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MULTINATIONAL CORPORATE EXPANSION AND RELOCATION: THE U.S.
EMPLOYEE PERSPECTIVE
(Updated 2020)

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June 5, 2020

Workforce Restructurings, Including M&A, Across Borders

Cross-Border Employment Law 2020
New York, New York

MULTINATIONAL CORPORATE EXPANSION AND RELOCATION: THE U.S. EMPLOYEE PERSPECTIVE

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As U.S. companies and organizations have become multinational corporate citizens, understanding the legal consequences of complex employment relationships has become as essential as it is difficult. These relationships can become increasingly more complicated as companies expand, relocate and restructure their workforce. Often, in executive expatriate and secondment agreements, knowing who the contracting parties are is a challenge to counsel on both sides of the table. When a U.S. employee is employed outside the U.S., knowing the nationality of the company, and its relationship to a U.S. corporation, if any, may determine what statutory protections and other employment rights (in or outside the U.S.) the employee may have and what the nature of the claims may be.

Sometimes, these relationships are clearly defined at their inception, but a subsequent sale, merger, expansion or consolidation can change the nationality of the employer and ultimately affect an employee's rights. Similarly, global companies with subsidiaries in several different jurisdictions raise questions about which law should apply to restrictive covenants, employment disputes and even contracts of employment. U.S. case law on extraterritoriality, and its effect on an employee's protection against discrimination, reflects how corporate nationality and relationships between a corporation and its subsidiary will ultimately determine an employee's right to some of these protections. Likewise, a corporation's ties to the host country may also influence how the host country's court will view certain contract clauses and determine the enforceability of certain provisions during or post termination of employment.

This paper will focus on the U.S, the EU and the UK as places of employment as well as their jurisdiction and choice of law rules. It is important to note that the UK left the EU on January 31, 2020. Under the UK-EU Withdrawal Agreement, a transition period will end on December 31, 2020 unless extended, during which time the UK will be treated for most purposes as if it were still an EU member state and most EU law will continue to apply to the UK.²

I. **At-Will vs. Definite Term**

Determining whether an employee is at-will or has been given a term contract for the duration of the assignment will significantly affect the terms and conditions of the relationship and any subsequent termination agreements. A U.S. employer will often

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² Edgington, Tom. "Brexit: What Is the Transition Period?" BBC News, BBC, 31 Jan. 2020, *available at* <https://www.bbc.com/news/uk-politics-50838994> (last accessed Mar. 25, 2020).

offer its mid-level employees an at-will assignment while its higher-level executives receive an employment contract for a definite term with significant severance rights or change of control provisions.

In an at-will relationship either party can terminate the relationship with no liability, and the employer is free to discharge the employee for a good or bad reason, or no reason at all. The employee is just as free to quit, strike, or otherwise stop working. There are some exemptions to the at-will doctrine. For example, most U.S. states and the District of Columbia recognize a public policy exemption under which an employer cannot fire an employee if it would violate the state's public policy or a state or federal statute.³ Some states recognize implied contracts and the covenant of good faith and fair dealing ("implied-in-law" contracts) as exceptions to the at-will doctrine. Federal statutory exceptions include violations of Title VII and other related anti-discrimination statutes, Sarbanes Oxley (SOX) and other whistleblower protections.

Contrary to this, in many countries outside the U.S., contracts, collective or trade agreements, works council directives, treaties, and/or statutes govern employment relationships. Employers can terminate employees only for "just cause," and in cases of termination without cause the employer is compelled to pay severance benefits. In the European Union, directives, treaties, and local law work in tandem in order to achieve uniformity regarding certain employment terms, i.e., jurisdiction, choice of law, salary, term, notice, equity, non-competes, and data privacy.

For example, Directive 98/59/EC provides protections for workers deemed "redundant" by mandating particular notice requirements and placing a burden on employers to attempt to mitigate harm to terminated employees.⁴ When crafting employment contracts and considering potential liability, employers must be mindful of not only the laws of the country where the employee works, but also of the broader EU regulatory scheme.

When a multinational corporation is considering an expansion or relocation of its operations, or there is a potential sale or merger in the offing, it is imperative that counsel for the corporation perform its due diligence and examine the corporation's trade union agreements, employment and retention agreements, secondment and offer letters and any other employment related agreements or policies. This process of review will help the Company to fully understand its obligations in regard to employment or termination of employment, and any reciprocal obligations that may exist on the part of its employees. Determining these rights, the choice of law and jurisdiction, if relevant, is essential to understanding the corporation's employment related liabilities in the transaction.

³ Alabama, Alaska, Florida, Georgia, New York, and Rhode Island are not supportive of the doctrine per se but have limited judicial opinions in the Whistleblower context and in some other narrow retaliation cases that support some exemptions.

⁴ Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship O.J. L 288, p. 32–35, *available at* <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31991L0533> (last accessed Mar. 20, 2020).

II. Choice of Law

A. Choosing Governing Law

Every employment agreement should have a provision binding the parties to a specific choice of law that will be applied to a dispute should it arise pursuant to the agreement. A single choice-of-law provision may govern all aspects of an expatriate agreement, or different choices of law may govern different clauses in one agreement. This will depend on what the governing law is in the host country concerning a particular issue, and under what circumstances the host country will recognize a choice-of-law provision in a U.S. contract.

In an expatriate agreement, the choice of law provision may ultimately determine whether or not the entire agreement is enforceable. While expatriate agreements generally call for the law of the home country to apply, contract provisions can be superseded by employee protections in the host country, such as local statutes governing vacation, severance, mandatory notice, and restrictive covenants.

Most U.S. companies will try to impose U.S. choice-of-law in all of its expatriate agreements and the employee will likely be asked to waive local protections, since many local protections favor the employee. Despite this waiver, throughout Europe, the local laws of the country where the expatriate is performing the work will generally control the employment relationship and local protections cannot be waived. Generally, a U.S. expatriate living abroad will leave behind the at-will status often imposed by contract and enjoy the employee protections of the host country.

This approach to choice of law provisions can create uncertainty and ambiguity for the U.S. expatriate, rendering certain provisions in an agreement hollow and impossible to enforce if the employee remains abroad during a dispute post termination. One clear exception to this principle is when the issue concerns a benefit or obligation that is guided by reciprocal treaties with the home country pertaining to issues such as social security or tax treatment. Other exceptions apply to highly compensated employees whose benefits and compensation are greater than what local protections offer.

Increasingly, negotiating the most favorable choice of law provision for multinational employees will require a sophisticated knowledge of the host country's mandatory law protections as well as other case law in a particular jurisdiction. An employee may benefit from certain provisions if they do not conflict or compete with local law such as those pertaining to pensions, equity or other benefits. Rather than a wholesale choice of law provision, choosing different laws for different terms may address the needs of both the employer and employee in a given situation.

B. Recognizing and Enforcing Choice of Law

EU member states are parties to the Rome Convention on the Law Applicable to Contractual Obligations of June 19, 1980 (also known as the European Contracts Convention), which identifies rules that govern international contracts and choice of law principles.⁵ Under Article 6(1) of the Convention, employers and employees are free to choose the applicable law to an agreement.⁶ Thus, European labor courts are generally bound by the choice-of-law set forth in the employment agreement.

But the Rome Convention has certain pro-employee protections, under which labor courts are allowed to set aside the law chosen if the applicable provisions of that law are less favorable than the mandatory provisions of law in the country in which the employee “habitually” performs the work.⁷ In furtherance of this principle Directive 96/71 was designed to prevent social dumping and to allow the mandatory protective labor rules of the host country to be applied to employees from other member states.⁸ However, it also takes exception to this rule, in recognizing an employment agreement’s choice of law provision when considering all circumstances of the employment relationship – the contract is more closely connected to the employment than local law.⁹

In June of 2008, the EU enacted the Rome I Regulation, which governs choice of law questions for contracts (including employment contracts).¹⁰ In effect since December 17, 2009¹¹ the Regulation moved the EU toward a more rule-based approach to choice of law with greater party autonomy and less balancing of parties’ interests.¹² While under the Rome I Regulation the place of habitual employment is the presumptive choice of law for employment contracts,¹³ the idea of “mandatory rights” has been replaced by “overriding mandatory provisions” that safeguard the public interests and can only be

⁵ Rome Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. L 266, available at <http://www.jus.uio.no/lm/ec.applicable.law.contracts.1980/doc.html> (last visited Mar. 20, 2020).

⁶ *Id.* at art. 6(1).

⁷ *Id.* at art. 6(2).

⁸ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, O.J. L 18, p. 1–6, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0071&from=en> (last visited Mar. 20, 2020).

⁹ *Id.*

¹⁰ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

¹¹ The Regulation has been adopted by all EU Member States except Denmark, which still follows the original Rome Convention, Regulation 80/934/EEC on the law applicable to contractual obligations, 1980 O.J. (L 266) 1 (Rome Convention).

¹² For a more general discussion of the Rome I Regulation, see Henry H. Drummonds, *Cross-Border Employment Contracts, Choice of Law, Choice of Forum, and the Enforcement of Cross-Border Judgments in the European Union*, 61st Annual New York University Conference on Labor (awaiting publication).

¹³ Rome I Regulation, Art. 8(2) (“To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.”)

applied if the choice of law in the contract renders the performance under the contract unlawful.¹⁴ Notwithstanding these provisions, the Rome I Regulation also contains a provision permitting courts to refrain from applying the law of *any* country if doing so would be “manifestly incompatible with the public policy of the forum.”¹⁵

III. Jurisdiction

A. Forum Selection

Many countries outside of the U.S. do not accept an employer’s choice of jurisdiction even if it was agreed to in advance by both parties to an agreement because of the disparity in bargaining power between the employer and employee. When negotiating or drafting a jurisdictional provision in an expatriate agreement, it is imperative to consider whether the host country will recognize the laws of the jurisdiction chosen to govern the employment relationship.

Also, determining that the employee has the practical means to meet the jurisdictional requirement in terms of cost, travel and adequate representation may later avoid a local court finding that the jurisdiction is unenforceable because the needs of the employee were not adequately considered. The circumstances surrounding the choice of jurisdiction by the parties at the beginning of the employment relationship may also change as time goes on depending on the length of the assignment abroad and under what circumstances the employment relationship ended.

B. Recognizing and Enforcing Jurisdiction

There are two legal documents that set forth the European view on jurisdictional issues. The first is the Brussels Convention on Enforcement of Judgments in Civil and Commercial Matters of September 27, 1968,¹⁶ and the second, the European Union Regulation No. 44/2001,¹⁷ which in many respects superseded the Brussels Convention when entered into force on March 1, 2002.

The Brussels Convention in Article 17 states that employers can invoke jurisdictional clauses only if they are signed AFTER a dispute has arisen. However,

¹⁴ Rome I Regulation, Art. 9 (3). Rome I Regulation Art. 8 (1). Party autonomy cannot “result [in] depriving the employee of the protection afforded to him [or her] by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable”

¹⁵ Rome I Regulation, Art. 21.

¹⁶ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention], *available at* <http://www.jus.uio.no/lm/brussels.jurisdiction.and.enforcement.of.judgments.in.civil.and.commercial.matters.convention.1968/doc.html> (last visited Mar. 19, 2008).

¹⁷ See EU Regulation 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Mar. 1, 2002, 2001 O.J. (L 12) 1, *amended by* 2002 O.J. (L 225) 1 [hereinafter EU Reg. 44/2001] (binding on all EU member states with the exception of Denmark, where the Brussels Convention is still effective).

employees can invoke the clause even if it was signed before the dispute.¹⁸ It also provides that jurisdiction is conferred on the court of the country in which the defendant employer resides.¹⁹ Thus, the court of the country in which the employer's offices are located generally would have jurisdiction. Nonetheless, courts may recognize fairly bargained for jurisdiction if not manifestly contrary to public policy.

The basic principle of the regulation is that jurisdiction is exercised by the member state in which the defendant is domiciled, regardless of his or her nationality. However, contrary to the Brussels Convention, Regulation 44/2001 markedly gives an employee the choice of where to sue the employer.²⁰ It can be in a court of the member state in which the employer is domiciled or, of the member state in which the employee habitually carries out his or her work or if the employee worked in multinational jurisdictions then in the court of the place in which the business that engaged the employee was situated.²¹ The employer does not have any choice as to jurisdiction and can only bring proceedings in a court of the member state in which the employee is domiciled.²²

In drafting jurisdictional clauses, while uncertainty of time and location surrounding the expatriate assignment may warrant the U.S. employer to always choose U.S. jurisdiction, the employee if in the EU or the UK will almost always have the choice of whether to seek jurisdiction under European law or to file suit in the U.S. This is demonstrated by the 2007 decision of a U.K. appellate court in *Samengo-Turner v. J & H Marsh & McLennan (Services) Ltd.*,²³ and reaffirmed by a 2015 U.K. appellate court decision, *Petter v. EMC Europe Ltd. & Anor.*²⁴ Clearly, this decision will depend on the rights in dispute and the convenience of the forum. Many employers try to circumvent this option by repatriating a U.S. citizen before severing the employment relationship, thereby insuring the best chance of U.S. jurisdiction if the employee brings a claim.

While parties are free to agree to a specific forum, court or a mechanism for dispute resolution, a specific court may not have the power to adjudicate the dispute in question. In many parts of the world, U.S. mechanisms for dispute resolution may not even exist. Also, in some foreign jurisdictions the civil procedures of the nominated jurisdiction will be applied to identify the appropriate court or forum that will resolve the

¹⁸ Brussels Convention at art. 17.

¹⁹ *Id.*

²⁰ EU Reg. 44/2001 at art. 19.

²¹ *Id.*

²² *Id.* at art. 20.

²³ In *Samengo-Turner*, the court applied the Brussels I Regulation to hold that an employer could not bring suit in New York against U.K.-domiciled employees to enforce a restrictive covenant in a stock award plan, even though the plan documents contained a New York forum selection clause. [2007] EWCA (Civ). 723, [2008] ICR 18.

²⁴ In *Petter v. EMC Europe Ltd. & Anor*, a case decided in 2015, a U.K. court of appeal reaffirmed its earlier decision in *Samengo-Turner* and declined to apply a contractual forum selection clause. The *Petter* decision relied on the Brussels I Regulation (recast) to conclude that an employer could not bring suit in Massachusetts against a U.K.-domiciled employee to enforce a restrictive covenant in a stock award plan, even though the plan contained an exclusive jurisdiction clause in favor of the Massachusetts courts. [2015] EWCA (Civ). 828.

dispute. This ultimately may supersede the choice of the parties and result in litigation in a forum unfavorable to both parties.

IV. Termination/Notice/Severance

In general, most well drafted employment or secondment agreements will contemplate termination and severance, particularly since employment by U.S. companies is otherwise at-will.

Generally, if there is no contract, there is no statutory protection against unfair dismissal in U.S. law. As mentioned above, this is because in the United States the employment relationship is at-will and either party can terminate the relationship without notice.²⁵ While there are challenges to this presumption, success in the U.S. courts has been limited. Some of these challenges are based on general contract principles even when the employment is not governed by an employment agreement or an offer letter. For example, if a company has a written policy or handbook which clearly states that summary dismissal is not appropriate and progressive discipline is the policy—a claim for the employee may lie in contract law or promissory estoppel particularly if the handbook was signed by the employee. To avoid the possibility of these claims employers often put disclaimers in their handbooks stating that they do not represent a binding contract.

As discussed above, another exception to the at-will rule is when an employee is terminated against public policy. Over the years, these exceptions have limited the at-will doctrine and have fostered legislation on the federal, state and municipal level. Discrimination, whistleblowing, retaliation and medical leave statutes have given a message to the U.S. employers that termination without cause may result in serious liability. Now, in 2020 with the Corona Virus pandemic in the U.S. and throughout Europe and Asia, more laws will certainly be passed to reflect public policy concerns for employees who cannot leave their homes to work.

In addition to general public policy exceptions intended to protect whistleblowers, several U.S. statutes have express provisions against retaliation.²⁶ Unlike the UK, which adopted a unified approach to whistleblower protection under the Public Interest Disclosure Act, the standard of proof and degree of employer liability under U.S. law

²⁵ Exceptions to the at-will doctrine in the United States include the State of Montana, Puerto Rico, and the Virgin Islands, where at-will employment is not recognized. Similarly, the Uniformed Services Employment and Reemployment Rights Act (USERRA) requires an employer to have good cause reason to terminate an individual who has recently returned from active military service.

²⁶ See, e.g., the Sarbanes-Oxley Act (18 U.S.C. § 1514A) (protecting employees of publicly traded companies who report fraud against shareholders and other forms of fraud); the False Claims Act (31 U.S.C. § 3729) (protecting individuals who report fraud on the government); the Occupational Safety and Health Act of 1970 (29 U.S.C. § 660) (protecting individuals who report workplace safety concerns); Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) (protecting employees who report discrimination in the workplace).

changes depending upon the state or federal law which applies and the cause of action.²⁷ Because some U.S. laws with retaliation protections apply extraterritorially, as will be discussed below, multinational employers must familiarize themselves with a myriad of standards. Employers who operate in the EU must also contend with differing standards between member states as they strive for compliance with the new Whistleblower Directive passed by the European Parliament in 2019.²⁸ The deadline to come into compliance is December 17, 2021, meaning that thirteen states will be drafting new whistleblower protections in the interim.

Until just recently, there has been no law in the U.S. that requires an employer to pay severance. In January of 2020, New Jersey became the first state in the U.S. to require employers to provide severance to employees during a mass reduction in force.²⁹ If an employer has a severance policy in place, it may be required to comply with this policy based on ERISA³⁰ but these policies can be changed with notice at almost any time in the future. Executive agreements generally do provide for severance and often a notice period. However, severance is generally conditioned on an employee signing a general release. In the U.S., statutory rights can be waived—so long as there is adequate compensation. All releases must be voluntarily given and informed. In addition, older employees have additional protections under Older Workers Benefit Protection Act and a 45 period to consider any release of rights.³¹

²⁷ On the federal level, some statutes, such as SOX, deal directly with whistleblower protections; however, laws directed at employment protections, like Title VII and the ADA, contain provisions prohibiting retaliation for attempts by the employee to enforce the law. Complicating matters further, U.S. courts are sometimes split on whether a statute contains retaliation protection, as is the case with the ADEA.

²⁸ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, O.J. L 305, p. 17–56, *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1937> (last accessed Mar. 22, 2020).

²⁹ The New Jersey bill will take effect on July 19, 2020 and requires New Jersey employers with 100 or more employees to provide (a) severance equal to one week of pay for each full year of employment; and (b) 90 days' notice of termination, to employees who lose their job in a mass layoff, transfer, or plant closing which results in the termination of 50 or more employees. Employers who fail to provide the required 90 days' notice are required to pay an additional 4 weeks of severance to those affected employees. Hays, James R. "New Jersey Significantly Modifies the New Jersey WARN Act to Require Severance Pay for Mass Layoffs." *The National Law Review*, 11 February 2020, <https://www.natlawreview.com/article/new-jersey-significantly-modifies-new-jersey-warn-act-to-require-severance-pay-mass>.

³⁰ *See* 29 U.S.C. § 1001 *et seq.* The Employee Retirement Income Security Act of 1974 (ERISA) is a federal statute that establishes minimum standards for pension plans in private industry and provides for extensive rules on the federal income tax effects of transactions associated with employee benefit plans. ERISA was enacted to protect the interests of employee benefit plan participants and their beneficiaries by requiring the disclosure to them of financial and other information concerning the plan; by establishing standards of conduct for plan fiduciaries; and by providing for appropriate remedies and access to the federal courts.

³¹ 29 U.S.C.S. § 626(f)(1)(B), (F), (G).

V. Extraterritoriality of Labor Laws

In the U.S. there are specific employee protections that are limited to jobs performed in the U.S., unless the employee is a U.S. citizen and, in some cases, a U.S. permanent resident. While some of these limitations have been expanded by our case law, the extraterritorial reach of U.S. employment discrimination statutes such as Title VII,³² the ADA,³³ the ADEA,³⁴ and Sarbanes Oxley³⁵ remain significantly limited to employees performing employment in the U.S. However, U.S. laws will reach across borders to cover U.S. citizens, and sometimes non-citizens, working abroad for U.S. corporations and in some cases a foreign corporation if it is an “integrated enterprise” of a U.S. corporation.³⁶

This specific approach has not been mirrored in Europe or in Asia and UK employee protections generally do not extend to UK citizens working abroad.³⁷ However, in 2018, Europe revised a rule that seeks to put workers who are temporarily assigned to foreign countries within the EU on par with local workers.³⁸ Other countries such as Japan and China have taken a different approach to choice of law by having distinctly local laws for its citizens and other laws for foreigners.

In the U.S., federal anti-discrimination laws including Title VII, the ADA, and the ADEA have extraterritorial effect. These laws expressly prohibit employment discrimination against U.S. citizens working for U.S. owned or controlled companies, regardless of where they are employed. Further, state laws may attach extraterritorial jurisdiction to non-U.S. citizens working abroad, as long as the allegedly discriminatory action originated in the state or the plaintiff is domiciled there.³⁹ In 2008, the U.S. District Court for the Southern District of New York expanded SOX anti-retaliation liability to include extraterritorial protection for employees working overseas, whether U.S. citizens or not, as long as the liability originated in New York.⁴⁰

A. **Sarbanes-Oxley Act of 2002 (SOX)**

While SOX primarily addresses accounting and auditing requirements, it also includes enhanced protections for employees who report corporate fraud and adds

³² 42 U.S.C. § 2000e (2000).

³³ 42 U.S.C. §§ 12101–12213 (2000).

³⁴ 29 U.S.C. §§ 621-634 (2000).

³⁵ Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

³⁶ See generally Kathy Roberts, *Correcting Culture: Extraterritoriality and U.S. Employment Discrimination Law*, 24 HOFSTRA LAB. & EMP. L.J. 295 (2007)

³⁷ See *Lawson v. Serco Ltd.*, [2006] UKHL 3 (U.K.) (noting that the Employment Rights Act of 1996 sec. 94(1), which gives employees the right not to be unfairly dismissed shall apply to expatriate employees in limited situations like where “the employee [is] posted abroad to work for a business conducted in Britain and [where] the employee [is] working in a political or social British enclave abroad.”).

³⁸ *Ius Laboris, EU States Have Until 2020 to Implement Revised Posted Workers Directive*. SHRM (2019), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/global-eu-posted-workers-directive.aspx> (last visited Mar 25, 2020).

³⁹ NY Exec. L. § 298-a (1) and (2).

⁴⁰ *O’Mahony v. Accenture, Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008).

penalties for retaliation taken against whistleblowers providing “truthful” information. The Act applies to U.S. publicly-traded corporations, all non-public companies whose debt instruments are publicly traded and all foreign companies registered to do business in the United States. The anti-retaliation provisions prohibit “any officer, employee, contractor, subcontractor, or agent of such company” from taking any negative employment action in retaliation for the employee providing information, otherwise assisting in an investigation or testifying, participating or otherwise assisting in any proceeding regarding conduct that the employee reasonably believes constitutes a violation of any rule or regulation of the SEC, any federal law related to corporate fraud or any federal law relating to mail fraud, bank fraud or fraud by wire, radio or television, if such information or assistance is provided to any federal regulatory or law enforcement agency, any member of Congress or congressional committee or any person with supervisory authority over the employee.⁴¹

Until the decision in *O’Mahony*,⁴² courts had held that SOX’s anti-retaliation protections did not have extraterritorial application, regardless of where the adverse decision was made, because Congress did not explicitly grant SOX whistleblowers extraterritorial protection in the same way as it had explicitly granted extraterritorial protection to victims of discrimination under Title VII, ADEA and ADA. However, in *O’Mahony*, the U.S. District Court for the Southern District granted relief to an Irish national working in France, who was a partner and employee of Accenture LLP, the U.S. subsidiary of Accenture Ltd., a Bermuda company listed on the New York Stock Exchange.⁴³

In the *O’Mahony* opinion, the court reversed the Department of Labor’s dismissal of O’Mahony’s charge and focused on the location of the alleged adverse decision. It held that since the decision to avoid paying French taxes and to significantly reduce plaintiff’s level of responsibility was made in the United States, the issue of extraterritoriality did not apply here.⁴⁴

B. Federal Anti-Discrimination Laws

In the field of discrimination law, the U.S., UK, and the EU each have blanket protections for workers that strive to guarantee fair treatment. The UK’s 2010 Equality Act⁴⁵ largely mirrors the EU’s Equal Treatment Directive,⁴⁶ though in some respects protections for workers in the UK are more expansive. Under the Equality Act, there are nine protected classes—age, disability, gender reassignment, marriage and civil

⁴¹ 18 USC §1514A (a).

⁴² *O’Mahony*, 2008 U.S. Dist. LEXIS 10600 (S.D.N.Y. Feb. 5, 2008).

⁴³ *Id.* at *3.

⁴⁴ *Id.* at *26.

⁴⁵ 2010 Equality Act, 2010 c. 15, available at <http://www.legislation.gov.uk/ukpga/2010/15/contents> (last accessed Mar. 21, 2020).

⁴⁶ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, O.J. L 204, p. 23–36, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0054> (last accessed Mar. 21, 2020).

partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation—whereas the EU’s Directive covers only discrimination on the basis of sex.⁴⁷ The Equality Act and the Equal Treatment Directive apply to all persons working in the UK and EU, respectively, meaning that expatriate workers could seek protection under UK law, EU law, and/or U.S. law, depending on the context of the employment relationship.⁴⁸

A wide range of variables determines whether an individual who has worked in the U.S. and abroad may invoke the protections of federal anti-discrimination statutes. While many of the same principles of extraterritoriality apply to all U.S. anti-discrimination statutes, federal courts have drawn distinctions in application and scope among Title VII, the ADA and the ADEA.

1. Title VII

Title VII prohibits discrimination with respect to employment on the basis of an individual’s race, color, religion, sex, national origin or pregnancy.⁴⁹ Title VII covers U.S. citizens who are employed in a foreign country working for a U.S. employer. In respect to a U.S. citizen employed outside of U.S. by a non-U.S. employer, Title VII applies only if the non-U.S. employer is shown to be under the “control” of a U.S. employer.⁵⁰

The statute mandates that whether the requisite degree of control exists “shall be based on (i) the interrelation of operations; (ii) the common management; (iii) the centralized control of labor relations; and (iv) the common ownership or financial control, of the employer and the corporation.”⁵¹ In *Sumitomo Shoji America, Inc. v. Avagliano*, the Supreme Court held that a U.S.-based employer that is a subsidiary of a business incorporated abroad is “subject to the responsibilities of other domestic corporations,” and by extension, subject to Title VII.⁵² Title VII does not apply to employees of non-U.S. companies where they are not controlled by a U.S. entity. Title VII also does not apply to non-U.S. citizens working abroad, regardless of whether the employer is a U.S. company or controlled by a U.S. firm.⁵³

In order to be a “covered entity” under Title VII, an employer must meet the fifteen-employee threshold.⁵⁴ In the case of multinational employers, a key question is

⁴⁷ There are, of course, additional protections provided by Article 13 of the Treaty of Amsterdam that address discrimination based on race, pregnancy, sexual orientation, religion, disability, and age.

⁴⁸ The UK Equality Act does not, however, apply extraterritorially. *See Turani v. Sec. of State for the Home Dep’t*, [2019] EWHC 1586 (Admin), available at <https://www.matrixlaw.co.uk/wp-content/uploads/2019/06/Turani-v-SSHD-2019-EWHC-1586-Admin.pdf>.

⁴⁹ 42 U.S.C. § 2000e *et seq.* (2000).

⁵⁰ 42 U.S.C. § 2000e-1(c) (2000).

⁵¹ 42 U.S.C. § 2000e-1(c)(3)(A)-(D) (2000).

⁵² 457 U.S. 176, 188-89 (1982).

⁵³ 42 U.S.C. § 2000e-1(a).

⁵⁴ The statute “applies only to companies with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.”

whether to count only those employees working in the U.S. or to include employees working for the entity outside the U.S. Determining whether the minimum employee requirement has been met is further complicated when the employer is a U.S. subsidiary of a company incorporated outside the U.S. In determining whether the U.S. entity meets the fifteen-employee threshold, some courts hold that employees of the parent organization can be counted.⁵⁵

In regards to its extraterritorial application, Title VII contains an exemption if compliance with U.S. law would cause the employer to violate the law of the country in which its workplace is located.⁵⁶ The “foreign law exception” and most case law elaborating on the contours of this bona fide occupational qualification defense (“BFOQ”) have emerged in the context of national origin discrimination cases under Title VII. Most courts narrowly construe this exception, consistent with EEOC Guidelines. To have its preference upheld as a BFOQ, an employer generally must show the discriminatory conduct to be a “business *necessity* [], not a business *convenience*.”⁵⁷

2. Americans with Disabilities Act (ADA)

Title I of the ADA provides that, “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁵⁸ Although the statute states that, “[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States,”⁵⁹ its definitions of “covered entity,” “qualified individual with a disability,” and “employee” do not include any citizenship prerequisite for ADA coverage.⁶⁰ In the

⁵⁵ See, e.g., *Salemi v. Boccador, Inc.*, 2004 WL 943869 (S.D.N.Y. 2004) (denying summary judgment where sufficient evidence of integrated enterprise would allow counting employees of foreign parent toward fifteen-employee threshold of U.S. subsidiary); *Morelli v. Cedel*, N. 28 supra; *Kang v. U. Lim American, Inc.*, 296 F.3d 810 (9th Cir. 2002) (although employer only had six employees in U.S., employees of plant that was wholly owned and operated in Mexico were to be counted in determining fifteen-employee minimum for Title VII coverage, even though employees in Mexico were not entitled to protections of Title VII); see also *Sinclair v. De Jay Corp.*, 170 F.3d 1045 (11th Cir. 1999) (employees outside Florida should be counted in determining whether employer meets minimum employee threshold for coverage under Florida Civil Rights Act). But see *Davenport v. HansaWorld USA, Inc.*, 23 F. Supp. 3d 679 (S.D. Miss. 2014) (holding that Irish parent company and subsidiaries did not meet minimum threshold requirement for Title VII claims); *Mousa v. Lauda Air Luftfahrt, A.G.*, 258 F. Supp. 2d 1329, 1335-1336 (S.D. Fla. 2003) (holding that foreign employees who work abroad exclusively outside the U.S. should not be counted in determining whether the fifteen-employee minimum is met for coverage under Title VII).

⁵⁶ 42 U.S.C. § 2000e-1(b).

⁵⁷ *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (emphasis added); see also *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (courts will defer to foreign laws requiring conduct constituting unlawful discrimination under U.S. laws, but will *not* defer to “cultural views” or “customer preferences” of the locality where conduct occurred).

⁵⁸ 42 U.S.C. §§ 12112(a).

⁵⁹ 42 U.S.C. §§ 12111(4).

⁶⁰ 42 U.S.C. §§ 12111(2), (8), (4).

absence of any such stated limitation, all individuals employed in the U.S. are protected by the ADA, even if they are not U.S. citizens.⁶¹

A non-U.S. citizen is protected by the ADA only if he or she was employed “in the U.S.” at the time of his termination. Further, the locus of the allegedly discriminatory act does not alone determine whether a non-citizen may sue an employer under the ADA.⁶² Rather, with respect to individuals who have worked domestically and abroad, courts have noted that, when the work done in the foreign country was part of a “temporary assignment” and the individual otherwise worked in the U.S., he or she is deemed to have been employed in the U.S. for purposes of the ADA, as well as Title VII and the ADEA. The court in *Torrigo v. IBM*⁶³ used a “totality of the circumstances” test, drawn from general employment law principles, to determine where the plaintiff was employed for purposes of federal anti-discrimination laws.⁶⁴ In *Torrigo v. IBM*, the court looked at the temporary nature of Torrigo’s employment abroad to determine whether he was employed in the United States.⁶⁵ Weighing these and similar factors, if a non-citizen employee’s place of employment is deemed to be the U.S., he or she may sue under the ADA. On the other hand, if the employee is deemed to be employed abroad, he or she would not be covered by the ADA.

Concerning the employee-numerosity threshold under Title I of the ADA,⁶⁶ the process for determining whether the minimum employee requirement has been met mirrors Title VII. In this regard, the ruling *Sumitomo Shoji America, Inc. v. Avagliano*, by extension applies to the ADA. Further, EEOC guidelines provide that, if the U.S. company and the multinational corporation are an “integrated enterprise,” then all employees, domestic or abroad, should be counted for purposes of the ADA’s requirement. Whether the two entities form an integrated enterprise is determined by looking at the following factors: (i) interrelation of operations; (ii) common management;

⁶¹ *Torrigo v. IBM*, 319 F. Supp. 2d 390, 405 (S.D.N.Y. 2002). “Congress established that the ADA applies to non-citizens as well as citizens employed in the United States . . .”

⁶² *See, e.g., id.* at 400 (allegations of discriminatory conduct in the U.S. do not by themselves bring a non-U.S. citizen employee within the ambit of the statute’s protections.)

⁶³ *Id.* at 403.

⁶⁴ In *Torrigo*, the district judge turned to New York law and concluded that the appropriate inquiry involved asking where the “center of gravity” of the employment relationship had been: “The center of gravity of an individual’s relationship with an employer is determined by considering a variety of factors, including (but not limited to) whether any employment relationship had, in fact, been created at the time of the alleged discrimination, and if so, where that employment relationship was created and the terms of employment were negotiated; the intent of the parties concerning the place of employment; the actual or contemplated duties, benefits, and reporting relationships for the position at issue; the particular locations in which the plaintiff performed those employment duties and received those benefits; the relative duration of the employee’s assignments in various locations; the parties’ domiciles; and the place where the allegedly discriminatory conduct took place. The list is not meant to be exhaustive; the center of gravity of the parties’ relationship is to be determined based on the totality of circumstances.” *Id.* at 402-03.

⁶⁵ *See, e.g., id.* at 403 “Whether Torrigo was ‘employ[ed]’ abroad or was employed in the United States and merely temporarily deployed to Chile is a question of fact which cannot be answered simply by noting that he spent the bulk of his time in Chile for the three years leading up to the alleged discriminatory termination.” *Id.*

⁶⁶ The statute “applies only to companies with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.”

(iii) centralized control of labor relations; and (iv) common ownership or financial control.⁶⁷

Like Title VII, the ADA explicitly exempts from its coverage “the foreign operations of an employer that is a foreign person not controlled by an American employer.”⁶⁸ The ADA also affirmatively states that it protects against the discriminatory acts of an entity that is incorporated outside the U.S. only if that entity is controlled by a U.S. corporation.⁶⁹ In those situations, the ADA deems the controlling U.S. corporation to be the employer and to be the party that engaged in the discriminatory acts.⁷⁰

Similar to Title VII, when both the employee and employer come within the ambit of the ADA, an employer may still be able to find a safe haven in a bona fide occupational qualification defense (“BFOQ”) to an ADA claim.⁷¹ Furthermore, in certain situations, a multinational employer may avail itself of an international treaty to defend its discriminatory conduct.⁷²

Whether the defendant-employer is a U.S. subsidiary or a foreign entity impacts the viability of such a defense. In *Sumitomo Shoji America, Inc. v. Avagliano*,⁷³ the Supreme Court concluded that, in general, a U.S. subsidiary of a foreign corporation may not invoke any treaty rights of the parent; but if the foreign parent actually controlled the employment decisions of the subsidiary, the treaty could be invoked by both entities. Moreover, under the Court’s holding, a branch office of a foreign-incorporated entity would be entitled to claim Friendship, Commerce and Navigation (FCN) treaty immunity.⁷⁴

⁶⁷ The Second Circuit agreed with the EEOC’s approach in *Morelli v. Cedel*, 141 F.3d 39 (2d Cir. 1998), an ADEA case. Looking to, among other things, the rationale behind the minimum employer requirement, the court concluded that the intention to exclude small-employers from liability simply did not apply when the employer was a company spanning international borders. Courts have followed the *Morelli* approach in subsequent ADA and Title VII cases. See *Jouanny v. Embassy of France in the U.S.*, 2017 WL 2455023 (D.D.C. Jun. 5, 2017); *Downey v. Adloox, Inc.*, 238 F. Supp. 3d 514 (S.D.N.Y. 2017); *Loffredo v. Daimler AG*, 54 F. Supp. 3d 729 (E.D. Mich. 2014).

⁶⁸ 42 U.S.C. § 12112(c)(2)(B).

⁶⁹ 42 U.S.C. § 12112(c)(2)(A).

⁷⁰ 42 U.S.C. § 12112(c)(2)(C) (emphasis added).

⁷¹ 42 U.S.C. § 12112(c)(1).

⁷² The following FCN treaties contain an “of their choice” provision: U.S.-Japan Treaty: Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, 4 U.S.T. 2063, 2070, T.I.A.S. No. 2863, U.S.-Greece, art. XII(4), 5 U.S.T. 1829; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, 1950, U.S.-Den., art. VII(4), 12 U.S.T. 908; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-F.R. Germany, art. VIII(1), 7 U.S.T. 1839; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, U.S.-Neth., art. VIII(1), 8 U.S.T. at 2043; Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-Korea, art. VIII(1), 8 U.S.T. 2217; Convention of Establishment, Protocol, and Establishment and Navigation, Feb 12, 1961, U.S.-Fr., art. VI(1)-(2), Protocol (9), 11 U.S.T. 2398; and Treaty of Friendship, Commerce and Navigation, Feb. 12, 1961, U.S.-Belg., art. 8 (1)-(2), 14 U.S.T. 1284.

⁷³ 457 U.S. 176 (1982).

⁷⁴ *Id.* at 189. For a more in depth discussion of the FCN Treaty see Wayne N. Outten & Jack Raisner, *Extraterritorial Application of U.S. Laws: Anti-Discrimination*, in INTERNATIONAL LABOR & EMPLOYMENT LAWS, ABA/BNA Books, 1997.

3. Age Discrimination in Employment Act (ADEA)

In 1984, Congress amended the ADEA⁷⁵ to give it a limited extraterritorial reach. Similar to Title VII and the ADA, the ADEA applies to U.S. citizens working outside of the U.S. for U.S. companies and for non-U.S. companies “controlled” by a U.S. company. It uses the same four factor test applied under Title VII.⁷⁶ The ADEA provisions that define “employee” and outline foreign employment are virtually identical to those contained in Title VII. Non-citizens working outside the United States are not protected because they are not considered “employees” under the Act. Further, U.S. citizens working abroad for companies not controlled by U.S. companies are not protected because their employers are not covered entities under the ADEA. In addition, Congress amended the ADEA’s “BFOQ” provision, specifying that actions otherwise prohibited under the Act shall not be unlawful if compliance with the ADEA’s provisions “would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.”⁷⁷

The identity of the employer is significant in cases brought under the ADEA. The ADEA’s foreign employer exception differs from that found in the ADA and Title VII. While the ADEA also does not apply where “the employer is a foreign person not controlled by an American employer,”⁷⁸ it does not explicitly limit this to “the foreign operations” of such a foreign employer. Some courts, most notably the Second Circuit Court of Appeals, have held that this provision does not exempt domestic operations of an employer incorporated outside the U.S. In other words, such domestic operations are covered by the ADEA.⁷⁹ Other courts have found such a conclusion to be inconsistent with the legislative history of the ADEA and its statutory amendments, however, holding that the ADEA does not apply to foreign employers, even with respect to their business within U.S. borders.⁸⁰

C. State Statutes--New York Human Rights Law

The New York State Human Rights Law (NYSHRL) prohibits employment discrimination on the basis of “age, race, creed, color, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, or marital status of any individual.”⁸¹ While federal law has limited extraterritorial applications, anti-

⁷⁵ 29 U.S.C.S. §§ 621-634.

⁷⁶ 29 U.S.C. §623 (h).

⁷⁷ 29 U.S.C.S. § 623(f)(1); *see also* Denty v. Smithkline Beecham Corp., 907 F. Supp. 879, 883 (E.D. Pa. 1995), *cert. denied*, 522 U.S. 820 (1997) (finding that the ADEA “applies abroad only when (1) the employee is an American citizen and (2) the employer is controlled by an American employer.”); Middlebrooks v. Teva Pharma. USA, Inc., 2018 WL 705058, at *6-7 (E.D. Pa. Feb. 5, 2018) (dismissing for lack of subject matter jurisdiction over an Israeli employer that was not controlled by the U.S. parent company).

⁷⁸ 29 U.S.C. §623(h)(2).

⁷⁹ *See* Morelli v. Cedel, 141 F.3d 39 (2d Cir. 1998); EEOC v. Kloster Cruise Ltd., 888 F. Supp. 147, 151-52 (S.D. Fla. 1995).

⁸⁰ *See, e.g.*, Robinson v. Overseas Military Sales Corp., 827 F. Supp. 915 (E.D.N.Y. 1993); Mochelle v. J. Walter Inc., 823 F. Supp. 1302 (M.D. La. 1993), *aff’d*, 15 F.3d 1079 (5th Cir. 1994).

⁸¹ NY Exec. L. § 296.

discrimination law under NYHRL has a more expansive interpretation. Section 298-a of the NYHRL states that the law applies to acts of discrimination committed in New York State, or committed extraterritorially by a state resident or a non-state resident against a New York State resident.⁸² Discrimination committed extraterritorially by a non-resident gives a state resident the right to an administrative proceeding before the New York State Division of Human Rights, while discrimination committed extraterritorially by a state resident against a state resident gives the state resident the right to a private civil action.⁸³ The New York Court of Appeals has held that non-residents, however, are not protected by the NYSHRL unless they can show that they worked in New York or that the discriminatory conduct otherwise “had an impact” in New York.⁸⁴

Conclusion

Knowing the parties’ citizenship, whether individual or corporate, is paramount to analyzing the rights and obligations of the parties to an employment relationship. Whether by agreement or by statutory right, a U.S. employee will be dealing with a multiplicity of events and decisions that could bolster, undermine, or determine his or her rights, obligations and remedies under U.S. law. Having a well drafted expatriate or secondment agreement may be beneficial, but the advice of employment and often corporate counsel, both U.S. and local, during a merger, sale or relocation of a business abroad may be key to maximizing specific and well thought out employment protections.

⁸² NY Exec. L. § 298-a.

⁸³ See, e.g., *Torrico v. IBM*, 213 F. Supp. 2d 390, 406-07 (S.D.N.Y. 2002); *Duffy v. Drake Beam Morin, Harcourt Gen., Inc.*, 1998 WL 252063 (S.D.N.Y. May 19, 1998); *Iwankow v. Mobil Corp.*, 541 N.Y.S.2d 428 (1st Dep’t App. Div. 1989).

⁸⁴ See *Hoffman v. Parade Pubis.*, 15 N.Y.3d 285 (2010); see also, e.g., *Canosa v. Ziff*, No. 18 CIV. 4115 (PAE), 2019 WL 498865, at *17 (S.D.N.Y. Jan. 28, 2019) (plaintiff who was sexually harassed on multiple occasions while working at business meetings in New York was covered by the NYSHRL); *Wexelberg v. Project Brokers LLC*, No. 13 CIV. 7904 LAK MHD, 2014 WL 2624761, at *10–12 (S.D.N.Y. Apr. 28, 2014) (analyzing application of *Hoffman* to remote work assignments).