

Lawyer Insights

November 8, 2016

US Employers Could Be Liable for Discrimination Committed Abroad

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Published in Daily Business Review



Borders are no longer a major barrier to doing business. Consequently, many American companies are establishing operations outside of the U.S. (or creating foreign subsidiaries) and sending employees to staff these operations. These arrangements raise the question of whether employees working abroad can sue these companies for discrimination under United States' anti-discrimination laws. The answer is often, yes. Whether such claims are viable depends, in large part, on which anti-discrimination law is at issue, the citizenship of the employee, and whether the entity can be considered a U.S. employer.

Some U.S. Anti-Discrimination Laws Apply Outside The United States

The presumption against extraterritorial application is a well-established principle of American law. The presumption requires courts in the U.S. to presume—absent congressional intent to the contrary—that the laws of the United States apply only within the jurisdiction of the U.S. In *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244 (1991), the Supreme Court created uniformity with respect to Title VII's extraterritorial scope. Applying the presumption against extraterritorial application, the Court held that Title VII did not apply outside the United States.

In the wake of *Arabian*, Congress amended Title VII to cover employees working outside the United States. Likewise, the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) also now apply extraterritorially. However, a number of other employment laws—including the National Labor Relations Act, the Family Medical Leave Act, the Equal Pay Act, and the Fair Labor Standards Act—do not apply extraterritorially.

U.S. Citizens are Protected by Title VII, the ADEA, and the ADA

Title VII, the ADEA, and the ADA protect employees. According to the EEOC, independent contractors, partners, officers, members of boards of directors, and major shareholders are rarely deemed "employees." Title VII and the ADA provide: "With respect to employment in a foreign country, [the term employee] includes an individual who is a citizen of the United States." The ADEA provides: "[t]he term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." Therefore, with respect to employment outside of the United States, the Acts apply only to citizens of the United States.

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Liability Extends to U.S. Employers and Foreign Entities Controlled by U.S. Employers

Liability under Title VII, the ADEA, and the ADA extends to U.S. employers and foreign entities that are controlled by U.S. employers—for example, a subsidiary of a U.S. company. An obvious example of a U.S. employer is an entity that is incorporated in the United States. Where the entity is not incorporated in the United States (or is not incorporated at all), courts look to see whether the employer has sufficient contacts with the United States to be deemed a U.S. employer. Under EEOC guidelines, the factors to be considered are “the employer’s principal place of business, the nationality of dominant shareholders and/or those holding voting control, and the nationality and location of management.” To determine whether a U.S. employer controls a foreign entity, Title VII mandates that courts consider the “interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control of the American employer and the foreign employer.” The ADEA and ADA have substantially similar provisions.

Employers may also be subject to liability under these Acts if they are found to be part of an “integrated enterprise” or are considered “joint employers.” The EEOC defines an “integrated enterprise” as “one in which the operations of two or more employers are considered so intertwined that they can be considered the single employer of the charging party.” A “joint employer” is “two or more employers that are unrelated or that are not sufficiently related to qualify as an integrated enterprise, but that each exercise sufficient control of an individual to qualify as his/her employer.” Thus, defining employers for purposes of liability can be complicated, and employers should consider whether—in conjunction with their subsidiaries or affiliates—they have exposure as part of a larger consolidated or joint enterprise.

The “Foreign Laws Defense”

Even if an employee working abroad may have an otherwise valid claim under one of the Acts, the law may allow employers a defense based on the application of foreign law. The EEOC has stated that “U.S. employers are not required to comply with the requirements of [the Acts] if adherence to that requirement would violate a law of the country where the workplace is located.” This is commonly referred to as the Foreign Laws Defense. The EEOC provides an illustrative example:

Sarah is a U.S. citizen. She works as an assistant manager for an U.S. employer located in a Middle Eastern Country. Sarah applies for the branch manager position. Although Sarah is the most qualified person for the position, the employer informs her that it cannot promote her because that country’s laws forbid women from supervising men. Sarah files a charge alleging sex discrimination. The employer would have a ‘Foreign Laws’ defense for its actions if the law does contain that prohibition.

The EEOC has concluded that the defense requires an employer to prove that complying with the Act caused the employer to violate foreign law. It is important for employers to consider this causation prong when seeking to rely on the Foreign Laws Defense.

What Employers Should Do

To reduce the chance of liability under the Acts, U.S. employers should work closely with their foreign human resource departments. Employers should train managers and human resources professionals at their subsidiaries and affiliates abroad on the company’s anti-discrimination policies, and should ensure that U.S. employees working abroad are aware of the company’s policies and the channels to lodge internal complaints.

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