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How to Implement a Cross-Border Human Resources Policy

Challenge:

Drafting a cross-border human resources policy (such as a global code of conduct, global employee handbook, or a free-standing global workforce rule) may be a challenge. But legally *implementing* a global policy across multiple jurisdictions is an even bigger undertaking—one too frequently overlooked.

In this era of internationally-aligned business operations, multinational headquarters launch all sorts of cross-border human resources policies. Multinationals these days issue, for example: global codes of conduct; global and regional employee handbooks; one-off stand-alone policies on human resources topics (discrimination and harassment, email monitoring, anti-bribery, smoking and dozens of other topics); global safety protocols (global disaster-response, pandemic policies, global sets of "cardinal safety rules"); global intranets containing work rules; one-time global orders like litigation holds and crisis communications; global and regional sales commission plans—and so many others.

When a multinational's headquarters launches any sort of cross-border HR policy, often the only question that gets asked is: *"What is our new cross-border HR policy going to say?"* But drafting policy text merely gets the cross-border HR policy launch process started. As soon as any cross-border HR policy is drafted, a multinational's follow-up question immediately needs to become: *"How are we going to impose this HR policy on our employees overseas?"* That is to say, "phase one" of any cross-border HR policy project is simply drafting the policy text. "Phase two," the more involved phase, should be implementing the policy legally across all affected jurisdictions. Unfortunately, too many global HR policy launch projects gloss over this "phase two."

- **"Backstopping":** For that matter, many cross-border HR policies purportedly in place today were launched without complying with the vital logistical and legal issues for implementing new HR policies outside the United States. As such, many existing global HR policies are subject to challenge—and could raise liabilities or be unenforceable. A best practice for a company that failed properly to implement its current cross-border HR policies correctly is to "backstop"—go back and correct oversights in implementation.

Pointer:

Treat any cross-border HR policy project as having two phases: Phase one (the easier part) is drafting the policy in the first place. Phase two (the more complex part) is implementing the policy, legally, in all applicable jurisdictions. Take six issues into account here.

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Six legal issues can come into play, in any jurisdiction, when implementing a headquarters-driven HR policy locally. To implement a new HR policy across borders, consider, in each affected jurisdiction, these six issues:

1. **Repeal or align existing policies and work rules:** Never issue a cross-border HR policy by releasing it from headquarters "on high," "damn the torpedoes," disregarding existing, possibly-inconsistent local human resources policies. Rather, repeal or align existing HR policies with the new headquarters cross-border HR edict. Doing this raises three sub-issues: Repealing an old cross-border HR policy; aligning with local HR policies; and aligning with local work rules.

   - **Repealing an old cross-border HR policy:** A multinational that issues a *revised* cross-border HR policy needs to repeal its own earlier version already out there. Too many multinational headquarters issue a new version without ever bothering about their own old version. Later, employees may genuinely get confused as to which one controls. Worse, an employee disciplined later for committing an act that violates the new policy but not the old one may exploit the "dueling" policies, arguing the old version remains in force. Always do whatever necessary to repeal an old version of a global HR policy, in every jurisdiction.

   - **Aligning with local HR policies:** A more complex scenario is dovetailing a cross-border HR policy with existing *local* HR policies. Cross-border HR policies often contain provisions inconsistent with certain existing HR policies, at least in some jurisdictions. For example, a global code of conduct might contain provisions on, say, conflicts of interest, expense reimbursement, business gift procedures—even on-job smoking or alcohol—that are inconsistent with local overseas affiliate policies or HR protocols that touch on these same topics but using inconsistent language that conflicts, in at least some respects, with the new code. When a local employee commits an act that complies with a local policy yet violates headquarters's cross-border policy, expect local labor courts to be skeptical when the employer argues its broad cross-border policy somehow trumps its own affiliate's locally-tailored policy. In every affected jurisdiction, be sure to repeal or align all local human resources policies inconsistent with a new headquarters cross-border policy. This can be a big job, but *failing* to do it causes problems—and gives locals an excuse to ignore the new cross-border HR policy.

   - **Aligning with local work rules:** Many jurisdictions, including France, Japan and Korea, require employers to issue formal "work rules" that list all infractions for which the employer can impose discipline. The idea behind "work rules" requirements is to estop an employer from disciplining staff for acts *other than* those the employer had previously forbidden via its own rules. Imagine this hypothetical scenario: A multinational's Tokyo affiliate has issued its required Japanese work rules which contain, say, 23 specific rules. But none of the 23 rules happens to mention bribery. Multinational headquarters, though, has issued a tough global anti-bribery/FCPA policy. Now imagine some Japan salesman entertains a government minister in a way that clearly violates the global bribery policy. If the employer tries to fire the salesman for that "bribe," the salesman will argue the firing is illegal because he did nothing to breach any of the 23 listed work rules. In launching a cross-border HR policy in a mandatory work rules jurisdiction, be certain to amend local work rules to accommodate the new policy or to incorporate it by reference.

2. **Multiple versions:** US multinationals rolling out a new cross-border HR policy should decide whether to issue one global policy worldwide, whether to create a "rest-of-the-world" version separate from the headquarters version, or whether to spin off distinct local polices or "riders" for each affected country. There are pros and cons to each approach. Selecting the best approach depends on the policy topic: Some topics (such as ethics, insider trading, bribery) more readily lend themselves to a global approach. Other topics (such as discrimination and harassment) are more appropriate for a "US" and "rest-of-world" approach. Still other topics (such as vacation policy and overtime rules) are most appropriate for a local approach:

   - **One global version:** A single cross-border HR policy creates a uniform policy and is always simplest. But policy provisions appropriate for US employees may need to be modified or reworded for use elsewhere. As just one example, an anti-harassment policy that mentions US protected groups will be far too narrow in jurisdictions that prohibit so-called "moral harassment," "bullying," "mobbing" or "psycho-social harassment."

   - **Two versions:** Many US-based multinationals launch a US HR policy plus a separate "rest-of-the-world" version. This strategy accounts for issues from a non-US perspective, but neglects specific local-country issues.

   - **Local versions:** Every country's laws are unique. Tailoring aligned local HR policies or crafting local "riders" for each country to account for local variations in law and human resources policy should be the most effective strategy. But issuing many different versions of one essentially global HR policy can get unwieldy—and expensive.

3. **Dual employer:** Multinationals' overseas employees often work for a locally-incorporated subsidiary or affiliate (as opposed to an unincorporated local branch or representative office of the parent). To impose a headquarters HR policy directly on employees of foreign affiliates raises the "dual employer" problem: Can an overseas parent corporation (headquarters) issue rules and orders to people—staff of local affiliates—whom it does not even employ? By imposing rules directly on foreigners who do not work for the headquarters entity, the headquarters may be deemed a *co-employer* or dual

employer of staff at the local subsidiary, jointly liable for employment claims. In Latin America, US multinationals regularly face this allegation. A related problem is that a parent entity imposing a global human resources policy directly on staff employed by subsidiaries abroad arguably starts *transacting business* locally—possibly even becoming a local "permanent establishment" subject to corporate registration and tax filing obligations. A best practice to avoid these problems is for headquarters to impose the cross-border HR policy on its foreign affiliate entities only. Each affiliate, in turn, imposes the policy on *its* own employees.

- **"Not my policy":** Taking this approach offers an additional benefit: It cuts off the technical argument of an overseas employee disciplined for violating a headquarters HR policy who claims that particular policy does not even reach him, because his employer never implemented it in the first place.

4. **Consultation:** Outside the US, employee representative groups are common—works councils, trade union committees, health-and-safety committees, ombudsmen, and the like. Labor laws abroad from Europe to China and beyond impose a requirement analogous to the US labor-law concept of "mandatory subject of bargaining": An employer cannot change workplace rules until after it sits down and discusses, negotiates, or "informs and consults" about the proposal with its employee representatives. This doctrine implicates all cross-border HR policies that impose rules or otherwise change (arguably, reduce) employment terms. Unfortunately, employee representatives outside the US can be skeptical of many US-generated cross-border HR policies. When a multinational headquarters launches some new cross-border HR policy or other HR "offering," it likely makes sense to involve overseas local *management-side* labor liaisons. Give the company's own foreign management-side labor liaisons a "heads-up" that a cross-border HR policy is coming, and discuss consultation strategy and timing. Then take any consultation steps with worker representatives that are necessary or advisable.

5. **Translation:** In Belgium, Chile, France, Iraq, Mongolia, Portugal, Quebec, Turkey, much of Central America, Venezuela and elsewhere, local laws require that work rules (including rules in a cross-border HR policy) be communicated in the local language. In these places, an English-language policy will not only be unenforceable, it can cost money. A few years ago a major US multinational was forced to pay a US$800,000 sanction because it had distributed English-language papers to French workers. Even in those countries that do not impose local-language laws, local courts are reluctant to enforce English-language policies. Translations buttress enforceability. Before issuing any global policy in English only, consider foreign translation requirements and strategy. (*See* our *Global HR Hot Topic* for November 2011.)

6. **Distribution/acknowledgement:** Multinationals need strategies for how to distribute a cross-border HR policy to overseas employees in a way that makes them responsible to comply. Multinationals often feel a need to develop some way to prove each employee actually received the policy—to facilitate enforcement against employees who later claim never to have seen it, and to establish a defense against US Foreign Corrupt Practices Act, Sarbanes-Oxley and Dodd-Frank enforcement actions. The default US approach here is to have all employees sign acknowledgements saying they have received and read the policy and that they will comply. But abroad, American-style employee acknowledgements raise logistical problems:

   - **Presumptive coercion or presumptive employment contract:** In Continental Europe and elsewhere, employee acknowledgments often are not binding; signed employee consents in these jurisdictions can be presumed coerced due to inequality of bargaining power—almost like a contract with a minor or someone suffering from diminished mental capacity. In other jurisdictions, a signed policy acknowledgement will be deemed presumptively an amendment to the employment agreement, and so will be unenforceable unless it conforms with local strictures and filing requirements for employment contracts.

   - **Non-signers:** A 100% return rate on employee acknowledgements may be impossible outside the US, where cross-border HR policies often meet with skepticism. Abroad, expect some employees either openly to refuse to sign or passively to neglect returning a signed acknowledgement even after repeated reminders. And expect local human resources staff to feel intimidated pestering high-level superiors with reminders. Away from the US employment-at-will environment there is no "good cause" to discipline staff for openly refusing or quietly neglecting to sign a routine policy acknowledgement. And non-signers raise an "Achilles' heel" problem: If they later violate the policy, they will argue they were exempt from it precisely because they never signed; they will point to their co-workers' signed acknowledgements and argue that the cross-border HR policy reaches only those of their colleagues who agreed to sign. A company facing that argument may realize it would have been better off not collecting any acknowledgements in the first place. Always have a strategy for how to handle non-signers.

- **Proof problems:** Human resources teams may have imperfect track records managing documents. Years after acknowledgements were signed, it can sometimes prove maddeningly difficult to locate the specific signed acknowledgement of the one employee in a remote overseas office who now, all of a sudden, needs to be disciplined for violating a global HR policy which he claims never to have seen before. Another problem is that new-hires who "onboard" after a cross-border HR policy was launched may never get asked to sign the acknowledgement. And on-line-click acknowledgements always raise a proof problem: The employer will have the burden to prove that a given employee actually clicked "I accept"—which can be difficult to prove, years later, under evidence and "electronic signature" rules in a foreign court. ("Electronic signature" law overseas is quite complex and differs by country.)

As an alternative to acknowledgements, local HR representatives might distribute a new cross-border HR policy personally, or in training sessions. Then HR representatives themselves might sign forms or log sheets that state the date and circumstances by which each employee received, and was trained on, the policy.

Conclusion

Cross-border HR policies have become virtually ubiquitous among multinational employers. Indeed, global policies of one sort or another are now all but inevitable in today's interconnected, global environment. Drafting a solid cross-border HR policy is itself a challenge. But too often a multinational focuses on policy text to the exclusion of complex local implementation requirements. Drafting is merely "phase one" of a cross-border HR policy launch project; "phase two," the more complex phase, is implementing the code legally in each relevant jurisdiction. As soon as a global HR policy gets drafted, focus on a legally-compliant global *launch*. Consider six issues to ensure the policy becomes enforceable in all applicable countries.

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