Can U.S. Employers Be Liable For Discrimination To Employees Working Overseas?

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In today's global economy, many U.S. companies are establishing operations outside of the U.S. and moving more of their employees to international locations, in new and different ways. The traditional arrangement of living and working only in a single country is being replaced by overseas assignments to explore new markets, set up or manage offices in foreign jurisdictions, or negotiate with overseas suppliers. With this new reality comes the legal question of whether employees assigned overseas will have the same rights, as those of the employees working in the U.S. to pursue claims if they encounter various types of discrimination on an overseas assignment. For example, consider a scenario where a U.S. corporation assigns one U.S. citizen to its Saudi Arabian office and another U.S. citizen to its California office and both employees experience identical acts of discrimination in their respective workplaces. In such a situation, will the employee stationed in Saudi Arabia have the same legal remedies as available to the employee in the U.S.? The answer is not straightforward and depends on multiple sources of U.S. statutes, legal authorities, international treaties, and laws of foreign countries.

Unlike other parts of the world, the U.S. is one of a handful of countries that affords comprehensive protections against discrimination to employees in the workplace. There are several statutes including Title VII of the 1964 Civil Rights Act (Title VII), the Americans with Disabilities Act (ADA) and the Age Discrimination Employment Act (ADEA) that expressly provide for varying degrees of protection against discrimination in the workplace. Title VII prohibits discrimination and harassment based on race, colour, religion, sex, or national origin, while the ADA prohibits discrimination based on disability. Also, the ADEA prohibits discrimination against individuals age 40 and older.

The determination whether these laws apply to employees stationed overseas is a multifaceted question. Despite this complexity, however, there has been a growing number of court cases filed by employees working overseas, against U.S. companies. For this reason, U.S. companies must have a thorough understanding of the relevant laws and seek timely legal advice to be able to carefully plan and structure overseas assignments of employees. By contrast, uninformed employers may inadvertently create legal issues that would otherwise not have existed, or which could have easily been avoided. As a starting point, this article provides some of the key factors that U.S. companies should consider and be aware of when stationing employees overseas.

1. Workplace of the employee. U.S. anti-discrimination laws have been primarily enacted to protect U.S. citizens or non-U.S. citizens, who are authorized to work in the U.S. These U.S. laws may also apply to non-U.S. citizens who are transferred to foreign jurisdictions, but continue to belong to their workplace in the U.S. In other words, a U.S. company can be held liable to an employee stationed overseas if the employee is sufficiently connected with the U.S. company on a regular basis. The percentage of time the employee spends working in the U.S. as compared to overseas is a key factor for this determination. For example, if an employee performs only some work in the U.S., it will most likely not preclude a finding that the employee's work was extraterritorial. Also, if an employee works in several locations, it can be difficult to limit the employment to just one location. In deciding the location of work, courts will scrutinize how the parties intended to or treated the work arrangement before the dispute arose.

2. Interrelation of operations. If a foreign corporation is controlled by a U.S. company, it may well be covered by the U.S. anti-discrimination laws. In assessing whether a U.S. company controls a foreign corporation, courts will determine whether there is a sufficient interrelation of operations in terms of shared departments, common

management, centralized control of employment relations, financial control, or common ownership between the U.S. corporation and its foreign subsidiary. Put simply, if the employment decisions made at the foreign subsidiary are sufficiently integrated with or controlled by the U.S. company, then the two corporations can arguably be considered integrated. Another theory that may be applied is that when one corporation acts as an alter ego of another, then both can be held liable.

3. Place of decision making. The key aspect of centralized control also depends on who makes the final decisions in employment matters. However, the mere fact that decisions relating to hiring or termination of employment were made in the U.S. is not likely to invoke the applicability of U.S. laws for jobs outside the U.S. Also, a U.S. corporation may not automatically be held liable for violations of the foreign subsidiary. It however can be held liable for actions taken by the foreign subsidiary only if it participates or approves the subsidiary's act of discrimination or failed to take appropriate corrective steps, if it was obligated to do so.

4. Employer's polices and handbooks. U.S. corporations often naively issue one single global employee handbook of policies to apply across their operations worldwide. There simply is no one-size-fits-all handbook that can be implemented for all of the global offices. It may be more apt to consider having a series of aligned but locally tailored handbooks, one per jurisdiction. In countries with differing employment regulations, a common handbook might actually be detrimental, to the extent that it can even complicate legal compliance in the foreign jurisdiction.

5. Laws of the foreign country. Depending on the jurisdiction, U.S. employers may not be required to comply with the requirements of the U.S. laws if adherence to that requirement would violate laws of the foreign country. This is commonly referred to as the Foreign Laws Defense. At the same time, a U.S. employer cannot simply transfer an employer to another country in order to unfairly disadvantage the employee. For example, an employer must not transfer a senior employee to a foreign country with a mandatory retirement age for the purpose of forcing the early retirement of the employee.

The takeaways

Employees stationed overseas may feel uncertain and vulnerable to discrimination when working outside of the U.S. It is therefore important for employees to be aware of their rights against discrimination when sent on ex patriate assignments as well as of scenarios when they can have a valid claim under U.S. laws. The viability of such claims, in large part, will depend on which anti-discrimination law will be at issue, the citizenship of the employee, and whether the entity in question can be considered a U.S. employer.

From an employers' perspective, U.S. companies should familiarise themselves whether any of the U.S. laws contain extraterritorial provisions that may apply to employees who work for foreign subsidiaries. Any lawsuits or threats of lawsuits by overseas employees can obviously be time consuming and disrupting to any corporation, to say the very least. It is therefore critical to have clear and fair employment policies for each of the foreign subsidiaries that are not only defensible and organizationally sensible, but also in compliance with the laws of the foreign jurisdiction. When the differences in employment practices between jurisdictions are clearly communicated to employees, they are more likely to perceive the corporation's decisions to be without bias and procedurally fair and will be less likely to challenge the decisions or file lawsuits of discrimination.