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Choice-of-Law Contract Clauses May Not Fly Abroad

By Donald C. Dowling Jr.

Probably the most common question in the field of international employment law is: Which country's employment laws apply to expatriates and other border-crossing employees?

This is obviously an important question in arranging any mobile job or expatriate posting—often called a "secondment." This question becomes particularly important when a multinational needs to fire an international employee.

Cocoon of Local Law Protection

Two lessons are essential for any U.S.-based multinational employer that posts expatriates abroad:

- Do not ignore local host-country law.
- Do not rely on a choice-of-law or choice-of-forum provision that calls for the application of the laws of the employee's home rather than host country, unless some special exception applies.

Employee protection laws of a place of employment tend to control by force of public policy. This is especially significant as applied to U.S. expats: Once a U.S. employee's place of employment becomes some foreign country, he or she almost always steps out of employment at will and enters a cocoon of local law protection—the "indefinite employment" regime of the host country's vested rights, severance pay and termination protection laws.

Choice-of-home-country-law clauses in international employment arrangements can actually *restrict* an employer's flexibility and, as a result, may not be advisable in most circumstances.

Assume Local Laws Apply

To determine which country's laws apply, start by assuming that the local host-country laws where expats work apply to all who work in the host country.

Employee protection laws tend to be mandatory rules that, by force of public policy, protect everyone who works locally, even foreign-citizen workers who may have purportedly opted out of local law by signing a choice-of-home-country-law provision (see the online sidebar, "Two Landmark Expat Choice-of-Law Cases"). These host-country laws with mandatory force tend to be the laws that get to the heart of the employment relationship, regulating hours, pay, overtime, rest, vacation, safety, representatives including labor unions, mandatory benefits, discrimination, firing, and often restrictive covenant/noncompete/trade secret rules.

This general rule on the mandatory application of host-country employee protection laws may seem heavy-handed. But U.S. expats need to remember: We impose it ourselves (see the online sidebar, "Application of Local Employee Protection Laws").

Refinements to General Rule

There are three important refinements to this general rule on the mandatory application of local employee protection laws:

- Long business trips.
- The "communist and Arab" exception.
- Extraterritorial reach.

Long business trips

Employee protection laws of a place of employment almost always govern an expat's employment relationship. But *which country* is the "place of employment" sometimes can be unclear—a factual question. Disputes can arise as to which country is, using the terminology in Europe's Rome Convention, "habitually" the place of "work."

Think of an employee only temporarily working abroad on a long business trip versus an expat recently arrived in a host country. Or consider a mobile employee such as a salesperson with international territory or executive whose office is outside his or her home country.

The 'communist and Arab' exception

A handful of countries—mostly communist nations such as China, Cuba and Vietnam but also including Indonesia—actually impose separate sets of employment laws on locals (versus foreigners), or at least allow inbound expats to opt out of local employment regulations. Also, certain Arab country employment laws may reach only locals or may be susceptible to choice-of-law provisions, such as minimum wage laws in the United Arab Emirates and Social Security rules in the United Arab Emirates and Saudi Arabia. But these exceptions are few.

Extraterritorial reach

The other side of the "employment laws are territorial" coin is that few countries presume to extend their rules so that they follow their citizens who leave to work abroad. But there are some exceptions with the United States being especially conspicuous, as well as the United Kingdom, France and Venezuela (see the online sidebar, "Extraterritorial Reach").

Choice-of-Law Clauses

Because a choice-of-law clause will rarely divest the mandatory application of host-country law, contractually selecting home-country law can give international employees *extra* legal rights by letting them simultaneously invoke both *host*-country and *home*-country legal protections, "cherry-picking" those rules that offer them more support.

However, in certain exceptional contexts a choice-of-home-country-law clause in an expat arrangement might actually be a viable strategy for a multinational employer. We can examine five exceptional situations that are sometimes said to render a choice-of-home-country-law clause advantageous to employers of international employees:

- Europe's Rome Convention.
- Nonmandatory benefits.
- Restrictive covenants.
- Forum-selection clauses.
- The "trick-the-expat" strategy.

Europe's Rome Convention

European Union (E.U.) member states have signed onto a choice-of-law treaty called the Rome Convention. For some reason, many European employment lawyers tend to talk about this treaty as if it somehow allows an expat choice-of-law clause to divest the application of host-country law. But this typical European characterization is wrong.

The Rome Convention's text actually reinforces the general international rule that "in a contract of *employment*, a choice of law ... shall *not* have the result of depriving the employee of the protection afforded to him by *mandatory rules* of law" (at art. 6(1) (emphasis added)). This explains why French appeals courts in Grenoble and Paris have disregarded choice-of-law clauses calling for Texas and German law and have invoked the Rome Convention to impose the French employment code on expats working locally.

Terminated expats in Europe—even U.S. and other non-E.U. expats—therefore follow the usual rule and select the law more favorable to them: any choice-of-law country or the country "in which [they] habitually carr[y] out [their] work" (Rome Convention at art. 6(2)(a)). This having been said, however, within Europe HR professionals and even lawyers often seem compelled to insert choice-of-home-country-law clauses into cross-border employment agreements, even though these clauses actually give employees an *extra basket of legal rights.*

> A handful of countries—mostly communist nations such as China, Cuba and Vietnam—impose separate sets of employment laws on locals.

Nonmandatory benefits

While host-country employee protection laws (like laws relating to firing, pay, hours, rest, vacation, overtime, safety, representatives including labor unions, mandatory benefits, discrimination and restrictive covenants) are usually mandatory and cannot normally be contracted around, an expat choice of law might control certain HR topics that steer clear of employee protection statutes.

A multinational employer and an international employee may in some cases remain free to select home-country laws that govern issues like voluntary benefits, pension, equity, compensation, and certain tax and Social Security matters, such as where there is a tax totalization treaty. Indeed, this principle underlies the emerging "global employment company" strategy and is often vital to agreements with highly compensated expats who earn complex benefits packages and equity awards. This principle also supports the choice-of-law clauses in global equity, restricted stock and other multicountry compensation plans.

In any event, however, when an employee is dismissed, the usual assumption should be that all benefits, mandatory or voluntary, are included in calculating severance pay.

Restrictive covenants

Cross-border restrictive covenant provisions raise special choice-of-law challenges. Host-country rules interpreting restrictive covenants tend to be employee protection laws that apply by force of public policy, and so the restrictive covenant interpretation rules of a place of employment tend to apply by operation of law.

When an employer needs to enforce a restrictive covenant against an ex-employee, the practical enforcement issue becomes complying with the public policy of the jurisdiction where the employer seeks enforcement, which is usually *where the employee ends up competing*, and may be *neither* the home *nor* the host country. One strategy in drafting restrictive covenants for border-crossing employees is to leave out a choice-of-law clause entirely, but independently to verify that the restrictions imposed are compatible with the law in each jurisdiction where the employee seems likely to compete.

Forum-selection clauses

Outside the United States, the jurisdiction of local courts tends to be mandatory as to employees working locally. Abroad, clauses in expat agreements that select some dispute-resolution forum (arbitration or a home-country court) *other than* local host-country tribunals are rarely enforceable to divest jurisdiction away from local judges, unless the parties sign the clause after an actual dispute arises. In fact, this is generally true even in London, where many U.S. financial services expats may be working today under unenforceable arbitration clauses.

The 'trick the expat' strategy

An expat consultant at a major HR consulting firm used to recommend inserting into U.S. employees' expat assignment documents a U.S. choice-of-law and U.S. choice-of-forum clause, even if those clauses could not effectively divest local host-country employee protection laws or host-country courts. His theory: Many U.S. expats (particularly those posted to developing countries) seemed so skeptical of overseas justice that a U.S. choice-of-law or choice-of-forum clause might convince certain expats not to sue in the host country, but instead to accept the employer-friendly regime of U.S. employment at will.

Expats, however, are increasingly sophisticated. In some cases, though, a choice-of-home-country-law or forum-selection clause could act as an acknowledgment between expat and employer that their mutual intent, even if nonbinding, is to resolve any disputes according to their home-country rules.

Common Simple Answer

Choice-of-law and choice-of-forum in the expatriate and mobile employee context is simultaneously both complex and simple. The topic is complex when accounting for all the various special situations and exceptions. But the topic is simple to the extent that, in the majority of situations, the answer to the question of which country's laws apply to an expatriate or mobile employee will usually be, at least, that local (host-country) employment protection laws apply, no matter what the agreements and documents say. In addition, home-country law will simultaneously apply if it was selected by contract or if the home country has exceptional rules imposing its employment laws extraterritorially.

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Ensure Compliance with Employment Laws in India

By Radhika Iyer and Vikram Shroff

Foreign investors often believe that Indian employment laws are draconian. In our view, this perception is, to a certain extent, due to an inability to fully understand employment laws in India, although admittedly certain provisions may at times appear inflexible or overprotective.

Typically, a company having operations in various cities across India may need to comply with close to 100 labor laws. In spite of the multitude of labor laws, a significant percentage of the working class is unable to get actual protection under the labor laws, due to the poor implementation of the laws by labor authorities and delays in judicial pronouncements.

Yet employers conducting business in India should familiarize themselves with the country's labor laws. This article provides a brief introduction to some of the main employment laws in India and provides a look at the relationship between federal and state employment laws.

While the laws are enacted by the central government, they are to be implemented by the respective states. In view of the strong trade union movement prevalent across some of the more traditional industrial sectors and the political drivenness of some of the trade unions, it generally has been difficult for the government to significantly amend labor laws.

Constitution of India

As a matter of background, the Constitution of India has categorized matters connected with employment—like regulation of conditions of employment in industries, wages, leave, provident fund, workers' compensation, old age pensions, and maternity benefits—under the Concurrent List, which is provided in the Seventh Schedule to the Constitution. For matters specified in the Concurrent List, the central (federal) government and the governments of each state have the power to enact laws.

Applicability of Labor Laws

The applicability of the employment laws in India depends on various factors.

For example, certain laws apply to all organizations, while certain other laws apply only to industrial establishments, plantation units and mines. Some laws are triggered when there are a minimum number of employees.

In addition, the applicability to employees may depend on the salary threshold of the employees.

There are also instances where the state governments have modified the laws enacted by the central government. Most labor laws in India contain several compliance requirements, like maintaining registers, keeping records, annual filings and notices to the labor authorities. Each labor law also contains its own set of penalties for noncompliance, which could range from a monetary penalty to imprisonment.

Hiring Preferences

Equality of opportunity in public employment is an integral part of India's constitutional scheme.

The Constitution guarantees this fundamental right to equality of opportunity with respect to employment with the government. The essence of this provision is that public employment should be free from discrimination on the grounds of religion, race, caste, sex or place of birth.

The Supreme Court has on several occasions emphasized this principle.

The Constitution also obligates the state to ensure that all citizens have the right to an adequate means of livelihood and that the theory of equal pay for equal work for both men and women will be adopted. These provisions are embedded in Article 39 of the Constitution and are the directive principles of state policy. These directives make the state duty-bound to ensure equality of opportunity and reasonableness in employment.

While the provisions in the Constitution may be enforced only with respect to public employments, they do not bind private employers.

For employees in the private sector, the Equal Remuneration Act of 1948 (ERA) prohibits discrimination in the workplace. Under the ERA, male and female workers are required to be paid equal remuneration for the same work. The ERA also provides that an employer, while recruiting for the same work, should not discriminate against women except where the employment of women in such work is prohibited or restricted by or under any law. The underlying principle behind the enactment of ERA seems to be derived from Article 39 of the Constitution.

No At-Will Employment

One of the most significant differences between employment law in the United States and India is the concept of "at-will" employment. Termination of employment in India is governed by the Industrial Disputes Act of 1947 (IDA), various states' Shops and Establishment Acts, and the employer's standing orders, in addition to the contractual arrangements. Unlike U.S. labor laws, Indian labor laws do not specifically recognize an at-will employment status and, generally speaking, the labor laws allow an employer to terminate employment only in the event of a cause or misconduct. This fact is at times overlooked by foreign employers.

> The Factories Act and the state Shops and Establishment Acts contain provisions for paid leave.

Recent news articles, however, seem to suggest that the India Ministry of Labour and Employment may be considering reforming the laws in order to allow for a type of at-will employment system in the sectors that have seasonal labor requirements.

Minimum Wage Requirements

The main minimum wage law in India is the Minimum Wages Act of 1948 (MWA), which empowers the appropriate labor authorities in each state to fix the minimum rates of wages for specific employments in certain specified industries. Minimum wages fixed by the state government are regularly revised, taking into consideration various factors including cost of living and inflation.

Health and Safety

The central laws in this respect are the Factories Act of 1948 (FA) and the Workmen's Compensation Act of 1923 (WCA), which contain comprehensive provisions on the safety and health of workers. They provide for compensation to workers in case of injuries and death, and for preventive and precautionary measures to be taken by the employer while employing workers who are handling dangerous substances or employed in hazardous activities.

However, as mentioned earlier, the applicability of these central laws depends on various factors, including the type of industry and the nature of employment. The state Shops and Establishment Acts contain basic provisions for first aid boxes, protection from fire and storing of dangerous materials.

Leave and Benefits

India has central labor laws for leave and benefits, including the FA; the Maternity Benefit Act of 1961 (MBA); the WCA; and the Employees' State Insurance Act of 1948 (ESIA). These laws regulate leave, health and safety, and insurance for employees. With regard to the working conditions in establishments and shops, there are state-specific Shops and Establishment Acts, which provide specifications for such things as working hours, leaves, holidays and overtime.

Unlike the federal law in the United States where there is no requirement for paid leave, the FA and the state Shops and Establishment Acts contain provisions for paid leave or annual leave, which can be carried forward to the next year up to a certain limit. Some states also provide for additional sick and/or casual leave.

Over and above the paid, sick and/or casual leave, there are certain compulsory national holidays that every establishment has to observe.

The MBA entitles every female employee who has worked for at least 80 days in an organization to paid maternity leave of 12 weeks.

However, unlike the United States, India does not mandate paternity leave, child care leave, bereavement leave, military leave or jury duty leave.

Social Security/Insurance

Indian labor laws require the employer to provide certain mandatory benefits to employees. The Employees' Provident Fund and Miscellaneous Provisions Act of 1952 (EPFMPA) provides for compulsory contributions to be made by the employer

as well as the employee at the prescribed rate, towards the provident fund account of the employees.

Under the EPFMPA, three schemes have been introduced, namely, the Employees' Provident Fund Scheme of 1952, Employees' Deposit-Linked Insurance Scheme of 1976 and the Employees' Pension Scheme of 1995.

The Employees' Provident Fund Organization manages the funds accumulated under the provident fund accounts by making investments and gives a guaranteed return to the employees when they want to withdraw the funds accumulated in their account as per the EPFMPA.

The Payment of Gratuity Act of 1972 (PGA) provides for payment of gratuity to eligible employees calculated according to the prescribed formula. Gratuity payments increase exponentially with the number of years of service, subject to a maximum limit of 350,000 Indian rupees.

Another important legislation on employee insurance is the ESIA, which requires the employers to obtain insurance for employment-related injuries.

A Look Ahead

The government needs to take initiatives to revamp some of the outdated labor laws and at the same time it needs to review its implementation policies in light of other significant global employment law developments, including the Chinese government's enactment of the China Employment Contract Law, which regulates the contract of employment with workers in China (see the article in this issue, "What You Need To Know About the New Labor Contract Law of China").

Having said that, it is extremely heartening to note some of the recent judgments where Indian courts have broken the shackles of protectionism and taken a stand that is in the interest of business and economy.

Hopefully, such developments may help change the perception of Indian employment laws.

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What You Need To Know About The New Labor Contract Law of China

By Lisbeth M. Claus

The People's Republic of China's new Labor Contract Law (LCL), previously adopted by the National People's Congress (NPC) Standing Committee on June 29, 2007, went into effect on Jan. 1, 2008. As all eyes are on China these days, it is imperative that global HR practitioners thoroughly understand the new LCL and meet its compliance requirements. This article discusses the context of the new law, its major provisions, and the implications for multinational companies (MNCs) and global HR practitioners.

Law Addresses Labor

China has experienced unprecedented economic growth during the past decades as evidenced by advances in its gross domestic product, foreign direct investment into the country and its exports. Many MNCs now have a considerable presence in China as employers, and Chinese employees—just by the sheer size of the population—make up a large percentage of the global labor force. The working conditions of Chinese employees are important, especially in light of China's increasingly important geopolitical role in the world.

As China is industrializing at a rapid pace, there have been many concerns with labor exploitation and the human rights of employees in terms of pay, working conditions and safety. With the new LCL (referred to by some as the new Employment Contract Law), the Chinese government provides a legal framework to protect the legal rights and interests of its workers independently of whether they operate in a state-owned enterprise, domestic company, or MNC, and it moves closer to the establishment of a desired harmonious socialist society.

Compared with the Western world, the legal benefits of Chinese employees were very limited during the past decades. The new law not only changes the previous situation in China—when not signing labor contracts was common—but it also sends a clear signal to Chinese employees that they have rights in the employment relationship.

Chinese social stability is a basic precondition to continuous economic development, and ensuring the legal rights and interests of workers is a critical foundation of that stability.

Multinationals' Opposition

In spite of the fact that sovereign nations have the right to enact labor legislation, China's new LCL received a great deal of opposition, especially from MNCs operating there. The main concerns of MNCs with regard to the new law centered on its possible negative impact, the expected change in labor-management relations the law would engender, and the broader implications of the law for foreign business entities.

MNCs argued that the new law would have a major negative impact in the following ways:

- Large severance packages would make it difficult to lay off employees.
- Implementation of the new law would require a burdensome administration.
- Labor costs would increase.
- Employment flexibility would be reduced.

The MNCs also expressed their concern about the implementation and enforcement of the new law and their fears that the handling of disputes and claims—mainly through local governments—would be unpredictable.

MNCs also were concerned about the shift in labor-management relations with the new law. They feared that the new law would curtail management power and increase the power of the union, and that certain stipulations, especially with regard to written contracts and severance payments, would be counterproductive and anticompetitive.

Finally, MNCs indicated that the new law would have broader business implications, perhaps requiring MNCs to move operations out of China to countries with

lower labor costs and discouraging future foreign direct investment in China.

The critics argued that the new law signals the revival of Chinese iron-rice-bowl jobs for life with few incentives and that it is fashioned after a European-type, labor-friendly, cradle-to-grave entitlement mentality.

During the comment period before the LCL went into effect, MNCs operating in China seemed most vocal in their criticism of the new law and expressed their concerns through lobbying organizations.

Yet, a different kind of opposition is emerging from domestic Chinese companies today. News reports indicate that some local Chinese manufacturers, more adept at operating in the framework of a Chinese society and less concerned for the rule of law, are trying to curtail the newly acquired basic rights of their Chinese employees.

Implications of the Law

The new LCL in China provides a more formalized approach to labor relations and emphasizes written labor contracts, job security, and promotion and pay standards. A tangible benefit for employers is that the new LCL provides more employment formats (i.e., contracts) like staffing agreements and part-time labor contracts.

In addition, employers have more formalized options for employee redundancy. The new LCL affects hundreds of millions of employees in China and brings that country's labor standards closer to a global standard of employment relations.

While on paper the law is somewhat fashioned after the European social employment model and is generous to employees, its enforcement may be weak and inconsistent. Since rule of law is less developed in China than in the Western world, more detailed and applicable regulations related to the new LCL are needed.

So, employers in China, whether domestic or multinational, are left with a number of questions:

- Will the Chinese central government be capable of enforcing the law throughout the country?
- How will local governments enforce the law?
- Will domestic companies be treated in the same manner as MNCs?
- What procedures will be used for resolving labor disputes when the law is violated?

On May 8, 2008, the People's Republic of China (PRC) State Council issued additional draft implementation regulations on the LCL. These regulations shed little light on the above questions. They clarified when employees become eligible for "open-term" contracts. Overall, these regulations confirm the protection of workers intended by the law.

Global HR practitioners will need to follow closely how the law is implemented and enforced in the Chinese context.

Law's Organization

HR practitioners should be aware that the new LCL does not replace or supersede existing Chinese law but merely details and supplements the earlier PRC Labor Law, effective Jan. 1, 1995, and the existing local policies and laws. It also provides more clarification to employers about their compliance with labor contracts and the administration of these contracts.

The new LCL has 98 articles organized around eight chapters that deal with general principles, conclusion of labor contracts, execution and modification of labor contracts, dissolution and modification of labor contracts, special provisions, collective contracts, staffing services, part-time labor, supervision and inspections, legal liability and supplementary articles. (A summary of the articles in the LCL is provided in online sidebars.)

Recommendations for HR

The following recommendations with regard to the new LCL are offered as a baseline for HR practitioners operating in China:

- **Don't ignore the law.** It is an old adage that lack of knowledge of the law is not an excuse for noncompliance. HR practitioners operating in China should become familiar with the provisions of the new law, how to execute its requirements and what they need to do so that their companies are in compliance.
- **Execute proper written contracts for employees in China.** While all provisions of the law require compliance, the conclusion of proper labor contracts is one of the key provisions of the law. Labor contracts must be executed within one month of employment.
- **Work effectively with your local Chinese HR practitioners.**
- **Be diligent when terminating employees in China.** HR practitioners must pay close attention to the dissolution of contracts and the severance pay liabilities that their company may incur when terminating employees.
- **Consider your obligations when using staffing services and part-time labor.** The new LCL extends special provisions to staffing services and part-time labor.
- **Establish good working relationships with local government authorities.** Although the law emanates from the Labor Administration Department at the central government level, enforcement is relegated to the local government authorities. As China is a country that has traditionally relied on *guanxi* or relationship-building to conduct business and resolve conflicts, good local relationships are recommended.
- **Use qualified outside legal advice.**
- **Establish and/or improve HR management systems.** HR professionals need to reconsider their HR management system so that employment and labor relations are integrated into a cohesive HR strategy. A strategic talent management system will mitigate the management risk when dealing with the growing complexity of legal compliance in China.

With its new LCL, China has made a historic revision of its labor legislation and is adopting more global labor standards for its employees. Because of the sheer size of the Chinese labor force, a significant number of the world's employees and employers are implementing a higher level of labor standards.

Global HR professionals should now learn to comply with the provisions of the new Labor Contract Law for the benefit of their employees and their companies.

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Comparing U.K. and U.S. Wage and Hour Laws

By Michelle Haste and Christopher Calsyn

As U.S. companies increasingly employ workers all around the world, HR professionals are being asked to understand the similarities and differences between the employment laws that apply to employees in their domestic and foreign offices. Few employment laws are as near and dear to employees' hearts as ones affecting their pocketbooks. This article compares and contrasts the wage and hour regulations in the United States and United Kingdom.

WTR and EC directive

Wages and working hours in the United Kingdom are governed by the Working Time Regulations of 1998 (WTR). The regulations implement the European Council (EC) Working Time Directive. As a member of the European Union (E.U.), the United Kingdom is subject to directives, which are binding on each E.U. member state but leave the member state the choice of form and implementation. The 2003 EC Working Time Directive establishes minimum conditions relating to weekly working time, rest entitlement and annual leave, and makes special provision for working hours and health assessments in relation to night workers.

In the United States, the Fair Labor Standards Act (FLSA) is the federal wage and hour law that provides for minimum standards in wages and hours. States and even some local governments supplement the provisions of the FLSA with their own laws. In most cases, the state and local laws expand on the protections provided by the FLSA. Much like the relationship between EU directives and the member state laws implementing them, no U.S. state or local law can offer fewer protections than the FLSA.

Who's Covered?

The WTR covers "workers," who are defined as including "someone who is paid a regular salary or wage and works for an organisation, business or individual" and who include part-time and temporary workers and the majority of independent contractors. Night workers—those who normally work more than three hours between 11 p.m. and 6 a.m.—enjoy additional protections, including free health assessments and an absolute limit on work hours per week.

The FLSA is defined as much by its exemptions as it is by who it covers. Millions of workers are exempted from the FLSA's coverage as executive, administrative or professional employees. Which precise jobs fall within these exemptions is the subject of extensive ongoing litigation in the United States. As a general matter, though, the EC directive and WTR cover a broader range of employees than the FLSA.

What Is Working Time?

The WTR defines "working time" as when someone is "working, at his employer's disposal and carrying out his activity or duties."

The FLSA does not define working time per se.

In both the United Kingdom and the United States, workers typically are not paid for normal travel to and from work or rest periods during which they are not required to perform any duties; certain exceptions to that rule exist under state law.

However, the question of whether certain activities, such as the donning and doffing of safety gear or performing "on-call" time, classify as working time (and therefore should be paid) is often litigated in both jurisdictions. In the United States, employees required to put on and take off safety gear that is indispensable to their work performance are generally required to be paid for that time. The determination of on-call pay is quite fact-specific, but U.S. courts usually follow the same approach as the European Court of Justice: on-call time that frees employees to engage in leisure activities is not compensable.

> As a general matter, the EC directive and Working Time Regulations cover a broader range of employees than the FLSA.

Can a Worker Opt Out?

Workers in the United Kingdom can agree to work longer than the 48-hour limit. This opt-out must be in writing and signed by the worker. Employers must keep a careful record of those who have opted out. The concept of an opt-out has been constantly under threat, although on June 9, 2008, the E.U. member states voted to allow the United Kingdom to keep the opt-out. There will be a further review in the next eight years. Night workers cannot opt out.

The FLSA does not include a similar opt-out provision. Employees may opt out of the required payment of overtime through a collective bargaining agreement (CBA). However, most CBAs in the United States do provide for some form of overtime pay protection.

Online Resources

For more information on choice-of-law contract clauses, employment laws in India, the China Labor Contract Law, and U.K. and U.S. wage and hour laws, see the online version of this issue in the Workplace Law/Legal Issues section of SHRM Online (www.shrm.org/law). There you will find links to:

- an online sidebar on two landmark expat choice-of-law cases.
- an online summary of China's Labor Contract Law.
- an online sidebar about the Working Time Regulations' basic protections.

Average Weekly Working Time

The number of hours worked each week in the United Kingdom is averaged out over a 17-week "reference period." Workers and employers can agree to calculate the average weekly working time over a period of up to 52 weeks under a workforce or collective agreement.

In the United States, a "workweek" is not determined by averaging several weeks of work, but instead is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week nor start at a particular time. An employer can establish different workweeks for individual employees or groups of employees.

Required Breaks

U.K. employees have the right to a 20-minute rest break if they work for more than six hours. The break must be in one block and it cannot be taken at the end or beginning of the working day. There is also an entitlement to daily rest (a break between working days of at least 11 hours) and an entitlement to weekly rest (the right to 24 hours clear each week or 48 hours clear each two weeks).

The FLSA fails to provide for any rest periods, either during or between workers' shifts. Several states, however, do maintain laws that require some form of rest period, either after a certain number of hours worked or in between shifts.

Vacation

There is a minimum right to paid leave under the WTR, but many employers offer more. The statutory holiday entitlement under the WTR has recently increased to 4.8 weeks with a further increase to 5.6 weeks starting April 1, 2009. Many employers state within the contract that bank and public holidays are in addition to this paid holiday entitlement. There are eight permanent bank and public holidays in Great Britain:

- New Year's Day.
- Good Friday.
- Easter Monday.
- Early May Bank Holiday.
- Spring Bank Holiday.
- Summer Bank Holiday.
- Christmas Day.
- Boxing Day.

The FLSA contains no similar provisions for mandatory paid leave, and most states do not maintain such laws. Paid leave is thus usually a matter of agreement between U.S. employers and their employees.

However, some states and local governments have started to require mandatory paid-leave coverage for employees. Among the jurisdictions with paid-leave laws are California, Washington (whose requirements will commence in 2009) and San Francisco.

Enforcement

Enforcement of the WTR is split between different authorities. The limits and health assessments (if a night worker) are enforced by the Health and Safety Executive, local authority environmental health departments, and other specialist departments relating to the sector.

The entitlements to employees for rest and leave are enforced through Employment Tribunals (the labor court in the United Kingdom).

The U.S. Department of Labor (DOL) is responsible for the enforcement of the FLSA. The DOL conducts investigations of employers through the review of pertinent payroll and time records, and interviews of employers and employees. The Secretary of Labor can also file suit on behalf of employees, and the FLSA contemplates a private right of action for employees. In recent years, class action lawsuits alleging wage and hour violations have risen exponentially and resulted in several multimillion dollar judgments or settlements.

Policy Implications

Workers in the United Kingdom enjoy greater wage and hour protections than their counterparts in the United States.

U.S. human resource professionals adopting employment policies for their U.K. workers cannot merely apply their U.S. employee policies to workers in the United Kingdom. Instead, they must be cognizant of the wage and hour regulations that apply to all of their various employees and amend their employment policies accordingly.

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The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. The Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 225,000 members in over 125 countries, and more than 575 affiliated chapters. Visit www.shrm.org.

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