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Employment

Civil Servant or Support Staff? Navigating the Conundrum of U.S. Employment Laws and the Foreign Sovereign Immunities Act

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In a tale of two public servants, two separate foreign sovereigns each employed a woman to work at government offices in the United States. Both women were responsible for promoting trade and commercial activity on behalf of their respective governments and national companies. Both women regularly staffed booths at trade shows and promoted country-specific products. Both women sued their respective governments under U.S. law for sex-based discrimination. Both foreign governments claimed immunity under the Foreign Sovereign Immunities Act (FSIA), but only one of the two was successful in raising the sovereign defense. With such similar facts, the contradictory rulings are a red flag for foreign sovereigns that may seek immunity from employment claims under the FSIA.

Applicability of U.S. Employment Laws to Foreign Governments

In the United States, employment relationships are governed by federal (national) law, state law, and local city or municipality law. Simultaneous claims may be brought in the same suit based on each source even though the legal standards of proof and permissible damage awards differ depending on the source. For example, employers in New York City are subject to federal, New York State, and New York City laws. Employers must monitor their exposure at each level.

A number of federal laws impact foreign employers that employ personnel based in the United States. Examples of statutes that protect employees from discrimination, unfair wages, and retaliation include:

- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act of 1990
- Age Discrimination in Employment Act of 1978
- Family and Medical Leave Act
- Fair Labor Standards Act of 1938 and the Equal Pay Act
- Employee Retirement Income Security Act of 1974
- Sarbanes-Oxley Act of 2002

Many states have statutes that mirror the federal laws that protect employees. These laws either reinforce the protections provided by federal law and/or provide additional protections often in favor of the employee. In addition to employment statutes, state law, rather than federal law, also governs claims involving employment torts that may arise in the course of an employment relationship. Foreign employers may face employment tort claims for such issues as breach of contract; tortious interference with contractual relations; negligent hiring, retention, or supervision; intentional infliction of emotional distress; fraudulent misrepresentation; and false imprisonment. Permissible tort-based causes of action will vary from state to state.

Failure to comply with employment statutes can be costly. The primary federal anti-discrimination statute, Title VII, permits awards for front pay, damages of future earnings, other compensatory damages, back pay, injunctive relief, punitive damages, and attorney's fees and costs. Compensatory and punitive damages are capped at $50,000-$300,000 depending on the size of the employer, but certain awards for front/back pay are not limited by this cap.[1] Other discrimination statutes such as the Age Discrimination in Employment Act and the Equal Pay Act permit the award of unpaid wages, liquidated damages, and attorney's fees and costs.[2]

Employers are additionally liable for damage awards under state statutes. Although the state statues may mirror the federal law, permissible damages are often very different. For example, California anti-discrimination law allows unlimited awards of compensatory and punitive damages as well as damages for emotional pain and suffering. In some cases, an additional administrative fine may be awarded up to $150,000 per aggrieved person.[3] In Florida, the state allows awards of back pay, compensatory damages, and punitive damages not to exceed $100,000.[4] New York State anti-discrimination law allows an additional, unlimited damage award for pain and suffering, but does not permit punitive damage awards,

yet New York City law allows awards for unlimited punitive damages for violations of its anti-discrimination laws.[5]

Assessing the cost of employment litigation is not limited to calculating monetary damages. Employers may be required, among other things, to reinstate the employee, incur significant administrative and litigation related costs, for lawsuits that often span months if not years and expose foreign sovereign employers to negative publicity and media coverage.

Foreign sovereign employers oftentimes face uncertainty when they attempt to defend themselves from costly employment claims brought in U.S. courts.

Foreign Sovereign Immunities Act

The availability of the FSIA as a defense in employment claims is a grey area of the law. U.S. district and appellate courts have taken a number of different approaches in deciding such claims, thus placing foreign government employers in a precarious position. As there is no straightforward approach, foreign government employers should have a basic knowledge of the availability of the FSIA as a defense, an understanding of the approaches taken by the courts, and a plan of action to help protect themselves from potential claims.

Overview of the FSIA

The FSIA grants all foreign sovereigns, their agencies, and instrumentalities immunity from suits in U.S. courts unless one of the limited exceptions is applicable.[6] The exception that is most readily claimed in employment lawsuits is that of commercial activity—if an employment relationship exists as an aspect of a "commercial activity," then FSIA immunity is not applicable. A commercial activity is determined by "reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose"[7] Courts have the discretion, on a case-by-case basis, to determine what conduct constitutes commercial activity for purposes of this exception.

The legislative history of FSIA offers some guidance in determining whether an employment relationship should be considered immune or fall within the scope of the commercial activity exception. The House Report states "Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States."[8] Examples of commercial activity employment relationships are the "employment or engagement of laborers, clerical staff or public relations or marketing agents."[9] These descriptions are not as straightforward as they may appear. Many seemingly "civil servant" employment relationships enter a grey area. This is due largely because the FSIA exception is applied not based on employment classification or title, but rather on the commercial activity exception which is based on the nature of the activity rather than the purpose.

Views of the Courts on the Application of the FSIA

To illustrate this nuance and how the courts take very different approaches to interpreting commercial activity in regard to employment relationships, return to the tale of two public servants. Both women were employed and based in foreign government offices in the United States with the purpose of promoting trade and commercial activities. Both women engaged in similar activities: providing information on investment, attending trade fairs, and promoting nation-specific products. Both women sued their respective foreign government employers relying on U.S. employment discrimination law. One court decided that the employment relationship did not fall within the commercial activities exception, but the other court decided that the employment relationship did. One sovereign received immunity under the FSIA, the second sovereign did not.

In the first instance, *Yuka Kato v. Shintaro Ishihara, Governor*,[10] a panel of the U.S. Court of Appeals for the Second Circuit, specifically declined to adopt an analysis based on whether or not Ms. Kato was a "civil servant." Instead, the court created a two-part test to decide whether Ms. Kato's employment relationship was commercial in nature. First, the court looked to the activities of the office itself to decide whether the sovereign was engaged in commercial activity. According to the court, it was not—finding the sovereign's actions were strictly governmental because a private person would not engage in the general promotion of commerce. It was not necessary for the court to review the second prong because it is only applicable if the sovereign was engaged in commercial activity. The court would have had to determine whether Ms. Kato's own activities while she worked in the sovereign's office were commercial in nature, thereby precluding FSIA immunity.

In the other case, *Holden v. Canadian Consulate*, [11] a panel of the U.S. Court of Appeals for the Ninth Circuit relied on the distinctions between civil servants and other support personnel to decide whether or not an employment relationship met the commercial activity exception. According to the court, a mere title is not enough, but a review of the nature of an employee's activities is necessary to determine whether an employee is a civil servant. If not, then the employment relationship falls under the scope of the commercial activity exception. The court decided Ms. Holden was a not a civil servant or diplomatic staff member because she did not pass a civil service exam, receive tenure as a civil servant, or have the ability to act on behalf of the Canadian government. Although her work made her part of the consulate staff, she was primarily responsible for marketing and promotion. Although the Canadian Consulate argued that Ms. Holden's work was to promote trade and commerce generally, the court stated its

decision was based on the nature of her work rather than the purpose behind it. Consequently, the FSIA commercial activity exception did apply and the foreign sovereign was not immune from suit.

The cases of *Kato* and *Holden* are only two examples of the way in which courts have decided employment claims under the FSIA. To decide if the commercial activity exception applies, some courts, like the *Holden* court, have relied heavily on the distinctions between civil servants and other support personnel.[12] Other courts analyze both the civil servant classification and the nature of the activities.[13]As seen from the variety of decisions, the availability of the FSIA immunity protection in employment claims is not guaranteed.

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In addition to the specific application of the FSIA to employment disputes, foreign sovereign employers should be aware of two general FSIA challenges. First, the FSIA's scope is relatively broad. By definition, the FSIA extends not only to foreign governments but also to any agency or instrumentality of a foreign sovereign, so long as such entity is nationalized-enough.[14] Immunity is not guaranteed in employment claims; the broad scope the FSIA merely lengthens the list of potentially liable foreign sovereign employers. Examples of foreign "agencies and instrumentalities" that have faced suit in U.S. courts include such entities as a pork processing plant and an oil company.[15]

Second, foreign sovereigns are not guaranteed the same protections as individual persons and corporations in court. There is a split among the federal courts of appeals as to whether a foreign sovereign can claim due process protections afforded by the U.S. Constitution.[16] Typically, a court will exercise jurisdiction if the defendant has the necessary minimum contacts with the forum. The courts have differing opinions as to the extent to which minimum contact protection applies to foreign sovereigns. The answer will vary depending on where a claim is brought.

Employment law claims brought against foreign sovereign employers are fraught with hazards. It is important that foreign sovereign employers protect themselves from exposure through planning.

Plan of Action

An effective strategy for protecting foreign sovereign employers should include both preventative measures and protections if a lawsuit arises.

A) Equal Employment Opportunity and Harassment Prevention Training

Misunderstood cultural differences are often a source of litigation. Actions that are harmless in one country may be actionable as harassment or discrimination in another. It is imperative that staff and employment decision makers receive cultural sensitivity training to avoid misunderstandings which can lead to claims. A reporting system should, and in some cases must, be in place to receive and resolve complaints of discrimination and harassment. Staff should be trained in the system.

B) Review of Job Descriptions and Responsibilities

As discussed above, in deciding whether or not the FSIA is applicable, most courts review the nature of the activities of an employee. It is important to review all job descriptions, job responsibilities, and actual activity of all staff that are not high level diplomatic support staff, in particular those of locally employed personnel. Clearly defined roles and responsibilities will help avoid situations where employees cross the line between diplomatic and commercial duties, thereby exposing the sovereign employers to liability for claims under U.S. employment laws.

C) At-Will Employment

In the United States, most employment relationships are "at-will," meaning both the employer and the employee may terminate the employment relationship at any time with or without cause, except that an employer may not terminate an employee based upon a protected category, such as gender, sex, race, or national origin. Sovereign employers should avoid situations where they limit their ability to terminate employees at will who are not civil servants under the FSIA by, for example, creating contractual relationships with employees.

D) Audits

In addition to auditing their workforces to ensure that personnel working for sovereign employers are properly classified as civil servants or commercial support staff, sovereign employers should also audit their commercial support staff to ensure that they are complying with federal and/or state wage and hour laws. These audits should include a review of exempt/non-exempt classifications, overtime pay calculations, etc. Such audits will minimize a sovereign employer's exposure to costly wage and hour claims under, for instance, the Fair Labor Standards Act.

E) Arbitration Agreements with Class Action Waivers

Sovereign employers should also consider entering into arbitration agreements with their commercial support staff. Arbitration agreements provide a more confidential mechanism to resolve disputes and more streamlined and cost-effective systems for investigating and hearing disputes. An important

feature of an arbitration program is that an arbitrator whom the sovereign's counsel participates in selecting will decide the case. An arbitrator is likely to be more predictable and less volatile than a jury. Further, in arbitration, sovereign employers may be able to minimize certain of the due process limitations they may face in some U.S. courts. Finally, in light of the escalating numbers of employment-related class actions filed in the United States, sovereign employers are well-advised to include provisions in such agreements that preclude employees from commencing or participating in class actions.

Conclusion

Foreign sovereign employers oftentimes face uncertainty when they attempt to defend themselves from costly employment claims brought in U.S. courts. The FSIA is not a guarantee of immunity. Therefore, foreign sovereign employers with employees working in the United States must have preventative measures in place to help prevent potential lawsuits and strategies to best defend themselves should a claim arise.

1. 42 U.S.C. § 1981a (b)(3); *Pollard v. E.I. duPont de Nemours & Co.*, 532 U.S. 843 (2001); *see also Gotthardt v. AMTRAK*, 191 F.3d 1148 (9th Cir. 1999) (upholding front pay amount of $603,928).
2. Pub. L. No. 102-66.
3. CAL. GOV'T CODE § 12970.
4. FLA. STAT. § 760.11(5).
5. *Thoreson v. Penthouse Int'l*, 591 N.Y.S.2d 978, 981-82 (N.Y. 1992); N.Y. CITY ADMIN. CODE § 8-502(a).
6. 28 U.S.C. §§ 1602 *et seq*.
7. 28 U.S.C. § 1603(d).
8. H.R. REP. NO. 94-1487 at 16 (1976).
9. *Id*.
10. *Kato v. Ishihara*, 360 F.3d 106 (2d Cir. 2004).
11. *Holden v. Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996).
12. *Segni v. Commercial Office of Spain*, 835 F.2d 160 (7th Cir. 1987).
13. *El-Hadad v. United Arab Emirates*, 216 F.3d 29 (D.C. Cir. 2007).
14. 28 U.S.C. §1603.
15. *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995); *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009).
16. *See Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F. 2d 300 (2d Cir. 1981); *Frontera Res.*, 582 F.3d at 393; *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002).

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