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Fighting Workplace Discrimination and Harassment on a Global Scale

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A WHITEPAPER
BY DONALD C. DOWLING, JR., WHITE & CASE LLP

In the U.S., taking a "zero tolerance" stand against illegal workplace discrimination and harassment is an aggressive, tough and compliant approach to assuring equal employment opportunity (EEO). Internationally, though, discrimination and harassment laws vary widely, complicating the anti-discrimination and anti-harassment initiatives that an American multinational might otherwise want to launch across its global operations. Multinationals looking to fight discrimination and harassment on a global scale, to protect both themselves and their employees, need subtlety, nuance, strategy and finesse. A one-size-fits-all approach does not work.

Here we discuss the adjustments in strategy, policy and approach that a U.S. multinational headquarters needs to make when driving a top-down global EEO compliance initiative that would impose international internal rules against workplace discrimination and harassment.

The first point we need to make is to draw a sharp distinction between overseas discrimination and harassment laws. In the U.S., of course, harassment law tends to be the same as our discrimination law—U.S. employment statutes tend to prohibit only "discrimination" expressly; American case law recognizes certain harassment as a *form* of discrimination prohibited under these same discrimination laws. Abroad, though, the legal doctrines that regulate workplace discrimination are often completely separate from rules regulating harassment. In fact, in some jurisdictions discrimination is a matter of civil employment law while harassment is a matter of criminal law. So we need to structure our discussion here about fighting discrimination and harassment on a global scale by drawing a bright line between these two concepts. Our discussion first addresses fighting workplace *discrimination* on a global scale, and then fighting workplace *harassment* on a global scale.

Multinational organizations looking to foster a harassment-free workplace on a global scale, to protect both themselves and their employees, need subtlety, nuance, strategy and finesse. A one-size-fits-all policy simply won't work to curb harassment in your various global operations.

Part One: Fighting Workplace Discrimination on a Global Scale

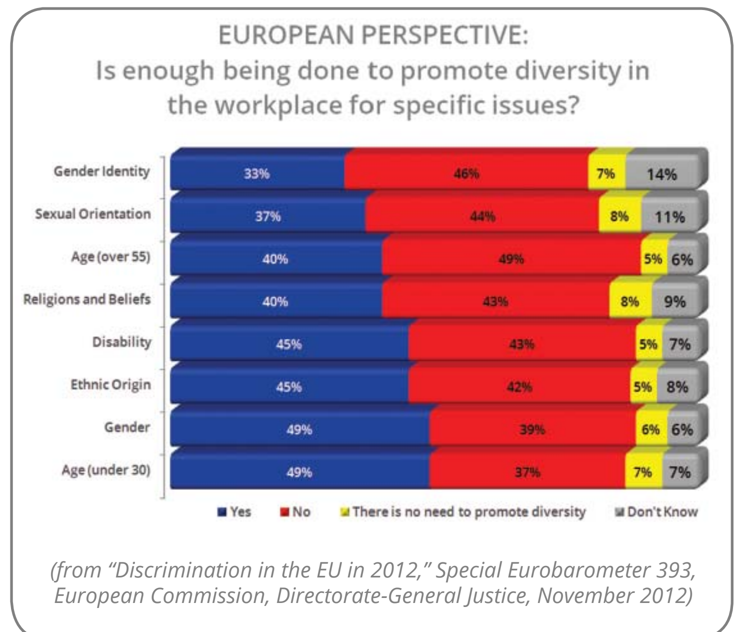
Discrimination law in the United States is more evolved than anywhere else on Earth. The leading treatise on U.S. employment discrimination law (by Barbara Lindemann and Paul Grossman) runs to two volumes and 3,300 pages. By now, decades after America's civil rights movement gave rise to tough, ground-breaking workplace discrimination laws, American jurisprudence has refined discrimination law concepts, making them 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 of a causal connection between an adverse employment action and a claim of "retaliatory animus."

In response to increasingly rarified discrimination law doctrines, American employers have engineered sophisticated tools to help eradicate illegal discrimination from their workplaces. These days, U.S. 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 U.S., 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 U.S. 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.



(from "Discrimination in the EU in 2012," Special Eurobarometer 393, European Commission, Directorate-General Justice, November 2012)

Still, the challenge in exporting U.S. anti-discrimination practices and policies to countries with less-developed equal

employment opportunity doctrines is that discrimination statutes and cultural perspectives outside the U.S. differ, in their particulars, from the U.S. domestic approach. This can make a multinational's U.S.-crafted anti-discrimination toolkit, when exported, inappropriate and even suspect. Sending U.S. discrimination compliance tools to foreign workplaces is a bit like a Swiss watchmaker bringing his watchmaking equipment along on a camp out: overly refined tools can be useless in a less nuanced environment.

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When adapting U.S.-honed anti-discrimination tools for use abroad (or globally), account for three issues: **Context, Protected Status** and **"Extraterritorial" Effect.** The rest of our discussion on cross-border anti-discrimination initiatives addresses these three issues.

Context

The first step in exporting or "internationalizing" any American-style approach to fighting workplace discrimination is to adapt the U.S. approach to different environments overseas. Workplace discrimination laws loom unusually large in the U.S. 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 U.S. environment explain why discrimination compliance is less of a priority outside the states—*employment-at-will, demographics* and *history*:

Employment-at-will. The U.S. is the world's only notable employment-at-will jurisdiction. U.S. 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 U.S. *discrimination* law. Indeed, some American lawyers argue that discrimination law now amounts to a sort of de facto U.S. wrongful termination regime. That is, there is a thesis that the U.S. 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 U.S. 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 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 U.S. job applicant pools and workplaces. In the U.S. context, demographic diversity makes laws against racial and ethnic employment discrimination vital. Legislative history shows that U.S. 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 U.S. The historical underpinnings of American discrimination laws simply are a non-issue abroad.

The point is that employment-at-will, demographics and history make our U.S. 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 U.S. discrimination law compliance strategies to account for this very different context.

Protected Status

In a 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, people 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.

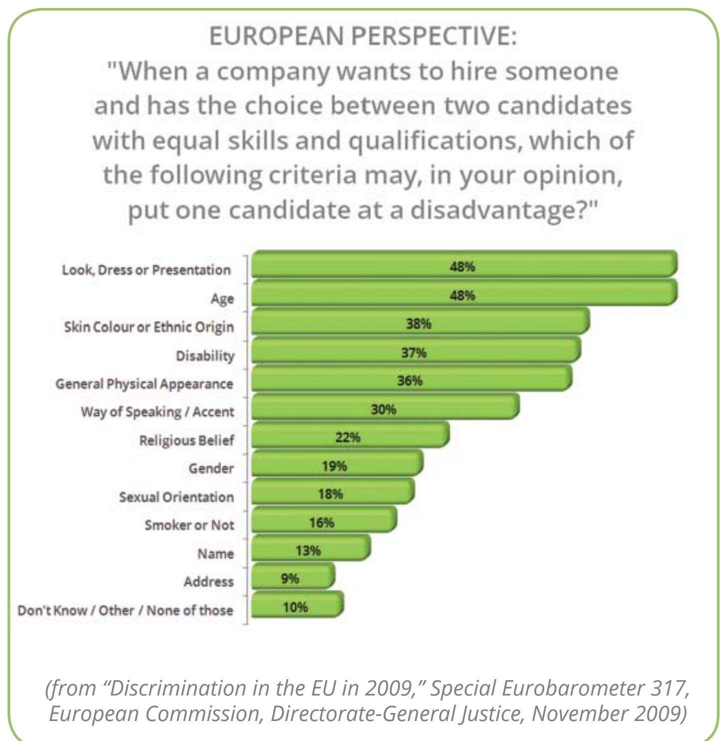
> "[There is] a sharp distinction between overseas discrimination and harassment laws. In the U.S., harassment law tends to be the same as our discrimination law.... Abroad, the legal doctrines that regulate workplace discrimination are often completely separate from rules regulating harassment...."

Therefore, well-drafted U.S. discrimination policies and provisions always list the specific protected traits or statuses against which the employer prohibits discrimination—usually these traits are gender, race, religion, national origin, age, disability, veteran status, genetic makeup, sexual orientation and

the like. U.S. 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 U.S. 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 U.S. and its states protect some quirky traits that probably no other jurisdiction protects, such as 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 make up their own protected groups.



(from "Discrimination in the EU in 2009," Special Eurobarometer 317, European Commission, Directorate-General Justice, November 2009)

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 U.S. 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, the "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 down plays 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. 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."[1]

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.[2]

Imagine, for example, a U.S. age discrimination lawsuit against a U.S. 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, U.S.-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 U.S. law. But veteran status and genetic predisposition make absolutely no sense to protect outside the U.S.—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.

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. 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 staff to do their own legal research.

"Extraterritorial" Effect

America's major U.S. federal (and apparently some state) discrimination statutes reach abroad, to a limited extent: They prohibit a U.S. "controlled" (such as a U.S.-headquartered) employer from discriminating, on any ground protected by American law, against American citizens who work outside the U.S., whether they work overseas as local hires or as expatriates. U.S.-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 U.S. companies that provide niche services like overseas security under U.S. government contracts or subcontracts).

Of course, it might be overkill to extend a full-blown U.S.-style anti-discrimination policy to all staff working outside the U.S. 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 U.S. discrimination laws in a way targeted to the overseas managers of U.S. citizens working abroad, not necessarily targeted to the protected American citizens themselves.

Part Two: Fighting Workplace Harassment on a Global Scale

U.S. 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 U.S. seriously complicates global anti-harassment rules and training.

Harassment law in the U.S. Over the past few decades, American workplace harassment law has evolved into the most intricate body of harassment jurisprudence in the world. U.S. 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 environment harassment," and claims of "implicit *quid pro quo* third-party harassment."

These esoteric harassment law doctrines evolved in U.S. court decisions even though the texts of American statutes tend not even to prohibit workplace harassment. U.S. federal harassment prohibitions are judge-made extensions of statutes that nominally prohibit only discrimination. Even the U.S. EEOC defines "harassment" as "a form of employment discrimination." [3] 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 U.S. unless it involves harassment based on protected status." [4]

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 such as 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." [5]
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 such as 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. [6]

Meanwhile, common-law countries impose tough anti-harassment rules broadly consistent with the U.S. model. All European Union states now impose laws that prohibit certain harassment, and awareness is spreading. Just look at a recent January 2013 article in the German press entitled "Wake Up Germany, You've Got a Serious Sex Harassment Problem." [7] Countries such as 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. [8]

As countries overseas get serious about stopping workplace harassment, their harassment laws mutate into new forms, some even broader (if less nuanced) than counterpart U.S. doctrines. Unfortunately, these growing differences leave our state-of-the-art American tools and training for weeding out the U.S. 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.

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 U.S. 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 harassment, race harassment, disability harassment, age harassment, religious harassment, even theoretically veteran status harassment and genetic harassment. To date, not too many U.S. 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 U.S. 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 U.S.").

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 U.S.-style harassment policy and training to account for foreign status-blind harassment prohibitions requires exponentially increasing its scope, and this expansion makes U.S. employers uncomfortable, especially if the broadened policy and training will reach into U.S. workplaces. Too many U.S. 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 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 U.S. 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

Harassment Policy: The Critical Link

The Association for Corporate Counsel (ACC) recommends that companies manage their risks regarding harassment by first developing a comprehensive, detailed written policy on sexual harassment, then distribute that policy to all workers, supervisors, and even some non-employees. The ACC lists these as the minimum requirements of such a policy:

- An expressed commitment to eradicate and prevent discrimination and harassment
- A definition of sexual harassment including both "quid pro quo" and "hostile work environment"
- A non-exhaustive list of prohibited conduct
- An explanation of penalties (including termination) the employer will impose for substantiated sexual harassment conduct
- A detailed outline of the grievance procedure employees should use
- A statement that the company will not retaliate against employees who complain under the policy
- Additional resources or contact persons available for consultation
- An express commitment to keep all complaints and personnel actions confidential

common U.S. 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."* [9]

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.

"... at a sex harassment training session for a Chinese manufacturing giant, a female worker was 'often' subjected to obscene gestures and sexual harassment from three male colleagues — *during* the sex harassment training session itself."

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 U.S. online or live harassment training modules around the world. 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 U.S.-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.” [10]

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. U.S. 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.

“... 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.”

Summary

While under U.S. law, workplace “harassment” tends to be a species of “discrimination” law, and workplace harassment and discrimination overseas are often completely separate legal concepts. A U.S. 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 U.S.-style discrimination and harassment policies, tools and training.

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