Global Overview

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American companies have gone increasingly global in recent years. Many US firms now have far-flung operations and employees (as well as customers) spread around the world. US-based multinationals often learn the hard way that they cannot deal with overseas employees in the same manner they do with their American counterparts because of the dramatic differences between the US and the rest of the world's labour and employment laws. This overview highlights and summarises these principal distinctions and discusses recent reforms and proposals in some foreign countries to narrow that gap.

Employment-at-will versus job stability

The United States regulates its labour market significantly less than other countries do. Unlike much of the rest of the world, there is no comprehensive statutory labour law governing individual employment relationships or constitutional recognition of labour rights in the US. The terms of employment relationships are determined largely by employers and accepted or rejected by workers rather than imposed by the government. This is generally designed to encourage business development, job creation, and the movement of workers from declining sectors of the economy to expanding sectors. The result is that the United States has a historically lower unemployment rate than that of most other nations.

The basic principle of individual labour law in the United States is the employment-at-will doctrine. Under employment-at-will, US private sector employers can dismiss their non-unionised employees at any time for any reason or even no reason at all. Thus, non-union US private employers do not have to demonstrate 'just cause' to terminate an employee without paying severance or providing notice. They just have to make sure that the termination is not for discriminatory (eg, based on sex, age, race, national origin, religion or disability) or retaliatory reasons, which are outlawed by federal, state, and sometimes local statutes.

On the other hand, in most other countries, both developed and developing, employees are presumed to have a basic right to keep their jobs indefinitely. Put simply, unlike in the United States, it is generally difficult to discharge employees abroad without incurring substantial liability. Their employment can only be terminated without consequence if the employer has 'just cause'. What constitutes 'just cause' is often specifically defined in the law and nothing less than serious misconduct qualifies. Establishing 'just cause' is typically analogous to meeting the very high burden of demonstrating wilful misconduct by an employee in an Unemployment Compensation hearing in the United States. And if the employer cannot prove 'just cause', it must either provide a lengthy pre-termination notice period or pay a very generous severance based on seniority. For high-level, long-term employees, these severance payments can run into six or even seven figures.

Importance of discrimination laws

One consequence of the fact that all employees in most countries outside the US have 'just cause' protection is that, although there are often anti-discrimination provisions on the books as in the US, they are invoked far less frequently. There is no need for foreign employees who believe that they were unfairly treated to attempt to 'shoehorn' their claims to fit within anti-discrimination protections to obtain relief. Aggrieved employees simply file claims that their terminations were without 'cause'.

Employment contracts

In the United States, employees rarely have written employment contracts. Employment contracts are generally reserved only for high-level executives. And, in the absence of a written employment contract for a fixed term, American workers' employment is 'at-will'.

By contrast, in most of the rest of the world employment contracts are either statutorily required for all employees or highly recommended as a best practice. Moreover, the minimum terms employment contracts must contain are often outlined in statutes. In the absence of a written employment contract, it is very difficult for employers to win if disputes with foreign employees arise.

Managing termination exposure risk

Although discharged employees in most parts of the world are entitled by law to generous severance payments, the potential exposure is easily quantified and can be budgeted and accrued for. Typically, the formula is set out in a statute and includes a base payment plus a multiple based on seniority of final pay for a specified period. And unlike in the US, compensatory and punitive damages, jury trials, and class and collective actions are generally unavailable for employment claims. This greatly reduces the risk of an unexpected or runaway result.

Unionisation

Less than 7 per cent of the US private sector workforce is unionised and it is doubtful that that number will increase anytime soon. Although the proposed Employee Free Choice Act, which would allow workers to elect union representation simply by signing a support card, was a hot issue in the 2008 elections, support has dwindled in the wake of the economic crisis. In 2012, Indiana became the 23rd 'right-to-work' state in which employees do not have to pay dues to unions to contribute to the cost of negotiating and administering union contracts. US unions claim that this weakens unions. It is particularly notable that Indiana adopted a 'right-to-work' law, as it was the first manufacturing state with a powerful union presence in the US to do so.

In the rest of the world, union and other employee representation penetration is much higher. Depending on the jurisdiction, employee representation outside the US can take a variety of forms, including trade, industry, national, regional, or local unions, works councils, and health and safety and other committees with employee members.

Employee benefits

Another fundamental difference between the US' and other countries' employment laws is in the area of employee benefits. In the United States, whether to provide fringe benefits and the scope of those benefits is up to the employer. For example, there are no statutory requirements for paid or unpaid vacations or holidays, paid leaves of absence, medical insurance, or pension plans. A US employer can even require employees to work on Christmas with no extra pay, something that would be unheard of in many parts of the world. Of course, most US employers do on their own provide generous fringe benefits to attract and retain qualified workers. But they are not mandated to do so by law.

In most other countries, however, the labour laws require that employers provide a whole host of benefits to their employees. These benefits include required vacations and holidays and premium pay for those vacations and holidays, sick and maternity leaves and leave pay, health insurance, caps on hours worked, year-end bonuses, and even profit sharing.

The gap begins to narrow

In recognition that overly employee-protective labour and employment laws have contributed to high unemployment, a number of countries have recently adopted, or are considering, changes that will bring their laws more in line with the US model. Particularly notable are the recent sweeping labour law reforms in Spain and Italy. Being that Spain is faced with nearly a quarter of its total workforce, and over half of its youth, jobless, its new conservative government published a decree in February 2012 giving employers incentives for hiring and making it easier and less costly to fire employees. Among other things, maximum severance payments were reduced for most businesses from 42 months, or 3.5 years' pay, to 12 months. Similarly, Italy's new prime minister, Mario Monti, in an effort to address a youth unemployment rate approaching one-third and other serious economic challenges, has announced plans to allow businesses more leeway in firing. Although employees discharged for economic reasons would receive up to 27 months' pay, they would not be eligible for reinstatement or reimbursement of lost earnings as they currently are. The objective of these measures is to promote business confidence and innovation and, ultimately, the creation of more jobs. And a number of other countries, including France and Mexico in this election year and the UK, are seriously entertaining similar proposals to make their labour laws more flexible to encourage businesses to expand their workforces, consistent with each country's own unique culture and political realities.

Conclusion

Outside the United States there is a strikingly different, more rigid and employee-protective approach to employment relationships that labour and employment practitioners need to recognise in our increasingly global economy. Nevertheless, we can anticipate some loosening in other countries' labour and employment laws to make them more business-friendly to incentivise new hiring as economic conditions improve.

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