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Applying U.S. Employment Discrimination Laws to International Employers

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Applying U.S. Employment Discrimination Laws to International Employers: Advice for Scientists and Practitioners

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ABSTRACT

The question of whether U.S. employment discrimination laws apply to international employers is complex and involves multiple sources of legal authority including U.S. statutes, international treaties, and the laws of non-American host countries. This article provides detailed, simplifying guidance to assist employers in working through that complexity. Based on an examination of 98 federal courts cases, this article identifies and explains eight general guidelines for determining when U.S. laws apply to international employers (e.g., U.S. employees working abroad or "foreign" employees working in the U.S.). These guidelines are incorporated into an organizing framework or "decision tree" that leads employers through the various decisions that must be made to determine whether U.S. discrimination laws apply in a wide range of international employment situations. Guidance for IO psychologists who advise international employers is provided and summarized in terms of general recommendations and conclusions.

Overview

Importance and Description of the Topic

It would be an understatement to point out that the field of Industrial and Organizational (IO) Psychology is filled with legal issues. For example, testing guidelines require the consideration of legal issues in all aspects of the development and implementation of our hiring tools (*Principles for the Validation and Use of Personnel Selection Procedures, 2003*). More broadly, Ryan, Weichmann, and Hemingway (2003) noted that knowledge of legal issues is important when designing all types of best practices for global organizations. The recent job analysis of IO psychology identified legal expertise as an important part of professional practice (Blakeney, Broenen, Dyck, Frank, Glenn, Johnson, Mayo, 2002). In addition, the guidelines for doctoral education (*Guidelines for Education and Training at the Doctoral Level in Industrial-Organizational Psychology, 1999*) and the instructor's guide (*An Instructor's Guide for Introducing Industrial-Organizational Psychology, 2002*) both emphasize the critical role of legal knowledge.

Furthermore, the growth of multinational enterprises and the expansion of employment relationships outside the U.S. is creating a global demand for the expertise of IO psychologists. Yet, IO psychologists trained inside the U.S. are accustomed to the legal constraints imposed by U.S. laws. They may falsely assume that these constraints apply to U.S. corporations operating outside the U.S., or mistakenly believe that they never apply outside the U.S. Although IO Psychologists usually understand U.S. employment laws, they usually do not understand the applicability of U.S. employment laws to international organizations. Understanding the law can help the IO psychologist avoid the embarrassment of giving bad advice to employers and to avoid being named as a codefendant in a lawsuit for an alleged unlawful employment practice (e.g., *EEOC v. Aon Consulting and Delphi Automotive Systems,* 2001).

This developing legal environment creates a significant and increasing challenge as businesses continue to expand their global operations (Brown, 1995; Savage & Wenner, 2001; Schuler, Dowling, & De Cieri, 1993). Employers inside the U.S. must be able to answer the question, "When do U.S. discrimination laws apply to our employees working overseas?" International employers based outside the U.S. must be able to answer the question, "When do U.S. discrimination laws apply to employees assigned to work in the U.S.?" Well-informed answers to these and related questions are necessary to ensure that employers comply with their legal obligations. Further, international employers may have a legitimate interest in avoiding the *legal burden* of U.S. laws. By understanding the law, they may be able to do so through contracting, structuring of assignments, or other careful planning. By contrast, uninformed employer actions may inadvertently create legal obligations that would otherwise not have existed.

Unfortunately, the determination of whether U.S. discrimination laws apply to international employers is a multifaceted question. Multiple sources of legal authority including U.S. statutes, international treaties, and laws of non-American host countries interact to provide the controlling law. Further, the application of the law often requires the resolution of ambiguous factual issues (e.g., was an overseas assignment "temporary"?). Moreover, in some situations where U.S. laws do apply, there may be legal defenses arising from international law justifying employment decisions that would normally be prohibited.

Despite this complexity, general guidelines for determining when U.S. employment discrimination laws apply to international employers can be gleaned from a growing body of federal court cases. This article reports the results of a systematic study of those cases. We identify general guidelines and incorporate them into a model that provides practical guidance to determine when U.S. laws will apply to the international workforce. This guidance will help

ensure that employers comply with their legal obligations under U.S. laws (where obligations exist). It may also help international employers to influence whether or U.S. laws will apply. The article concludes with a final section that integrates legal and behavioral science perspectives to provide practical observations and recommendations for IO psychologists and employers with an international workforce.

Summary of Major U.S. Employment Discrimination Laws

The three major employment discrimination statutes in the U.S. are the Age Discrimination in Employment Act of 1967 (ADEA), Title VII of the Civil Rights Act of 1964, as amended in 1991 (Title VII), and the Americans with Disabilities Act of 1990 (ADA). Although other statutes are also sometimes cited in international employment discrimination cases (e.g., *Helder v. Hitachi Power Tools*, 1993), the ADEA, Title VII and the ADA are the statutes most often used by plaintiffs to claim discrimination (EEOC, 2003). Since other employment laws are typically not applied outside the U.S. they are not included in this review.

The ADEA prohibits employers from discriminating against individuals 40 and over based on their age. Several older cases involving plaintiffs from many countries rejected attempts to extend the coverage of the ADEA outside the U.S. (i.e., extraterritorially) (England: *Cleary v. United States Lines,* 1984; France: *Wolf v. J. I. Case Co.,* 1985; Holland: *Thomas v. Brown & Root, Inc.*, 1984; Honduras: *Zahourek v. Arthur Young & Co.*, 1984; Republic of Zaire: *Belanger v. Keydril Co.,* 1984). However in 1984, Congress amended the ADEA to extend coverage to U.S. citizens working for U.S. corporations outside the U.S. The amendments also extended coverage to corporations controlled by U.S. firms, but they did not require employers to comply with the ADEA if it would violate foreign laws. However, these extraterritoriality amendments did not extend coverage to cases that were brought before 1984

(*De Yoreo v. Bell Helicopter Textron, Inc.,* 1986; *Lopez v. Pan Am World Services, Inc.*, 1987; *Wolf v. J. I. Case Co.*, 1985).

Title VII prohibits employers from discriminating based on race, sex, religion, color, or national origin in hiring, firing, or other terms and conditions of employment. The ADA prohibits employers from discriminating against qualified individuals because of their disabilities and also requires employers to provide a reasonable accommodation for employees when it is not an undue hardship for the employer.

Before 1991 courts had differing opinions about the applicability of Title VII outside the U.S. Most cases held that it could be applied outside the U.S. to U.S. citizens working for U.S. employers (*Akgun v. Boeing Co.*, 1990; *Bryant v. International Schools Services, Inc.*, 1980; *EEOC v. Bermuda Star Line, Inc.,* 1990; *Love v. Pullman Co.*, 1976; *Seville v. Martin Marietta Corp.*, 1986). Other cases held that it could not be applied outside the U.S. (*Lavrov v. NCR Corp.,* 1984 and *Marques v. Digital Equipment Corp.,* 1980). In 1991 the U.S. Supreme Court ruled that Title VII did *not* apply to employees who are U.S. citizens working outside the U.S. (*EEOC v. Arabian American Oil Co*., *1991 ("*Aramco")). In response to the Supreme Court's ruling in Aramco, in 1991 Congress amended both Title VII and the ADA to provide that these statutes do apply to U.S. citizens working outside the U.S. for U.S. employers. These amendments were estimated to affect more than 2,000 U.S. employers operating outside the U.S. (Starr, 1996).

However, Title VII and the ADA do not apply to foreign corporations unless a U.S. firm controls the foreign corporation. In addition, the 1991 amendments prohibit applying these statutes to situations that would require the employer to violate the laws of the foreign country. Finally, the extraterritorial amendments to Title VII and the ADA only apply to cases occurring

after the amendments became effective (*Arno v. Club Med*, 1994; *Kimble v. Holmes & Narver Services*, 1993; *Peterson v. DeLoitte & Touche*, 1993).

Identification of Relevant Federal Court Cases

We searched the Lexis-Nexis electronic database to identify published federal court cases dealing with the issue of the applicability of U.S. employment discrimination laws to international employers. The cut-off date for the identification of relevant cases was June 1, 2004. Several different searches used appropriate search terms (international, Title VII, extraterritorial, etc.). In addition, we cross-referenced the cases cited in each opinion to determine if the other cases also dealt with employment discrimination. We then used the Shephard's citation system to determine if each case had been appealed, overturned, affirmed, etc. (Roehling, 1993). Only the highest level opinion for each case was used to prepare this study. In the end, we identified 98 relevant cases from the federal district courts, Courts of Appeal, and Supreme Court.

Model of the Applicability of U.S. Employment Discrimination Laws to International Employers

A Decision Tree

We crafted eight guidelines emerging from the cases (Table 1). Each of the eight guidelines is presented in the following sections of the paper in the context of a discussion of the cases from which the guideline is derived. In the process of formulating these guidelines, we identified four factors that determine the applicability of U.S. employment discrimination laws. Those factors are:

- location of the work (inside or outside the U.S.)
- employer status (number of employees, home country)
- employee status (U.S. citizen, authorized to work in the U.S.)

- international law defenses (international treaties, foreign law defenses).

The complex interplay of these four factors is illustrated in a parsimonious algorithmic model presented in the form of the decision tree in Figure 1. "Yes" or "No" answers to the questions posed at each node in this decision tree lead to a determination of whether U.S. employment discrimination laws will apply. Each of the endpoints in the decision tree corresponds to one of the eight guidelines presented in Table 1. This analysis and organization of court cases into a conceptual framework simplifies the complex and potentially confusing set of issues in this area. The next section discusses the top half of this decision tree, pertaining to jobs located inside the U.S. After that section we discuss the bottom half of the decision tree, pertaining to jobs located outside the U.S. The top and bottom sections are symmetrical with each discussing the four factors of location of work, employer status, employee status, and international law defenses. We also selected one or more cases to illustrate each guideline in more depth.

Jobs Located Inside the U.S.

Location of Work

The courts clearly distinguish jobs located inside from those located outside the U.S. For example, in *O'Loughlin v. Pritchard Corp.* (1997) a district court ruled on the applicability of the ADEA to an employee working in both the United Arab Emirates (UAE) and the United States. Plaintiff, age 64, was a lawful permanent resident of the U.S. but not a U.S. citizen. He was hired by defendant Pritchard Corporation, a U.S. corporation, to work in the UAE. He worked in UAE during 1994 under successively renewed visitor visas. However, the laws of the UAE require foreign nationals to have a work visa as well as a visitor visa. The UAE usually does not grant work visas to persons over age 60 or to those whose passport comes from a country other than Europe or the U.S.

Despite several requests to UAE government officials and even the ruling families of the UAE, Pritchard could not obtain a work visa for O'Loughlin because of his age. He returned to the U.S. in September 1994 for an emergency medical leave. Because he did not have a work visa in the UAE, Pritchard laid him off. Although Pritchard had another job in Louisiana for which O'Loughlin was qualified, they gave that job to someone else. O'Loughlin sued under the ADEA alleging age discrimination for being laid off from the job in the UAE and for not receiving the job in Louisiana. The court held that the ADEA does not apply to lawful permanent residents of the U.S. working outside the U.S. Nevertheless, the court did permit his claim to proceed with respect to the job in Louisiana, holding that the ADEA does apply to lawful permanent residents if the work occurs inside the U.S. This case illustrates the following guideline:

Guideline 1: U.S. employment discrimination laws apply to jobs located inside the U.S. when the employer is a U.S. entity and the employee is authorized to work in the U.S.

Employer Status

For jobs located inside the U.S., the question of employer status is twofold. The first issue is whether the employer is a U.S. or foreign employer. Employers are considered U.S. employers if they are incorporated inside the U.S. (*Mochelle v. J. Walter, Inc.*, 1993; *Sharkey v. Lasmo (AUL Ltd.)*, 1998). The primary focus is on the state in which they are incorporated and not where their main offices are located (*EEOC v. Kloster Cruise, Ltd.*, 1991; *EEOC v. Kloster Cruise, Inc.*, 1995). By contrast, if the employer is incorporated outside the U.S. and not controlled by a U.S. employer, it is generally not covered by U.S. discrimination laws (*EEOC v. Kloster Cruise, Inc.*, 1995; *Sumitomo Shoji America, Inc. v. Avagliano*, 1982; *Wildridge v. IER, Inc.*, 1999).

The second question involves the issue of the number of people employed by the defendant employer. This issue focuses on whether the employees of a foreign corporation can be counted to determine that a U.S. employer has enough employees for the statute to apply; and if it applies, what the limits will be for compensatory and punitive damages.

In cases where an employer is a single entity and all of its employees are located in the U.S., the determination of coverage and damage limits is straightforward. Employers with 15 or more employees are covered by Title VII and the ADA while those with 20 or more are covered by the ADEA. The limits for compensatory (e.g., emotional pain and suffering) and punitive damages (i.e., malice or reckless indifference to plaintiffs) range from $50,000 for employers with 100 or fewer workers up to $300,000 for employers with more than 500 workers.

In the typical case, an employee working inside the U.S. for a U.S. subsidiary of a foreign corporation seeks to include all of the employer's foreign employees in the total headcount for purposes of determining applicability of the statute or damage limits. There are two views on this topic.

The first view, espoused by the Equal Employment Opportunity Commission (EEOC), is called the "integrated enterprise" rule (EEOC Office of Legal Counsel, 1993). This view holds that if the employment decisions made at a domestic subsidiary of a foreign corporation are sufficiently integrated with or controlled by the foreign parent corporation, then the two firms constitute an integrated enterprise. When an integrated enterprise exists, all of the parent corporation's employees may be counted (*Greenbaum v. Handelsbanken*, *N.Y.*, 1998; *Kang v. U. Lim Am. Inc.*, 2002; *Morelli v. Cedel*, 1997).

Some courts use other similar legal doctrines such as the "single employer" rule which holds that when two employers are sufficiently intertwined they should be considered as one employer (*Darden v. DaimlerChrysler N. Am. Holding Corp.*, 2002; *Gaugaix v. Laboratoires*

Esthederm USA, Inc., 2001; *Haugh v. Schroder Investment Management North Am., Inc.*, 2003). Another theory provides that when one employer acts as "alter ego" of another, then both can be held liable (*EEOC v. Kloster Cruise, Ltd.*, 1991). Other courts adopt an "agency theory" which holds one corporation liable for the conduct of another if it was acting as its agent (*Goyette v. DCA Advertising, Inc.*, 1993). Any one of these theories accomplish essentially the same result as the integrated enterprise rule. However, under any of these theories, the main focus is on the degree to which there is "centralized control of labor relations" (*Da Silva v. Kinsho Int'l Corp.*, 2000: 244). The key aspect of centralized control is who makes the final decisions about employment matters. When the foreign parent makes the final decisions, then the enterprise is more integrated.

In addition, courts often justify the inclusion of foreign employees by reasoning that larger employers have more resources enabling them to comply with the statues and to defend themselves in litigation. For example, in *Goyette v. DCA Advertising, Inc.* (1993), a district court ruled that employees of a U.S. subsidiary of a Japanese corporation could claim national origin discrimination under Title VII when the company retained Japanese personnel but discharged the Americans. DCA Advertising, Inc. (DCA), a U.S. corporation, was a wholly owned subsidiary of Dentsu, Inc. (Dentsu), a Japanese corporation headquartered in Tokyo that is the world's largest advertising and communications company. Dentsu placed its own Japanese expatriates in charge of DCA and retained control over which Japanese expatriates DCA could terminate. The company fired several U.S. citizens and replaced them with Japanese expatriates. The court ruled that DCA's Japanese parent company, Dentsu, significantly affected the employment policies of DCA. Therefore, with Dentsu's employees included, the defendant had enough employees to be covered by the statute.

By contrast, in *Da Silva v. Kinsho Int'l Corp.* (2000), a court found that the foreign parent corporation did not have sufficient control over the employment decisions of the domestic subsidiary. In *Da Silva*, all of the hiring, firing, and pay raise decisions were made by managers inside the U.S. who did not get approval from the Japanese parent corporation before making these decisions. Because the domestic subsidiary was sufficiently independent and it did not have enough employees to be covered by the statute, the court dismissed the case.

The second view is something we call the "foreign parent exclusion rule." That rule holds that the foreign employees of a foreign parent corporation cannot be included because U.S. employment discrimination laws don't apply to foreign corporations outside the U.S. when they are not controlled by U.S. employers. Courts following this approach tend to adopt a stricter reading of the text of the statutes.

For example, in *Russell v. Midwest-Werner & Pfleiderer, Inc*. (1997) the court ruled that employees of a foreign parent corporation do not count when computing the damage limits imposed under Title VII. Tami Russell worked in the U.S. for a domestic subsidiary of a German corporation. She sued her employer for hostile environment sexual harassment. Russell claimed the parent and subsidiary companies were an integrated enterprise so that the employees in Germany should be added to the total. Including them would substantially raise the limit on compensatory and punitive damages. However, the court ruled that foreign employees of a foreign employer are not included in the definition of covered employees under Title VII; and therefore they should not be counted. Several other courts have followed the foreign parent exclusion rule (*Feit v. Biosynth Int'l, Inc.*, 1996; *Kim v. Dial Service Int'l, Inc.*, 1997; *Minutillo v. Aqua Signal Corp.*, 1997; *Mousa v. Lauda Air Luftfahrt, A.G.*, 2003; *Rao v. Kenya Airways, Ltd.*, 1995; *Robins v. Max Mara, U.S.A., Inc.*, 1996).

Employee Status

For jobs inside the U.S., the issue of employee status is important in cases where the employee is not a U.S. citizen or is otherwise authorized to work in the U.S. In *Espinoza v. Farah Mfg. Co.* (1973) the Supreme Court ruled that Title VII does apply to aliens inside the U.S., noting the definition of covered persons in Title VII included "any individual" without requiring that one be a citizen in order to be covered. However, the Court also ruled that employers in the U.S. may discriminate against job applicants who are not citizens. The plaintiff in that case was a lawfully admitted resident of the U.S., but a citizen of Mexico. The Court noted that citizenship discrimination was permitted but national origin discrimination was not.

After *Espinoza*, the Immigration Reform and Control Act of 1986 (IRCA) changed the rules. IRCA was intended to eliminate job opportunities for unauthorized aliens attempting to illegally immigrate into the U.S. However, IRCA also prohibited both national origin and citizenship status discrimination. Nevertheless, it does permit discrimination in favor of U.S. citizens for some government jobs (*Tovar v. U.S. Postal Service*, 1993).

Yet, there is a key distinction between non-citizens who are legally authorized to work in the U.S. and those who are not. Two cases from the Fourth Circuit Court of Appeals held that U.S. employment discrimination laws do not apply to aliens who are not legally authorized to work in the U.S. In *Egbuna v. Time Life Libraries, Inc.* (1998) the court ruled that a job applicant who is not authorized to work in the U.S. may not file suit under Title VII for an alleged discriminatory refusal to hire. Obiora Egbuna, a Nigerian national, claimed Time-Life retaliated against him for participating in an EEOC investigation of a complaint where Egbuna had corroborated sexual harassment claims filed by another employee. Egbuna had been working in the U.S. under a valid student visa in 1989. That visa expired, but Egbuna continued to be employed illegally until 1993. He resigned in 1993 thinking he would return to Nigeria.

He had not attempted to renew his visa because he did not want to alert immigration officials of his illegal status. However, after he resigned he changed his mind about leaving, and reapplied for work with Time-Life. They refused to rehire him and Egbuna claimed the refusal was retaliation. The Court of Appeals held that because Egbuna could not legally work in the U.S. under the IRCA, he was not qualified for the job in question. Because he was not qualified, he could not prove a necessary element of a *prima facie* case of discrimination.

Although Egbuna was inside the U.S. when he applied for the job, in another case the applicant was outside the U.S. In *Reyes-Gaona v. North Carolina Growers Ass'n* (2001) the Fourth Circuit Court of Appeals ruled the ADEA does not apply to foreign citizens who apply in foreign countries for jobs inside the U.S. While in Mexico, Luis Reyes-Gaona applied for a job located in the U.S. hoping his employer would help him get a temporary agricultural worker visa. In this case the court focused on the definition of covered employees, noting that it included U.S. citizens working for U.S. corporations abroad, but it did not include non-U.S. citizens seeking employment inside the U.S. Based on its reading of the text of the statute, the court held that foreign citizens who apply outside the U.S. for a job inside the U.S. are not covered. Similarly, in *Chaudhry v. Mobil Oil Corp.* (1999) the Fourth Circuit ruled that a Canadian citizen who worked for Mobil outside the U.S. could not file suit under Title VII or the ADEA for Mobil's refusal to promote him to a job inside the U.S.

However, the EEOC disagrees with the Fourth Circuit and takes the position that U.S. employment discrimination laws *do* apply to jobs inside the U.S. even for persons not legally authorized to work in the U.S. Although EEOC positions are not binding on the courts they do often influence how judges make their decisions. However, EEOC recognizes that unauthorized or undocumented workers may not be entitled to receive back pay or reinstatement to a job because of their illegal status (EEOC Office of Legal Counsel, 1999, 2002). This position was

adopted by the EEOC in response to the Supreme Court's ruling in *Hoffman Plastic Compounds, Inc. v. NLRB* (2002). In that case the Court held that the National Labor Relations Act of 1935 (NLRA) does apply to undocumented illegal workers inside the U.S. However, the court ruled the plaintiff could not receive back pay for the period of time that he would have been illegally working in the U.S. because it would violate the nation's immigration policies under IRCA. The Supreme Court might rule similarly when faced with issues of back pay to plaintiffs who claim a violation of U.S. discrimination statutes.

Even if it is determined that undocumented workers are not protected under employment discrimination laws, significant civil and criminal sanctions exist under other laws such as IRCA and anti-racketeering statutes to penalize employers who systematically employ undocumented workers (e.g., *Mendoza v. Zirkle Fruit Co.*, 2002; Racketeer Influenced and Corrupt Organizations Act of 1970; *Trollinger v. Tyson Foods Inc.*, 2002).

In addition, if an employer unknowingly hires a worker who is not legally authorized to work in the U.S., the employer has a legal obligation to terminate that employee upon discovering the worker's illegal status (*Hoffman Plastic Compounds v. NLRB*, 2002; IRCA). In some cases, courts have denied employer requests to use legal discovery rules to order a plaintiff to produce documents showing that they are legally authorized to work in the U.S. (*De La Rosa v. N. Harvest Furniture*, 2002). This led to an unusual situation in *Lopez v. Superflex, Ltd.* (2002). In that case Antonio Lopez sued for discrimination under the ADA. His attorney advised him not to answer questions about his immigration status presumably because he was illegally employed in the U.S. Because of the ruling in *Hoffman Plastic Compounds* that undocumented workers are not entitled to back pay, Lopez withdrew his demand for back pay, but the court permitted him to pursue a claim for punitive damages.

In summary, these cases suggest U.S. employment discrimination laws probably do apply to aliens inside the U.S. even though they are not citizens. In the Fourth Circuit the statutes do not apply to persons not legally authorized to work in the U.S. However, the EEOC has taken the position that statutes should apply to people whether they are authorized to work in the U.S. Further the Supreme Court may permit the application of the statutes, but not authorize back pay remedies. The foregoing discussion leads to our second guideline:

Guideline 2: U.S. employment discrimination laws apply to jobs located inside the U.S. when the employer is a U.S. entity and the employee is <u>not</u> a U.S. citizen but is legally authorized to work in the U.S. U.S. Depending on jurisdictional issues, U.S. Laws may apply to workers who are <u>not</u> authorized to work in the U.S., although the remedies they receive may be limited.

International Law Defense: The Impact of International Treaties

Under the U.S. Constitution, international treaties are the supreme law of the land. They supercede any contradictory provisions of federal statutes (U.S. Constitution, Article VI; *cf., Weinberger v. Rossi*, 1982). U.S. diplomats have negotiated numerous treaties of "Friendship, Commerce, and Navigation" (FCNs) with other countries (e.g., FCN Italy, 1948; FCN Japan, 1953; Senate Committee on Foreign Relations, 1953) specifying the rights and privileges of firms called Foreign Direct Investors (FDIs) (Schnitzer, 1999). While negotiating FCN treaties, U.S. diplomats insisted on provisions permitting U.S. firms operating in foreign countries to select their own executives (Silver, 1989; Walker, 1958). These were intended to counter local laws that required hiring host country nationals for key management jobs. Reciprocal rights were granted to FDIs operating in the U.S. The North American Free Trade Agreement (1993) takes a slightly different approach. It prohibits the governments of Canada, Mexico, and the U.S. from requiring that FDIs operating in their country appoint persons to senior management positions based on their nationality.

The courts recognize that although foreign employers operating inside the U.S. are covered by U.S. discrimination laws (*Helm v. South African Airways*, 1987; *Mattison v. Cannon USA, Inc.*, 1981; *Porto v. Cannon USA, Inc.*, 1981), they also have the right employ citizens of their home country to manage their U.S. operations because of the rights granted to foreign corporations under FCN treaties (*Fortino v. Quasar Co.*, 1991; *MacNamara v. Korean Air Lines*, 1988). The Supreme Court ruled that as a general rule a U.S. corporation that is a subsidiary of a foreign corporation generally may not invoke the treaty rights of its foreign parent corporation (*Sumitomo Shoji America, Inc. v. Avagliano*, 1982). However, other courts have carved out a narrow exception to the general rule that permits domestic subsidiaries to invoke the treaty rights of their foreign parent corporation in cases where the foreign parent actually controlled employment decisions (*Papaila v. Uniden Am. Corp.*, 1995; *Spiess v. C. Itoh and Co. (Am.)*, 1981; *Wallace v. SMC Pneumatics, Inc.*, 1997).

Furthermore, several courts have ruled that the right to prefer citizens of the corporate parent country does not permit discrimination based on other grounds. *Linskey v. Heidelberg Eastern, Inc.* (1979) illustrates the interplay between FCN treaties and the ADEA. A district court ruled that the FCN treaty between the U.S. and Denmark gave Danish corporations the right to hire Danish citizens to manage their operations in the U.S. However, the court also ruled the treaty did not justify the dismissal of a former employee who was a U.S. citizen. Plaintiff James Linskey, a 55-year old U.S. citizen, alleged he was fired because of his age and because he was not a Danish citizen. The court ruled the FCN treaty with Denmark gave the employer the right to hire its own citizens, but that it was not permitted to do so if it would violate U.S. law that prohibits age discrimination.

Similarly FCN treaty rights did not permit discrimination based on age or ethnicity in *Adames v. Mitsubishi Bank*, Ltd. (1990). Other courts have ruled that the employer's right under

a treaty to prefer citizens does not permit discrimination on other grounds (*Bennett v. Total Minatome Corp*., 1998 (age, national origin, race); *Linskey v. Heidelberg Eastern, Inc.*, 1979 (age); *Shane v. Tokai Bank*, 1997 (race, sex, or national origin). Also, a foreign corporation's right under an FCN treaty to discriminate in favor of its own citizens does not give it the right to permit sexual harassment (*Santerre v. AGIP Petroleum Co.*, 1999) or to discriminate in favor of citizens of a third country (*Starrett v. Iberia Airlines of Spain*, 1989).

However, citizenship and national origin are often highly correlated. Citizenship is a legal status question determined by a country's immigration laws. National origin is a demographic characteristic that refers to the place where people or their ancestors were born. However, one's citizenship is often the same as one's national origin. As a consequence, the right to discriminate based on citizenship (permitted by FCN treaties) may result in discrimination based on national origin (prohibited by Title VII). This creates a potential conflict between treaty rights and employment discrimination laws.

The courts have found ways to avoid this conflict under both disparate treatment and disparate impact cases. Under disparate treatment, the plaintiff attempts to show that the employer intended to treat one person differently than another based on national origin (*EEOC v. United Airlines*, 2002; *Lemnitzer v. Philippine Airlines*, 1991). Thus, when a FDI invokes its treaty rights to hire its own citizens, it is probably also intentionally discriminating based on national origin. However, two courts ruled that the conflict between treaty rights and discrimination law can be avoided by requiring the employer to show that national origin is a bona fide occupational qualification (BFOQ) for the job in question. In this way, the FDI can utilize its treaty rights to prefer its own citizens, but also defend the intentional preference based on national origin as a BFOQ (*Avagliano v. Sumitomo Shoji America, Inc.,* 1981; *Goyette v. DCA Advertising, Inc.*, 1993).

Disparate impact requires a showing that one group is disproportionately excluded (e.g., not hired) when compared to another group. To avoid the conflict between Title VII and FCN treaty rights, one court ruled that the disparate impact theory of discrimination simply does not apply to foreign corporations covered by FCN treaties (*Weeks v. Samsung Heavy Indus. Co.*, 1997).

For foreign government agencies operating inside the U.S., the general rule is that they are immune from U.S. employment discrimination statutes unless they are engaged in commercial activities (*Elliot v. British Tourist Authority*, 1997; Foreign Sovereign Immunities Act of 1976). For example, in *Kato v. Ishihara* (2002) the court dismissed the sexual harassment complaint of Yuka Kato because she was an employee of the Tokyo Municipal Government (TMG) on temporary assignment in New York. As a civil servant, her employment was not commercial so sovereign immunity applied to TMG.

However, the cases reflect two types of commercial activities that are not immune. The first type consists of activities that have a commercial purpose. This includes marketing the products of a foreign country (*Holden v. Canadian Consulate,* 1996; *Segni v. Commercial Office of Spain,* 1987) or operating an airline (Carponcy v. Air France, 1985; *Gazder v. Air India*, 1983). The second type consists of employment that is considered commercial. This includes secretarial work performed by persons who are not civil servants (*Zveiter v. Brazilian Nat'l Superintendency of Merchant Marine,* 1993) and matters such as pay raises, promotions, and working conditions (*Hansen v. Danish Tourist Board*, 2001).

In addition, when dealing with foreign government agencies, issues of diplomatic immunity may also arise under the Vienna Convention on Diplomatic Relations (1964) (Vienna Convention) and the Foreign Service Immunity Act (2000) (FSIA). However, like the cases noted above, when employees perform non-diplomatic functions, the employment relationship is

considered "commercial" and therefore not protected by the FSIA. For example, in *Mukaddam v. Permanent Mission of Saudi Arabia* (2000), Rajaa Al Mukaddam sued under Title VII claiming she was harassed, terminated, and retaliated against based on her sex. Plaintiff was an American citizen hired in New York City to work in the diplomatic offices of the Saudi Arabian government. Her duties included general administrative and clerical duties but she was not part of policy deliberations and was not authorized to speak on behalf of the Saudi government. The court held that Mukaddam's employment was a commercial activity because her work was administrative/clerical and she was not a civil servant or member of the diplomatic staff of the Saudi government, therefore the Mission was not immune. The court also ruled that the Vienna Convention did not provide immunity for the Saudi Arabian government because the Convention does not grant absolute immunity to foreign governments regarding the hiring and firing of their personnel. The cases above illustrate the following guidelines.

Guideline 3: U.S. employment discrimination laws do not apply to jobs located inside the U.S. when the employer is a foreign entity exempted by a treaty, even though the employee is authorized to work in the U.S.

Guideline 4: U.S. employment discrimination laws apply to jobs located inside the U.S. when the employer is a foreign entity not exempted by a treaty and the employee is authorized to work in the U.S.

Jobs Located Outside the U.S.

Location of Work

In many cases there are disputes about whether a plaintiff's employment should be considered *extraterritorial*. The typical case involves a non-U.S. citizen seeking to establish that the work was located in the U.S. For employers this is a key issue because whenever the plaintiff is not a U.S. citizen and the location of the work is outside the U.S., U.S. discrimination laws do not apply.

These cases show that the courts consider a variety of factors when addressing the issue of work location. While the particular facts of a case may influence which factors are more or less relevant, five of the most important factors are summarized below.

First, in cases involving staffing issues (e.g., hiring and termination) it is well settled that in determining whether a claim the job is extraterritorial, the primary focus is on the location(s) where the employee performs his or her duties, and not the location where the discriminatory decisions occurred (e.g., the refusal or termination decision). In these cases, courts have consistently rejected something we call the "place of decision theory" and instead focused on the location of plaintiff's workstation (*Denty v. SmithKline Beecham Corp.,* 1997; *Mithani v. Lehman Bros., Inc.,* 2001). This is especially important for employees who are not U.S. citizens. For non-U.S. citizens, even if they are recruited, hired, and trained in the U.S., when their workstation is outside the U.S., U.S. discrimination laws do not apply *(Shekoyan v. Sibley Int'l Corp*., 2002). Furthermore, this holds true even if a decision to terminate their employment is made inside the U.S. by the U.S. parent corporation (*Iwata v. Stryker Corp.*, 1999).

Similarly, in cases involving sexual harassment, the location of the workstation plays a key role in determining whether Title VII applies. For example in *Peterson v. DeLoitte & Touche* (1993) the court ruled that Title VII did not apply to sexual harassment because it happened in Russia before the adoption of the extraterritorial amendments to Title VII. Similarly, in *Arno v. Club Med* (1994) plaintiff filed a complaint with Club Med headquarters personnel in New York about the alleged rape and sexual harassment she suffered at the hands of her supervisor while working at a resort in Guadeloupe, France. However, the court held that even though she filed her complaint in the U.S. at the company's headquarters, because the harassment occurred outside the U.S. and before the adoption of the extraterritorial amendments to Title VII, the employer had no duty to investigate or take remedial action.

Furthermore, if the plaintiff is not a U.S. citizen, the location of the alleged sexual harassment is important. In *Mota v. Univ. of Tex. Houston Health Sci. Ctr.* (2001) the court ruled that because the plaintiff was a foreign citizen, the alleged incidents of sexual harassment occurring in Mexico were not covered by Title VII. The court explained that Title VII does not apply to harassment that occurs outside the U.S. to non-citizens. Dr. Luis Mota, a Venezuelan citizen, alleged several incidents of same-sex sexual harassment against his department chair occurring in their Houston offices, and at academic conferences in Philadelphia, Breckenridge, Orlando, and Monterrey, Mexico. The Fifth Circuit Court of Appeals ruled that jurisdiction could not be asserted based on the sexual harassment that occurred in Mexico because Mota was not a U.S. citizen. Nevertheless, the court found the other incidents of sexual harassment occurring inside the U.S. were sufficient to bestow jurisdiction, and therefore upheld the jury's verdict and damages award.

Second, the fact that an employee performed some work in the U.S. does not preclude a finding that his or her work for the employer was extraterritorial. The percent of time the employee spent working in the U.S. versus overseas is often a key factor. For example, in *Gantchar v. United Airlines* (1995) the court held that spending approximately 20% of one's working time in the U.S. was inadequate to establish that the plaintiff's workstation was in the U.S. Yet the court also stated that there is no "bright line rule that work performed less than 50% within the U.S. is necessarily extraterritorial" (*Gantchar v. United Airlines*, 1995, p. 35). Further, *Barbosa v. Merck & Co*. (2002) suggests that the percent of work time that must be in the U.S. to establish a U.S. workstation depends on the nature of the work performed. Presumably, the more important the work done in the U.S., the less time would be needed to establish a work station in the U.S. Thus, the percent of time spent working in the U.S. is a key factor, but it is not necessarily determinative.

Third, the question whether the plaintiff was employed abroad or was employed in the U.S. but merely temporarily deployed overseas is a factual issue that the court must ultimately resolve. In addressing that issue, the *Torrico v. IBM* (2002) court adopted a "center of gravity" test assessing "the totality of the circumstances." Important factors include a pre-existing employment relationship (and where it was created), intent of the parties concerning the location of the employment relationship, location of job duties, location where benefits were received, location of reporting relationships, duration of assignments, and the domicile of the employer and employee.

The *Torrico* court held the facts alleged by the plaintiff could support a finding that the plaintiff was employed in the U.S. and only temporarily assigned to Chile. Of particular relevance to the court were allegations that the plaintiff was employed by IBM in the U.S. before his assignment to Chile, he did not take on new responsibilities in Chile, he spent substantial time traveling to IBM's U.S. headquarters, his activities were controlled and directed by executives in the U.S., and IBM had made statements characterizing plaintiff's work in Chile as temporary. Based on these factors, the IBM's motion to dismiss the case for lack of jurisdiction was denied.

Fourth, in deciding the location of work issue, courts will scrutinize how the parties treated the work arrangement before the dispute arose. For example, the *Torrico* court noted that IBM's letter agreement with Torrico stated his assignment was temporary in nature. Further, on at least two occasions, IBM informed immigration officials in Chile that his assignment was temporary.

Finally, recent court decisions suggest a liberalizing of location of work standards to reflect today's globalized environment. Employees increasingly work in multiple locations, with work in one location intertwined with work in another location making it difficult to describe

employee activities as limited to one locale, either domestic or foreign (Moldof, 2002). In both *Torrico v. IBM* (2002), and *Barbosa v. Merck & Co.* (2002), the courts also indicated that it may be possible for an individual to have two (or more) legal workstations.

Employer Status

Generally, U.S. discrimination statutes do not apply to jobs located outside the U.S. when the employer is a foreign entity. For example, in *Robinson v. Overseas Military Sales Corp.* (OMSC) (1993), Howard E. Robinson, a 60-year old U.S. citizen, sued OMSC alleging he had been fired because of age discrimination. He worked for OMSC in Korea selling cars to military personnel. OMSC is a Swiss corporation with an office in New York. The district court ruled the ADEA did not apply to a U.S. citizen working outside the U.S. for a foreign corporation. This case illustrates the following guideline.

Guideline 5: U.S. employment discrimination laws do not apply to jobs located outside the U.S. when the employer is a foreign entity, even though the employee is a U.S. citizen.

Employee Status

The citizenship status of the employee or job applicant is critically important for jobs located outside the U.S. when the employer is a U.S. entity. For example, in *Hu v. Skadden, Arps, Slate, Maegher & Flom, LLP* (Skadden) (1999), a district court ruled that William Hu, a lawful resident of the U.S. and Chinese citizen, could not sue under the ADEA. Hu was a recent law school graduate who had previously worked for the defendant law firm as a legal assistant. He applied at Skadden's New York offices for a job in their Beijing and Hong Kong offices. The plaintiff alleged he was not hired because of his age. The court noted that the job search occurred inside the U.S. and that Skadden conducted interviews and made hiring decisions in their New York offices. However, the ADEA did not apply because Hu was a Chinese citizen and the job was located in China. Other courts have also ruled that Title VII and the ADEA do

not apply to jobs outside the U.S. for persons who are not U.S. citizens (*Iskandar v. American Univ.*, 1999; *Iwata v. Stryker Corp.*, 1999; *Ghandour v. American Univ.*, 1998). These cases illustrate the following guideline.

Guideline 6: U.S. employment discrimination laws do not apply to jobs located outside the U.S. even if the employer is a U.S. entity, if the employees are foreign citizens.

International Law Defense: The Impact of Conflicts Between U.S. and Foreign Laws

The ADEA, Title VII and the ADA have been amended to follow the general principle of international law that U.S. laws not be applied extraterritorially where they would conflict with foreign laws (Restatement, 1987). Under this principle, employers may claim that U.S. discrimination laws should be not applied to their foreign operations where it would cause them to violate foreign law (i.e., the foreign law defense).

For example, in *Mahoney v. RFE/RL, Inc.* (1995) the issue was whether breaching a collective bargaining agreement in a foreign country would violate that country's laws thereby exempting the employer from compliance with the ADEA. Two U.S. citizens working in Germany for Radio Free Europe and Radio Liberty (RFE/RL) were forced to retire at age 65. RFE/RL is a U.S. non-profit corporation headquartered in Munich, Germany. It had a collective bargaining agreement, modeled after the nation-wide agreement in the German broadcast industry, requiring employees to retire at age 65. For most jobs the ADEA prohibits mandatory retirement based on age. All efforts by RFE/RL to an exemption from this rule from German government agencies failed. Therefore, the D.C. Circuit Court of Appeals ruled that requiring RFE/RL to violate the German collective bargaining agreement would be forcing it to violate the "law" of a foreign country because in Germany labor agreements take on the force of law.

Other than the *Mahoney* case, the courts have not interpreted the meaning of the foreign law defense contained in the statutes. However, there are several cases dealing with the issue of

whether the customs or laws of foreign countries might constitute a BFOQ defense. These cases were decided before the 1991 amendments that provided employers with a statutory foreign law defense. Nevertheless, they provide guidance on the type of foreign customs and laws that the courts would likely find to be legitimate foreign law defenses today. In fact, in cases where employers have a BFOQ based on a foreign law, they may also have a valid foreign law defense. For example, if there is a foreign law that makes being the member of a certain religion a requirement of the job, it is a BFOQ and would also be a valid foreign law defense.

These cases range from mere social customs that are not valid BFOQs to formal laws enforced by foreign governments that are valid BFOQs. For example, in *Fernandez v. Wynn Oil Co.* (1981) the court ruled that stereotypes about the proper roles of males and females did not justify a preference for hiring a male for the position of Vice President of International Operations. The court rejected the employer's claim that sex was a BFOQ in Latin America because women would have difficulty conducting business from a hotel room. This is an example of a social custom that was not a valid BFOQ and probably would not constitute a valid foreign law defense today.

Furthermore, assertions or opinions about what the law is in a foreign country or citation to legal treatises about foreign law are not enough to create a valid BFOQ or foreign law defense (*Pfeiffer v. Wm. Wrigley Jr. Co.,* 1985). For example, in *Abrams v. Baylor College of Medicine* (1986) the court ruled that a belief that Jews would not be granted entry and exit visas was not enough to justify failure to send Jewish doctors to work in a hospital in Saudi Arabia. Presumably, a more definitive determination of the Saudi law would be required for the foreign law to be a BFOQ.

However, formal doctrines with serious consequences enforced by foreign governments are likely to constitute both a valid BFOQ and foreign law defense. For example, in *Kern v.*

Dynalectron (1983), Wade Kern, sued for religious discrimination when he was constructively discharged from the job of helicopter pilot. The job entailed flying a helicopter into Mecca, a holy area inside Saudi Arabia according to the Islamic religion. The religious laws of Saudi Arabia prohibit non-Muslims from entering Mecca. Since Kern was a Baptist and not a Muslim, Islamic law would require that he be beheaded for entering Mecca. The court held that religion was a BFOQ for this job because of the religious laws enforced in Saudi Arabia. If decided today, a court would also likely find this to be a valid foreign law defense. These cases illustrate the following guidelines.

Guideline 7: U.S. employment discrimination laws apply to jobs located outside the U.S. when the employer is a U.S. entity and the employee is a U.S. citizen, if compliance with U.S. laws would <u>not</u> violate foreign laws.

Guideline 8: U.S. employment discrimination laws <u>do</u> <u>not</u> apply to jobs located outside the U.S. when the employer is a U.S. entity and the employee is a U.S. citizen, if compliance with U.S. laws would violate foreign laws.

General Observations and Recommendations

Organizationally Sensible and Responsible Decisions

So far, this article has focused on a *legal analysis* of U.S. employment discrimination laws and their application to international employers. That analysis suggests that in many circumstances, international employers may influence whether U.S. discrimination laws apply to their employment relationships through the policies that they adopt, the practices they implement, and their conduct in dealing with employees. Sometimes that influence is exerted unknowingly, with results the employer later regrets (e.g., IBM's conduct toward Torrico, discussed earlier). A clear lesson from this review and analysis is that IO psychologists working with international employers should give thoughtful consideration to the issues associated with the application of U.S. discrimination law to their workforce *before disputes arise*.

All international employers need to consider the legal issues associated with the potential application of U.S. discrimination laws to their workforce. Yet, the question of whether a given international employer should attempt to influence the law that applies to their workforce, and if so, in what direction, is one that transcends legal analysis. The threat of employment litigation is obviously a legitimate consideration. However, organizationally sensible and responsible decisions require that other factors be taken into account, including ethical issues, the organization's espoused values, and potential human resource management concerns (e.g., impact on the organization's ability to attract and retain desired employees) (Roehling & Wright, 2004). The following section addresses several of these factors, providing guidance that will help IO psychologists contribute to international employer policies and practices that are both legally defensible and organizationally sensible.

Keys to Managing the International Employment Law Landscape

Make consistency and organizational justice primary concerns. Consistency in the substance, symbolism, and application of organizational policies and practices is a critical issue (Baron & Kreps, 1999). Consistent policies and practices provide employees a clearer sense of what they can expect and what is expected of them. Inconsistent policies and practices may create mistrust, and perceived inconsistencies in the application of policies within an organization may contribute to invidious social comparisons and feelings of distributive injustice. Thus, in deciding whether to enthusiastically embrace, passively accept, or seek to avoid the application of U.S. discrimination laws, a primary concern should be the extent to which the organization's decision will be perceived by employees as consistent with the organization's stated mission, espoused values, and existing policies and practices.

In addition to inconsistencies between employer policies in different countries, inconsistencies may be perceived in the application of policies across employees. This may occur

if among employees located in the same workplace, some employees are covered by U.S. employment discrimination laws while others are not. Employees who are not covered by U.S. employment discrimination laws may compare themselves to those who are and perceive relative unfairness. This kind of inconsistency may be addressed by the adoption of a uniform policy that guarantees all employees the substantive protection of U.S. discrimination laws. Where there is a legitimate basis for not adopting such a uniform policy, the importance of using only valid job-related criteria for all employees, whether or not they are covered by U.S. laws, becomes even greater. When the employment practices are clearly job-related, employees are more likely to perceive that the decisions are distributively and procedurally fair and may be less likely to file charges of discrimination (Goldman, 2001).

Compared to the typical manager, IO psychologists are likely to have a greater appreciation of the importance of consistency for employees' perceptions of fairness, and ultimately, positive employer-employee relations. Therefore, IO psychologists should assume a special responsibility for raising and addressing consistency and fairness issues in international employment settings. For example, if a company is considering moving part of its operations outside of the U.S. to avoid the restrictions of U.S. discrimination laws, IO psychologists can contribute to an organizationally sensible decision by informing the employer of the findings from research regarding organizational reputation and attractiveness. That research indicates that if moving operations overseas to avoid U.S. employment laws is viewed by job applicants and employees as inconsistent with the organization's espoused values, it may negatively affect the employer's ability to attract and retain desired employees in it U.S. offices and other operations (Greenig & Turban, 2000; Roehling & Winters, 2000; Turban & Greenig, 1997).

Conduct professional job analyses that yield written job descriptions. Professionally conducted job analyses and written job descriptions take on increased importance in many

international employment situations. In addition to helping ensure job-related practices that will promote employees' perceptions of fairness, courts deciding international employment disputes have given great weight to job descriptions that are based on job analyses conducted prior to the dispute. For example, job descriptions have played a critical role in courts' determination that a subsidiary can assert its parent company's FCN treaty right to give a preference to its own citizens over U.S. citizens. Conversely, the treaty defense for giving a preference has been rejected because the foreign employer's job description did not reflect the need for the special skills of a foreign executive (*Goyette v. DCA Advertising, Inc.*, 1993; *Sumitomo Shoji America, Inc. v. Avagliano*, 1982). Clearly, foreign employers operating in the U.S. should only consider giving preferences to foreign citizens when there is a job description documenting the importance of foreign citizenship for the position in question (e.g., a need for familiarity with the parent company, necessary language skills, knowledge of foreign markets, customs, etc).

IO psychologist should also consider the potential value of written job descriptions as evidence bearing on the location of an employee's work, an issue that may affect whether U.S. discrimination laws apply. Examples of job description content that may be relevant to the work location issue include information regarding the job holder's reporting relationships, descriptions of job responsibilities that indicate where the essential responsibilities will be performed, and how much time they will be performed in different countries (*Torrico v. IBM,* 2002).

The increased importance of professionally conducted job analyses in international employment situations is also due, more generally, to the greater ambiguity regarding legal requirements when compared to solely domestic employment situations. When specific steps that will provide a legally defensible procedure cannot be clearly ascertained, the need to provide documented, job related, non-discriminatory reasons for all employment policies, practices, and decisions becomes even more critical.

Verify local "legal concerns" that are offered as a basis for differentiating staffing practices. IO psychologists developing global staffing systems sometimes encounter pressure to differentiate staffing practices across countries due to concerns about local laws (Ryan, Wiechmann, & Hemingway, 2003). This situation raises a U.S. employment law concern if the local staffing practice is one that will be applied to U.S. citizens working abroad, and it potentially conflicts with U.S. employment laws (e.g., a practice of not hiring women for certain jobs). The perception of the local law may suggest a possible foreign law defense which, if established, would allow the employer to adopt the local practice. However, in order to establish the foreign law defense, the local staffing practice must be based on an *actual* foreign law requirement, and not mere social norms, customer preferences, or *perceived* legal concerns. Recent research indicates that local staffing practices that are *perceived* as legally required often do not reflect *actual* legal requirements (Ryan et al., 2003). Thus, before adopting a local staffing practice that will be applied to U.S. citizens working abroad, and potentially conflict with U.S. employment laws, it is absolutely essential that the existence of a local law requiring the practice be verified (i.e., consult an attorney with relevant expertise and request an opinion letter).

Design internationally-sensitive training. The concerns associated with the application of U.S. discrimination laws to international employers suggest several training needs. IO psychologists can design and deliver managerial training to increase the awareness of how statements and conduct in dealing with employees may provide evidence that impacts the legal obligations, and ultimately the liability of employers. Such training might address, for example, how statements made to reassure an employee being transferred to an overseas subsidiary may inadvertently constitute evidence that the employee's location of work remained in the U.S. Foreign managers coming to the U.S. should receive training that familiarizes them with U.S. discrimination laws. In addition to reducing the likelihood of violations occurring, the fact that

the employer provided such training is evidence of the employer's good faith that may, in some circumstances, reduce the employer's liability for punitive damages. Conversely, U.S. managers going abroad should receive training that familiarizes them the employment laws of their host country.

Finally, international employers should assess the need for all employees operating in foreign countries to receive cross-cultural training that addresses cultural differences that may cause employment related litigation. For example, it has been observed that when foreign employers operate inside the U.S., they may bring with them cultural perspectives that do not carry the same level of concern for issues of sexual harassment. Therefore, foreign employers operating inside the U.S. may benefit from cross-cultural training for managers that addresses different perceptions of appropriate treatment of persons based on sex and ethnicity (Taylor & Eder, 2000).

Consider the impact of organizational structure and job design on legal obligations. The work of contemporary IO psychologists includes helping organizations improve their organizational structure and job design (*Guidelines for Education and Training at the Doctoral Level in Industrial-Organizational Psychology*, 1999). In the present context, this requires an understanding of how an international employer's organizational structure may impact its legal obligations under U.S. employment laws.

International management systems are centralized to varying degrees (e.g., ethnocentric, polycentric, geocentric: Adler, 1983; Caligiuri & Stroh, 1995; Heenan & Perlmutter, 1979). This may include centralized control of employee recruiting and selection systems (Ryan, Weichmann, & Hemingway, 2003), performance management and appraisal systems, and employee compensation systems. The degree to which a *foreign parent company* exercises control over its U.S. subsidiary may affect legal obligations in at least two ways. On one hand,

the more control that a foreign parent exercises over employment matters in the subsidiary, the more likely it will be that their foreign employees will be counted in determining the applicability of U.S. employment discrimination laws and the applicability of higher damage limits. This means that where there are relatively few employees in the U.S. subsidiary (below the minimum threshold for U.S. discrimination laws to apply), the parent's extensive control over employment matters in the subsidiary may result in U.S. discrimination laws applying. However, if the parent had exercised less control, the laws would not have applied.

On the other hand, the more that the parent exercises centralized control over employment matters, thereby minimizing the involvement of the subsidiary in setting terms and conditions of employment, the more likely it will be that the FCN treaty defense will apply. The treaty defense will be less likely to apply where the U.S. subsidiary is involved in employment decisions (e.g., compensation, promotion) relating to expatriates. Thus, in terms of addressing U.S. employment law concerns, the desirability of greater centralized control of employment matters will depend on the international employer's most pressing concern (keeping the subsidiaries workforce number down to avoid the application of U.S. discrimination laws versus ensuring the availability of the FCN treaty defense to allow preferences for foreign expatriates).

The degree to which *U.S. firms* exercise centralized control over their operations in foreign countries may also affect the extent to which their workforce is covered by U.S. discrimination laws. The mere fact that decisions were made at the U.S. corporate headquarters office is not likely to invoke the applicability of U.S. discrimination laws for jobs outside the U.S. However, the more that control of employment relationships are centralized in the U.S., the more likely the work location will be considered to be inside the U.S. Of course, for both foreign companies with operations in the U.S., and U.S. companies with operations overseas, the optimal

extent of centralized control in an organization is likely to depend on a variety of other relevant factors, both legal and non-legal.

The issue of centralized control has potential implications for the design of jobs individual jobs in international organizations (e.g., the amount of autonomy given managers in overseas operations, the desirably of decision-making teams that include both expatriates and locals, etc.). Also, when providing job design advice to foreign government employers operating inside the U.S., IO psychologists should recognize that the addition or deletion of commercial as opposed to governmental functions to the job could affect the applicability of U.S. employment discrimination laws. Generally, designing a job to include only commercial activity (e.g., clerical work) may exclude the job from treaty-based immunity and invoke the application of U.S. employment discrimination laws. However, when the job includes more governmental functions (e.g., setting policy, diplomatic activities) then the treaty-based immunities may apply.

Consider international legal implications in designing recruiting and selection procedures. The cases suggest several things for IO psychologists who design recruiting and selection procedures for work that crosses international borders. First, when IO psychologists establish job requirements for employee selection systems, they should know which laws apply so that they can determine what criteria may be prohibited or required. For example, in the U.S. age and national origin are prohibited forms of discrimination. Yet, when recruiting in the U.S. for work in another country: age, citizenship, and immigration status may be job-related requirements. Second, where an employer believes that national origin should be a job-related selection criteria, then IO psychologists can perform job analysis to collect data and prepare documentation to support this claim in the event that they are asked to testify as an expert witness in any subsequent claim of employment discrimination. Similarly, where familiarity with language, religion, or culture are claimed to be the essential job functions or BFOQs, IO

psychologists are well trained to develop tests, structured interviews, and assessment centers that can distinguish those who are qualified from those who are not. Job analysis and selection instruments developed for employers in the U.S., where these criteria are prohibited, are unlikely to capture these potentially important dimensions.

Also because many of the court cases discussed above differentiate national origin and citizenship, IO psychologists may need to develop measures of national origin that are distinct from measures of immigration status and citizenship status. Such measures may go beyond asking where someone was born, but also include items measuring the time spent in a country, and familiarity with culture, language, and the origin of one's ancestors.

Furthermore, when employers recruit workers from outside the U.S. to work inside the U.S., they need to audit and monitor the status of employees working under immigration visas. Those trained in the verification of employment qualifications can monitor the immigration status of employees working inside the U.S. IO psychologists can also aid employers in recruiting and selecting workers from outside the U.S. to work inside the U.S. However, in so doing they will need to know what forms of employment requirements will be permitted and which will not. Despite the rulings of the Fourth Circuit Court of Appeals, discussed above, recruiters going outside the U.S, probably should not assume that discrimination based on age, sex, etc., will be permitted outside the U.S. for jobs to be performed inside the U.S.

Recognize the potential value of written employment contracts. Written employment agreements are an increasingly attractive option for specifying relevant terms and conditions in international employment settings (Boskey, 1999; Exten-Wright, 2002; Hoguet & Dansicker, 1997). From a legal perspective, written documentation provides evidence that is given great weight by the courts, and is often viewed as dispositive on the issue of what country's laws apply (Sabiru-Perez, 2000). In practice, this means that written contracts will increasingly constrain (or

enable) international employers' ability to make employment decisions (e.g., discipline, compensation, training, discharge).

From a behavioral science perspective, written contracts may help create clear expectations that guide performance (both supervisor and employee), and avoid the kind of unpleasant surprises that may lead to employee turnover or litigation. IO psychologists familiar with the psychological contract research literature (e.g., Rousseau, 1998) can facilitate contracting because of their special understanding of the psychological processes involved in forming employment contracts (both written and unwritten).

International treaties (e.g., the Rome Convention, 1980) and the courts in most countries generally permit the parties considerable autonomy in designating the law that will apply to their employment contract so long as a substantial relationship exists between the country chosen and the parties or their transactions (Sabiru-Perez, 2000; Yamakawa, 1992). Employment contracts may also include the parties' understanding regarding the location (i.e., country) of the employee's work, often a critical issue in deciding the applicability of U.S. employment discrimination laws. In reflecting the parties' understanding, it may be desirable to include the specific conditions under which the employee's location of work will be deemed to have changed during the period of the contract (e.g., the conditions under which a temporary assignment overseas will become a "permanent" assignment shifting the location of the employees work to the overseas country). Finally, when an employee is expected to spend significant time working in two or more countries, written employment agreements should include a provision addressing the issue of what country's laws will apply in the event of a dispute.

Other guidance for addressing the U.S. employment law uncertainty. IO psychologists working with international employers should at least be aware of three additional strategies for

managing the uncertainty associated with the application of U.S. discrimination laws in international settings. First, U.S. employers with operations overseas should assume that both U.S. discrimination laws and the employment laws of the host country will apply to their overseas workforce, and to the extent possible, endeavor to meet the requirements of both. Second, the adoption of a written corporate code of conduct should be considered. Such codes may reduce the kind of inappropriate behaviors that lead to employment litigation by providing clear standards for supervisors and employees, and, it has been argued, contribute to a positive corporate image in the eyes current and potential employees and shareholders (Westfield, 2002a). Third, international employers should adopt internal grievance procedures and alternative dispute resolution (ADR) practices (e.g., arbitration) to mitigate the costs of employee-employer disputes when they arise. The benefits of ADR (reduce cost, speedier resolution of disputes, avoidance of unfamiliar and/or potentially hostile legal forums) make it particularly attractive in international employment settings (Boskey, 1999; Westfield , 2002b).

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Table 1.
Guidelines that Specify when U.S. Employment Discrimination Laws (Title VII, ADEA, ADA) Apply to International Employers.

No.	Guidelines
1.	U.S. employment discrimination laws apply to jobs located inside the U.S. when the employer is a U.S. entity and the employee is authorized to work in the U.S.
2.	U.S. employment discrimination laws apply to jobs located inside the U.S. when the employer is a U.S. entity and the employee is not a U.S. citizen but is legally authorized to work in the U.S. Depending on jurisdictional issues, U.S. laws may apply to workers who are not authorized to work in the U.S., although the remedies they receive may be limited.
3.	U.S. employment discrimination laws do not apply to jobs located inside the U.S. when the employer is a foreign entity exempted by a treaty, even though the employee is authorized to work in the U.S.
4.	U.S. employment discrimination laws apply to jobs located inside the U.S. when the employer is a foreign entity not exempted by a treaty and the employee is authorized to work in the U.S.
5.	U.S. employment discrimination laws do not apply to jobs located outside the U.S. when the employer is a foreign entity, even though the employee is a U.S. citizen.
6.	U.S. employment discrimination laws do not apply to jobs located outside the U.S. even if the employer is a U.S. entity, if the employees are foreign citizens.
7.	U.S. employment discrimination laws apply to jobs located outside the U.S. when the employer is a U.S. entity and the employee is a U.S. citizen, if compliance with U.S. laws would not violate foreign laws.
8.	U.S. employment discrimination laws do not apply to jobs located outside the U.S. when the employer is a U.S. entity and the employee is a U.S. citizen, if compliance with U.S. laws would violate foreign laws.

Figure 1.
Decision Tree: Are U.S. Employment Discrimination Laws Applicable to International Employers? (Numbers in parentheses match the guideline numbers in Table 1.)