APPLICATION OF U.S. DISCRIMINATION LAWS TO OVERSEAS OPERATIONS OF U.S. COMPANIES AND TO U.S. CITIZENS ABROAD

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I. INTRODUCTION.

The number of discrimination claims by employees of U.S. corporations, and U.S.-controlled corporations, operating abroad has been steadily increasing in the last five years, and is expected to continue to increase. The application of U.S. anti-discrimination laws overseas has now been the subject of a small but significant body of case law. As one would expect, the analysis as to when U.S. law will apply to citizens overseas is complex, as are the conflict-of-law issues in this arena where foreign labor codes and practices may clash with the U.S. framework.

II. EXTRATERRITORIAL APPLICATION - STATE AND LOCAL LAWS.

State and local anti-discrimination laws apply to employers who employ a certain number of employees within the state or locality, and to employees who are employed within the state or locality. Foreign citizens employed within the state or locality and foreign entities located within the state or locality may be covered, depending on the particular provisions of the state statute. But see, e.g., Doricent v. American Airlines, Inc., 1993 WL 437670 (D. Mass. Oct. 19, 1993) (provisions of Massachusetts Civil Rights Laws did not apply to U.S. citizen’s claim against U.S. airline where facts giving rise to the lawsuit occurred in Haiti).

III. MAJOR FEDERAL STATUTES SUBJECT TO EXTRATERRITORIAL APPLICATION.

A. Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq. See also 29 C.F.R. 1604, et seq. for regulations promulgated by the Equal Employment Opportunity Commission (EEOC) interpreting specific provisions of Title VII.


Title VII prohibits employers, labor organizations and certain other entities from discriminating against an individual based on race, color, religion, sex or national origin. The entities cannot discriminate against the individuals with respect to any employment decision -- from hiring to advancement decisions to discharge or any other decisions affecting the terms and conditions of employment. 42 U.S.C. § 2000e-2. The protections and prohibitions apply to employers with 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b).

2. Extraterritorial Application.

Prior to 1991, a number of courts ruled that Title VII applied to United States citizens employed abroad by United States companies, interpreting
the Title VII provision that it shall not apply to any employer with respect to the employment of aliens outside any State to mean that Title VII did apply to employers with respect to employment of citizens outside the United States.

In 1991, the United States Supreme Court determined, in the Boureslan case, that Title VII did not apply extraterritorially to regulate employers of United States citizens abroad. E.E.O.C. v. Arabian American Oil Company, Boureslan v. Arabian American Oil Company, 111 S.Ct. 1227, 499 U.S. 244 (1991). Boureslan was a U.S. citizen born in Lebanon and working in Saudi Arabia. He was hired in 1979 as a cost engineer in Houston, Texas. A year later he was transferred at his request to work for Aramco in Saudi Arabia. Boureslan’s troubles began when, in 1982, his supervisor allegedly started harassing him based on his national origin, race and religion. He was eventually terminated in 1984. After filing a charge with the EEOC, he instituted an action in federal district court alleging violations of Title VII. The district court, court of appeals and Supreme Court all ruled that Title VII did not protect U.S. citizens employed abroad by U.S. firms. The Supreme Court reasoned that, although Congress clearly has the authority to exercise its laws beyond the territorial boundaries of the United States, it failed to do so in this instance. Boureslan, 111 S.Ct. at 1229, 1335.

Congress, in reaction to the Boureslan decision, amended Title VII in 1991, to specifically protect U.S. citizens employed in a foreign country by a U.S. employer or a U.S. - controlled employer.

* The definition of employee was amended to include the following language:

With respect to employment in a foreign country, such term [employee] includes an individual who is a citizen of the United States.


* The Act was amended to specifically exclude coverage for foreign entities not controlled by a U.S. entity:

. . . [T]his title shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

* The Act was amended to specifically cover foreign entities controlled by a U.S. entity:

If a [U.S.] employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by . . . [this title] engaged in by such [foreign] corporation shall be presumed to be engaged in by such [U.S.] employer.


B. The Americans with Disabilities Act (“ADA”), 42 U.S. C. §§ 12101, et seq. See also 29 C.F.R. 1630, et seq. for regulations promulgated by the EEOC interpreting specific provisions of the ADA.


The ADA prohibits employers, among other matters, from discriminating against a qualified disabled person with respect to any employment decision -- from hiring decisions to advancement decisions to discharge or any other decisions affecting the terms and conditions of employment. An employer is further required to make reasonable accommodation for disabled individuals. 24 U.S.C. § 12112.

The ADA protections and prohibitions apply to employers with 15 or more employees for each working day of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 12111(5)(A); 29 C.F.R. § 1630.2(e).

Qualified disabled persons are protected. A qualified disabled person is an individual who, with or without reasonable accommodation, can perform the essential functions of the position which the individual holds or desires. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

In determining the essential functions of a job, consideration is given to the employer's judgment as to what functions of a job are essential, and, if an employer has prepared a written description before advertising or interviewing applicants for a job, this description shall be considered evidence of the essential functions of the job. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n).
A **disability** under the ADA is defined as:

1. A **physical or mental impairment** that **substantially** limits one or more major life activities of the individual;

2. A **record** of such an impairment; or

3. Being **regarded** as having such an impairment.

42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

A physical or mental impairment is defined as:

1. Any physiological disorder, or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic, lymphatic, skin and endocrine; or

2. Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities.

29 C.F.R. § 1630.2(h).

**Major Life Activities** are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(i).

The individual is substantially limited if he or she is:

1. unable to perform a major life activity that the average person in the general population can perform; or

2. significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to an average person in the general population.

The following factors should be considered:

* Nature and severity of impairment

* Duration or expected duration of impairment
* Permanent or long-term impact or expected impact

29 C.F.R. § 1630.2(j).

**Reasonable Accommodation.** The ADA requires that the employer make reasonable accommodations so that an otherwise qualified individual may perform his or her duties. 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9.

Reasonable accommodation may include alterations to the employee's physical work space, job restructuring, modified work schedules and similar measures. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o).

The Act does not require accommodations which would cause **undue hardship**. 42 U.S.C. § 12111(5)(A); 29 C.F.R. § 1630.9(a). "Undue hardship" means an action requiring **significant** difficulty or expense. Factors which are considered in determining whether a particular accommodation would cause the employer undue hardship include:

* Nature and cost of the accommodation needed, taking into consideration tax credits and deductions and/or outside funding.

* Overall financial resources of the facility or facilities involved; number of employees; effect on expenses and resources or other impact of such accommodation on the operation of the facility.

* Overall financial resources of the entity; overall size of the business with respect to the number of its employees; number, type and location of facilities.

* Type of operation including the composition, structure and function of the work force; geographic separateness, administrative or fiscal relation of facility(ies) involved to covered entity.

* Impact of accommodation upon the operation of the facility, including the impact on the facility's ability to conduct business.

42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(o); (p).

**Third Parties.** Employers are prohibited from participating in contractual or other arrangements which have the effect of subjecting an individual to disability discrimination. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.6. Examples: Relationships with employment or referral agencies, labor unions, organizations providing fringe benefits, organizations providing training and apprenticeship programs.
Pre-Employment Medical Examinations and Inquiries. Pre-employment medical examinations are allowed under very limited circumstances. The examinations must be conducted after an offer has been made and prior to the commencement of employment. The employer must be able to show that the exam and inquiries are job-related and that the conduct of such is a business necessity. The employer may condition the offer on the result of the examination only if:

i. All entering employees are subjected to such an examination regardless of disability;

ii. Information relating to the medical condition and medical history of the applicant is maintained on separate forms and kept in separate medical files and treated as confidential medical information; and

iii. The results of the examinations are used in accordance with the ADA prohibitions.

42 U.S.C. § 12112(d); 29 C.F.R. § 1630.14.

Medical Examinations During Employment.

Voluntary Medical Examinations. Employers may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. Employers may make inquiries into the ability of an employee to perform job-related functions. 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(d).

Required Medical Examinations. An employer may not require a medical examination and cannot make inquiries as to whether an employee has a disability or as to the nature or severity of the disability unless the examination or inquiry is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14.

Pre-Employment Tests. The use of qualification standards, employment tests or other selection criteria that screen or tend to screen out an individual or individuals based on disability is prohibited unless the standard test or other selection criteria is job-related and is consistent with business necessity. 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10.

Harassment. It is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of any right granted or protected under the ADA. 42 U.S.C. § 12203; 29 C.F.R.
1630.12. It is similarly unlawful to engage in such action against an individual because he/she has aided or encouraged any other individual in the exercise or enjoyment of his/her rights.

2. Extraterritorial Application.

The ADA has the same extraterritorial application as Title VII. See EEOC Enforcement Guidance N-915.002, October 20, 1993.

C. The Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621, et seq. See also 29 C.F.R. 1625, et seq. for regulations promulgated by the EEOC interpreting specific provisions of the ADEA.


The ADEA prohibits employers, labor organizations and certain other entities from discriminating against an individual based on age (40 years or older). 29 U.S.C. § 623(a). It applies to employers with 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 29 U.S.C. § 630(b).

2. Extraterritorial Application.

Originally, the ADEA incorporated by reference the extraterritorial exemption contained in the Fair Labor Standards Act which provided that the provisions of the Act "shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country." 29 U.S.C. § 213(f).

The ADEA was amended in 1984 to extend the protection of the ADEA to U.S. citizens employed abroad by U.S. employers or their subsidiaries. Employers are exempt from the ADEA where application of the Act would violate the law of the foreign country where the United States citizen is employed. 29 U.S.C. §§ 623(f)(1), (h); 630(f).

IV. ASSESSING THE NATIONALITY AND CONTROL OF PARTICULAR ENTITIES.

A. Nationality. In determining the applicability of U.S. anti-discrimination laws, one must first determine the nationality of the employer within the meaning of various laws. The first question then is whether the allegedly offending entity is a U.S. entity or a U.S.-controlled entity. The EEOC has provided guidance for determination of an entity's nationality.” See EEOC Guidance No. 915.002, October 20, 1993. The nationality of the entity is determined on a case-by-case
basis taking into consideration the following factors, among others:

1. **Entity’s Place of Incorporation.**

   An entity that is incorporated in the United States will generally be deemed to be a U.S. employer as it, by so incorporating, has taken advantage of the U.S. laws. See *Restatement (Third) of the Foreign Relations Law of the United States*, § 213 (1987) (for purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized).

2. **Entity’s Principal Place of Business.**

3. **Entity’s Contacts Within the United States.**

4. **Nationality of Dominant Shareholders and/or Those Holding Voting Control.**

5. **Nationality and Location of Management.**

**B. U.S. Control.** Even if the entity abroad is not deemed a U.S. entity under the above criteria, the entity will be covered if it is ‘controlled’ by a U.S. entity.

Title VII provides that four factors will be considered. The determination of whether an employer controls a corporation will be based on:

1. Interrelation of the operations;

2. Common management;

3. Centralized control of labor relations; and

4. Common ownership or financial control of the employer and the corporation.


**V. FOREIGN ENTITIES OPERATING OUTSIDE OF THE UNITED STATES.**

**A. Generally.** Title VII, the ADA and the ADEA do not apply to the foreign operations of foreign companies not controlled by a U.S. entity. 42 U.S.C. § 2000e-l(c)(2) (Title VII); 42 U.S.C. § 12112(c)(2)(B) (ADA); 29 U.S.C. 623(h)(2) (ADEA).
B. U.S. Entities Abroad Controlled by a Foreign Entity Not Covered. Although a U.S. company and a foreign company may be integrated enterprises, where the foreign company controls the American company, U.S. anti-discrimination laws do not apply. *Robins v. Max Mara, U.S.A., Inc.*, 914 F. Supp. 1006, 1009 (S.D.N.Y. 1996) (If an integrated enterprise -- comprising foreign and domestic components -- is controlled by the foreign component, then that enterprise shall be treated as a foreign company for the jurisdictional purposes of the anti-discrimination statutes).

VI. FOREIGN ENTITIES CONTROLLED BY UNITED STATES ENTITIES.

A. Generally. Title VII, the ADA and the ADEA provide that foreign affiliates or subsidiaries of U.S. employers can be treated as U.S. employers if they are "controlled" by the U.S. employer. These provisions prevent American companies from circumventing U.S. anti-discrimination laws by employing U.S. workers through foreign subsidiaries. *E.E.O.C. v. Kloster Cruise Ltd.*, 888 F. Supp. 147, 151 (S.D. Fla. 1995). The statutes create a presumption that the subsidiary's discriminatory actions are in fact actions of the U.S. employer: "If the [U.S.] employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such [U.S.] employer." 29 U.S.C. § 623(h)(1) (ADEA). See also 42 U.S.C. §§ 2000e-l(c)(1) (Title VII); 42 U.S.C. § 12112(c)(2) (ADA).

B. Examples. The EEOC has found evidence of control, for instance, where: the U.S. company instituted corporation-wide personnel policies; certain personnel decisions required approval by the U.S. company; the foreign subsidiary was not authorized to change remuneration or benefit plans or operating conditions without prior approval; the U.S. company appointed members of the subsidiary's board; and the U.S. company assigned products for the subsidiary to market. EEOC Enforcement Guidance N-915.002, October 20, 1993.

C. Foreign Laws Defense. The defense applies to U.S.-controlled foreign entities just as it applies to U.S. employers operating abroad.

VII. UNITED STATES ENTITIES OPERATING ABROAD.

A. Generally. Title VII, the ADA and the ADEA protect American citizens employed abroad by American companies. Title VII and the ADA both provide in part: With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." 42 U.S.C. § 2000e(f); 12111(4). The ADEA provides in part: The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f).
B. American Citizens Employed Abroad are Protected. Title VII, the ADEA and the ADA apply only to U.S. citizens employed abroad. Foreign citizens employed abroad, whether for a U.S. entity or otherwise, are not protected. E.g., Hugh E. O'Loughlin, Sr. v. Pritchard Corporation, 972 F. Supp. 1352, (D. Kan. 1997) (ADEA does not protect foreign citizens employed by a U.S. corporation abroad). See also 42 U.S.C. § 2000e-l (a) (Title VII does not apply to an employer with respect to the employment of aliens outside any State.); H.R. Rep. No. 98-1037, 98th Cong., 2d Sess. 28 (1984) (The House Report on the ADEA states that the statute does not apply to foreign nationals working for [U.S. corporations or their subsidiaries] in a foreign workplace.). Thus, a U.S. company does not violate U.S. anti-discrimination laws by hiring only U.S. citizens for work abroad, even if this results in discrimination against citizens of the foreign country where the U.S. company operates.

VIII. THE FOREIGN LAWS DEFENSE.

A. Generally. Employers are exempt from liability under Title VII, the ADA and the ADEA if compliance with U.S. anti-discrimination laws would cause the employer to violate the law of the foreign country in which the employee works. 42 U.S.C. §§ 2000e-l(b) (Title VII); 42 U.S.C. § 12112(c)(1) (ADA); 29 U.S.C. § 623 (f)(1) (ADEA).

For instance, Title VII provides in part as follows:

It shall not be unlawful . . . under this title for an employer (or a corporation employed by an employer) . . . to take any action otherwise prohibited by this section, with respect to an employee in a workplace in a foreign country, if compliance with such section would cause such employer (or such corporation) . . . to violate the laws of the foreign country in which such workplace is located.

42 U.S.C. § 2000e-l(b). The provisions of the ADA and the ADEA are substantially similar.

To invoke the foreign laws defense, the employer must show that:

1. The action is taken with respect to an employee in a workplace in a foreign country;

2. Compliance with U.S. anti-discrimination laws would cause the employer to violate the law of the foreign country; and

3. The law is that of the country in which the employee's workplace is located.

B. The Employee Must Be Employed in a Foreign Country. The defense is unavailable for employment practices involving employees in the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, or the Outer Continental Shelf Lands. EEOC Enforcement Guidance N-915.002, October 20, 1993. See also 42 U.S.C. § 2000e(i); 29 U.S.C. § 630(i).

C. There Must Be a Violation of Foreign Law.

1. Compliance with U.S. Law Must “Cause” a Violation of Foreign Law. Compliance with the U.S. law must violate the law of the foreign country in which the employee works. To satisfy this prong of the foreign laws defense, it must be impossible to comply with both the U.S. anti-discrimination law and the law of the foreign country. EEOC Enforcement Guidance N-915.002, October 20, 1993.

2. Law of a Foreign Country. The employer must show that the source of authority upon which it relies for the exemption constitutes a foreign law, not, for instance, mere custom or preference. EEOC Enforcement Guidance N-915.002, October 20, 1993.

   a. The EEOC does not regard the following as law:

      i. An employer’s corporate charter registered with a foreign governmental agency;

      ii. A bill passed by only one house of a foreign legislature where the Constitution of the foreign country requires bicameral passage before being given the force and effect of law;

      iii. An employer’s rules, regulations, and employment policies;

      iv. Preferences of the host country do not justify discrimination against U.S. citizens.

D. The Foreign Law Must Be the Law of the Country in Which the Employee Works. For the foreign laws defense to apply, the foreign laws in danger of violation must be those of the country in which the employee works, or absent the discrimination, would be located. The laws of the country in which the employer is incorporated or headquartered do not control unless the employee’s workplace is
also located in that country. EEOC Enforcement Guidance N-915.002, October 20, 1993.


RFE/RL, Inc. is a Delaware non-profit corporation. It is funded but not controlled by the federal government, and is best known for its broadcast services, Radio Free Europe and Radio Liberty. RFE/RL’s principal place of business is Munich, Germany. In 1982, the company entered into a collective bargaining agreement with unions representing its employees in Munich. One of the provisions of the labor contract, modeled after a nation-wide agreement in the German broadcast industry, required employees to retire at age sixty-five. In 1982, the Age Discrimination in Employment Act had no extraterritorial reach and thus the agreement was entirely lawful.

Congress amended the Act in 1984 to cover American citizens working for American corporations overseas. RFE/RL initially thought its American employees in Munich would therefore no longer have to retire at the age of sixty-five, as the collective bargaining agreement provided, and could continue to work until they were seventy if they so chose. In order to implement this understanding, the company applied to the Works Council for limited exemptions from its contractual obligation. Works Councils exist in all German firms with twenty or more workers. They are bodies elected by both unionized and nonunionized employees. Their duties include insuring that management adheres to all provisions of union contracts. Departures from contractual requirements are illegal without the Works Council’s approval. Rejecting RFE/RL’s requests, the Works Council here determined that allowing only those employees who were American citizens to work past the age of sixty-five would violate not only the mandatory retirement provision, but also the collective bargaining agreement’s provisions forbidding discrimination on the basis of nationality.

RFE/RL appealed the Works Council’s decisions and lost. The Labor Court agreed with the Works Council that RFE/RL must uniformly enforce the mandatory retirement provisions because exemptions would unfairly discriminate against German workers. The Labor Court also held that the retention of employees over the age of sixty-five despite the collective bargaining agreement would be illegal. RFE/RL tried to negotiate with the unions to delete the mandatory retirement provision from the collective bargaining agreement, but to no avail.

The company terminated plaintiff De Lon in 1987, and plaintiff Mahoney in 1988. Both plaintiffs were working for the company in Munich, both are United States citizens, and both were discharged pursuant to the labor contract because they had
reached the age of sixty-five. The parties agreed that RFE/RL thereby violated the Age Discrimination in Employment Act unless the foreign laws’ exception applied. The D.C. Circuit ruled that the foreign laws defense exempted the employer from liability under the ADEA. The Court noted that the company otherwise would be in the impossible position of having to conform to two inconsistent legal regimes, one imposed by the United States and the other imposed by the country in which the company operates.” Mahoney, 47 F.3d at 450.

IX. FOREIGN ENTITIES OPERATING WITHIN THE UNITED STATES.

A. U.S. Anti-Discrimination Laws Generally Apply to Foreign Entities Operating in the United States. By employing individuals in the United States, a foreign employer is viewed to invoke the benefits and protections of U.S. law, and should reasonably anticipate being subject to U.S. anti-discrimination laws for conduct arising from the business the employer does in the United States. See EEOC Enforcement Guidance N-915.002, October 20, 1993. See also Ward v. W & H Voortman, Ltd., 685 F. Supp. 231, 232 (M.D. Ala. 1988) (“It would be contrary to Title VII’s expansive goal, and indeed would be simply illogical, to limit the Act’s protective reach to only those American employees who work for a domestic entity and to leave open for victimization those employees in the country’s workplace who work for companies that happen to be foreign-owned … The court therefore holds that any company, foreign or domestic, that elects to do business in this country falls within Title VII’s reach and should, and must, do business here according to its rules prohibiting discrimination.”)


The Third Circuit, in a 1997 case, however, held that the ADEA and the Pennsylvania Human Rights Act did not apply to the discrimination claim of a U.S. citizen employed in the United States for a U.S. subsidiary controlled by a foreign
parent corporation where the individual was claiming discriminatory denial of a promotion to a position overseas. **Denty v. SmithKline Beecham Corporation**, 109 F.3d 147 (3rd Cir. 1997), *cert. denied*, 118 S.Ct. 74 (1997). Denty was hired by SmithKline, a Pennsylvania corporation, in 1984 and held various positions with the company. SmithKline subsequently merged with the Beecham Group, a British corporation. The resulting corporation –SmithKline Beecham –is incorporated and headquartered in the United Kingdom. Denty continued working for its wholly-owned subsidiary in the U.S. As a result of the merger, five positions were created in various foreign locations. Denty filed an age discrimination action under the ADEA and the state human rights act when he was denied a promotion to one of five new positions. The promotion decisions were made by executives at the parent in England while Denty worked in Philadelphia.

The Third Circuit dismissed the case determining that the Age Discrimination in Employment Act applies extraterritorially only to U.S. citizens in a U.S. company abroad, or a foreign company in the U.S. or abroad which is controlled by a U.S. company. The ADEA did not thus extend protections to a U.S. citizen employed in the U.S. by a U.S. subsidiary of a foreign entity where the alleged discriminatory action arose abroad.

D. **Treaties, International Agreements and/or Other Applicable Law May Insulate Foreign Entities From U.S. Law.**

1. **Treaties or International Agreements May Preclude Application of U.S. Law.** A treaty or international agreement or convention may protect a foreign employer in the U.S. from the application of U.S. anti-discrimination laws. For example, the United States has entered into friendship, commerce and navigation (FCN) treaties with some countries. Under a typical FCN treaty, each signatory grants legal status to the other party's corporations so that they can conduct business in the foreign country on a comparable basis as domestic companies. **See Weeks v. Samsung Heavy Industries Co.**, 126 F.3d 926, 934 n. 3 (7th Cir. 1997). When an FCN treaty is raised as a defense to anti-discrimination laws, the EEOC considers:

   Whether the defendant company is protected by the treaty;

   Whether the employment practices at issue are covered by the treaty; and

   The impact of the treaty on application of anti-discrimination laws.

2. **Example: Sumitomo Shoji America, Inc. v. Avagliano.** 457 U.S. 176, 102 S. Ct. 2374 (1982). Sumitomo Shoji America, Inc. is a New York corporation and a wholly-owned subsidiary of Sumitomo Shoji Kabushiki, a Japanese general trading company. The plaintiffs, U.S. citizens or Japanese citizens residing in the U.S. and former female secretarial employees of the U.S. subsidiary, filed a sex and national origin discrimination action alleging that the U.S. subsidiary hired only male Japanese citizens to fill managerial and sales positions. Sumitomo sought to dismiss the case arguing in part that its practices were protected by the Friendship, Commerce and Navigation Treaty between the U.S. and Japan. The Supreme Court ruled that Sumitomo was not covered by the FCN because it was incorporated in the U.S. and thus not a Japanese company.

Subsequent to *Sumitomo*, some courts have disagreed that a defendant company is protected by an FCN treaty only if it is incorporated in the foreign country. FCN treaties are intended to give foreign companies the right to favor their own citizens for executive positions in the United States. *See Fortino v. Quasar Co.* 950 F.2d 389 (7th Cir. 1991).

The EEOC disagrees with the result in *Fortino*, and has stated that permitting a U.S. subsidiary of a foreign company to accomplish indirectly what it cannot accomplish directly is incongruous. The EEOC has stated that it will continue to treat place of incorporation as determinative of FCN treaty protection, except in those jurisdictions where the courts have ruled otherwise. EEOC Enforcement Guidance N-915.002, October 20, 1993.

3. **Citizenship preferences only.** Although some treaties may protect foreign companies who give preference to citizens of their own countries for certain positions in the United States, those treaties do not entitle a foreign company operating in the United States to discriminate on any other basis. *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984) (U.S./Greek FCN treaty was intended to be a narrow privilege to employ Greek citizens for certain high level positions, not a wholesale immunity from compliance with labor laws prohibiting other forms of employment discrimination).

**Example: Weeks v. Samsung Heavy Industries Co.,** 126 F.3d 926 (7th Cir. 1997). Samsung Heavy Industries (SHI), a Korean company, employed Weeks through its U.S.-incorporated subsidiary. Weeks was initially hired as North American sales manager, but his responsibilities were subsequently diminished to cover only a portion of the U.S. SHI eventually installed a Korean citizen as North American sales manager, and Weeks filed suit against SHI alleging national origin discrimination in
violation of Title VII. The Court in Weeks noted that SHI’s actions were protected by the FNC Treaty between the U.S. and the Republic of Korea, which permits Korean businesses operating in the U.S. to choose citizens of their own country to serve as executives. The Court also held that, if hiring preferences for Korean citizens would result in a violation of Title VII due to the disparate impact this would have on the basis of national origin, covered employers were shielded from liability under Title VII.

In Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394 (7th Cir. 1997) The Court of Appeals for the Seventh Circuit held that the FNC Treaty between the U.S. and Japan permits Japanese companies operating in the U.S. to adopt a hiring preference for Japanese citizens. This decision also states that, although the Supreme Court, in Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 102 S.Ct. 2374 (1982) held that such protection does not extend to a U.S. incorporated subsidiary of a Japanese corporation, that: “If, however, the parent dictates the personnel decisions of the U.S. subsidiary, those decisions are protected by the treaty.” See also Kirmese v. Hotel Nikko of San Francisco, 72 FEP Cases 760 (Cal. App. 1996) (FNC Treaty with Japan would not shield a U.S.-incorporated subsidiary of a Japanese corporation from liability for employment decisions made at the U.S. subsidiary by individuals at the subsidiary affecting a U.S. citizen).

Treaties do not permit foreign employers operating in the United States to intentionally discriminate on the basis of age, sex, race, national origin, or disability. See MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988), cert. denied, 493 U.S. 944 (U.S./Korean FCN treaty permitted Korean company operating in U.S. to select Korean nationals as managers because of their citizenship, but did not allow foreign company to deliberately discriminate on the basis of age).

A treaty only permits a foreign employer operating in the United States to prefer citizens of its own country. See Starrett v. Iberia Airlines of Spain, 756 F. Supp. 292 (S.D. Tex. 1989) (immunity granted to Spanish company only permitted discrimination in favor of Spanish nationals and did not allow company to discriminate on basis of citizenship in favor of Venezuelan national who replaced plaintiff). Note: The Immigration Reform and Control Act also prohibits discrimination based on national origin, and may affect the ability of a foreign employer operating in the United States under an FCN treaty to discriminate in favor of its own nationals.

4. The Foreign Sovereign Immunity Act. If the employer is a foreign state, agency or an instrumentality of a foreign government, it may be insulated
from liability in accordance with the Foreign Sovereign Immunity Act (FSIA). 28 U.S.C. § 1602 et seq. Under the FSIA, foreign states are presumed to be immune from the jurisdiction of U.S. courts unless one of the FSIA’s exceptions applies. 28 U.S.C. § 1604. In *Holden v. Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996), *cert denied* 117 S.Ct. 767 (1997), a former employee of the Canadian Consulate’s office in San Francisco sued the Consulate after it terminated her but retained a younger man in the same position as a result of a staff-reduction. The Court held that the FSIA did not shield the Consulate from liability for its decision because of the FSIA’s commercial activity exception, which provides that a foreign state is not immune if the plaintiff’s cause of action is based upon a commercial activity carried on by the foreign state. 28 U.S.C. § 1605(a)(2). Holden was not a diplomatic, civil service, or military employee, and was employed primarily to promote and market Canadian products in the U.S., and therefore fell within the commercial activity exception.

X. PRACTICAL ASSESSMENT OF APPLICABILITY OF U.S. ANTI-DISCRIMINATION LAWS.

A. Alleged Discrimination by a U.S. or U.S.-Controlled Employer Outside the United States.

1. Is the individual a U.S. citizen?

2. Is the employer a U.S. entity or controlled by a U.S. entity?

   a. Is the employer a U.S. entity?

      i. Where is the employer incorporated?

      ii. If the employer is not incorporated in the U.S.:

         Where are its employees and managers located?

         What is the nationality of the owners, shareholders and management of the company?

   b. Alternatively, is the employer controlled by a U.S. employer or covered entity?

      i. Do the U.S. and the foreign company have interrelated operations? For example, does the foreign company exist exclusively to market the products/services produced by the
U.S. company? Do the companies share certain departments or functions? Do they have common policies?

ii. Do the U.S. and the foreign company have common management? Do they have the same officers and/or directors?

iii. Do the U.S. and the foreign company have centralized control of labor operations? For example, do they share a personnel department or apply the same personnel policies? Do employees of both companies get the same benefits and leave? Does one person make employment decisions for both entities?

iv. Do the U.S. and the foreign company have common ownership, e.g., have overlapping shareholders?

3. If the employer is a U.S. or U.S.-controlled employer, can it take advantage of the foreign laws’ defense for its conduct?

   a. Is the source for the defense a law of the country in which the employee’s workplace is or would be located?

      i. Does it involve merely a contract, a corporation’s internal policies or regulations, or constraints that are the result of foreign customs or practices, but not laws?

   b. Would compliance with Title VII, the ADA or the ADEA cause the employer to violate that foreign law?

      i. Do Title VII, the ADA or the ADEA cause a violation of the law? In other words, is compliance with both U.S. law and the foreign law impossible?

      ii. What steps has the employer taken to avoid the conflict? What actions, if any, are possible to meet both sets of obligations?

   c. Is the law that would be violated a law of the country in which the individual’s workplace is or would be located?

B. Alleged Discrimination by Foreign Employer Within the United States.

   1. Is the employer a foreign government or an entity owned by a foreign government?
2. Is there a treaty or other international agreement that protects the respondent from the full application of Title VII, the ADA or the ADEA?

   a. If a treaty is raised as a defense, does it in fact exist?

   b. Is the employer covered by the treaty?

   c. If the employer is in fact covered by the identified treaty, are the challenged employment practices also covered by it?

      i. Is the position for which charging party is applying among those named in the treaty?

      ii. In addition, is the particular employment practice covered by the treaty?

   d. If the treaty does apply to the employment actions taken by the employer, what impact does it have on the application of Title VII, the ADA or the ADEA?

      i. Has the employer acted to benefit citizens of its own country?

      ii. Has the employer acted to benefit citizens of its own country because of their citizenship?