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Critical Issues in Global Employment Law for the Multinational In-house Counsel

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This InfoPAK provides an overview of major issues in global labor and employment law. It is important to emphasize that this is an overview; only local labor/employment counsel in the relevant jurisdiction can advise on specific issues. Nevertheless this article identifies the major issues which the corporate headquarters and/or regional counsel need to understand, and provides some examples of the types of problems which often arise.

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I. Introduction

Not very long ago, labor and employment law was almost exclusively a local matter, even in multinational corporations. A labor/employment law specialist or team handled matters at the headquarters country; local operational labor/employment issues were exclusively the province of local Human Resources ("HR") personnel working with outside counsel or perhaps a local or regional in-house counsel. That model has certainly not entirely disappeared, as there are a myriad of workplace matters which are most knowledgably and efficiently managed by people who are physically and culturally close to the local workforce.

Yet the model is changing: globalization and technology have made business both larger in its physical footprint and more demanding in its expectations of control, monitoring, global consistency, and immediate analysis of issues in far-flung places which may affect the reputation of the business or its financial/compliance profile. Even smaller and medium-size enterprises now routinely deal with workplaces far from their headquarters.

Today's in-house counsel is expected to provide globally effective strategy, solve the more difficult problems, and generally advise headquarters without adding another layer to the resolution of labor and employment matters best handled locally. Needless to say, these additional demands often arrive on the global counsel's desk unaccompanied by increases in resources or compensation.

In-house counsel, particularly in US-headquartered companies, commonly must deal with two conflicting sets of management expectations in the global employment law setting. One is that the plans of top corporate management—those strategies carefully developed behind closed doors in conference rooms and off-site locations over several weeks under a coded project name—will be accepted universally, regardless of local impact, once the business logic is explained, if only local management/HR personnel and employment lawyers have the courage and skill to implement them properly. The other is that jurisdictions outside the US favor employee protections over support of successful enterprises, so that even well-justified restructurings and other decisions have no chance of implementation.

The reality is that the global enterprise can almost always achieve its major objectives (albeit often with greater cost and delay than desired) through appropriate advance planning coupled with realistic implementation that recognizes different legal contexts and values. In many jurisdictions, reforms are underway which increase employer flexibility, and encourage voluntary measures and mutual agreement, while mitigating some of the substantial remedies for termination without cause.

This InfoPAK provides an overview of major issues in global labor and employment law with that perspective in mind. It is important to emphasize that this is an overview; only local labor/employment counsel in the relevant jurisdiction can advise on specific issues. Nevertheless this article identifies the major issues which the corporate headquarters and/or regional counsel need to understand, and provides some examples of the types of problems which often arise. While the discussion will be relevant to all who manage global

issues, our focus will be on jurisdictions outside the US. For coverage of US labor and employment law issues, please visit the ACC Resource Library at https://www.acc.com/legalresources/index.cfm.

II. Sources of Global Labor and Employment Law

- **Labor and employment law, while influenced in some areas by international standards and agreements, is predominantly local.**
- **The framework of global labor and employment law is built on several foundational elements: European directives, national laws, collective bargaining agreements, works council agreements, individual employment contracts, and international labor standards.**

Why do we speak of "global" rather than "international" labor and employment law? One reason is that labor and employment law, while influenced by international agreements in areas such as taxation and by international labor standards, is quintessentially local. Even in Europe, where a host of European Directives touch on employment law, the local employment law of Germany differs quite significantly from the law of France, Italy or Belgium because the Directives provide latitude and tend to avoid overturning fundamental local practices. The challenge in managing a worldwide portfolio of workplace matters is to have a sufficient grasp of the commonalities in this mosaic of national requirements to permit both resolution of local issues and reasonable application of global corporate standards.

The framework of global labor and employment law is built on several foundational elements: European directives, national laws, generally in the form of labor or more general civil codes; collective bargaining agreements; works council agreements; individual employment contracts; and international labor standards. In some circumstances, judicial decisions are of importance, but consistent with the general prevalence of civil law systems the impact of case law is much less than in the United States.

A. European Directives

The European Union is a political and economic confederation of 28 member states, with legislative competencies in areas specified in a series of treaties. In accordance with the "ordinary legislative procedure" of the EU decision-making system, the European Commission, the executive arm of the European Union, proposes legislation for adoption by the Council of the European Union and the European Parliament, a representative body directly elected by EU citizens. Upon approval of the legislation, a Directive is published binding Member states to adopt national laws in compliance with the terms of the Directive within a specified timeline. If a member state fails to implement the Directive adequately or

in timely fashion, then the European Commission may bring legal action against the member state in the European Court of Justice.[1]

Several directives in the labor/employment area merit detailed consideration in this InfoPAK:

- 2009/38/EC (relating to establishment of a European Works Council),
- 2002/14/EC (establishing a general framework for informing and consulting employees),
- 98/59/EC (relating to collective redundancies),
- 2001/23/EC (relating to safeguarding employees' rights in the event of transfers of undertakings),
- 2000/43/EC (implementing equal treatment irrespective of racial or ethnic origin),
- 2000/78/EC (establishing framework for equal treatment irrespective of religion, disability, age or sexual orientation),
- 2002/73/EC (implementing equal treatment irrespective of gender or pregnancy).

By the specific terms of each Directive, the Member states are given defined latitude in implementing the initiatives set forth in the Directive.

B. National Laws

Relevant national laws typically include labor and/or civil codes (and sometimes Constitutional mandates) which govern, in detailed fashion, many aspects of the employment relationship and its termination. National laws will often set forth, for example, the permissible bases for terminating employment, as well as establish statutory notice periods and termination indemnities. In addition, they will cover more technical matters such as wage and hour requirements, statutory leaves, non-competition clauses, and confidentiality provisions. In Europe, national laws implementing or "transposing" European Directives will often be of importance.

C. Collective Bargaining Agreements

Depending on jurisdiction and industry, your local workplace may be governed as well by a collective bargaining agreement known more commonly as a collective labor agreement ("CLA"). An important difference from the US model is that in many countries these agreements are negotiated at the industry level by an employers' association with a national trade union. While headquarters counsel may not be involved frequently with implementing or interpreting a CLA, the agreements will often be relevant in calculating notice periods, severance, and other termination indemnities as well as managing restrictive covenants and retirement matters. In countries such as France, the CLA will also affect compensation and many other aspects of the day-to-day employment relationship.

D. Works Council Agreements

In works council jurisdictions (see discussion in section V), it is common to negotiate agreements with these employee representative bodies in a number of areas. One type of agreement is the "social plan," which governs the manner in which the employer will mitigate the employment effects of reductions in force and other restructurings. In any type of complicated information/consultation process with works councils, the process itself may be governed by a "method agreement" which sets forth the procedure by which management and the works council will confer.

E. Individual Employment Contracts

In most countries, the individual employment contract is either required, advisable or just common in practice, and is not limited to executives or other upper-level employees. For rank-and-file employees, the contract may be standardized and largely track or incorporate statutory and CLA provisions. For executives, there may be more individual customization, particularly in compensation, benefits and termination arrangements, as the local employment law and CLA may not cover employees at that level, or may be seen as insufficient or incomplete. In dealing with a potential executive separation, the individual employment contract is generally the starting point for analysis. As discussed below, the common applicability of an individual employment contract drives what often seems to be the wide chasm between the employment law of most countries and that of the US; it may be most obvious to think of that distinction in the context of employment termination, but equally or more important is the impact of the individual contract on the employer's plans for job changes and restructuring.

F. International Labor Standards

International labor standards generally are comprised of a variety of benchmarks—some binding but often aspirational—which define basic employee protections and collective labor relations. Sources of these standards include trade agreements, formal or informal industry codes, and international human rights or United Nations-affiliated labor organizations.

III. Termination of Employees in the Global Context

- **Though in many jurisdictions there are significant employee protections against involuntary termination, in many cases the parties will reach a negotiated solution which avoids the many statutory limitations.**

- **Several broad categories exist of permissible grounds for ending an employment relationship, including poor performance, misconduct, and economic/organizational restructuring.**
- **Some procedural protections against dismissal include formal requirements, internal hearing processes, court or agency approval, works council interactions, and timely response.**
- **In most countries, using a written individual employment contract is common. In contractually-based employment regimes, the written contract may mitigate the underlying protections which would otherwise benefit the employee.**
- **Employers in most countries can use fixed-term contracts to hire employees needed for a special project. Many countries, however, statutorily define the proper subject of a fixed-term contract and/or limit the duration or number of consecutive contracts entered into with an employee.**
- **To the extent plan beneficiaries include ex-US employees (or US employees serving ex-pat assignments), care must be taken to draft these severance plans to avoid "double dipping" between the plan severance and statutory/contractual entitlements under local law.**
- **When dealing with executives or other key employees, separation agreements should include strong confidentiality clauses, assurances of cooperation with ongoing investigations and litigation, non-solicitation of employees, and the like.**
- **Employers must reconcile local employment law protections with global compliance-related disciplinary standards. Potential conflicts can be mitigated by measures that the global compliance team and the local management/HR personnel should both support.**

A fundamental concept underlying employment law of most countries is that the employment relationship can be terminated only based on some concept of "cause" and in observance of procedural limitations. The robust "employment-at-will" statements contained in so many US offer letters, contracts and employee handbooks (*e.g.*, "Just as you are free to leave the Company at any time, the Company may terminate your employment at any time for any or no reason, with or without notice....") are generally alien outside US borders. Within the broad boundaries of termination "for cause," considerable variation exists as to the definition of "cause," as well as the remedies available when the employer acts without cause or in violation of prescribed procedures.

Although the US and ex-US frameworks could not be more different in concept, there are commonalities which mitigate the gap in practical terms, at least for the careful employer. In theory, a US-based employee not protected by a collective bargaining agreement generally has no claim for wrongful dismissal except as provided in statutory protections, such as laws prohibiting discrimination or retaliation. Since managers rarely admit

discrimination or retaliation, those claims largely turn on evidence as to the employer's justification for termination; the poorly supported termination (*i.e.*, one which lacks "cause") permits the inference that the employer may have been motivated by bias or an intent to retaliate. In that respect, the evidence and argument submitted in an employment case in US court are not totally different from those offered to a labor tribunal in France, for example. In both systems, the employer is expected to justify termination—in the US in order to negate discriminatory intent and elsewhere to support a showing of "cause."

Important differences persist, however, in the scope and predictability of the employer's liability. Employers have more widespread exposure in many countries in that wrongful dismissal claims are available across the board (rather than limited to protected classes of employees), and the notice pay, severance indemnity, and/or damages payable can be significant. US employers, on the other hand, face far more unpredictable results given the latitude US law permits in awarding damages.

Apart from the question of exposure, the protections and limitations discussed in this section may appear almost impossibly onerous to the common-law practitioner seeking to support his or her client's restructuring or other business initiative. Nevertheless, it is important to remember that in a great number of cases the parties will reach a negotiated solution which surmounts the many statutory obstacles to termination. In those situations, the legal protections form the backdrop for the negotiation and define the relative leverage between the parties, rather than obstruct the employer's business decision.

A. Reasonable Grounds for Termination

Although the details vary across jurisdictions, several broad categories exist of permissible grounds for ending an employment relationship.

1. Poor Performance

Failure to meet the employer's reasonable performance expectations is, not surprisingly, a universally accepted justification for termination. This criterion, however, is generally interpreted strictly, in the sense that a court will scrutinize whether the employee was given adequate notice of failure to meet reasonable standards and ample opportunity to improve over time. The employer is expected to demonstrate poor performance with thorough documentation.

2. Misconduct

An employee can also be terminated for personal misconduct or deliberate violation of company policies. The misconduct, however, should be serious (a subjective concept, particularly across borders) or sustained, and the employer should expect to demonstrate that clear advance warning was given. A local court may also scrutinize the fairness of the investigation which revealed the misconduct, in addition to the strength of the evidence

supporting its findings. For these reasons, the in-house counsel may find that the policy violation that so enrages the Vice President of Compliance in headquarters is viewed less harshly by local courts, or by local counsel or HR who know what to anticipate if suit is brought.

3. Economic/Organizational Restructuring

Job elimination or "redundancy" resulting from economic pressures or organizational change is a well-established concept everywhere. In many countries, this position entitles the severed employee to a specific level of indemnity. As will be discussed in section V, however, reductions-in-force above certain threshold numbers will implicate collective dismissal processes, which can be time-consuming and onerous in some works council jurisdictions. Even where the restructuring does not meet the collective dismissal threshold, the employer's economic justification will be scrutinized carefully, and there may be expectations of serious redeployment efforts as well as rules governing the selection of employees to be terminated. One of the more common errors by the global counsel is to assume that the relatively modest redundancy formula for Country X found in a treatise or on the Internet will apply in real life; in reality the employer may not be willing or able to demonstrate true economic hardship or follow the selection rules required in the jurisdiction, not to mention that there may be employee expectations of generous separation packages beyond statutory requirements, driven by recent restructurings by the employer or other companies in the same industry sector.

B. Procedural Protections Against Dismissal

Global in-house counsel are often unpleasantly surprised to find that the manner and timing of dismissal, and occasionally even the ability to carry out a dismissal, are impacted by statutory procedural requirements.

1. Formal Requirements

In many countries notice of termination must be provided in writing, set forth the grounds for termination with specificity, be delivered in a statutorily-defined manner, and be signed by a person with legal authority to terminate employment. All of these requirements are obviously manageable with sufficient time and planning; nevertheless, it seems a need to act often arises during inconvenient situations, such as local holidays or vacation periods when there is no one to draft the notice or it cannot be delivered the required way. Other potential complications include situations where the person implementing the dismissal is not employed by the same legal entity which employs the person to be dismissed and therefore lacks legal authority, or where other mishaps occur that baffle and frustrate headquarters. Failure to carry out the notice of termination in the legally appropriate manner is in the best case an embarrassment; in the worst case, particularly in a number of jurisdictions in Europe and Latin America, the employee who has now become aware of the employer's intent to terminate may suddenly begin a statutorily-protected disability leave and delay the termination indefinitely.

Special attention is needed when the person to be dismissed is an officer or director of a local legal entity. Corporate law in many countries contains specific procedures to be followed in replacing such persons, such as notice periods, convening of board meetings, and even the opportunity for an officer to be heard before final decision is rendered. An employee who is dismissed or in separation negotiations may refuse to resign from a director/officer post, complicating the operation of the company unless alternative arrangements have been planned in advance.

Thus, it is critical for in-house counsel to understand any procedural requirements as early as possible in an investigation or other process that may potentially lead to disciplinary action, so that appropriate expectations can be set and alternative scenarios anticipated. This can be a particular challenge to the headquarters-based attorney in situations where it is not feasible, for confidentiality reasons, to engage local in-house counsel or HR during the investigative or disciplinary process, such as when the subject is a local Managing Director to whom the local in-house counsel and HR director report. In those cases, the very actors who best understand the corporate governance and other local complexities are absent; at times, the headquarters attorney and HR group will need to rely solely on outside counsel during the planning phase.

2. Internal Hearing Processes

In jurisdictions such as France and the United Kingdom, the employer is expected to provide the employee with notice and an opportunity to be heard before making the final decision whether to terminate; failure to do so increases the damages available to the employee in a suit for wrongful termination, and potentially casts doubt on the validity of the reason for termination asserted by the employer. In most countries, this is largely a matter of planning and timing; in France, however, this requirement creates interesting complications, particularly when dealing with an executive or other high-level employee whom management has concluded is not performing adequately.

French law requires that the employer call the employee in writing on five days' notice to a meeting to discuss the company's intention to terminate, hold a meeting and listen to the employee's views, and finally inform the employee of its decision and grounds in writing. Yet abruptly serving a written notice on a high-level employee who may not recognize his or her own poor performance often does not foster constructive dialogue. This has led to a common practice of having a general discussion with the executive which stops carefully short of communicating a decision to terminate, but indicates the company's interest in discussing alternatives, preferably through outside counsel. The outside counsel can then negotiate a separation agreement which is placed in escrow, followed by the orchestrated implementation of the legally-required notice, meeting, and decision. Then the agreement is finalized. This can take weeks, so the employer needs to consider contingency plans as to how the executive's functions will be carried out during the process.

3. Court or Government Agency Approval

In the Netherlands, approval by a court or government agency, the Center for Work and Income, is generally required before terminating an employee; failure to comply could

result in reinstatement or at least an enhancement of damages. In several other countries, protected categories of employees (see section III.C) and groups of employees sufficient to meet the threshold of collective dismissals (see section VI) enjoy a similar protection from dismissal absent approval by a labor authority or works council. Needless to say, getting approval in any of these situations can take weeks or months, and is far from a sure thing. In practical terms, this does not necessarily mean that the employer cannot dismiss, but it argues strongly in favor of a negotiated departure in which the employee has substantial leverage.

4. Works Council Interaction

In Germany, the dismissal of even a single employee often must be reviewed with the works council for its opinion, although the employer does not need to follow it. In collective dismissals, as will be discussed, detailed and substantial works council processes are required in several countries.

5. Timely Response

A common pitfall in large multinational organizations is the requirement in many countries that a termination based on misconduct follow quickly upon discovery of the facts by the employer. This can be a firm requirement (*e.g.*, 30 days' window in Mexico) or just a significant factor taken into account by a labor tribunal examining a claim of unfair or wrongful dismissal. In theory, the kind of misconduct justifying termination should not take long for the employer to determine and respond to, but in a world of complex multi-jurisdictional compliance investigations where the employer needs to conduct several layers of interviews and try to achieve a consistent response across multiple locations, 30 days becomes a brief moment in time. This becomes another critical parameter to know in advance of any investigation of misconduct beyond the simple locally-controlled matter.

C. Protected Employees

Many countries define categories of employees entitled to special protection from dismissal. Such categories typically protect employees who are pregnant, on maternity/paternity leave, disabled, or serving as a works council member or other employee representative. As mentioned above, the employee who becomes aware in advance of the employer's intention to terminate may exploit protected status by going on a disability leave. The protection can be either an absolute prohibition or a requirement for labor authority or works council approval. Violation of the protected status would generally lead to reinstatement or enhanced damages. In some countries, even candidates for a works council position are protected; if a reduction in force is suspected during the works council election process, then the employer might expect a very large turnout of candidates for election.

D. Typical Termination Scenarios

The concepts described result in practical terms in several types of termination scenarios,

each with its own set of consequences.

1. Gross Misconduct

Even in jurisdictions highly protective of employees, there are nearly always provisions defining a limited number of situations in which misconduct is so severe and urgent that the employment relationship must be immediately ended. Examples would be significant theft from the employer (which is obvious without investigation) or workplace violence of a serious nature. Where gross misconduct is established, the employer typically does not need to provide notice, is exposed to minimal or no severance payments or damages, and may avoid the procedural prerequisites normally applicable to terminations. As a practical matter, headquarters in-house counsel will rarely encounter these cases, as they are legally straightforward and managed locally.

2. Justified Dismissal Based on Performance, Conduct or Economic Reasons

When the employer can establish cause for termination short of gross misconduct, the typical liability will be for a statutory or Collective Labor Agreement notice period and indemnities. There may also be statutory redundancy payments where the position is eliminated for economic or organizational reasons. As mentioned, the bar for establishing cause is high, but where the requirements are met, the legal ramifications are relatively clear-cut.

3. Unjustified Dismissal

The headquarters in-house counsel will commonly be engaged in the difficult situation in which termination is appropriate from the business point of view, but does not meet the rigorous local definition of cause. This often arises with executives or other upper-echelon employees who have not received carefully documented performance appraisals but whom regional or global management has now determined must be removed immediately for the good of (if not, in management's mind, the very existence of) the local business. In another common scenario, the employee violates compliance standards deemed critical by headquarters but works in a jurisdiction that rejects termination because of mitigating personal factors such as service and prior good record, a perceived inadequacy of the investigation which revealed the violation, or a different perspective on the seriousness of the violation. In these cases, the employee may be entitled to a substantial severance indemnity, damages for breach of contract, or even reinstatement, and can use that leverage to gain a favorable separation package.

4. Dismissal of a Protected Employee

The employer's largest potential exposure occurs in the case of a dismissal of a works council member or other employee representative, or the dismissal of an employee with a protected characteristic such as disability, pregnancy or recent maternity/paternity. Local operations are typically acutely aware of and manage these limitations without involvement at the global organization level.

E. Employment Contracts

In most countries, the written individual employment contract is far more common than in jurisdictions such as the United States. This is often driven by affirmative statutory requirements. For example, the Working Environment Act in Norway requires a written contract setting forth the parties, the place where services will be rendered, the professional group or category, trial period clause, vacation days and holiday pay, notice periods, wage payment procedures, work hours, length of breaks, and applicable collective agreements. Even where no specific statutory requirement of a contract exists, there will typically be statutory presumptions or local practice encouraging written contracts.

US-based management are often pleased to find out that a particular country does not require a written employment contract, believing that the absence of a contract provides them additional flexibility in managing or terminating local employees. To the contrary, unlike in employment-at-will jurisdictions where the employment contract tends to tie the employer's hands, in contractually based employment regimes, the written contract may mitigate the underlying protections which would otherwise benefit the employee. An important example is Canada, which holds that an employee terminated without cause must be given "reasonable notice" of dismissal, determined by a court; this notice period as a rough rule of thumb typically amounts to a month per year of service, up to 24 months---often a remarkable jolt to the planning of multinational companies with facilities there. Yet a well-drafted employment contract can mitigate that exposure by defining a more limited period of notice as "reasonable."

Rank-and-file employees will tend to have standard contracts setting forth probationary periods, general terms and conditions of employment, and perhaps notice periods or other provisions relating to termination (although statutory or CLA provisions relating to termination commonly would apply through incorporation or by legal requirement). The executive may have an individually negotiated contract with special notice and termination provisions, as the local employment law may not protect a senior employee such as a managing director, or the protections may be deemed insufficient.

Employers in most countries can use fixed-term contracts to hire employees needed for a special project. The benefit of this arrangement is that the employer can decide simply not to renew the contract, and thus avoid the termination indemnities or damages associated with a dismissal. Many countries, however, statutorily define the proper subject of a fixed-term contract and/or limit the duration or number of consecutive contracts entered into with an employee. This is intended to prevent the employer from creating a de facto permanent employment relationship through a succession of fixed-term contracts while avoiding the usual termination indemnities and protections.

In some jurisdictions, the fixed-term contract can backfire when the employer wants to end the relationship early, as the remedy may be payment of the remaining term of the contract; in those countries, the two-year fixed-term contract terminated after one year may expose the company to an additional year of pay, whereas an indefinite term contract terminated without cause might have been resolved for a few weeks or months. A similar set of considerations underlies the concept of the trial or probationary period in permanent or indefinite-term contracts. The employer may terminate the employee during that initial

period without exposure to wrongful dismissal protections, but the length of the period is generally limited by statute (*e.g.*, six months in Germany; two months in the Netherlands).

Individual employment contracts naturally may impact the terms of separation, and the in-house counsel confronted with a proposed termination should request a copy of the contract as a routine first step. What is sometimes overlooked, however, is the impact a contract may have on a restructuring process. A contract which specifically defines the employee's job responsibilities, reporting relationship, or place of work may constrain the employer from changing those aspects of the job as part of an organizational change without the employee's consent. For example, an acquiring company seeking to consolidate local operations quickly will need to consider whether changing the organizational structure or work location will breach the contracts of the acquired company's executives, thus prematurely giving them the right to leave the combined company with notice and severance.

F. Severance Plans

Many multinational companies have severance plans or policies (1) covering countries such as the US which lack statutory notice/severance protections, (2) providing executives with additional termination compensation, and/or (3) generated for a special purpose such as retention of Managing Directors or other key personnel during a merger or other restructuring.

To the extent the plan beneficiaries include ex-US employees (or US employees serving ex-pat assignments), care must be taken to draft these plans to avoid "double dipping" between the plan severance and statutory/contractual entitlements under local law.

A common mistake is to condition a plan severance on waiver or an agreed reduction by the employee of local entitlements. This creates the risk that a local court may find that the statutory entitlements are not waivable but that the severance plan is entirely enforceable. A better approach is to provide that the plan severance will be offset against any local entitlements or reduced by the amount of any local entitlements, so that the statutory entitlements are honored and duplication is avoided by the terms of the plan which are in the employer's control.

Take for example a plan designed to provide Managing Directors a minimum guarantee of 18 months severance pay if they are terminated within the first two years after a merger; the plan should provide that the 18 months will be reduced by any amounts due the employee in statutory notice/ severance/ indemnities or contractual entitlement, so the employee with a statutory notice period of 12 months will receive 6 months severance while the employee with a combined statutory notice/severance entitlement of 24 months will receive nothing. The net effect is a floor of 18 months severance, with employees entitled to a greater amount by statute or contract still entitled to receive those amounts.

G. Separation Agreements

The separation agreement is a familiar focus to in-house counsel dealing with global employment terminations, particularly counsel schooled in more litigious jurisdictions like the United States. Because the routes to recovery by the employee are in most countries well-travelled and severances not subject to as much debate as in countries like the United States, however, there is not the same urgency in many jurisdictions about all-encompassing releases.

For this reason, the common US release containing encyclopedic catalogues of potential claims and contingencies, which carefully seal off any escape hatch created by statute or aberrant court decision since the beginning of the republic in any of the 50 states, is often greeted with bafflement if not derision elsewhere. Germans, for example, can live with a clause stating simply that "all reciprocal claims resulting from and in connection with the employment relationship, its termination and on the occasion of its termination and for the time following the termination are finally settled on discharge of the obligations under this agreement."

Nevertheless, a balance is relatively easy to attain. When dealing with executives or other key employees (typically the level that would be handled regionally or globally), a legitimate company interest exists in protections such as strong confidentiality clauses, assurances of cooperation with ongoing investigations and litigation, non-solicitation of employees, and the like. These will make the separation agreement longer than some would like and meet with the occasional protestation of "that's not done here," but most of these clauses will survive most of the time, subject to local legal review. This does not mean that a company needs the entire panoply of US-style provisions for an employee who is not a US citizen and never worked in the United States. A possible template for a multi-country agreement with US headquarters which may be used as a starting point for consideration is annexed as Exhibit A.

There are a number of issues which should be considered up front when advising on a termination.

1. Language

In France, the separation agreement must be in French; in Belgium, French, Dutch, or German; in Poland, Polish. In many Latin American countries, the agreement must be in Spanish. In a majority of countries, any language is fine as long as it is understood by the employee, but the risk is always that the departing employee will later claim that the agreement was too complicated to understand in a non-native language. In a complex termination where headquarters involvement is important, it is common to draft the agreement in two languages, for example French and English.

2. Procedure

In Italy and many Latin American countries, a separation agreement is voidable unless formalized by a court, labor bureau or union settlement committee. Depending on the country, approval is not necessarily a given where the terms of the separation vary from the statutory norms or incorporate complex foreign-sounding terms. In complicated multi-jurisdictional separations, it is at times advisable to have multiple separation agreements with sufficient consideration to support releases, so that a straightforward agreement can be formalized before a labor authority while other terms are encapsulated in a separate agreement which releases claims in other countries.

In the United Kingdom, a settlement agreement waiving employee claims must recite that the employee has been advised by an independent lawyer or trade union official about the terms and effect of the agreement, and that the advice is covered by a policy of insurance or indemnity. It is typical for the lawyer or union official to sign a side letter attesting to these facts. The employer accordingly often makes a contribution of €250 – 500 towards the employee's legal costs.

3. The Restrictive Covenant as a Separation Term

Consider the scenario in which senior management has concluded that a Managing Director is performing very poorly and needs to be replaced. In fact, the business of the local subsidiary literally depends on a rapid and smooth transition from the current incompetence to effective new leadership.

The in-house counsel, after researching the Managing Director's entitlements by contract and under applicable law, is tasked with negotiating a separation package. After arduous discussions, counsel reports to management the successful conclusion of a package which happily comes in under the authority granted. Management wishes the package could have been less rich but understands the context, and casually asks for confirmation that "we are getting a non-compete, aren't we?"

The in-house counsel, not realizing that the completely incompetent Managing Director needed to be restrained from competition, did not include that concept in the negotiation. Unfortunately, the jurisdiction is one which requires compensation of 50% of the Managing Director's base salary for a valid non-compete, so now the choice is between going over the authority granted and abandoning the non-compete. Had the in-house counsel known that a non-compete was desired, the compensation might well have been rolled into the overall package. Lesson: understand up front each and every term that management will want in the package, particularly any post-employment restraints.

For a more general discussion of global restrictive covenants, see section VIII below.[2]

4. Timing

In countries such as France and Belgium, the agreement resolving an involuntary termination cannot be entered into until after termination of the employment relationship; otherwise, it is unenforceable.

As suggested, many countries have their own unique requirements or prohibitions, which need to be reviewed in advance with local counsel. The Additional Resources referenced in section XIV may serve as a starting point for planning.

H. Reconciling Local Employment Law Protections with Global Compliance-Related Disciplinary Standards

Global compliance has in the last 20 years increasingly absorbed the attention and resources of multinationals, driven from the US perspective by the US Sentencing Guidelines (which define how the US Government evaluates compliance programs in seeking penalties for corporate crimes), statutes such as the Foreign Corrupt Practices Act, Sarbanes Oxley, and Dodd Frank, whistleblowing exposure under a variety of federal and state laws, and more broadly a vigorous level of scrutiny from the media, investors, regulatory agencies, employees, and customers.

Some of these laws and regulations explicitly apply extraterritorially, but beyond that it is clear that corporate compliance systems will be evaluated by government and the public based on global benchmarks. The bribery or corruption in a small subsidiary will, apart from its potential legal impact on the parent, demonstrate to prosecutors and regulators in the headquarters country that the corporate compliance system is ineffective. And an important element of any compliance system is, as the US Sentencing Guidelines phrase it, both incentives and discipline.[3]

Some interesting problems arise when applying these global objectives throughout jurisdictions embodying widely varying levels of employee protection. Consider, for example, a situation in which a pharmaceutical product batch must be recalled for quality defects, at great expense to the employer. On investigation, it is determined that a long-service employee in Germany or Korea approved a raw ingredient for release, even though documents clearly showed that quality testing had not been completed. A similarly long-service employee in the United States, who had an independent obligation to confirm that the documentation reflected the completion of quality testing, approved the receipt of the raw ingredient despite the lack of documentation and released it to the production process. The employer's global head of compliance considers these policy violations egregious and recommends termination of both employees.

In this fact pattern, the employer's risks may vary significantly between countries. The US employee likely has limited recourse if she is terminated, except to the extent she can establish that the asserted policy violation is a pretext for discrimination or retaliation. Even if she has a compelling case that the investigation was faulty or the policy was not enforced against favored employees, she is looking at damages that may only be awarded well off in the future.

On the other hand, the German or Korean employee of long service with a good employment record might have a decent claim for reinstatement or damages based on a dismissal without cause. He could argue that a lesser sanction plus retraining would be a fairer response and a sufficient measure to enforce the compliance standards, based on contentions that the company's compliance standards were "on paper" only as opposed to

fully integrated into the local workplace, that the employee's manager tolerated this conduct by others, that training was inadequate, etc.[4]

If the company terminates both employees, the German or Korean employee may regain his position through court action or win substantial damages—a visible rejection of the company's compliance stance. If the company applies a lesser sanction to both employees, it arguably weakens its policy enforcement. If the company terminates the US employee and gives more-lenient treatment to the German employee, it may no longer be perceived as applying its global standards consistently.

There is no simple answer to this dilemma in the short term, but the potential conflicts can be mitigated by measures that the global compliance team and the local management/HR personnel should both heartily support:

- Frequent local training on key compliance issues and consistent discipline, even for lesser violations where a warning is all that reasonably be imposed. A history of discipline may justify the termination of the non-compliant employee as a repeat offender as well as show that local management did not tolerate non-compliance.
- Integrating key aspects of the global code of conduct into local work rules. (In France, for example, failure to include Code of Conduct provisions in the "règlement intérieurs" (internal regulations) of the local workplace greatly weakens the employer's ability to show that the termination is supported by "real and serious cause."[5]

This is easier said than done, of course, in a major global enterprise with numerous far-flung operations of varying levels of sophistication and differing business cultures. It is well worth prioritizing larger operations in employee-protective jurisdictions, or those that present larger compliance risks because of their functions or the legal context in country, for example, to ensure that the best possible predicate is set for effective discipline when a compliance violation arises.

IV. Global Discrimination Law and Diversity Initiatives

- **Global discrimination and diversity issues may arise in individual disciplinary or termination settings as well as implementation of global codes of conduct, handbooks, policies, or training programs; and increasingly, corporate governance.**
- **Discrimination and harassment protections derive from national laws, which in Europe are driven by EU Directives. The EU directives on race (2000/43/EC) and equal treatment (2000/78/EC and 2002/73/EC) require member states to afford remedies for discrimination on the basis of race, gender, religion, disability, age, and sexual orientation.**

- **Some key areas of global activity in the last several years include gender discrimination/ harassment, religious accommodation, and protection of sexual orientation and identity.**

One of the more sweeping changes in employment law across the globe has been the rapid expansion of protections against discrimination and harassment, accompanied by increasing emphasis on diversity. The US experience has no doubt informed and helped drive many of these initiatives, but cultural, legal and historical differences among jurisdictions have led to a variety of approaches to the subject.

In understanding the global context of discrimination law, it helps to recall several unique aspects of the US historical and legal context which are much diminished or absent elsewhere: (1) a history of slavery, racial discrimination, and a prominent civil rights movement which focused attention on discrimination against an expanding array of protected classes; (2) a society built on immigration of ethnic groups from around the globe; (3) an "employment at will" regime which generally provides no remedy for unfair or wrongful dismissal thus magnifying the importance of discrimination law as a remedy for perceived injustice in the workplace; and (4) a litigation process featuring notice pleading, broad discovery, and unpredictable but substantial levels of damages—far more supportive of proving discriminatory state-of-mind than the more limited civil law processes. Each of these factors contribute to the centrality of discrimination and harassment issues in US workplace law—a strong contrast with most other jurisdictions. Nevertheless, it is an area of increasing importance to the global practitioner.

A. Sources of Discrimination Law

Discrimination and harassment protections derive from national laws, which in Europe are driven by EU Directives. The EU directives on race (2000/43/EC) and equal treatment (2000/78/EC and 2002/73/EC) require member states to afford remedies for discrimination on the basis of race, gender, religion, disability, age, and sexual orientation. Many of the concepts outlined in the directives will be familiar to US-trained lawyers:

- Defining discrimination to include "direct" and "indirect" discrimination, paralleling the US concepts of "disparate treatment" and "disparate impact" respectively;
- Including hostile environment harassment as a form of discrimination;
- Permitting specific measures to compensate for disadvantages linked to racial or ethnic origin without violating the principle of equal treatment;
- Shifting the burden of proof to employers once the employee has established a prima facie case of discrimination;
- Protection against retaliation ("victimisation") for asserting an equal treatment claim; and
- Requiring designation of national-level agencies dedicated to promotion of equal treatment.

The EU approach to age discrimination differs from that of the United States. Directive

2000/78/EC specifically carves out national retirement ages as permissible, and allows member states to provide that:

> [D]ifferences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.[6]

Permissible differences in treatment include, for example, "the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement."[7] This more nuanced treatment of age discrimination may reflect a history of high unemployment among younger people in Europe, as well as a generally more protective social safety net supporting earlier retirement.

The EU directives on equal treatment only set minimum requirements; accordingly, national law will control in any particular case. A number of countries, for example, have broadened the protected categories. France adds marital status, nationality, genetic characteristics, political opinions, trade union activities, physical appearance, family name, and medical condition. Italy includes language, political beliefs, and personal beliefs. Norway and Poland also protect political beliefs, and Norway adds "spirituality."

B. Sanctions for Discrimination and Harassment

The sanctions for discriminatory conduct are also potentially more punitive than the liability normally associated with wrongful dismissal. France imposes criminal fines of up to €45,000 (about $52,000) and up to three years imprisonment for acts of discrimination by individuals; a corporate entity can be fined up to €225,000 (about $259,000). In Poland, discrimination is an offense subject to a fine of at least 3000 PLN (about $800), and penal charges can be brought in cases of malicious or persistent infringement.

Other countries imposing criminal sanctions for sexual harassment (particularly quid pro quo harassment) include Algeria, China, Hungary, Kenya, Lithuania, Philippines and Spain,[8] with South Korea expected to follow in late 2018.[9] Italy places discriminatory dismissals in the category of "real protection" entitling the employee to reinstatement plus back pay. In general, many jurisdictions allow recovery of economic and non-economic damages for discrimination, although mostly at levels well below typical damage awards in the United States (in Belgium, for example, up to 6 months' compensation; in Germany, generally up to 3 months' compensation).

As mentioned above, discrimination claims in most countries, while increasingly important, are neither as common nor as prominent a risk as discrimination claims in a jurisdiction such as the United States. For perspective, the State Labor Inspectorate of Poland, a nation of nearly 40 million, receives about 300 complaints annually, a breathtakingly small number to lawyers in litigious jurisdictions. There are likely many historical and cultural

explanations for this, but the incentives in local employment law also play a role.

Globally, most employees have the direct route to recovery against employers provided by contract in addition to statutory protections against dismissal without cause; they may recover substantial awards without pursuing the more difficult path of establishing discrimination by their managers. And, the typical civil law litigation process emphasizing documentary evidence with very limited opportunities for discovery (including discovery of statistical evidence), identification of comparators, and cross-examination of managers does not support what is ultimately a state-of-mind inquiry as effectively as the US litigation system.

C. Current Trends in Global Discrimination Law

Some key areas of global activity in the last several years include gender discrimination/ harassment, religious accommodation, and protection of sexual orientation and identity.

1. Gender Discrimination and Harassment

Even before the "Me too" movement brought sexual harassment to global attention in 2017, many countries (particularly in Asia) had substantially increased employee protections in the workplace. Perhaps the most dramatic example is the India Sexual Harassment of Women at Workplace Prevention, Prohibition, and Redressal Act of 2013,[10] which broadly defines unacceptable conduct; applies to contractors, volunteers, and trainees in addition to employees, and takes the innovative step of requiring an Internal Complaint Committee with a female presiding officer and at least one outsider committed to women's interests or sexual harassment issues. Many employers have found it a challenge to staff and monitor the compliant operation of the Committee, particularly those with limited numbers of senior managers in country.

Notable other recent anti-harassment measures have been enacted in Singapore[11] (specific sexual harassment law); Hong Kong[12] (protection of workers from customer sexual harassment); and South Korea[13] (broadening protection against sexual harassment and violence). And a new law in Ontario requires the employer to adopt a written plan to prevent and address sexual harassment, including policies, training, and investigation, and authorizes the labor ministry to require a third-party investigation.[14]

Overall, 152 countries now prohibit gender discrimination in promotions and demotions, while 122 countries prohibit sexual harassment in the workplace.[15]

2. Religious Accommodation

With increasing levels of immigration in many developed countries as well as greater focus on discrimination and diversity, disputes about accommodation of religious practices are becoming more common. Unlike in the US, where Title VII of the Civil Rights Act of 1964 specifically defines "religion" to include religious practices which can be reasonably accommodated without undue hardship, the EU for example views religious practice as

subject to legitimate and proportionate regulation by the employer. In one recent case, the European Court of Justice held that a company's internal rule prohibiting all religious, political or philosophical symbols could be applied to forbid a receptionist from wearing a Muslim headscarf at work.[16]

3. Protections Against Sexual Orientation and Identity Discrimination

While there is a clear global trend toward protection of LGBT employees (*e.g.*, EU countries pursuant to EU Directive 2000/78, South Africa, Australia, New Zealand, Taiwan, Israel, Canada, Mexico, Colombia Venezuela, Costa Rica, Uruguay, Ecuador, Nicaragua, Bolivia, Georgia, Serbia, Croatia, and Iceland have varying levels of protection), 136 countries do not prohibit discrimination on the basis of sexual orientation or gender identity,[17] and 76 countries retain criminal laws applied on the basis of sexual orientation or gender identity such as laws criminalizing same-sex relationships. These latter countries include some notable ex-pat destinations such as United Arab Emirates, Saudi Arabia, Kuwait, Nigeria, Ghana, Indonesia, Philippines and Singapore, although not all of these countries enforce such laws vigorously.

D. Diversity Measures

Diversity is no longer exclusively a US concern, but is increasingly important in Western Europe and other developed countries. One of the more heavily publicized initiatives is the effort to increase the participation of women on corporate boards (recently as low as 4% in countries such as South Korea and Japan, 12% in the US). These measures include hard quotas of 40% (France, Norway) or 30% (Germany) applied to large or publicly-traded companies, hard quotas applied to state-owned enterprises (Quebec, Colombia, Greece), requirements to set targets and disclose (UK, Denmark) or minimum requirements of one diverse member (India). Hard quotas are often enforceable by voiding any appointment of a male Board member while the Board remains under the quota of diverse membership.

A measure which has received somewhat less attention globally is the EU Non-Financial Reporting Directive[18] ("NFRD"), applicable to large enterprises of 500+ employees which have securities traded on an EU exchange. The NFRD requires that the corporate governance statement in the annual report contain…

> a description of the diversity policy applied in relation to the undertaking's administrative, management and supervisory bodies with regard to aspects such as, for instance, age, gender, or educational or professional backgrounds, the objectives of that diversity policy, how it has been implemented and the results in the reporting period.[19]

The rationale for this diversity disclosure is that…

> diversity of competences and views of the members of administrative, management and supervisory bodies of

> undertakings facilitates a good understanding of the business organisation and affairs of the undertaking concerned. It enables members . . . to be more open to innovative ideas [and avoid] the 'group-think' phenomenon.[20]

To the US practitioner, what is striking about the NFRD is that focuses on diversity of "age, gender, or educational or professional backgrounds," whereas in the US diversity emphasis is on race/national origin and gender. This seems to reflect a more purely utilitarian rationale for diversity (spurring innovation, avoiding "group think") than in the US, where diversity still combines important historical aspects of remedying past discrimination with the more recently prominent rationale of improving corporate performance through broader perspectives of decisionmakers.

V. Information and Consultation

- **Information and consultation is a mandatory process in the EU and certain other jurisdictions in which the employer must obtain some level of input from employee representatives before embarking on a planned course of action.**
- **Though largely a European concept (predominantly through works councils), some countries outside of Europe require a form of information and consultation in some contexts, particularly collective dismissals.**
- **Where it becomes critical for the global in-house lawyer to understand works councils is in analyzing mergers and acquisitions, global integrations, multi-country reductions-in-force, and other transactions in which works council interactions may greatly affect the timing, cost, and even the structure of the initiative.**
- **Some of the more challenging aspects of works council relationships and negotiations include burdensome information requests, use of outside experts, and lengthy consultation processes.**
- **An important challenge for headquarters counsel is ensuring that the global decision-making process respects local information/consultation rights in reality and in appearance.**

A unique and often misunderstood aspect of global employment law is the concept of "information and consultation." By this we mean a mandatory process in which the employer must obtain some level of input from employee representatives before embarking on a planned course of action. This is mostly, but certainly not entirely, a European concept, and the most common, though not exclusive, vehicle for information and consultation is the works council. Outside of Europe, some countries require a form of information and consultation in some contexts, particularly collective dismissals. Subsection A of this section focuses mainly on issues surrounding works councils, while subsection B below addresses

other information and consultation processes.

A. Works Councils

A "works council" can be broadly defined as an elected body of employee representatives (sometimes with management representatives and co-members), organized on a site or corporate entity basis, with a mission of fostering communication and cooperation between employees and management for the betterment of the enterprise. The influence of and processes surrounding works councils vary considerably among EU member states, but a number of basic generalizations can be made:

- Works councils are distinct from trade unions. In some countries, works councils have "co-determination" or approval rights on certain issues, but their central focus in most countries is to receive information concerning enterprise operations and provide input or "consultation" on statutorily-defined issues.
- There is a wider cultural acceptance of works councils among European enterprises than of trade unions in the United States; good works council relationships are seen as part of good employership. Local managers and HR personnel value their rapport with works council leaders, and often worry that hard-charging global project managers will undermine the local atmosphere they have created over time with abrupt or uncalibrated implementation of restructurings and other global initiatives.
- Some countries, such as the United Kingdom, Ireland, and Finland, have no statutory requirement or strong tradition of works councils. Countries in which they are most influential include Germany, France, and the Netherlands; they are also prevalent in Belgium, Austria, Spain, and Italy.
- Even in countries where the works council is limited to providing an opinion before an employer launches an initiative, the works council's right to prior consultation may be strictly enforced to the point of civil injunction and (in France) criminal sanction. It cannot be overemphasized that the outsider's (particularly the American's) tendency to see information/consultation as an exercise or a "hoop to jump through" is not shared in strong works council countries. There is no easier route to litigation and delay than to appear not to be taking the works council's statutory rights seriously.
- Larger enterprises may be required to establish a European Works Council (EWC), a separate pan-European council which is informed and provides consultation on issues involving two or more member countries. A reduction in force affecting multiple member states, for example, may require prior consultation on the local level in the affected countries as well as on the pan-European level.

Day-to-day interactions with local works councils are normally managed by local HR and management with little visibility to headquarters or even local in-house legal personnel. (The EWC may be managed regionally or even from headquarters.) Where it becomes critical for the global in-house lawyer to understand works councils is in analyzing mergers

and acquisitions, global integrations, multi-country reductions-in-force, and other transactions in which works council interactions may greatly affect the timing, cost, and even the structure of the initiative.

1. Legal Framework

There are two distinct European directives to keep in mind. The Information and Consultation Directive (2002/14/EC) sets forth a baseline requirement for informing and consulting employees in the EU, whether through works councils or otherwise. The European Works Council Directive (2009/38/EC), first promulgated in 1994 and recast in 2009, establishes the framework for pan-European works councils in enterprises which meet the triggering threshold (mentioned below).

a. The Information and Consultation Directive

The Information and Consultation Directive was promulgated against the background of a patchwork of works council traditions among the member states, and addressed a perceived need to strengthen dialogue and promote mutual trust within undertakings in order to improve risk anticipation, make work organization more flexible and facilitate employee access to training within the undertaking while maintaining security, make employees aware of adaptation needs, increase employees' availability to undertake measures and activities to increase their employability, promote employee involvement in the operation and future of the undertaking and increase its competitiveness.[21]

Of particular concern was improving information and consultation…

> on the situation and likely development of employment within the undertaking and, where the employer's evaluation suggests that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, in particular in terms of employee training and skill development, with a view to offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected.[22]

The main requirements of the directive are as follows.

- The employer must provide information and consultation on the activities and economic situation of the business, the structure and probable development of employment (particularly where there is a threat to employment), and decisions likely to lead to substantial changes in organization or contractual relationships.[23]
- Information must be given at a time and in sufficient detail to permit employee representatives to conduct an adequate study.[24]

- Consultation (defined as "the exchange of views and establishment of dialogue") shall take place concerning "the opinion which the employees' representatives are entitled to formulate" and the employer must provide a response to that opinion with supporting reasons.[25]

The member states are also required to restrict disclosure by employee representatives of confidential information received by the employer, and to permit the employer to deny information and consultation where it would "seriously harm the functioning of the undertaking or establishment or would be prejudicial to it."[26] The directive applies to undertakings employing 50 or more within a country or establishments employing 20 or more within a country, at the member state's option.[27]

Member states can satisfy these basic requirements in accordance with their national law and industrial relations practices; some do so with works councils, others through collective bargaining or other processes. In works council jurisdictions, the directive requirements are, in a rough sense, declarative of most local processes, but there is considerable local variation as to the scope of information/consultation, the powers of the works council, and the practical arrangements used. In any given situation, it is critical to study these local requirements carefully and seek local legal advice as necessary.[28]

b. The European Works Council Directive

The European Works Council Directive defines a related but separate concept—the pan-European works council consisting of representatives from across the European Union. Why impose this additional layer of employee information/consultation? The preamble to the directive observes that the "functioning of the internal market involves a process of concentration of undertakings, cross-border mergers, take-overs, joint ventures and, consequently, a transnationalisation of undertakings and groups of undertakings"[29] and that "if economic activities are to develop in a harmonious fashion, undertakings and groups of undertakings operating in two or more Member States must inform and consult the representatives of those of their employees who are affected by their decisions."[30] The directive applies to "community-scale undertakings" (an undertaking with 1,000 employees within the member states and 150 employees in each of at least two member states) as well as "community-scale groups of undertakings" (a group with 1,000 employees within the member states, and group undertakings of 150 employees in at least two member states).

The first point to understand about EWCs is that they are not automatically created by virtue of the directive or national implementing law; they need to be affirmatively initiated by management or the written request of at least 100 employees or their representatives in at least 2 undertakings or establishments in at least 2 member states.[31] There follows a potentially cumbersome and lengthy process of negotiation between management and a "special negotiating body" of employee representatives drawn from the member states in which employees are located. The object is to reach a written agreement setting forth the details of implementation of the EWC, including composition (number of members, allocation of seats), the procedure for information/consultation, venue/frequency/duration of meetings, procedures for a select committee of representatives, financial resources, and provisions for amendment or termination.[32] Where management refuses to negotiate or where the negotiation is unsuccessful, then a set of "subsidiary requirements" (essentially

default provisions) set out under national law in alignment with Annex 1 of the directive come into play. As a practical matter, the subsidiary requirements influence the negotiation of the agreement significantly, in that the parties know what provisions will govern them if they do not reach mutual agreement. Typical points of negotiation center on the scope of matters covered by the process, EWC composition, interactions with local works councils, and the number of meetings per year.

The impact of the directive on European business varies quite widely among employers. Many employers who meet the triggering thresholds in the directive nevertheless do not have an EWC because neither management nor a sufficient quantum of employees has initiated the negotiation process. While it may seem surprising that employees or their representatives would not seek an EWC across the board, it may be that employees in works council countries see a European entity as superfluous or even detracting from the role of the local works council, while employees in other jurisdictions have no history with or knowledge about the process. Among employers with EWCs, the additional level of information/consultation can consist of anything from a routine (though expensive) set of annual meetings (with the real action taking place locally) to a serious additional obstacle to change that may impact multiple countries, depending on the labor relations history and climate within the company and the nature of the transactions or restructurings at issue. The 2009 recast of the directive was, from the trade union point of view, intended to invigorate the EWC process through clarification of the scope of transnational issues and strengthening of the information/consultation requirements. The ultimate impact of these changes continues to be debated.

c. National Law

The detailed provisions governing the processes of local works council are set forth in national law. Although the relevant national law needs to be analyzed in any particular situation, some broad concepts can be generalized.

i. Works Council Right of Information/Consultation

In general, works councils have the right to the following:

- Information: Management must keep the works council advised of significant matters affecting the business or its employees (usually through periodic meetings), and provide information on specific statutorily-defined issues such as mergers/acquisitions or restructurings sufficient to support a consultation process.
- Consultation: The works council has the right to provide an opinion on specific issues. Implicit in this right is frequently the ability to call on external advisors, at company expense, to assist the works council in interpreting and analyzing information provided by the employer.

ii. Other Works Council Rights

- Advice: The Netherlands features a unique process in which the works council provides formal written advice to the company. The advice can be

positive (agrees with the company's proposed course of action), negative (rejects the company's proposed course of action), or positive subject to a potentially long list of conditions. If the company does not intend to follow negative advice or meet all the conditions to positive advice, it must delay action for one month to permit the works council to bring suit challenging the company's decision on the grounds that it is manifestly unreasonable. In theory, this permits a court determination on the substance of the company's decision; in practice, however, the issue is generally whether the process was respected.

- Co-Determination: In some countries (*e.g.*, Germany), the works council must agree to measures such as new codes of conduct or other matters affecting working conditions. Disagreements between management and the works council are resolved through arbitration or court action.
- Supervisory Board Membership: In some countries, the works council has the right to appoint or recommend one or more members of the supervisory board of directors of the local employer. The supervisory board functions similarly to the outside directors of a company, so membership can provide a certain amount of influence or leverage on major transactions affecting the corporate entity.
- Protected Employee Status: Works council members are typically protected-status employees entitled to enhanced severance or protection from dismissal.

iii. Matters Within the Scope of Works Council Processes

From the headquarters perspective, the usual types of matters implicating works council interactions include the following:

- Mergers & Acquisitions Directly Affecting the Local Corporate Entity or its Employees. From a management point of view, it is important to distinguish between the corporate entity actually acquired (where the works council may have the right of consultation or advice) and the subsidiaries or affiliates whose employees might ultimately be impacted once the acquirer and the acquired entity are fully integrated. Although employee representatives might argue otherwise, it would generally be premature to engage works councils in those affiliated or subsidiary entities, except to provide information.
- Consider the example of a Canadian company with subsidiaries in each of the major European markets acquiring a German company, which also has subsidiaries in each of those markets. The acquisition is at the level of the parents. On Day 1, there would continue to be local operations of each company until a decision is made on local integration. The first issue is whether the German works council needs to be engaged concerning the proposed acquisition of the German parent company, and the answer, presumably, is "yes." But if no specific plans have been developed for local subsidiary restructuring or integration, then the company would want to take

the position— subject to local legal review—that works council processes at the subsidiaries are premature. In France, a separate information/consultation requirement is triggered by a filing seeking competition review by the European Commission or French competition authorities.[33]

- Collective Dismissals. As will be discussed in section V.A, works council countries typically make special provision for consultation in collective dismissals affecting employees above a numerical threshold.
- Significant Organizational Changes or Restructurings. One of the thornier issues for the headquarters counsel is anticipating the local impact of a global restructuring and determining whether it constitutes an organizational change of sufficient magnitude to trigger a works council process. This is often a mixed question of local law and local practice or relationships.
- Changes to Company Policies or Practices. This often applies in matters affecting performance assessment, compensation, data privacy, working conditions, and standards of conduct.

2. Issues in Works Council Relationships

The idea that employees should be informed about and given the opportunity to provide input on major matters affecting the business is simple in theory, and its implementation can be straightforward in the ordinary course. When the employer seeks to institute major changes with adverse impact on employment, or has a history of difficult labor relations, however, problems often arise. Some of the more challenging obstacles to be anticipated include the following.

a. Wide-Ranging, Burdensome Information Requests

In France, for example, it has historically been common for a works council to respond to the employer's initial information disclosure with an extensive request for documents and data that would make a US litigator proud. Skillful employee representatives, often guided by an external advisor (see the following discussion), are accomplished at focusing on documents which require extensive effort to retrieve and/or are extremely sensitive for the employer to disclose. There is no formal procedure for challenging the scope of the works council's request; instead, it is a matter of negotiation guided by the employer's judgment as to what a court would find relevant should it become necessary either to bring suit to compel a recalcitrant works council to provide an opinion or to defend against a works council's suit to enjoin the employer's intended action. There are generally strong statutory confidentiality protections for information provided by the employer; nevertheless, it is often necessary to spend further time negotiating a confidentiality agreement with the works council to cover particularly sensitive information. Recent reforms in France have significantly expedited works council processes in collective dismissals. (See section XII below.)

b. Appointment of Outside Experts and Advisors

In jurisdictions where the works council is empowered to consult on economic justifications for a transaction or restructuring, employees will often appoint an outside financial or other advisor to assist their consultation at company expense. These advisors may be highly credentialed and well-known in their countries. They will typically request extensive information, even interviews with company personnel, in support of their written report to the works council; depending on their prominence and likely influence on a court, it may be difficult for the employer to limit or hasten their inquiry.

c. Lengthy Consultation Processes

Not surprisingly, possibilities of delay attend the process of negotiating a method agreement (*i.e.*, the agreement defining the procedures which will be followed during the consultation process), arguing about the scope of information requests, protecting confidentiality, producing the information, interacting with an outside advisor, and/or reviewing and responding to the works council's opinion. Much depends on the culture, the political conditions in the country, and the employer's prior relationship with its employee representatives. Works council processes in France, for example, have been notoriously lengthy, even two or more years in duration; in most countries, the process is much shorter, but still can easily consume several months or more.

d. Dispute Resolution

Generally, the worst-case scenario for the employer is to become embroiled in litigation or arbitration with the works council over the consultation process. This can arise at the initiative of the employer when the works council unreasonably refuses to give an opinion or approval, or at the initiative of the works council if the employer presses ahead with a decision before the process is completed or (in the case of the Netherlands) does not follow the works council's advice. The courts in many countries move fairly expeditiously on these applications, but time and money are being spent arguing over process; in the meantime, the employer is stopped in its tracks.

e. Communications/Political Considerations

Works councils may have credibility with the employee population as well as local media. They are also often assisted by trade unions that may have considerable political influence. Accordingly, a protracted dispute with the works council may rapidly take on communications, political, and/or employee relations dimensions well beyond what may have been anticipated in headquarters.

f. Coordination with European Works Councils

A lesser, but at times significant, complication is coordinating information/consultation processes between local works council and the EWC, neither of which want to be subordinated to the other. The 2009 recast of the EWC Directive did not clarify this issue, leaving it to the parties to arrange as part of their EWC agreement without prejudice to requirements of national law.

For the in-house counsel charged with managing the labor and employment aspects of a multi-country transaction or restructuring, early analysis, advance coordination, and proper setting of expectations are key in order to avoid frustration at the headquarters level. There is a tendency at the local level to resist headquarters involvement with works council processes for fear that local labor relations will be compromised by demands from upper management, which lack the local perspective. While local management and HR unquestionably are best positioned to implement the works council process within their country, there is an important role for regional or headquarters counsel in strategizing, coordinating, and projecting results in a multi-country process where timing and expense are critical.

Many works council processes are the ultimate result of a global strategy developed in headquarters. For example, a review of 100 plants in the supply chain leads to elimination of 25 in various locations. The proposed closure in France is not a simple trade-off with another facility, but instead is the result of several complex analyses of product mix, technology, and outsourcing. If the in-house counsel is able to gain access to the global process early enough, then great benefit may be realized in developing a set of documents that explains the basis for the global strategy clearly and uses information that the company is comfortable disclosing under a confidentiality agreement. This facilitates the information/consultation procedure and reduces the back-and-forth delay of arguing about the scope of disclosure and confidentiality, while sensitizing management to the need to explain the basis of their plans to employee representatives and experts at a later date.

Another important challenge for headquarters counsel is ensuring that the global decision-making process respects local information/consultation rights in reality and in appearance. A distinction needs to be made between global strategy/planning and local implementation. For example, a global strategy of streamlining the supply chain may be developed at headquarters; as part of that strategy, there may be proposals to exit certain locations. The decision as to whether a plant is closed in France or Germany, however, is subject to works council information/consultation and probably a collective dismissal process. Global managers often do not understand the distinction, and/or do not prepare documents which reflect the distinction. Hence the memo, e-mail, or PowerPoint which shows the list of plants to be closed includes European plants where no information/consultation has taken place. A multinational enterprise planning a global strategy in an electronic age disseminates information so quickly and widely that errors of this sort outrun in-house counsel's ability to correct them. It is important to explain the process to headquarters management at an early stage, and to ensure that documents accurately reflect the difference between plans/strategies and any decisions subject to information/consultation. Some suggestions for template language to reflect the role of information/consultation within a global project are set forth in Exhibit B.

B. Other Information and Consultation Processes

As mentioned at the outset of this section, the Information and Consultation Directive does not specifically require works councils, as indeed not every country in Europe had such a tradition. Nevertheless, the information and consultation requirements remain, so in non-works council countries in Europe the employer at times will need to establish a process for

the employees to choose representatives for the specific purpose of providing input on a particular company decision.

In the UK, for example, employers with 50 or more employees must establish an Information and Consultation Agreement ("ICA") in certain situations. Specifically, the employees must make a valid request to negotiate or the employer must give a valid notification of its intention to negotiate. The employer must then negotiate with representatives of the employees to put in place an ICA. If the parties cannot agree on the ICA's terms within a specific period of time, there are standard information and consultation provisions that will automatically apply.[34]

Outside the European context, some countries by national law require information and consultation processes, particularly in collective dismissals and/or transfer of undertaking. It is not uncommon for these information and consultation requirements to depend on the nature of the business decision and how it impacts employees. In China, for example, when an employer "decides major company matters that directly implicate the interests of employees," such as a transfer of undertaking, the employer should discuss these matters with employee representative. While the consultation procedure gives the trade union and employees a chance to express their opinions, the employer is responsible for making a final decision.[35]

Other countries have stricter requirements. In South Africa, for example, an employer can only layoff employees in a collective dismissal by agreement after meeting specific consultation requirements. The employer must start the consultation process as soon as layoffs are reasonably foreseeable. This consultation requirement includes, among other things, a discussion regarding ways to avoid retrenchments or to keep the number of retrenchments to a minimum, as well as how to mitigate hardship for employees.[36]

These processes are nearly always most efficiently handled locally, but from the headquarters point of view it is important to understand their scope in advance so that appropriate expectations of cost and timing can be set.

VI. Collective Dismissals

- **In some jurisdictions, employers carrying out collective redundancies must meet specific substantive and procedural requirements.**
- **In-house counsel can make a difference with advance planning, project management, development of appropriate documentation, and setting of realistic expectations with global management.**
- **Statutory and regulatory requirements vary widely, but common themes include special disclosure and notice periods; notification and approval of a government authority; information and consultation of employee**

representatives; special severance requirements or other indemnities; and priority rules for termination decisions.

It has become nearly universal to give special attention in employment law to larger-scale restructurings or reductions-in-force, imposing requirements that go well beyond simple aggregation of the limitations on individual dismissals. This has often been driven by the impact the closure of a plant or large facility and sudden loss of employment can have on a community or region. In recent years, as the global flow of labor to lower-cost jurisdictions has accelerated, more nationalist concerns have entered the discussion. All of the most common measures—from notice periods imposed in the US to labor authority approvals in countries such as France and China to enhanced severances, selection rules and redeployment obligations in many countries—tend to generate media attention, litigation, labor relations issues, and even political scrutiny.

A. European Regulation of Collective Dismissals

Europe's extensive employee protections have both provided the framework for regulation of collective dismissal and, some would argue, promoted the flow of labor to lower-cost places which leads to collective dismissals. In any event, Europe is a leader in this area of law, starting with Directive 98/59/EC. The directive on collective redundancies applies to dismissals implemented by the employer for "one or more reasons not related to the individual workers concerned" which reach one of two thresholds chosen by the member state: (i) at least 10, 20, or 30 employees over 30 days, depending on size of the company; or (ii) 20 employees over 90 days, regardless of size of the company.[37] The directive does not prohibit the member states from promulgating laws more favorable to employees, so it is possible (as in France, for example) to have thresholds below those set forth in the directive. Excluded from the calculation are terminations of fixed-term contracts unless they are terminated before the term date.[38]

Employers carrying out collective redundancies must meet several substantive and procedural requirements.

- When it is contemplating collective redundancies, the company must initiate timely consultations with employee representatives with a view to reaching an agreement.[39] The employee representatives will be works council members in works council jurisdictions; in other countries, trade unions or specially selected employee representatives will be involved.
- The member states may provide that employee representatives can retain the services of experts[40], sometimes a major influence in the process in countries such as France and the Netherlands.
- The company must supply "all relevant information," including (in writing) the reasons for the anticipated redundancies, number and categories of workers normally employed and to be affected, the expected time period, selection criteria, and method for calculating redundancy payments.[41]
- The "competent public authority" must be provided a copy of the written disclosure except for the method of calculating redundancy payments.[42] The

> projected redundancies cannot take effect earlier than 30 days after notification, although member states may permit the competent authority to shorten the period[43] or extend the period to 60 days or more.[44]

The directive also anticipates that clever practitioners may have thought to structure a reduction-in-force so that all decisions are made at a headquarters level outside the European Union, and thus avoid the need to consult locally:

> [I]n considering alleged breaches of the information, consultation and notification requirements laid down by this Directive, account shall not be taken of any defense on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies.[45]

B. Typical Issues in European Collective Dismissals

As foreshadowed in the discussion of works councils, the broad requirements of the directive are implemented with considerable variation locally, and local conditions also may greatly influence the outcome of a plan for collective dismissal. An employer may have a relatively easy time in a less restrictive jurisdiction with a favorable works council relationship if the employer makes changes plainly dictated by economic or industry considerations (such as restructuring a facility which manufactures an obsolete product) and offers a favorable redundancy package. Another employer, operating in a strong works council jurisdiction, which wants to relocate a facility to Asia or the United States while enjoying global profitability may encounter much more difficulty. As is the case generally with works council processes, some of the elements of the collective redundancy process which may cause delay include the following:

- A proliferation of works councils and other employee representative bodies which need to be consulted, particularly if the redundancy crosses business units and involves multiple facilities.
- Assembling information supporting economic justifications for the restructuring, particularly in France and the Netherlands. A major global supply chain or sales force restructuring may have been planned rapidly and without significant legal (particularly labor/employment law) input, leading to collections of documents which do not tell the company's story succinctly and persuasively to non-experts.
- Use of outside experts who request additional (often highly confidential) information and produce extensive reports for works councils.
- Negotiation of a "social plan" setting forth how the impact on employees will be addressed through redeployment, outplacement, early retirement, and severance. Some jurisdictions have selection rules (*e.g.*, spreading out

reductions over age groups in the Netherlands) which will be counterintuitive to global managers.

- In the worst case, litigation with works councils or trade unions, which will bring the process to a halt while the case is resolved.

In-house counsel can make a difference with advance planning, project management, development of appropriate documentation, and setting of realistic expectations with global management.

C. Collective Dismissals in Other Jurisdictions

Collective dismissals outside Europe encounter a large variety of statutory and regulatory limitations but a number of common themes predominate:

- **Special disclosures and notice periods:** requirements that the employer disclose the scope and/or reasons for the redundancy, and provide a time period before implementation may begin. In China, for example, the employer must explain the situation to its trade union or its entire staff 30 days in advance;[46] 30 days' notice is also required in South Korea. In Canada, employers must provide between eight and 16 weeks notice to employees, depending on the number of employees who will be terminated.[47]
- **Notification and approval of a government authority:** these range from simple filing of a notice with a government office to obtaining formal approval of a labor ministry. For example, in Canada, employers must provide notice to the appropriate provincial or federal official that a mass termination will occur.[48] Similarly, Colombian Labor Law requires the employer to obtain a prior, discretionary authorization from the Ministry of Labor in order to be able to legally terminate existing employment contracts.[49] In China, the employer must submit a redundancy report to the labor administrative authorities.[50] In India, where a collective dismissal impacts "workmen" under the Industrial Disputes Act, 1947, the employer must submit an application to the Labour Department for a layoff. The Labour Department then has discretion to approve the application after providing employees an opportunity to be heard.[51]
- **Information and consultation of employee representatives:** in the absence of works councils, information and consultation may be required with trade unions (if present), through appointment of employee representatives especially for the purpose, or through communication to all staff. For example, in South Africa, Section 189 of the Labour Relations Act requires consultation with the employees who may potentially be dismissed, or their representatives.[52] Even in countries such as Brazil where there is no law regulating collective dismissals, local courts have ruled that mass termination can only occur following previous negotiation with the union.[53]
- **Special severance requirements or other indemnities:** these include predetermined severance calculations. In Mexico, for example, in the case of union workers, the Federal Labor Law sets forth a formula to calculate the

amount of severance to be paid to each employee.[54] In Egypt, the employer is obligated to pay compensation to the terminated employees in a value equivalent to one month for every year of service for the first five years of service, then one and a half-months for each subsequent year of service.[55] In Australia, employees are entitled to a minimum of four to 16 weeks of pay.[56]

- **Priority rules for termination decisions:** these include social factors and special considerations regarding the order of termination. In China, for example, employers are required to give priority to retaining certain employees, including those who are the sole income earners for their families and must support elderly or minor family members. The Labor Contract Law in China also protects certain employees from termination due to a redundancy, including individuals who may have contracted an occupational disease or with an occupational injury, pregnant employees and employees on maternity leave; and employees less than five years from retirement age who have been working for the employer for at least 15 years.[57]

Alternatively, in some jurisdictions, such as Japan, there is no concept of a collective dismissal, meaning that there are no additional legal requirements derived from the fact that multiple terminations occur within the same time frame.

Global counsel should at an early stage research the collective dismissal requirements of the relevant jurisdiction(s) affected by a proposed restructuring. This is not only to assure proper projection of overall timing and cost, but to test the assumptions of the finance and operating personnel who may have designed an intricate interrelated series of changes in a supply chain, research program, or global marketing department which do not factor in the timing differences and legal/public relations obstacles created by widely varying local processes.

VII. Transfer of Undertaking

- **The rules governing transfer of undertaking are designed to address a broad range of mergers, acquisitions, outsourcing, business unit sales, and other activities which move work from one entity to another.**
- **The rules are designed to preserve rights and benefits belonging to the employees who perform such work.**
- **Where a transfer within the scope of the relevant EU directive occurs, certain predetermined consequences follow.**
- **Outside the EU, many countries have established their own unique rules governing transfers of undertaking.**

As mentioned in the discussion of collective dismissals, the EU and a number of countries in other regions have taken extra care to protect employees' interests when restructurings or corporate transactions lead to mass reductions in workforce. A similar objective is at

work in the body of law relating to "transfer of undertaking" or, as it is sometimes referred to casually, "TUPE," after its expansive UK manifestation, the Transfer of Undertakings (Protection of Employment) Regulations 2006. Here, however, the target is a broad range of mergers, acquisitions, outsourcing, business unit sales, and other activities which move work from one entity to another; the effect is to preserve rights and benefits belonging to the employees who perform such work. The concept of "transfer of undertaking" does not refer to share acquisitions in which a corporate entity simply takes on a new corporate parent, as employee rights are normally protected in those situations by operation of law; rather, it addresses transfers of assets and sources—transactions where work moves from one corporate entity to another and where there would not otherwise be automatic protection of the employees who perform that work.

A. European Regulation of Transfer of Undertaking

This concept of employment rights following the transfer of work is most fully-developed in the EU. Directive 2001/23/EC relates to "the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses." The core definitional concept is that "there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."[58]

As the generality of the language may imply, the directive leaves much of the concept of an organization with a definable economic objective to be defined on a case-by-case basis under national law. National law tends either to use its own general definitions (in France, for example, transfer of undertaking is the transfer of "an organized structure comprised of both natural persons and tangible and intangible assets, allowing the entity to pursue its own business"), simply repeat the directive, or provide a list of factors to be considered. Determining whether the protections of the directive apply under national law does not always follow bright lines, and can be one of the most difficult questions to resolve.

Where a transfer within the scope of the directive occurs, certain consequences follow:

- The transferor's rights and obligations under an employment contract or relationship automatically transfer to the transferee. Member states have the option of making the transferor and transferee jointly and severally liable for the employer's obligations, rather than imposing liability solely on the transferee.[59]
- Pension rights do not transfer unless otherwise provided by the member state.[60]
- The transferee must continue to observe the terms of collective agreements until their expiration or termination.[61]
- The status and function of employee representatives are preserved if the "autonomy" of the business or undertaking is preserved.[62]

- The transfer itself does not constitute grounds for dismissal by the transferor or transferee, although this is without prejudice to dismissals for economic, technical, or organizational reasons that result in changes in the workforce.[63]
- The employer must inform representatives of the affected employees (or the employees themselves, if there are no representatives) of the date of transfer; the reasons for transfer; the legal, economic, and social implications; and "any measures envisaged in relation to the employees."[64]
- The employer must consult employee representatives in a timely manner with respect to measures envisaged in relation to the employees with a view to reaching an agreement.[65]

Again, the directive provides an outline, and national law fills in the details.

B. Typical Issues in European Transfer of Undertaking

Once the practitioner has concluded that the law applies, a number of other issues must be considered:

- What is the scope of disclosure or information/consultation required to employees or their representatives? What is the remedy for insufficient disclosure or information/consultation by the transferor? These are answered by reference to national law implementing the Directive, which typically parallels the jurisdiction's general approach to information and consultation. A failure to comply with local requirements can lead to delay or even objection to the transfer by the employees.
- Under what circumstances do employees in the relevant jurisdiction have the right to object to the transfer? Most jurisdictions provide that an employee who declines to transfer resigns her employment or is subject to disciplinary dismissal, unless the conditions of employment post-transfer are materially different. In Germany, however, the employee may refuse the transfer and remain the transferor's employee; the question will then become whether the German employer will have "socially justified" reasons for dismissal once the activity previously engaged in by the employee has gone, which in turn may depend on whether there is a comparable position which can be offered to the employee. In Spain, an objecting employee generally can either continue employment with the transfer or receive dismissal compensation.
- What is the scope of liabilities transferred, in particular what happens with pension rights? Under TUPE, for example, pension rights and benefits do not transfer, but the transferee must make a contribution to the employee's occupational or private pension arrangement.
- What will happen with transfers between countries, particularly where the transferee country has no transfer of undertaking law? National laws are generally not clear on whether such transfers are within scope. As a practical matter, most employees will likely not wish to transfer cross-border, and

national law will generally not require them to do so—meaning that alternative positions will need to be offered or severance arrangements made.

C. Transfer of Undertaking in Other Jurisdictions

Outside the European Union, many countries have established their own unique rules governing transfers of undertaking--—some of which resemble Directive 2001/23/EC while others do not. For example, rules in South Africa are relatively similar to the EU. If a transfer of a business takes place, as defined by Section 197 of the Labour Relations Act, unless otherwise agreed, the new employer is automatically substituted in place of the old employer with respect to all employment contracts in existence immediately before the date of transfer. The new employer must provide employees with terms and conditions that are generally not less favorable than those that applied before the transfer, except that it can transfer employees to different retirement plans or similar schemes. Employees cannot be dismissed due to the transfer of a business. A dismissal that breaches this provision is automatically unfair, meaning that the employee could be reinstated or the employee may be entitled to up to 24 months of remuneration.[66]

Other countries apply an automatic transfer concept but more narrowly defined than in the EU. In Mexico, for example, there is a doctrine of "employer substitution" which comes into play when there is a transfer of assets essential for the employer's operations—a more limited definition than in the European model. Where "employer substitution" applies, the Federal Labor Law generally requires the acquiring entity to retain the selling entity's workers, as well as to assume existing benefit liabilities. During the first six months following what the Federal Labor Law refers to as an employer substitution, both employers remain jointly liable for labor claims.[67] In Brazil, where essentially all of the assets of an operation are transferred, the new owner is prevented from making changes to employment terms and conditions that are detrimental to employees.[68]

Yet a third approach is to hold that there is no automatic transfer of employment contracts, but there are protections of the employee's terms, conditions and seniority if the transferee chooses to take on the transferor's employees. In Australia, where a "transfer of business" occurs (the work performed by the transferring employee must be the same or substantially the same as the work previously performed, and the employee must become employed by the transferee within 3 months of the termination by the transferor) the employee's service with the original employer must be counted as continuous service with the new employer. However, should the new employer fail to recognize these accrued rights, Section 91 of the Fair Work Act holds that the original employer must pay out all accrued entitlements.[69] Similarly, in Hong Kong there is no automatic transfer but the transferee must recognize prior service if it elects to employ the transferor's personnel. In Canada, again the transferee decides whether to retain the transferor's employees but employment will be deemed continuous with the term of employment by the transferor under employment standards litigation. In China, there is no automatic transfer but there is an obligation to consult with affected employees.[70]

Early in the process of planning any significant transfer of assets or outsourcing, it is important to identify whether the relevant jurisdictions fall into any of these categories—

the full EU-type recognition of transfer of undertaking, narrower recognition of transfer limited to certain types of transactions, or the more limited concept of protection of employee terms and conditions in the event of the transferee's voluntary decision to employ the transferor's employees. These obligations need to be factored into the valuation and ultimate negotiation of the transaction.[71]

VIII. Confidentiality Agreements and Post-Employment Restrictive Covenants

- **The concept of protecting the employer's confidential information is well accepted globally.**
- **In most countries, non-competes and non-solicitation clauses are permissible, but with limitations and employee protections set out in national law, which must be consulted case-by-case.**

A. Confidentiality Agreements

The concept of protecting the employer's confidential information is well accepted globally and generally established in statutory law, including in some jurisdictions' criminal law. It is also common to implement written confidentiality agreements as part of the employment contract and in separation agreements. Confidentiality also applies in works council interactions, where national law imposes strict requirements of nondisclosure on employee representatives who receive proprietary information from the employer in connection with information/consultation processes. In general, confidentiality agreements tend to be simpler and less technical than the elaborate provisions used in the United States.

B. Restrictive Covenants

The topic of global restrictive covenants merits a separate InfoPAK, and indeed there is one which covers the topic in detail.[72] Here, we briefly address some of the key issues.

Post-employment restrictive covenants are more accepted globally than commonly thought, with major exceptions including Russia, India, and Mexico, where non-competes are generally violative of public policy. In most countries, non-competes and non-solicitation clauses are permissible, but with limitations and employee protections set out in national law, which must be consulted case-by-case.

1. Non-Compete Clauses

In most jurisdictions, the non-compete clause must be in writing and expressly agreed to by the employee. There must be reasonable limitations as to time, nature of activity, and territory. There are often specific limits on duration; in Italy, for example, the limit is three years for most employees and five years for "dirigenti" or executives, while in Spain it is two years for technical employees and six months for others.

One of the most important points to keep in mind is that in many jurisdictions compensation must be paid to the employee in return for the limitation, either a specified statutory level (such as one-half gross compensation) or a reasonable amount agreed to by the parties. In France, for example, non-competes are often covered by collective bargaining agreements, which typically require a consideration of 30 – 50% of average monthly salary for the length of the agreement. In Spain, the compensation is normally at least 50%; in Italy 15– 35%; in Germany, 50%. Other countries such as the Netherlands have no specific requirement, but a court could order compensation if the clause effectively prevents the employee from being employed.

In China, compensation varies by province, but according to the Supreme People's Court on Several Issues Relating to Laws Applicable for Trial of Labor Dispute Cases (IV), if there is no compensation set in the agreement itself, monthly compensation will be 30% of the employee's average monthly salary.[73] In Brazil, compensation is required but there is no clear standard, meaning that the only safe and conservative approach is to pay full compensation. In general, the rights and obligations under a non-compete agreement will be transferred to the new employer in those countries with transfer of undertaking regulations.

As discussed above in section VIII.B.1, in jurisdictions where compensation for a non-compete is required, the in-house counsel negotiating or documenting a termination needs to determine from management up front whether the company desires and is willing to pay for a new non-compete restriction. With high-level employees, typically there will be a severance negotiation; assuming that counsel knows in advance, part of the amount the company is willing to pay for the overall package can be allocated to compensation for the non-compete as part of the discussion. The difficulty arises when the non-compete issue first surfaces after the severance has been negotiated, at which point the company has to reopen the negotiation, increase the size of the package, or forego the non-compete. It is not uncommon for management's view about non-competes to evolve as the severance negotiation proceeds and rumors begin to circulate that the employee (*e.g.*, a general manager) may be in demand with competitors, so it is important to explore the issue thoroughly at the outset when negotiating authority is discussed.

Another critical issue in those jurisdictions where compensation is required for a restrictive covenant arises when an employee once thought important enough to have a compensated non-compete in her employment agreement resigns or retires at a time when the company

no longer sees the departure as posing competitive risk. In some jurisdictions, it is not a given that the company can simply waive the non-compete; it may be required to pay the compensation even though the employee has no intention of working at all and/or the company is not concerned whether she did. In Spain, for example, the employer cannot unilaterally waive even if the non-compete clause retains that right. In other countries such as France, the employer can waive, but only if the right is expressly reserved in the non-compete and exercised during the time of employment. In Germany, the waiver will only be effective one year after its exercise, so that a decision to waive at the time of termination will not cut off the compensation for the first year of the restrictive covenant term.

2. Non-Solicitation Clauses

The treatment of non-solicitation clauses again varies considerably by jurisdiction. In general, non-solicitation of customers is closer to a non-compete in its impact, and is treated similarly. Jurisdictions requiring compensation for non-competes tend to require the same for non-solicitation of customers, and reasonable limitations on activity, duration, and territory would apply.

The law specifically dealing with non-solicitation of employees is not as thoroughly established. Some jurisdictions would likely treat them the same as non-competes (*e.g.*, Spain), while others would likely sustain them without compensation if they did not impose any unreasonable restraint on the employee in a particular case. In France, for example, a non-solicitation of employees covenant does not have to be financially compensated as a non-compete. In the United Kingdom, a non-solicitation covenant would generally be limited to protect key employees such as senior management and research or sales staff, and have a maximum term of one year.

3. Garden Leave as Alternative to Non-Compete Clauses

An alternative to the non-compete clause used in some countries (*e.g.*, Switzerland) is the extended notice period/"garden leave" arrangement. Typically present in senior executive contracts, the provision establishes a notice period of perhaps six months to a year for either party to terminate. The employee planning to jump to a competitor knows that he will not be able to begin the new position for an extended period without the employer's consent; if consent is refused, the employee may lose the new opportunity while chilling the relationship with the current employer. In its purest form, the notice period acts as an all-encompassing non-compete because it is not limited geographically or by subject matter of the new position; on the other hand, it locks the employer into paying full compensation for the notice period and may be an obstacle to recruitment. Given its broad reach, this type of provision may not be enforceable in jurisdictions such as the United States.[74]

IX. Setting up International Operations

- **There are many issues of tax, corporate law, immigration, and employment law affecting what type of structure should be established when starting up new operations. An initial consideration is determining whether it is appropriate to retain independent contractors vs. hiring employees.**
- **Assuming employees are to be hired but the company is not yet ready to establish a local branch or subsidiary, it may be possible to carry on limited operations through either employment by an entity outside the jurisdiction or by a local staffing agency or professional employer organization.**

One of the more vexing interdisciplinary questions faced by counsel for multinationals—particularly in those companies with lean staff functions or companies which became international originally by acquisition rather than organic growth—is when and how to set up the appropriate infrastructure for an operation in a new country. Obviously, the range of business considerations involved in determining whether to expand, as well as where, when, and how to grow a global entity, are beyond the scope of this discussion, but some key questions include:

- Can the business operate through distributors, franchisees, or independent sales representatives?
- Are there joint venture partners or other business partners that can function as the local presence?
- Are there discrete functions (*e.g.*, customer technical support) which can be handled by independent contractors?
- Can the business hire an employee through a local staffing agency?

Posing these questions to the business/financial side at the outset—to the extent they have not considered them already—helps focus what the company is trying to accomplish and whether it is necessary to undertake the ongoing costs, staffing and compliance issues inherent in establishing a local entity. In smaller companies, this discussion often gravitates quickly to whether the business can operate through independent contractors.

A. Employees vs. Independent Contractors

Many corporate managers are attracted to the perceived simplicity and flexibility of the independent contractor relationship and will often regale counsel with apocryphal accounts of how the company's competitors are able to conduct a thriving local business without ever hiring employees protected by the local employment law. And to be sure, some of the benefits of utilizing independent contractors, regardless of jurisdiction, include:

- No entitlement to statutory pension and welfare benefits, which add considerably to cost;
- No statutory protection against termination; and
- No wage and hour issues, mandatory leaves, payroll compliance, etc.

We need to remember, however, that local jurisdictions with generous social safety nets and

employee protections are well aware of and skeptical toward arrangements by foreign companies which essentially circumvent support of the systems they have carefully set up. The arrangement can come under scrutiny when a contractor, unhappy with the company's decision to terminate the contract, claims that the relationship was actually an employment subject to local social security obligations and termination protections, or when the contractor is investigated by local tax authorities for failure to pay taxes. Exposure to back payroll taxes and penalties, overtime, unpaid leave, and termination indemnities can be well out of proportion with the value and importance of the position.

When is it appropriate to retain independent contractors, as opposed to hire an employee? This is a question addressed with a surprisingly consistent analysis globally, despite local variations. Generally, an employment contract is defined as an agreement by which an individual works for another person (natural or legal), under the latter's *subordination*, for which s/he receives remuneration. On the other hand, it is likely that an independent contract or relationship will be honored if an individual is responsible for organizing his/her own workload and occupational activities, without being subject to the authority of another. To determine whether *subordination* exists, the reality of the situation is more important than how the parties define their relationship. The latter point bears repeated emphasis: a properly drafted independent contractor agreement is a minimal expectation but in no way sufficient to prove an independent contractor relationship if the reality looks more like employment.

Typical elements of an independent contractor relationship, include the following:

- A contract for service should be devoid of any kind of control or supervision from the employer;
- Payment should be based on specified deliverables/results, as opposed to a salary or bonus arrangement typical of employment;
- The assignment should be limited in scope and duration;
- The contractor should be free to contract with and do work for other companies; and
- The nature of the services, the apportionment of risk, remedies in the event of breach, and liability for taxes, should be clearly and expressly provided for in the agreement.

In some jurisdictions, the service should be ancillary to the main mission of the company, *e.g.*, an IT troubleshooter, as opposed to someone engaged in researching, manufacturing, marketing or selling the company's products.

The employer must also ensure that its managers manage the relationship with the independent contractor in a manner that is consistent with its independent nature, rather than in the same manner and with the same expectations as employees.

For employers with operations in multiple jurisdictions, it is imperative to review local rules when analyzing the appropriateness of an independent contractor classification. For additional information, please refer to L&E Global's 2017 Global Handbook, which contains analyses from 32 key jurisdictions across 6 continents.

B. Employment Without Setting up a Local Entity

It may be possible to carry on limited operations through either employment by a foreign entity (*i.e.*, an existing entity of the organization set up in a country other than the location of the operations) or by a local staffing agency or professional employer organization. In some countries such as Canada and many EU jurisdictions, a foreign entity, such as a US company, can register with labor and tax authorities and employ a person locally with a local payroll provider assuring compliance with payroll and tax withholding requirements. The practical burdens that accompany this approach include the cost of the payroll provider and the need to administer leave, wage and hour requirements and other local laws which apply to employment on a territorial basis.

Another alternative is the staffing agency or professional employer organization ("PEO"), which acts as legal employer of the employee in a jurisdiction and seconds the person back to the multinational client. (There is not necessarily a sharp line separating the two concepts, but generally the staffing agency offers to supply or recruit talent as well as act as legal employer, while the PEO may only fill the legal employer/HR compliance role.) Through a contract, the cost of the employment including termination indemnities are all passed through from the legal employer to the client. The advantage of this arrangement is that all compliance worries are handled by the staffing agency or PEO including day-to-day employment law issues, but the cost is correspondingly greater and quality varies somewhat. Also, some employees prefer the prestige and what they see as the security of working directly for the ultimate employer, so the use of a staffing agency or PEO may hamper recruitment. The staffing agency/PEO arrangement is particularly common in Latin America, where a local employer is frequently required by local law.

An important limitation underlying any form of employment by a foreign entity, particularly if direct but even if accomplished through a third-party legal employer, is "permanent establishment" tax liability in the jurisdiction of operation. In other words, is the employee engaged in activity which rises to the level of taxable activity such that the foreign entity could be taxed locally? This is a question for tax advisors, but generally the key benchmarks include whether the person has power to bind the foreign entity legally or whether there is a physical location through which business is conducted. In thinking through appropriate structures of employment, it is generally a good idea to consider the tax implications at the outset and let them drive the analysis, as there is typically less flexibility there than under the local employment laws and practices.

C. Related Employment and Corporate Considerations

Once we have decided that independent contractors or limited local employment will not serve the needs of the business and that we must establish a local presence in a foreign jurisdiction, in-house counsel must address a litany of employment-related and corporate questions. Often counsel will be asked which jurisdiction within a given region is most attractive. Some of the relevant considerations include:

- The ease of business registration, maintaining a corporate entity, choosing officers and directors

- Cost of real estate, wage levels and other operating costs
- Corporate taxation
- The ability to obtain work authorization for key foreign employees who may be needed to staff the organization
- Tariff and trade laws
- The likelihood that the local business culture will foster compliance concerns e.g. bribery and other corrupt practices
- Trade union environment
- Employment law/mandatory social benefits

Most of these criteria are beyond the scope of this InfoPAK, but we include the list to make the point that employment law issues are a piece of the puzzle, not necessarily be the dominant consideration. It often seems that, particularly to US decisionmakers, the fear of difficulty in terminating employees in certain countries outweighs what probably should be far more important considerations of the business environment and operating costs.

Within the general rubric of employment law considerations, however, a number of criteria should be analyzed:

- Social security, health insurance and other mandatory social benefits. This can be a strong distinguishing factor, particularly in high-cost jurisdictions such as Brazil (approximately 60% social costs) or France (approximately 45-50%) (Note that in ex-pat assignments between countries with totalization treaties, it may be possible to keep an assignee in the home country social security system for up to 5 years.)
- Leave requirements (annual, maternity/paternity, disability). Annual leave can vary from 5-15 days in a number of Asian countries (China (5-15 days), Hong Kong (7-14 days) Japan (10-20 days), Singapore (7-14 days) to 25-30 days in Europe (Austria (25-30 days), Denmark (25 days), Finland (30 days), France (30 days), Germany (20-30 days), Poland (20-26 days). Some countries have notably generous disability leaves (*e.g.,* Netherlands—up to 2 years with 70% pay) or maternity leaves (Norway—80 percent salary for 59 weeks or 100 percent for 49 weeks).
- Information and consultation requirements. Again, primarily a European issue, but there is considerable variation within the Continent with Germany, France, and the Netherlands with the strongest works councils. A start-up operation will typically be below the thresholds for establishment of a works council at the outset.
- Unfair dismissal protections. These vary enormously within regions, with Japan and South Korea far more employee-protective than Hong Kong or Singapore, and France or Germany far more protective than Switzerland. Many are surprised to find that Canada's common-law notice regime can provide an executive or manager with seniority up to 24 months notice for a dismissal without cause. There is more uniformity in Latin America, but at a

high level, with a month per year of service not unusual. Some countries have more than a theoretical possibility of reinstatement as a remedy, such as Germany, Quebec, South Korea, South Africa and China. In the Netherlands, an involuntary termination must be approved by a court or government agency. As discussed above, even in the most protective jurisdictions the employer can generally reach an agreement on separation with an employee, so this criterion, while important, should not dominate.

- Restrictive Covenants. As discussed above in section VIII, certain markets such as Mexico, India and Russia will not enforce noncompetes. Many countries in Europe as well as China and Brazil will require compensation for non-competes. And many countries theoretically will enforce non-competes but may not have a court system likely to provide urgent relief.
- Trade Unions. Trade unions may not be a major issue in start-up situations with a small number of employees if manufacturing is not a focus. Also, in many European countries, collective bargaining will occur at the sector level and result in national collective bargaining agreements governing all employees in that sector. In cases of larger start-up operations or manufacturing facilities, countries of note for trade union influence include Mexico, Brazil, Argentina, South Korea, and the Philippines.[75]

X. International Labor Standards

- **International labor standards emanate from a variety of sources including trade agreements, formal or informal industry codes or benchmarks, and international human rights or labor organizations. Companies are often challenged by investors, suppliers, customers or employee representative organizations to commit to these standards.**
- **Some of the more generally applicable standards and principles include United Nations foundational documents and ILO Conventions.**
- **Companies headquartered in the US are more likely to commit more generally to the principles underlying the standards rather than to the specific language of the ILO core conventions.**
- **This section contains examples of corporate statements on international labor standards.**

Multinationals increasingly face inquiries or demands from socially responsible investors, customers/suppliers, labor organizations, other employee representatives and the media about their compliance with international labor standards. A typical request might be for a commitment that the company adhere to the "core conventions" of the International Labour Organization, an agency of the United Nations, and might be addressed either to global

headquarters or a local subsidiary. In some countries, these requests may seem quite benign, but there is complexity beneath the surface, particularly for companies with substantial US operations.

International labor standards emanate from a variety of sources including trade agreements, formal or informal industry codes or benchmarks, and international human rights or labor organizations. In-house counsel in particular industries will no doubt be quite familiar with standards affecting their particular sector; here, we deal with the more generally applicable standards and principles.

A. United Nations Foundational Documents

There are a number of broad global principles issued by the United Nations concerning support of human rights in business activities. The foundation for many of these is the United Nations Universal Declaration of Human Rights, in essence an aspirational international Bill of Rights issued in 1948. As with many of these global principle documents, the commitments are broad enough to gain consensus but subject to interpretation according to local conditions. For example, Article 24's guarantee of "the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay" would probably be interpreted quite differently in France as opposed to South Korea.

One level down in specificity are documents such as the UN Global Compact Guiding Principles, which commit to "freedom of association and the effective recognition of the right to collective bargaining." Few would disagree with the concept, but how do we define the "effective recognition" of collective bargaining rights in the context of widely varying labor law constructs throughout the world, some far more protective of employee collective activity than others?

There is no substitute for careful reading of the specific documents and principles cited by stakeholders who request statements pledging adherence to these documents. It should generally be possible, however, to agree to these very general underlying principles while making clear that the employer must act in compliance with the legal framework of each of the countries in which it operates.

B. The International Labour Organization

Particular attention should be given to one agency of the United Nations---the Geneva-based International Labour Organization (ILO), originally formed in 1919 under the Treaty of Versailles as a body within the League of Nations and a part of the UN since 1946. The ILO is comprised of one-half government representatives, one-quarter employer representatives, and one-quarter employee representatives drawn from its 187 member states. It promulgates "conventions" which become binding upon ratification by a member state, which then must submit periodic detailed reports regarding compliance with their obligations. Overall, the ILO Conventions strive to protect employee rights in the broader context of human rights, promote economic growth in all societies, and create uniform

standards to level the playing field for business enterprises. Member state ratifications vary widely from nearly universal in the case of some of the fundamental Conventions to very limited or even none in some cases.

Of the current total of 189 Conventions, there are eight fundamental Conventions known as "core" conventions:

- Forced Labor Convention (No. 29)
- Freedom of Association and Protection of the Right to Organise (No. 87)
- Right to Organise and Collective Bargaining Convention (No. 98)
- Equal Remuneration Convention (No. 100)
- Abolition of Forced Labour Convention (No. 105)
- Discrimination Convention (No. 111)
- Minimum Age Convention (No. 138)
- Worst Forms of Child Labour Convention (No. 182)

Another important ILO pronouncement frequently relied on by employee advocates is the ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998. The Declaration recognizes that not all countries have signed on to the core conventions, but states that:

> [A]ll Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.[76]

Hence, the Declaration is a statement on behalf of all ILO member states that they support the general principles of the core Conventions even if they have not ratified the specific Conventions. As will be apparent from the discussion below, this distinction means that the employer's obligation to comply with local law in jurisdictions which have not ratified a particular core Convention will not necessarily drive the answer to a demand that the employer state its adherence to the principles of the Declaration.

C. US Position on Core Conventions

Stating an appropriate position on adherence to international labor standards is

complicated for US employers, whether global parents or local subsidiaries of foreign companies, by the fact that the US has ratified only two of the eight core conventions: No. 105 (Abolition of Forced Labour) and No. 182 (Worst Forms of Child Labour), whereas 138 member states have ratified all eight core conventions and only five states have ratified two or less. And the absence of US ratification reflects fundamental differences between US labor law and law of collective labor relations in most other developed countries.

Conventions No. 87 and No. 98 are generally the most controversial by US labor standards. In brief, the Convention on Freedom of Association and Protection of the Right to Organise (No. 87) guarantees that "[w]orkers and employers, **without distinction whatsoever**, shall have the right to establish and . . . to join organisations of their own choosing **without previous authorisation**." Convention No. 98 on the Right to Organise and Collective Bargaining provides that workers and employers' organizations…

> shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration" and that "measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation . . . with a view to the regulation of term and conditions of employment by means of collective agreements.

Some of the main issues where US labor law diverges from ILO standards include:

- US law more broadly excludes managers/supervisors from the bargaining unit, in potential contradiction to Convention 87's guarantee that workers "without distinction whatsoever" can join organizations.
- The National Labor Relations Act does not apply to public employees, who are subject to a patchwork of federal and state laws with varying levels of protection, again in possible contradiction to Convention 87.
- US law provides for union recognition by election or voluntary recognition by the employer, with exclusive representation, whereas Convention 87 precludes a requirement of "previous authorization" for a worker to join an organization.
- US law generally permits active campaigning by employer against union recognition if it does not threaten, bribe, or conduct surveillance. In many countries, the campaign would be seen as an "act of interference" in violation of Convention 98.
- US law generally permits "no strike" collective bargaining clauses and replacement of striking workers.
- US law generally limits "secondary" activity to peaceful requests and excludes economically coercive measures.

- ILO standards (particularly Convention 98) presume desirability of collective agreements, while US law is more neutral and requires only bargaining in good faith.

Accordingly, the employer with US operations entertaining a demand to adhere to the ILO core conventions is essentially being asked not only to abandon the usual US employer options to respond to organizing activity but also to take on obligations (e.g. inclusion of managers in a bargaining unit) contrary to US law. On the other hand, a demand to support the principles of the ILO Declaration or the UN Global Compact (including "freedom of association and the effective recognition of the right to collective bargaining") is more general and probably can be given positive response if the company makes clear that it also adheres to local law, regulation and practice in its collective labor relations. This is a particular challenge for multinationals headquartered in countries which have ratified the core conventions and would otherwise be inclined to commit globally to them; an exception needs to be carved out for compliance in jurisdictions where local law and practice is different.

D. Examples of Corporate Statements on International Labor Standards

An unscientific survey of corporate statements on international labor standards generally supports the expectation that companies headquartered in the US will commit more generally to the principles underlying the standards rather than to the ILO core conventions. For example, nearly 30 US-based companies have, through membership in the Fair Labor Association ("FLA"), committed to "voluntarily meet internationally recognized labor standards wherever their products are made."[77] The FLA's Workplace Code of Conduct is purportedly based on ILO standards but the language is closer to the ILO Declaration (*e.g.,* "Employers shall recognize and respect the right of employees to freedom of association and collective bargaining.").

Similarly, the Clorox Company maintains a business partner Code of Conduct "based on the International Labour Organization (ILO) Core Labor Conventions" which "outlines [its] expectations that business partners share [its] commitments in the areas of human rights and labor, health and safety, the environment and business conduct and ethics."[78] The Code itself recognizes local context, requiring that business partners respect the "rights of workers to freely associate… in accordance with applicable laws and the customs of the countries in which they are employed." Another example, US-based Halyard Health, a signatory to the United Nations Global Compact, states:

> Our policies align with the goals of several international standards, including the International Labor Organization's Declaration on Fundamental Principles and Rights at Work and those of the UN Global Compact.[79]

(But see Patagonia Supplier Workplace Code of Conduct, which specifically refers to ILO Conventions 138, 182, 29, 105, 100, 111, 87, 98, and 135.)[80]

On the other hand, some companies with headquarters outside of the US specifically commit to all eight core conventions. Roche (Switzerland), for example, states:

> Roche acknowledges the United Nation's Principles on Business and Human Rights implementing the United Nations "Protect, Respect and Remedy" Framework of Prof. Ruggie and recognises and follows the international standard ISO 26000 guidance on social responsibility. We also adhere to the Fundamental Conventions of the International Labour Organization: Elimination of forced and compulsory labour (Conventions 29 and 105), abolition of child labour (Conventions 138 and 182), elimination of discrimination in respect of employment and occupation (Conventions 100 and 111), freedom of association and collective bargaining (Conventions 87 and 98).[81]

Another example is Air France KLM, which refers generally to ILO Conventions and then specifically lists all eight conventions:

> Companies of the AIR FRANCE KLM Group are committed to promoting and complying with the Conventions of the International Labour Organization[1] and its Declaration concerning Fundamental Principles and Rights at the workplace as well as the Social Charters adopted by the European Union and the Council of Europe.
>
> [1] In particular the freedom of association and the recognition of the rights to collective negotiation (Conventions 87 and 98). The elimination of discrimination in terms of employment and profession (Conventions 100 and 111). The abolition of child labour (Conventions 138 and 182). The elimination of all forms of forced or compulsory labour (Conventions 29 and 105).[82]

Similarly, Modulift (UK) states,

> Modulift UK Ltd expects its suppliers to recognize and respect the rights of employees to freely associate, organize and bargain collectively in accordance with the laws of the countries in which they are employed, as well as core ILO conventions Freedom of Association and Protection of the Right to Organize Convention, (C 87, 1948) and Right to Organize and Collective Bargaining Convention, (C.98-1949).[83]

Counsel confronted with requests for statements of adherence to international labor standards can, through careful analysis of the request and the workplace law context in the relevant countries, steer the middle course between blanket adherence to broadly conceived labor standards which may conflict with local law and overcautious resistance to principles which have wide global acceptance.

XI. Global Mobility Issues

- **In a temporary ex-pat assignment, the employee continues under the home country's contract or terms of employment, with an assignment letter setting out his or her responsibilities for an extended time period in the local or "host" country. This section covers labor and employment issues that should be addressed in the agreement.**
- **An alternative option is to offer employees a transfer of employment whereby the employee is terminated by the home-country entity and hired by the host-country entity. This section addresses the advantages and disadvantages of such an arrangement.**

The topic of global mobility comprises a complex set of interrelated immigration, employment, compensation/benefits, tax, and other issues well beyond the scope of this discussion. Moreover, considerations outside of employment law, such as the expense of expatriate packages, the terms of compensation/benefit plans, and local immigration requirements, will often drive the structure of a global mobility arrangement. Nevertheless, some labor and employment law issues should be kept in mind in negotiating, implementing, and terminating such arrangements.

A. The Temporary Ex-Pat Assignment

In this scenario, the employee continues under the home country's contract or terms of employment, with an assignment letter setting out his responsibilities for an extended time period in the local or "host" country. Depending on tax, other local laws, and internal organizational requirements, this may be structured as a continuing relationship with the home country entity or as a secondment to the host country entity. Depending on host country requirements, there may also be a local employment contract. Headquarters counsel should ensure that the assignment letter accomplishes the following.

- The assignment letter expressly continues the home-country relationship and chooses home-country law as governing. In many countries, important aspects of local labor law such as termination protections cannot be waived and will trump a "choice of law" clause; nevertheless, this will provide the best possible contractual argument against application of local employment law (of the destination country).

- Where the United States is the home country, the "employment-at-will" concept is expressly reaffirmed. Although host-country local law will in many situations negate the "at-will" relationship if employment is terminated locally during the assignment, this language will support the strongest possible legal position for the US employer to apply US law in such a case, confirm that employment at will remains in force after the assignment, and generally set expectations for the assignee. And in some situations, such as a foreign employer assigning a foreign national to a representative office in China, the US language may control.
- There is no language implying a minimum or definite length of assignment. Typical language stating that the assignment "will last X years" or even "is expected to last approximately X years" is more likely to be argued to create a fixed-term contract if not specifically disclaimed in the letter, particularly where an employee has moved family and household to a foreign country. It is wise to state the term as "currently expected to last approximately X years but subject to change in the Company's discretion according to business need" as well as include a specific admonition that the letter "is not intended to create an employment relationship of fixed or definite duration." It is fairly common to find that even high-performing employees in the home country struggle in a foreign venue or that management changes alter the company's strategy to a degree that a high-cost ex-pat assignment in a particular country no longer makes sense. In some countries, the company could be exposed to paying out the remainder of the term of the assignment if the letter (and any local contract) are not appropriately drafted.
- Management and HR understand that, despite the most careful drafting of the assignment letter, the ex-pat will likely benefit from both home- and host-country law during the assignment. (A US-citizen ex-pat, for example, remains covered by federal statutes such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act while working for a foreign entity controlled by the US parent, and may benefit from local employment law protections if terminated abroad.) For this reason, the simplest course from an employment law point of view when dealing with a poor-performing or redundant assignee is to terminate the assignment and manage the employee back in the home country. Needless to say, the business may or may not find this factor determinative when deciding how to proceed.
- Provision is made for benefit coverage commensurate with the employee's position and responsibilities. From the US perspective, for example, health insurance and 401(k) plans may not cover employees working outside the US; alternatives may include a global health insurance plan covering ex-pats (the typical option in companies with significant global mobility), an individual policy obtained by the employer, a cash allowance or reimbursement of a policy obtained by the assignee, or in some cases registration in the host country social security system. Although coverage for employment-related injuries will not necessarily be covered in the assignment letter, counsel should ensure that such injuries are covered by the company's insurance

policy; US workers' comp will generally not apply to employees on an extended foreign assignment, and similar local programs may only cover the relationship between the employee and a local entity.

- Provision should be made for tax preparation and, if applicable, tax equalization arrangements. While some (particularly smaller) employers may instinctively want to put responsibility for tax preparation on the employee, retaining a provider experienced in cross-border tax preparation can be well worth the investment to create peace of mind that all tax laws are being followed.

B. The Localization or Transfer

Given the expense of ex-pat packages, it is becoming more common to offer employees a transfer of employment whereby the employee is terminated by the home-country entity and hired by the host-country entity. From an employment law point of view, this makes life simple, as it establishes that the new employment relationship will be governed by the law of the host-country entity. The downside, however, is that the home-country termination may give rise to severance liabilities which the employee is unable or unwilling to waive—an aspect that counsel must be sure to point out to management expecting to save money by avoiding an ex-pat arrangement. Depending on the home and host countries, the employee may also find localization unattractive; the executive in a high-severance jurisdiction like the Netherlands may have little interest in giving up a local contract to move to the United States, particularly given its high cost of education and health benefits. One way to address the severance part of the equation is to establish by contractual arrangement that the company will pay the employee from a high-severance country an enhanced US severance equal to the amount payable under the home-country law.

XII. Recent Trends and Reforms

- **Recent reforms in Europe have, among other measures, aimed at mitigating the heavy notice/severance burden associated with restructuring.**
- **Major reforms have been undertaken in France and Brazil, many aspects of which benefit employers**
- **One area where worker protections seem to be expanding across the globe is in the area of family leave.**

International employment laws on many of the issues addressed in this InfoPAK are

constantly evolving. One trend described above is the expansion of discrimination and harassment protections throughout the globe. On the other hand, employers are benefiting from reforms in a number of major markets aimed at increasing flexibility for employers without eliminating fundamental workers' rights. Some key recent developments are highlighted below.

A. Macron Reform

Labor law reforms have long been a controversial issue in France, even paralyzing past governments with massive strikes. Accordingly, one of the most remarkable achievements of President Emanuel Macron is his overhaul of the French Labor Code in 2017. This reform is comprised of five decrees aimed at reducing employment costs and simplifying employer mandates while promoting fairness to employees.

Some of the key provisions include: [84]

- Termination-Related Reforms
  - Employers are no longer strictly bound by the precise language of the dismissal letter but can provide further details supporting the rationale for termination at a later time, either on their own initiative or at the request of the employee. If the employee does not request further details, the insufficiency of the stated rationale will not automatically lead to a finding of unfair dismissal but will entitle the employee to damages of up to one month's salary.
  - The economic justification for collective redundancies is now assessed at the level of the French operations rather than globally, and an employer considering economic dismissals is no longer obligated to seek out redeployment positions abroad.
  - Established minimum and maximum compensation amounts for unjust termination based on the employee's length of service in the company replace the open-ended judicial discretion and unpredictability of the French labor tribunals.
- Employee Representation and Collective Bargaining Agreements
  - Direct negotiation with employees on collective agreements is now permitted in companies with fewer than 20 employees. Companies with a staff of 20 to 50 employees can now negotiate with the staff delegates.
  - In a potentially far-reaching measure, one single "social and economic committee" will ultimately replace the current tripartite regime of works council, staff delegates, and health and safety committee.
  - In certain areas (e.g. notice period, length of trial period) the employer may enter into a companywide agreement which prevails over an industrywide collective bargaining agreement.

- Workers' Rights
  - Statutory minimum dismissal indemnity allowance increased by 25 percent.
  - Modifications to the point system used for evaluating workers' entitlement to early retirement from physically taxing positions.
  - Telecommuting regulations simplified.[85]

B. Labor Reform in Brazil

Brazil also has been a complex jurisdiction for the outsider to navigate, lacking commonly accepted characteristics such as the binding waiver and release in a separation agreement. In 2017, the Brazilian Congress approved an important new labor reform, Law 13.467, which is a sweeping modernization of more than a hundred clauses in Brazil's Consolidated Labor Law, many untouched since first introduced in 1943. Changes to Brazil's Consolidated Labor Law include:

- Alternatives for conflict resolution;
- Greater leeway in collective bargaining agreements;
- Additional forms of termination, such as by mutual agreement;
- Flexibility in overtime, holiday, and telecommuting options;
- Increased protections for pregnant women in the workplace; and
- Expansion of outsourcing of core business.

Like the Macron reform, labor reform in Brazil is an attempt to reduce risk and increase flexibility for employers while protecting workers' rights. One of the most significant changes is the introduction of termination by mutual agreement, in which the prior notice and indemnification based on the severance fund known as FGTS required for a termination without cause are reduced by half. Mandatory severance must be paid in 10 days and there will no longer be the need to validate the termination by the union. Further, mass dismissals will not require prior negotiation with the union as has been demanded by courts. Finally, a voluntary dismissal plan implemented under union negotiation can establish a full release of claims arising out of the relationship.[86]

C. Reforms in Compensation for Unfair Dismissal

The economic crisis of 2008 set in motion a wave of reforms in Europe aimed at mitigating the heavy notice/severance burden associated with restructuring, based on concern that these costs could deter new hiring. These reforms do not eliminate the popular stereotype of excessive European termination packages, but they have real impact.

In Italy, for example, the "Jobs Act" has made significant changes to the system governing employment contracts. While the sole remedy for unfair or wrongful dismissal had previously been reinstatement, for employees hired after 7 March 2015, reinstatement has

generally been replaced by an award of damages, calculated on the basis of the employee's length of service.[87] Another noteworthy reform is in the Netherlands, historically one of the most employee-protective countries in matters of unfair dismissal, requiring the employer to obtain permission of a court or government agency to dismiss an employee as well as payment of severance according to the much-maligned Cantonal Court Formula, leading to payouts of several years' compensation for senior employees. Under the labor law reform of 2015, the Cantonal Court Formula is replaced by a far more limited statutory transition payment, although the framework of requiring agency or court permission to terminate remains in place.

Several other countries, including Spain and Belgium, have also mitigated the cost of dismissal without cause, at least on a going forward basis. In 2012, Spain reduced severance awards for unfair dismissal from 45 days per year of service with a maximum of 42 months of pay to 33 days per year of service with a maximum of 24 months for service from 2012 forward. Further, the Spanish Labor Reform eliminated the requirement of prior approval for collective dismissals and also now allows termination by mutual agreement.[88] Similarly, in 2014, Belgium overhauled rules regarding notice periods, basis for dismissal, and compensation, with significant reductions in the required notice period for dismissal without cause—often the largest element of compensation in such cases. On the whole, these reform measures give employers more flexibility to make termination decisions along with more certainty regarding the maximum amount of compensation.

D. Statutory Protections

In some respects, there is a global convergence underway in which some countries with typically high levels of worker protections have reduced those protections, while some Asian and other countries that have been less protective appear to be enhancing workers' rights. For example, Belgium's recent reforms allow longer hours and raise the retirement age, while South Korea conversely has reduced its maximum working week from 68 hours to 52 hours and, in 2011, Burma for the first time passed a law to allow for unions.

One area where worker protections seem to be expanding across the globe is in the area of family leave, with some European countries such as Norway providing for approximately 50 weeks of paid leave. Another trend may be the "right to disconnect," where France seems to be leading the trend. However, while the new French law requires employers to develop a post-work email policy aimed at protecting employees from burnout, it does not include sanctions for employers who fail to comply. Brazil has also acknowledged a concern over work-life balance as a result of around-the-clock emailing through legislation enacted in 2012 establishing that post-work email communication qualifies as overtime. How effective these measures are in improving work-life balance remains to be seen.

XIII. Conclusion

Few enterprises today remain unaffected by accelerating globalization and advances in technology. Global impact on people seems part of every change in business strategy or productivity enhancement. In this fast-moving environment, regional or headquarters counsel can play a critical role in assembling the scattered input from the far reaches of a global enterprise into a coherent labor and employment strategy that furthers the business objectives of the company. The issues raised by global labor and employment matters are of great variety and vast complexity, but this overview may provide a basis for issue-spotting and strategic planning with clients.

XIV. About the Author

Jackson Lewis P.C. is a law firm with more than 850 attorneys in major cities nationwide serving clients across a wide range of practices and industries. Having built its reputation on providing premier workplace law representation to management, the firm has grown to include leading practices in the areas of government relations, healthcare and sports law. The firm's commitment to client service, depth of expertise and innovation draws clients to Jackson Lewis for excellent value-driven legal advice.

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XV. Additional Resources

- L&E Global's Employment Law Overviews provide "country-specific summaries of key labour and employment law matters, such as hiring practices, employment contracts, anti-discrimination laws, termination of employment contracts, authorisation of foreign employees, social media and data privacy." https://knowledge.leglobal.org/explore-employment-law-resources-from-more-than-40-countries-worldwide/

- L&E Global's Opening Up Shop brochures "present country-specific, tailor-made checklists and guidelines to assist employers seeking to open operations in a new jurisdiction." https://knowledge.leglobal.org/ous/

- L&E Global's 2017 Global Handbook "serves as an introduction to the complex issue of employees vs. independent contractors, with analyses from 32 key jurisdictions, across 6 continents." https://knowledge.leglobal.org/employees-vs-independent-contractors/

- "At Home in the World: Ensuring the Safety of Global Workforce," ACC Docket, 2018, *available at* https://www.acc.com/docket/articles/ensuring-the-safety-of-your-global-workforce.cfm

- "#MeToo: The Global Impact of the Sexual Harassment Movement," ACC Docket, 2018, *available at* https://www.acc.com/legalresources/resource.cfm?show=1481066

- "Ten Tips for Non-Compete Agreements in Employment Law," Top Ten, 2018, *available at* https://www.acc.com/legalresources/publications/topten/non-compete-agreements-in-employment.cfm

- "Multi-Country Survey on Covenants Not to Compete," InfoPAK, 2018, *available at* https://www.acc.com/legalresources/resource.cfm?show=1471842

- "Managing Employees Across Borders: Managing Culture Differences, Global Investigations, and Compliance, Hiring & Terminations," Webcast, 2017, *available at* https://www.acc.com/util/InReachProxy.cfm?productID=D77B872F-F4EE-4F69-B2AE-093333A46B8E

XVI. Exhibits

A. Template Separation Agreement (Primarily for Companies Based or Headquartered in the U.S.)

Disclaimer: This sample language should not be construed as legal advice or a legal opinion on specific facts. It is not intended as advice or assistance with respect to individual problems. It is provided for informative purposes only, with the understanding that the publisher, editor or authors are not engaged in rendering legal or other professional services. Readers should consult competent counsel or other professional services of their own choosing as to how the matters discussed relate to their own affairs or to resolve specific problems or questions.

SAMPLE SEPARATION AGREEMENT AND RELEASE

This Separation Agreement and Release ("the Agreement"), is made and entered into by and between **[INSERT EMPLOYEE NAME]**, residing at **[INSERT EMPLOYEE ADDRESS, CITY, COUNTRY]** ("the Employee"), acting on behalf of [himself/herself], and **[INSERT EMPLOYING ENTITY]**, acting on behalf of itself and its parents, affiliates, subsidiaries, and related companies, including, without limitation, **[INSERT RELEVANT CORPORATE ENTITIES]**, and **[GLOBAL HOLDING COMPANY]** and its subsidiaries, affiliates, and related companies ("the Company").

[INSERT WHEREAS CLAUSE(S) AS REQUIRED FOR LOCAL JURISDICTION]

1. The Agreement shall not in any way be construed as an admission on the part of the Company that it wrongfully or in any manner or fashion whatsoever violated any law or obligation to the Employee. The Company specifically denies that it has violated any law or obligation relating to its employment of the Employee and to the Employee's separation from such employment.
2. Effective as of **[INSERT month + date + year]** (the "Termination Date"), the Company and the Employee agree to terminate (i) the Employee's employment by the Company and of any positions whatsoever, held currently by the Employee or which may have been held by the Employee at any time previously in any division within the Company,

(ii) Employee's employment **[agreement or letter]** with the Company dated **[INSERT month + date + year]** and (iii) any previous employment or assignment letters, without any reciprocal notice or payment of any corresponding indemnity in lieu of notice, save such notice or payment in lieu thereof and attendant benefits set forth herein below. The Company and the Employee agree that the Employee shall not be required to perform work for the Company as from **[INSERT month + date + year]** until the Termination Date and that, during that period, the Employee will provide the Company with the reasonable information and assistance necessary to allow a smooth transition of duties to the Employee's successor or other personnel of the Company.

3. Immediately upon signature of this Agreement **[OR SPECIFY OTHER DATE]**, the Employee will return all Company property and information received in the course of employment with the Company, including, without limitation, documents, laptop computer computer-generated information, reports, books, studies, data, credit cards, employee identification, access cards and other such materials and shall retain no copies of any such property or information. However, the company car **[INSERT type + mark]**, plate number: **[INSERT reg. no]** and company mobile telephone shall be returned no later than 5 days following the Employee's execution of this Agreement **[OR SPECIFY OTHER DATE]**. All of the above property shall be in good condition, save for normal wear and tear.
4. In full and final settlement of all amounts due to the Employee as a result of the Employee's employment with the Company and the termination thereof, the Employee will receive:
   a) A gross payment in the amount of **[INSERT amount + currency]** (less applicable tax deductions and/or withholdings) ("the Payment"). The Payment includes any notice payments, severance and/or other types of payments which are or may be claimed to be accrued or due and owing to the Employee under the laws of **[INSERT RELEVANT COUNTRIES]**, and any and all other applicable countries or locations, and under any employment agreement with or severance or separation pay plan maintained by, the Company. The offer of this Payment to Employee by the Company is contingent on the Employee's first having signed this Agreement, and
   b) The Employee shall receive any unpaid vacation entitlements for the calendar year **[20__]** and any vacation entitlements for **[20__]** on a pro-rata basis.

5. The Payment set forth in Section 4 (a) above will be paid, less applicable taxes or other required withholdings, by check or wire transfer to the Employee's bank account in two equal installments, i.e., 50%, **[INSERT currency + amount]**, will be paid no later than seven (7) days after the signing of this Agreement, and the remaining 50%, **[INSERT currency + amount]**, will be paid no later than **[INSERT month + date + year]**. The payment of the two installments set forth above will be contingent upon (i) the Employee having first signed this Agreement and (ii) the return of the Company's property in the agreed condition as set forth in Section 3 above.
6. [IF APPLICABLE: The Employee's outstanding deferred stock awards and stock options will be distributed, cashed out, or exercisable following termination to the extent provided by and in accordance with the terms of the individual grant agreements and the relevant plans.]
7. In consideration for the items set forth in Section 4 above and allowing for only those obligations created by or arising out of this Agreement, the Employee, on [his/her] own behalf and on behalf of all heirs, executors, administrators, assigns and successors, recognizes that the Payment is exceeding legal or contractual minimum requirements and therefore irrevocably and unconditionally releases and forever discharges the Company, including its parents, subsidiaries, affiliates and related companies, including, without limitation, its and their trustees, directors, officers, shareholders, agents, attorneys, insurers, and employees, past and present, and each of them, from any and all claims and causes of action under the laws or regulations of any country or jurisdiction, including, without limitation, **[INSERT RELEVANT COUNTRIES]**, arising out of or related to the Employee's employment with the Company or mutual termination of such employment, including, without limitation:
    a) Claims and liability of any kind or nature, salary-related debt (in money or in kind), any and all bonuses (including without limitation any corporate/local incentive plans), seniority, age, or severance entitlements, profit sharing, allowances, social benefits, stock awards or stock options, indemnity in lieu of notice payments, transportation, vacation leave, travel allowances, commissions, indemnities, extralegal benefits, and in general any other labor or other benefit or payment, which because of an involuntary error or omission, or due to any other reason, was not paid to the Employee during the course of his employment with the Company or at the time of his separation therefrom. The Employee fully waives the right to bring any claim of any nature

whatsoever, be it labor, civil, administrative or other, or a claim for any additional compensation whatsoever, including expressly stock awards and stock options, against the Company and hereby forever releases same.

b) Any and all claims under contract, tort, statutory or common law, including, without limitation, wrongful discharge, breach of implied or express contracts, breach of an implied covenant of good faith and fair dealing, tortious interference with contract or prospective economic advantage, violation of public policy, whistle blowing, intentional or negligent infliction of emotional distress, negligent hiring/supervision, defamation, fraud, discrimination, harassment, retaliation or other claims of wrongful conduct, including, specifically, any claims arising out of any legal or contractual restriction on the Company's right to terminate its employees;

c) The Employee waives, and acknowledges full satisfaction of, all claims against the Company, including, without limitation, those claims concerning Employee's employment, employment contract(s) and mutual termination thereof, both with respect to the procedure or the form of the mutual termination, and the reasons for such mutual termination, which the Employee may have, whether implied, by law, or pursuant to the provisions of the Employee's employment contract or any other document.

This release includes all claims and causes of action, whether known or unknown, arising from conduct occurring on or before the date of signature of this Agreement, which itself conclusively settles all matters between the Company and the Employee. **[IF EMPLOYEE IS A US CITIZEN, INSERT US RELEASE LANGUAGE]**

8. In consideration of the payment of the amounts specified herein, Employee agrees to execute any documents (including, without limitation, letters of resignation and share transfer agreements and take any other actions reasonably necessary to terminate any directorships, officerships, or other relationships with the Company or any of its affiliates. In particular, the Employee agrees to cooperate with the Company and to sign any other document(s) which may be required in accordance with the laws of [INSERT local country], consistent with the terms of this Agreement.

Confidential Information. As used in this agreement, "Confidential Information" means nonpublic information belonging to the Company or any affiliated person or entity (together, the

"Affiliates") which is of value to any of the Affiliates in the course of conducting its business and the disclosure of which could result in a competitive or other disadvantage to any of the Affiliates. Confidential Information includes, without limitation, financial information, reports, and forecasts; inventions, improvements and other intellectual property, trade secrets, know-how, designs, processes or formulae, software, market or sales information or plans, customer lists; and business plans, prospects, strategies and opportunities (such as possible acquisitions or dispositions of businesses or facilities) which has been discussed or considered by the management of the Affiliates. Confidential Information includes information developed by the Employee in the course of employment by the Company, as well as other information to which the Employee may have access in connection with such employment. Confidential Information also includes the confidential information of others with which any of the Affiliates has a business relationship.

a) Confidentiality. The Employee understands and agrees that [his/her] employment with the Company created a relationship of confidence and trust between the Employee and the Company with respect to all Confidential Information. At all times, both during the employment and after its termination, the Employee will keep in confidence and trust all such Confidential Information and will not use or disclose any such Confidential Information without the written consent of an Officer of **[INSERT CORPORATE ENTITY]** except as may be required by law and in that case with prior written notice to **[INSERT CORPORATE ENTITY]**.

b) Documents, Records, etc. All documents, records, data, apparatus, equipment and other physical property, whether or not pertaining to Confidential Information, which are or were furnished to the Employee by any of the Affiliates or were produced by the Employee in connection with employment with the Company will be and remain the sole property of the Company. The Employee will return to the Company all such materials and property. The Employee will not retain any such material or property or any copies thereof after such termination.

9. Until the Termination Date and for a period of two years thereafter, the Employee will not directly or indirectly, knowingly cause or induce any present or future employee of the Company or any of its affiliates to

leave the employ of the Company (or affiliate) or to accept employment with the Employee or any other person, firm, association or company, if such employee (i) is in the employ of the Company or any of its affiliates or (ii) has been in the employ of the Company or any of its affiliates within one year immediately preceding employment by the Employee or by such other person, firm, association or company. Nothing contained in this paragraph will prohibit the Employee from providing personal references or recommendations for individuals in connection with such individuals' application for employment by, or other association with, a person, firm, association or company if the personal reference or recommendation was requested by such person, firm, association or company without initiation by the Employee.

10. The Employee shall not make, participate in the making of, or encourage any other person to make, any public statements, written or oral, in whatever format, including, without limitation, electronic communications such as Internet message boards, which are intended to criticize, disparage, or defame the goodwill or reputation of, or which are intended to embarrass the Company, any of its subsidiaries or affiliates, or any of their respective directors, officers, executives, or employees. The Employee further agrees not to make any negative public statements, written or oral, relating to [his/her] employment, separation of such employment, or any aspect of the business of the Company or any of its subsidiaries or affiliates.
11. The Employee agrees that until his separation date he will fully cooperate with all reasonable instructions from the Company or its representatives, including without limitation documenting and explaining historical and ongoing information as may be requested by new management or employees, not signing or approving items outside the scope of his transitional assignment, and continuing to sign items at the direction of new management where such signature is required based on his position as officer or director of a legal entity, designated signatory on a bank account, investment account, or contract, or otherwise. The Employee also agrees to reasonably cooperate both before and after his/her separation date with any Company investigation and with any request by the Company for assistance in responding to requests for information or documents by any governmental agencies or in connection with any pending or threatened administrative or judicial proceeding, and further agrees, to the extent permitted by law, to promptly provide the Company with the same information or documents (or copies thereof) that the Employee provides to any governmental agency or discloses in any pending or

threatened administrative or judicial proceeding. The Company agrees to reimburse the Employee for any out-of-pocket expenses reasonably and directly incurred in connection with compliance with any request(s) by the Company in connection with this clause.

12. The Employee agrees to keep the terms and conditions of this Agreement confidential and not disclose them to anyone except members of [his/her] immediate family, [his/her] attorney, and [his/her] tax and financial advisors. In the event of any such allowed disclosure, the Employee shall inform each individual that the existence and terms of this Agreement are confidential and shall secure agreement from the individual that he or she will abide by the confidentiality provisions of this Agreement. Nothing in this Agreement shall prevent the Employee from providing information to any governmental agency, in response to a request by any court, or as otherwise required by law.
13. In the event of the breach of any of the provisions of this Agreement, the Employee will pay the Company the contractual penalty in the amount of [INSERT local currency]. The Company reserves the right and will be entitled to claim damages in excess of the contractual penalty specified above.
14. Except as specifically set forth in this Agreement, the Employee and the Company represent that, to the best of their knowledge, each has no outstanding debts or other obligations to the other, apart from what is explicitly mentioned in this Agreement. **[IF EMPLOYEE HAS A REPATRIATION AGREEMENT AND DECLINES REPATRIATION, INSERT AS FOLLOWS: The Employee acknowledges that the Company has offered to repatriate [him/her] to [INSERT home country] in accordance with the terms and conditions of the Employee's expatriation agreement [and INSERT RELEVANT POLICY], and that [he/she] has declined such offer. The Employee hereby waives any right to repatriation or relocation by the Company.]**
15. The Employee acknowledges that the Company has advised [him/her] to consult with an attorney regarding this Agreement. The Employee represents and agrees that [he/she] fully understands the right to discuss all aspects of this Agreement with an attorney and that [he/she] has carefully read, fully understands and voluntarily enters into this Agreement. **[IF EMPLOYEE IS A US CITIZEN AND AGE 40+, INSERT LANGUAGE RELATING TO THE U.S. OLDER WORKERS BENEFIT PROTECTION ACT OF 1990 (OWBPA)]**
16. This Agreement has been executed in English and [INSERT local language] where the English language version shall prevail. One copy of each version shall be provided to each party.

17. **[INSERT local country]** law will prevail for any matters not specified in this Agreement.

Place, Date: _____

Place, Date: _____

[INSERT relevant entity] Branch in [INSERT local country]

_____ _____

[INSERT name of authorized signatory] [INSERT name of Employee]

B. Template Language for Plans/Strategies Subject to Works Council Processes

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SUGGESTIONS FOR PROPER DOCUMENTATION OF WORKS COUNCIL INFORMATION/CONSULTATION REQUIREMENTS DURING GLOBAL RESTRUCTURINGS OR OTHER INITIATIVES

- In the early phase of a project when counsel may be only intermittently involved, it may be useful to have a legend on all reports or presentations such as "THIS IS A DRAFT FOR INTERNAL DISCUSSION PURPOSES ONLY AND DOES NOT REFLECT APPROVAL BY SENIOR MANAGEMENT OF THE COMPANY. IMPLEMENTATION OF ANY ACTIONS DESCRIBED IN THIS [REPORT/PRESENTATION] IS SUBJECT TO ANY NECESSARY CORPORATE APPROVALS AND SATISFACTION OF ALL APPLICABLE LOCAL LEGAL REQUIREMENTS."
- As analysis becomes more concrete and proposals are developed for approval by senior management, it is important to determine whether the proposals are likely to have a material impact in works council countries. In those situations, all documents should make clear that the proposals are "plans" or "strategies" rather than recommendations which, once approved, would automatically result in final action within the works council countries.
- Where a proposal is granular enough to encompass specific actions in works council countries (e.g. a reorganization of the global research function which includes an intended facility closure in Germany), the document should expressly provide that the effects in those countries are "subject to local legal requirements including, where applicable, information/consultation processes with employee representative bodies."

XVII. Endnotes

[1] For an overview of the operation of the various EU institutions, consult the multilingual official European Union website at www.europa.eu.

[2] See also Multi-Country Survey on Covenants Not to Compete.

[3] Chapter 8 of the 2016 Federal Guidelines Manual, United States Sentencing Commission.

[4] See, e.g., Studt & Schlößer, German Federal Labor Court: Improper Compliance System Invalidates Suspected Corruption Termination, Latham & Watkins Client Alert (May 27, 2013).

[5] See Kadar, D., France: Code of Conduct compliance breach of not automatically a sufficient reason for employee termination—Employers should be cautious of a "right" local implementation of compliance guidelines, Reed Smith LLP (April 2, 2013).

[6] Council Directive 2000/78, art. 6, 2000 O.J. (L 303), 19 (EC).

[7] Council Directive 2000/78, art. 6, 2000 O.J. (L 303), 20 (EC).

[8] Workplace Sexual Harassment as a Crime, The Advocates for Human Rights (December 2014)).

[9] Seoul Plans to Criminalize Workplace Harassment, Korea Herald (July 19, 2018).

[10] Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Act No 14 of 2013.

[11] Protection from Harassment Act 2014, No. 17 of 2014.

[12] Sex Discrimination Ordinance, E.R. 1 of 2013.

[13] Rules for Establishment and Operation of the Comprehensive Government Inspection Team for Promoting Eradication of Sexual Harassment and Sexual Violence, Prime Minister Ordinance No. 713, Mar. 30, 2018.

[14] Sexual Violence and Harassment Action Plan Act, (Supporting Survivors and Challenging Sexual Violence and Harassment), Bill 132, 2016.

[15] Preventing Gender-Based Workplace Discrimination And Sexual Harassment: New Data on 193 Countries, WORLD Policy Analysis Center (2017).

[16] *Samira Achbita v G4S Secure Solutions NV*, Case C-157/15 (ECJ, 2017).

[17] Preventing Gender-Based Workplace Discrimination and Sexual Harassment: New Data on 193 Countries, WORLD Policy Analysis Center 2017.

[18] 2014/95/EU.

[19] *Id.*

[20] *Id.*

[21] Council Directive 2002/14, 2002 O.J. (L 80), 29 (EC).

[22] *Id.*

[23] *Id.* at 32.

[24] *Id.*

[25] *Id.* at 31-32.

[26] *Id.* at 32.

[27] *Id.* at 31.

[28] See Section XIV for additional resources, including links to country-specific summaries of applicable labor and employment laws prepared by L&E Global, which are discussed and referenced throughout this InfoPAK.

[29] Council Directive 2009/38, 2009 O.J. (L 122), 28 (EU).

[30] *Id.*

[31] *Id.* at 34.

[32] *Id.* at 35.

[33] Article L.2323-20 of the French Labor Code French Labor Code Article L. 2323-19.

[34] The Information and Consultation of Employees Regulations 2004. See https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_UK.pdf.

[35] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_China.pdf.

[36] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_South_Africa.pdf.

[37] Council Directive 1998/59, 1998 O.J. (L 225), 16 (EC).

[38] *Id.* at 18.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 17.

[46] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_China.pdf.

[47] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_Canada.pdf.

[48] *Id.*

[49] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_Colombia.pdf.

[50] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_China.pdf.

[51] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_India.pdf.

[52] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_South_Africa.pdf.

[53] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_Brazil.pdf.

[54] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_Mexico.pdf

[55] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_Egypt.pdf.

[56] https://uk.practicallaw.thomsonreuters.com/3-503-3758?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1#co_anchor_Ia94b95f45aab11e89bf199c0ee06c731.

[57] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_China.pdf.

[58] Council Directive 2001/59, 2001 O.J. (L 82), 16 (EC).

[59] *Id.* at 17.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 18.

[63] *Id.* at 17.

[64] *Id.* at 18-19.

[65] *Id.* at 19.

[66] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_South_Africa.pdf.

[67] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_Mexico.pdf

[68] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_Brazil.pdf.

[69] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_Australia.pdf.

[70] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_China.pdf; https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_Egypt.pdf; https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_Hong_Kong.pdf.

[71] Additional information regarding country-specific rules governing transfer of undertaking is available on L&E Global's website at https://knowledge.leglobal.org/explore-employment-law-resources-from-more-than-40-countries-worldwide/.

[72] See Multi-Country Survey on Covenants Not to Compete.

[73] https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal_Memo_China.pdf.

[74] See, e.g., *See Bear, Stearns & Co. Inc., v. Douglas A. Sharon*, 550 F. Supp. 2d 174 (D. Mass. 2008).

[75] For a summary of start-up considerations on a country-by-country basis, see the compilation by L&E Global at https://knowledge.leglobal.org/ous/.

[76] Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

[77] http://www.fairlabor.org/affiliates/participating-companies.

[78] https://www.thecloroxcompany.com/who-we-are/corporate-governance/codes-of-conduct/.

[79]https://www.halyardhealth.com.au/media/12337773/2016-halyard-corporate-citizenship-report.pdf

[80]https://www.patagonia.com/on/demandware.static/Sites-patagonia-us-Site/Library-Sites-PatagoniaShared/en_US/PDF-US/Patagonia_COC_English_02_13.pdf.

[81] https://www.roche.com/employment_policy.pdf.

[82]https://www.airfranceklm.com/sites/default/files/publications/charte_sociale_afkl_2013_en.pdf.

[83] https://modulift.com/code-of-conduct-for-suppliers/regulations-standards/code-of-conduct-for-suppliers.

[84] https://www.flichygrange.fr/articles/special-edition-the-12-major-points-of-the-macron-reform-10098.htm.

[85]*Id.*

[86]http://tozzinifreire.com.br/assets/conteudo/uploads/reformenglish-5970044d3d56b.pdf.

[87] https://knowledge.leglobal.org/ous/wp-content/uploads/sites/6/2018/04/Opening-Shop-in-Italy-2018.pdf.

[88] Royal Decree Law 3/2012.