





All Together Now:

The Challenge of Managing a Global Workforce

Multinational companies with feet on the ground of many different jurisdictions face a daunting task. Employment and labor laws differ greatly from country to country, and sometimes there are substantial differences even within a given jurisdiction. For example, when employing workers in Germany, an employer needs to comply with the laws of the European Union, German federal laws and the laws of any one of the 16 states where the operation is located. In the United Arab Emirates, an employer must comply with the laws of the specific emirate where its employees work. In Canada, an employer is faced with Canadian federal law, as well as the law of the province or territory where its employees are located. Australia has federal labor law, as well as law in each of its six states and two territories. On top of all of this, many cities have their own labor regulations.

Compliance is further complicated by the fact that companies typically have their own code of conduct and other rules and procedures that may provide more or less protection for its workers, depending upon the jurisdiction in question. Complicating this further, cultural issues can vary greatly depending upon the country, region, religion and ethnicity involved. Understanding not just what the applicable law and company policy says, but how it can and should be practically applied and communicated at a given location, requires taking into account sometimes vast cultural differences within and among a given workforce. It is essential that a game plan be developed between in-house counsel and the company's human resources department to ensure that these myriad factors are considered when operating a global workforce.

By Tracy M. Preston, Stephen J. Hirschfeld and Lyrae Myxter

The challenge of global compliance

Corporate counsel must develop a strategy to ensure that all applicable local labor and employment laws are identified. Once accomplished, counsel must understand what the law says, and perhaps even more importantly, how it is interpreted. In-house counsel who fail to fully appreciate this may be in for a real shock. In many countries, labor and employment law is highly ambiguous. It may be difficult, if not impossible, to interpret and apply without understanding local nuances. The term “employment law” itself encompasses many discrete areas of the law — ranging from employment rights of workers to labor regulations, employment contracts, employee handbooks and work rules, union agreements, discrimination issues, and wage and hour laws.

Most American employers are familiar with key concepts and principles as they apply to these issues at the federal and state levels. Many are not, however, aware of the significant differences between the way employment and labor laws are handled in the United States and how they are dealt with overseas. For example, the at-will doctrine is virtually non-existent outside of the United States, and has been rejected in many countries around the world — including the United Kingdom, Australia and Canada. Most jurisdictions outside the United States provide employees with significant protections, which are completely at odds with the notion of at-will employment and often impose significant restrictions on a multinational’s ability to terminate or lay off workers.

It is quite common for countries to limit, or at least regulate, the number of hours an employee can work in a day and week, and to mandate that certain benefits be provided. In the European Union, for example, labor tribunals are regularly used to “Monday morning quarterback” personnel decisions. Advance notice and mandatory severance payments for terminated employees in many countries are quite common. For example, if an employment contract fails to state the duration of the contract or the advance notice that must be given to a terminated employee, Hong Kong law mandates that terminated employees are given at least one month’s notice or payment in lieu thereof.

Multinational companies often favor the use of a unified, global code of conduct and standard employee policies and procedures. While companies greatly benefit from this approach as it ensures consistent treatment of employees from jurisdiction to jurisdiction, those policies can run



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afoul of both local laws and customs. When an American company, for example, does business in a Muslim country, can it have an internal policy forbidding sexual orientation discrimination when acts of homosexuality may be criminalized in that country? Can or should a company tolerate religious or ethnic discrimination in a jurisdiction where no anti-discrimination law exists, or where religious or ethnic preferences are common? These are challenging issues. Of course, if an American business operating overseas is employing US citizens there, most US discrimination laws will apply. That is not, however, the case when employing foreign nationals there.

Japan is a classic example of where it is challenging to balance a jurisdiction’s employment and labor law with local customs. Under Japanese law, a company is not permitted to lay off an employee without that employee being willing to leave “voluntarily.” This legal requirement fits nicely with the notion of “saving face,” a concept prevalent in many Asian countries. Communicating effectively with that employee to get him to understand why agreeing to be terminated is in everyone’s best interest is both art and science.

The latest statistics indicate that unions represent only about seven percent of the private sector workforce in the United States. This is not true in many other countries around the world where either trade unions are prevalent or where “works councils” are mandated. In many jurisdictions, companies are not permitted to fight unionization and do not have the same leverage when negotiating with a union. Recent cases involving executive and other high-level managers being “kidnapped” by union members in France and Korea — seemingly without any legal repercussions — highlight this point.

A strategy for ensuring legal compliance

Far and away, the most effective vehicle for ensuring global employment law compliance is to periodically conduct an employment law audit. Such an audit is akin to having a physical exam. The objective is to determine the company’s “state of health” as it applies to local labor and employment law-particular locations throughout the world. Such an audit includes a thorough review of all personnel policies, procedures and practices ranging from recruiting and hiring, to performance management and termination. Local management and HR representatives can conduct this audit, however legal counsel should oversee it to ensure that the results are protected by attorney-client

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privilege. While the concept of attorney-client privilege can vary from country to country, using an attorney to oversee this process will help to minimize the risk that a third party will be successful in obtaining disclosure of the information in a legal proceeding. In addition, it is not uncommon to find that implementing recommendations issued as the result of an audit will carry much greater weight with local management when such an audit is conducted, or is at least overseen, by outside experts.

A global code of conduct provides the foundation for the behaviors an employer wants instilled in and followed by its workforce.

A questionnaire should be designed to identify all key human resource policies and practices that must be reviewed. The following critical issues should be examined:

a. Pre-hiring: local recruitment practices, application forms, interviewing procedures, selection process and

criteria, offer letters, background checks, and pre-employment testing and screening.

- b. Employment relationship: employment contracts, including any non-compete and trade secrets agreements, introductory or probationary period used, performance evaluations, personnel policies and codes of conduct, wage and hour practices, mandatory training, investigation and complaint procedures, and the relevant issues to consider in terminating or dismissing an employee.
- c. Post-employment: mandated advanced notice for terminations, layoffs or redundancies, required post-termination benefits, references, mandatory severance benefits and any record retention requirements.
- d. Past and present litigation: careful review of legal disputes involving the courts, labor tribunals and unions in order to determine if there are lessons to be learned from these disputes.

Upon completion of the employment law audit, the company will need to establish a game plan. It must determine where problems or lack of compliance exists and decide how changes will be implemented. Developing a network of competent and well-connected employment lawyers in each jurisdiction where the company operates will not only save money, but will also ensure local compliance. Many multinational companies retain a local expert who can quickly and easily resolve a compliance issue or grievance



initiated by a government agency or union, which, if not tackled properly, could create significant liability and serious public relations and employee morale problems.

Balancing the law with corporate policies

A multinational company is presented with a wide range of issues when managing a diverse workforce — not just identifying and understanding the laws of a country, province, state or locale in which the employee works, but also adhering to the company's culture, set forth in its own work rules and policies to ensure a safe and productive work environment for all of its personnel. Today, most multinationals have some version of a global code of conduct, typically, a document that sets forth requirements and guidelines as to how employees are expected to work together and with third parties. It is in the creation or construct of this global code of conduct that a multinational will be faced with putting the company's values and beliefs into words. This code of conduct does not sit in isolation, but is a living and breathing document that is influenced by a myriad of laws (US and foreign), local culture and customs.

A global code of conduct provides the foundation for the behaviors an employer wants instilled in and followed by its workforce. Sometimes, the code of conduct may provide broader protections than local law currently recognizes. This can also be true domestically for

a multi-state employer in the United States. From the outset, the employer is faced with various wage and hour regulations as well as expanding protections under state or local laws emanating from anti-discrimination laws, which may include sexual orientation or transgender persons, among others.

For example, if the company's code of conduct prohibits race discrimination, yet the locale does not share the same view or has not progressed to the same extent, what does the company do? This was the case for Levi Strauss & Co., in the early 1960s when it was expanding its domestic operations, preparing to open a factory in Virginia. The company's intent was to have the factory be fully racially integrated, as that reflected the company's value of equality for its entire workforce. Yet, it was ahead of the governmental mandates on racial desegregation by several years. Levi Strauss & Co., insisted that it be allowed to have a racially integrated facility or it would take the jobs elsewhere. The local city officials eventually agreed, and following that Levi Strauss & Co., opened its factory.

Periodically, a multinational will be faced with similarly difficult issues. A US-based company may find that it affords protections and benefits to foreign nationals that go above and beyond local law, custom and practice. While homosexuality is considered a crime in many Muslim countries, many multinationals prohibit discrimination

We go the distance.

against individuals based on their sexual orientation. In fact, several multinationals offer HIV/AIDS health benefits to its employees. In many Asian countries, it is customary to give and receive gifts on the occasion of marriage or death. However, what should a company do if the gift is given to an employee from a large vendor or supplier of the company? While it may be a recognized local practice, does it run afoul of the global policy on gifts or conflicts of interests?

Assuming local and US laws are not violated, a multinational's code of conduct or policies might need to allow for varying limits on gifts based on the location of the business operations to ensure that the cultural mores and norms of its workforce are not overridden for the sake of consistency of application of the rules.

Taking that further, what about those local customs and practices that actually violate local (as well as US) law? This is a growing concern for many multinationals moving into the emerging markets. Take Russia for example. There have been numerous articles discussing the difficulties many US and European companies are having as they move into Russia due to large-scale corruption. Bribes are commonly proffered and are expected in order to ensure that business is completed. The 2009 *Transparency International Corruption Perceptions Index*, which rates the degree to which corruption is perceived to exist among public officials and politicians, rated Russia as being highly corrupt. This is the dilemma — while it may be custom or practice to provide a bribe to a government official to get that person to perform his ministerial or administrative duties, the custom itself may violate local laws. So, while the “payment” to a low-level official may have been acceptable under the US Foreign Corrupt Practices Act (FCPA) as a possible facilitating payment, it violates local law and thereby violates the US law as well. Thus, the multinational may be placed in situations where adherence to all applicable laws places it in contradiction of a local cultural norm.

A sophisticated multinational will know that cultural norms and policies may often conflict and will therefore take the next step. That is, once the multinational has articulated its global code of conduct, it must follow up with all of its employees to ensure that they are educated and trained on the company's policies and expectations of its workforce. Training should be conducted on a regular schedule and, where possible or required by local law, provided in the local language. Additionally, the company should make sure that there are avenues for employees to ask questions and raise concerns about the company's code of conduct or other policies. This can be done through a hotline, the company's human resources department, compliance or legal function, or a combination of these.

Assumed in all of this is an understanding that a multinational has a solid infrastructure — in its HR and law departments — and access to skilled outside advisors (both attorneys and cultural consultants). There are forums and dissertations on creating a global HR function, but it will depend on numerous factors, including how the company's operations are set up, the number of personnel in the country, and whether local HR presence is needed because of unique issues (or legal requirements) in a particular jurisdiction or whether a regional HR manager could suffice, among others. However the multinational answers those and other questions, one factor is crucial: the importance of the HR department to interact and work seamlessly with the company's legal counsel.

Assuming that a company has dotted its “i’s” and crossed its “t’s” in terms of legal and corporate compliance, another dimension of international operations that warrants close examination is how business is practiced country by country, culture by culture.

The in-house employment lawyer is, in many ways, akin to an impresario or music conductor interpreting a composition. Just as a conductor must stay alert and involved with the various musicians and blend their contributions seamlessly and in the intended way, so must the in-house lawyer constantly work within the company's cultural norms (i.e., code of conduct and policies) to ensure the desired outcomes regarding compliance with local culture and US laws. Similarly, the facts and circumstances of each instance of application of the law vary, as do the melodies dependent upon the conductor's emphasis for that particular, unique performance. As an in-house employment attorney, it is important to have local counsel who you can rely on in order to assist the company in managing various employment issues, such as performance management, accommodations, pay issues, terminations or layoffs, to name only a few. The in-house attorney has to conduct

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this “symphony” on a regular basis and ensure that these groups, working together, identify the issues and mitigate the risks to the extent possible.

As can be seen, managing a global workforce is far more complex than meets the eye. It must be viewed through the varied lenses of:

- the company’s global code of conduct — i.e., its culture;
- the specific facts and circumstances of the situation;
- the local culture mores and norms;
- the local laws and regulations (which, in many instances, may be more than one) of the particular jurisdiction(s); and
- US laws.

Employment compliance in a global landscape is much like the crystals in a kaleidoscope — it is ever changing and with a slight movement of the hand a new picture is brought into view. The key to bringing compliance into focus is to ensure the compliance officer has addressed all of the above factors and works toward understanding and

addressing the issues so as to mitigate the company’s risks. Additionally, proper resources need to be in place to assist in the education of the workforce, including the subject matter experts in HR and legal departments.

Culture matters

Assuming that a company has dotted its “i’s” and crossed its “t’s” in terms of legal and corporate compliance, another dimension of international operations that warrants close examination is how business is practiced country by country, culture by culture. Parallel to the employment law audit, a multinational company would be well served to conduct a cultural audit in all of its active markets to examine how well the organization is balancing employment law, corporate governance and cultural effectiveness in its local operations. If the local customs and values are not reflected in the organization’s business behaviors, the best legal and corporate compliance plans, policies and efforts can be for naught.

ACC Extras on... Global Employee Management

ACC Docket

- *Building a Global Law Department (Oct. 2005)*. This case study details the efforts of one general counsel to build a world-class global legal team capable of meeting operating model demands and complex legal issues affecting a variety of jurisdictions. www.acc.com/docket/build_glbld_oct05
- *Considerations for Multinationals: The Need for Cultural Awareness When Implementing Corporate Policies and Guidelines for Your Workforce (Sept. 2003)*. This article explains how your company can successfully integrate cultural awareness into the policies and guidelines for US multinational corporations conducting business in foreign countries. www.acc.com/docket/multinat_wfgd_sep03

Education

- Any company managing a global workforce will also one day have to manage global reductions and reorganizations. This year’s ACC Annual Meeting session 504, “How to Properly Implement Workforce Reductions and Reorganizations Worldwide,” will explore the challenges in complying with local employment and labor laws. <http://am.acc.com>

Program Materials

- *How to Set Up a Legal Department in a New Market from the Ground Up (Oct. 2009)*. This material focuses on how to establish a small local or regional law office as a multinational company. It includes organizing and structuring a depart-

ment, policies and procedures, oversight and contract management. www.acc.com/setuplegaldept_oct09

- *Managing a Global Workforce: HR and Employment Law Challenges (Oct. 2009)*. This material addresses key challenges in managing global reductions in force and provides advice on best practices. www.acc.com/mgglobalwlf_oct09
- *Navigating Global Compliance: Establishing Rules for Taking the High Road in the Borderless Corporation (Oct. 2006)*. For global companies operating across multiple jurisdictions, establishing a single set of compliance policies and guidelines that can be used around the world can be challenging. This material discusses how recognized compliance leaders at global companies are navigating this maze. www.acc.com/glob_compli_oct06
- *Business Ethics: Implementing a Global Code of Conduct (June 2006)*. Standards of business conduct are becoming increasingly important, as is getting acceptance and engagement across multiple jurisdictions. The panel examines how some of the largest companies tackle this on a global basis, with lessons and experiences for all to share. www.acc.com/glob_coc_jun06

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Take the example of a US firm that acquired a China-based business. The director of marketing in China was let go post-acquisition. In a country where employees feel a special obligation to the manager who brought them into the organization, a degree of loyalty exists that is not often seen in Western countries. This individual had acted as a mentor to many, shepherding their careers over the years. When he was let go, the termination was conducted legally and per company policy. What was not anticipated was that 28 of the company's top salespeople in China would respond to his departure with their own resignations and follow him to a competitor. The undesirable attrition in an already challenging transition period was costly and the misstep of not taking the local context adequately into account was avoidable.

For multinationals, the road to global growth is paved with international business activities — mergers and acquisitions, outsourcing engagements, joint ventures, new market entry, etc. — and is filled with cultural differences which, if left unattended, can bring travel down that road to a screeching halt. In one case in Eastern Europe, a US/UK/Turkish joint venture was hired for a project that required them to work alongside a British project management team, and French and Italian engineering firms. It wasn't long before the project was behind schedule and over budget. Recognizing that the root of their discord and inefficiencies could be attributed to their divergent ways of approaching a common goal, with help from cross-cultural advisors they were able to dial into their cultural differences and work together to create a shared plan and single project culture that enabled them to right the course and get the project back on track.

Culture is often considered a “soft” business issue — a vague concept that doesn't really have teeth. Therefore, in many cases, it is not flagged or prioritized for attention in the business plan. It isn't until the company feels the pain associated with this blind spot, through unnecessary costs incurred and preventable errors made, that it fully appreciates the business impact of intercultural business savvy, or a lack thereof.

Multinational companies can avoid costly setbacks by acknowledging and adjusting to cultural differences in their various markets worldwide. A best practice is to begin the organizational learning curve at the executive level. If the company executives can align around the critical nature of developing internationally competent business professionals and practicing smart cross-cultural business for the company's long-term success, they can invest in their own development as global leaders, prepare the rest of the workforce and leverage the diversity of their employees worldwide as an asset.

Employee retention and productivity can be protected and improved by engaging with local staff in culturally

appropriate ways. By learning country-specific business norms from intercultural consultants and local experts, corporate counsel and those whom they advise can better navigate the terrain and sidestep international business landmines. Even baseline knowledge can be a tremendous advantage; knowing things such as:

- In Saudi Arabia, it is advisable to provide performance feedback in private, on a one-to-one basis.
- When negotiating in the Netherlands, it is best to be honest and straightforward. Objectivity is valued. Be prepared to support statements with concrete facts.
- In Brazil, personal relationships can and often do trump organizational and institutional affiliations. It is important to invest in face-to-face time with your business contacts, and it is advisable to obtain the services of a local Brazilian contact or despachante who is well-connected in the industry, to meet key people as well as possible customers and suppliers.
- While individual recognition for a job well done is good practice for motivating employees in Canada, it may be ineffective or even de-motivating in Japan where team performance and rewards are valued.

For companies that rely on expatriate talent to start-up in a new market, transfer knowledge and skills to local talent, or trouble-shoot a in a problem area, the investment in cross-cultural training for those individuals and their accompanying family members can make or break the assignment. For the employee, gaining insights about the local culture, understanding how the cultural differences impact the way work is done and learning how to style-switch to be effective, can expedite the rate at which she reaches optimal performance and the degree to which he or she is able to accomplish business objectives. Additionally, an expatriate family's inability to adjust to the host location continues to be cited as the leading cause for assignment failure. One could argue that cultural training for them is of equal importance.

Given the vast amount of cultural differences in how business is practiced around the world, no one can be expected to possess all of the know-how to traverse the globe effortlessly. Fortunately, there are resources that can be tapped to sharpen the multinational company's international business acumen. What's the best advice? Find these resources proactively. Acquire the knowledge and skills to work effectively with your clients and colleagues in the company's target markets, and be your own best resource to the company as you serve them globally. 🚩

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