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Cross-Border Age Discrimination Compliance

Multinationals have to comply with discrimination laws across their worldwide operations. And multinationals certainly need to comply with their own internal equal employment opportunity (EEO) policies that they impose globally. To meet their global EEO compliance obligations, probably all major American-headquartered multinationals have launched cross-jurisdictional anti-discrimination compliance initiatives of one sort or another, such as global discrimination/harassment policies and code of conduct provisions, or global training modules on discrimination, harassment and diversity.

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 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).

1. 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 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.

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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 *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, 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 now 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 trade unions overseas 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 *Rosenbladt 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*, Itl. 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.*, A. Tugend, "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 Rosenbladt* 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.

2. 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.

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?

3. 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 such a 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 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.