

Global Equal Employment Opportunity Toolkit

How to Fight Workplace Discrimination and Harassment and Promote Workplace Diversity on a Global Scale

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Equal employment opportunity initiatives like policies, code of conduct provisions and training modules on discrimination, harassment and diversity have long been vital to domestic American employers. Now, in the global economy, the EEO issue has gone global. As US multinationals internationally align an ever-increasing list of human resources policies and “offerings,” their cross-border efforts at promoting fairness in the workplace have become increasingly vital.

In the US, a “zero tolerance” stand against illegal workplace discrimination and harassment is an aggressive, tough and compliant approach to assuring equal employment opportunities. And stateside, affirmatively to champion workplace diversity is important. Internationally, though, discrimination and harassment laws vary widely and in many countries diversity is not an issue. These differences complicate the EEO initiatives that American multinationals might otherwise be inclined to launch across global operations. Multinationals ready to fight discrimination/harassment and champion diversity on a global scale need subtlety, nuance, strategy and finesse. A one-size-fits-all American-style approach to EEO compliance does not work globally because American laws on discrimination, harassment and diversity are unique in the world. American employers’ homegrown EEO initiatives, when exported, can be culturally inappropriate and legally problematic.

This is a toolkit for a US-based multinational’s headquarters that needs to expand or improve its EEO (discrimination, harassment, diversity) initiatives regionally, or around the world. We discuss how US headquarters

needs to adjust its strategies and policies when driving a top-down global EEO compliance initiative—policy, code of conduct provision, training module—that would impose, internationally, internal rules against workplace discrimination and harassment, or that would affirmatively promote workplace diversity. In part one of this toolkit we address global *discrimination* programs generally. Then in parts two and three of this toolkit we cover a pair of particularly-troublesome discrimination sub-topics—global *age* discrimination compliance and global *pay* discrimination compliance. In part four we address global initiatives for combating workplace *harassment*. Finally, in part five we address global workplace initiatives regarding *diversity*.

Part One: Fighting Workplace Discrimination on a Global Scale

Discrimination law in the United States is more evolved than anywhere else on Earth. The leading treatise on US employment discrimination law (by Barbara Lindemann and Paul Grossman) runs to two volumes and 3,300 pages. By now, decades after America’s civil rights movement gave rise to tough, groundbreaking workplace discrimination laws, American jurisprudence has refined discrimination law concepts more complex than analogous doctrines anywhere else. Stateside employment discrimination disputes can implicate ideas as esoteric as “gender stereotyping,” “third-party retaliation,” “sex plus” discrimination against a protected “sub-class,” “differential,” “single-group” and “situational” validity in statistical adverse-impact analysis, and the requirement



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of a causal connection between an adverse employment action and a claim of “retaliatory animus.”

In response to increasingly rarified doctrines of US discrimination law, American employers have engineered sophisticated tools to help eradicate illegal discrimination from their workplaces. These days, US employer best practices for fighting discrimination include, for example: imposing increasingly tough work rules against workplace discrimination, offering comprehensive discrimination training, implementing detailed reporting and whistleblowing mechanisms, isolating alleged targets from alleged discriminators, running statistical adverse-impact analyses, and project-managing internal investigations into specific allegations and incidents.

Because sophisticated anti-discrimination tools like these have evolved to such an advanced state in the US, an American multinational might assume that its kit of state of the art anti-discrimination tools is ready for export to countries with simpler, less-evolved employment discrimination rules. After all, these days most countries do impose some laws against workplace discrimination, but no country’s body of employment discrimination law is as intricate as that of the United States, and enforcement of discrimination laws in many countries is weak. As one example, a recent posting to an online human resources forum by someone calling himself “Tokyo-Based HR Consultant” pointed out that “we know companies are not supposed to” discriminate in Japan, but “in reality, everybody knows...that such discriminatory practices exist here.”

So surely a carefully thought-out, robust American-style approach to fighting workplace discrimination must be a best practice everywhere around the world—right? Perhaps not. Prohibiting illegal workplace discrimination is of course a vital and valid objective in every country. Common-law jurisdictions, in particular, impose sophisticated laws that ban employment discrimination in ways reminiscent of our US approach. Indeed, these days even civil law jurisdictions, particularly the Continental European states subject to EU anti-discrimination directives, impose strict workplace discrimination laws that in some respects are even stricter than corresponding American laws. As one example, a French law (decree no. 2011-822 of July 7, 2011) requires employers of 50 or more employees to implement written gender equity action plans.

Still, the challenge in exporting US anti-discrimination practices and policies to countries with less-developed equal employment opportunity doctrines is that discrimination statutes and cultural perspectives outside the US differ, in their particulars, from the

US domestic approach. This can make a multinational’s US-crafted anti-discrimination toolkit, when exported, inappropriate and even suspect. Sending US discrimination compliance tools to foreign workplaces is a bit like a Swiss watchmaker bringing his watchmaking equipment along on a campout: Overly refined tools can be useless in a less nuanced environment.

When adapting US-honed anti-discrimination tools for use abroad (or globally), account for three issues: Context, protected status and “extraterritorial” effect. The rest of our discussion in this part one on cross-border anti-discrimination initiatives addresses these three issues.

A. Context

The first step in exporting or “internationalizing” any American-style approach to fighting workplace discrimination is to adapt the US approach to different environments overseas. Workplace discrimination laws loom unusually large in the US context; the other side of that coin is that overseas, discrimination laws tend to be less central in day-to-day human resources. Adjust accordingly. Be sensitive to local context. Keep discrimination compliance in local perspective.

Three matters specific (if perhaps not unique) to the US environment explain why discrimination compliance is less of a priority outside the states—employment-at-will, demographics, and history:

- *Employment-at-will.* The US is the world’s only notable employment-at-will jurisdiction. US employment law tends not to offer unfairly fired workers any viable cause of action for wrongful discharge (outside the labor union context and outside the state of Montana). American-style employment-at-will is in essence a legal vacuum, and nature abhors a vacuum. What rushed in to fill this particular vacuum is US *discrimination law*. Indeed, some American lawyers argue that discrimination law now amounts to a sort of de facto US wrongful termination regime. That is, there is a thesis that the US employment-at-will doctrine fuels discrimination litigation in the employment dismissal context. As support for this thesis, look east to Bermuda or north to Canada. Bermudian and Canadian “human rights” laws, on paper, are quite similar to US employment discrimination statutes. But the percentage of contested and litigated Bermudian and Canadian employment dismissals that lead to “human rights” claims is tiny when compared to the percentage of American employment dismissal lawsuits that assert a discrimination theory. For an aggrieved fired Bermudian or Canadian, having to meet the burden to prove

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a “human rights” or discrimination claim is much tougher than merely establishing a wrongful dismissal/inappropriate notice claim.

■ **Demographics.** America’s unusually heterogeneous population makes for broad racial diversity in US job applicant pools and workplaces. In the US context, demographic diversity makes laws against racial and ethnic employment discrimination vital. Legislative history shows that US Congress adopted our discrimination laws to “stir” the American “melting pot.” But many other countries have homogeneous populations. There is no “melting pot” in most (albeit not all) countries in Asia, Africa, Europe and Latin America. Countries from Finland to Haiti to Paraguay to Mali to China, Japan, Korea and beyond are essentially just one race. Because race discrimination in these countries is not a widespread social problem, fighting workplace race discrimination in these countries is not a top human resources priority.

■ **History.** America’s unusually troubled past with its overt racial and ethnic discrimination—slavery, lynchings, displacements, massacres of indigenous people—is a conspicuous scar on our history and sparked our civil rights movement that led to our employment discrimination laws. But American history is unique to the US. The historical underpinnings of American discrimination laws simply are a non-issue abroad.

The point is that American-style employment-at-will, demographics and history make our US discrimination laws vital, but these issues are much less significant in most places abroad. Therefore, foreign workplace discrimination laws carry correspondingly less baggage, and discrimination compliance plays a more modest role in foreign human resources administration. American multinationals operating abroad might ratchet down their US discrimination law compliance strategies to account for this very different context.

B. Protected Status

In any discrimination policy or provision, protected status is everything. After all, every employer can, and does, discriminate every day against employees in non-protected groups. Employers routinely discriminate against poor performers, criminals, smokers, current drug users, people with bad credit, the lazy, the incompetent, the uneducated and undereducated, the illiterate, graduates of less-prestigious schools, those with poor grades and test scores, and many other non-protected groups. Indeed,

discrimination in employment is so ubiquitous (and legal) that many employers take pride in being “discriminating” in their standards. All that is illegal, of course, is discrimination against people because they belong to one of a dozen or so *protected groups*.

Therefore, well-drafted US discrimination policies and provisions always list the specific protected groups, traits or statuses against which the employer prohibits discrimination—usually these are gender, race, religion, national origin, age, disability, veteran status, genetic makeup, sexual orientation and the like. US employers’ lists usually track the categories protected under American state and federal law.

Listing the protected statuses in a discrimination policy or provision is essential in the domestic US context because failing to list these traits would result either in an over-broad discrimination policy that prohibits discrimination on every conceivable ground, or in an inscrutable policy that forces workers to go research what categories are, and are not, “protected by applicable law.”

But the logic behind listing protected traits gets murkier in the international context, because protected groups differ so much by jurisdiction. When drafting a cross-border workplace anti-discrimination rule (like a global anti-discrimination policy or an anti-discrimination provision in a global code of conduct), the problem is that local lists of protected traits differ radically across jurisdictions. Gender, religion and race are protected in most places, disability and sexual preference are increasingly protected, “gender identity” and “intersex status” are protected in Australia, part-time status is protected in Europe, “traveler” (homeless) status is protected in Ireland, HIV-positive status is protected in South Africa and Honduras, infectious-disease-carrier status is protected in China, caste is protected in India, and family status and social origin are protected in Chile. Political opinion, views and beliefs are protected in Argentina, Europe, El Salvador, Mexico and Panama. Illness (in addition to disability) and language are protected in Guatemala and Peru. Economic circumstances are protected in Argentina, Guatemala and Mexico. Criminal record is protected in British Columbia, Canada. Rural (versus urban) origin is protected in China. Meanwhile, the US and its states protect a few quirky traits that probably no other jurisdiction protects, chiefly veteran status, workers’ compensation filings and genetic predisposition. And then there are the jurisdictions like Argentina, Belgium and Turkey with legal doctrines that actually let courts invent their own protected groups.

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So a central question in drafting a border-crossing anti-discrimination rule is: Which protected traits or statuses merit explicit mention in the multinational's global discrimination policy? Which traits or statuses can a multinational afford to exclude? Can a multinational drafting a cross-border discrimination policy ever refer expressly only to some groups protected by law in certain jurisdictions without naming all groups protected everywhere?

There are no easy answers. Because whether or how to list protected statuses is the central challenge to drafting a global discrimination policy or provision, different employers address this problem in different ways. One common approach is for the global discrimination provision to list the US protected groups and then to add the "catch-all" clause "*and any other category protected by applicable law.*" But using this "catch-all" clause in a global discrimination policy suffers from three serious shortcomings—at the same time, this "catch-all" clause is *too vague*, *too narrow* and *too broad*:

- *Too vague.* Listing some protected traits and then using the catch-all clause ("and any other category protected by applicable law") in a global discrimination provision can be vague, impractical and insensitive, because this clause both downplays the importance of local law and it forces workers to research what "applicable law" is. This clause is actually dangerous because it signals the employer's lack of patience with local rules. In Australia, for example, a global anti-discrimination policy that fails to address Australian local discrimination law has been held inadequate. *Cf. Richardson v. Oracle Corp. Aust. Pty. Ltd.*, [2013] FCA 102 (Aust.) at 163, 164 (Australia-specific "elements were absent from [a multinational's] global online [discrimination/harassment] training package..., the omission of these important and easily included [Australia-specific provisions in the multinational's] statements of its own policies is a sufficient indication that [the multinational] had not...taken all reasonable steps to prevent sexual harassment").
- *Too narrow.* At the same time, using this catch-all clause in a global discrimination policy can be too narrow—it can fall short. Inserting this clause into a discrimination policy demotes all the unnamed protected groups (the groups falling under the catch-all) to a second-class tier of protection. Invoking the canon of construction *expressio unius est exclusio alterius* (to express one thing is to exclude another), a court could and indeed perhaps should reason that this catch-all clause protects the unnamed protected traits (statuses) less than it protects the expressly named traits. *Cf. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts* 107-11 (2012).

Imagine, for example, a US age discrimination lawsuit against a US employer whose anti-discrimination policy somehow happened to prohibit discrimination on the grounds of "gender, race, disability, religion, genetic predisposition, veteran status and any other ground protected by applicable law." The age discrimination plaintiff's lawyer would surely argue this policy's conspicuous omission of "age" from its list of protected statuses betrays this employer's ambivalence toward eradicating age discrimination from its workplace. For this employer to have left "age" out of its policy's listing of named protected traits all but invites a claimant's lawyer to argue the omission evidences the employer's antipathy toward members of the omitted group. American employment lawyers, therefore, would strongly caution against listing (in drafting a discrimination policy) some but not all of the key legally protected traits or statuses. An employer that lists some protected groups in a discrimination policy should go ahead and include all of them.

Now extend this analysis abroad. Imagine for example an Irish plaintiffs' employment lawyer representing an aggrieved fired "traveler" or a British Columbia lawyer representing a rejected felon, and arguing that the omission of "travelers" or "criminals" from a multinational's list of protected traits in a global anti-discrimination provision evidences the employer's antipathy toward travelers and criminals.

- *Too broad.* While the "catch-all" clause approach in this respect is too narrow, at the same time this approach can also be too broad, or go too far, because this approach extends named protected groups into jurisdictions where they are not otherwise protected or even appropriate. For example, US-headquartered multinationals commonly list veteran status and, increasingly, genetic predisposition in their global anti-discrimination policies and code of conduct provisions, because these two groups are protected under US law. But veteran status and genetic predisposition make absolutely no sense to protect outside the US—these traits tend not to be protected abroad, and employees overseas tend not to consider them as analogous to the other protected categories. Separately, to include "age" in a global anti-discrimination provision raises real problems in jurisdictions where the employer imposes mandatory retirement or age ranges in staffing certain positions. (See Part Two.)

There is no "magic bullet" here—no foolproof way to draft a border-crossing anti-discrimination provision that works well everywhere. Each multinational needs to think hard about the listing-protected-traits issue internationally, and then select a less-than-ideal approach.

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One less-than-ideal approach is to list protected groups separately for each jurisdiction. But of course that approach requires crafting separate local discrimination provisions (or separate discrimination policy or code of conduct riders or appendices) and so that approach undercuts the advantage of issuing a single global policy. Another less-than-ideal approach is to keep the global anti-discrimination policy silent as to all protected groups, and simply to prohibit “illegal” discrimination that violates “applicable law,” using a clause that says something to the effect of “the company’s policy is to provide equal employment opportunities among all groups, of whatever classification, protected by applicable law.” This approach, though, yields a vague policy that forces employees to do their own legal research.

C. “Extraterritorial” Effect

America’s major US federal (and apparently some state) discrimination statutes reach abroad, to a limited extent: They prohibit a US “controlled” (such as a US-headquartered) employer from discriminating, on any ground protected by American law, against American citizens who work outside the US, whether they work overseas as local hires or as expatriates. US-based multinationals need to factor this mandate into their global anti-discrimination policy and strategy.

But be careful not to let the “tail wag the dog” here, as this issue is deceptively narrow. Most American-headquartered multinationals employ relatively few Americans among their overseas workforces (although there are exceptions, such as US companies that provide niche services like overseas security under US government contracts or subcontracts).

Of course, it might be overkill to extend a full-blown US-style anti-discrimination policy to all staff working outside the US only to cover a tiny percentage of American citizens in an organization’s foreign workplaces. So consider a more nuanced approach. Focus on complying with US discrimination laws in a way targeted to the overseas managers of US citizens working abroad, not necessarily targeted to the protected American citizens themselves.

Part Two: Fighting Workplace Age Discrimination on a Global Scale

For an American-headquartered multinational, often the toughest specific issue in crafting any international EEO compliance initiative is figuring out what to do about *age* discrimination. US multinationals’ cross-jurisdictional EEO provisions tend to prohibit discrimination and harassment (and sometimes promote diversity) based on specific lists of protected traits, usually including gender, race, national origin, religion, disability—and *age*. While listing most of these traits in a multinational’s cross-border EEO initiative raises few problems, the mere mention of the three-letter word “age” in a global anti-discrimination provision causes tough problems that too many American multinationals overlook.

Our discussion here in Part Two focuses on the apparently benign, seemingly narrow but surprisingly intractable problem of whether, or how, an American multinational can afford to mention the word “age” in a global anti-discrimination policy, code of conduct clause or training module. Our discussion breaks into three parts: the *problem* (widespread age discrimination around the world); the *challenge* (crafting a cross-border age discrimination provision); and the *solution* (bringing international age discrimination initiatives into compliance).

A. The Problem: Widespread Age Discrimination Around the World

The United States imposes the world’s toughest and best-developed laws against discrimination in employment, but most other countries do indeed have laws that purport to ban employment discrimination. Other countries’ discrimination laws, though, differ from American discrimination law in significant ways. One of the starkest differences between American-style discrimination laws and overseas employment discrimination laws regards *age discrimination*. The US Age Discrimination in Employment Act (29 USC § 621), passed in 1967, is the world’s most robust, well-developed and frequently invoked age discrimination law, and it has few real counterparts overseas. Many other countries do not even bother to ban age discrimination in employment. And even the growing group of jurisdictions that now do outlaw age discrimination tend to have laws that by US standards are weak, poorly conceived, lightly enforced and riddled with exceptions. Most jurisdictions that now purport to prohibit age discrimination impose no minimum protected age (age 40, under the US ADEA) nor do they let employers favor the old over the young (as the US ADEA does—*General Dynamics v. Cline*, 540 US 581 (2004)). In

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theory this means foreign age laws are even broader than America's ADEA but in *practice* this means foreign age laws are broad to the point of being blunt: Because everyone is some age, foreign age discrimination laws protect everyone. In an age-related dispute involving applicants or employees of different ages, everybody gets to claim to be equally protected. Foreign age laws favor 20-year-olds as much as 41-year-olds as much as 72-year-olds. Therefore, foreign age laws can forbid employers from favoring old applicants and employees by offering the seniority-enhanced benefits that American employers commonly use—service-enhanced pension benefits, severance pay, and vacation benefits, as well as age-plus-service-based early retirement offers.

Not only do foreign legal systems tend either not to impose any age discrimination laws or to have blunt age laws, but many jurisdictions outside the United States actually enshrine age-discriminatory concepts right in their employment laws. For example, laws in Bahrain, Oman and many other countries force employers to give all employees written employment agreements that must list employee date of birth. Italy, Germany, Turkey and many other countries let employers use the fact that an older worker has vested in social security ("state pension") to help justify a dismissal or layoff.

That said, the global trend is in the direction of better protections against age discrimination. Some common law countries including Australia, Canada and New Zealand passed tough age laws some years ago, and an ever-increasing pool of civil law jurisdictions including Costa Rica, Israel, Mexico and all the Continental states of the European Union purport to outlaw "age" discrimination. As to Europe, EU Directive 2000/78 bans discrimination on "age" as well as on four other grounds (article 1), and each EU state was supposed to have passed an age discrimination law by December 2006 (article 18). Still, in practice most countries tolerate what to Americans look like blatantly ageist practices including, in particular, *mandatory retirement* and *age caps in recruiting*.

■ **Mandatory retirement.** The United States and Canada ban mandatory retirement because firing someone for celebrating a certain birthday is indisputably a blatant act of age discrimination. But most other countries—even lots of those that purport to impose age discrimination laws—rationalize (or ratify employer rationalizations for) mandatory retirement in many contexts. For that matter, even overseas trade unions often buy in and enshrine mandatory retirement in collective bargaining agreements. Two examples are Israel and Europe.

– **Israel.** Israel has a law that purports to ban age discrimination (Israel Retirement Law 2004 §4), and Israel's legal community talks about how tough their age discrimination law is. But by American standards Israel still allows blatantly ageist mandatory retirements. See, e.g., *Weinberger v. Bar-Ilan Univ.*, Israel Labor Appeal case 209-10 (6 Dec. 2012); *Zozal v. Prison Author*; Israel HCJ case 1268/09 (27 Aug 2012).

– **Europe.** Mandatory retirement is legal in much (if not all) of Europe despite the "age" discrimination prohibition in EU directive 2000/78. Mandatory retirement comes under increasing scrutiny in Europe but it remains common, widely legal and enshrined in countless collective bargaining agreements. The European Commission admits that "most [EU states] have mandatory retirement ages for particular sectors or professions" (EU Commission, "Age and Employment," doc. 10.2767/16878 (2011), p. 5, report by D. O'Dempsey & A. Beale.) The EU Court of Justice, the Italian Supreme Court, the UK Supreme Court and Germany's Federal Labor Court all tolerate mandatory retirement under many circumstances. See *Rosenblatt v. Oellerking*, Eur. Ct. Justice case C-45/09 (12 Oct. 2010); *Georgiev v. Tehnicheski*, Eur. Ct. Justice case C-250/09 (18 Nov. 2010); *Poste Italiane SpA*, Irl. Sup. Ct. decision #10985 (9 May 2013); *Seldon v. Clarkson Write & Jakes*, [2012] UK Sup. Ct. 16 (25 April 2012); German Fed. Labor Court ruling of 5 Mar. 2013.

■ **Age caps in recruiting.** In addition to mandatory retirement, another pervasive and often perfectly legal ageist practice overseas is imposing age caps in recruiting. Employers abroad actually pay websites to post openly discriminatory job ads along the lines of "Wanted: Brand Manager age 30 – 35" or "Seeking trainees up to age 28." In Europe these age caps are technically illegal—see e.g., two rulings of Denmark's Board of Equal Treatment of 11 April 2012—but the European Commission itself concedes that "minimum and maximum age requirements [in jobs] are...extensively used across virtually all reporting [EU] States" ("Age and Employment," *supra*, at 6). According to one expert, in "Italy, between 60 and 70% of public recruitment ads for jobs contain an upper limit of 35–40 years. This is true also of recruitment ads for public administration, including Italian Parliament—despite the fact that it is against the law" (Louise Richardson, Vice President of AGE Platform Europe, presentation at UNOEWG (22 Aug. 2012), available at www.docstore.com.)

Difference in social perspectives. From an ADEA-compliant American point of view, mandatory retirement and age caps in recruiting look starkly ageist (see e.g., M. Winerip, "Set Back by Recession, and Shut Out of Rebound," *New York Times*, August 27, 2013; A. Tugend,

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“Unemployed and Older, and Facing a Jobless Future,” *New York Times*, July 27, 2013). But there is a vital cultural component here, a social gap between the rigid American position of protecting old people from the very different social concerns abroad for alleviating chronic youth unemployment. According to the *New York Times*, Europe suffers from “historically high unemployment rates—in excess of 50 percent among youths—[which] in countries like Greece, Italy and Spain [are] discouraging young people from having children” (S. Daley & N. Kulish, “Germany Fights Population Drop,” Aug. 14, 2013, at 1,6). In Europe and elsewhere abroad, alleviating chronic youth unemployment is so vital a social policy that opening up jobs by forcing retirements does not seem too harsh as long as society (social security or “state pensions”) offers a viable safety net: In many countries outside the United States, the social security replacement rate of final average pay is so high that workers actually anticipate when their benefits will finally vest and they can stop working. And so even the European Court of Justice recognizes a worker’s vesting in social security benefits as grounds that can justify firing old people (see *Rosenblatt* and *Georgiev* cases, *supra*). Separately, another defense for mandatory retirement commonly heard abroad is that it serves as a sort of pressure-release-valve on tough overseas rules against no-cause firings, offering employers at least one way legally to dismiss underperformers with “dignity.”

By American standards, of course, this apologia for mandatory retirement and age discrimination looks weak. In particular, to justify mandatory retirement on the ground that firing old people helps alleviate chronic youth unemployment seems bizarre—this reasoning defends discrimination because discrimination discriminates. No one would justify firing people of a thrifty race or religion so as to open up jobs for those in some less-frugal race or religion, and we now completely reject the old argument against giving a woman a job that could go to a man who heads a family. That said, Americans should remember that as recently as the late 1980s our ADEA had a (now-repealed) cap that made mandatory retirement perfectly legal stateside.

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

In their global discrimination policies, codes of conduct and training modules, American multinationals tend to proclaim zero tolerance for “age” (and other) discrimination across their worldwide workforces. But making this claim globally can be a real problem because of the difference in social perspectives, because foreign laws ostensibly prohibiting age discrimination vary widely and allow exceptions, and

because many American multinationals’ own foreign affiliates persist in embracing mandatory retirement, age caps in recruiting and other ageist practices.

We already noted that every multinational needs to comply both with local discrimination laws and with its own global policies against discrimination. Outside the United States, complying with the age discrimination laws of any given jurisdiction tends to be fairly straightforward at least for on-the-ground local management and human resources professionals. For American multinationals, the *cross-border* age-discrimination compliance challenge is how to craft and enforce one single workable cross-border “age” discrimination provision like a policy, code of conduct clause or training module. Merely to mention the little word “age” in a global provision risks liability exposure even in jurisdictions without age discrimination laws, because overseas, an employer’s internal rules tend to be enforceable against the employer as part of each employee’s employment contract. (Outside employment-at-will, a so-called “employment-at-will disclaimer” written into a human resources policy is, obviously, unenforceable.) This means a multinational that issues global age discrimination provisions may someday have to answer, in court, to overseas applicants and employees claiming the organization denied them rights under its own provision. In one case some years ago, a group of Chinese forced retirees sued in a Chinese labor court alleging that while their forced retirements did not violate any Chinese statutory law, the employer, when it retired them, breached its own guarantee of freedom from workplace “age” discrimination.

It would seem that any American multinational voluntarily claiming, in its own global anti-discrimination provision, that it does not tolerate “age” discrimination must have processes in place to comply with its own internal rule. But too often this assumption is wrong. Many American multinationals suffer from a disconnect between idealistic headquarters-drafted anti-ageism pronouncements and entrenched ageist practices overseas. A “little secret” in global human resources administration is that the overseas operations of even US-based multinationals commonly impose mandatory retirement and cap job eligibility at specified ages. A German employment lawyer once estimated that more than 90 percent of American employers in Germany write mandatory retirement clauses right into their local German employment contracts. These days at US organizations’ European offices mandatory retirement and age-capped recruiting may on the retreat, but many US multinationals still use these practices widely across Africa, Asia, India, Latin America and the Middle East.

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In addition, ageist practices abroad threaten to implicate an entirely separate danger: adverse consequences in a *US domestic age discrimination lawsuit*. What if a US domestic age discrimination plaintiff trying to prove systemic age bias (such as in a US class action) tried to convince an American judge to order discovery, or to admit evidence, about a multinational defendant's overseas mandatory retirements or age-capped recruiting, on the theory that any multinational that forcibly retires its own overseas staff and disqualifies its own overseas applicants from jobs because of their ages violates its own global "age" discrimination provision—and likely harbors ageist animus?

C. The Solution: Bringing International Age Discrimination Initiatives into Compliance

Any multinational faces a problem if it has issued a global anti-discrimination provision (policy, code of conduct, training module) that mentions the word "age" while its own overseas affiliates still impose mandatory retirement, age caps in recruiting or other locally acceptable ageist practices. Can this multinational possibly come into compliance with its own global anti-age-discrimination rule? The good news is the answer is yes, there is a solution here, if the multinational is willing to take four steps:

- **Step 1: Assess noncompliant practices abroad.** Human resources professionals and employment lawyers at a multinational's US headquarters often have no idea that their own organization's overseas affiliates openly discriminate on age. Find out whether your overseas affiliates impose mandatory retirement, age-capped recruiting or other ageist practices. The answer may surprise you. Some progressive multinationals have made headway stamping out age discrimination internationally, but ageist practices remain surprisingly common in many markets around the world, often unbeknownst to US headquarters.
- **Step 2: Align the global prohibition with actual practices.** Where headquarters imposes a global provision (policy, code of conduct, training) that purports to ban age discrimination, but where headquarters discovers that its own overseas affiliates may be violating that provision, headquarters needs to select one of five possible strategies for getting into compliance:
 - Stamp out mandatory retirement, age-capped recruiting and other non-compliant practices worldwide by better policing overseas affiliates.
 - Write an express exception into all global age discrimination prohibitions that excludes mandatory retirement and age caps

in recruiting—recognizing, of course, that this exception all but swallows up the global anti-age-discrimination rule.

- Remove from the global policy's list of protected traits all mention of the word "age."
 - Remove lists of protected traits from the global policy entirely (including references to "age"), replacing those lists of traits with a general statement that the organization tolerates no illegal discrimination under applicable law ("*our policy is to provide equal employment opportunities among all groups, of whatever classification, protected by applicable law*").
 - Replace the global discrimination policy with tailored local-country policies which, where appropriate and legal, omit references to "age" discrimination.
- **Step 3: Police outsource partners.** Many multinationals have contractually bound their overseas suppliers and outsource service providers to *supplier* codes of conduct that are completely separate from their internal ethics codes of conduct. Check the anti-discrimination clause in any supplier code. If a supplier code expressly prohibits "age" discrimination—as many supplier codes do—then monitor whether outsource partners actually comply with this particular prohibition. If suppliers flout the age prohibition by imposing mandatory retirement or age-capped recruiting, then either police suppliers accordingly or edit the supplier code to eliminate the reference to "age."
 - **Step 4: Ensure practices abroad comply with local age discrimination laws.** A completely separate global age discrimination problem is how to comply with emerging foreign age discrimination laws like those in Costa Rica, Israel, the European Union and Mexico. In discussing how US age discrimination laws tend to be more strictly enforced and less riddled with exceptions than age laws abroad, we mentioned that age laws abroad tend to be, in theory, much broader than the US ADEA—again, the ADEA is narrowly tailored to reach only people over age 40 and the ADEA allows discrimination against young people, while age laws overseas tend to protect everybody. This means that many ADEA-compliant practices common in the United States violate these broader (if blunter) foreign age laws. For example, overseas age discrimination laws that prohibit discrimination against the young can stop an employer from imposing minimum experience levels in recruiting; see *Rainbow v. Milton Keynes Council*, UK Employment Appeals Tribunal 2008. And overseas, lockstep and seniority-linked compensation and vacation benefits can be suspect, as can linking severance pay to

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years of service and offering voluntary early retirement incentives to older staff unless somehow “objectively justified”; see *MacCulloch v. ICI*, UK Employment Appeal Tribunal 2008. Be sure foreign practices comply.

Part Three: Fighting Workplace Pay Discrimination on a Global Scale

A consultant at Norfolk Mobility Benefits, David Bryan, has said that as “[t]oday’s multinational employer [evolves] into the transnational of tomorrow... [t]here appears to be more centralization of core corporate functions,” such as “benefits professionals implementing global benefits strategies.” (D. Bryan, “Creating a Global Benefits Strategy,” www.internationalhrforum.com (11/09).) Indeed, at many multinationals the push to globalize the human resources function begins with aligning certain aspects of compensation and benefits across borders, such as implementing global executive rewards initiatives, regional commission plans and sales incentive programs, broad-based global incentives/bonuses, and global stock option/equity awards. In addition, sometimes a one-time event like a merger or restructuring spawns special global offerings like retention bonus plans and severance pay plans. And multinationals that conduct global employment law compliance audits sometimes export tools like statistical adverse impact analysis.

But multinationals launching cross-border rewards programs and compliance audits need to comply with the targeted pay-related discrimination laws of each affected country. Because the United States imposes the world’s most sophisticated set of employment discrimination laws, US-based multinationals may assume that we Americans enjoy a big head start in complying with employment discrimination mandates worldwide. But in the particular context of *pay/benefits* discrimination, this assumption is wrong. Foreign laws on pay and rewards discrimination can be surprisingly different from, even significantly broader than, analogous US concepts. Overseas, watch for unexpected doctrines like “comparable worth,” “local citizenship” discrimination, “job category” or “colleague” discrimination—even “job category comparable worth” discrimination.

Here we examine the range of issues that a cross-border rewards offering or compliance audit might trigger as to pay discrimination compliance abroad. At the broadest level, our analysis splits into two categories, “protected group” pay discrimination and “job category” pay discrimination.

A. “Protected Group” Pay Discrimination

Most every jurisdiction on Earth imposes general employment discrimination laws that prohibit employers from discriminating based on specified traits or groups such as gender, race and religion. These laws tend to reach hiring, firing and terms of employment. Examples of these laws include: Brazil constitution art. 7 items XXX-XXXI; EU Equal Treatment Directives 76/207/EC and 200/78/EC; South Africa Employment Equity Act 55/1998; Spain labor code arts. 4.2 (c), 17.1; US Title VII/ADEA/ADA. Coming from the US perspective, foreign jurisdictions’ “plain vanilla” discrimination laws raise a number of issues as they apply in the pay discrimination context:

- *Adverse treatment.* Because rewards like pay, benefits, bonuses, commissions and equity grants are vital terms of employment, any employer that discriminatorily rewards its employees by favoring members of certain protected groups at the expense of others almost always runs afoul of protected group employment discrimination laws. This analysis is simple.
- *Disparate impact.* Many countries’ protected group discrimination laws not only prohibit straightforward *adverse treatment* discrimination (called in Europe “direct discrimination”), but also “disparate impact” discrimination (called in Europe “indirect discrimination”). This means that even facially neutral compensation systems illegally discriminate if they disadvantage employees in one protected group. For Americans, this analysis is straightforward because “disparate impact” law in the United States is as evolved as anywhere. Indeed, some of the subtler disparate impact scenarios actionable stateside are far less likely to draw notice overseas—for example, the American government position that refusing to hire convicted criminals has an illegal disparate impact against “African American and Hispanic men.” (*EEOC Enforcement Guidance, “Consideration of Arrest and Conviction Records in Employment Decisions,”* no. 915.002 (4/25/12)).

Disparate impact law tends to be more developed in common law jurisdictions like Australia, Canada, New Zealand, South Africa and the UK—but, by US standards, largely undeveloped elsewhere. Therefore, outside of common law countries, employers rarely launch American-style statistical adverse impact “regression” analyses to verify that employees’ pay and rewards comply with gender discrimination laws. For example, these statistical analyses are virtually unknown in China, Japan, Germany, the Czech Republic, Hungary and for that matter most other countries.

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That said, though, statistical-adverse-impact-on-pay analyses do get run, on occasion, in the UK and Australia—in the UK, these are called “Job Evaluation Schemes.” But these may be more common in the public sector than among nongovernment employers, because in some jurisdictions equal pay claims arise mostly in the public sector. In Canada, though, statistical adverse impact analyses of pay/rewards are increasingly common.

- **Protected group.** In auditing compliance with local rules on both adverse treatment (“direct”) and disparate impact (“indirect”) discrimination, be sure rewards systems fairly compensate members of each locally protected group. Expect each jurisdiction to impose its own list of protected groups or traits. Most jurisdictions protect gender, race, religion, disability and (increasingly) age and sexual orientation. In addition, individual jurisdictions protect quirky groups not normally protected elsewhere. In the European Union, to pay employee members of one political party more than employees in another party is theoretically illegal because the EU protects “political opinion or belief” (EU Equal Treatment Directives, *supra*.) India protects caste, Ireland protects the itinerant homeless (“travelers”), South Africa protects HIV status, China protects rural background and laws in Yemen protect *al akhadam* (low-caste, dark-skinned servants). The United States may be unique in the world in protecting veteran status.
- **Gender.** That said, in the specific context of pay discrimination (as distinct from discrimination in hiring, firing and terms/conditions of employment beyond remuneration), the most vital protected group is inevitably *gender*. Employees and government enforcers are particularly likely to look for gender discrimination when analyzing “equal pay” compliance of employer rewards systems. Many countries including the United States impose targeted gender discrimination laws specific to the pay/benefits/equity context. Examples include: EU treaty article 141 and EU equal pay directive 75/117; the Ontario and Quebec Pay Equity Acts; the UK Equal Pay Act of 1970; and the US Equal Pay Act of 1963. Plus, some countries impose gender-specific discrimination laws like Korea’s Gender Equality Employment Act that reach—but are not specific to—compensation.
- **“Comparable worth.”** Some targeted gender pay discrimination laws impose what in the United States is called “comparable worth” analysis, and in the UK is called “work of equal value.” Comparable worth/equal value laws require equalizing (“validating”) pay across separate job categories traditionally worked by one gender or the other. For example, an employer’s

secretaries might argue they contribute as much comparable worth/equal value as the company’s truck drivers, and therefore deserve the same pay rate, even though the employer has completely different pay scales for secretaries and truck drivers.

Decades ago, US workers’ rights advocates and law professors championed comparable worth as a possible extension of US employment discrimination law. But the US Supreme Court rejected the comparable worth idea. In the United States, “[t]he ‘comparable worth’ theory, pursuant to which plaintiffs have asserted that courts should infer an intent to discriminate based on the employer’s practice of setting dissimilar salaries for jobs deemed to be of comparable worth, in reliance on market rates, has consistently been rejected since the Supreme Court’s 1981 decision in *County of Washington v. Gunther* [452 US 161].” (Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law* 4th ed., vol. 1 (2007 & supp.) at p. 1281.)

Indeed, it could be argued that comparable worth is un-American in its core assumption that experts can somehow “validate” pay rates across distinct job categories. This view rejects the basic Chicago-school free market capitalist principle that the wage differential between any two jobs is our free market economy’s inherent reflection of those two jobs’ relative contributions to society. To a free marketeer, market wage rates, by definition, reflect the “worth” or value of any given job. Pilots earn more than cab drivers because society values pilots more, which also explains why pilots earn more than, say, flight attendants. Do we really want to open the comparable worth Pandora’s box and unleash industrial workplace experts pontificating on relative values of dissimilar jobs without regard to those jobs’ actual market pay rates?

But this is just a parochial American view. Comparable worth mandates thrive in certain other jurisdictions, imposing real burdens on local employers’ compensation systems, particularly but not exclusively in the public sector. In February 2012, for example, Fair Work Australia (an adjudicatory body) issued a sweeping decision ([2012] FWAFB 1000) under Australia’s Fair Work Act 2009 that boosted pay for a class of more than 200,000 women in Australia’s “Social and Community Services Sector” on a comparable worth theory. Fair Work Australia held (¶ 2):

“[F]or employees in the SACS industry, there is not equal remuneration for men and women workers for work of equal or comparable value with comparison with workers in state and local government employment.”

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Similarly, Ontario's Pay Equity Act (R.S.O. 1990, chap. P7, as amended 2009) requires employers affirmatively to run comparable worth/equal value analyses—and Ontario's increasingly proactive Pay Equity Commission launches unannounced enforcement audits. The Quebec Pay Equity Act (RSQ c E-12.001, as amended 2009) is just as strict; Quebec's pay equity law is designed "to redress systemic wage discrimination, which was seen to be the result of long-standing stereotypes and social prejudices, the undervaluation of women's jobs and the professional segregation of women in [Quebec] society." (L. Granosik, "Shouldn't a Secretary Earn the Same Salary as a Truck Driver? What is the Value of a Job?" *International Bar Ass'n Discrimination Law Newsletter*, vol. 15 no. 1 (July 2012).)

Check whether a multinational's operations include any comparable worth jurisdictions. In those locations, be sure to comply with comparable worth mandates, however strict.

- **Local citizenship.** Moving beyond gender, another protected group subject to special scrutiny under some countries' pay-specific discrimination laws—a category unexpected to Americans—is *local citizenship*. Some developing countries prohibit employers from compensating aliens more generously than locals, resisting those multinationals that "parachute in" an expatriate and reward him better than locals who work every bit as hard. For example, Bahrain labor law art. 44 mandates that "wages and remuneration" of "foreign workers" not exceed pay for local "citizens" with "equal skills" and "qualifications" unless necessary for "recruitment." Brazil labor code art. 358 requires that "salary" of a local citizen not be "smaller" than pay of a "foreign employee perform[ing] an analogous function." Watch for laws like these when structuring expatriate packages.

B. "Job Category" Pay Discrimination

So far we have been discussing pay discrimination laws that are conceptually similar to US employment discrimination laws in that they get triggered only if an employer disadvantages a discriminatee based on protected-group status. Moving now beyond protected-group discrimination laws, many countries outside the United States impose separate "job category" or "colleague" pay discrimination laws—in France, called "equal work equal pay" laws—under which every employee enjoys a legal right to be rewarded the same as similarly situated colleagues in equivalent jobs, *even if both discriminatee and comparator belong to all the same protected groups*.

As applied to a single job, these laws are conceptually simple: Two colleagues working the same position enjoy a legal right to the same pay package, even if both are white 45-year-old Christian men originally from Norway or even if both are black Muslim 26-year-old women originally from Yemen. Under these job category or colleague pay discrimination laws, job category becomes, itself, a protected group. To pay different wages or benefits to two identically situated colleagues working the same job is illegal even if the two are twins. The lower-paid colleague has a legal right to "equal pay for equal work."

Going further, a rarified version of job-category discrimination law addresses irregular—temporary/part-time/contingent—status. Indeed, every European Union member state expressly prohibits pay discrimination on the basis of *irregular status* like temporary, part-time or contingent work. (See EU directive 97/81/EC.) This means that European employers cannot legally pay their temps and part-timers lower wages or stingier medical insurance or retirement benefits. These same laws can even force European employers to credit part-time service as full-time for calculating years-of-service requirements. (Cf. *Lapouge v. Assoc. ADAPEI*, CCcs case # 07-40.289 (5/7/08) (France).) From a US perspective, this concept is a "game changer." American employers almost universally deny American part-timers and temps the full package of benefits available to regular full-timers, and American employers often pay part-timers and temps lower hourly wages than regular full-timers. As just two examples, this practice explains the huge uptick in US universities' use of adjunct faculty and US law firms' use of contract lawyers. In Europe, these practices could constitute illegal pay discrimination.

Another version of job-category discrimination is the equal pay law doctrine in the Czech Republic that employers operating across the country pay their employees in similar jobs equal pay rates regardless of location (irrespective of protected group status). Czech unions push employers to live up to "geographic equal pay," and so some Czech employers run internal analyses to ensure compliance. The Czech geographic pay equity rule causes headaches for employers operating across the Republic, because (not surprisingly) cost-of-living and market pay rates in the Prague area significantly outstrip pay in the Czech countryside.

Beyond Europe, two countries that impose job category discrimination rules of one type or another include Brazil and China:

- **Brazil:** Brazil labor code article 461 mandates equal pay among employees who perform "identical" work of the "same value." The

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text of article 461 seems to link this mandate to protected group status—“sex, nationality or age”—but Brazilian courts completely decouple the equal pay mandate from protected group status.

A 2007 case explains that “what is relevant for the purpose of [Brazilian] equal pay [analysis] is whether the identical tasks were performed by the claimant and comparable colleagues with the same quality and productivity”—*regardless* of sex, nationality or age. (*Fisch v. Unibanco*, 2d App. Trib. #00530-2007-201-02-00-4.)

- **China:** China’s 2008 Employment Contract Law (articles 11 and 18) mandates that “the principle of equal pay for equal work shall be observed” (absent a union agreement to the contrary), without linking “equal pay” to gender or other protected group status. Implementing regulations are silent on equal pay; Chinese law on this point remains underdeveloped.

Job-category or colleague-discrimination laws get even trickier where they enter the realm of *comparable worth/equal value*—equating separate jobs that purportedly contribute equal value to an organization but without linking claims to comparators’ protected-group status. For example, France’s job-category pay discrimination law allows for comparable worth/equal value theories but subject to employer defenses based on different lengths of service or different performance and responsibilities, and affirmative action/“positive discrimination” for nationality. (See *15 Employees v. Renault*, *Cour de Cassation chambre social* (France) [CCCs] case # 92-42.291 (10/29/96).) In one landmark French case, a lawyer won a daily lunch subsidy that the employer law firm had granted only to non-lawyer staff, on the theory that the law firm could not legally favor employees in a lower professional category. (*Meier v. Alain Bensoussan*, CCcs case # 05-45.601 (2/20/08); *principle affirmed in Pain v. DHL*, CCcs case # 07-42.675 (7/1/09); *principle expanded in Cour d’appel de Montpellier chambre social* case # 09/01816 (equalizing benefits between *cadre* [executive] and *non-cadre* employees).)

In a June 2009 decision under the Finnish Employment Contracts Act 2001 (Finland Sup. Ct. case # *KKO:2009:52*), Finland’s Supreme Court mandated equalizing employee benefits across two very different job categories. In that case, a construction company had enrolled its *clerical* workers in a generous medical insurance plan that had excluded its *construction* workers. The construction workers sued for the medical insurance under a job category (not gender-linked) comparable worth/equal value theory—and won. The employer argued, but failed to prove, that each clerical worker

contributed greater value. The court ordered the employer to extend the insurance benefit to the construction workers.

These cases, of course, require “validating” allegedly comparable jobs. Not all jobs claimed to be comparable are actually comparable. One French court ruled that a human resources job is not functionally comparable to—and therefore does not merit the same pay as—positions of “project manager” and “commercial manager.” (*Fornasier v. Sermo Montaigu*, CCcs case # 06-46.204 (6/26/08).)

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

Part Four: Fighting Workplace Harassment on a Global Scale

US multinationals proactively ban illegal harassment across their operations worldwide, almost always as part of their prohibition against workplace discrimination. But the radically-different harassment law landscape outside the US seriously complicates global anti-harassment rules and training.

Harassment law in the US: Over the past few decades, American workplace harassment law has evolved into the most intricate body of harassment jurisprudence in the world. US federal and state court decisions in harassment cases now construe concepts as esoteric as a “tangible employment action requirement for vicarious liability” in *quid pro quo* harassment, an “affirmative defense of unreasonable failure to take advantage of preventive or corrective opportunities,” a “severe and pervasive requirement for hostile

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environment harassment” and claims of “implicit *quid pro quo* third-party harassment.”

These esoteric harassment law doctrines evolved in US court decisions even though the texts of American statutes tend not even to prohibit workplace harassment. US federal harassment prohibitions are judge-made extensions of statutes that nominally prohibit only *discrimination*. Even the US EEOC defines “harassment” as “a form of employment discrimination.” (See “Harassment” page at www.eeoc.gov/laws/.) Therefore, harassing behavior in the American workplace tends to be actionable only to the extent it is a form of discrimination. *Non-discriminatory* harassment—sometimes referred to as bullying, pestering, abusive work environment or equal opportunity harassment—tends to be perfectly legal stateside. A Washington State Department of Labor & Industries publication issued to combat abusive workplace behavior actually concedes that “[b]ullying in general is NOT illegal in the US unless it involves harassment based on “protected status” (Workplace Bullying and Disruptive Behavior: What Everyone Needs to Know,” WSDLI rept. #87-2-2011, Apr. 2011 (emphasis in original)).

Harassment law abroad: In contrast to the tough, well-evolved but narrow American law stance against workplace harassment, the harassment-law landscape overseas differs greatly. Singapore imposes no specific laws banning workplace harassment. Countries like China and Russia may ban harassment on paper, but they tend not to offer workplace harassment victims many tough precedents or readily enforceable remedies. (Although there are some: In February 2013, Chinese “[m]ilitary prosecutors indicted a one-star general on charges of sexually harassing a military officer.” Jo Yeh, “One-Star General Indicted for Sexual Harassment,” chinapost.com, Feb. 26, 2013.) In 1997 India’s Supreme Court banned workplace sex harassment (*Vishakha v. State of Rajasthan*), but women’s rights advocates say India has a long way to go in enforcement. More enlightened countries like the Netherlands and Luxembourg impose tough bans against workplace harassment, but confounding case law in these jurisdictions actually supports proven sex harassers—labor judges in these countries can be quick to hold dismissal too severe a punishment for a proven sex harasser, particularly a long-serving executive with a relatively clean prior discipline record. (E.g. *Luxembourg* C.S.J. no. 34066 (Nov. 12, 2009).)

Meanwhile, common-law countries impose tough anti-harassment rules broadly consistent with the US model. All European Union states now impose laws that prohibit certain harassment, and awareness is spreading. A January 2013 article in the German press is called “Wake Up Germany, You’ve Got a Serious Sex Harassment

Problem.” (A. Borchardt & T. Rest in *Suddeutsche Zeitung* (English translation by WorldCrunch).) Countries like France and Egypt have criminalized certain types of harassment—France reenacted its sex harassment criminal law in 2012 (law no. 2012-954 of August 7, 2012). Under a 2006 Algerian law (art. 341bis), anyone who “exert[s] pressure to obtain sexual favors” in Algeria faces two to twelve months in prison plus a fine of up to 200,000 dinars (US\$2,540). These days even Shari-ah law gets interpreted to criminalize workplace sex harassment—in October 2010, a judge in Arar, Saudi Arabia sentenced a sex harasser to *death*. The Saudi harasser had tried to blackmail a government employee at her workplace with revealing photographs, but she denounced him to the Saudi Virtue Police. (See Deccan Herald, India, deccanherald.com, Oct. 23, 2010.)

As countries overseas get serious about stopping workplace harassment, their harassment laws mutate into new forms, some even broader (if less nuanced) than counterpart US doctrines. Unfortunately, these growing differences leave our state-of-the-art American tools and training for weeding out the US variety of workplace harassment increasingly unhelpful overseas. So any multinational trying to foster a harassment-free workplace internationally these days needs subtlety, nuance, strategy and finesse. Reflexively extending the rigid American “zero tolerance” approach around the world does not work.

Toward a global approach to eradicating workplace harassment: Multinationals pursuing a global approach to eliminating harassment from their worldwide workforces need to account for the international context by factoring in seven issues: alignment; protected status; affirmative mandates; policy drafting; launch logistics; communications/training; and investigations. We address each.

- **Alignment.** A multinational must align any global approach to eradicating workplace harassment with its own approach to preventing workplace discrimination and promoting equal employment opportunity. Be sure a global harassment policy and international harassment training, as well as a cross-border anti-harassment enforcement initiative, dovetail with the multinational’s global initiatives as to discrimination and diversity. Tackle these three related issues together, not in isolation.
- **Protected status.** Because American-style prohibitions against workplace harassment grow out of US statutes that prohibit workplace discrimination, American employers’ harassment policies and training tend to ban only *status-based* harassment linked to a victim’s membership in a protected group—sex

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harassment, race harassment, disability harassment, age harassment, religious harassment, even theoretically veteran status harassment and genetic harassment. To date, not too many US domestic employers have taken the bold step of imposing tough, enforceable workplace rules that ban status-blind harassment—bullying, pestering, equal opportunity harassment. A trend may be emerging at the US state government level to outlaw so-called “abusive work environments,” but state proposals here so far have little traction. (Remember even Washington State’s campaign against abusive work environments concedes “[b]ullying in general is NOT illegal in the US.”)

By contrast, many other countries already prohibit infinitely broader status-blind harassment (abroad called workplace “bullying,” “mobbing” “psycho-social harassment,” or “moral harassment”), without regard to protected group status. A Belgian law of June 2002 prohibits workplace “pestering.” A French law of June 2010 criminalizes “psychological violence.” A Luxembourg law of June 2009 prohibits “bullying and violence at work.” Venezuela’s 2005 “Organic Law on... Work Environment” prohibits “offensive, malicious and intimidating” conduct in the workplace, including “psychological violence” and “isolation.” And mushrooming case law in Brazil imposes damages for workplace “moral harassment”—Brazilian moral harassment law in recent years has become a common claim in all sorts of workplace disputes. In Brazil these days, even employers that legally assign and legally pay overtime have faced “moral harassment” litigation from overworked employees arguing the extra hours amount to a form of bullying.

In theory, foreign status-*blind* harassment laws are infinitely broader than American-style status-*based* harassment prohibitions: A doctrine that bans abusive behavior for whatever reason is infinitely broader than a targeted American-style rule that prohibits only harassment motivated by a dozen or so protected traits. For a multinational, the challenge here is how to factor these broad foreign status-blind harassment laws into a workable global workplace anti-harassment policy and training module. Expanding a US-style harassment policy, and training, to account for foreign status-blind harassment prohibitions requires exponentially increasing its scope, and this expansion makes US employers uncomfortable, especially if the broadened policy and training will reach into US workplaces. Too many US multinationals downplay this conflict and simply issue overly narrow international policies that merely ban status-based harassment. But this approach blows a huge hole in the multinational’s international

harassment compliance initiative, because the employer’s internal harassment prohibition bans much less than all illegal harassing behavior.

- *Affirmative mandates.* Every law against workplace harassment imposes a negative *prohibition* against employers (and often co-workers) who commit illegal harassment. In addition, some jurisdictions’ laws go farther and impose affirmative employer *duties* or *mandates* as to harassment compliance. Multijurisdictional harassment initiatives (policies, training, enforcement) need to account for these. A global policy or code of conduct provision that merely bans illegal harassment does not go far enough in a jurisdiction where employers have to take affirmative harassment compliance steps.

For example, like California, South Korea requires employers to offer periodic training on sex harassment. Chile, Costa Rica, India, Japan and other countries affirmatively require employers to issue written sex harassment policies. The Austrian Supreme Court requires employers affirmatively to investigate complaints of sex harassment (Austria Supreme Court decision *9 ObA 131/11x*, Nov. 26, 2012), as do statutes in countries including Chile, Costa Rica, India, Japan, South Africa and Venezuela. Costa Rica requires employers to institute sex harassment claim procedures and to report each sex harassment claim to the Ministry of Labor Inspection Department. A 2006 Japanese regulation (MHCW notification No. 415) imposes similar affirmative mandates. (In addition, some jurisdictions’ harassment laws, such as China’s Special Provisions on Occupational Protections for Female Employees of April 2012, affirmatively require that employers provide a “harassment-free workplace.” But in practice, mandates of harassment-free workplaces differ little from simple negative prohibitions against harassment.)

- *Policy drafting.* In drafting a multinational’s cross-border anti-harassment policy (or code of conduct provision), be sure the policy mandates actually work overseas. Reject American-style prohibitions that are unworkable abroad. To do this, define key terms cross-culturally and ensure the policy’s explicit prohibitions are enforceable in each affected jurisdiction:
 - *Define key terms cross-culturally.* Workplace harassment policies implicate concepts that are highly susceptible to being misconstrued abroad. Be sure to be clear. For example, the common harassment policy terms “inappropriate” behavior and “improper” touching get interpreted very differently depending on cultural context—some behavior obviously “inappropriate” or “improper” in Atlanta, Roanoke and Milwaukee may not

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seem so out of line in Athens, Riyadh or Mexico City. “Kissing,” prohibited by many American harassment policies and training modules, usually implies romantic mouth-kissing without distinguishing the cheek-kissing common among co-workers in many countries. Even the term “harassment” itself takes on very different meanings abroad. In Brazil, “harassment” (*assédio*, in Portuguese) is understood to mean overt and abusive acts like bullying and *quid pro quo* harassment and therefore does not reach “hostile environment” harassment. For that matter, employees abroad are not likely to understand even basic US harassment terms of art like “hostile environment” and “*quid pro quo*” harassment.

- *Ensure the policy’s explicit prohibitions are enforceable in each affected jurisdiction.* A harassment policy’s specific restrictions may raise legal issues abroad. Be sure policy prohibitions are enforceable overseas. For example, again we have the “kissing” problem: The common US harassment policy provision prohibiting on-job “kissing” is unworkable in places like France where men and women co-workers kiss one another every morning as a greeting. Also, restrictions against co-worker dating raise serious privacy law issues and spark human resources challenges overseas, especially in countries like Germany and Switzerland where birth rates are low and a third to half of married couples are believed to have met in the workplace. Society in these countries actually sees workplace romance as vital to sustaining the local population base, and so local employees and even courts push back hard against American-style co-worker dating restrictions—or, at least, passive-aggressively ignore them. In these jurisdictions, even a workplace rule that merely requires dating co-workers to disclose their relationships almost always offends. In one extreme case, a Russian judge confirmed a worker’s sex harassment allegation as true but nevertheless denied her claim, reasoning that “*if we had no sexual harassment, we would have no children.*” See E. McKenzie, “Sex Harassment Good for Procreation: Russian Judge,” *Law360*, Aug. 8, 2008.

- *Launch logistics.* Be sure to launch a cross-border harassment policy in a way that complies with overseas procedures for implementing new work rules. Every harassment policy imposes a discipline or termination sanction, but we have seen that many jurisdictions get surprisingly lenient when an employer invokes an anti-harassment policy to fire a harasser for good cause. So the policy needs to stick. Harassment policies are work rules that can be subject to mandatory “information and consultation” with works councils and health-and-safety committees or mandatory bargaining with unions. Launching a new harassment policy may also require tweaking lists of local work rules, such as the work

rules required in France, Japan, Korea and many Arab countries. And any harassment policy that imposes a mandatory disclosure rule—such as a rule requiring dating co-workers to disclose their relationships—can trigger employment and data privacy law challenges.

- *Communications/training.* A multinational implementing a global harassment policy should communicate its policy to employees abroad and then train on how it works. But never directly export US online or live harassment training modules. Training about sex harassment, in particular, raises unique cultural challenges in places where harassment remains poorly understood. Foreign workers, male and female alike, used to mock US-generated sex harassment and gender-sensitivity training. In recent years, overseas workers may have become superficially more accepting of these training sessions, but many overseas employees forced to sit through harassment modules may still see this as a puritanical American exercise irrelevant to their local environment. Indeed, in some pockets of the Arab world, Africa, Asia, Latin America and Eastern Europe, a workforce may openly scoff at training seen as too awkward, too “politically correct” and too insensitive to the local environment. For example, at a February 2013 sex harassment training session at Chinese manufacturing giant Foxconn, one “18-year-old female worker” was “often”—*during the sex harassment training session itself*—“subjected to obscene gestures and sexual harassment from three male colleagues.” (Ma Yujia, “Foxconn Employees Suffer Sexual Harassment,” *China.org.cn*, Feb. 22, 2013.) So tailor anti-harassment communications and training for local audiences. Tone down messages likely to ruffle local feathers. Make the case for why harassment is a local problem. Show how harassment rules can work locally to improve local conditions.
- *Investigations.* US employers understand the importance of thoroughly investigating credible harassment complaints, allegations and denunciations received both informally and through reporting channels like hotlines. Indeed, as already mentioned, law in Austria, Chile, Costa Rica, India, Japan, South Africa, Venezuela and elsewhere affirmatively *requires* employers to investigate allegations of sex harassment. But even in these countries, an aggressive American-style workplace harassment investigation can trigger push-back and unexpected legal issues. So adapt overseas harassment investigations (and discipline for proven harassers) to comply with host-country rules and culture.

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Part Five: Promoting Workplace Diversity on a Global Scale

Equal employment opportunity and diversity play a huge role in domestic American human resources administration and in US employment law compliance—surely a bigger role than in any other country, particularly outside the common law world. So it might seem that, when it comes to promoting workplace diversity globally, American multinationals enjoy a clear head start. But very different demographics abroad make this head start less advantageous than it may at first appear. Indeed, in some contexts overseas, too much experience with US diversity initiatives might even be a drawback.

How, specifically, does a multinational drive EEO compliance and foster workplace diversity across jurisdictions? US EEO and diversity tools were originally honed for the atypical, rarified environment of US discrimination, harassment and affirmative action law, and for the unique demographics of the United States. So they do not always work well abroad, at least not without significant retooling. This is particularly true as to those American diversity tools and programs engineered to increase demographic representation in the workplace through recruiting and retention (as opposed to softer diversity training programs meant to enhance respect and tolerance among co-workers already in a workforce).

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

The US understanding of “diversity.” In addressing “diversity,” the US Supreme Court has adopted the increasingly-popular “big tent” view, saying that “[m]ajor American businesses have made clear that the skills needed in today’s increasingly *global* marketplace can only be developed through exposure to widely diverse *people, cultures, ideas and viewpoints*” (Grotter v. Bolliner, 539 US 306, 330 (2003)). This all-encompassing approach sees “diversity” as far more than the three narrow but well-defined “diversity dimensions” that US government statisticians track via America’s mandatory employer-diversity-reporting form, the EEO-1: gender, “Hispanic or Latino” ethnicity, and “race” defined as “White,” “Black or African

American,” “Asian,” “American Indian or Alaskan Native” or “Native Hawaiian or Other Pacific Islander.”

US diversity experts these days expand their efforts well beyond these three EEO-1 categories of gender, Hispanic/Latino ethnicity and race. Modern diversity experts, along with the Supreme Court, speak broadly (if vaguely) of “diversity of backgrounds,” “diversity of opinions” and “diversity of experiences.” Diversity professionals also cultivate diversity among age groups, sexual orientations, the “differently abled,” and other groups, legally-protected and non-legally-protected alike. To a modern US diversity expert, confining a corporate diversity initiative just to the three EEO-1 categories would be far too narrow.

That said, though, the fact remains that domestically within the US, the *sine qua non* of a “diverse” workforce *actually* is rooted in our three “old school” US EEO-1 categories. To Americans, those three “diversity dimensions” stand alone in their own tier, with all other categories less important. After all, no American would consider a workplace of all white, non-Hispanic men as “diverse”—even if those Anglo white guys came from various cities, were alumni of various schools, voted for various political parties, cheered for various sports teams and were of various religions, ages, sexual orientations and physical abilities. On the other hand, we would all have to concede that a workforce is indeed “diverse” if made up of half men/half women and boasting big percentages of Hispanics, blacks, Pacific Islanders, Asians and Native Americans—even if it somehow turned out that this gender and race balanced workforce included only able-bodied, heterosexual, Ohio-born, Democrat Catholics over age 40.

- Among our three EEO-1 “diversity dimensions” (gender, Hispanic ethnicity, race), one category—race—stands above the others. According to the *Yale Journal of International Law* (vol. 35, p. 116 (2010)), “U.S. judges, activists and academics have theorized extensively about how the struggle for African Americans’ civil rights shapes U.S. law prohibiting discrimination against other groups.”

The international understanding of “diversity.” For years the importance of “diversity” has been growing outside the US. According to a report from the Conference Board (Executive Action Series #175), “demographic changes in Europe, combined with... regulations, are...pressur[ing European] companies to increase the diversity of their workforces.” A study by the Lee Hecht Harrison firm found that two-thirds of employers *worldwide* see employer

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diversity programs as key retention tools. Some countries now actually mandate specific diversity initiatives: South Africa requires workplace diversity plans, for example, and Brazil and Germany require affirmative action for the disabled. European jurisdictions are requiring gender equity on corporate boards of directors. India now imposes some caste diversity rules in the public sector.

So in today's diverse, multi-cultural world markets, all multinationals, regardless of where headquartered, should be thinking about how to foster inclusion and equality of employment opportunity within workforces worldwide, and how to recruit and retain diverse workforces.

But in propagating a diversity program abroad we come right back to our definitional question of metrics: *What do we mean by "diversity"?* Like plugs on our American electrical appliances, our US EEO-1 metrics of gender, Hispanic ethnicity and race just will not fit overseas. Indeed, our American understanding of race and ethnicity is so uniquely our own that even the US Census struggles—recent immigrants cannot interpret American census forms because peoples from other cultures do not "get" how Americans categorize ourselves. According to *The New York Times* (January 22, 2010):

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

This disconnect between what Elizabeth Grieco calls "how we define race in the United States" and how other countries define race (and ethnicity) explains why workforce demographic diversity programs hatched from US EEO-1 metrics are bound to fail if transplanted overseas. Consider:

- The "Hispanic/Latino" EEO-1 ethnicity category is unique to the US, is misunderstood outside the US, and is meaningless where there are virtually no Hispanics/Latinos—countries from Albania to Zimbabwe—as well as where there are virtually *nothing but* Hispanics/Latinos—Spanish-speaking Latin America, Spain, Equatorial Guinea.

- Concepts of race differ abroad. In England, "Asian" means Indian/Pakistani but rarely includes peoples of the Far East (who are called "Orientals"). South Africa's diversity-promoting EEA-2 form distinguishes "Whites," "Indians" and "Africans" from "Coloureds"—a mixed-blood category that looks offensive to Americans. At the same time, of course, the US category "African-American" looks offensive in the many countries of the world with big populations of "Africans" who are not "American."
- Labor-pool demographics make racial diversity statistically impossible in much of the world. In 2013 the *CIA World Factbook* (www.cia.gov) reported that Japan is 98.5 percent Japanese and more than 99.4 percent Asian. Korea is 100 percent Korean ("except for about 20,000 Chinese"). Finland is 99 percent Finnish and Swedish. Paraguay is 95 percent "mestizo," and Mali is more than 95 percent black. Even the increasingly-heterogeneous UK remains 92.1 percent white.
- Our three American EEO-1 categories are too coarse to account for the granular demographic distinctions necessary abroad. In India, caste status is legally-protected—but in EEO-1 terms, all Indians are "Asian." In Africa, tribal ancestry is critical—but in EEO-1 terms, all tribal Africans are "black." In Spain, Basques and Catalans speak their own languages and promote separatism—but in EEO-1 terms, all Spaniards, Basques and Catalans are "Hispanic/Latino whites." In Canada, French Canadians are culturally distinct—but in EEO-1 terms, they are, like most Canadians, "non-Hispanic/Latino whites."
- Even workplace *gender* diversity can be impossible abroad. In Saudi Arabia, just five percent of the workforce is female and local law requires segregating women workers from men.

According to *HR Magazine* (Nov. 2003), US "HR directors are finding that one-size-fits-all [diversity] programs" launched overseas "will not work and might not even be understood." Andrés Tapia, serving as Chief Diversity Officer at Hewitt Associates (now AON Hewitt), once said "we're beginning to see an increasingly resentful backlash against the American version of diversity abroad." Outside the US, the complaint Tapia heard most often was that "this diversity thing is an American thing." This tension with cross-border diversity initiatives forces US multinationals to confront what "diversity" means in the cross-border context.

Three viable cross-border diversity initiatives. Because US diversity metrics and the American understanding of "diversity" do not travel well, any US-headquartered multinational intending to launch, across

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regional or worldwide workforces, a diversity initiative focused on recruiting and retention should resist the urge to transplant its US approach. Retool an American diversity initiative by using internationally-appropriate metrics and a global understanding of “diversity.” There are at least three alternate designs a multinational might use in transforming a made-in-the-USA diversity initiative into a viable international one: (1) cross-cultural understanding, (2) gender inclusion and (3) local racial/ethnic diversity.

- **Cross-cultural understanding.** International project teams with members from different countries can run into misunderstandings because of deep-rooted cultural differences. Even within a region as well-integrated as Western Europe, work styles differ and underlying assumptions and attitudes diverge across a team of, say, Britons, French, Germans and Italians. Cross-cultural understanding sessions can address these problems with training focused on attitudes. But these soft training programs are so distinct from hard demographic “diversity” initiatives focused on recruiting and retention metrics that using the “diversity” label here is perhaps disingenuous. One human resources manager, Suzanne Bell of Toyota Financial Services, once suggested keeping the distinction clear by labeling this training “Global Cultural Competence” or “Global Cultural Awareness” programs—eschew the word “diversity” entirely.
- **Gender inclusion.** Homogeneous racial demographics in many overseas markets may block efforts at racial diversity, but *gender equity* is good everywhere (except in Saudi Arabia, where in many respects it remains illegal). Women are underrepresented, especially in leadership roles, in so many overseas workforces. Gender inclusion is becoming a hot issue in many jurisdictions like Europe, which is requiring gender balance on corporate boards of directors. Some American multinationals therefore focus their outside-US diversity efforts on promoting gender inclusion, reserving race and ethnicity for their domestic US diversity programs. According to *HR Magazine* (Nov. 2003), as far back as the early 2000s Chubb, DuPont, Eastman Kodak, Ford and J.P. Morgan were all testing gender diversity programs in Latin America.
- **Local racial/ethnic diversity.** Bold multinationals that take international workplace diversity seriously enough to confront the irrelevance of our three US EEO-1 categories abroad might promote racial/ethnic inclusion by tailoring overseas diversity metrics to the different “core diversity dimensions” of their overseas workforces. It makes absolutely no sense to track the

“Hispanics” and “African-Americans” within a workplace in, say, Russia, India, Chile or South Africa. Ask instead: *Which “diversity dimensions” and demographic categorizations are locally appropriate in each of our overseas locations?* Then implement meaningful demographic benchmarking metrics on a localized basis. Does your Mexico City executive suite reflect Mexico’s Indian/Mestizo majority? Is your Brussels facility equally inclusive of both Flemish and Walloons? Does your Zurich branch welcome Switzerland’s French and Italian-speaking minorities? Do your Tokyo office policies fight Japan’s entrenched discrimination against ethnic Koreans, Ainu and Ryukyuan?

Do local taboos—and data privacy laws—prevent you from learning the status quo, taking action and measuring success? Going beyond racial/ethnic categories, how can a global diversity program cultivate diversity among age groups, sexual orientations and disabilities? Bold cross-border diversity initiatives of this sort that actually focus on locally-relevant racial and ethnic distinctions remain rare. But they may be the next frontier.

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

Conclusion

While under US law, workplace “harassment” tends to be a species of “discrimination” law, workplace harassment and discrimination overseas are often completely separate legal concepts. A US organization with “zero tolerance” for workforce discrimination and harassment will be understandably reluctant to allow any discrimination or harassment in its overseas operations, but the concept of what behavior constitutes inappropriate and illegal discrimination and harassment needs to be flexible enough to accommodate very different foreign laws and social environments. American multinationals need to think carefully about how they extend, internationally, their US-style discrimination and harassment policies, tools and training.

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in perhaps any other country, particularly outside the common law world. And so American-based multinationals often place more emphasis on EEO issues than do multinationals headquartered elsewhere.

There are excellent reasons why all multinationals should strive to equalize employment opportunities across their workforces worldwide. But how, specifically, can headquarters control EEO compliance strategy on a *cross-jurisdictional* basis? EEO tools that American multinationals originally developed in the atypical and rarified legal environment of US discrimination, harassment and diversity laws do not work well abroad, without modification.

Any multinational launching cross-jurisdictional work rules, international HR policies, global code of conduct provisions, multi-country training modules or other border-crossing initiatives that touch upon discrimination, harassment or diversity should modify these offerings carefully to account for the special context of the global workforce.

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