Webcast: Twenty-five Basic Employment Law Questions and Answers for Managing Non US-based Employees
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Presented by ACC's Employment & Labor Law Committee and Jackson Lewis LLP
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ASSOCIATION OF CORPORATE COUNSEL

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March 21, 2006

Operator: Just a reminder, today's conference is being recorded.

Female: Please, go ahead, (Angela).

(Angela DeSilva): Good afternoon, everyone. My name is (Angela DeSilva). I'm Associate General Consulate to ((inaudible)) corporation and the moderator for this conference.

I'd like to introduce our speakers. We have two, (Jim Byer), who is Senior Employment Law Counsel at ((inaudible)) in Chicago and who has significant experience in international labor law matters, and (Johann Lobey), a partner at (Jackson Lewis), who is advises corporations on cross-border employment and expatriate issues, and has law degrees from

universities in South Africa, England, and the U.S., and is admitted to practice law in a variety of states.

You can read more about each of our speakers on the Web site.

And with that, I'll turn it over to (Jim Byer).

(Jim Byer): Thank you, (Angela).

Good morning and good afternoon to everyone wherever they are on the face of the earth.

Certainly, we deal these days in a global workplace environment. Many companies are going to have employees, perhaps from the United States, working in other countries and vice versa. And we want to cover some of these basic issues today. We're trying to make a set of basic levels so please, bear with us. Those who are more experienced, we will try to cover those issues as well.

But the first question that I'm going to ask (Johann) today is what law's going to apply?

(Johann Lobey): (Jim), that's a challenge that we face each time when we manage employees who are overseas. It's sometimes the misconception that if we employ an individual here that and the individual is working for an American company that the individual will always be covered by U.S. laws.

That is not correct. As a basic starting point, we should work on the premise that where the employee is working, the law of that country will govern the employment relationship.

To the extent that we are dealing with American employees who are working overseas for an American corporation, or a corporation controlled by an American corporation. In those limited circumstances, three of our anti-discrimination laws will follow those American employee who works overseas and those are Title 7, the Age Discrimination Act, and the Disability Discrimination Act, only these three federal discrimination laws.

Now, there's a recent decision of the First Circuit Court of Appeals that held in January of this year that Sarbanes-Oxley's whistle-blowing ((inaudible)) does not have this reach out outside the country, does not apply to an employee that works for an American corporation in a foreign jurisdiction and so it does not have that extraterritorially application.

Just one comment ((inaudible)) I frequently get this question as to what does it mean that the issue of control? When is a foreign company controlled by an American corporation? And there are typically four factors that the courts will consider.

First, the inter-relationship operations. The common management would be the second one. Third, centralized control of labor relations. And then, fourth, common ownership or financial controls. So that's what the U.S. courts look at.

And what this means, (Jim), is these three federal anti-discrimination laws, if we have an American employee who we either sent on an expat assignment and let's pick a country –

let's say, England – that individual may be covered then by the American three federal anti-discrimination laws and will also be covered by the U.K. employment laws.

(Jim Byer): That's an excellent point, (Johann). I was going to use the example of I always call this the "two bites of the apple" rule that you can have a U.S. employee that can invoke the U.S. law provisions as well generally, the more favorable from an employment standpoint, i.e., no employment at will law in he country in which he or she is located, i.e., Italy or France, is one example.

(Johann Lobey): You're right, (Jim), and particularly the protection against fair – unfair termination or dismissal as it's typically called in other jurisdictions. That's the kind of protection that Americans will get when they work for us overseas.

(Jim Byer): Right.

All right, going on to …

(Angela DeSilva): (Jim), if I may interrupt for just a minute. This is (Angela) again. I'm sorry but I neglected to mention two basic housekeeping matters at the beginning of this.

The first is the panelists will be taking questions as the presentation goes on. If you want to send a question, there is a box where you type in the text and hit "send" on the computer.

The second is please, don't forget to do a Web cast evaluation survey, which is in the "links" box and also, if you notice, the bios of the speakers are in the "links" box as well as the ((inaudible)) themselves.

So please remember those two housekeeping items and I'm sorry to take you out of order, (Jim).

(Jim Byer): No, that's no problem. Thanks for the reminder.

Moving on to Page 8 on the slides, are you ((inaudible)) employee that we were talking about, (Johann), as we have an employment agreement. She signs it in New York. Won't that mean New York law will apply?

(Johann Lobey): (Jim), that's a question that I get quite frequently and the short answer is no, with regard to which law governs the employment relationship, but yes, to a certain extent regarding when a dispute arises as to contractual benefits that are either set forth in the offer of employment, or if it is a written employment contract in the employment contract.

Let me just briefly explain.

If the offer of employment for example, has a provision for stock options, and it has a vesting schedule, if a dispute should arise later on as to whether the stock was properly vested and what the employee properly ((inaudible)) entitlements are, then the courts and tribunals will typically if there's a choice of a provision, will look at that to interpret and apply the local law.

But to the extent that it pertains to substantive issues and that is, what is the core of the employment relationship, how do we deal with this employee, that will not necessarily mean that where the offer was signed or issued, that the law of that place will apply.

So the safe premise is always to operate on if is this an issue concerning the employment relationship? In other words, how do we deal with this individual? How do we discipline this individual? There the safe premise would be to work on the law of the place where the individual is actually working.

If it pertains to contractual benefits, either the choice of law or the place where the offer ((inaudible)) was signed may apply.

(Angela DeSilva): There's been a question, (Johann). Does a foreign company need to be controlled by U.S. companies for the federal laws to apply extraterritorially?

(Johann Lobey): Yes, the answer is yes. The control must be by a U.S. corporation. Just remember, there are three elements that must be met. Must be a U.S. citizen and I'm not aware of any case law that deals with people with green cards, but inevitably, he must be a U.S. citizen. That citizen must work overseas. And then, thirdly, comes into this control issue so it must be either a U.S. corporation. In other words, a branch office of the U.S. corporation or it can be a foreign company but that is controlled by a U.S. corporation.

(Angela DeSilva): And then, another question, (Johann), is can you tell us the site for the whistler blower decision that you made reference to out of the first …

(Johann Lobey): Sure, I'd be happy to. That is the decision of Carnero, c-a-r-n-e-r-o, vs. Boston Scientific Corporation. This is a First Circuit Court of Appeals decision that was handed down on January the 5th, 2006.

(Angela DeSilva): OK.

(Jim), you can go ahead.

(Jim Byer): Yes, (Johann), I just had a question what you just raised about control. What about if a company is publicly traded in the United States but is not the U.S. corporation?

(Johann Lobey): That company is incorporated in the U.S.?

(Jim Byer): No, it's incorporated in some other country but is publicly traded in the U.S.

(Johann Lobey): My understanding of being a U.S. corporation is that it must be a company that is actually incorporated in the United States.

(Jim Byer): OK, thank you.

All right. Moving on to Page 9, of course, we're all good lawyers and we're going to put a choice of law provision in our employment contracts stating that New York law will govern the relationship and that, of course, will mean the employee's employed at will. Isn't that right?

(Johann Lobey): That's not going to help us, (Jim). There's very strong policy considerations if this employee's working in a foreign jurisdiction. As we know, each country is very jealous to enforce its own laws and from the same premise, if you or I were to work in let's say, Korea, the moment that we're in that country, performing services there, ((inaudible)) expat assignment or we were hired as a local, Korean law will apply. And there's a very strong public policy principle that employees cannot contract out of their statutory minimum protections, that they would enjoy under local law.

There is in the E.U. countries, there is one provision in the Treaty of Rome and that's the document going back to 1959 that really establishes the economic units of the European community. It has a provision in that will recognize choice of law provisions on the (substant) of employment relationship but only if the choice of law jurisdiction gives the employee better legal protections. You've got to read into that better legal protections. In other words, making it more difficult for the employer to terminate the employee and having said that, although the principle is not to my knowledge, been tested regarding a employee who or an employer tries to invoke American law, I'll be very surprised if any European court, for example, will find that the protections that we provide employees – general protection, I'm not just talking about the anti-discrimination protections – would be better legal protection than employees generally enjoy in any one of the E.U. countries.

So to the extent that it pertains to the (substant) of employment relationship, the answer is most likely no. If, and I will go back to our previous discussion, if it pertains to contractual issues, yes, the choice of law will most likely be enforced.

(Jim Byer): Great.

Since we did say the program was basic, E.U. refers to the European Union. Correct me if I'm wrong, (Johann) but I believe it now has 25 member countries and it a very large population.

(Johann Lobey): That's correct. I think the total population of the E.U. now extends just over 500 million.

(Jim Byer): ((inaudible)).

(Angela DeSilva): There's a question, (Johann). The question is if I have an employment agreement with a U.S. citizen, which is governed by New York law, regarding his employment in Korea, and if that agreement states a fixed amount of severance, that the U.S. employee is entitled to the statutory, mandatory Korean severance?

(Johann Lobey): (Angela), what will typically happen is – and I'll make this more general than just Korea because I don't want to ((inaudible)) on Korean law – but if the local law – and many local laws do have minimum severance pay provisions – if the U.S. contract gives the employee greater benefits, the contractual provision will apply.

But if the contractual provision gives the employee less than the minimum that's mandated or required under, say, Korean law, then Korean law will apply.

(Angela DeSilva): So it's the greater of?

(Johann Lobey): It's the greater of. It's always – I think we should bear in mind that all these are laws dealing with workplace law. The overall legislative intent is to protect employees and if we approach it from that vantage point, it's clear that whatever the greater protection the employee will enjoy, that protection will apply.

(Angela DeSilva): And then, to go back to the original statements that you made regarding laws which do and do not apply extraterritorially, there is a question that says that the – the question assumes that this excludes wage and hour regulations and the FSLA that they do not apply extraterritorially. Is that correct?

(Johann Lobey): That's correct. I believe there's a specific decision that held that the FSLA does not apply extraterritorially.

(Angela DeSilva): OK.

(Johann Lobey): Whether any of our laws apply extraterritorially, is each time an issue of legislative intent and there is in fact, a general presumption against laws applying extraterritorially and that presumption was reaffirmed in the Supreme Court decision of the EEOC vs. Arabian Oil. That's a 1991 decision.

And so the courts will typically look at the specific provision of the statute and it frequently evolves around how is the term "employee" defined as to whether there's an express legislative intent to apply that law outside the specific jurisdiction.

(Angela DeSilva): OK.

(Jim Byer): Thank you.

Moving on to Page 10, many companies just issue employment contracts to executives in the United States. I heard that we must have a contract for all employees in foreign countries. Is that right?

(Johann Lobey): (Jim), I think that's one of the frequent questions that I also find ((inaudible)) and the answer, the short answer to that is no, not necessarily. Most countries do not require a written employment contract.

But I want to distinguish this and that is the basis of the employment relationship in most other countries is the employment contract. It's called the "employment contract." That does not mean that the employment contract must be in writing. It's really the legal, philosophical approach to the employment relationship.

In foreign jurisdictions or most of them, the approach is one is we're looking at this as if it is a contractual relationship in which we read a number of implied duties and obligations. And we also read into that a fairness duty from the employer. For example, in New Zealand, there is an implied duty in the employment relationship or this employment contract that the employer will always deal fairly with the employee.

Now, that approach is totally different from our "at will" more free market approach to the employment relationship that we have in the United States. A number of jurisdictions, say,

increasingly a large number of jurisdictions, will require that if the employment relationship or the employment contract is really just on a oral arrangement, that within a certain period of time after the employment starts, that the employer issue what is typically called a "written statement of particulars" and in each country, it's defined by statute and in each country, it generally would list anything between eight to 17 kinds of details that should be covered and it will range from salary, position, a brief description of the job duties, the place of work, hours of work, vacation entitlement.

Generally, the typical issues we may cover in a U.S. based kind of offer of employment and it's issued to the employee so that the employee is informed in writing of the basic terms that will govern the employment relationship. But this written statement of particulars is not necessarily a written employment contract because it's not required that the employee signs off on it. It's really just a required written communication from the employer.

(Jim Byer): Thank you.

I have two questions from somewhat related to that. One is if the employer's standard practice though in different countries is to have written employment contracts for all employees even though it may not be legally required, will that practice create a binding obligation on that employer to do so for an employee from another country who's gonna work in that particular country?

(Johann Lobey): I would as a general rule apply my practices consistently so if the practice is in – and let's call the country – and let's pick a country; let's say Italy – to issue these written employment contracts, I would as a good practice and also to avoid potential claims of

discrimination, is follow the same practice for all employees that I employ in that jurisdiction.

(Jim Byer): What advice do you generally give to your clients as to whether or not if they should do a written employment contract for a U.S. employee in another country?

(Johann Lobey): (Jim) particularly if it is an expat employee, that is the term applies to someone who works for us in the United States who we are now sending overseas, in those instances, I strongly recommend a written agreement and it need to be elaborate. In foreign countries, for managers, I typically recommend a written agreement and the reason why I recommend that for management level employees in foreign jurisdictions, in a number of countries, there is a limit of (carve out) of the basic employment rules for certain levels of managers. And that give you, the employer, the freedom to regulate and arrange this employment relationship exclusively by contract. And in those instances, I recommend that it's done via a written employment contract.

(Jim Byer): Thank you.

I'm told the employment contract has to be in the local language. Of course, the employee we know, is fluent in English and no one at corporate headquarters in the United States is able to understand or (work) the language of course. Can't we just the employee documents in English?

(Johann Lobey): (Jim), in a number of jurisdictions, yes. We can do that. We can follow the rule of convenience and if we satisfy the employee is, indeed, fluent in English, we can do that.

However, there are a number of jurisdictions that actually prescribe by statute that all employment documents, and the employment contract and offers of employment, must be in the local vernacular. Now, if we are applying this rule to an employee who is going to work for us in one of those jurisdictions, of course, we should be very cautious, because if we don't provide the documents in the local language, we will not have any enforceable document.

And the English version will merely be a convenience copy. So I would recommend as we employ and manage employees in different parts of the world, is to double check whether local law requires the documents to be in the local vernacular and then to ensure we get it properly translated.

It does add costs but if we operate as global companies all across the world, we should be mindful of that.

We can move on, (Jim).

(Jim Byer): I'm sorry. I was going to echo it's very important to have a legal translation done of the document. Many times we receive contracts back and it will say something like you know, "unofficial translation." That's not going to cut it. If you don't understand the local language, you really need to get a full legal translation and as you said, (Johann), you will increase the cost but it's very important to do so.

(Johann Lobey): Yep, you're quite right.

(Angela DeSilva): (Johann), there is a question or two that you might want to consider here. One is, are new ((inaudible)), Germany, Holland, and Italy, require contracts or statements of particular?

(Johann Lobey): I know Germany off the top requires a statement of particulars. I believe Italy does. I'm not certain off the top on The Netherlands. What was the other jurisdiction?

(Angela DeSilva): It was France.

(Johann Lobey): France. I believe France, but I can double-check and make certain that we post a response to this question on the Web site afterwards.

(Angela DeSilva): And then, another question is, if you have a U.S. employee on an international assignment, is it beneficial to bring the employee back to the U.S. before you terminate the assignment and pay any severance in accordance with your policies for procedures in the U.S., or is there a risk if you allow the employee to stay in the foreign country when you terminate the assignment? Is there a risk they can claim both the U.S. severance and that of the country of their assignment?

(Johann Lobey): Let's deal with the severance pay issue. First, if we terminate the employee in the host country – that will be the general term we use for expat assignments – the host country's employment laws will apply. And as you may recall in one of the earlier questions, if our severance pay in our contract is more beneficial than what's required under local law, we'll pay that out. If the individual – if we effect the termination while the individual was on foreign soil, we'll have to comply with those legal requirements.

And hence, this question if we bring the employee back, and we repatriate the individual, then it's a question of contract, whether if we terminate the employee while he or she is back in the U.S., whether we'll have to pay some kind of termination pay or severance pay. And that will depend on what the assignment contract says. Sometimes, assignment contracts do address the issue of repatriation and sometimes there's a provision that says if we don't find you a suitable position upon repatriation within six months or 12 months, and we terminate this certain agreed-upon severance pay, in those circumstances, if the employees back in the United States, that arrangement will apply and the foreign law provisions will fall on the wayside.

(Angela DeSilva): So it would be prudent then, for an employer who is making an expatriate assignment to provide for these types of situations in the expatriate assignment agreement?

(Johann Lobey): I generally recommend that employers address the issue of repatriation in their assignment contracts. And it can be done generally and it could be provisions that merely state, you know, if we can terminate your foreign assignment at any time for any reason, if we do that, we'll bring you back to the United States. We'll pay your repatriation costs, and ((inaudible)) when you're here, we'll try to find you a suitable position and we'll place you in a specific project management position.

But it's not just the legal issue. There's also the employee relations aspect because you give this individual who you now are sending out on an expat assignment out of the country, some assurance that the company will at least make some good, safe efforts to find him or her a suitable position when he or she returns to the United States.

(Angela DeSilva): OK. so if we have a situation such as that, where we've followed your advice and put that in the agreement, how do you recommend that we – or what are the risks if when we go to repatriate the employee, the employee says you know, my family and I like it here and we would like to stay. Is the employer at risk for having to pay some sort of separation pay or redundancy pay required by the host country?

(Johann Lobey): I've had such a situation arise a few months ago. And what we did there is we insured we had the proper written communications to the employee that he is being repatriated. The employee then elected and said I'd like to stay. In other words, in terms not so much into a termination initiated by the company, but a resignation by the employee and in those circumstances – and I work closely with local counsel – we ensured that the documentation was properly worded so it did not trigger a lay-off or a redundancy which would trigger the statutory severance pay provisions. In those circumstances, because the individual saved the company the repatriation costs, we did a kind of a severance agreement where he was paid something akin to the value of these repatriation costs. But he then totally went localized.

(Angela DeSilva): I see. And then, in those circumstances, then, the employee, after those arrangements were made, the employee is on his or her own with respect to future employment opportunities?

(Johann Lobey): Correct. And there's also a trend – let me just add that. There is a trend to quote unquote "localize" expat employees after a certain period. A number of studies out show companies increasingly, if an employee takes an expat assignment, and is on expat assignment

with all the bells and whistles offered an expat assignment, that up front, they will tell the employee, after three years, we'll pay all these good allowance, but after three years, if you're still in that country, we're going to localize you. So there's an up front knowledge and the employee will then convert from an expat to a local employee and it will merely affect the individual's compensation package.

That is not then, a termination but it's really just a change in the compensation package, which was addressed in advance.

(Angela DeSilva): Thank you.

(Jim Byer): Let's move on. Of course, we required all our employees to sign a comprehensive confidentiality and non-compete agreement. Are these agreements going to be enforceable in other countries?

(Johann Lobey): (Jim), as a general statement, yes, if they are reasonable. And the reasonable standards is something that you and I are familiar with in the United States.

There are a couple of different aspects in some foreign jurisdictions that we should ((inaudible)) in mind. And that is that some countries actually limit the post-employment duration of the restriction. So you may find this in the statute itself where it states that the duration may not be 12 or more than 24 months.

Furthermore, we see if often in a number of jurisdictions – Germany will be one – a number of the free economic zones in China would be another example – where to have the post-

employment restrictions enforceable. The law will require that the employer pays the employee a substantial portion of his salary during the restrictive period. And it may vary from 50 percent to more.

In some jurisdictions, particularly in the Chinese jurisdictions, they would actually prescribe it should be 60 or 70 percent. In Germany, It's typically something more than 50 percent and from a number of projects I've worked with in the past, I've been told by local counsel, the more the better. As the employee is getting 60 or 70 percent of the pay, it's virtually guaranteed that a local German labor law judge or courts will enforce that restrictive period.

(Jim Byer): I've had situations where what many companies like to do is say well, we can decide at the end of the person's employment whether or not we want to invoked the non-competition period and therefore, you know, we can decide whether or not we want to pay for it.

I believe there are some countries where you must make that clear up front. In other words, if you have a non-competition clause in their contract, you can't unilaterally decide at the end of the agreement not to pay the employee for that period.

(Johann Lobey): Yeah, you're absolutely right, (Jim). And most countries even if you change the non-compete – there was a recent decision in the English Tribunals where there was an attempt to change the non-compete and get the employee to sign it as a condition of continued employment. And when the employee refused to sign, he was fired. And in that case, it was underscored by the local tribunals that this is something that must be agreed up

front and you can't change and then utilize the employer's strong arm of continued employment to force the employee to sign off and agree to the changes.

(Jim Byer): I had a couple of other questions related to this that we've run across.

One is typically in U.S. ((inaudible)) property agreements or tied within an employment agreement, there's a strong assignment of intellectual property rights to the employer. Are those kind of things going to be enforceable in other countries?

(Johann Lobey): (Jim), in my experience, yes, generally. In terms of intellectual property, there are a number of conventions and treaties that assist corporations over the globe and there's an increasingly a sort of a homogenization of those provisions so as a broad sweep statement, yes, generally they are enforceable.

(Angela DeSilva): I'm sorry, (Jim), does that also apply to trade secrets and confidential information?

(Johann Lobey): (Angela), yes, generally, there is a recognition of trade secrets as a protectable employer interest. Generally, what we describe is just other confidential business information between the various jurisdictions, they may take a more narrow view than we do as to what constitutes protectable confidential business information as opposed to the smaller category of trade secrets. But as a broad sweep statement, yes, trade secrets generally protected. Business confidential, other confidential business information generally also, but the category might be more limited.

(Angela DeSilva): And then, one last question on this point. What about non-solicitation provisions in the employment agreement? Are those views as restrictively as the non-compete agreement?

(Johann Lobey): No, they're generally enforceable. There are some jurisdictions that if you have a non-solicitation provision, either of the customers or the employees, they would say, well, you have that protection already through your non-solicitation provision and hence, you don't really have a ((inaudible)) case for a protectable interest in enforcing the non-compete. So they are generally seen as inter-related in some of the jurisdictions. But it typically gives you the better protection if you go on particularly the non-solicitation or customer's route because they are different policy considerations. It's not so much then, the ability of the employee to continue earning a livelihood, but it's really hands off from an identified employer interest.

And, (Angela), let me jut add. I didn't expressly state at the outset, the term of reasonable – I'm using that in the general context of pertaining to the geographical scope of the non-compete. It pertains to the duration as well as the description of the competitors.

We have seen in a number of instances in the E.U., in Europe, that there is a resistance to enforced non-compete that would be fore example, E.U.-wide, in other words, cover the entire 25 countries.

On a number of projects we've learned that it's better to carve and define the non-compete as restrictively as possible to ensure potential ((inaudible)) enforcement.

(Jim Byer): Moving on, we're a small company here. It's our first employee overseas. Can't we just manage that employee from the U.S.? Can we keep the employee on our U.S. payroll and pay her in U.S. dollars?

(Johann Lobey): That is an option that we should consider, particularly if we venture out for the first time. And with a global economy, the global market, the playing field is no longer reserved for the large multi-national corporations. So yes, we can.

There are a couple of things that we need to bear in mind. In some jurisdictions, and primarily due to local currency regulations, we cannot pay the employees in U.S. dollars. We may have to then employ a local payroll company, pay into their account, and have the employee paid in the local currency.

The one thing that we cannot escape, if we have an employee in a foreign jurisdiction, is that we generally will have to pay social security taxes in that foreign country. And if we don't, this is – if we fail to do that, this failure could come back to haunt us later on.

I recently worked on a project where we terminated an employee in a Latin American company. We managed that employee from New York, never paid any social security taxes in the Latin American company. And then, when we wanted a termination agreement, under local law, that termination agreement had to be registered with the local department of labor. And that would mean they would also check whether the social security taxes were paid. And if they're not paid, you could incur substantial fines and interest that you'll have to pay on the failure to pay the required social security taxes.

So these are options that we can. These are fixability options that we generally can consider but we should just note that there may be some restrictions.

(Jim Byer): OK. We decide that we are going to manage the employee from the U.S. What else should we be concerned about?

(Johann Lobey): First of all, in some countries, we may be required by their commercial laws to register our branch office or business in that country before we can employ any individual. Having said that, even in jurisdictions where that is not required, we should check with our tax experts because in some jurisdictions, under their tax laws, the mere fact that we are paying the individual and employing a single person jurisdiction, could potentially create a tax presence under the tax laws and hence, regardless of the commercial laws of the jurisdiction, we may fall prudent tax reasons rather incorporate in that country to insulate our tax liability.

The second issue is in not too many jurisdictions – China is the one that jumps to mind – and it depends on how we structure our presence in China. In China, we could either be there as a representative office as one potential entry into the market, or we could be as a joint venture, or we could be as a foreign-owned enterprise. But if we go in as what is called a "representative office" and this will be typically when we enter the Chinese market is to start exploring business opportunities, marketing our services or product there, or if we, for example, outsource production in China and we just want to have one or two employees, say in Beijing or Shanghai, to interact liaise with our local producers, we may have to register then a what's called a "representative office."

If our presence is in the form of a representative office in China, we cannot directly hire employees. We must hire the employees via a local labor bureau. So that might limit our choices, or at least, structure our choices of employees that we can hire.

Another issue is sometimes if we try to just get a temporary presence in a foreign jurisdiction, we want to see whether this is going to work out, and hence, we want not only to manage and limit our entry costs, but we also having our eye on the potential exit cost. A number of our clients have hired employees via agencies or temporary employees. That is an option but if we do so, just check the local laws. Again, in a number of jurisdictions, there are actually statutory restrictions on the time period or the duration of the use of temporary employees. In some jurisdictions, they may be deemed to be your permanent employees after a certain time period. The one that I'm thinking of has a two-year period.

And then, lastly, for the same considerations, we may want to limit our exposure and ((inaudible)) employment contract with the local employee or employees. In some jurisdictions, they prescribe what type of jobs or employees and which industries may legally enter into fixed-term employment contracts. And in other jurisdictions, they would limit the duration of such fixed-term employment contracts or their roll-overs. In other words, you may have a total cap of using a particular employee on a fixed-term employment contract from anything between 18 months to 36 months.

So there are some flexibility options available but we should just check local regulation which could limit that for us.

(Jim Byer): I do want to – thank you, (Johann). I do want to tell the audience that we will have the ability to answer questions afterwards by posting them somewhere. We've go a couple of different options so I can tell that we are running somewhat short on time. We're trying to get through the questions so to the extent that your questions are answered here. We will make every effort to do so later.

(Johann), going on to the next issue that we talked about. We want to send a U.S. citizen on an expat assignment for two years. Do we have to pay social security contributions in both countries while the employee is working abroad?

(Johann Lobey): (Jim), in a number of countries ((inaudible)) this morning, the U.S. has what's called bilateral social security agreements. And they typically are called totalization agreements with 21 countries. These countries are mostly E.U. ((inaudible)) countries but then outside the E.U., it includes Chili, South Korea, Japan, and Australia.

And due to these bilateral agreements, if the employee's going to be there for a limited time period, typically two to three years, we can get from the social security administration in the United States, and it's a very simple process. You can go on line and get the necessary documents. In advance, as employer, apply for a certificate of coverage. The certificate of coverage is then filed in the foreign jurisdiction and what that will do is excuse the company from or exempt the company from making social security contributions in the host country. Because the intent is the employee is not going to stay on there, retire ultimately, and be a drain on the host country's social security administration.

The Web site or this www.ssa.gov/international/agreements and that's where you'll find a pretty good overview of the countries and the various totalization agreements.

(Jim Byer): Well, (Johann), we sent our one employee overseas now, and now, this employee is refusing to send our corporate office some basic HR data via e-mail. And she's talking about some personal data issue. What's this all about?

(Johann Lobey): (Jim), this is the effect of the extraterritorial application of foreign laws that is having a severe impact on American business. It started out in the European community countries with a past initiate directive on data privacy and as a result, all 25 countries passed their own national data privacy laws. And these laws cover the collection, processing, and use, and the critical terms is "identifiable personal data."

Now, typically, this will include HR data. It may include a photograph of the employee, the name of the employee, telephone number, so it could impact company directories, for example, where we have a dir4ectly posted on our Intranet and it has all the home addresses and contact details of our employees worldwide.

Now, I want to caution this is not just a Euro-centric regulation. As a result of the ((inaudible)) territorial impact of the E.U. laws, a number of other jurisdictions are passing similar laws and I'll give you just some: Canada, Argentina, Japan, New Zealand, Australia, Hong Kong have similar data privacy laws.

They're a provision, common provision, in all these laws and what they say is as a local company, let's say you're in Argentina, if you operate in Argentina, you cannot transmit,

send out identifiable, personal data outside of Argentina to another country except if that recipient country has adequate protections in place.

So this is a challenge, an increasing global challenge for us as American practitioners to ensure that if we have employees all over the globe, that we comply with these requirements.

(Jim Byer): OK, but the, you know, we have to get this information in order to run our business. What should we do so that we can get the requested information that we need?

(Johann Lobey): (Jim), we can either if it's the employee's located in the E.U. member countries, in the 25, we can certify with the State Department of Commerce that we are compliant with the Safe Harbor principles. And it can even be done electronically. It is a comprehensive process to ensure that all our local data practices are in compliance with the various principles ((inaudible)) in these laws and a number of principles in terms of you only collect data that's needed. You keep it as long is it's needed. You permit the employee access to change. You give the employee notice that you're collecting this information. Generally, these principles.

The second option is that we enter into an inter-company agreement with this foreign subsidiary. Again, it will become then a contractual arrangement.

And thirdly, another avenue is to give the employee the written consent, the written notice, that we are collecting certain information. We explain for what purpose it will be used, and we set out in the notice that some of this information we may transfer, say, to corporate

headquarters in Detroit, Michigan. And you get the employee to sign off and give consent to that transfer of his or her information.

(Jim Byer): Could an employer do both steps, Steps 2 and 3 and would that be a good thing to do in your opinion?

(Johann Lobey): In my opinion, these are three potential legal basis to ensure that we comply and protect employees' rights. And my general approach is to do as much as you can to ensure so if you cover one, two, and three, that just gives you much better protection.

(Jim Byer): Great.

Of course, we're all familiar with ((inaudible)). Can we require foreign employees to adhere to the hotline and requirements in that reporting financial misconduct?

(Johann Lobey): (Jim), the short answer is yes, but there are a number of (recent) decisions in the E.U. Countries, primarily in France and Germany, that impact the privacy issues in those countries.

And, in short, it limits how we structure these hot lines, whether they're going to be anonymous reports, whether we give notice to the employee whose conduct is reported on, and (Jim), in the interest of good time, I know that in I think it's in the April edition ACC Docket, there's a fairly comprehensive article offered by the two of us on this very issue. But the short is that our audience should understand that there are significant challenges, primarily from data privacy angles on the use of these hot lines.

(Jim Byer): Thank you.

Moving on to a different topic, you touched on this before but we've got an employee who's a manager and he claims he's entitled to overtime pay. Isn't he exempt from a foreign country's overtime laws?

(Johann Lobey): (Jim), I'm going to keep this answer fairly short.

First of all, we should not look at these foreign-based employees in the same manner that we consider exempt employees in the U.S. The exempt employee characterization does not really apply in most of the outer countries.

A lot of foreign country laws and their equivalent wage and hour laws, will state that it does not apply to certain employees. But the caveat is much more limited than under our ((inaudible)) and state, wage, and hour laws. It's typically very senior managers to whom those laws do not apply. So we need to check the local law and see if a particular job category is indeed carved out. The chances are pretty good that that manager that we regard as a manager may be covered by the overtime laws.

(Jim Byer): OK. Of course, we American always hear that in other countries, they get a lot more vacation time and other things than we do. Broadly speaking, how doe the laws compare?

(Johann Lobey): You're quite right. Very favorable. I frequently get the statement when I share this information with local counsel here is that by golly, we should really work overseas.

And that's true. As a general statement, the general rule is a minimum of four weeks or more annual vacation entitlement. In some countries, that entitlement only kicks in after a qualifying period. I'll give you one example. In Bulgaria, the qualifying period is eight months of employment.

The second issue that we should remember is unlike in the United States where public holidays is really a holiday that people observe, companies decide which public holidays they're going to observe, in most other jurisdictions, by law, certain dates are declared as quote, unquote, "public holidays," and they are mandatory time off for the employees. If an employee works on that day, on a declared public holiday, that is also severely regulated. For example, in some countries – I'll use Hungary as an example and this is fairly common in many countries – the statue expressly states employees may not work on a public holiday, and then sets forth fairly limited exceptions in circumstances when employees may work on a public holiday. For example, if the employer is in a continuing operation, it's a 24/7 operation. And then, also the law may prescribe enhanced overtime pay. It's frequently double pay on a public holiday and frequently, there's also the right to take a day off within the next seven days.

So a general statement, (Jim), yes, ((inaudible)) leave of absence regulations here as a broad sweep statement fairly pale against protections employees enjoy in other jurisdictions.

(Jim Byer): Great. Our employee says that there's some industry agreement that entitles her to certain benefits. What that all about?

(Johann Lobey): Unlike in the United States, in a number of countries, Belgium, The Netherlands, Italy, even South Africa, there are typically centralized bargaining between employer organizations and union federations. They will negotiate a collective bargaining agreement stating a minimum ((inaudible)) conditions of employment that will apply to all employers and employees in that industry. And it becomes like a local law that applies to that industry. And that means if you employ an individual, better check if there is an industry collective bargaining agreement and if so, check the particular provisions.

In some of these industry agreements, in some of the Italian industry agreements, they may even include such sexual harassment policies and investigation procedures. And so there again, you'll have to make certain that our own policies will comply with those industry agreements.

(Jim Byer): Just quickly, you mentioned Italy. Many people may be surprised that these industry or as they're called ((inaudible)) cross bargaining agreements apply to the highest level of employees. We're not talking about rank and file. They can go up to senior management.

(Johann Lobey): Oh, absolutely. I had a recent instance where it applied to the country manager.

(Jim Byer): Right. (Johann), in the interest of time, I'm going to I think retain some discretion here and skip a couple of these so that which I think are fairly straightforward. Again, if people do ask specific questions about somewhere, we'll be happy to answer them.

But I think that this slide here about, you know, we have an employee not performing to management satisfaction. Can we terminate her employment?

(Johann Lobey): It's a real challenge for American corporations. We are so used to if an employee does not perform, it's relatively easy to terminate the employment. We typically only look at consistency, application of the policy, and we look at some potential discrimination exposure.

In most other jurisdictions, it's a real challenge to terminate an employee and even a manager for performance issues. It better be very well documented. The performance standards better be communicated well in advance. Those standards should be reasonable, not just in the discretion of management but frequently in the opinion of a third party decision maker who's going to preside over the dispute.

And so these present huge challenges for us as American employers based here and managing these employees to terminate them.

The short answer is, (Jim), you can but it's a significant process and it requires a lot of planning.

(Jim Byer): somewhat related to that, what does it mean if an employee's protected against unfair dismissal?

(Johann Lobey): (Jim), in most jurisdictions outside our jurisdiction, employees have the statutory right that they will not be frequently stated in the negative, that they will not be terminated unfairly. And this unfair termination or dismissal ((inaudible)) has two components.

It has a substantive component, which means there must be a good, sufficient reason. As we call it here in unionized settings, "just cause."

But also, second equally important component is there must be certain due process. And the due process could mean internal disciplinary hearing, even an internal appeal, and in all these instances, typically, a written notice in advance of the hearing to say this is the misconduct that we believe you committed and we're going to call you to a hearing let's say in 48 hours' time and we're going to give you a chance to respond.

So it's statutory protection and some of the countries for example, Brazil, it lists the types of good reason that you may terminate an employee. And we may be surprised sometimes if we read these local laws, as to what constitutes a sufficient reason. In Brazil, for example, we would think here if an employee arrives at work intoxicated, you fire the employee. But in Brazil, according to the statute, you can only fire an employee for habitual intoxication at work. So it's not the first time. It's got to be a couple of times the employee arrives at work intoxicated before you have the right to terminate the employee.

Now, in some of these countries, (Jim), these unfair dismissal laws don't apply immediately. There may be a qualifying period so our colleagues should just check when that protection is triggered.

(Jim Byer): I did want to mention, I'm sure everybody's aware of the significance of this issue. The riots that are going on in France because of the government's proposal to take some of these protections away from younger employees.

(Johann Lobey): That's correct, (Jim). The current French proposal is that – and it's interesting – it has an age component as well as service component. It's employees under 26 years old who have not yet completed two years of employment will basically be at will employees. And, or conversely, you must be over 26, and you must have worked for more than two years before you enjoy the French unfair dismissal protection.

(Jim Byer): Thanks. Let's just try to – I'm showing close to the appointed time to end – let's quickly go through the last few points here.

If we terminate an employee, what generally is the procedure we should follow?

(Johann Lobey): (Jim), I think just on the slide, it depends on what the reason is for termination. If it is due to the conduct of the employee or a misconduct, there typically will be a hearing, representation, and possible internal appeal. There would also be a written notice.

If it's performance, it typically will require counseling. It will be ((inaudible)) forth what are the performance standards. If the employee says, you know, I've tried my best. I can't achieve this, it might require additional training. It will require a reasonable period to improve and it will require a re-evaluation period. And it better be well-documented.

If it's an economic reason or sometimes called a "termination of which the employee has no control" it typically has advance notice. But importantly, something that you and I as American practitioners are not used to, it will require information and consultation with the employees. And this can be either individually with the employees or through an employee representative forum, which could and does not mean necessarily the union. It will mean

either a work counsel or in some countries, it's call a work place forum. And it will impose statutory obligations frequently on ((inaudible)) the employers to make good faith attempts to avoid losing the employees and the jobs. And in most instances, some form or mandatory severance pay.

(Jim Byer): OK, unfortunately, our experience in the foreign country didn't go so well and we're going to close the office there. What should we consider?

(Johann Lobey): (Jim), I've listed on the slide basically four, I think critical aspects. There's going to be some significant advance notice so we can think and ((inaudible)) one, but it's not necessarily just mass dismissal. It's really the labor laws' basic advance written notice requirement.

Again, the issue about consultation.

But thirdly, what we are not used to, and this is the preparation of a social plan which we must present to these employees and sometimes to the government. This preparation of a social plan is typically a very involved process, and also, it may require us as employer to pay for the employees or the union's representative to engage services of an economic or financial expert so that they can comment on the plan and submit their own plan. And then, we have to go through that process before we can actually close that office.

And then, there's the issue about statutory minimum severance pay.

So these are the issues that we need to consider. All of these are frequently dependent on the number of employees involved. If we only have one or two employees in the office, typically these requirements will not apply. But in some countries they would be applicable if we have five – I believe five is the lowest I've seen that we have to consider these issues.

(Jim Byer): I can certainly echo your point, (Johann). I know in France ((inaudible)) a specific number of employees. If you are going to have a reduction in force of more than 15 employees, you must submit a social plan to the French government as well as consulting with a works counsel. In addition, this has real teeth.

The example that we lawyers in this area often give is that a U.K. company of department stores, I think Spencer Marks, decided to close their stores in France. They closed the stores. The claim was brought that they didn't give adequate notice and consultation rights to the works counsels and they had to reopen all the stores in France. That's a very specific example.

(Johann Lobey): It really has teeth.

(Jim Byer): Yeah.

(Johann Lobey): And there's an auto manufacturer that did the same in France from closing a factory in Belgium didn't go through this process and they were besides the virtual opening of the factory and hence, paying all the back pay to the employees, there were also criminal sanctions posed on the executives.

(Jim Byer): Thank you. May I ask (Jaqueline) if we should continue or because we are now past the appointed time?

Operator: We can go on for another five minutes.

(Jim Byer): OK, thank you.

Well, (Johann), we hear something about an employee who's terminated has to be paid an indemnity. What's that all about?

(Johann Lobey): (Jim), it's just a typically, it's just a different term for some kind of severance pay. But this is a payment that would be payable in most instances, where the employment relationship is terminated.

It's frequently it's only a serious gross misconduct. If that is the reason for the termination, the employee will be disqualified from getting this indemnity.

It's frequently calculated on a sliding scale but importantly, it refers to wage. Just check under local law, how that wage is defined. It may not mean the employee's actual wage. It may refer to the regional or national minimum or the industry prevailing wage, which would be a significantly lower rate.

So for example, if we terminate a factory manager in a country, some payments will be calculated on an actual compensation package and some required statutory payments, frequently this indemnity payment or part of it will calculated at a significantly lower rate.

(Jim Byer): Again, this is for the audience's benefit. In a number of countries, this amount can be very high. The one that always opens peoples' eyes is oftentimes in Italy when you say that three years' pay is not untypical.

(Johann Lobey): Yeah, you're right.

(Jim Byer): What about laws that we have in the United States like anti-discrimination laws? Do most foreign countries have any such animal?

(Johann Lobey): (Jim), increasingly so. I think in the sixties and seventies, we were the leaders in the world in terms of workplace anti-discrimination laws. As a general statement, I think most jurisdictions are catching up very fast. But also, we find very interesting other protective categories that we don't have in our statutes in the United States.

To give you a couple of examples, in the Czech Republic for example, they do prohibit discrimination. There's also a separate category for discrimination on the basis of an individual's color of skin, which then can be of course, a much wider concept and protection.

We also see different variances on protecting employees against discrimination based on their beliefs. In The Netherlands for example, the one protective category is based on life principles, which goes much wider than religion, as we can see. In South Africa, there's a protection for conscience. In Turkey, there's protection against discrimination on the basis of philosophical belief.

All these laws, anti-discrimination laws should be seen in their peculiar historical and social, political developments in that country that would motivate the local legislature to eradicate discrimination.

So for example, in Ireland, a protective category is membership of the traveling community. I understand from our Irish colleagues that this is sometimes referred to I think in sometimes the derogatory terms as the Tinkers. It's kind of a gypsy community that travels all over Ireland. You cannot discriminate against them. And it's based on those developments.

A number of countries protect language and family relationship and family status. We also see different mutations of it. For example, a protected category in Australia is family responsibility. It's a fairly wide concept. In Bulgaria, family is sort of thrown in with a number of others and there's protection for family, public, or financial status.

And then, lastly, social status is also a protective category that I see frequently in some of the local laws. For example, in the Czech Republic, national or social background is a protective category. Wealth is a protective category in the Ukraine. And also residence and property is in some countries.

A recent development that all of you should just bear in mind is in the E.U. countries increasing the laws that protect part time employees. It's a different kind of discrimination but it really is benefits for employees time off for part time employees the right to take time off for union activities, et cetera. Those are extended to part time employees in Europe.

Lastly, (Jim), we should also – in some countries there are very peculiar laws dealing with anti-discrimination. For example, in Belgium, and these provisions let me just add, impact on the ((inaudible)) anti-discrimination policies that we are tempted to roll out an American-based anti-discrimination harassment policy, just bear these local requirements in mind. In Belgium, they passed what's called an harassment act in 2002. Among the minimum requirements for an anti-harassment policy, includes that the employer must concern the work space layout to prevent harassment so these open office spaces may be something that we need to seriously consider whether they might contribute to harassment.

And interesting, it also imposes in Belgium, a statutory obligation on employers to have a specialist, a prevention advisor, and this prevention advisor must be a specialist in psycho-social aspects of work. And if you are a larger employer, that means if you have more than 50 employees in Belgium, you must actually have such a prevention advisor on staff. If you're a smaller employer, less than 50 employees in Belgium, you may use an outside service, something that's to our what we're used to as an EAP program.

(Jim Byer): I think we're going to have to end it here. There are a few more slides that the answers are on the pages and again, we're happy to answer other questions.

So now, I'll turn it back over to (Angela) for some final comments.

(Angela)?

(Angela DeSilva): I'm sorry.

There are a few questions here that I just want to double check on. One is in the discussion ((inaudible)) having had today, (Johann), I assume that when you're talking about U.S. territories, such as Guam and Puerto Rico, U.S. law applies. Is that correct?

(Johann Lobey): Each one of them has their local laws. And I'm not certain that our Title 7 extends to Puerto Rico. I'm not ((inaudible)) certain about that but I can check.

(Angela DeSilva): OK. And then, the other question – there are a number of questions that we will attempt to answer as (Jim) said earlier, and post, hopefully, in the archives for this Web cast because we didn't get to all the questions.

So I think we should probably wrap it up at this point. (Jim), if you have anything else you want to add?

(Jim Byer): I just wanted to remind people again, if they could, fill out the Web cast evaluation, we'd really appreciate it. And ACC really appreciates it. That's how we can make the programs even more effective.

I just wanted to thank everybody for participating.

(Angela DeSilva): Thanks, everybody.

(Johann Lobey): Thank you.

(Angela DeSilva): Bye.

END