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Differences In Employment Practices Across The Pond

*The Editor interviews **Daniel Ornstein,** Co-Head of Proskauer's International Labor and Employment Law Group based in the London office.*

Editor: Please describe your practice area from your position in Proskauer's London office.

Ornstein: Our London Labor and Employment practice covers the full range of employment issues, with a focus on matters that are complex, high-value or have reputational impact. In particular, our experience includes litigation, non-competes, discrimination, whistleblowing, investigations, reductions in force, bonus disputes, executive disputes and compensation (and the associated regulatory landscape), board-level disputes and trade union recognition applications.

Our London office is also the hub for our international and cross-border labor and employment practice, where we work with our network of partner firms from around the globe, literally covering every continent, to provide advice to multinational businesses on cross-border matters, such as cross-border litigation, data privacy and multijurisdictional reductions in force.

Editor: How do you approach achieving uniformity in practices and procedures when drawing up employment agreements that cross so many borders?

Ornstein: The heart of our approach is to understand the essence of what our clients really want and the results they're trying to achieve through their practices and procedures. Once we understand this, it becomes much easier to achieve uniformity, notwithstanding the important legal and cultural differences between different jurisdictions, because we're able to focus then on the issues that count instead of getting distracted by peripheral issues. As a result, by focusing on fewer objectives, it becomes easier to achieve uniformity.

Editor: Do you think greater uniformity will come with unions being internationalized?

Daniel Ornstein

Ornstein: Yes. Indeed, we're already seeing greater uniformity as trade unions become increasingly international in their outlook. For example, at IKEA, a Swedish company, the Swedish union of forestry, wood and graphical workers, GS, and the International Association of Machinists and Aerospace Workers have worked closely together to obtain union recognition at two U.S. sites, in Perryville, Maryland and Danville, Maryland. As part of their cooperation, the Swedish trade union put pressure on Swedish management to require U.S. management to agree to a "neutrality" agreement, which prevented U.S.-style campaigning in relation to the application for recognition at the U.S. sites. In contrast with the U.S., where U.S. management will often run campaigns to forestall a union from seeking recognition, a campaign like that would be very unusual in Sweden, and the Swedish union appealed to this difference to prevent such a campaign being run in the U.S. This was likely to have been a factor that led to recognition at the two U.S. sites.

Similarly, I would expect that as unions communicate more and more across borders, they will seek to import favorable practices and procedures from one jurisdiction to another. For example, we're beginning to see that in some companies there is pressure from unions to implement uniform severance terms globally that reflect more generous European standards.

Editor: What kind of internal support do you see among trade unions worldwide?

Ornstein: In terms of membership, there is a clear decline. We've seen this in the U.S. as well as other jurisdictions like France, Germany and the UK. According to some recent studies carried out by the OECD, around eight percent of French employees are currently members of unions compared with a rate of about 30 percent after the Second World War. Likewise, in Germany, reports suggest membership is now about 19 percent, down from 36 percent in 1991. Here in the UK there has been a steep decline in union membership over the years. When Margaret Thatcher became prime minister in 1979, the figure was around 13 million members. Of course, she set out to dismantle the unions. There are now just about 6 million union members today. Interestingly, in the UK, last year, for the first time in many years, union membership actually increased. This might be due to austerity measures being implemented.

Editor: The United Steelworkers president Leo Gerard has recently come out in favor of worker coops, which the Steelworkers have begun in partnership with Spain's Mondragon cooperatives. Is this a departure from the normal practices of trade unions?

Ornstein: Cooperation between trade unions from different jurisdictions is something we're seeing more and more. The Leo Gerard example is not a departure from the norm; rather, this is an example of a developing trend. For example, I mentioned the IKEA neutrality agreement, which was a result of the cooperation between unions from different countries. Another very prominent example of this is the ongoing discussions about establishing a German-style works council at the Chattanooga plant of Volkswagen involving a U.S. union, the UAW, working very closely with Volkswagen's works council. That's a big issue. There are other examples as well, such as the CWA in the U.S. and ver.di, a German trade union, which have been working very closely together within the telecommunications industry. Then you also have the United

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Steelworkers and the UK union Unite working very closely at Crown Manufacturing across its sites in a number of jurisdictions. These are some of the many examples of increasing cooperation between unions from different jurisdictions.

Editor: IndustriALL has come on the scene. How does it differ from other trade unions? What are its origins? How much traction has it built among workers?

Ornstein: IndustriALL was formed in June 2012 through the amalgamation of three global union federations, the International Metalworkers Federation, International Federation of Chemical, Energy, Mine and General Workers' Union and the International Textile, Garment and Leatherworkers' Federation, which is a pretty broad mix and provides a flavor of the wide range of industries that IndustriALL represents. The mere fact of the amalgamation and the pooling of their resources is a real demonstration of the increasing focus by unions on international matters.

An example of the type of campaigns IndustriALL has run include the implementation of the Bangladesh Accord, an agreement designed to improve the safety of garment factories in Bangladesh and signed by many prominent clothing retailers. This is a highly significant development. The Bangladesh Accord was a response to the collapse of the Rana Plaza in spring, 2013, in which a building housing literally thousands of garment workers collapsed leading to over 1,100 deaths – a terrible tragedy. This international collective agreement includes a commitment to ensuring the health and safety of workers in factories through measures such as independent safety inspections, public reporting of the results of those inspections, and a commitment on the part of the signatory retailers to ensure that any needed repairs that are identified are carried out and sufficient funds are made available to do so. It even includes a commitment to ensure that the workers in those factories who are not their employees, but rather employees of the manufacturers in their supply chain, will continue to be paid for any period that they cannot work while repairs are being carried out. So that is a pretty significant agreement and illustrative of the role that IndustriALL is playing on cross-border issues.

Editor: Is it able to enforce these agreements?

Ornstein: There is an arbitration clause. There are questions as to its enforceability. However, even if it is not enforceable from a legal perspective, I think that there could be adverse labor relations consequences for any signatory that subsequently refuses to settle any disputes through arbitration.

Editor: What are the major differences between U.S. and UK employment law?

Ornstein: First, in the UK, the primary source of employment relationships for all employees, and not just executives, is a contract of employment that must be in writing. In addition, in employment litigation, there are generally no punitive damages in the UK with the exception of discrimination claims. But even then, guidelines provide that these rarely exceed $50,000 even in the most extreme cases. Another significant departure is there are no jury trials, which, combined with the lack of punitive damages, means that you can pretty much predict the value of any claim with a reasonable degree of certainty – any damages are mostly based on loss of earnings flowing from any wrongdoing. This facilitates settlement, because without punitive damages and juries, there is greater certainty about the price of a breach compared to the situation in the U.S. In addition there are generally no class actions in the UK. Although there are other nuanced differences, the good news is that the UK law isn't radically different from the law in the U.S. Most of the key statutory provisions contain concepts and frameworks that will be familiar to people in the U.S., such as provisions outlawing various forms of discrimination, rights on termination of employment and legislation that lays down minimum standards for working hours, rest breaks and holidays.

Editor: Cross-border reductions in force often cause animosity on the part of employees toward management. How can this be avoided?

Ornstein: There are steps that employers can take to reduce the risk of antagonizing their workforce. Some of these include consulting and communicating with employees and explaining why tough decisions need to be made. Communication can deflect antagonism because often what workers don't like is not only the fact that there needs to be a reduction in force, but that no one is telling them what is happening or why it needs to happen. Also, as part of that dialogue, it is useful to explore alternatives, such as reducing hours or salaries, even on a temporary basis, and looking at ways to mitigate the financial consequences of a reduction in force. Of course, these often involve costs, such as enhanced severance, but can also include the provision of other benefits, such as outplacement counseling. When there is an international connection, from my experience, one particular source of animosity is where workers in different jurisdictions are treated differently. Generally, that is the result of cultural practices and legal requirements. In reality, there is no obvious solution because of the adverse cost implications of treating workers in all jurisdictions as favorably as employees in the jurisdiction that treats its employees more generously. It is virtually impossible to treat everybody the same. However, in my experience, where there are differences, it is often sensible to explain why these arise rather than simply ignore them.

Editor: Please give our readers some guidance on best practices for employers to follow in dealing with international trade union issues.

Ornstein: Guidance should be given to ascertain the extent to which a business is at risk of being subject to an international union campaign, especially regarding hot topics, such as working conditions of supply-chain workers. Understand the relationships between trade unions in different jurisdictions within a particular industry and where operations are based, such as the U.S.-German cooperation in the telecommunications industry. Where there are strong relationships between relevant unions, there will be greater likelihood of inter-union cooperation in different jurisdictions within a business. Consider the advantages and disadvantages of dialogue with international unions and alliances of national unions where there is susceptibility to a campaign. Just like in domestic issues, building a relationship with a union can increase the chances of finding mutually acceptable solutions when issues do arise. Where there is the possibility of an international, industry-wide agreement, such as the Bangladesh Accord, where a business has any chance of becoming impacted by that agreement, I would strongly advise it to get involved in negotiations early to maximize its chance to set an agenda and to negotiate terms before they have been determined by others. I would also advise that a company should be in a position to make a very quick decision whether or not to enter into an agreement at all, because if it delays and ultimately ends up entering into an agreement, it may end up with the worst of all worlds since the company probably has been the target of a lengthy campaign and will have lost the chance to influence the terms of any agreement. So be quick!

I would also suggest that companies train and educate senior management about developments in the international trade union movement. That puts management in the best possible position to identify issues and spot risks that might occur ahead of time. If an issue arises after a campaign starts, you're on the back foot, whereas pre-empting things puts you on the front foot.