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FIRST IN EMPLOYMENT LAW

When Does a Foreign Law Compel a U.S. Employer to Discriminate Against U.S. Expatriates?: A Modest Proposal for Reform

By Tyler M. Paetkau

I. Introduction

A large U.S. multinational corporation announces a major joint venture in Saudi Arabia and strongly encourages certain employees to relocate there for three to four years. It could be a smart career move. It could be a terrific experience, both professionally and personally. The Saudi Government, however, refuses to process work visas for young, single women; openly homosexual employees; Jews; disabled employees; and all employees over the age of 50. Can the U.S. employer intentionally discriminate on the basis of gender, marital status, sexual orientation, religion, disability and age, by denying transfers to all employees on these protected bases? Unfortunately, despite Congress' amendments of Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act ("ADA") in 1991, and the Age Discrimination in Employment Act ("ADEA") in 1984,^[1] to provide for extraterritorial application of these landmark antidiscrimination laws, the answer is still unclear.

As the global economy continues to develop rapidly, more and more courts will grapple with the contours of the so-called "foreign compulsion" defense. Under what circumstances will U.S. multinational employers get a pass on intentional discrimination? Does the foreign law truly compel the U.S. employer to discriminate against U.S. citizens, or is the U.S. employer instead using this foreign law compulsion defense as a smokescreen to legitimize discrimination? How well-defined must the foreign law be to compel such blatant discrimination? How hard must the U.S. employer push the foreign government before acceding to the discriminatory foreign law?

This Article analyzes the legislative history and some of the evolving case law interpreting the foreign compulsion defense to otherwise clear violations of Title VII, the ADEA and the ADA. Neither Congress nor the courts have provided clear guidance to multinational employers and expatriates as to when the "foreign laws" defense permits employers to deny employment opportunities to employees in protected classes. Such lack of clarity necessarily results in increased litigation expenses, not to mention strained foreign relations and other

attendant social costs. This Article proposes a practical solution to help employers, employees and the courts determine when the foreign compulsion defense applies to immunize U.S. employers from liability under Title VII, the ADEA and the ADA. Congress ought to amend these three antidiscrimination statutes again to permit employers and employees to seek intervention by the U.S. Department of State in cases of conflict or perceived conflict between U.S. and foreign employment discrimination laws.

II. Analysis

A. Extraterritorial Application of U.S. Employment Antidiscrimination Laws (Title VII, ADEA and ADA)

To “protect against unintended clashes between our laws and those of other nations which could result in international discord,” courts developed a “presumption” against extraterritorial application of U.S. law.[2] For example, the Fifth Circuit majority in *Boureslan v. Aramco, Arabian Am. Oil Co.*, 857 F.2d 1014, 1020 (5th Cir. 1988),[3] noted the “strong countervailing policy arguments” against extraterritorial application of Title VII in a religious, race and national origin case brought by a naturalized U.S. citizen born in Lebanon who worked in Saudi Arabia. The majority acknowledged the reality that “[t]he religious and social customs practiced in many countries are wholly at odds with those of this country.”[4] “Requiring American employers to comply with Title VII in such a country could well leave American corporations the difficult choice of either refusing to employ United States citizens in the country or discontinuing business.”[5] In addition to the “paucity of reference to such an [extraterritorial] application” of Title VII in the statute or its legislative history, the Fifth Circuit majority noted the “serious, potentially devious policy considerations for and against application of [Title VII] outside the country.”[6]

In *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 246 (1991), the U.S. Supreme Court applied the presumption in holding that Title VII did not apply extraterritorially.[7] The Court noted the absence of “sufficient affirmative evidence that Congress intended Title VII to apply abroad.”[8] The Court invited Congress, however, to amend Title VII to apply to U.S. citizens working for U.S. employers abroad,[9] Congress did so in the Civil Rights Act of 1991.[10]

Congress added the following statement after the definition of “employee” in Title VII: “With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.”[11] The three major U.S. anti-discrimination laws – Title VII of the Civil Rights Act of 1964 (“Title VII”)[12], the Age Discrimination in Employment Act (“ADEA”)[13] and the Americans with Disabilities Act (“ADA”)[14] – now expressly protect U.S. employees working overseas if U.S. companies or foreign entities controlled by U.S. corporations employ them.[15] In providing for extraterritorial application of these three

important antidiscrimination laws, however, Congress created a “foreign laws” defense or exception, which permits a covered U.S. employer to participate in otherwise discriminatory action to avoid violating the laws of a foreign country where the U.S. expatriate works.[16] More specifically, a U.S. multinational employer may violate Title VII, the ADEA and the ADA if compliance “would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located.”[17]

For example, according to the District of Columbia Circuit Court of Appeals, an employer does not violate the ADEA if compliance would require the employer to violate a foreign law imposing a mandatory retirement age.[18] The EEOC, however, has adopted a narrower exemption to obligations arising from foreign law – that discriminatory labor agreements are not the equivalent of foreign statutes, and cannot be the basis of a foreign law defense, because they are discriminatory arrangements to which the company voluntarily agreed.[19] As discussed further below, the Circuit Courts of Appeal and the EEOC are not consistent with regard to the important question of whether obligations imposed by collective bargaining agreements – such as the one in Germany imposing a mandatory retirement age – rise to the level of a “foreign law” sufficient for application of the foreign laws defense.

Congress also specifically limited application of U.S. anti-discrimination law to cover only foreign entities that are controlled by an American employer.[20] Whether a foreign entity is “controlled” by a U.S. corporation depends on whether the two entities share interrelationship of operations, common management, centralized control of labor relations and common ownership and financial control.[21] This is essentially the same test used by the EEOC to determine whether two or more entities should be considered a “single employer,” and courts tend to put the most emphasis on the extent of centralized ownership and control of labor relations.

The U.S. Supreme Court has held that Congress has the authority to regulate employers of U.S. citizens abroad, but that such coverage must be explicitly provided in the statute.[22] As a result, other federal employment protections do not share the extraterritorial reach that Congress granted to Title VII, the ADA and the ADEA. For example, the National Labor Relations Act (“NLRA”), the Occupational Safety & Health Act (“OSHA”), and the Worker Adjustment & Retraining and Notification Act (“WARN Act”) apply only to workplaces within the United States and its possessions. Similarly, only employees based in the U.S. are protected by the Family Medical Leave Act (“FMLA”), the Equal Pay Act (“EPA”), the Fair Labor Standards Act (“FLSA”), the Equal Pay Act (“EPA”) and the whistleblowing provisions of the Sarbanes-Oxley Act (“SOX”), none of which apply abroad. Employees working outside the United States are not counted for determining coverage for purposes of the FMLA, but *are* counted for determining whether an employer is subject to the WARN Act.[23]

B. The “Foreign Laws” Exception to Extraterritorial Application of Title VII and the ADEA

The ADEA contains an express statutory exception to extraterritorial application:

It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer . . . to violate the laws of the country in which such workplace is located.[24]

The Civil Rights Act of 1991 extended Title VII to apply extraterritorially.[25] The 1991 Act also added a foreign laws exception nearly identical to that contained in the ADEA.[26]

The issue that has caused division in the case law is whether compliance with the U.S. anti-discrimination law “would cause such employer . . . to violate the laws of the country in which such workplace is located.” The courts and the EEOC have adopted different tests.

C. The Inconsistent Case Law Interpreting the Foreign Compulsion Defense to Otherwise Discriminatory Employment Actions

Prior to Congress’ amendment of Title VII in 1991 to provide for extraterritorial application to U.S. citizens working for U.S. employers (and U.S.-controlled employers) abroad, some courts considered the question under a different theory: whether the foreign law or requirement constituted a bona fide occupational qualification (“BFOQ”), a defense to discrimination.

Since the 1991 amendments, some courts have narrowly interpreted the “foreign laws” exception, requiring the employer to prove that complying with U.S. antidiscrimination laws will *inevitably* violate the national law of the host country. But the standard is uncertain, requiring multinational employers to speculate and litigate whether a foreign law trumps the antidiscrimination provisions of Title VII and the ADEA.[27] In addition, application of the foreign laws exception in a particular case is likely to implicate diplomatic relations. For these reasons, Congress should amend Title VII and the ADEA to permit employers to apply to the U.S. State Department for a foreign laws exception in appropriate cases.[28]

In one case, for example, an employee lost his age discrimination claim because the court held that a mandatory retirement provision in the employer's German labor contract trumped enforcement of the ADEA.

1. Kern v. Dynalectron: BFOQ Warranted Religious Discrimination

In *Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), a helicopter pilot working in Saudi Arabia sued his employer for religious discrimination based on its requirement that he convert to Islam as a condition of employment. The district court held that the requirement was a BFOQ that warranted the employer's intentional religious discrimination. The court reasoned that the requirement was not merely a response to a contractor's preference for Muslims, but rather reflected the undisputed fact that non-Muslim employees caught flying in Mecca would be beheaded under Saudi Arabia law.[29]

The district court distinguished a Ninth Circuit BFOQ decision, *Fernandez v. Wynn Oil Co.*,[30] in which the court held that customer preference in South America to do business with male employees did not justify the BFOQ defense to discrimination against a female employee. Unlike *Fernandez*, the evidence in the *Kern* case demonstrated that "being Moslem was linked to job performance," and was "an absolute prerequisite to doing this job (flying helicopters into Mecca)." The *Kern* court applied "Title VII's B.F.O.Q. exception as it was intended to be applied (*i.e.*, in those limited instances where one must tolerate religious discrimination where it is a necessity, in fact, a prerequisite for the performance of a job)."[31] "Thus," the court was "in no way allowing a foreign nation, here Saudi Arabia, to compel the non-enforcement of Title VII in this country." [32] The BFOQ defense was a precursor to the foreign compulsion defense to extraterritorial application of the anti-discrimination laws.

2. Abrams v. Baylor College of Medicine: U.S. Employer Must Obtain Official Pronouncement from the Foreign Government Before Foreign Compulsion Defense Applies

In *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986), for example, the Fifth Circuit found intentional discrimination where a medical school employer excluded Jewish physicians from a program that supplied doctors to a hospital in Saudi Arabia, for the asserted reason that they would be unable to obtain visas for entry to that country. The court held that the medical school had not established a BFOQ defense because it had simply *assumed* that Jewish physicians would be excluded from Saudi Arabia without asking the Saudi government about its policy on the matter. The court criticized the employer's "theoryless theory":

There is no evidence in the record that that statement represented the actual position of the Saudi

government with regard to the participation of Jews in the program. *In addition, there is no evidence that Baylor even attempted to ascertain the official position of the Saudi government on this issue.* Despite this “visa problem,” [the plaintiff-doctors] Abrams and Linde persisted in their desire to undertake a Saudi rotation. Nevertheless, each time a team departed for Riyadh, Jewish personnel were excluded from participation.

* * *

One of the chief difficulties in this case is that Baylor simply never arrived at a theory of its case. There was at least a theoretical possibility that Baylor could assert that “non-Jewishness” was a bona fide occupational qualification (BFOQ) for the Faisal Hospital rotation program, notwithstanding the fact that the exclusion of Jews as Jews would normally be prohibited from discrimination under Title VII. *Cf. Dothard v. Rawlinson*, 433 U.S. 321, 97 S. Ct. 2720, 53 L.Ed.2d 786 (1977) (gender is BFOQ for employment as a state prison guard). Baylor just danced all around this; it never zeroed in on this as a BFOQ. *In order to substantiate that defense though, Baylor would have to prove that the official position of the Saudi government forbade or discouraged the participation of Jews in the program. That would have meant that Baylor would have to obtain formally an authoritative statement of the position of the Saudis.* Yet Dr. DeBakey testified that it was not until 1983, more than a year after suit was instituted, that Baylor attempted to obtain such a statement. While the failure to seek or obtain such a critical determination is puzzling - and goes a long way toward knocking the props from under the BFOQ defense - a good explanation may well be the District Court's finding that Baylor's inaction was motivated, in part, by its desire not to “rock the boat” of its lucrative Saudi contributors. 805 F.2d at 531, 533 (italics added).

Abrams v. Baylor College of Medicine thus counsels multinational employers to inquire and verify with the foreign government whether local law will require the employer to discriminate in violation of Title VII and the ADEA. This standard has the potential to interfere with international diplomatic relations.

3. Brownlee v. Lear: No Imputation of Foreign Customer's Discrimination to U.S. Employer

Another noteworthy case is *Brownlee v. Lear Siegler Management Services Corp.*, 15 F.3d 976 (10th Cir. 1994). In *Brownlee*, the defendant Lear hired the plaintiffs to provide services to the Royal Saudi Air Force ("RSAF") in Saudi Arabia. "Sometime after plaintiffs' arrival in-country, RSAF personnel insisted plaintiffs were unsuitable for their assigned duties – allegedly based on impermissible age considerations – and barred plaintiffs from their work stations. When efforts to dissuade the RSAF proved fruitless, Lear capitulated and terminated plaintiffs." *Brownlee v. Lear Siegler Management Services Corp.*, 15 F.3d at 977.

Since the plaintiffs had no evidence that Lear intended to discriminate against them on the basis of age, their age discrimination suit "turn[ed] on whether the RSAF's alleged discriminatory intent may somehow be imputed to Lear." *Id.* The court concluded that it could not: "[W]e know of no authority for imputing a principal's *discriminatory intent* to an agent to make the agent liable for his otherwise neutral business decision. Similarly, while discriminatory practices of an agent may be imputed back to a principal to render the principal liable for its agent's statutory violations, [citations], we have found no authority for imputing statutory liability in the opposite direction, from a culpable principal to an innocent agent." *Id.* at 978. In these circumstances, following the client's wishes can correctly be regarded as a "neutral business decision." [33]

4. Mahoney v. RFE/RL: Private Contractual Obligations May Support the Foreign Compulsion Defense

In *Mahoney v. Radio Free Europe/Radio Liberty, Inc.*, 47 F.3d 447 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 866, 116 S. Ct. 181, 133 L.Ed.2d 120 (1995), the D.C. Circuit Court of Appeals elevated a private employer's contractual obligation under a German collective bargaining agreement to the status of a foreign law for purposes of the foreign compulsion defense. The employer, Radio Free Europe/Radio Liberty ("RFE/RL"), was a non-profit Delaware corporation based in Munich, Germany. RFE/RL broadcast around the world. In 1982, RFE/RL negotiated a collective bargaining agreement ("CBA") with a German labor union. Labor contracts in Germany typically contain a mandatory retirement provision, requiring covered employees to retire by the age of 65. The CBA contained such a mandatory retirement provision. RFE/RL signed the CBA before Congress amended the ADEA in 1984 to provide expressly for extraterritorial application to U.S. expatriates.[34] Following the amendment, RFE/RL applied to the German Works Council for an exception to the CBA so as not to violate the ADEA.[35] The Works Council denied RFE/RL's request for an exception, and RFE/RL appealed to a German labor court.

The German labor court also denied RFE/RL's request for an exception to the CBA's mandatory retirement provision, reasoning that an exception to allow U.S. employees to work past age 65 would discriminate against similarly situated German employees.[36] Based on that ruling, RFE/RL terminated the plaintiff's employment when he turned 65.

The district court found that RFE/RL had violated the ADEA. Relying on a German labor law professor as an expert witness, the employer argued that "a mandatory retirement age is a deeply embedded concept in German labor practice." [37] The defendant's expert opined that union contract terms with mandatory retirement ages were considered to have "legal force" in Germany. [38] The district court was unimpressed: "[E]ven an expert (even one with Professor Simitis's impressive credentials) cannot tell a court how to interpret the word 'law' as Congress used it in § 623(f)(1). . . . Defendant's argument based on German labor 'practice' and 'policy' is unpersuasive." [39] Noting the absence of legal authority directly on point, the district court reasoned that "it is difficult to imagine that Congress intended the term 'laws' to extend beyond its ordinary meaning to encompass practices, policies and contracts." [40] The district court posed a hypothetical of "a foreign country's labor unions came to be controlled by a group committed to the exclusion of a racial minority": "It can hardly be doubted that Title VII [] would not allow a U.S. employer in that country to enforce racist policies under the guise of obeying the foreign labor unions." [41] The *Mahoney* district court faulted the employer for not doing enough to "fully pursue the possibility of achieving an actual change in the union contract." [42]

On appeal from the district court's ruling, the D.C. Circuit reversed. [43] The D.C. Circuit faulted the parties for not bringing to the district court's attention an earlier U.S. Supreme Court decision, *Norfolk & Western Railway v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 111 S. Ct. 1156, 113 L.Ed.2d 95 (1991), which the appellate court found "stands firmly against the district court's interpretation," and that "[i]f *Norfolk & Western* had been brought to the district court's attention, we have no doubt that it would have ruled the other way." [44] In *Norfolk*, the Supreme Court held that a rail carrier's exemption under 49 U.S.C. § 11341(a) "from all other law" included a "carrier's legal obligations under a collective-bargaining agreement." [45] This meaning of "law" was "clear and certain" to the Court. [46] "A contract," the Court reasoned, "has no legal force apart from the law that acknowledges its binding character," and that "[a] contract depends on laws to enforce it and make it effective." [47]

The D.C. Circuit also brushed aside the plaintiffs' argument in *Mahoney* that the employer "could have bargained harder for a change in the labor contract":

If RFE/RL had not complied with the collective bargaining agreement in this case, if it had retained plaintiffs despite the mandatory retirement provision, the company would have violated the German laws

standing behind such contracts, as well as the decisions of the Munich Labor Court. In the words of [ADEA] § 623(f)(1), RFE/RL's "compliance with [the Act] would cause such employer . . . to violate the laws of the country in which such workplace is located." . . . When an overseas employer's obligations under foreign law collide with its obligations under the Age Discrimination in Employment Act, § 623(f)(1) quite sensibly solves the dilemma by relieving the employer of liability under the Act. Plaintiffs complain that RFE/RL could have bargained harder for a change in the labor contract. But application of § 623(f)(1) does not depend on such considerations. The collective bargaining agreement here was valid and enforceable at the time of plaintiffs' terminations, and RFE/RL had a legal duty to comply with it. There is not, nor could there be, any suggestion that RFE/RL agreed to the mandatory retirement provision in order to evade the Age Discrimination in Employment Act. Such provisions are, the evidence showed, common throughout the Federal Republic of Germany, and RFE/RL entered into this particular agreement before Congress extended the Act beyond our borders.[48]

D. The EEOC's Restrictive Test

Further complicating matters, the EEOC has rejected the *Mahoney* court's broad application of the foreign compulsion defense, opining that discriminatory labor agreements are not the equivalent of foreign statutes, and cannot be the basis of a foreign law defense, because they are discriminatory arrangements to which the company voluntarily agreed. See EEOC Enforcement Guidance at 2313-27.

The EEOC also opines that an employer "must initially demonstrate that the source of authority on which it relies constitutes a foreign law." [49]

The EEOC provides the following example of a situation where the foreign laws defense applies:

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.[50]

The EEOC's restrictive test thus requires that the U.S. employer prove both the existence of a specific foreign law, and that compliance with the U.S. law would cause the employer to violate the specific law of the foreign country. Under the first prong of the defense, the employer "must initially demonstrate that the source of authority on which it relies constitutes a foreign 'law.'" The EEOC Guidance then explains:

As noted in the Policy Guidance on the ADEA Foreign Laws Defense, the parameters of this element of the defense are uncertain. As a result, investigators should contact the Attorney of the Day whenever a question concerning a "law" arises. As further indicated in the Policy Guidance on the ADEA Foreign Laws Defense, however, there are circumstances in which the defense clearly would *not* be available. See Examples 2 and 3 at pp. 3-4 of ADEA Policy Guidance.[51]

The EEOC's ADEA Policy Guidance in turn provides:

A critical element of a successful sec. 4(f)(1) "foreign laws" defense is proof by the United States employer, or a corporation controlled by such employer, that compliance with the ADEA would "cause" it "to violate the laws" of the foreign country. The ADEA, as well as the legislative history interpreting the Act, is silent as to what constitutes a "law" for purposes of setting forth a sec. 4(f)(1) defense. This silence reflects, in part, a recognition of the difficulty in formulating such a comprehensive definition. As one court has noted, "[T]here is no word in the language which, in its popular and technical application, takes a wider or more diversified signification." [52] A "law," however, clearly does not include a corporation/business's rules, regulations or policies of employment.

The EEOC's ADEA Guidance provides the following examples:

Example 2 - CP is a 64-year-old United States citizen working in the country of Xenon for R, a United States business concern. At the annual stockholders meeting, an amendment to the corporate charter is adopted whereby the corporation must reduce any

employee's salary by 25% upon their reaching the age of 65. The Xenon Civil Code provides that all corporate charters and amendments to corporate charters must be registered with the Department of Commerce. Two weeks later R notifies CP of its intent to reduce CP's salary upon CP's reaching the age of 65. CP then files a charge of age discrimination with the Commission. In response to CP's charge, R asserts a sec. 4(f)(1) "foreign laws" defense as CP's continued employment at non-reduced wage would violate its government registered company charter.

R's defense would fail in this instance as the provisions of R's government registered company charter do not rise to the level of a foreign law under sec. 4(f)(1).

Example 3 - Assume for purposes of this example that the Republic of Argon's Constitution provides that only a bill which passes both houses of the legislature shall have the force and effect of law within the boundaries of the country. Due to overwhelming public support by voters in Argon, a measure, introduced and passed in the lower house of government, requires an employer to retire employees at the age of 55. CP is a 57-year-old United States citizen working in Argon for R, an American corporation. R notifies CP of its decision to retire CP immediately. CP then files a charge of age discrimination with the Commission. Two weeks later the upper house of government passes the mandatory retirement bill. R responds to CP's charge by asserting a sec. 4(f)(1) "foreign laws" defense grounded in the recently adopted mandatory retirement law.

A sec. 4(f)(1) defense would not be available to R under these circumstances as no mandatory retirement law existed at the time of R's decision to terminate CP, i.e., only one house had approved the measure. Of course, since the bill later became law, it could well have a limiting effect on the available relief, e.g., reinstatement would not be feasible.[53]

The second requirement of the foreign law defense is whether compliance with the ADEA would "cause" an employer to violate a foreign law. According to the

EEOC Guidance, “[a]nalysis of this issue focuses on the nature and substance of the foreign law asserted in support of the defense (i.e., does the ADEA mandate an action inconsistent with the foreign law or is such action merely discretionary).” The EEOC provides the following example:

Example 4 - Assume for purposes of this example that a Thorium law requires employers to pay an annual fee of \$50 for every active employee age 65 or above. This fee is used to fund Thorium's program to provide workers' compensation benefits. While the program is available to all employees in the country, Thorium has determined that the greater frequency and amount of benefits paid to persons 65 and older justifies the assessment. R, a United States employer operating in Thorium, employs 50 U.S. citizens, 10 of whom are 65 or above. On the last pay period of the year, in addition to normal deductions, R subtracts \$50 from the paycheck of each person 65 or above. In responding to charges of age discrimination filed by the 10 older workers, R asserts that compliance with the ADEA (not deducting additional money from the wages of older workers) would cause it to violate a law of Thorium.

R's foreign law defense would fail in this hypothetical situation because treating employees of all ages equally with respect to their compensation as required by the ADEA would not "cause" a violation of Thorium law. The law in question does not require that individual employees 65 and above be assessed the fee. Indeed, the Thorium law is entirely silent with respect to the source of the levy. R had the option of paying the \$500 itself or pro rating the amount deducted among all of its employees. Since either course of action would have satisfied the requirements of the ADEA without causing R to violate Thorium law, R's sec. 4(f)(1) defense would fail.[54]

The EEOC opines that to establish the second prong of the foreign laws defense, an employer must demonstrate that “it is impossible to comply with both sets of requirements,” i.e., the U.S. anti-discrimination law and the foreign country law.[55] The EEOC instructs its investigators to “attempt to obtain copies of all documentary material that might be relevant in assessing the requirements of the foreign law, including the text of the law itself, and any available legislative history or case law interpreting it.” Curiously relying on the district court’s opinion in *Mahoney*, and not the D.C. Circuit’s superseding opinion, the EEOC also

instructs its investigators to “consider the steps a respondent has taken or could take to avoid the conflict and to comply with Title VII or the ADA.”[56] According to the EEOC, “[t]he defense will be established only where compliance with Title VII or the ADA will inevitably lead to a violation of foreign law.[57]

The EEOC provides the following example:

Example: A Casparian statute requires that, after the period of their pregnancy-related disability, new mothers be given six weeks paid leave for childcare purposes. In compliance with the law, R, a United States employer employing teachers of English in Caspar, provides its female employees with such paid leave. Charging Party, a male U.S. citizen employed by R in Caspar, challenges R's failure to provide him the six weeks' childcare leave when his wife gave birth to their first child. R asserts a foreign law defense based on the Casparian statute.

R's foreign law defense would fail under the above facts. Title VII requires that childcare leave be granted, equally to male and female employees. See "Policy Guidance on Parental Leave," No. H-915-058 (Aug. 27, 1990). Requiring R to meet this Title VII obligation would not, however, "cause" a violation of -- or make it impossible for R to comply with -- Casparian law. Although R is required by Casparian law to give paid childcare leave to female employees, Casparian law does not forbid R from offering such leave to male employees as well. R can meet the requirements of both Casparian law and of Title VII by offering paid childcare leave to new parents in its employ, without regard to their sex.

The EEOC's unhelpful guidance further muddles the test for when a foreign law compels discrimination.[58] The EEOC decided to follow a lower district court's interpretation of the foreign compulsion defense, instead of the D.C. Circuit's controlling opinion in *Mahoney*. At best, multinational employers must now guess whether a court will follow the D.C. Circuit's broad test of "foreign law" in *Mahoney*, or the EEOC's more restrictive test adopting the district court's analysis in *Mahoney*. The EEOC's guidance unfortunately leads to more uncertainty and unnecessary litigation, not less. At least the EEOC admitted in its guidance that "the parameters of [the foreign law] element of the defense are uncertain." [59]

Like the EEOC's restrictive test, the *Restatement of Foreign Law* provides: "The defense of foreign government compulsion is in general available only when the

other state's requirements are embodied in binding laws or regulations subject to penal or other severe sanction; it is not available when the second state's orders are given in the form of 'guidance,' informal communications or the like." [60]

E. Proposal for U.S. Department of State Intervention

The EEOC's Guidance on Extraterritorial Application of the ADEA [61] recognizes the possibility of intervention by the U.S. Department of State in cases of conflicts with foreign "laws":

This scenario could also give rise to a possible conflict of laws or foreign policy question. If such a situation arises contact the Guidance Division as it will then coordinate with the Department of State for an appropriate review of the matter (see discussion at p. 5-6).

In light of the international comity concerns underlying the presumption against extraterritorial application, and the fact that the President enjoys the power to enter into treaties with foreign nations, [62] Congress should amend the three major U.S. anti-discrimination statutes (Title VII, the ADEA and the ADA) to allow a U.S. multinational employer to seek intervention by the U.S. Department of State in the event of a suspected conflict between these laws and the laws of a foreign country.

The Office of the Legal Advisor within the U.S. Department of State appears well suited to intervene in foreign law compulsion cases. The Office serves the following roles, among others:

1. Advises and represents the Bureaus and missions of the Department; the Secretary and senior leadership; and, through the Secretary, the Executive Branch on all legal and legal policy issues arising in connection with U.S. foreign policy and the work of the Department;
2. Brings legal considerations to bear in formulating and carrying out U.S. foreign policy and in the administration of the Department and the Foreign Service;
3. Reports directly to the Secretary of State;
4. Participates in international negotiations and represents the United States in international conferences related to legal issues, and serves as

a member of delegation and legal adviser to Treaty implementation commissions;

5. Represents the Department regarding legal concerns at interagency meetings, congressional hearings, and meetings of private organizations; and
6. Represents the United States in litigation before international tribunals.[63]

The Department of State's Office of Legal Advisor also serves as Chairman of the Department of State's Advisory Committee on International Law and the Secretary of State's Advisory Committee on Private International Law.

III. Conclusion

Based on the evolving case law, a U.S. employer cannot be certain when compliance with Title VII, the ADEA and the ADA "would cause such employer . . . to violate the laws of the country in which such workplace is located." Some courts, such as the D.C. Circuit in *Mahoney*, appear to recognize the reality that some countries' "laws" include religious customs, mores and local practices, whereas other courts and the EEOC take a more restrictive interpretation of what constitutes a "foreign law" sufficient to justify discrimination. Based on the *Abrams v. Baylor College of Medicine* decision by the Fifth Circuit, it would appear that, at the very least, U.S. companies with foreign operations should attempt to obtain some official governmental statement regarding the availability of work visas *before* excluding in those countries certain employees in protected classes (under U.S. law).

In light of the international comity and diplomatic relations concerns, and the uncertainty regarding the foreign laws defense to discrimination, Congress should amend Title VII, the ADEA and the ADA to provide for intervention by the U.S. Department of State in cases of perceived conflict with local laws.

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[1] See 29 U.S.C. § 630(f) (ADEA) ("The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."); *and compare* 29 U.S.C. § 213(f) (excluding from FLSA coverage "any employee" who performs services in foreign country).

[2] See Randall S. Abate, "Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context," 31 Colum. J. Envtl. L. 87, 92 (2005); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citing *Foley Bros., Inc. v.*

Filardo, 336 U.S. 281, 284-85 (1949)); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (“construction of any statute [is] intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. ‘All legislation is prima facie territorial.’”) (*quoting Ex parte Bain, In re Sawers*, 12 Ch. Div. 522, 528); see also William S. Dodge, “Understanding the Presumption Against Extraterritoriality,” 16 *Berkeley J. Int’l L.* 85, 90 (1998).

[3] *Affirmed*, 892 F.2d 1271 (5th Cir. 1990) (en banc).

[4] 857 F.2d at 1020.

[5] *Id.*

[6] *Id.*; see also *O’Loughlin v. The Pritchard Corp.*, 972 F. Supp. 1352, 1363 (D. Kan. 1997) (“Prohibiting age discrimination against a non-citizen of the United States working outside the United States or its territories could potentially intrude upon the domestic laws of other nations”); *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447, 450 (D.C. Cir.), *cert. denied*, 516 U.S. 866, 116 S. Ct. 181, 133 L.Ed.2d 120 (1995) (noting purpose of foreign laws defense is “to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed from the United States and the other imposed by the country in which the company operates”).

[7] Interestingly, the U.S. Department of Justice opined in 1975 that Title VII applied extraterritorially during legislative debates over a proposed prohibition on participation in foreign boycotts requiring religion-based employment discrimination. See *Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. On International Trade and Commerce of the House Comm. On International Relations*, 94th Cong., 1st Sess. 88 (1975) (testimony of Antonin Scalia, Asst. Atty. Gen.), *quoted in Note, Equal Employment Opportunity for Americans Abroad*, 62 *N.Y.U.L.Rev.* 1288, 1291 (1987); *Boureslan v. Aramco, Arabian Am. Oil Co.*, 892 F.2d 1271, 1276-77 & n.4 (5th Cir. 1990).

[8] 499 U.S. at 259.

[9] *Id.* at 255-56; see Scott Smith, “Extraterritorial Application of Title VII and the Americans With Disabilities Act: Have Statute, Will Travel,” 36 *Tex. L. Rev.* 191, 192 (1995).

[10] See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[11] 42 U.S.C. § 2000e(f).

[12] 42 U.S.C. § 2000e, *et seq.* (prohibiting discrimination and harassment on the basis of race, sex, religion and national origin)

[13] 29 U.S.C. § 621 *et seq.*

[14] 42 U.S.C. § 12101 *et seq.*

[15] See *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147 (3rd Cir. 1997), *cert. denied*, 118 S. Ct. 94 (1997). Note that the federal Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201 *et seq.* (“SOX”), is silent as to whether employees located outside of the United States can sue under its whistleblower provisions (§ 1514A). SOX protects employees who disclose potential violations of federal securities laws from retaliation by their employers. SOX’s “whistleblower” provision does not specifically protect, nor does it explicitly exempt from protection, employees working for non-U.S. subsidiaries of U.S. corporations. In *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir.), *cert. denied*, 126 S. Ct. 2973 (2006), the First Circuit ruled that the SOX whistleblower provision did not reflect the “necessary clear expression of congressional intent” to extend the reach of the provision to non-U.S. employees working outside the U.S. In a February 2008 U.S. district court decision, *O’Mahony v. Accenture, Ltd.*, 537 F. Supp. 2d 506, 513-15 (S.D.N.Y. 2008), the court rejected the employer’s argument supporting dismissal of the employee’s SOX claim on the ground that SOX (§ 1514A) does not apply extraterritorially. The plaintiff had worked for the employer for many years, and was working in France when she told her supervisor that she objected to the company’s conduct in failing to make French social security contributions (which the company was required to do under an agreement between France and the United States). When the employer demoted the plaintiff, she alleged that the demotion was in retaliation for her complaint. The court ruled that the plaintiff may sue in the U.S. under the SOX whistleblowing provision because the employment relationship was between a U.S. employer and its employee, and both the alleged fraud and the decision to retaliate occurred primarily in the United States. This case, which is now on appeal, potentially extends the reach of SOX’s whistleblowing retaliation provision.

[16] See 42 U.S.C. §§ 2000e-1(b), 12112(c)(1); 29 U.S.C. § 630(f)(1). See also EEOC Enforcement Guidance, N-915.002. See generally M. C. St. John, Note, “Extraterritorial Application of Title VII. The Foreign Compulsion Defense and Principles of International Comity,” 27 Vanderbilt J. Transnat’l L. 869 (1994); L. Maher, “Drawing Circles in the Sand: Extraterritoriality in Civil Rights Legislation After *Aramco* and the Civil Rights Acts of 1991,” 9 Conn. J. Int’l L. 1 (1993); O. Dirig & S. Sarofsky, Note, “The Argument for Making American Judicial Remedies Under Title VII Available to Foreign Nationals Employed by U.S. Companies on Foreign Soil,” 22 Hofstra Lab. & Emp. L.J. 709 (2005); L. Brown, Note, “The Title VII Tug-of-War: Application of U.S. Employment Discrimination

Law Extraterritorially,” *Vanderbilt J. Transnat’l L.* (May 2001); M. Madden, “Strengthening Protection of Employees at Home and Abroad: The Extraterritorial Application of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act,” 20 *Hamline L. Rev.* 739 (1996-97).

[17] 29 U.S.C. § 623(f)(1) (1967).

[18] See *Mahoney v. RFEFL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 181 (1995).

[19] See EEOC Enforcement Guidance (1993) at 2313-27.

[20] See 42 U.S.C. §§ 2000e-1(c)(2), 12112(c)(2)B).

[21] See 42 U.S.C. §§ 2000e-1(c)(3), 12112(c)(2)(C); 29 U.S.C. § 623(h)3; see also EEOC Policy Guidance: Application of ADEA and EPA to American Firms Overseas, Their Overseas Subsidiaries, and Foreign Firms, No. N-915.039 (March 3, 1989).

[22] See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991). The same appears to be true with respect to extraterritorial application of state law. See *Torrico v. International Business Machines*, 213 F. Supp. 2d 390 (S.D.N.Y. 2002) (extending protection of New York anti-discrimination law to New York resident working in Chile).

[23] See 29 C.F.R. § 825.105; 20 C.F.R. § 639.3(1)(7)

[24] 29 U.S.C. § 623(f).

[25] 42 U.S.C. § 2000e-1(b) & (c) (as amended by Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991)).

[26] 42 U.S.C. § 2000e-1(b) (an action otherwise prohibited is not unlawful if it “would cause such employer . . . to violate the law of the foreign country in which such workplace is located”).

[27] See EEOC Enforcement Guidance on Application of Title VII and ADA to Conduct Overseas and to Foreign Employers in the United States (1993), available at: <http://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html>. Some commentators have criticized the EEOC’s restrictive test as to what constitutes a “foreign law,” arguing that it “ignores the practical realities of companies operating outside Europe and North America.” Scott Smith, “Extraterritorial Application of Title VII and the Americans With Disabilities Act: Have Statute, Will Travel,” 36 *Tex. L. Rev.* 191, 211-12 (1995).

[28] For additional commentary on the “foreign compulsion” defense, also called “foreign laws exception,” see Note, “The Title VII Tug-of-War: Application of U.S. Employment Discrimination Law Extraterritorially,” *Vanderbilt Journal of Transnational Law*, May 1, 2007; Meredith Poznanski Cook, Note, “The Extraterritorial Application of Title VII: Does the Foreign Compulsion Defense Work?,” 20 *Suffolk Transnat’l L. Rev.* 133, 145-53 (1996); M. Madden, “Strengthening Protection of Employees at Home and Abroad: The Extraterritorial Application of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act,” 20 *Hamline L. Rev.* 739, 763 (1996-97). at 763 (noting “no guidance exists as to what constitutes ‘compulsion’ sufficient to invoke the [foreign compulsion] defense”).

[29] 577 F. Supp. at 1200-01.

[30] 653 F.2d 1273, 1276 (9th Cir. 1981) (“No foreign nation can compel the non-enforcement of Title VII here”; “There is, in short, no factual basis for linking sex with job performance”).

[31] *Kern*, 577 F. Supp. at 1202.

[32] *Id.*

[33] *Brownlee v. Lear Siegler Management Servs. Corp.*, 15 F.3d at 978.

[34] Older Americans Act, Amendments of 1984, Pub. L. No. 98-459 §§ 802(a), 98 Stat. 1767, 1792 (1984).

[35] “Works Councils” are common in Western Europe to ensure that employers comply with collective bargaining agreements. Around 10 million workers across the EU have the right to information and consultation on company decisions at European level through their EWCs. The EU Works Council Directive (94/45/EC) applies to companies with 1,000 or more employees, including at least 150 in two or more Member States. Of these, 841 have EWCs in operation, covering around 60% of workers in the EU.

[36] 47 F.3d 448.

[37] *Mahoney*, 818 F. Supp. 1, 3 (D.D.C. 1992).

[38] *Id.*

[39] *Id.*

[40] *Id.* at 4.

[41] *Id.*

[42] *Id.* The district court conceded that “some of defendant’s officers had discussions about the possibility of eliminating the mandatory retirement provision [in the union contract],” but found “these discussions [] limited and informal.” *Id.* The district court noted that the employer “did not pursue serious negotiations with the unions” on the mandatory retirement provision issue, even though it did negotiate various other changes to the union contract, including a comprehensive new salary structure

[43] *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995), *rehearing and suggestion for rehearing en banc denied* (April 19, 1995).

[44] *Id.* at 449.

[45] *Norfolk*, 499 U.S. at 127, 111 S. Ct. at 1162.

[46] *Mahoney*, 47 F.3d at 449 (citing *Norfolk*, 499 U.S. at 133, 111 S. Ct. at 1165-66).

[47] *Mahoney*, 47 F.3d at 449-50 (citing *Norfolk*, 499 U.S. at 130, 111 S. Ct. at 1164). To drive the point home, the Supreme Court quoted extensively from its prior opinions. “The obligation of a contract is ‘the law which binds the parties to perform their agreement.’” *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 429, 54 S. Ct. 231, 237, 78 L.Ed. 413 (1934) (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 197, 4 L.Ed. 529 (1819)). It is the law that gives “legal and binding effect to collective agreements.” *Detroit & T.S.L.R.R. v. United Transp. Union*, 396 U.S. 142, 156, 90 S. Ct. 294, 302, 24 L.Ed.2d 325 (1969). “Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge.” *Farmers & Merchants Bank of Monroe v. Federal Reserve Bank of Richmond*, 262 U.S. 649, 660, 43 S. Ct. 651, 655, 67 L.Ed. 1157 (1923).

[48] *Mahoney*, 47 F.3d at 449-50.

[49] EEOC Guidance on Application of Title VII
(www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html) (1993).

[50] See <http://www.eeoc.gov/facts/multi-employees.html> (last visited 3/8/09). The EEOC also opines: “An American employer cannot transfer an employee to another country in order to disadvantage the employee because of race, color, sex, religion, national origin, age, or disability. For example, an employer may

not transfer an older worker to a country with a mandatory retirement age for the purpose of forcing the employee's retirement.”

[51] See <http://www.eeoc.gov/policy/docs/foreignlaws-adea.html> (last visited 3/8/09).

[52] Citing *Miller v. Dunn*, 72 Cal. 462 (1887).

[53] See <http://www.eeoc.gov/policy/docs/foreignlaws-adea.html> (last visited 3/8/09).

[54] *Id.*

[55] *Id.*

[56] *Id.* Compare *Mahoney*, 818 F. Supp. at 5 (rejecting defendant's claim that it had done all it could to comply with the ADEA where it had not fully pursued possibility of changing union contract or of mediating mandatory retirement issue), with EEOC Decision No. 85-10, CCH Employment Practices Guide 6851 (respondent not liable for refusing to hire woman for work overseas where it provided "authoritative" evidence that foreign law restricted employment of women and demonstrated that it had taken all possible steps to process her application despite foreign restrictions).

[57] *Id.* Cf. *Kern v. Dynalectron Corp.*, 577 F. Supp. 1196, 33 EPD 34,194 (N.D. Tex. 1983) (employer had BFOQ defense for requiring helicopter pilots it employed in Saudi Arabia to convert to Moslem religion where Saudi Arabian law provided for beheading of non-Moslems who entered holy area), *aff'd*, 746 F.2d 810, 40 EPD 36,317 (5th Cir. 1984); see also EEOC Decision No. 90-1, CCH Employment Practices Guide 6875 (customs and preferences of host country do not justify gender discrimination against United States citizens).

[58] Commentators have criticized the EEOC's restrictive test, see St. John, Note, "Extraterritorial Application of Title VII. The Foreign Compulsion Defense and Principles of International Comity," 27 *Vanderbilt J. Transnat'l L.* 869, 890-91 (arguing that "good faith standard" should apply to determine whether employer's discrimination was compelled) (1994); Smith, "Extraterritorial Application of Title VII and the Americans With Disabilities Act: Have Statute, Will Travel," 36 *Tex. L. Rev.* 191, 192 (1995).

[59] EEOC Guidance (1993).

[60] *Restatement (Third) of Foreign Relations Law* § 441 Comment c (1987).

[61] See

[62] Under the U.S. Constitution, the President is responsible for making treaties with the advice and consent of the Senate. Once the President transmits a treaty to the Senate, it is referred to the Committee on Foreign Relations. The House of Representatives plays a role in the treaty process only when separate legislation to implement the treaty is required. See Article II, section 2 of the U.S. Constitution. More information on the treaty process is available at [\[http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm.\]](http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm)

1[63] See U.S. State Department website: <http://www.state.gov/>; U.S. Department of State Foreign Affairs Manual ("FAM") 1 – Organization and Functions, 1 FAM 240 (2/10/09).