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The Multinational Executive: Whose Law Governs?

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INTRODUCTION

Although not all employees of US-based employers who work abroad will have an employment contract (*e.g.*, workers who travel internationally for business, even if they do so frequently, often do not have written employment agreements), many employers will reduce to writing the terms of a employment when it involves the employee taking up residence in a foreign country, either through an individual contract or through a corporate policy governing international staff, or both. These writings generally set forth the terms and conditions of employment, such as compensation, benefits, taxation, vacation and the like, as well as deal with the employer's expectations, termination provisions and repatriation. One important question is what law will govern the employment relationship — the law where the employer is based, the law where the employee is working or the law where the employee was born or is domiciled? In this article, we explore this question in various contexts that frequently arise for multinational corporations.

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A. SURVEYING CONTRACTUAL CHOICE-OF-LAW JURISPRUDENCE ACROSS THE GLOBE

Ostensibly, the benefit of a choice-of-law clause in an expatriate contract is that it limits the law governing to the agreement and the conduct of the parties to one, and only one, country's laws. In many cases, however, this is impossible to do — even with a choice of law clause. For example, in the discrimination context, where the extraterritorial reach of the preeminent employment discrimination statute of the United States, Title VII of the Civil Rights Act of 1964, may give rise to a claim that is also simultaneously actionable under foreign law. The potential detriment, of course, is that by including the choice-of-law clause, the employer gives the employee recourse to a set of laws that he or she would otherwise be unable to convince a court or administrative tribunal to apply.

To determine if including a choice-of-law clause is a benefit to an employer, one must first determine what law she thinks will apply in the event a dispute arises. Even if a contract contains a choice-of-law clause, many other variables go into this determination, including: (i) the nature of the employing entity that is a party to the contract, (ii) the duration of the assignment, (iii) how long an employee has been present in the foreign country when the dispute arises, (iv) the nature of the dispute, and (v) the country in which the expatriate is assigned. Because so many of these factors are out of an employer's control, the focus of the advice given to employers is generally on the choice-of-law clause, even though courts and commentators generally agree that the existence of a choice-of-law clause is rarely the single determinative factor as to what law will apply to the dispute.

The decision to include or exclude a choice-of-law clause in an employment agreement with an employee being assigned abroad should not be a reflexive one. Too often, the unique circumstances that inform the choice-of-law decision in a particular case are not given the careful though required to allow employers make an informed decision on what law they hope will govern any particular future dispute. Without specific knowledge of the county at issue, the duration of the assignment, and the nature of the potential dispute, and the additional factors listed above, any discussion of the risks and benefits associated with choice-of-law clauses can only be based on generalities.

1. Factors That Affect the Effectiveness of a Choice-Of-Law Clause in an Expatriate Agreement

a. *The Country in Which the Expatriate is Assigned and the Nature of the Claim or Dispute*

In general, the most important factor is the nature of the claim at issue. Almost uniformly, host-country laws that provide for minimum labor standards on matters such as wages, hours, vacation, rest periods, overtime, safety, probationary periods, termination, severance, privacy, mandatory benefits, and collective representation will apply to an expatriate after a certain period of time, regardless of the existence a home-country choice of law clause.

In the EU, contractual choice-of-law provisions are enforceable only to the extent permitted by the Rome Convention of June 19, 1980 on the Law Applicable to Contractual Obligations ("Rome I"). Rome I provides that although parties are free to choose the law that governs their contractual relationship, the choice cannot have the effect of depriving an employee of the protections granted by the public policy provisions of the employment laws that would apply in the absence of a contractual choice-of-law clause. In the absence of a choice of law clause, Rome I provides that the contract is governed by the law of the country in which the employee routinely performs his or her work under the contract. Japan's choice-of-law regime is similar to Rome I. Even in the US, the parties' choice-of law clause is not always given determinative effect. In New York, for example, the highest court has noted that while the parties' choice of law is to be given considerable weight, "the law of the jurisdiction with the most significant contacts is to be applied." *Haag v. Barnes*, 9 N.Y.2d 554, 559-60, 216 N.Y.S.2d 65, 68-69 (1961).

In the EU, non-contractual obligations, such as torts, and other civil actions like unjust enrichment, are governed by an EU regulation commonly know as "Rome II." The regulation provides that non-contractual causes of action are governed by the law of the place where the alleged harm is or will be felt, not the law of the place where the harmful act was committed.

Similarly, countries in South and Central America, and Mexico, will generally disregard a choice-of-law clause that purports to deny a worker rights. In many of these countries, worker protections emanate from the countries' constitutions and are considered laws of "public order," meaning they apply to persons within their territory, nationals and foreigners alike. A choice-of-law clause that deprived an employee of these rights could be stricken as a threat to public order and policy.

In other countries, such as China, Cuba, Vietnam, Indonesia, and certain Arab countries have separate employment laws for locals and will readily enforce foreign choice-of-law clauses for foreign workers.

b. *The Duration of the Assignment and How Long an Employee Has Been Present in the Foreign Country When the Dispute Arises*

As noted above, host-country laws that provide for minimum labor standards will apply to an expatriate *after a certain period of time*, regardless of the existence a home-country choice-of-law clause. This gives rise to two questions: where does the employee work and how long before the law of that place applies? There is no firm answer to either of these questions.

Determining which country is the "place of employment" can sometimes be unclear, for example, as to an employee temporarily working abroad (on a long business trip), as to an expatriate recently arrived in a host country and as to mobile employees (flight crews, sailors, executives and salesmen with international territories or offices outside their residence country). For these employees, a question can arise as to which

country is the "place of employment" (or, in terms of Rome I, which country is "habitually" the place of "work").

In addition, there is no set answer as to how long an employee must work in a country before that country's law begins to apply. Each country is free to interpret how long someone must be present in the country for the worker protection laws to apply — and to change that period of time. For example, in Belgium, worker protection laws used to not apply to employees temporarily assigned to Belgium. However, in 2002, Belgium decided that Belgian law is applicable to "posted employees assigned to Belgium, regardless of the expected term of their activities in Belgium." Somewhat less helpful, Germany provides that for non-mandatory provisions of the law, home state law continues to govern the employment of employees on "temporary secondment," but that German law covers employees "not merely [on] temporary secondment or transfer" without defining what is temporary.

Conversely, it should be noted that each country is also free to determine how long an employee must be out of the country before its laws no longer apply (*e.g.*, NY workers compensation may cover an injury suffered abroad for an employee on an extended business trip). This is the genesis of the expatriate being able to simultaneously pursue relief in more than one forum for the same wrong or choose the forum in which he or she wishes to proceed.

c. *The Nature of the Employing Entity that is a Party to the Contract*

As noted above, the employing entity can be, among other things, the parent company or a foreign subsidiary. At least one commentator has noted that the law that many courts end up applying (and the enforceability of a choice-of-law clause) is often influenced by the identity of the contracting employer. That is, if the employer is the foreign subsidiary, and the employee is in the same location as the employing entity, there is a greater likelihood that the law of that location will apply and that a choice-of-law clause specifyling law other than the law of the location will be ignored or rejected.

2. <u>"Real World" Application</u>

So how do the multitude of factors discussed above play out in court? As the following discussion shows, the decisions in this area (of which there are surprisingly few) can range from irreconcilable to expected, but never dull or lacking complexity.

Take for example a pair of cases that involved the enforcement of a non-compete covenant, *Guy Carpenter v. Samengo-Turner, et al*., 2007 WL 1888800 (S.D.N.Y. June 29, 2007) and *Samengo-Turner v. Marsh & McLennan, et al*., [2007] EWCA Civ 723.

Three executives left their employ to join a business that was competitive with their former employer, and a group of employees went with the new employer. The executives were sued in the US by the parent companies of their former employer alleging that the executives were in breach of their obligation not to recruit or solicit other employees. These obligations were contained in an incentive compensation plan

that contained a US choice-of-law clause and a forum selection clause that provided for exclusive jurisdiction in New York courts.

In the US case, the court rejected the executives' argument that the dispute belonged in the UK It found that the dispute was properly governed by US law pursuant to the US choice-of law clause and that the forum selection clause was valid and enforceable.

The employees then filed suit against their former employer and the two parent companies in the UK seeking to end the US litigation. In a decision seemingly incompatible with the US decision, the UK court granted the three employees an anti-suit injunction to restrain the proceedings brought against them in New York under the bonus agreements, in order to give effect to their rights under the European Regulation on jurisdiction. It found that the bonus agreement was in actuality, an employment contract, and the exclusive New York jurisdiction clause in the bonus agreements had to be disregarded under the EU Directive on jurisdiction. Thus, the end result was that despite the contractual terms, the employer received neither the law nor the forum it bargained for.

In another cautionary tale, *Halliburton Manufacturing & Services Limited v. Ravat* (UKEASTS/0012/08/MT), an employee was employed by a UK Halliburton subsidiary, a company in the business of providing tools, services and personnel to the oil industry. He worked in Libya, on operations which were part of the business of an associated German company. His employment contract provided that UK law would continue to apply to him throughout the duration of his assignment in Libya. He was dismissed and sought to pursue a claim of unfair dismissal in the UK. The UK Employment Tribunal found that it had jurisdiction on the basis that there was a substantial connection between Great Britain and the employment relationship. On appeal, the decision was reversed. The Employment Appeals Tribunal held that if "an employee does not ordinarily work in Great Britain or cannot be regarded as doing so because he is a peripatetic employee who has his base in Great Britain" then there is generally no jurisdiction. This so even though the parties have agreed that UK law applies. As the EAT noted, "jurisdiction cannot, of course, be determined according to whether or not parties have agreed that jurisdiction exists." Again, the will of the parties was not sufficient to resolve the question of what law applies to a dispute and where the dispute should be resolved.

In other cases, however, the choice-of-law and forum selection clauses have had their intended effect. In *Spradlin v. Lear Siegler Management Services Company*, 926 F.2d 865 (9th Cir. 1991), Lear Siegler, a Delaware corporation with its principal place of business in Oklahoma City, hired Spradlin, a US Citizen, to work in Saudi Arabia for a two-year period. Lear Siegler and Spradlin entered into an employment contract that designated Saudi Arabia as the proper forum in which to litigate disputes and required Saudi Arabian law to govern all employment disputes. Seven months after Spradlin began working in Saudi Arabia, Lear Siegler terminated Spradlin, and he filed an action in US federal court alleging, among other things, breach of contract and age discrimination. Although the Court did not rule on the validity of the choice-of-law

clause, it upheld the validity of the forum selection clause, and dismissed the case, directing that the action needed to be brought in Saudi Arabia.

Similarly, in *Levine et al., v. Arabian American Oil Company*, No. 84 Civ. 2396, 1985 US Dist. LEXIS 13386 (S.D.N.Y. Nov. 27, 1985), the plaintiffs worked in Saudi Arabia. While employed, Saudi Arabian police arrested the plaintiffs and, upon notice of the arrest, the employer terminated the plaintiffs. As a result of their termination, the plaintiffs were ordered to leave Saudi Arabia immediately.

Upon returning to the US, the plaintiffs brought suit in the Southern District of New York alleging wrongful termination under Saudi Arabian law. Under the Saudi Arabian Labor and Workmen Law, which requires "cause" for discharge. Plaintiffs claimed that they were terminated as a result of the public comments they made concerning their arrest.

Plaintiffs argued that the suit should be decided pursuant to Saudi Arabian laws. The court rejected the argument and concluded that there were sufficient contacts with Texas to justify enforcement of the contract's Texas choice-of-law provision. Specifically, the Court noted that "[Plaintiffs] were recruited by ASC in Texas for employment with Aramco in Saudi Arabia; the employment applications signed by [plaintiffs] stated that Texas law was applicable to the employment agreements; [plaintiffs] signed [forms] in Texas; [plaintiffs] attended orientation programs for their employment with Aramco in Texas prior to their departure to Saudi Arabia; and [one plaintiff] was employed by ASC in Texas prior to the commencement of his employment with Aramco in Saudi Arabia. Plaintiffs have failed to identify any fundamental policy of Saudi Arabia that would be violated by the enforcement of the contracts' choice-of-law provisions. Thus, based upon both the contractual choice of law provisions and the parties' significant relationships with Texas, Texas law would seem to govern the plaintiffs' employment relationships with Aramco."

In *Chinnery v. Frank E. Basil*, No. 86-2977, 1988 US Dist. LEXIS 19438 (D.D.C. January 13, 1988), Frank E. Basil, a Delaware corporation, hired plaintiff to work in Saudi Arabia. The plaintiff signed an employment contract in Washington, D.C. The contract contained a choice-of-law clause that designated Saudi Arabian law as the law that would govern any disputes arising out of the contract. A dispute arose concerning the defendants obligation to provide a smoke-free working environment. The plaintiff filed suit in D.C. federal court alleging that the defendant violated US laws by not providing a smoke-free working environment.

The defendant argued, and the court agreed, that because the contract designated Saudi Arabian law as governing all disputes, and because a substantial relationship existed between the contract and Saudi Arabia, the application of Saudi Arabian law was appropriate.

Recently, in *Hatfield v. Halifax PLC*, 564 F.3d 1177 (9th Cir. 2009), the Ninth Circuit entertained whether an English choice-of-law clause in a contract between an English company and California investors could incorporate England's statute of

limitations, which was more generous than California's statute of limitations. The court said yes, finding that such an application did not violate California's public policy. The court reasoned that California law allowed waiver or modification of the otherwise applicable California statute of limitations by contracting parties, if such a waiver is in writing and does not extend the limitations period for more than four years at a time.

Recently, US courts have reached mixed outcomes concerning the enforceability of arbitration clauses in employment contracts that require the application of foreign law.

For instance, in *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009), *reh'g and reh'g en banc denied* (11th Cir. Sept. 2, 2009), *cert. denied*, 130 S. Ct. 1157 (2010), the Eleventh Circuit considered whether a clause in a contract of maritime employment mandating arbitration in the Philippines under Panamanian law was enforceable against an employee claiming wages under the federal Seaman's Wage Act, 46 USC. § 10313. In its decision, the Circuit cited *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614, 637 (1985), which upheld a foreign arbitration clause for claims based on a federal statute, but also expressed readiness to "condemn" such a clause if it would operate in conjunction with a choice-of-law clause "as a prospective waiver of a party's right to pursue statutory remedies" under federal law. The court found the clause unenforceable, stating that, "under the terms of the arbitration clause, [the plaintiff] must arbitrate in the Philippines under the law of Panama. As the arbitrator is bound to effectuate the intent of the parties irrespective of any public policy considerations, these arbitration requirements have 'operated in tandem' to completely bar [the plaintiff] from relying on any US statutorily-created causes of action." 573 F.3d at 1123.

In *DiMercurio v. Sphere Drake Ins. PLC*, 202 F.3d 71 (1st Cir. 2000), the First Circuit considered the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Sept. 30, 1970, 21 UST. 2517, T.IA.S. No. 6997., as implemented through Chapter 2 of the Federal Arbitration Act (FAA), 9 USC.A. § 201. The plaintiff fisherman appealed a trial court's judgment that upheld the validity of an arbitration provision in an insurance policy issued by the defendant, a London-based insurance company, for a Massachusetts fishing vessel. The plaintiff, who was injured when the boat foundered, claimed that the arbitration provision was void under Massachusetts law because it ousted the courts of jurisdiction. Mass. Gen. Laws ch. 175, § 22. However, the circuit court affirmed the judgment, finding that the arbitration provision did not contravene the Convention's "null and void" clause, as Massachusetts courts no longer agree that arbitration provisions oust the courts of jurisdiction. In addition, the court found, since both parties were required to arbitrate any coverage disputes, the arbitration clause in the policy was not unconscionable.

3. Is There a Clear Answer?

As the cases make clear, it is all but impossible to employ a "one-size-fits-all" approach to deciding if a choice-of-law clause should be included in an expatriate agreement, and if so, which country's laws the parties should choose. Instead, once an employer ascertains which, if any, home country provisions it wants to include in the contract and have enforced according to home-county law (*e.g.*, incentive compensation,

employment-at-will, covenant not to compete, etc.), the employer should have counsel determine if the host country judiciary would be receptive to a foreign choice-of-law clause for such a provision. If the answer is yes, an employer should consider the selective inclusion of a choice-of-law provision in paragraphs outlining the specific provisions it seeks to have enforced in accordance with home-country law. If is unlikely the choice-of-law clause will have utility, the employer should not waste any negotiating power seeking to a home-county choice-of-law clause that will likely go unheeded. This more measured approach would lessen the likelihood of the situation where, because of the existence of an unenforceable choice-of-law clause, an employee has a cause of action under, or the protection of, two countries' laws rather than one.

B. DON'T ASSUME CHOICE OF LAW PROVISIONS APPLY: A LESSON IN THE VARYING TREATMENT OF POST-EMPLOYMENT NON-COMPETITION RESTRICTIONS

In this age of highly-mobile employees, employers need to ensure that their employees do not misappropriate and exploit confidential information for their own benefit, or that of their competitors, both during and after the employment relationship. Employers often turn to non-compete agreements to protect their interests and prevent employees from using valuable confidential information acquired during their employment. Employers struggle to craft these covenants to protect their confidential information while still meeting the conflicting interest of preserving employees' freedom to obtain employment.

Legal standards governing the enforceability of non-compete agreements often differ with the jurisdiction in which parties enter into such an agreement. Because the validity of such clauses is governed largely by local laws, *regardless of choice-of-law provisions*, multinational corporations cannot rely on a standard, global covenant. To ensure their enforceability, restrictive covenants must be drafted carefully and in compliance with the requirements of the applicable country's laws.

Non-compete laws vary in Europe, Australia, Canada, Asia, and Latin America. While there are several common factors that many countries' courts consider in evaluating the validity of non-compete agreements, the way those factors are analyzed and weighed varies greatly. There is no common denominator that would make one non-compete agreement suitable wherever it might be signed or applied.

Employers would be well-advised to take caution if implementing global non-competition policies. Both an intimate understanding of local law governing non-compete agreements and a thorough understanding of the business justifications and employment circumstances giving rise to the need for such agreements in each case are required to draft enforceable non-compete covenants. A valid agreement in any jurisdiction must be crafted in light of the applicable law and must be tailored to the specific circumstances warranting the non-compete protection.

1. Europe

Other than the existence of a several common principles, there is an absence of regulation of non-compete agreements at the EU level. The relevant principles are as follows:

- The European Union is based on the principle of free and undistorted competition between its Members States.

- Article 81 of the Rome Treaty bans any agreement between companies which may affect the business between Member States and restrain or distort the competition within the European market.

- The Charter of Fundamental Rights of the European Union dated December 7, 2000 provides under Article 15 that "*Everyone has the right to engage* in *work and to pursue a freely chosen or accepted occupation.*" Article 16 of the same charter provides that "*The freedom to conduct a business in accordance with Community law and national laws and practices is recognized.*"

With the exception of these principles, there is no harmonized legal framework regarding the standards for enforceability of non-compete covenants in employment agreements in Europe. In each Member State, the legal requirements governing non-compete agreements vary greatly.

2. Australia

Under Australian common law, a covenant with the effect of restraining an individual's ability to freely exercise his/her trade or business upon termination of his/her employment is considered presumptively void and unenforceable. Such a provision may be deemed valid and enforceable, however, if it is "reasonable." Courts determine reasonableness by evaluating the clause in question from the point of view of both parties to the contract while also taking into account public policy. The party seeking to enforce such a provision must establish that the: (a) employer has an interest to protect (such as confidential information or goodwill); (b) restriction is no broader than what is strictly necessary to protect that interest; (c) geographical scope of the restriction is no wider than what is strictly necessary to protect the employer's interest; and (d) period of time over which the restriction operates is no longer than necessary to protect the employer's interest.

In addition to these generalities, the specifics relating to enforceability vary from state-to-state. For example, in New South Wales, the common law position differs by virtue of the Restraints of Trade Act 1976 (NSW), under which the Supreme Court of New South Wales determined that it has the authority to evaluate a non-compete provision, in light of the specific factual context surrounding the application of the agreement, and the authority to pare down a restraint so that it is reasonable given the particular circumstances of the situation. As a practical matter, this alters the common law presumption that a restraint of trade is void and unenforceable.

3. Asia

a. *India*

In India, non-compete covenants that apply post-employment are illegal and unenforceable. *See Section 27, Indian Contract Act 1872.*

b. *Singapore*

Singapore courts typically decline to enforce non-compete agreements unless they protect an employer's legitimate interests and are reasonable in light of the circumstances of the situation. *Buckman Laboratories (Asia) Pte Ltd. V. Lee Wei Hoong* [1999] 3 SLR 333. A covenant with the purpose of restricting competition in business in general will not be enforced.

c. *China*

While some common law jurisdictions set forth an employee duty of loyalty to his employer, Chinese common law does not. Int'l Labor & Emp. Laws Vol. I, 31-18 – 31-19. A new labor law effective January 1, 2008, however, allows for certain selected employees to sign non-compete agreements. The agreements are limited to: (a) senior management; (b) senior technicians; and (3) other employees with knowledge of trade secrets.

The new statute provides that an employer may only restrict an employee from competition for a maximum of 2 years from the date of termination of his labor contract. Under the new statute, an employer is also required to pay monthly compensation to the employee in consideration for the non-compete agreement. What the new law does not do is indicate what amount of compensation would be considered adequate consideration for a non-compete agreement.

Local law in some areas of China, however, sets forth a minimum amount of compensation that is required in non-compete agreements.

- ***Shenzhen.*** In Schenzhen, an employee who has access to the "technical secrets" of his employer is entitled to at a minimum of 2/3 of the salary that he received the last year he was employed. Under local law, an employee is entitled to this amount each year the non-compete agreement is enforced after the employment relationship with the former employer has ended. Shenzhen Special Economic Zone Protection of Enterprise Technical Secrets Regulations, promulgated Nov. 3, 1995, effective Jan. 1, 1996; INT'L LABOR & EMP. LAWS VOL. I, 31-18 – 31-19.

- ***Beijing.*** Local law in Zhongguancun Science and Technology Park in Beijing requires the economic compensation be at a minimum 1/2 of the salary the employee received in his final year of employment. Like in Shenzhen, this amount is owed the employee each year the

non-compete agreement is enforced after the termination of the employment relationship. Zhongguancun Science and Technology Park Regulations, promulgated Dec. 8, 2000, effective Jan. 1, 2001; Int'l Labor & Emp. Laws Vol. I, 31-18 – 31-19.

4. Latin America

a. *Mexico*

While there is an absence of regulation or authoritative decisions by Mexican Courts on the subject, as a general rule, non-compete agreements meant to survive the work relationship are of questionable validity and limited enforceability under Mexican law once the work relationship has ended.

First, Mexico's Constitution protects its citizens' freedom to engage in lawful work. Art. 5 of the Mexican Constitution.

Second, the labor law expressly provides that work constitutes a "social right and duty" and, as such, to "preclude any person from carrying out work, or from engaging in a profession, industry or trade of choice, so long as it is lawful" is not permitted. Articles 3 and 4 of the Mexican Federal Labor Law.

b. *Argentina*

Generally, the duty not to compete ends with the termination of the employment relationship, but the confidentiality duty extends indefinitely and without any express agreement being necessary. Int'l Labor & Emp. Laws Vol. I, 37-26 – 37-32.

The validity of post-termination non-compete agreements is assessed on the basis of the right to freedom to work set forth in the Argentine Constitution, which establishes the right of any individual to perform any kind of commercial or industrial act or activity freely. Under this principle, the employee should not be forced to stay inactive or perform any other kind of activity different from the one related to the employee's own skills and knowledge, because it is reasonable that an employee will be more valuable working within the same branch or field of expertise in which the employee already specializes.

C. APPLICATION OF US EMPLOYMENT LAWS ABROAD

As noted above, an employer cannot guarantee that a contractual US choice-of-law clause will determine the law under which its actions towards an employee are judged. Similarly, a foreign choice-of-law clause cannot insulate an employer from those US laws that may have extraterritorial affect.

So, to what extent do American laws apply to employees in foreign offices? Although the extent of extraterritorial application of employment law had been somewhat uncertain, Congress and the courts have resolved many of the legal ambiguities. Nevertheless, uncertainties remain in the application of the rules to particular situations.

The courts have generally held that, absent an express provision in the statute or other indication from Congress to the contrary, a presumption against the extraterritorial application of federal employment statutes will limit the geographic scope of a statute to the territorial jurisdiction of the United States. *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 US 244, 111 S. Ct. 1227 (1991) ("*Aramco*") (holding that Title VII did not apply to US citizens working for American employers abroad; subsequently altered by § 109 of the Civil Rights Act of 1991).

Title VII prohibits discrimination with respect to employment on the basis of an individual's race, color, religion, sex, or national origin. 42 USC. §§ 2000e *et seq*. An amendment to Title VII also prohibits discrimination on the basis of pregnancy. Following *Aramco*, Congress amended Title VII to provide expressly for extraterritoriality. Specifically, Congress overruled and enacted section 109 of the Civil Rights Act of 1991, which extended application of Title VII to US citizens employed abroad by American companies or by foreign companies under the control of an American firm. 42 USC. §§ 2000e(f), 12111(4).

Other employment discrimination statutes expressly provide for extraterritoriality, such as the Age Discrimination in Employment Act, 29 USC. §§ 621-634, ("ADEA"), which prohibits employers from discriminating against employees or prospective employees aged forty or older, and the Americans with Disabilities Act, 42 USC. §§ 12101 *et seq.*, ("ADA"), which prohibits discrimination against a "qualified individual" with a disability.

However, neither Title VII nor other US employment laws apply to aliens who are employed abroad by American or American-controlled companies. 42 USC. § 2000e-1(a) (Title VII); 42 USC. §§ 2000e-1(c)(2); 12112(c)(2)(B). (ADEA). In *Shekoyan v. Sibley International,* 409 F.3d 414 (D.C. Cir. 2005), *cert. denied*, 126 S.Ct. 1337 (2006), the plaintiff, a citizen of Georgia (former USSR) and a lawful permanent resident of the United States who was working in Georgia, sued his employer, a United States corporation, for national origin discrimination in violation of Title VII. The court held that Title VII does not extend extraterritorially to anyone who is not an American Citizen, even though decisions regarding future employment in US were made in US because the contract specified Georgia as the place of employment. *See also Gomez v. Honeywell International, Inc.*, 510 F. Supp. 2d 417 (W.D. Tex. 2007) (motion to dismiss denied because defendant failed to establish plaintiff's employment location).

In order to determine whether an American employer controls a foreign corporation, the ADEA provides that the following four factors be considered (29 USC. § 623(h)(3)): (1) Interrelation of Operations; (b) Common Management; (c) Centralized Control of Labor Relations; and (d) Common Ownership or Financial Control of the Employer and the Foreign Corporation.

As amended, Title VII uses the same four-part test as contained in the ADEA for determining whether a US employer controls a foreign corporation. *See also Lavrov v. NCR Corp.*, 600 F. Supp. 923 (S.D. Ohio 1984) (applying four-part test in determination that foreign subsidiary of American company subject to the provisions of Title VII is a

joint employer or integrated enterprise). *See also Rajoppe v. GMAC Corp. Holding Corp.*, No. 05-2097, 2007 US Dist. LEXIS 18956 (E.D. Pa. March 19, 2007) (motion to dismiss denied in a race discrimination action because a genuine issue of material fact existed regarding whether the defendant controlled its Japanese subsidiary).

The Americans with Disabilities Act has also been amended to cover US citizens employed abroad by American companies or by foreign companies under the control of an American firm. 42 USC. §§ 2000e(f), 12111(4). However, like Title VII and the ADEA, the ADA does not apply to foreign nationals who are employed abroad. 42 USC. § 2000e-1(a).

In contrast, many other labor and employment statutes, as summarized below, either do not have extraterritorial application, or their extraterritorial reach is statutorily circumscribed.

- The Worker Adjustment and Retraining Notification Act ("WARN"), 29 USC. §§ 2101-2109, requires employers in certain circumstances to proffer advance notification to employees of a plant closing or mass layoff. The statute includes no reference to extraterritorial application and, further, there is no legislative history or case law addressing the issue.

- The Family and Medical Leave Act ("FMLA"), 29 USC. §§ 2601 *et seq*., requires that employers provide employees with unpaid leave in enumerated circumstances. The statute contains no reference to extraterritorial application and there is no case law interpreting its reach outside of the United States. Further, the FMLA was modeled in many instances after the Fair Labor Standards Act ("FLSA"), which implies that it too lacks extraterritorial application save specific amendment.

- The Occupational Safety and Health Act ("OSHA"), 29 USC. §§ 651 *et seq*., requires employers to follow certain safety standards in the workplace. The statute's application is expressly limited to "employment performed in a workplace in a State, the District of Columbia, The Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Lake Island, Outer Continental Shelf lands . . . Johnston Island, and the Canal Zone." 29 USC. § 653(a) (1990).

- The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 USC. §§ 1001 *et seq*., governs the provision of pension and welfare benefits to employees. ERISA explicitly excludes from coverage employee benefit plans that are "maintained outside of the United States primarily for the benefit of individuals substantially all of whom are nonresident aliens." ERISA § 4(b)(4), 29 USC. § 1003(b)(4). Neither the US Department of Labor ("DOL") nor the US courts have

established any bright-line test to determine whether a plan is maintained "primarily for the benefit of nonresident aliens." ERISA § 4(b)(4), 29 USC. § 1003(b)(4). One important factor in the analysis appears to be the total number of US citizens and/or US residents that are eligible to participate in the plan. However, the case law and DOL Opinion Letters relating to the non-US plan exclusion differ on what provisions are relevant.

- The Equal Pay Act ("EPA"), 29 USC. § 206(d), prohibits an employer from discriminating between employees on the basis of sex by paying unequal compensation to employees of one sex for jobs requiring equal skill, effort, and responsibility. Courts have held that the EPA does not have extraterritorial application. *See, e.g., Hart v. Dresdner Kleinwort Wasserstein Securities, LLC, et al.*, 2006 WL 2356157, at *6 (S.D.N.Y. Aug. 9, 2006).

- The Fair Labor Standards Act ("FLSA"), 29 USC. §§ 201-219, regulates certain conditions of employment, including standards relating to minimum wage and overtime. Generally speaking, there is no extraterritorial application to employment outside of the United States. *See* Sections 206 (Minimum wage), 207 (Maximum Hours), 211 (Collection of data) and 212 (Child labor provisions), which "shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country [or outside of certain specified territories]." 29 USC. § 213(f) (1990).

    - Sometimes the location of the employment is not clear-cut. For instance, an employee of a company may work both in and outside of the United States. The Wage and Hour Division of the United States Department of Labor has interpreted the FLSA as applying to an employee who performs a portion of his or her work during any week in the US, even if the remainder of the work for that week is performed outside of the US 29 C.F.R. § 776.7, n.20 (1993).

    - However, there a number of cases that have applied a "work station" or "employment base" test to hold that employees who are based in a non-US country are not entitled to coverage, even if they perform services in the United States for part of the workweek. *See, e.g., Hodgson v. Union De Permisionarios Circulo Rojo, S. De R.L.*, 331 F. Supp. 1119, 1121 22 (S.D. Tex. 1971) (holding that Mexican bus drivers employed by Mexican company were not protected by the minimum wage provisions of FLSA, even though part of each workweek they spend driving in the United States).

- Whistleblowing Law. There are many federal whistleblowing laws in the United States. The most recognized such statute is the Sarbanes-Oxley Act, 18 USC. §1514A(a), ("SOX"), which provides protection to employees of companies subject to the Securities Exchange Act of 1934 who lawfully cooperate with an investigation concerning its violations. Though SOX's application to "issuers," which can include foreign corporations, has made its other provisions applicable extraterritorially, courts have found that the employee whistleblowing protections are not applicable overseas. For instance, in *Concone v. Capital One Financial Corp.*, No. 2005-SOX-00006, 2004 WL 3127233 (O.S.H.R.C.A.L.J. Dec. 3, 2004), and *Carnero v. Boston Scientific Corp*., No. Civ. A.04-10031-RWZ, 2004 WL 1922132 (D. Mass. Aug. 27, 2004), employees of foreign companies subject to SOX sued for damages for dismissal based on their reporting of accounting irregularities and violations of the Securities Exchange Act of 1934. *Id.* In both cases, the employees were denied protection under SOX. *Id.* According to the decisions, whether SOX applied to employees in a foreign jurisdiction turned on whether Congress intended to apply the whistleblowing protections extraterritorially. Both cases held that the requisite intent was not manifest. *See Concone*, 2004 WL 3127233, at *3 (ruling by OSHA Administrative Law Judge that whistle-blower protections of Sarbanes Oxley Act do not apply to workers employed in foreign countries); *Carnero*, 2004 WL 1922132, at *2 (stating that "[n]othing in Section 1514A(a) remotely suggests that Congress intended it to apply outside of the United States").

- Labor Law. There are a number of labor laws in the United States. The Labor Management Relations Act, 29 USC. §§ 141 *et seq*. ("LMRA"), provides certain protections for the collective bargaining rights of employees with employers through the labor organization of their choice. The Supreme Court has held that the LMRA has no extraterritorial application. *See Benz v. Compania Naviera Hidalgo, S.A.*, 353 US 138, 144 (1957). The National Labor Relations Board ("NLRB") has clarified *Benz* to hold that the National Labor Relations Act, including its LMRA amendments, only applies to employees within the United States and its territories, and not to US citizens working abroad. *See, e.g., RCA OMS, Inc.*, 202 N.L.R.B. 228 (1973) (holding that a US employer in Greenland does not come within the jurisdiction of the Act, even where the employees are hired in the US, require US security clearance, are paid from the US, and return to their original hiring location in the US upon completion of their jobs).

CONCLUSION

There is no shortage of choice-of-law issues to spot when dealing with the movement of employees across borders. Every aspect of the employment relationship must be examined and all notions of intuition must be abandoned when determining how best to ensure compliance with all relevant laws when moving employees internationally. Often, there is no substitute for consulting someone familiar with both the laws of the point of departure and the destination.