Integrating the Cultures—and Employment Laws—of Your Multinational Workforce in the Global Economy

Employment and Labor

CHEAT SHEET

- ***US business protections apply abroad.*** US employment laws are not the only laws to consider when arranging for US employees to work abroad. Many business laws, treaties and trade agreements can influence the duties and responsibilities of employees working overseas.
- ***Additional layers of employment regulation.*** Employment protections can be created by trade unions and works councils, as well as by local and national laws.
- ***Restrictive covenants.*** The notion of a non-compete agreement has little cultural or legal support in non-US jurisdictions.
- ***Termination of employment.*** In many jurisdictions, an employer needs a very good reason to terminate the employment relationship.

In the movie *Up in the Air*, US actor George Clooney played a corporate hit-man, traveling around the country racking up frequent flyer miles as he fired people from one job after another, as he lived out of a suitcase and enjoyed luxury accommodations. As Clooney's character famously exclaimed in the movie: "I tell people how to avoid commitment." Well, in today's world of multinational workforces, the travel miles logged in the corporate world are much longer and the commitment is more difficult to avoid because of the intersection of foreign and domestic labor laws.

US companies going abroad should be aware of the intersection of foreign and domestic labor laws as they pertain to US citizens working abroad for branches or affiliates owned or controlled by US companies, and foreign citizens working for US companies in their own countries. These employees are protected by a complex matrix of domestic and foreign employment laws and regulating bodies. If this intersection of complex laws and regulatory authorities were not enough, employment relations with these employees may be further affected by cultural norms and ideals.

Expatriate employees — employees working outside of their country of origin — typically have complicated legal relationships with their employers while working abroad. That is because expatriate employees may be protected by layers of legal rights, both domestic and foreign, which can cause complications. US expatriate employees are no exception. For example, both domestic and foreign tax laws and health benefit regulations may apply to US employees working overseas, notwithstanding considerable differences that exist in the protections afforded to workers in each nation's respective system.

Of course, employers cannot forget that certain foreign citizens working in the United States are covered by US laws and, as a consequence, these foreign nationals are entitled to every employment protection as a US citizen working in the United States. In addition, these foreign workers may have some additional (and/or different) employment rights and privileges conferred from the foreign worker's home nation pursuant to treaties and trade agreements.

American companies deploying personnel overseas should be mindful, therefore, that their expatriate employees may be protected by the laws of two nations, which could result in rights in the courts of two nations. To this end, company policies, procedures and employment agreements should reflect the proper legal standards and laws.

Businesses looking to engage employees outside of the United States or foreign nationals inside the country should be aware of how the complicated matrix of laws, regulating bodies and cultural ideologies intersect to avoid legal missteps and costly litigation. If a corporate hit-man like Clooney's character tells you "how to avoid commitment," you'd better make sure that your company understands: (1) the legal and cultural differences affecting multinational employment, and (2) what best practices should be employed to provide the greatest protections for an international workforce. This article discusses these issues and their corresponding influence on businesses operating overseas. Businesses that are new to foreign employment should examine their practices to ensure compliance at home and abroad.

Legal and cultural differences can affect the terms of employment

The age-old axiom that knowledge is the key to success rings true for companies employing a multinational workforce. American companies may underestimate the social contract mandated between employers and employees abroad, especially in the European Union. Employment laws in the United States have historically been based around the market-driven, widely accepted doctrine unique to the United States known as "employment at will," which essentially allows US employers to terminate employment for any reason or no reason at all, with or without notice. Thus, employment laws tend to give ample consideration to the needs of the business. Though the American sense of fairness has created laws that attempt to codify a level playing field for all workers, few people question the underlying principle in a capitalistic economy like the United States that a business exists primarily to generate profit for its owners.

Elsewhere in the world, a company's profit orientation may be tempered by the social contract between the employer and the employee as well as the political orientation and history of the country and its legal system. The social contract supports the notion that indefinite employment, or limiting terminations to those only based upon "good cause," benefits the economic health of the country and the individual because of the stability (whether real or perceived) it creates. This may be reinforced in some countries by religious or political ideologies (such as Socialist-Communist thought in countries like China or Vietnam), where private enterprise may be viewed as something to be tolerated but harnessed always for the public good. As such, businesses are restrained from making decisions that do not take into account the social and economic well-being of their employees, and courts and government agencies may assert rights to second-guess the employment decisions of a multinational business. For example, the employment relationship cannot easily be severed because it would deprive employees of their livelihood and affect the stability of the country's worker-employer relations. To balance inequities, employees may have a greater role in influencing company policy and in making operational decisions, and even relatively routine changes in local employment policies may require consultation of the employees themselves (or their union) prior to implementation. Though the balance of power between employers and employees may shift to adjust to economic conditions, politics and abuses from either side, the idea of a social contract remains a bedrock principle in many foreign countries, in contrast to the market-oriented approach in the United States.

These idealistic and ideological differences in employer-employee relations should be acknowledged by US companies that plan to send their employees overseas. While US companies should expect to integrate the social contract ideology into the terms and conditions of expatriate employment, the companies should remember the extraterritorial reach of US laws. Some of these touchpoint considerations are discussed below.

Limited US employment protections apply abroad

Most US employment laws do not typically have an extraterritorial effect, meaning the laws do not expressly provide protection for employees working outside of the United States. While Congress has indicated that it expects US citizens to always be subject to US laws, the US Supreme Court has held that there is a presumption against extraterritoriality when interpreting a statute. But some statutes, like Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), contain language that applies anti-discrimination protections to US employees working in foreign countries. These protections are not applied without limit however.

An exception exists to the enforcement of US anti-discrimination laws for expatriate employees, which is known as the foreign law exception. If enforcement of a US anti-discrimination law violates a foreign law, then the foreign law trumps US law. The exception is narrowly construed and requires a US company to show that the US law would directly violate the law of the host country. For example, if an employee working in a nation with a mandatory retirement age that would be unenforceable in the United States makes a complaint of age discrimination under the ADEA, the employer may have a defense to the claim under the foreign law exception if it can show that enforcing the ADEA protection will result in a violation of the host country's mandatory retirement law.

Many US employment laws have no extraterritorial effect

Without an explicit extension of extraterritorial protection, US employment laws provide limited employment protection to US employees working overseas. US employees working in foreign countries usually are not protected by the Equal Pay Act (EPA), the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the National Labor Relations Act (NLRA), the Occupational Safety and Health Act (OSHA), or the Worker Adjustment and Retraining Notification Act (WARN). Still, employers should be careful and mindful of the remedial purpose of these laws. Some of the protections found in the EPA, the FLSA, the FMLA, the NLRA, the OSHA, and the WARN Act are addressed in foreign laws and may, in fact, be more generous abroad.

US employees may find less support of American workplace values in the sexual harassment laws of other countries, however. While many countries have laws that forbid quid pro quo harassment, few countries have defined a hostile work environment related to sexual harassment or have adopted the rigorous US case law on the subject.* US companies sending employees abroad may consider addressing the issue of sexual harassment in policies and procedures, codes of conduct and even in employment agreements, all of which can serve as the basis for discipline or termination for offensive conduct.

* It is useful to note in this regard that India, the second most populous country in the world, only recently adopted a broad, federal prevention of sexual harassment statute in December 2013.

Whistleblowers may also receive less cultural and legal support outside of the United States. Culturally, whistleblowing is a repugnant concept in some parts of the world and is considered a violation of the social contract, akin to turning a family member over to the authorities. As a result, few foreign countries have laws that explicitly protect whistleblowers. The rise in the number of European companies listed on US stock exchanges, however, has caused the Securities and Exchange Commission (SEC) to consider requiring foreign companies to adhere to US whistleblower standards. If the SEC requires foreign companies to adhere to whistleblower regulations, foreign nations may become more accepting of whistleblowing behavior. This practice may be especially true

where whistleblowing protects the profitability of companies that financially struggling countries depend upon.

Employees working abroad must have proper documentation

US citizens working in a foreign country must apply through the US government and the host country to obtain proper work visas and immigration clearance. The visa application process varies from country to country, so attention should be paid to the particulars required by the host country. Obtaining a work visa will likely require proof of employment in the host country, such as a letter of intent from the employer and a copy of the employment contract. The host country may also require proof of travel arrangements, passport, birth certificate and payment of a fee before a visa will be granted. Spouses traveling abroad with the employee will need proper documentation as well. The employer and the employee should plan for medical and emergency situations as well. Certain immunizations may be required for the employee to enter the host country and immunization records may be required. All documents and clearance needed for the employee to enter and work in the host country should be completed before the employee leaves the United States.

Additional layers of employment regulation may require adherence

Organized labor in foreign countries can have multiple layers not commonly found in the United States. Employment protections can be created by trade unions, labor unions and work councils as well as by local and national laws. Companies should be aware of the various regulating bodies in the host country, the authority of those bodies, and the protections and compliance requirements of each.

Legal tribunals may decide employment disputes

In Europe, labor disputes typically go before special labor tribunals, often composed of a neutral administrative law judge, a judge or advocate appointed by the labor group, and a judge or advocate appointed by management. Complaints about termination, discrimination and wages usually go to these courts, where the civil procedure is simple — court protocol is informal, and employees often represent themselves. Similarly, in China and other Asian-Pacific countries, the first stage of a dispute is commonly resolved by a labor arbitrator under the auspices of a local labor agency. Labor tribunals can award damages, though they rarely impose the huge awards seen in American courts. Class or representative action lawsuits remain a mostly American phenomenon.

Trade unions provide employment protections

Trade or labor unions generally represent entire industries and can provide widespread employment protections. The unions usually serve as the employment bargaining body for specific trades. The trade unions, their functions and their rules may vary from country to country.

American companies, which are generally accustomed to adversarial relationships with labor unions, may find that labor and management abroad are more likely to work from a forced collaborative model where workers have a voice in management decisions. Employee protections secured by foreign trade unions may also be applicable to expatriate employees. Employers should be aware of the impact of any local unions when defining the terms of employment for expatriate employees.

Work councils give employees a voice in the company

A work council — a group not typically found in the United States — is an elected body that acts on

legislative authority and represents the interests of employees in a single company. Work councils require only a small minority of employees to request representation, so it is unusual for any company to avoid interaction with them. In some countries, significant decisions about operations, such as pay rates or acquisitions, must have meaningful input from the work councils. A work council can block an acquisition or divestiture of assets under certain conditions; therefore, it behooves companies to form solid relationships with worker representatives.

Corporate codes of conduct outline company practices

Corporate codes of conduct are common — if not required — in many countries outside of the United States. This unique cultural standard is more than a core values statement and may outline the corporate governance practices of a business, including: how accountability is shared among managers and other stakeholders; hierarchies of responsibility; compensation of managers and directors; responsibilities to workers and the community; and, generally, how the company carries out its role as a responsible and ethical business. The European Commission has issued guidelines for corporate codes, and some countries overlay their own requirements. Codes of conduct, together with policies and procedures, may be used to set the standards for acceptable employee behaviors. In some countries, codes or “work rules” that govern the expectations for conduct of the company’s workers may have to be registered with local labor agencies to be an effective basis for local discipline or termination actions. Expatriate employment agreements should reference these codes where applicable, or alternatively should reference that expatriate employees continue to be bound by the US code they followed before their overseas assignment.

Best practices for using employment agreements to help define and control the terms of employment for expatriates

Employment agreements for expatriates should be crafted carefully to address the many legal implications of working abroad. Expatriate employment agreements should address many of the same employment terms found in domestic employment agreements. These terms may include the length of the expected employment overseas, the location and work assignment, days and hours of work, holidays and manner of termination – both in terms of terminating the expatriate assignment and in terminating employment. Issues such as moving expenses and reimbursement, and emergency trips back to the United States, as well as unusual living expenses, such as expensive international medical coverage required in a foreign country, should be addressed in the agreement. Local law may require that the contract be available in the official language of the host country as well as in English.

Naturally, employers want to obtain the same level of protection against liability and business exposure in employment agreements for expatriates as employers receive in traditional employment agreements. As a result, best practices dictate that employers should make sure the following key concerns are expressly addressed in their agreements:

Choice of law and alternative dispute resolution are items to include in the agreement.

Expatriate employment agreements typically address choice of law issues, as well as dispute resolution. Companies should include choice of law and dispute resolution provisions in employment agreements, but with the understanding that most countries’ courts will not allow choice of law and dispute resolution provisions in an expatriate agreement to circumvent the application of local

employment protections for employees who have performed more than minimal work in their country.* It is critical to include choice of law and dispute resolution provisions, nonetheless, because many expatriates may still ultimately choose to litigate in the United States and the company will want to control the jurisdiction and manner of that US litigation.

* This remains true even in Canada (which is, for the most part, a common law jurisdiction closer in form to the US legal system than most other countries), and it is generally true across Europe and Asia as well. *See, e.g., Newton v. Larco Hospitality Management Inc.* (2004), 70 O.R. (3d) 427 (Sup. Ct. J.) (choice of law clause in expatriate employment agreement ignored in order to ensure applicability of local employment protections).

Intellectual property issues should be explained in the agreement

It is beyond the scope of this article to address the international differences in intellectual property (IP) laws, but if employees are involved in research or creation of products, companies should ensure appropriate protections are in place. If a company wants to retain ownership rights to IP that is generated in the course of employment, the employment agreement should expressly state the ownership rights in a “works for hire” provision or in another separate agreement as may be required by local law.

Restrictive covenants are uncommon outside of the United States and should be expressly stated

The notion of a non-compete agreement, de rigueur for many executives and essential personnel in American companies, has little cultural or legal support in many jurisdictions abroad. Even where non-competition agreements are enforced, they will be construed more narrowly than most US courts might interpret them, and may have a requirement attached forcing the employer to pay a portion of the former employee’s previous wages each month for the duration of the restriction as compensation. Expatriate employment agreements may, however, forbid employees from divulging trade secrets, provide terms for severance, outline the scope of responsibilities, and set performance standards that could provide a basis for termination.

Grounds for termination of employment should be explained in the agreement

Employment at will is an American concept but in many foreign jurisdictions an employer may only terminate employment for good cause. Good cause may be a term specifically defined in the local or national laws of the host country or in collective bargaining agreements. Local statutes or work council rules may also dictate a termination process that must be followed. Foreign companies often give the employee more time to correct performance deficiencies than is typically granted in the United States. Even misconduct — behavior that would generally lead to termination in the United States — is more likely to result in a program of improvement in many countries, and an employer may need to hold a “show cause” hearing to allow the employee to explain his or her behavior and assess the company’s evidence before termination is allowed. These local rules may apply to expatriate employees.

Further, European countries often allow companies to give consideration to tenure, number of dependents and proximity to retirement when administering layoffs, reflecting a cultural and legal effort to institutionalize job security. Companies exploring overseas operations should be aware of the termination limitations and requirements of the host country before sending US employees.

Retirement plans, their vesting and taxability should be defined

Under US law, an American expatriate can typically continue to participate in his or her US employer's qualified retirement plan, such as a 401(k) plan. In some cases, however, it is administratively difficult to continue participation, or the employer would prefer that the employee be covered under the host country's retirement plan.

If a US citizen participates in a foreign retirement plan that is funded, then the employee could be taxed by the United States under Section 402(b) of the tax code as vested amounts are accrued under the plan. In some situations, international tax treaties avoid or mitigate this result. Expatriate employment agreements should explain the tax consequences and obligations.

Detail any deferred compensation

US tax law imposes strict distribution timing rules on unfunded deferred compensation of US citizens and other US taxpayers. Unfunded deferred compensation is defined broadly and can include things like severance, long-term incentives, phantom equity and unfunded retirement plans, regardless of whether the compensation is provided by a US or a foreign employer. If the deferred compensation does not comply with Section 409A of the tax code, the employee is generally subject to a 20 percent additional tax, plus an interest penalty. Many exclusions apply to this provision in the international context, and employers and employees will need professional advice to ensure compliance.

In addition, if a US expatriate is employed by a non-US employer located in a no-tax or low-tax foreign jurisdiction, then the employee is generally taxed immediately on any unfunded deferred compensation under Section 457A of the tax code. As with Section 409A, this provision is complex, so employees and employers should seek tax advice to ensure their compensation arrangements achieve their intended objectives.

Explain any tax and Social Security implications

The employment of a multijurisdictional workforce can have material tax implications for both employers and their employees. From the employer's perspective, the presence of employees in a location other than its jurisdiction of incorporation can cause the employer to have a taxable presence in that second jurisdiction, known as a "permanent establishment." This risk of permanent establishment in a country where the employer is not properly registered to avoid taxation while employing workers is an issue which keeps many international attorneys and tax professionals up at night. Similarly, employee presence in a second jurisdiction may subject the employer to double taxation on income earned or attributable to the activities of the employee. Local apportionment laws and an international treaty network can help alleviate the risks of double taxation, but careful planning is required to ensure that the employer is not subject to double taxation.

From the employee's perspective, income earned in a jurisdiction frequently is subject to tax in that jurisdiction, even if the income earned is also subject to tax in the jurisdiction where the employee is tax resident. Subject to an exemption for the first $97,000 of income earned outside of the United States, US citizens generally must pay taxes on all of their worldwide income, regardless of where the income is earned. Foreign tax credits may be available to minimize the tax cost to the employee, but there are significant limitations on the availability of these credits that can result in additional tax costs to employees. The United States and many non-US jurisdictions also impose Social Security taxes on income earned in the jurisdiction. Although there are significant intergovernmental

agreements (known as “totalization agreements”) designed to minimize the risk of being subject to these taxes on the same income, the US has negotiated these with only a small number of countries, and careful planning is necessary to ensure the availability of exemptions.

In an effort to address perceived unfairness when an employee with an overseas assignment incurs taxes in excess of what would have applied in the United States, many employers provide “tax equalization” to their expatriate employees. Tax equalization can take several forms, but conceptually it is a process by which an employer pays the employee’s taxes to the extent he or she incurs additional taxes as a result of working overseas to ensure that the expatriate employee does not face a reduction in income. This often comes at great cost to the employer, however, and pre-advice from accountants is absolutely necessary in this regard.

In addition, each US state has its own rules, though most require domiciliary residents who are living abroad to file a resident income tax return. The resident living abroad, however, may not be subject to state tax on his or her foreign income to the extent it is excluded under Section 911 of the Internal Revenue Code. For domiciliary residents of those states that do not fully conform to the federal foreign income exclusion (or the employee simply does not want the compliance burden of filing a state tax return), or employees who expect to remain overseas for a long period, might want to investigate the requirements for relinquishing their state residency. In either case, it is imperative that the employee working abroad and his or her employer review the applicable state law prior to filing returns or ending domiciliary residency.

Expatriate employment agreements should clearly explain the tax responsibility of the employee and explain any tax equalization measures taken by the employer.

Secondment agreements may provide a tax alternative

One approach to address the tax considerations related to the crossborder movement of employees is a “secondment” arrangement. A secondment agreement typically provides for an employee to be assigned temporarily to another company, often a business partner or supplier. When structured properly, secondment arrangements can limit the employee’s and the employer’s tax risks and costs by being crafted to avoid permanent establishment risk, but they can have significant non-tax implications. Again, employees and employers should seek tax advice to ensure their arrangements achieve their intended objectives.

If your company is venturing into a foreign country for the first time, closely review the laws and regulations of the foreign locale in which you plan to do business. Understand the various governing bodies and advocate groups that influence employment conditions and laws in the area. Consider whether company policies and procedures applicable to expatriate employees reflect the applicable host country laws. Develop a template for expatriate employee agreements and monitor changes to the host country laws, as well as those in the United States. Compile a nation-specific handbook that spells out policies and explains the legal differences between the US employment laws and the employment laws of the host country. If the handbook will apply to local (non-expatriate) employees, it should ideally be written in the local, dominant language of that nation or in “dual languages” (English text on top of the local language text). Include the company’s core values on topics such as equal treatment of employees and explain local cultural mores and how their employment rights and responsibilities will change when they leave the United States.

Companies venturing overseas should also understand the business implications of maintaining an overseas presence, including tax ramifications and currency and banking issues. Currency and

banking issues may arise in countries that have currency controls or highly inflationary economies where local employees may not want to be paid in local currency or may ask for frequent cost-of-living adjustments. Companies should be prepared to address immigration and work status issues for the employees the company sends overseas. Companies should give attention to these details when planning their overseas engagements.

Companies venturing outside US borders will inevitably reach the complex intersection of foreign and domestic labor and employment laws. Managing and protecting a multinational workforce is no small commitment. If your company is going abroad, you will want to carefully survey the legal landscape both at home and abroad to set policies that align with all applicable laws and build positive relationships with employees.

Further Reading

Even US federal anti-discrimination laws – widely seen as some of the strongest such protections in the world – maintain ample room to accommodate business prerogatives. See, e.g., Simms v. Oklahoma ex rel. Dep't of Mental Health and Substance Abuse Servs., 165 F.3d 1321, 1330 (10th Cir. 1999) (in federal age discrimination case, court stating that "[o]ur role is . . . not to act as a 'super personnel department' that second guesses employers' business judgments.").

E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (holding that there is a presumption against the extraterritorial reach of US laws unless Congress expresses its intent otherwise).

42 U.S.C. § 2000e(f); 42 U.S.C. § 12111(4); 29 U.S.C. § 623. In particular, separation agreements containing releases of claims for US-based expatriate workers over the age of 40 should generally comply with the Older Workers' Benefit Protection Act (OWBPA), which may have extraterritorial effect.

42 U.S.C. § 2000e-1(b); 42 U.S.C. § 12112(c)(1); 29 U.S.C. § 623(f); Enforcement Guidance: Application of Title VII and the Americans with Disabilities to Conduct Overseas and to Foreign Employers Discriminating in the United States, No. 915.002, E.E.O.C. (Oct. 20, 1993); Policy Guidance: Analysis of the sec. 4(f)(1) 'foreign laws' defense of the Age Discrimination in Employment Act of 1967, No. 915.046, E.E.O.C. (Dec. 5, 1989).

Policy Guidance: Application of the Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Pay Act of 1963 (EPA) to American Firms Overseas, Their Overseas Subsidiaries, and Foreign Firms, E.E.O.C. (1989), (the FLSA and EPA do not have extraterritorial application).

29 U.S.C. §§ 2601 et seq. (patterned after the FLSA, which does not have extraterritorial application, the FMLA has no language expressly stating that it shall apply to US citizens working in foreign countries).

RCA OMS, Inc., 202 N.L.R.B. 228 (1973) (holding that the National Labor Relations Board does not have jurisdiction over US employees of a US company who were hired in the United States, paid from the United States and will return to the United States after completion of their jobs).

29 U.S.C. § 653(a).

29 U.S.C. §§ 2101-2109 (contains no reference to extraterritorial application).

26 U.S.C. § 401(k).

26 U.S.C. § 402(b).

26 U.S.C. § 409A.

26 U.S.C. § 457A.

26 U.S.C. § 911.

The United States currently has Totalization Agreements with 25 countries.

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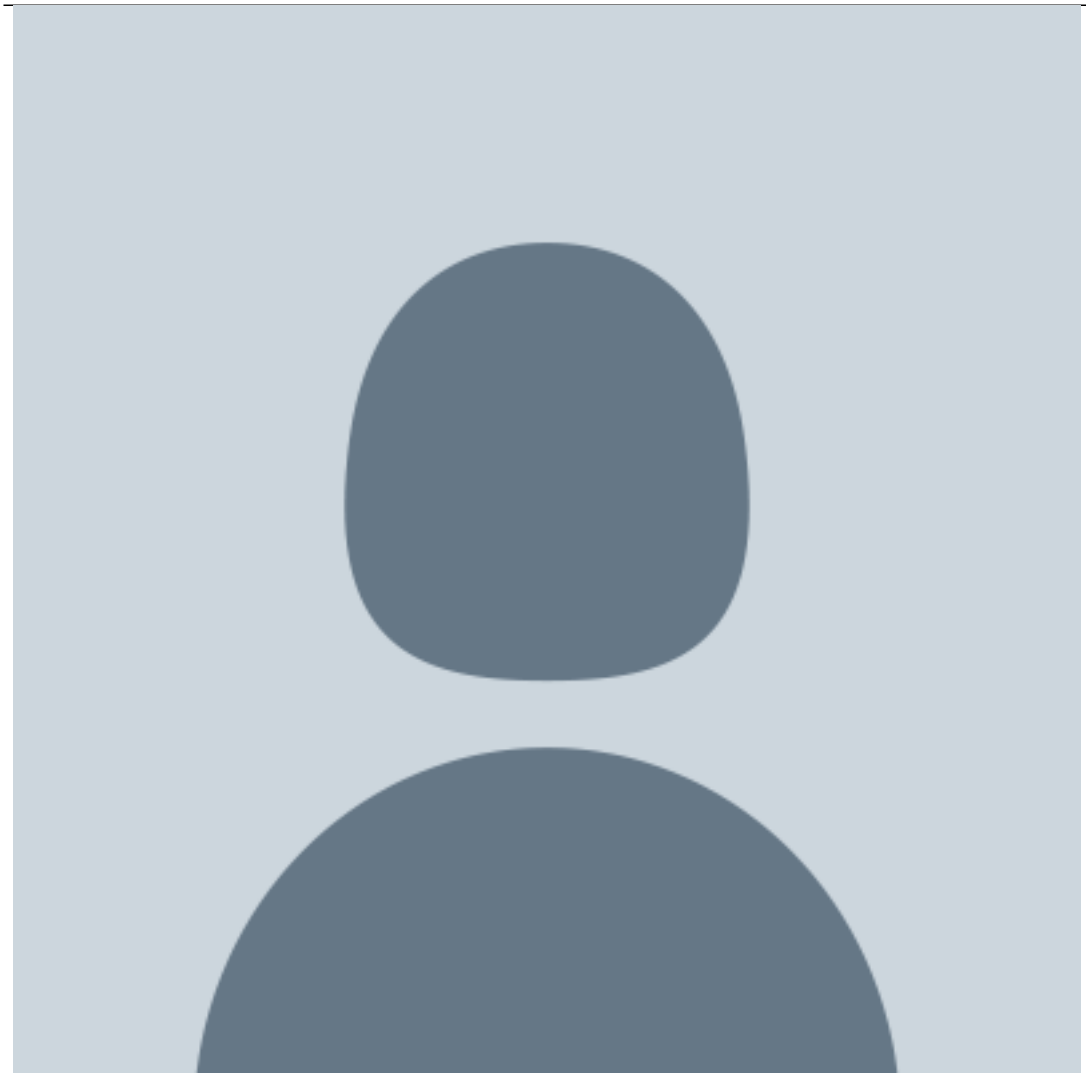

International Employee Relations Counsel

Target Corporation

Target Corporation is a multinational retailer with employees working across more than a dozen countries.

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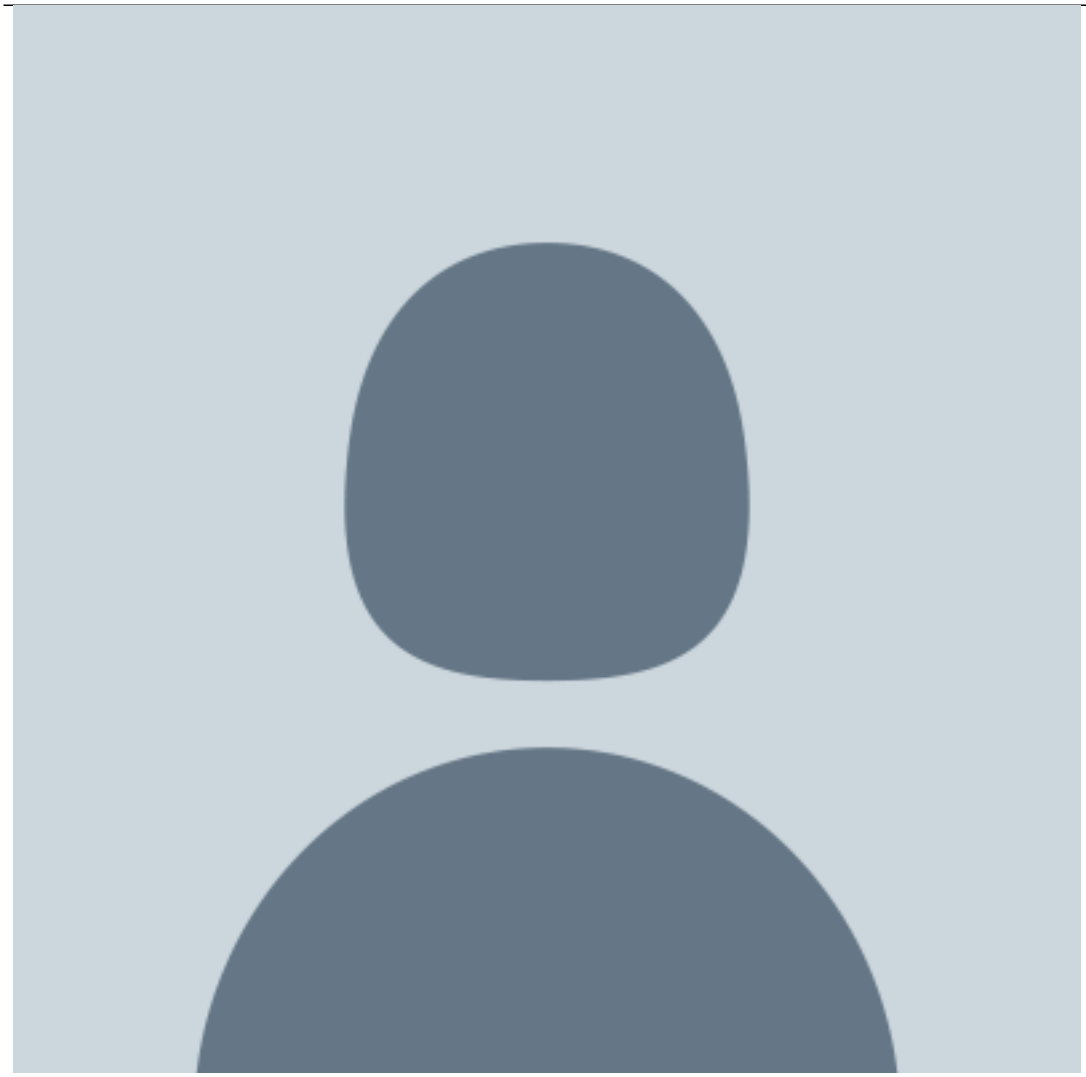

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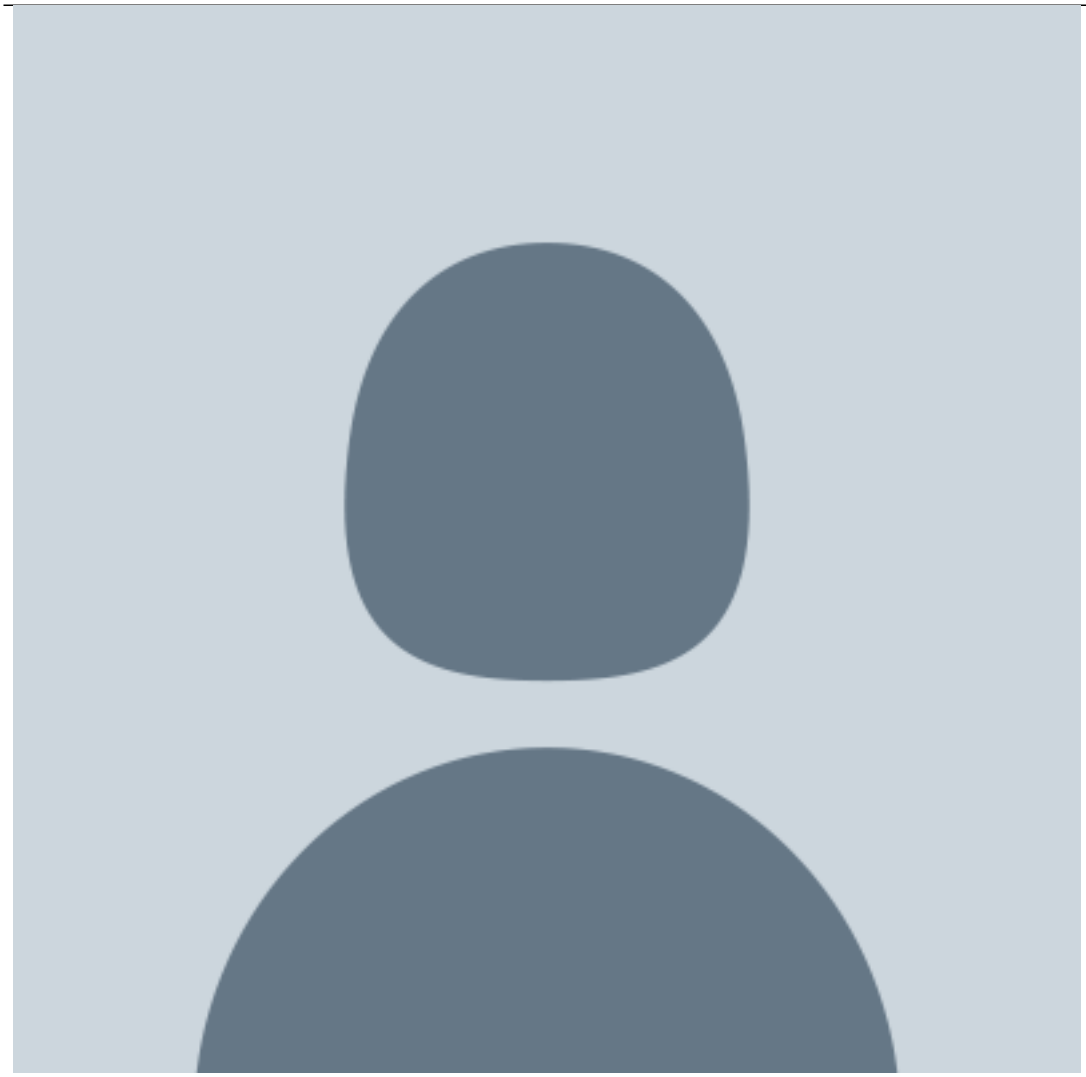

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