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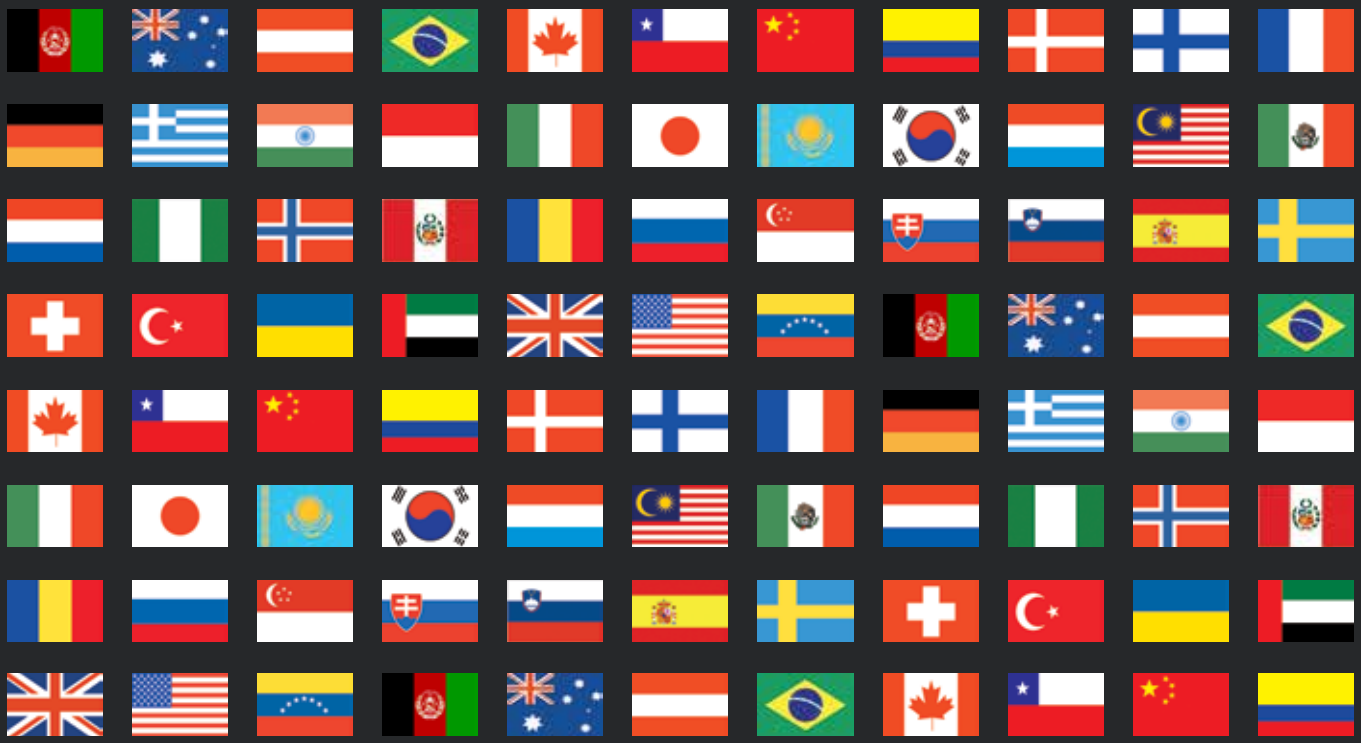
Contributing editors
Mark Zelek, Matthew Howse, Sabine Smith-Vidal and Walter Ahrens



2015

GETTING THE DEAL THROUGH

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2006
Tenth edition
ISSN 1750-9920

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Global Overview

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American companies have gone increasingly global in recent years. Many US firms now have far-flung operations (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 United States and the rest of the world's labour and employment laws. This overview highlights and summarises the principal distinctions and discusses recent reforms 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 United States. 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 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. In addition, back wages often accrue until a ruling is made.

Importance of discrimination laws

One consequence of the fact that all employees in most countries outside the United States have 'just cause' protection is that, although there are often anti-discrimination provisions on the books as in the United States, 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 best practice. Moreover, the minimum terms that 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 can be quantified and can be budgeted and accrued for. Typically, the severance 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. Unlike in the United States, compensatory and punitive damages, jury trials, and class and collective actions are also generally unavailable for employment claims. This greatly reduces the risk of an unexpected or runaway result.

Unionisation

Only 6.7 per cent of the US private sector workforce is unionised and it is doubtful that number will increase any time soon. Although the proposed Employee Free Choice Act, which would allow workers to elect union representation simply by signing a support card, was a big issue in the 2008 elections, support dwindled in the wake of the economic crisis and the Act was scarcely mentioned in the 2012 elections. In 2013, Michigan became the 24th '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 Michigan adopted a 'right-to-work' law, as it was the second manufacturing state (after Indiana) with a powerful union presence in the United States 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 United States 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 United States' 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 at the discretion of 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 over Christmas with no extra pay, something that would be unheard of in many parts of the world. Of course, most US employers do provide generous fringe benefits of their own volition, to attract and retain qualified workers and remain competitive, but they are not obliged 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 mandatory vacations and holidays, and premium pay for those

vacations and holidays, sick and maternity leave 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, in recent years, adopted changes that will bring their laws more in line with the more flexible US model. These efforts are beginning to bear fruit.

For example, in 2015, Spain saw the first annual rise in employment in six years. This followed the Spanish labour reform of 2012, which gave employers incentives for hiring and made it easier and less costly to fire employees (eg, maximum severance payments were reduced for most businesses from 42 months' pay to 12 months').

Moreover, several countries, including France, are expected to continue reforming their labour laws in 2015 to further promote job creation. We expect, for instance, that France will adopt laws this year that will make it easier for retail employers to employ Sunday workers and simplify collective redundancy procedures and profit-sharing schemes.

On the other hand, the US labour market is becoming slightly less flexible. For example, social media and information technology make it easier for American employers to 'weed out' potential employees and increasingly protective anti-discrimination and retaliation laws make it more difficult to sack workers and thus hire new ones. In addition, the proliferation of licensing requirements for many jobs in the United States has added barriers to entry where none previously existed.

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 anticipate continued loosening in other countries' labour and employment laws to make them more business-friendly and incentivise job creation as economic conditions improve.

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Law Business Research

Labour & Employment
ISSN 1750-9920

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