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## 2015 Hot Topics for Multinational Companies

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As we enter the New Year, Littler's international practice has identified a number of key employment and labor law issues for multinational companies (MNCs). The past year has brought to the fore some challenging issues likely to grow in importance in 2015, among them the increasing strength of global unions as well as the ever-growing importance of corporate compliance. While some of these topics are certainly familiar—data privacy and whistleblower protection, for example—the continuing importance and expansion of these issues highlight their increased complexity and correspondingly increased challenges.

### Data Privacy

***Keeping Data in the Cloud.*** More MNCs are keeping data available “in the cloud,” greatly widening its access within an organization but also subjecting it to potential breach. MNCs must implement rules and safeguards regarding the use of and access to this data, as well as procedures to safeguard it, in an environment where data privacy is of increasing concern worldwide.

***Theft of Trade Secrets and Data Breaches.*** The recent Sony Pictures data breach highlights the risks and concerns of multinational companies in preserving trade secrets as well as the confidentiality of internal discussions and deliberations.

***E-Discovery and the Expansion of Discovery and Privilege Issues (in Domestic and Cross-Border Litigation).*** Cross-border litigation and conflicting rules on discovery and privilege pose continuing labor-intensive and costly challenges for multinationals. In the United States, discovery and the attorney-client privilege are familiar problems, but overseas, where discovery in civil litigation is virtually non-existent, the attorney-client privilege usually is not as developed as it is in the U.S.— or it may not exist at all. Thus, clients need to consider that many cross-border communications may not be protected by this privilege, regardless of whether the client is seeking and receiving legal advice.

***Uncertainty in the Law.*** The European Union (EU) likely will approve broad changes in its data protection framework by the end of 2015. The Safe Harbor (a streamlined process for U.S. companies to comply with the EU Directives on the protection of personal data) likely will change in some respects in 2015. Further, many countries have recently enacted data protection regimes and there likely will be new guidance, case law, and/or enforcement actions in 2015.

## Third-Party Compliance Liability

Numerous risks may arise from an organization's use of third parties for compliance purposes. Failure to prevent or mitigate these risks can expose an organization to financial loss, litigation, and reputation damage. The board of directors and senior management of a public company are ultimately responsible for managing activities conducted through third-party relationships, and identifying and controlling the risks arising from such relationships, to the same extent as if the activity were handled within the organization. The use of third-party relationships does not eliminate the inherent responsibility of the board of directors and management. The organization's officials must develop a clearly defined system of risk management controls built into the management system that governs the organization's compliance operations, including controls over activities conducted by affiliates and third-party vendors. The more significant the third-party program, the more important it is that the organization conduct regular periodic reviews of the adequacy of its oversight and controls over third-party relationships.

## Expansion of Whistleblower Rights

**International Whistleblowers.** In September 2014, the SEC made its largest Dodd-Frank whistleblower bounty award ever—\$30 million—to a foreign national who submitted to the SEC, from overseas, evidence of his employer's alleged unlawful conduct, which occurred entirely overseas. In explaining the award, the SEC stated: "It makes no difference whether . . . the claimant was a foreign national, the claimant resides overseas, the information was submitted from overseas, or the misconduct comprising the U.S. securities law violation occurred entirely overseas."

**Continued Ascendance of "C-Suite" Whistleblowers.** The typical plaintiff in a whistleblower claim is a white-collar employee with access to highly confidential company information. Multinational companies will continue to be challenged by claims from high-level executives, particularly as huge bounty awards become more commonplace.

## The Volkswagen Effect: Setting the Stage for the Re-Emergence of Unions in the U.S.

Volkswagen has engaged with Works Councils in almost all jurisdictions where it manufactures cars. In the United States, the United Auto Workers (UAW) claimed a union was necessary for the formation of a Works Council. Representatives of the Global Works Council supported the recognition efforts of the UAW through a secret ballot election process recognized in the United States. Nonetheless, the UAW lost the election. Efforts persist, however, for the UAW and another employee organization, ACE, to achieve some kind of "representation" rights among the VW employees in Chattanooga, Tennessee. This "experiment" is receiving worldwide attention as the German manufacturer attempts to blend corporate culture and a European system of representation with a legal system in the U.S. that, arguably, does not embrace such concepts, while keeping in mind the paramount desires of its U.S. employees in the process. As the UAW fights for its own survival with the co-operation of its European counterparts, some believe that this initiative marks a major turning point for unions, certainly in the U.S., and perhaps throughout the world. Clearly it presents unique challenges, not confined to VW, but for many other worldwide enterprises subject to an extremely complex array of laws, cultures, brand identity issues, attack points, political considerations and practical strategies as organizations attempt to achieve their economic goals.

## The Re-Emergence of Organized Labor and Social Activism

We are seeing increasing activism and civil disobedience around the world focusing on income equality issues. Fast Food Forward, an SEIU-funded coalition with the goal of unionizing restaurant employees in New York City chain restaurants, is going global.

## The Continued Extension of "Section 7 Rights"

In December 2014, the U.S. National Relations Board (NLRB) ruled that employees are presumptively permitted to use their employer's email systems during non-work time for Section 7 activities if employers give employees access to their email systems. This sweeping new rule is contrary to employers' well-established right to restrict employee use of its property based on convenience. Similarly, employer policies restricting employees from revealing confidential compensation information, publicly criticizing their employer, and demanding loyalty, are being challenged in the United States as violating employees' right to engage in concerted activity.

## Global Integration of Employment Practices: an Evolving Challenge

MNCs increasingly look to implement employment practices and policies across borders, in the face of different and sometimes conflicting laws and customs. Key issues include working time, fatigue management, overtime compliance, data privacy, enforcement of post-employment restrictive covenants, and background checks. These issues become more critical as companies from emerging markets in Asia and Latin America expand their overseas footprint and hope to bring with them the practices to which they have grown accustomed in their home countries. In doing so, they risk making the same mistakes that U.S. companies made decades ago, i.e., expecting to export their workplace standards to countries where the laws and customs may have contrary requirements.

## Implementation of Restrictions on Incentive Compensation and Other New Limits on Compensation

The United States and Europe have imposed variations on “say on pay” rules, requiring non-binding shareholder approval of compensation for senior executives of publicly traded corporations and for compensation packages payable in connection with a change of control. The European Parliament approved various elements of the Capital Requirements Directive (CRD) IV, the legislation regulating certain investment firms to ensure financial viability, including restrictions on bonus payments by credit institutions and investment firms. CRD IV reaches far beyond the EU, applying to 1) all institutions and investment firms in the EU; 2) subsidiaries established outside the European Economic Area (EEA) of institutions which have their head office in the EEA; and 3) subsidiaries established inside the EEA of institutions that have their head office outside the EEA. Implementation of these restrictions has created challenges for multinationals that face conflicting rules regarding compensation of key executives.

## The Emergence of China as a Global Employer

Chinese companies are expanding across the globe at a rate rivaling Japan’s ascendance in the 1970s. How successfully will these companies integrate into the community of global employers? Will they learn from the mistakes of their predecessor pioneers in the global marketplace, or will they insist on going their own way in establishing policies and doing business?

## New Minimum Wage Requirements

Many countries have, for the first time passed, or are considering, a minimum wage. The legislation will impact record keeping which would also affect what we call in the United States the “white collar exemptions.” Germany has passed a minimum wage law, and South Africa is considering one. The new German minimum wage will affect all companies, even if they already pay their staff well over the hourly minimum, because the statutory minimum is a component part of every wage paid. If it is paid late or not at all, it constitutes an administrative offence (which may carry a fine of up to EUR 500,000.00). Failure to comply with the new legislation could also render a company criminally liable for not remitting social insurance contributions and/or withholding payment for work performed and usury. If the company contracts work or services to sub-contractors, it is also responsible for ensuring that the sub-contractor and its sub-contractors pay the statutory minimum wage.

These are a small portion of workplace and legal/regulatory challenges that will face employers in 2015, whether their operations are regional or worldwide. Littler’s international team is available to assist multinational companies with their global employment matters, wherever they arise.

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