controversy, the reform will establish 50% as the minimum percentage of workers required to legally begin a strike. Given the wording of the bill, 50% may be interpreted as requiring just 50% of those present in assembly. Therefore, theoretically, a strike will be considered legal if 50% of the employees who are present in an assembly declare a strike.

The soon-to-be enacted law will likely impact only a few employers, as union organizations operating in Costa Rica are relatively small and only approximately 7% of the population is unionized—consisting of 5% in the agricultural industry and 2% in the private sector—in contrast to higher unionization rates in most countries in the rest of Latin America. In fact, Costa Rica's low unionization rate has been a driving factor for many companies that relocate their business from other Latin American countries to the more flexible business environment found in Costa Rica.

Outsourcing

Outsourcing is common all across Central America and it is minimally regulated. However, Costa Rica courts have imposed joint liability on companies found to be co-employers, where the companies outsourcing their services have retained some form of control over the subcontractors' employees.[167]

167 *See* the Costa Rica chapter of The Littler Mendelson Guide to International Employment and Labor Law (3d ed. 2012).

Additional Practical Considerations

Each jurisdiction in Central America has its set of regulations. Before launching a new venture anywhere in the region, employers should seek competent legal counsel for a complete analysis of the legal landscape specific to the company's field or industry. Virtually each country in the region has very specific requirements concerning employment contracts, schedules, work shifts, and/or terms and conditions of employment. As such, employers should ensure that their internal policies and operational procedures are aligned with the legal mandates of the country where the company will conduct business.

D. South America: A Panoramic View of Labor and Employment Law in the Region and Practical Considerations for Employers Based in the Region[168]

At the dawn of this century, most countries in South America had enacted labor laws that disproportionately protect employees, making these laws a permanent part of the labor law landscape. Accordingly, companies and foreign investors conducting business in the region face high risks, including arbitrary government expropriation of their assets.[169]

Forming an Employment Relationship

Virtually every country in South America holds the doctrine that an employment relationship generally exists where an individual renders services under the subordination or dependence (legal, technical or otherwise economic) of another, in exchange for remuneration. Where a conflict exists between the worker's performance and what the parties agreed, labor courts typically disregard the contract language (if one exists, for example, identifying an independent contractor relationship) and base their decision on the actual performance, generally finding an employment relationship and disregarding the agreement reached by the parties. For example, in Argentina, Brazil, Colombia and Venezuela, the hiring of an independent contractor generally is treated by the labor courts of those jurisdictions as the hiring of an employee.

In the absence of an employment contract, an employment relationship will be presumed if the elements are present. Where an employment relationship exists, whether by contract or through a finding by a labor court, the employee is automatically entitled to all employment benefits available under the law, and the contracting party will be required to incorporate the employee into its payroll and perform all employment-related obligations, retroactively and prospectively for that employee.

While the employment relationship presumption may trump what may appear to be a perfect contract, employers should nonetheless take proactive steps to determine whether liability may be imposed retroactively due to what the relevant labor authorities may consider to be independent contractor misclassification.

Compensation: Minimum Wage and Benefits

Most countries in South America mandate a minimum wage and require an annual mandatory salary increase across the board. Generally, the annual increase to minimum wage is based on an inflation rate determined by the government. Therefore, when adjusting salaries, employers should be mindful of the jurisdiction's minimum wage rate requirements.

Benefits generally are fairly favorable to employees and can be very costly to employers. Most jurisdictions mandate payment of overtime, paid holidays, mandatory weekly rest, a Christmas bonus, in addition to paid vacation days which may range from 15 to 35 continuous days. Generally, the number of paid vacation days will be contingent upon the employee's seniority.

Profit-sharing benefits also are common in the region. In Chile, a company is required to distribute 30% of its annual profits to its employees. In Venezuela, the contribution must be at the 15% level, based on the company's annual net income. Peru's profit-sharing system sets percentage levels based on the company's industry.

Employers should be mindful that some jurisdictions have a strict interpretation of the concept of "equal pay for equal work." So, for example, in Colombia, if an employer decides to grant additional pay to an employee based on performance, it may create grounds for another employee in the same position to claim the same amount in compensation on the doctrine of "equal work, equal pay."

168 This discussion concerning South America was led by Littler Shareholder Juan Carlos Varela (Venezuela).

169 For detailed analysis of the labor laws of various countries of South America, including Argentina, Brazil, Chile, Colombia and Venezuela, see those chapters in The Littler Mendelson Guide to International Employment and Labor Law (Third Edition).

While other countries may not be as rigid as Colombia in requiring "equal pay for equal work" across the board, employers should be mindful that, in most Latin American jurisdictions, any changes in compensation—even a one-time bonus—may trigger additional employer obligations and change the employee's overall compensation package, including the amount of vacation days, vacation bonus, profit-sharing contribution, and severance payments owed to the employee.

Since employers are not required to provide additional compensation from what is mandated under the law, employers should grant additional pay with caution, being especially aware of the compensation requirements for the jurisdictions where they operate before altering employees' compensation. Additionally, where the employment relationship is governed by a collective bargaining agreement, the employer should be especially aware of any CBA provisions restricting the employer's ability to unilaterally award additional pay.

Terminations and the Ensuing Consequences

None of the countries in South America follow the at-will employment doctrine. However, with the exception of Venezuela, most jurisdictions in the region allow employers to pay a severance package as indemnity for termination.

In Venezuela, employers can discharge an employee only with cause and with prior authorization from the government. The government's labor inspectors virtually never authorize a discharge, so employers typically are compelled to negotiate the termination to prompt the employee's voluntary resignation. Given these constraints, employers are advised to seek legal counsel before discharging an employee in Venezuela.

In Brazil, as in most countries in Latin America, a collective bargaining agreement generally affords greater employee protections from termination than what are provided under the law, thereby significantly restricting employers' ability to discharge employees even with cause.

Some countries in Latin American require a settlement agreement and/or release of claims to be properly ratified before a competent labor board or inspector officer, for the agreement to be enforceable. However, a release of claims may prove to be futile in Brazil where its law prohibits the waivability of labor rights. As a result, labor litigation in Brazil is unparalleled, allowing multiple suits by the same employee, against the same employer, and for the same underlying termination, regardless of whether the employee had already received valuable consideration in exchange for a release of claims.

Employers therefore would be well advised to seek assistance from competent legal counsel before terminating an employment relationship anywhere in Latin America or compelling the voluntary resignation of an employee in lieu of a termination by offering consideration in exchange of a release of claims.

Outsourcing

The treatment of outsourcing varies from country to country in the region. While outsourcing is permissible or not regulated in some countries, it is highly regulated or prohibited in others.

In Venezuela, for example, the new Organic Law of Labor and Workers (known as the "LOTTT", for its Spanish acronym), enacted on May 7, 2012, prohibits any form of outsourcing done with the purpose of committing fraud or circumventing the labor laws. While hiring contractors is not *per se* prohibited, the contracted services must be performed using the contractors' (the service provider) own means and employees. Nonetheless, the contractor and beneficiary of the service may be held jointly liable for all employment-related obligations if the service is deemed "inherent" or "connected" to the beneficiary's main activity. Failure to comply with the outsourcing regulation can expose the company to various governmental actions, including imprisonment and government seizure of assets.

In contrast, Colombia's regulations not only permit outsourcing, but also impose obligations on the outsourcing company to render the services with technical and administrative autonomy. Once a contractor enters into an agreement to provide services to another company (the beneficiary of the services), the contractor will be deemed to be the actual and unique employer of the individuals performing the services. Accordingly, the contractor will be responsible for all employment obligations relative to its employees.

Employers should keep in mind that the general presumption in the region is that an employment relationship exists unless clearly established otherwise. Therefore, even where outsourcing is not highly regulated, employers nonetheless should avoid creating relationships of dependence or subordination—such as when services are performed by persons in high managerial positions or positions of confidence and trust—to prevent claims of joint employment.

Employer-Union Relations

Argentina and Brazil require that employers join a union as soon as the company's articles of incorporation are filed and even before hiring a workforce or opening for business. In those jurisdictions, employers essentially lack the freedom to determine their employees' compensation and benefits, as the compensation package generally is determined by the agreements negotiated with the union.

Many union organizations in South America are engaged in coercive practices, demanding payment from workers in exchange for jobs, and a chief complaint from employers is that the government does not effectively protect them from this corruption. Given the corrupt practices, union-related disputes in Colombia, Venezuela and Brazil are common, and have proved to be dangerous and, at times, deadly.

Before joining a union, employers are advised to seek competent legal counsel to identify the unions that operate within the industry related to the employer's core business activity. Employers also should rely on local legal counsel for any union-related dispute, whether the dispute was initiated by the workforce or the union.

E. Final Thoughts for Employers in Latin America

In the famous words of the wise Mahatma Gandhi, "leadership at one time meant muscles; but today it means getting along with people." If a show of strength ever was an answer for employers, it certainly is not the answer now given the current landscape in Latin America. Employers therefore are encouraged to seek innovative ways to bring their business operations into full compliance with the local laws, while simultaneously deriving the necessary profits to make the venture a thriving proposition. Such innovation will require able legal counsel to design successful methods to prevent legal liabilities in this promising, albeit challenging, environment.

XIII. PANEL DISCUSSION ON TENSIONS AND WORKPLACE DISRUPTIONS IN CHINA: EVOLVING LABOR CHALLENGES AND NEW RULES ON THE DEMOCRATIC MANAGEMENT OF ENTERPRISES

A. Introduction

The People's Republic of China (PRC) transitioned to a market economy approximately 20 years ago. Since that time, the PRC has drawn immense foreign investment given the comparatively inexpensive cost of labor. Despite this investment, no comprehensive national legislation governing labor or employment existed until 1995, when the *Labor Law of the PRC* ("Labor Law") became effective. Until that time, legislation was scattered across hundreds of policies, rules and regulations at the national, regional and local levels.

This section discusses the historical perspective of PRC labor law, and then highlights recent developments to assist employers, and especially foreign investors, to understand the current and future labor environment in the PRC.[170]

B. Labor Law in China—A Historical Perspective

Until the Labor Law, there was no single statutory source governing employment-related issues. This dynamic made it relatively easy for employers to dictate the terms and conditions of an employment relationship – a historical incentive for foreign investment.

The Labor Law provided the first comprehensive set of labor regulations in China, and contained a number of protections for employees including provisions related to employment contracts, work hours, wages, leave, job safety, labor disputes, social insurance and welfare. However, despite these relatively new and robust protections, the Labor Law did not sufficiently cover key aspects of the employment relationship. For example, the Labor Law's specific provisions relating to employment contracts were limited and not nearly sufficient to protect either employers or their employees.

The Employment Contract Law (ECL), effective January 1, 2008, remedied those statutory gaps. Among other items, the ECL requires employers to provide written employment contracts to each of its full-time employees one month after they are hired. Otherwise, the employer must pay double wages to the employee for every month that it has failed to sign a contract beginning from the 2nd month and, at one year, an open-ended contract will be deemed to be in place. Although 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 to avoid the accompanying legal obligations.

170 This chapter is based on a presentation moderated by Litter Shareholder Robert Millman. The presentation began with Mr. Guo Jun, the Deputy Secretary General of the All-China Federation of Trade Unions (ACFTU), who discussed significant developments associated with the ACFTU's Rules on the Democratic Management of Enterprises. Thereafter, attorneys Jesse T. Chang and Dr. Isabelle Wan, of the Chinese law firm TransAsia Lawyers discussed key developments in PRC labor law, the increase in collective labor actions, and the accompanying due diligence considerations for companies seeking to make foreign investments in China. We gratefully acknowledge the contributions by these guest speakers, and this summary is based on their presentations.

However, since the ECL was introduced, according to statistics received by relevant authorities in the last quarter of 2011, nearly 97% of large companies in China had signed written employment contracts by the end of 2010.

In addition to dramatically increasing the number of contracted employees in the PRC, the ECL has dramatically increased the amount of collective actions in the PRC. This phenomenon was discussed at length during the presentation, and the guest speakers' insights are summarized below.

C. The ACFTU and the New Rules on the Democratic Management of Enterprises

The ACFTU is China's largest union. Founded in 1925, the ACFTU was established to monitor workplace tranquility between managers and workers. The ACFTU comprises 31 provincial trade union federations, 10 national industrial unions and myriad local trade union organizations. To say the least, the ACFTU has had a dramatic role in shaping the evolving dynamics of Chinese labor markets.

To that end, 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 ACFTU's overall target is to have the total number of legal persons in trade unions reach six million or more. The ACFTU believes that every foreign invested enterprise should prepare itself for the inevitability that its Chinese employees will be represented by a trade union. A representative from the ACFTU commented on the differences between the labor-management tradition in the United States and China. He emphasized that Chinese trade unions are more deeply entrenched in the actual enterprises of the workers that they represent. This dynamic fosters a more productive working relationship between trade unions and enterprise management. This approach facilitates workers (and their representatives) having a meaningful and democratic role in how an enterprise is managed, which stabilizes the balance of power between workers and their employers.

In the view of the ACFTU representative, China's labor market, once predicated on low-cost labor, is unsustainable and must develop to remain competitive globally. He discussed how workers' democratic involvement in the management of their enterprises will spur the innovation necessary to allow China's labor market to evolve. Companies seeking to invest in China need to be prepared for China's trade union presence, as well as trade unions' aspirations to become more intimately involved in management decisions.

D. Due Diligence for Foreign Invested Enterprises

Attorneys from the PRC continued the presentation by discussing additional key matters that foreign investors need to consider. They emphasized the need for foreign investors to have a clear understanding of the labor law implications of any contemplated Chinese operations. They also focused on the increasing prevalence of collective labor actions in the PRC. This growing trend should be of particular importance to companies seeking to make investments in the PRC. Such companies are advised to conduct professional and detailed due diligence. If not, any of the non-compliance issues could trigger collective actions and cause dramatic financial and other impacts.

Chinese employees have become savvier, and have used the threat of a potential or actual collective action as a bargaining tool. If demands are not met, which at times even exceed the financial resources of their employers, some employees have escalated their concerns to the media. Collective actions are time-consuming and costly, and must be considered as part of any due diligence review with experienced counsel.

In an effort to define the issue, the attorneys from the PRC presented an overview of 180 major collective disputes from January 2010 to February 2012. Highlights of these findings included:

- Collective actions were rather evenly divided into three general categories:
  - Disputes alleging wrongful dismissal, and accompanying unpaid severance and other compensation (*e.g.*, overtime pay and unused statutory annual leave);
  - Disputes alleging illegal withholding or deductions, as well as violations of minimum wage and overtime requirements; and

  - Social Insurance (pension, medical, unemployment, medical and work-related injury benefits) and housing fund-related disputes, alleging unpaid or underpaid social insurance and housing fund contributions.
- Almost half of the collective actions were in the manufacturing sector.
- The vast majority of these collective actions involve more than 50 employees, with most lasting between 2 and 10 days, but some lasting longer than a month.

E. Practical Considerations

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

- understand the trade union dynamic in the industry in which you plan to invest, and be prepared to receive demands that a representative trade union take part in decisions that are traditionally reserved for company management;
- review their employment contracts and human resources policies to confirm that they comply fully with the ECL;
- confirm that employees have been appropriately and fully paid their benefits—including social insurance, housing fund and other benefits—as well as their wages, including overtime;
- understand whether there are any pending (or potential) labor disputes, whether they are arbitration or litigation matters and also understand the statutory limitations on different claims;
- try to become familiar with current employment law (both national law and relevant local rules), including the provisions on collective wage bargaining, and be prepared to deal with both collective bargaining procedures and an increase in the minimum wages or 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.

XIV. EMPLOYMENT LAW CHALLENGES FACING MULTINATIONALS IN ASIA AND FACING ASIAN COMPANIES IN THE UNITED STATES[171]

A. Introduction

This program brought together lawyers from diverse Asian countries, as well as in-house lawyers with substantial experience navigating their corporate clients through legal employment law challenges that often have their root in differing cultural as well as legal expectations.

B. Emerging Trends—The Impact of Cultural and Legal Differences or "Don't Throw Sand in Someone Else's Rice Bowl"

As the largest and most populous continent in the world, Asia is composed of a wide variety of ethnic groups, religions, cultures, environments, economic structures, and governmental systems.[172] With approximately 4.3 billion people, the Asian continent hosts 60% of the world's current human population, and it should come as no surprise that Asia is considered the most diverse continent.[173]

171 This session was led by Littler Shareholder Philip M. Berkowitz. The other panelists were Selvamalar Alagaratnam, (SKRINE, Malaysia); Joseph S. Kendy (Former Senior Vice President, General Counsel and Secretary, Shiseido Americas Corporation); Masahiro Matsuoka (Nagashima Ohno & Tsunematsu, Japan); and Daniel Rosenblum (Japan Society, New York).

172 http://www.worldatlas.com/webimage/countrys/as.htm

173 http://www.nationsonline.org/oneworld/world_population.htm

Varied Legal Systems

In Asia, we find common law systems based on the English influence in Singapore, Hong Kong and India, and civil law systems (similar to the European Continental tradition) in China, Japan and several other nations.

The concept of at-will employment prevalent in the United States generally does not exist in Asia, where employees are virtually guaranteed their jobs pursuant to written agreements or codified law. In many Asian countries, once an employee is hired, he or she has a right to that job and can only be discharged for specific circumstances, and is often entitled to significant severance payments. For example, in Malaysia, an employer can only discharge an employee for cause after a stringent process. A trade union employee may be reinstated to his position or may be awarded back pay (up to 24 months) and compensation (calculated on the basis of one month's salary for each completed year of service).[174]

And, it is not uncommon for U.S.-based companies to discover that Asian countries provide more generous medical and parental leave to local employees.

Japanese labor laws and court precedents are very protective of and favorable to employees. In many matters, it is not easy for employers to succeed against employees in a labor dispute. This is particularly true regarding dismissal of employees, which is only allowed based on objectively reasonable grounds, in very limited situations.[175] If an employee successfully challenges the effectiveness of a unilateral termination of employment, the legal remedy is reinstatement of the employee.

The employment law framework in the People's Republic of China (PRC or "China") is also a complex web of national and provincial laws, rules and regulations.

Communication Style: Beyond Language

U.S. communication style, which can be direct and blunt, may be perceived as rude in Asia. Comments that are acceptable in the United States, such as "cut heads by 10 percent," may be perceived in a negative way by local judicial systems.

The non-confrontational style of communication predominant in some Asian countries may hinder an employer's ability to impose discipline or dismiss an employee for performance problems. In Malaysia, for example, managing performance by noting deficiencies can be equated with the cultural concept of "throwing sand into someone's rice bowl," which means interfering with the person's ability to make a living.

Another cultural distinction that can pose a challenge is the lack of understanding by U.S.-based companies of collectivist models. Asian employees may be more focused on working for the common good of the company and may be reluctant to express issues of concern until it is too late to implement remedial measures. Similarly, decision-making can take longer because local managers may want to obtain the input of everyone on their team.

Thus, in Japan, it is not unusual for a supervisor to point out a mistake of a worker in a group meeting. This is because of the strong focus on teamwork in the Japanese culture. Of course, this practice may backfire in the United States, where an individual is likely to feel singled out and resentful if a mistake is mentioned openly. Here, an employee expects to be confronted privately about performance problems.

On the other hand, American cultural propensity for overpraising (from the Asian perspective) (*e.g.*, recognizing an employee for some small contribution), can pose problems in the defense of wrongful dismissal claims. Asian culture generally does not provide praise for simply doing what is expected, so courts can perceive an acknowledgment as contradicting claims of poor performance. Another cultural phenomenon that can pose a challenge to objective performance evaluations is the entrenched norm of "saving face" and avoiding insulting someone.

Another cultural distinction that impacts the workplace is respect based on age and rank. By way of example, in Japan an employee is expected to avoid looking a superior in the eye or approaching a superior to speak directly with him or her.

Non-Discrimination Laws: A Foreign Concept

U.S. employment discrimination laws generally have extraterritorial effect. That is, U.S.-based companies and their subsidiaries can be sued for overseas discrimination against U.S. citizen employees. These restrictions, though, can be difficult to enforce overseas, where

174 Industrial Relations Act, sec. 30(6a) and 2nd Schedule.

175 Labor Contract Law, art. 16.

discrimination may or may not be illegal, and indeed, where some kinds of discrimination are mandated by local law. An employer may defend itself from a claim that it violated U.S. law in its overseas employment practices if it can prove that complying with U.S. anti-discrimination law would cause it to violate local law. It is not enough to show that the laws are inconsistent; instead, the employer must show that complying with U.S. law would result in an affirmative violation of local law.

While a few Asian countries, including Japan and China, have developed a legal framework for nondiscrimination in employment, others, such as Malaysia, Singapore, and Vietnam, have not.[176] Even in countries where discrimination and harassment laws have been enacted, it often is not culturally acceptable for employees to assert their rights under the laws. An employee subject to sexual harassment in Malaysia, for example, is likely to be treated with contempt and ridicule if she comes forward to complain. As a result, claims are rare even where protections exist.

Protections afforded in some U.S. jurisdictions to lesbian, gay, bisexual, and transgendered (LGBT) employees are not recognized in most Asian countries. In some countries, gender identification beyond traditional male/female roles is a punishable crime. These laws may prevent a multinational corporation from providing benefits to same-sex couples or from recognizing domestic partnerships.

Thus, other countries' struggles with bias based on race and color and accepted social norms can conflict with the obligations and commitment of U.S. anti-discrimination laws. Asian nationals may face challenges adapting to U.S. equal employment concepts and can subject their foreign employers to liability.

Mandatory Retirement

In most of the world, including Asia, mandatory retirement on the basis of age is perfectly legal, and is fully accepted as a normal part of the employment cycle. Even the recently enacted prohibitions against age discrimination in Europe do not prohibit mandatory retirement—to the contrary, the focus of these new prohibitions seems as much to prohibit discrimination against *younger*, as against older, employees.

On the other hand, in the United States, mandatory retirement on the basis of age is prohibited by federal, state, and local laws. The Age Discrimination in Employment Act of 1967 (ADEA)[177] prohibits discrimination in any term or condition of employment on the basis of age against individuals age 40 or over.

As might be imagined, this contradiction may lead to problems for U.S. subsidiaries of foreign companies, whose parent companies may require age-based retirement overseas, but which practice may violate the ADEA.

Special risks and issues surround the employment of expatriate employees in the United States (commonly also referred to as "rotating" or "rotational staff"). The U.S. laws prohibiting employment discrimination generally apply to all employees working in the United States, and a U.S. subsidiary of a foreign company should consider the possibility that expatriate employees of the parent will be considered by a U.S. court to be protected by U.S. laws against age discrimination. However, some courts have recognized that expatriates may not be considered employees of the U.S. subsidiary, but instead are employed by the *foreign parent*.

Special Defenses for Foreign Employers

Foreign companies doing business in the U.S. generally must comply with federal, state and local laws prohibiting discrimination in employment. However, special defenses may protect foreign companies. The scope of these defenses' application as to U.S. *subsidiaries* of foreign companies has been somewhat unsettled.[178]

At least two dozen countries have entered into treaties of Friendship, Commerce, and Navigation ("FCN Treaty" or "Treaty"), most of which were implemented in the aftermath of World War II in an effort to encourage post-war economic growth. These treaties generally include an "employer choice" provision, similar or identical to that used in the 1953 FCN Treaty between the United States and Japan, which provides: "Companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."[179]

176 *See* The Littler Mendelson Guide to International Employment and Labor Law (3d ed., 2012).

177 29 U.S.C. §§ 621-34.

178 Philip M. Berkowitz, *Discrimination Claims Against Foreign Companies: New Developments* (Mar. 11, 2010).

179 Almost all of the case law related to FNC applicability is based on this language. *See* Gerald D. Silver, *Note: Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The right of branches of foreign companies to hire executives "of their choice,"* 57 Fordham L. Rev. 765, 768-69 (1989).

Employer choice provisions were proposed to dodge the severe percentile limitations that foreign governments required on the employment of *Americans* abroad.[180] By allowing businesses to select key personnel from their own country to work in the participating country, governments could encourage international investment.

Relationship Between the FCN Treaty and Title VII

U.S. Title VII prohibits discrimination in employment against "any individual" on the basis of race, color, religion, sex, and national origin.[181] The law covers U.S. citizens and aliens alike. Accordingly, an American employee of a foreign company (or its U.S. subsidiary) who is subjected to adverse employment action—*e.g.*, termination, demotion, or reduction in compensation—may sue his or her employer under Title VII, alleging that the adverse action was motivated by the employee's national origin (*i.e.*, American) or race (*i.e.*, non-Asian).

The employer choice provision provides immunity only insofar as the foreign company discriminates in favor of its own citizens for one of the select employment positions named in the Treaty—thus, it does not immunize covered entities from all manner of otherwise unlawful discrimination, such as age and gender, nor does it necessarily protect discrimination on the basis of national origin (although as far as countries with homogenous cultures like Japan and Korea are concerned, this distinction may be difficult to unravel).[182]

Parties Entitled to FCN Treaty Protection

The extent to which U.S. *subsidiaries* of foreign companies (as opposed to the parent itself) can rely on the Treaty as a defense is not entirely settled. In 1982, the U.S. Supreme Court held that a U.S. subsidiary of a foreign company cannot directly invoke the protections of an FCN Treaty. In *Sumitomo Shoji America, Inc. v. Avagliano*, female employees brought a class action against Sumitomo, a New York subsidiary of a Japanese company, claiming that Sumitomo's practice of hiring only Japanese males to fill key managerial positions violated Title VII's prohibition against gender and race discrimination.[183] The Court held that the subsidiary was not protected by the FCN Treaty. Nevertheless, the Supreme Court expressly left *undecided* whether a U.S. subsidiary of a Japanese company could *vicariously* assert the FCN Treaty rights "of its parent" when faced with an employment discrimination claim.

C. Practical Considerations

Functioning effectively in a global market requires an understanding of how employment laws differ significantly from country to country. Managing employment issues in Asia as a multinational corporation is a complex undertaking. Following are practical recommendations:

- Consider how the employment relationship differs in each country where the corporation seeks to establish operations.
- Consider the impact of local laws when transferring employees.
- Develop communication guidelines when communicating with Asian subsidiaries and affiliates about employment-related matters.
- Train executives and managers on the key legal and cultural distinctions, including:
  - understanding the interaction between U.S. employment laws and those of other jurisdictions;
  - "at-will" employment v. employment contracts;
  - best global practices for lawful hiring, performance management, and terminations;
  - extraterritorial application of U.S. labor and employment laws;
  - understanding employment laws in the country/countries within the decision maker's area of responsibility;
  - understanding layoffs and redundancies;
  - understanding discrimination, harassment and retaliation laws across the globe;
  - understanding noncompete agreements and trade secrets;
  - understanding medical issues, leaves and vacation obligations;

180 Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 375, 386 (1956).

181 While discrimination based upon *citizenship* status does not necessarily violate Title VII, the Supreme Court has held that Title VII prohibits such conduct when it has the purpose or effect of discrimination based upon national origin. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 180 n.4 (1982).

182 *Ventress v. Hawaii Aviation Contract Servs., Inc.*, 2007 U.S. App. LEXIS 9289 (9th Cir. Apr. 24, 2007).

183 457 U.S. 176 (1982).

– privacy issues; and

– responding to and investigating claims.

XV. INTERNATIONAL EMPLOYMENT LAW UPDATE – 2012

A. Introduction

Across the globe in 2012, workplace legal disputes continued to be played out before courts, tribunals and arbitrators. New legislation was also introduced and adopted. This section[184] provides a brief summary of some of the employment and labor law developments around the world in 2012. The summary is not exhaustive—no doubt many significant developments have been omitted. However, a representative sampling of the sorts of claims and issues that continue to arise in the context of global labor and employment law are provided below. We have also endeavored to identify some decisions that are "quirky" and, perhaps, a bit amusing.

The update is divided into 10 segments:

- Cross-Border Employment Agreements
- Employment Discrimination
- New Statutes
- Outsourcing and Layoffs
- Wage and Hour
- Independent Contractors
- Can you get fired for that?
- The Electronic Workplace
- Workplace Climate
- Littler's Case of the Year

B. Cross-Border Employment Agreements

UK and USA: Globe Trotter

An employee was initially hired in New York, transferred to Tokyo for a time, and then transferred again to London. While in London, his employer prepared, and he signed, a new employment agreement. The agreement designated London as the employee's primary place of business, and stated that English law will govern his employment. The Agreement stated:

> "Any dispute arising hereunder shall be subject to the exclusive jurisdiction of the English courts."

The employee was laid off in 2011. He brought suit in New York federal court, alleging claims for employment discrimination under U.S. law—the Americans With Disabilities Act. He also brought claims under New York State anti-discrimination law, and New York City anti-discrimination law.

Three days later, he brought suit in England under English employment law for unfair dismissal, whistleblowing and unlawful deduction of wages. He did not assert any discrimination claims there.

Later, he withdrew his claim in the English courts, citing the high cost of litigation there as the principal reason. (Apparently litigating in New York City is a bargain, by comparison!)

His employer moved to dismiss the claim in U.S. federal court, citing the forum selection clause in the Agreement and alleging improper venue. The employee responded that the forum selection clause covered only: "any dispute arising hereunder." Accordingly, he argued that the forum selection clause applied to contract claims only, but not to statutory claims, such as those arising under the ADA.

184 This chapter is based upon the presentation led by Littler Shareholder Bruce Sarchet (Sacramento). Panelists were: Rafael Aguiló-Vélez of Schuster Aguiló (Puerto Rico); Jeffrey Goodman of Heenan Blaikie (Canada); Bartlomiej Raczkowski of Raczkowski i Wspólnicy (Poland); and Littler attorney Anita Vadgama (Boston).

In support of this argument, the Employee pointed to New York law regarding enforcement of employment-based arbitration agreements. Under that law, arbitration agreements with similar language ("any dispute arising hereunder") have been found to not mandate arbitration of statutory claims.

However, the federal court concluded that UK law, not New York law, should be applied to interpret the forum selection clause. In England, discrimination claims may only be brought if the employment relationship is predicated upon the existence of a valid contract. Therefore, under the law of the UK, the employee's discrimination claim technically "arose under the agreement." The U.S. Court therefore enforced the forum selection clause and dismissed the U.S. claims.[185]

A few practical suggestions can be drawn from a study of this case. Of course, careful drafting of employment agreements is always required. However, the traditional approach taken by employers in drafting forum selection clauses in cross-border employment agreements (*i.e.*, where do we want to be sued?) may not be enough. Instead, employers should consider all the countries where a legal claim might arise, and should carefully evaluate all of the unique substantive and procedural legal issues that could arise under those legal systems. The agreement should then be drafted taking those issues into full consideration. This case provides only one example of such issues: the difference between statutory and contractual claims. Dozens of other examples also exist.

C. Employment Discrimination

Northern Ireland: Out-of-Work Discrimination

A job applicant was seeking a job with a community outreach and development Partnership in Londonderry. She had been out of the workforce for six years, to care for her children. The Partnership set a hard and fast "shortlisting" requirement for applicants: at least two years of relevant experience in the past five years. The applicant had not worked in the past six years, and so obviously did not meet this requirement. While caring for her children, however, she had served as a high level volunteer in the community, which provided experience relevant to the mission of the Partnership.

The applicant brought suit and the Employment Tribunal agreed she was improperly excluded from consideration. Although the Partnership may have had a legitimate purpose in wanting someone with experience in a position with little oversight, the policy itself was not adequately drafted to avoid indirect discrimination – the applicant had been out of work for maternity reasons.[186]

United Kingdom: USA-Sized Damages

A Hospital Trust was ordered to pay a former obstetrician £4.5m for "hounding" her out of her job after she decided to have a baby. This is thought to be the largest award in any U.K. discrimination case. The O.B. alleged that the Trust started having secret meetings when she was seven months pregnant, after colleagues learned they would have to cover her work during her maternity absence. She was the first physician at the Trust to take maternity leave.

Upon returning to work from her maternity leave, the O.B. was accused of bullying junior doctors. She was suspended from work for 2.5 years while an "independent investigation" into the bullying allegations was conducted. She was eventually dismissed and sued for discrimination.

The Employment Tribunal found that the O.B. was subjected to a 5-year campaign of harassment and false allegations engineered by the medical director, who "ha[d] to be regarded as … a self-acknowledged liar."[187]

The size of the award has raised concerns about the worsening financial condition of the Trust, which had already been ordered to cut costs by £31m. The Trust offered a public apology, while noting it would need to consider its ability to continue delivering high-quality patient care in light of the damages ruling. The obstetrician's pay-out—which has been touted as "staggering" and a "shock award"—would fund the salaries of 210 nurses for a year.

United Kingdom: Philosophical Belief Discrimination

In this case, an employee sought to wear a "poppy" on his lapel on Remembrance Day. His employer found this to be a dress code

185 *Martinez v. Bloomberg LP*, 2012 U.S. Dist. LEXIS 113227 (S.D.N.Y. Aug. 10, 2012).

186 *Crilly v Ballymagroarty Hazelbank Community Partnership* [2011] NIIT 00242_11IT (Oct. 13, 2011), *available at* http://www.bailii.org/nie/cases/NIIT/2011/00242_11IT.html

187 *Michalak v. The Mid-Yorkshire NHS Trust and others* (ET/1810815/2008).

violation and told the employee to remove it. The employee is a veteran and claimed that all persons should pay our respects to those who have given their lives for us by wearing a poppy from All Souls' Day (November 2) to Remembrance Day (November 11).

The Employment Tribunal concluded that this belief lacked the level of "cogency, cohesion and importance" that was required to proceed with a claim for discrimination based on a philosophical belief. The Tribunal found that while the employee did take the matter seriously, the nature of the belief underpinning his wearing of the poppy did not rise to a philosophical belief. It is important to note that this holding is a first instance decision and is not precedential.[188]

D. New Statutes

France: Sexual Harassment

In France, the issue of sexual harassment has been in the spotlight due to recent events such as accusations that the ex-IMF boss, Dominique Strauss-Kahn, committed sexual assault and after Housing Minister Cécile Duflot was heckled and cat called in the National Assembly for wearing a blue and white flowery dress. As of the beginning of 2012, sexual harassment was prohibited under France's Labor Code and Penal Code, which had different and vague definitions of what constituted sexual harassment but in each instance the definition was limited to obtaining favors of a sexual nature.

In May 2012, upon hearing the appeal of a deputy mayor who had been convicted of sexually harassing three employees, the law on sexual harassment was declared unconstitutional by the French Conseil Constitutionnel, and all pending sexual harassment cases in French courts were dismissed. Accordingly, from May through August 2012, there actually was no French law prohibiting sexual harassment in the workplace.

However, in August 2012 a new law was passed. Sexual harassment is now defined as "imposing on someone, in a repeated way, words or actions that have a sexual connotation" and either "affecting the person's dignity because of their degrading or humiliating nature" or putting him or her in an "intimidating, hostile or offensive situation." Offenders can be punished with up to two years in jail and a fine of 30,000 euros.[189]

Poland: Pension Reform

When retirement insurance was first introduced in Poland in 1891, the retirement age was set at 65. However, at that time, the average life expectancy was only 45. Although life expectancy has continued to increase (to an average age of 75 in Poland today), the retirement insurance age remained at 65—the same as it was 100 years ago! Polish legislators have taken note of this and have made a slow step towards reality by increasing the retirement insurance age to 67.[190]

UK: Employment Tribunal Reforms

The U.K. Government intends to introduce Employment Tribunal fees in 2013.[191] The fees will vary depending on the type of claim filed. "Level 1 Claims" (wage deductions, redundancy pay, etc.) will require payment of a fee of £160 to issue; and £230 for a hearing. "Level 2 Claims" (unfair dismissal, equal pay, discrimination) will come with a fee of £250 to issue; and £950 for a hearing.

The fees will also vary depending on the number of claimants. For two to ten claimants, the fees will be twice the individual claimant fee. For 11 to 200 claimants, four times the individual fee, and for 200 and more claimants, six times the individual fee.

A variety of other fees will also be imposed. For judge-led mediation, £600. An application to set aside a default judgment: £100. An Employer's counterclaim to a breach of contract claim: £100. An application for a review of a tribunal decision: £100 for Level 1 Claims, £350 for Level 2 claims. An appeal to the Employment Appeal Tribunal, £400 to issue, £1,200 for a hearing.

There are exemptions for low-income applicants, and Tribunals have discretion to order the reimbursement of fees to the prevailing party. One unanswered question is which fee will apply if a claimant brings claims in both Level 1 and Level 2.

188 *Lisk v Shield Guardian Co Ltd and others* (ET/3300873/11).

189 *Law Number 2012-954* (Aug. 6, 2012), *available (in French) at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&fastPos=1&fastReqId=410942679&categorieLien=cid&oldAction=rechTexte.

190 The Act of 11 May 2012 amending the Act on retirement and pensions from the Social Security Fund and certain other Acts (Journal of Laws 2012 item 637

191 *Charging Fees in the Employment Tribunals and Employment Appeal Tribunals*—Response to Consultation CP22/2011 published on 13 July 2012 by the Ministry of Justice; *available at* https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011.

Spain: Labor Law Reform

In an effort to respond to the current economic crisis in Spain, the country's labor laws have been significantly reformed. The aim is to improve the employability of individuals and the stability of employment, and to create a new work culture better suited to today's business reality.

An in-depth discussion of the reform is far beyond the scope of this section. However, a few of the highlights include:

- Increased objectivity in dismissals of individual employees
- Reduction in potential damages for unfair dismissal claims
- Increased flexibility for temporary suspension of contracts or reduction in hours
- Increased ability of employers to make unilateral changes in geographical mobility and substantial changes to working conditions
- Increased ability to deviate from the conditions of the collective bargaining agreement
- Increased objectivity and reduced consultation requirements for collective dismissals.[192]

However, there have been indications that courts may not be willing to grant employers all of the leeway that the new law provides. For example, a Regional High Court recently ruled that a subsidiary of a large corporation may not document the economic case for redundancy using an affiliate's financial data. The court further held that projections of future economic hardship did not warrant redundancies.[193]

In another case, the Social Chamber of the High Court ruled that strict and technical compliance with the employee consultation rules was required in order to effectuate a change allowed under the new labor laws.[194]

E. Outsourcing and Layoffs

Venezuela: New Outsourcing Laws

In Venezuela, a new law limits the ability of employers to outsource work. The Organic Law of Labor and Workers ("LOTTT") became effective May 7, 2012. The law prohibits contracting through a third party for services to be performed, where the services are to be performed on the work premises of the employer, on a permanent basis and where the tasks being completed are directly related to the production process itself. LOTTT also prohibits hiring workers through intermediaries or entities created by the employer for the purpose of undermining the employment relationship.

There is a three-year implementation period for a Company to absorb any currently "outsourced" workers into the beneficiary's payroll.

LOTTT does not *per se* prohibit the hiring of contractors, but does provide that the contractor and the beneficiary of the service may be held jointly liable for all employment-related obligations if the service is deemed "inherent" or "connected" to the beneficiary's business.

Remedies for violation of LOTTT include sanctions, criminal penalties, and "Reenganche" (an order of reinstatement). An employer who fails to comply with an order issued by the Labor Inspector may face imprisonment for a period of six to 15 months. It is anticipated that further regulations will be forthcoming.[195]

Indonesia: Moratorium on Outsourcing

Under Indonesia's 2003 labor law, companies cannot outsource core jobs and can only outsource five types of peripheral work: cleaning services, security, driving, catering and work to support mining. However, the Manpower and Transmigration Ministry has admitted that many companies outsource most of their workers, including workers in their core businesses.

In January 2012, the Constitutional Court determined that outsourcing is unconstitutional unless the contract workers enjoy the same benefits and employment conditions as regular employees performing the same services. Those benefits would include severance pay, overtime premiums and social security contributions.

192 Royal Decree-Law 3/2012 of urgent measures to reform the employment market.

193 *Spanish courts curb abuse of new law making layoffs easier, Part Two: Unique Issues Faced in Specific Jurisdictions* (Aug. 16, 2012), http://select.mercer.com/blurb/252308/t/y2-cj0yMCZsPTQyNzM5NiZtPTQyODcyNCZmPTM-ZD03Njg4Nzkw/.

194 *Id*.

195 Organic Law of Labor and Workers (LOTTT) (May 7, 2012).

In response, the Manpower and Transmigration Ministry was tasked with drafting guidance to assist employers with compliance. The deadline for completing those regulations was May 2012.

However, the Ministry missed the May 2012 deadline and mass protests resulted, with up to 2,000,000 workers participating in demonstrations.[196] In November 2012, the Manpower and Transmigration Ministry issued a decree that will make it more difficult for companies to conduct outsourcing practices. The new decree has been sent to the Justice and Human Rights Ministry for review before adoption.[197]

F. Wage and Hour Laws

Canada: Wage and Hour Class Actions

Recent court filings and rulings indicate that wage and hour class actions are becoming more prevalent in Canada. For example, challenges have been filed recently against policies of two different banks where manager approval is required for overtime. One case involves a potential class of 5,000 employees,[198] the second involves 31,000 employees.[199]

Another recent case involved the alleged misclassification of employees as supervisors, and sought overtime pay. This action involved 1,550 first-line supervisors.[200]

The Ontario Court of Appeal certified the two cases (Fulawka and Fresco) involving "off the clock" overtime claims, finding commonality regarding whether an employer policy precluded overtime. However, the court dismissed the misclassification case (McCracken) involving "supervisor" overtime claims, finding that there was no commonality within the job classifications.

In evaluating the potential future impact of this relatively new trend, it should be noted that Canadian courts in such cases will not award aggregate damages, rather, employee claimants must assess and prove their claims individually.

Germany: After Hour Calls

In Germany, Labour Minister Ursula van der Leyen has recommended that employers introduce policies that would prevent employers from contacting employees after work hours by cell phone or by email. The goal is to reduce work-related stress and psychological disorders and to improve work/life balance. Some companies, such as Volkswagen, have implemented a policy designating after-work hours as a "Blackberry-free zone."[201]

G. Independent Contractors?

Australia: Employees or Contractors?

An Australian company engaged five insurance sales representatives. Each of the sales representatives signed a written independent contractor agreement, which had been approved by a prominent Queen's Counsel. The agents worked for an extended period of time, with one agent being engaged for more than 24 years.

Eventually, the agents' engagements were terminated. They brought a claim for payment of their leave entitlements, alleging that they were employees, not independent contractors.

The Australian court concluded that the agents were, in fact, employees. The factors considered by the court in reaching this conclusion included the degree of control which the insurance company was able to exercise over the agents. Most importantly, the agents did not have sufficient time to conduct other, independent business – they were in fact not conducting their own business but were instead spending all of their productive time enhancing the goodwill of the insurer.

196 *Indonesian Workers Demand an End to Outsourcing*, JAKARTA GLOBE (Oct. 4, 2012), http://www.thejakartaglobe.com/economy/indonesian-workers-demand-an-end-to-outsourcing/548109.

197 *Indonesia: Limits to Be Placed on Contract Labor*, Library of Congress (Nov. 23, 2012), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403409_text.

198 *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443.

199 *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444.

200 *McCracken v. Canadian National Railway Company*, 2012 ONCA 445.

201 *Labour Minister wants Blackberry-free zone after working hours*, Staffing Industry Analysts Daily News (June 14, 2012), http://www.staffingindustry.com/eng/Research-Publications/Daily-News/Germany-Labour-Minister-wants-Blackberry-free-zone-after-working-hours.

The court did explain that the company did not "unreasonably rely" on Queen's Counsel's advice. However, the advice was no longer accurate after the High Court case of *Hollis v. Vabu* in 2001.[202]

The company was ordered to pay AUS$325,671 of holiday entitlements with interest for several years, AUS$10,000 as a penalty, and AUS$5,000 as a civil penalty for each breach.[203]

UK: Employees or Contractors?

A London West End nightclub that featured dancers offered a dance package menu: £20 for one tableside dance and from £300 for one hour to invite a dancer to "sit downs." The dancers were not paid wages *per se* but instead were rewarded in "heavenly money"—vouchers that could be exchanged for cash at a later date, but were subject to the club's commission fees. And, as you may have guessed by now, the dancers did not wear too much clothing while dancing.

The club assigned customers to dancers, the dancers had set working hours, and the dancers could not take extended holidays. In fact, the dancers would incur financial penalties for not working. However, the work could be quite financially rewarding. One dancer received more than £100,000 annually. On one occasion she accepted £2,000 to sit with a client for two hours. She used this money to pay her way through college.

Eventually the club owners asked this dancer to leave, stating that she had been dealing drugs at the club. She then brought a claim for unfair dismissal. The London Central Employment Tribunal rejected her claim, finding that the dancer was self-employed, and noting that this is the industry standard.

The Employment Appeal Tribunal reversed the Tribunal's finding the dancer was self-employed. It noted, *inter alia*, that she had to report as per the published schedule, the club was obliged to provide her opportunity to dance and she was required to dance on the stage at various times during the night, without receiving any "heavenly money," in order to attract customers for private dances. The Court of Appeal disagreed and overturned the EAT's decision. It held that the Claimant was not employed under a contract of employment, because the employer was under no obligation to pay her and that it was her who took the risk as to whether or not she might be out of pocket on any given night she worked. As a result, the Claimant's unfair dismissal claim was dismissed.[204]

H. Can You Get Fired for that?

Poland: I Need a Drink!

An employee came to work completely drunk and was dismissed "with immediate effect." This is possible if the employee seriously breaches his basic duties and is "guilty" of the breach.

The employee went to a doctor who diagnosed him with a "health condition caused by alcoholic illness." Next, he was sent to a mental institution where they diagnosed delirium tremens. The interview with the patient indicated that he had been on a drinking binge, suffered from depression and sleeping disorder, and he did not recognize places and persons he knew. The medical report concluded that the dynamics of his pathology were characteristic of alcoholic psychosis featuring consciousness disorders and disorders in orientation and conduct. In short, the employee was unable to control consumption of subsequent doses of alcohol.

The court considered whether, under the circumstances, the employee was "guilty" of the breach of his duties as an employee. The Supreme Court ruled that the employee could not be fired with immediate effect for appearing drunk at work—he could not be considered "guilty" of drinking before work.[205]

Canada: Malicious Prosecution

In a recent decision by the Supreme Court of British Columbia, the question presented was whether an employee who stormed out of a meeting saying "I'm out of here!" was expressing an intention to quit, or an intention to go on vacation.

202 *Hollis v. Vabu Pty Ltd* [2001] HCA 44 (Aug. 9, 2001).

203 *ACE Insurance Ltd v Trifunovski* (No 2) [2012] FCA 793.

204 *Stringfellows Restaurants Ltd – v – Nadine Quashie*, [2012] EWCA Civ 1735, *available at* http://www.judiciary.gov.uk/media/judgments/2012/stringfellows-restaurants-ltd-v-quashie-judgment.

205 Judgment of Supreme Court of 10 Oct. 2000 ref. No. 1 PKN 76/00.

What was at stake for the employee was his entitlement to reasonable notice. If it was determined that he quit, he would not be entitled to any notice, but if he was dismissed, then he would be entitled to notice prior to dismissal, or pay in lieu of notice.

The plaintiff was a Certified Public Accountant who had been working as a tax manager for a national accounting firm for nearly eight months. He did not possess the Canadian equivalent designation of Chartered Accountant, and his hiring manager did not find him to be fully qualified for the position of Tax Manager, but the title was important to plaintiff and the firm hoped he would "grow into the role" over time.

Soon after he was hired, plaintiff's superiors began expressing concerns about his work performance, his general unfamiliarity with Canadian tax principles, and his negative attitude.

The plaintiff, for his part, countered that he was not being assigned tasks worthy of a tax manager. Tensions mounted, and came to a head when plaintiff met with the firm's Managing Partner and Tax Director on the afternoon before he was scheduled to leave on a two-week vacation. The plaintiff sought a 50% raise, which his superiors refused. The firm managers continued to maintain that plaintiff's performance and work attitude needed improvement. The plaintiff replied that no one in the office was qualified to review his work. When asked what this meant for the future, plaintiff proclaimed "I'm out of here!" The plaintiff was asked to return his keys and computer before leaving for the day.

The plaintiff left the workplace, and his employer claimed that he had quit his job. The plaintiff claimed that had not quit his job, but rather, he was simply leaving for a planned vacation. When asked about the employer's request that he return his keys and computer before leaving for the day, he claimed that he simply thought his supervisor needed his computer while he was away on vacation.

The court concluded that the plaintiff was entitled to pay in lieu of notice. The court found that a resignation must be clear and unambiguous to be effective. Here, plaintiff did not express a clear intention to resign, and was therefore entitled to reasonable notice. The plaintiff was awarded two months' pay in lieu of notice—CAN$10,600.[206]

Poland: How Confidential is Confidential?

An employee, a very successful salesman, was paid a decent salary and a handsome bonus. There was an unwritten company policy that employees' salaries and bonuses were confidential and not to be shared with other employees. Some employees signed confidentiality statements, but not the successful salesman.

At one point, the salesman asked his manager exactly how his bonus for Q4 2006 had been calculated. His manager emailed him an explanation, but by mistake he forgot to delete the details of the bonuses of all the other employees of the sales department. The salesman reviewed the email, and concluded that there were some inexplicable differences between the bonuses paid to individual employees. He promptly forwarded the email to all of his colleagues in the sales department, and to his wife.

The sales department employees got together and asked the manager for a meeting and an explanation, but none was ever held. Instead, the manager was summoned to a meeting with his boss and was punished by the penalty of "reprimand" for sending the additional information in the email.

The manager then summoned the salesman to his office and punished him by the penalty of "reprimand," for breaching confidentiality and sending the email on to others. The manager then asked the salesman if he would do the same thing again, to which the salesman replied: "Yes!"

The manager then reached into his desk for the termination forms, but before completing them, the salesman exclaimed: "I am ill!" He sprung from his chair and burst out of his manager's office.

Eventually, the salesman was fired. He brought a dismissal claim, asserting that he never signed the confidentiality statement, and that there was, in fact, no written policy regarding confidentiality of pay information. The salesman noted that the employer had been aware of and tolerated employees' secret discussions about their remunerations for several years.

The trial and intermediate appellate courts agreed that the reason for termination was specific, real and fair and that the plaintiff's behavior was a serious breach of an employee's basic duties.

206 *Balogun v Deloitte & Touche, L.L.P.*, 2011 BCSC 1314 (Oct. 4, 2011), *available at* http://canlii.ca/en/bc/bcsc/doc/2011/2011bcsc1314/2011bcsc1314.html.

However, the Supreme Court of Poland reversed. The court found that all of the salesman's actions fell within the scope of the "employee's activity aimed to counteract discrimination." The court found that such activity is explicitly allowed by law and protected, and that the action of the company in this case was an "obvious and impermissible retaliation."[207]

I. The Electronic Workplace

Spain: Facebook Photos

When Spain won the 2010 World Cup (soccer), a store manager at a supermarket was so excited that she celebrated by uploading photos of herself on Facebook. The photos showed her and another employee celebrating Spain's victory. The employee was photographed lying on the General Manager's desk, surrounded by the day's cash takings, pretending to play cards and drink alcohol, wearing her company ID tag, and showing the supermarket's safe, IT system and security alarm.

The store manager was dismissed as a result. The employer stated that it no longer had trust and confidence in her as a manager, and that her actions had put the supermarket at risk. She brought a claim, but in the end the court found that her dismissal was fair.[208]

Brazil: Orkut Photos

An intensive care nurse had an account on Orkut (which is Google's social networking site and is very popular in Brazil). The nurse posted photos of herself on her commute to work and inside the ICU facility. The photos were described as "intimate" and "inappropriate." She was shown wearing the hospital uniform, with work colleagues, and hospital patients were visible in some of the photos.

The hospital discovered this and immediately terminated the nurse for cause: for bad behavior. The nurse brought suit, claiming a violation of her right of privacy. She asserted that the photos were obtained from a social network with "private" access.

The Labour Court ruled in favor of the plaintiff and found no just cause to dismiss. However, the decision was reversed on appeal. The Superior Labour Court concluded that the employee had published the pictures willingly on a public website, and therefore there was no breach of her right of privacy.[209]

Canada: Invasion of Privacy

An inter-office romance at a bank led to the creation of a new tort in Ontario: the tort of "intrusion upon seclusion." Both the plaintiff and the defendant worked for the bank. The defendant was in a common law relationship with the plaintiff's former husband. Over a period of four years, defendant used her workplace computer to access the plaintiff's personal accounts 174 times. Personal information and transaction details were accessed. While the actions were deliberate and repeated, no actual public embarrassment was suffered.

The Ontario Court of Appeal became the first in Canada to recognize a common law tort of breach of privacy. The court identified three elements of the claim: the conduct must be intentional, there must be an invasion of personal privacy without justification, and the invasion must be offensive and cause anguish.

In this case only the individual was found liable, and thus it is unclear whether an employer may be found vicariously liable for this tort.[210]

UK: TMI on Facebook

A teacher at a primary school had a Facebook page. She had 81 friends on her page, including 32 former pupils, 12 of whom were between the ages of 11 and 17. On her Facebook page, she talked about her favorite pupils, but also talked about drinking alcohol, and even the best places to go buy sex toys. To one of her ex-pupils she said "You should pop up to see me or even better we can go out for a drink or clubbing, I'm a very different person outside school. I like to party hard—life is for the living. I'm not a teacher on here. I'm just like anyone else, I drink, swear... but don't tell anyone."

The teacher was terminated from her job, but she claimed she didn't realize how public her comments were. She received an official reprimand from the General Teaching Council of Wales that will last two years and will have to be disclosed to future employers.[211]

207 Judgment of the Supreme Court 26 May 2011 ref. No. II PK 304/10.

208 *Emilia v. Cecosa Supermarkets* (Superior Employment Court of Andalusia).

209 Superior Labour Court, AIRR 5078-36.2010.5.06.0000.

210 *Jones v. Tsige*, 2012 ONCA 32.

211 *BBC News*, Feb. 7, 2012: http://www.bbc.co.uk/news/uk-wales-south-east-wales-16929442.

J. Workplace Climate

UK: TV Reality Show—a Bit Too real

Mastercrafts is a BBC2 reality TV series that shows various craftsmen at work. One episode featured a visit a stonemason's workplace. A viewer noticed that there were inadequate precautions to protect the workers from dust that can cause serious lung diseases. The viewer contacted the Health and Safety Executive (HSE) and filed a complaint.

The HSE inspected the facility and issued an Improvement Notice: take action immediately to reduce exposure to stonemasonry dust to within the legal limit. The HSE made a second visit—things had not improved and so a second notice was issued. On the third inspection, there was still insufficient improvement.

The company eventually pleaded guilty to one charge of breaching section 33 (1) (g) of the Health and Safety at Work Act 1974. The company was fined £5,000 and ordered to pay costs of £1,400.10. The HSE Inspector commented: "[The Company was] happy to get their moment on television, but rather less quick to protect their employees from a wholly avoidable risk that can have serious consequences and cause respiratory diseases."[212]

K. Littler's Case of the Year

Australia: Injured on the Job?

Each year, this panel of Littler's Global Employer Institute designates one case as "most important." (In reality, it is usually the case that is the most entertaining or unusual.) This year, our case comes from Australia. There, an employee was required by her employer to travel on a business trip with a fellow employee to a country town in New South Wales. Her employer booked her a motel room. She travelled to the town, checked into the motel, and later met up with a male friend there. They went out to dinner, apparently had a nice time, and then they returned to her motel room.

It's unclear whether they turned off the lights, but … [use your imagination here].

During the course of the activity which ensued, a glass light fitting located above the bed was pulled from its mount. The light fitting fell on the employee, causing injuries to her nose and mouth. The injuries were so severe that she was later taken to a hospital for treatment. Note: it is unknown whether it was the employee or her companion who pulled the light fitting from the wall.

The legal question presented was: Did the injury occur during the course and scope of employment?

The court concluded: Yes!

The employee was in town on business, the employer booked her room, and there was no express prohibition on her engaging in the sort of conduct that resulted in the injury. According to the tribunal: "While it was not suggested that [the employee] was induced or encouraged by her employer to engage in sexual activity while at the motel, it is clear that her employer induced or encouraged her to spend the night there."[213]

212 *Stonemason 'as seen on TV' is prosecuted,* Health and Safety Executive, Oct. 25, 2011, http://www.hse.gov.uk/press/2011/coi-e-4311.htm.
213 *PVYW v. Comcare* (No 2) (2012) FCA 395 (Apr. 19, 2012).

Littler Mendelson Offices

Albuquerque, NM
505.244.3115

Anchorage, AK
907.561.1214

Atlanta, GA
404.233.0330

Birmingham, AL
205.421.4700

Boston, MA
617.378.6000

Charlotte, NC
704.972.7000

Chicago, IL
312.372.5520

Cleveland, OH
216.696.7600

Columbia, SC
803.231.2500

Columbus, OH
614.463.4201

Dallas, TX
214.880.8100

Denver, CO
303.629.6200

Detroit, MI*
313.446.6400

Fresno, CA
559.244.7500

Gulf Coast
251.432.2477

Houston, TX
713.951.9400

Indianapolis, IN
317.287.3600

Kansas City, MO
816.627.4400

Las Vegas, NV
702.862.8800

Lexington, KY*
859.317.7970

Long Island, NY
631.247.4700

Los Angeles, CA
Downtown
213.443.4300

Los Angeles, CA
Century City
310.553.0308

Memphis, TN
901.795.6695

Miami, FL
305.400.7500

Milwaukee, WI
414.291.5536

Minneapolis, MN
612.630.1000

Morgantown, WV
304.599.4600

Nashville, TN
615.383.3033

New Haven, CT
203.974.8700

New York, NY
212.583.9600

Newark, NJ
973.848.4700

Northern Virginia
703.442.8425

Northwest Arkansas
479.582.6100

Orange County, CA
949.705.3000

Orlando, FL
407.393.2900

Overland Park, KS
913.814.3888

Philadelphia, PA
267.402.3000

Phoenix, AZ
602.474.3600

Pittsburgh, PA
412.201.7600

Portland, OR
503.221.0309

Providence, RI
401.824.2500

Reno, NV
775.348.4888

Rochester, NY
585.203.3400

Sacramento, CA
916.830.7200

San Diego, CA
619.232.0441

San Francisco, CA
415.433.1940

San Jose, CA
408.998.4150

Santa Maria, CA
805.934.5770

Seattle, WA
206.623.3300

St. Louis, MO
314.659.2000

Walnut Creek, CA
925.932.2468

Washington, D.C.
202.842.3400

INTERNATIONAL

Caracas, Venezuela
58.212.610.5450

Valencia, Venezuela
58.241.825.3689

Mexico City, Mexico
52.55.5955.4500

Monterrey, Mexico
52.81.8851.1211

*In Detroit, Littler Mendelson, PLC and in Lexington, Littler Mendelson, P.S.C., both are wholly-owned subsidiaries of Littler Mendelson, P.C.

www.littler.com • Littler Mendelson, P.C.