

WHERE IN THE WORLD ARE YOUR
EMPLOYEES? INSTITUTIONS AS GLOBAL
EMPLOYERS:

EMPLOYMENT LAW CONSIDERATIONS IN THE
AGE OF INTERNATIONAL PROGRAMS

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INTRODUCTION

Studying abroad has become an increasingly popular academic endeavor among United States college and university students. In the past decade, the number of American students studying internationally has more than doubled.¹ During the 2007–2008 academic year alone, more than 263,000 U.S. students studied abroad for credit.² Indeed, the educational importance of study abroad experience has been recognized by Congress, as demonstrated in the Senator Paul Simon Study Abroad Foundation Act of 2009.³ As well, the popular press acknowledges the importance of such programs; in late 2007, the New York Times observed that “[f]or students,

1. Press Release, Open Doors 2009, Americans Study Abroad in Increasing Numbers, Institute of International Education; <http://opendoors.iienetwork.org/?p=150651> (last visited Mar. 23, 2010).

2. *Id.*

3. As introduced in the Senate, the purposes of this Act are:

(1) to significantly enhance the global competitiveness and international knowledge base of the United States by ensuring that more United States students have the opportunity to acquire foreign language skills and international knowledge through significantly expanded study abroad;

(2) to enhance the foreign policy capacity of the United States by significantly expanding and diversifying the talent pool of individuals with non-traditional foreign language skills and cultural knowledge in the United States who are available for recruitment by United States foreign affairs agencies, legislative branch agencies, and nongovernmental organizations involved in foreign affairs activities;

(3) to ensure that an increasing portion of study abroad by United States students will take place in nontraditional study abroad destinations such as the People’s Republic of China, countries of the Middle East region, and developing countries; and

(4) to create greater cultural understanding of the United States by exposing foreign students and their families to United States students in countries that have not traditionally hosted large numbers of American students.

S. 473, 11th Cong. § 3 (2009).

international exposure . . . has become a must-have credential.”⁴

To keep up with the growing popularity of study abroad programs, U.S. institutions of higher education have been opening foreign campuses at a record rate.⁵ For the purposes of this article, “foreign campus” means an educational institution (primarily higher education and/or higher education-based research) that is located outside the United States but is (i) owned by a U.S. institution and is recognized as part of that U.S. institution, and/or (ii) operated in conjunction with another institution of higher education. Establishing an academic program in another country is not a simple task, however, and should not be undertaken lightly. Opening a foreign campus requires negotiating a complex web of U.S. and foreign laws and regulations, cultural issues, and processes of often unfamiliar legal systems. Indeed, a variety of risks and challenges face those who make study-abroad programs available. Along with the usual day-to-day issues⁶ of operating in

4. Laura Pappano, *The Foreign Legions*, N.Y. TIMES ONLINE, Nov. 4, 2007, <http://www.nytimes.com/2007/11/04/education/edlife/studyabroad.html>. See also Kent Hoover, *U.S. Universities Expand Overseas Efforts to Keep Global Edge*, BUS. FIRST OF LOUISVILLE, Aug. 6, 2007, available at <http://bit.ly/9rnzvw>. Also noted by the press are unflattering situations regarding disputes with students and their institutions, often involving disputes over credit transfers and perks from vendors to colleges and universities (Diana Jean Schemo, *In Study Abroad, Gifts and Money for Universities*, N.Y. TIMES, Aug. 13, 2007, at A1, available at <http://nyti.ms/9dxv6w>), investigations into financial practices and management, including rebates, subsidized travel, and other value that may not be disclosed to students (Jonathan D. Glater, *Inquiry of Study Abroad Programs Grows*, N.Y. TIMES, Jan. 21, 2008, at A10 available at <http://bit.ly/aVm37q>), as well as claims by a graduate against her alma mater that the institution forced her to pay more tuition than her study-abroad program actually cost (Tamar Lewin, *Lawsuit Takes Aim at College's Billing Practices for Study Abroad*, N.Y. TIMES, Mar. 9, 2008, <http://nyti.ms/bbASLq>).

5. For further information and statistics on this growth, see DANIEL OBST, RAJKA BHANDARI, & SHARON WITHERELL, MEETING AMERICA'S GLOBAL EDUCATION CHALLENGE: CURRENT TRENDS IN U.S. STUDY ABROAD & THE IMPACT OF STRATEGIC DIVERSITY INITIATIVES, IIE Study Abroad White Paper Series (Issue 1, May 2007), available at http://www.iienetwork.org/file_depot/0-10000000/0-10000/1710/folder/62450/IIE+Study+Abroad+White+Paper+I.pdf. According to the authors:

IIE's study abroad directories (*IIE Passport: Academic Year Abroad* and *IIE Passport: Short-Term Study Abroad*) have provided U.S. students and advisors with study abroad program listings since 1950. The IIE Passport directories are the most comprehensive directories of study abroad programs for U.S. students. In 1986 the directories listed 2,005 programs. This number increased to 6,514 in 2006. This represents an increase of approximately 225 percent. During the same period, the number of U.S. students studying abroad increased by 327 percent. The most recent IIE Passport directories (2007 editions) include over 7,500 listings. These do not include the many campus-based initiatives open only to their students, nor the growing numbers of students enrolling directly in foreign university degree programs.

Id. at 7.

6. For example, tort issues, establishing contractual relationships, real estate matters, trade compliance (export control, trade sanctions), etc.

different countries, institutions must navigate a multitude of interrelated, overlapping labor provisions and other employment laws, regulations and workplace ordinances. An institution must not rush through this process simply to have a study abroad program as an angle for recruiting students, enhancing prestige, and attracting research investment. Rather, when opening a foreign campus or operating a study abroad program, institutions must carefully assess the applicable laws and regulations, particularly when sending American citizens to work abroad and when hiring foreign citizens (not to mention sending students who are U.S. citizens to such locations).⁷ Many U.S. civil rights or non-discrimination statutes have extraterritorial reach and protect American citizens working abroad.⁸ Starting with the Marcus Neff-J. H. Mitchell transactions that gave rise to *Pennoyer v. Neff*,⁹ in his thorough and insightful article *The Extraterritorial Application of American Law: Preliminary Reflections*,¹⁰ Professor John Robinson provides an impressively thorough review of the history, evolution, and current state of affairs with respect to the extraterritorial application¹¹ of American law. The foreign country in which your institution is operating a study abroad program may have complicated, or even counterintuitive, employment requirements for its citizens or for American workers in the jurisdiction.

7. Indeed, many institutions partner with local entities for the purpose of ensuring compliance with foreign employment law requirements or for delegating employment-related responsibilities to a local entity with expertise. However, there are significant risks associated with this insofar as the institution then loses a measure of control over its staff.

8. Title VII of the Civil Rights Act of 1964, Pub. L. 89-554, 80 Stat. 378 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2006)); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–34 (2006); and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (2006), provide protections for American citizens working outside the United States (in addition, of course, to the application of the laws inside the United States) for American companies or foreign employers controlled by a U.S. corporation. See *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147 (3rd Cir. 1997), *cert. denied*, 522 U.S. 820 (1997).

9. 95 U.S. 714 (1878).

10. John H. Robinson, 27 J.C. & U.L. 187 (2000). Beginning with the dispute underlying the famed *Pennoyer* case and identifying the “flood of private international litigation” that will be created by the “vast increase in international business transactions characterized by the globalized economy,” *id.* at 203, Robinson sets out much to be considered as higher education transforms with, and as part of, our global economy. For additional information on the Neff-Mitchell and *Pennoyer*-Neff activities that gave rise to the famous civil procedure case, Prof. Robinson recommends Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH L. REV. 479 (1987).

11. See *id.* at 195–197 for a fine discussion of *Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244 (1991) (holding that there was no extraterritorial application, short of explicit Congressional authorization), and corresponding Congressional action in the Civil Rights Act of 1991 to address the limitations of *Aramco*.

Institutions opening a foreign campus or operating a study abroad program often realize the complexities of the labor and employment guidelines of other countries only after having decided to open a foreign campus, or after a problem arises. This article addresses many of the labor and employment legal implications of opening foreign campuses and sponsoring and staffing international programs.¹² Part I discusses the different types of arrangements that institutions utilize to develop study abroad programs for their students, including relationships with foreign institutions and establishing their own campuses abroad. Part II provides a methodology for determining which jurisdiction's (or, perhaps, jurisdictions') employment laws apply on a foreign campus. A comparison between U.S. employment laws and regulations and those of France (a popular study abroad choice for students attending U.S. colleges and universities) and the People's Republic of China (also an increasingly popular study abroad choice for students at U.S. colleges and universities, especially with its economic growth, the 2008 Summer Olympics in Beijing, and China's ongoing contributions to technology in Asia) is discussed in Part III. This article concludes that with a careful and strategic approach to opening and operating a foreign campus, U.S.-based institutions of higher education can reasonably manage risk, create more attractive programs, produce more efficient program management, and continue to grow and participate in global education and commerce.

I. THE INSTITUTION'S ROLE AS AN EMPLOYER

An institution's role as an employer varies in accordance with the type of study abroad program or foreign campus being operated. Administrators should consider their institution's ability to effectively manage the level of complexity associated with each type of arrangement.

The most basic arrangement is one in which an American institution partners with a foreign institution which, in turn, acts as host to American students. This arrangement is often called "direct enrollment," as it allows U.S. students to enroll directly in a foreign educational institution.¹³ U.S. entities would do well to be mindful of their roles as good citizens and ambassadors of the United States, or at least, the higher education and research sector of the United States. As institutions of higher education maintain a presence abroad, they will interact with, conduct commerce in, and likely engage the services of governments and individuals in various

12. This article does not address foreign entity formation, taxation, or immigration issues implicated when students and staff participate in study abroad programs. These issues require separate treatment and are beyond the scope of this article. In addition, one should also consider how foreign and domestic (both federal and state) welfare, social security, property, corporate/entity and other tax issues are implicated.

13. See, CIEE, Direct Enrollment and the Resident Advisor, <http://www.ciee.org/study/advisors/direct-enrollment.aspx> (last visited Apr. 16, 2010).

foreign countries. Considering how others perceive and receive the institution and its affiliates can help smooth the way for better relations between the colleges and universities and their partners abroad. A direct enrollment program does not generally require the American institution to send American employees abroad or to hire foreign citizens, although some program sponsors do hire student services and other personnel to assist their students when problems arise.

A more complex arrangement often occurs when an American institution operates a short term faculty-led educational program in a foreign country with its own staff or professors. Examples of this situation include a short term study abroad program or an inter-term trip led by one or more U.S.-based faculty. Because this arrangement requires the institution to have faculty or staff working abroad, this type of situation will often require an institution to review and analyze the extraterritorial reach of U.S. employment statutes, as well as the contractual rights or authority of the U.S.-based professors and staff on the program. If the American institution employs citizens of the country where the program is located, or of a third country (i.e., foreign nationals), in roles such as tour guides or professors, the foreign country's employment laws and regulations must also be followed with respect to those employees.

The most complex arrangement is one in which an American institution physically opens a foreign campus for student study abroad programs or research in that country. Because of the new campus's cross-border ties, establishing a foreign campus typically requires the American institution to adhere to certain U.S. employment laws and regulations (with respect to U.S. citizens it employs), as well as the laws of the jurisdiction of the international campus or research institution. Aside from local regulatory issues, institutions acting as employers abroad should also be aware of local market practices and local customs, both to avoid unnecessary disputes and to retain a qualified workforce.¹⁴ Not paying sufficient

14. For example, on the two-island nation of St. Kitts and Nevis in the West Indies:

The right to strike, while not specified by law, is well established and respected in practice. Restrictions on strikes by workers who provide essential services, such as the police and civil servants, were enforced by established practice and custom, but not by law. Foreign companies that recently opened reportedly discouraged workers from organizing The law provides for a 40- to 44-hour work week, but the common practice was 40 hours in five days. Although not required by law, workers receive at least one 24-hour rest period per week. The law provides for premium pay for work above the standard work week. There was no legal prohibition of excessive or compulsory overtime, although local custom dictated that a worker could not be forced to work overtime.

BUREAU OF DEMOC., LABOR, AND HUMAN RIGHTS, U.S. STATE DEPT., 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: ST. KITTS AND NEVIS (Mar. 6, 2007),

attention to applicable regulations and local market practices can yield both legal disputes and a tarnished reputation. In turn, a tarnished reputation can impede the institution's ability to attract and hire qualified foreign employees, thereby rendering the institution's foreign campus inoperable (or, equally damaging, unable to generate sufficient operating revenue due to students' lack of interest in enrolling in a program with a public relations problem).

To further complicate matters, the applicability of employment laws may vary in accordance with the citizenship of the employee, thus precluding one-size-fits-all human resources policies. As well, the complex aspects of immigration law (both U.S. and foreign) need consideration for legal and practical reasons: nothing can ruin a program like having to cancel its events or classes because visas are not in place or an employee or contractor is barred from working in or returning to a country because of immigration-related problems.¹⁵ Consequently, institutions of higher education acting as employers in foreign countries should periodically review each stage of the employment cycle—from their employment-related contracts and policies to specific employment practices and policies—to ensure not only compliance with all applicable laws, but also the successful management and retention of their employees.¹⁶

Despite the complexity of establishing a campus abroad or cooperative research arrangements, it is not impossible. In 2007 there were 7,500 study-abroad programs available for U.S. students.¹⁷ As opening a foreign campus or research institution can be an invaluable benefit for an institution of higher education—often bringing with it an international footprint, increased prestige, broader networking, and global interaction and influence—the admittedly complicated intersection of American and foreign employment laws should not deter an institution from opening or operating such a program. Operating well-run study abroad programs allows institutions to act as “model” employers, who can effectively observe the labor laws, comply with tax requirements, and otherwise honor the local jurisdiction's employment laws. This allows for an improved

available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78903.htm>.

15. As indicated *supra* note 12, this article does not address details regarding immigration issues, though such are relevant to travel and foreign work related activities.

16. For a general analysis of multi-jurisdictional employment issues, see Kevin Cranman & John F. Baum, *Ten Proactive Steps for the MultiJurisdictional Employer: A Global Approach to Your Employment Law Audit*, 25 ACC DOCKET 26, Mar. 2007. For examples of clauses and drafting for agreements for foreign employment engagement, see *Forming and Concluding Foreign Employment Relationships*, a presentation by John Briggs at the April 2007 NACUA meeting, available at <http://www.nacua.org/nacuanet/NACUAResourcePages/Docs/InternationalPrograms/BriggsOutline.pdf>.

17. OBST, BHANDARI, & WITHERALL, *supra* note 5, at 7.

perception of American institutions. In order to reap the benefits offered by international operations, an institution must approach such an arrangement from an educated standpoint, with full knowledge of the potential legal and liability risks and practical complications.¹⁸

In order to understand the full range of employment-related legal and liability issues, it is necessary to take an in-depth look at the arrangements that trigger extraterritorial application of American law or implicate the employment laws and regulations of the foreign jurisdiction involved.¹⁹

A. Study Abroad Programs: Which Laws Apply?

As previously noted, the applicable employment law may vary with the citizenship of the employee. For this reason, it is important to understand the sources of law that will govern the employee's terms and conditions of employment.

1. U.S. Citizens

U.S. citizen employees, such as professors and administrators who are leading a study abroad program, remain subject to some U.S. employment laws and regulations while working abroad for their institution.²⁰ Their employment may also be governed by the express provisions of an employment contract, which, for clarity and good management practice, should address choice of law and choice of forum provisions, as discussed below.

Many federal employment statutes provide for extraterritorial application to ensure that U.S. citizens working abroad for U.S. employers receive the same benefits and rights that they would otherwise enjoy while

18. See Susan Bradshaw, International Study, The University of Texas at Austin, *University Study Abroad Programs: A Guide to Faculty Liability Issues* (Apr. 19, 2002), available at <http://www.utexas.edu/internationalstudy/pdf/liabilityissues.pdf>, for a discussion on faculty liability issues in study abroad programs. See ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY* (1999) for historical background and valuable information on tort liability with respect to colleges and universities.

19. Not addressed in this article, but extremely important, are issues regarding foreign entity formation. Some countries may require a local employment entity, so this type of planning is important. As well, related taxation implications, both in the foreign jurisdiction as well as in the United States, should be considered.

20. Although there is a "presumption against extraterritoriality," courts will often grant extraterritorial effect to federal statutes when evidence suggests that Congress intended the law to operate outside the United States. Timothy J. Darby, *Extraterritorial Application of U.S. Laws*, in 1B *INTERNATIONAL LABOR AND EMPLOYMENT LAWS* at 34-4 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009).

working for that employer on U.S. soil.²¹ For example, Title VII of the Civil Rights Act of 1964 prohibits certain types of employment discrimination.²² In 1991, the U.S. Congress explicitly amended both Title VII and the employment provisions of the Americans with Disabilities Act to provide protection for U.S. citizens working abroad.²³

Moreover, U.S. organizations that send U.S. employees abroad should also be aware of and guard against host country practices that might put the American employer at risk for liability under American equal employment opportunity laws. For example, a number of countries do not afford equal rights and opportunities to women in the same way that the U.S. does.²⁴

Employers need to protect themselves from such liability by establishing clear policies and clear, accessible training programs and complaint procedures. Employers should also ensure that any complaint-reporting structure includes senior-level American employees, because employee complaints may stem, in part, from the cultural behavior or attitudes of host country employees. In addition, U.S.-based employers should periodically disseminate anti-discrimination and anti-harassment policies, provide employee and supervisor training, and audit both home territory and foreign workplaces on a regular basis to ensure that they comply with anti-harassment and discrimination laws.

2. Foreign Citizens

In general, the extraterritorial application of federal employment laws to U.S. citizens working for U.S. employers abroad does not apply to foreign nationals hired by the same employers operating abroad. For example, Title VII states that the prohibition on discrimination in employment based on race, color, religion, sex or national origin “shall not apply to an

21. The U.S. Supreme Court held, in *Aramco*, 499 U.S. 244 (1991), that Congress has the authority to legislate employers of U.S. citizens who work outside the United States as long as Congress explicitly provides for the extraterritorial coverage in the statute.

22. 42 U.S.C. § 2000e-2(a) (2006) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”).

23. See e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1077–1978 (codified as amended at 42 U.S.C. § 12112 (2006)) (“If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under [Section 102 of the Americans with Disabilities Act of 1990] and is engaged in by such corporation shall be presumed to be engaged in by such employer.”).

24. For example, employment law in Saudi Arabia prohibits men and women from working together. LABOR AND WORKMEN LAW, art. 160, cl. 1 (1969), English translation available at http://www.saudiembassy.net/about/country-information/laws/Labor_and_Workmen_Law-3of4.aspx.

employer with respect to the employment of aliens outside any [U.S.] State.”²⁵ Thus, a French national hired by a U.S. institution at its Paris, France, campus is not subject to U.S. employment laws, even though his or her employer is American. Instead, the law of the jurisdiction in which the institution is operating governs the terms and conditions of employment of foreign nationals in this area. As such, institutions must familiarize themselves with and comply with the employment laws, regulations, and customs in the foreign jurisdiction where they operate.²⁶ This obligation is best satisfied by consulting with local legal counsel in the country where the program is operating.²⁷

An institution that employs foreign nationals for a study abroad program, at a foreign campus, or at a foreign research institute should have its employment policies and practices established or reviewed by legal counsel who has expertise in multi-jurisdictional employment issues and in managing an institution’s multi-jurisdictional workplace practices. In addition, institutions should engage local lawyers to educate themselves in regards to local market practices and particular legal traditions in the jurisdiction. In some places, cultural consultants may be helpful in advising on policies or plans to ease an employer’s (and an employee’s) transition to a new locale and its customs. Not only will the employer receive advice and comprehensive knowledge of the particular jurisdiction’s relevant laws, but implementing the consultant’s advice also can provide an extra layer of protection from exposure in a lawsuit by showing that the employer behaved reasonably (relying on expert advice), which may be especially important if there is an anti-American bias in the foreign locale. Communication between clients and lawyers for the purpose of obtaining legal advice may be covered by the attorney-client or legal professional privilege in certain jurisdictions and thus may be afforded protection from discovery in litigation in those jurisdictions.²⁸ Of course, it is necessary to determine the parameters of such privileges of the foreign jurisdiction in which the institution is operating in order to avoid misunderstandings and, perhaps, losing or minimizing the protection of the privilege; the privilege may even be waived by discussions or emails with or through colleagues in some jurisdictions.²⁹ In addition, institutions will

25. 42 U.S.C. § 2000e-1 (2006).

26. For a focused discussion of how to effectively manage a multinational workforce, see Cranman & Blum, *supra* note 16.

27. See Cranman & Blum, *supra* note 16.

28. Joseph Pratt, Note, *The Parameters of the Attorney-Client Privilege for In-House Counsel at the International Level: Protecting the Company’s Confidential Information*, 20 NW J. INT’L L. & BUS. 145 (1999).

29. For example, the attorney-client privilege is not recognized for communications between in-house counsel and a corporate client in Austria, Belgium, France, Italy, Luxembourg, The Netherlands, and Sweden. The scope of the privilege is unclear in Denmark, Finland, Germany, Spain, and Switzerland. Mary C. Daley, *The*

also need to determine whether and to what extent their employment of third-party nationals (employees who are not U.S. citizens or citizens of the country in which the institution is operating) may impose additional obligations and requirements. Counsel should be consulted prior to engaging third-party nationals so as to ensure compliance with any potentially applicable laws or regulations.

B. Resolving Disparity Between United States and Foreign Employment Laws

A key issue that confronts institutions of higher education at the outset of establishing an international program is determining what workplace standards to set for their employees in different locations. For example, does a U.S.-based institution want to establish a harassment policy that meets the minimum legal compliance standards of each particular country where it has a workforce? Or should an institution consider establishing a global policy that exceeds the highest standards of the law in any jurisdiction and raises the bar in doing global policy work? There are significant ramifications for each option.

1. Different Standards in Each Jurisdiction

Establishing different workplace standards at different workplace locations may be difficult to enforce and logistically cumbersome because the institution has the burden of closely monitoring changes to the laws in each jurisdiction to ensure compliance. Different standards based on locale also present challenges in those cases where an employee from the home country is transferred abroad or transferred from one non-U.S. location to another. What impact would the employer's home territory employment laws have on those employees? Similarly, what impact does a multitude of different policies for each location have on those managers who supervise employees across several jurisdictions? For instance, under U.S. law an U.S.-based employer has a continuing obligation to protect its U.S. national employees against sexual harassment, even in countries where such protections are not afforded by local law.³⁰

Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel, 46 EMORY L.J. 1057, 1103-04 (1997). See also Association of Corporate Counsel, *An Overview of the Legal Professional Privilege in EU Competition Investigations After the AKZO Judgment* (Oct. 4, 2007), available at <http://www.acc.com/advocacy/upload/accakzoimpact.pdf>, which reviews the Sept. 17, 2007 judgment of the European Court of First Instance of the Akzo Noble case. Also of interest may be Association of Corporate Counsel (ACC) support for, and other activities regarding, U.S. legislation to protect the attorney-client privilege in the corporate context, available at <http://www.acc.com>.

30. 42 U.S.C. § 2000e-1(b) (2000).

2. Standardized Policies

Whereas a more stringent standard set by a single global policy might be the answer to some of the challenges presented above, it also raises the bar in terms of the employer's obligations toward its employees in those jurisdictions where such protections (or protections at that level) are not offered or required by applicable law. One major criticism of standardized, one-size-fits-all, policies is that they do not recognize a particular workforce's unique cultural sensitivities or social conditioning. Institutions that choose to develop such policies must ensure that they are flexible enough to adapt to each jurisdiction's unique cultural climate.

C. Contractual Provisions Governing the Terms and Conditions of Employment

1. Choice of Law

A key issue for an institution operating in a foreign country is the choice of law under which disputes will be resolved.³¹ Before any type of employment contract is prepared in any jurisdiction, an institution should decide its jurisdictional governing law. A properly drawn contract should contain a clause expressly stating which law governs in the event of a conflict so that all parties know which jurisdiction's law will be applied for interpretation and procedural administration when there are disputes. In most cases, parties may elect which law will apply to the interpretation and enforcement of their contracts.³²

a. Enforceability of Choice of Law Provisions Under U.S. Law

United States courts generally uphold reasonable choice of law provisions in contracts.³³ In order to be deemed "reasonable," the choice of law specified should be one in which there is a clear relationship to either the institution, the employee, or the program.³⁴ The law chosen must

31. For a discussion on the extraterritorial application of law, see Robinson, *supra* note 10.

32. See Martin Franzen, *Conflicts of Laws in Employment Contracts and Industrial Relations*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES*, (Roger Blanpain ed., 9th ed. 2007).

33. *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982) ("But reasonable stipulations of choice of law are honored in contract cases, . . . and we do not see why the same principle should not apply in tort cases.") (citing RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 355-56 (2d ed. 1980)).

34. See *RESTATEMENT (SECOND) OF CONFLICTS* § 187(1) (1988) ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied unless the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice.").

be one in which a substantial portion of the making or performance of the contract occurs.³⁵ Though a boilerplate choice-of-law provision could be questioned by the courts because it was not bargained for by both parties, courts will generally enforce reasonable clauses that are part of standard form contracts.³⁶ An institution that establishes these parameters at the outset is less likely to have problems enforcing its rights under the contract if disputes arise.³⁷

b. Enforceability of Choice of Law Provisions under Foreign Law

The enforceability of choice of law provisions in contracts with foreign employees will depend on the jurisdiction in which an institution is operating. For instance, the Rome Convention, which all member states of the European Union³⁸ have incorporated into their domestic legislation, expressly permits the parties to choose which governing law they wish to use.³⁹ The Convention provides that regardless of the choice of law, the employee must have at least the protection given by the law of the country in which he or she habitually performs his or her duties, “unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the law of the other country governs the contract.”⁴⁰

As a general rule, if the institution hires employees with a strong local connection, most employers write the contract to contain a clause expressly stating that local law governs the contract; this adds clarity to the contract. If a particular country’s law is selected in a case where it clearly does not apply, such as a French employment contract that incorporates the laws of California, where the institution is located, the employer may trigger some antagonism from a local court called upon to interpret the contract.

2. Choice of Forum

Likewise, employment contracts entered into between an institution and nationals of a particular foreign country should contain a forum clause. Forum clauses contractually specify the forum in which a claim will be litigated. The choice of forum provision in the contract should state that

35. *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 537 (Pa. Super. Ct. 1990).

36. *See, e.g., Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 54 (1995).

37. *See Vincent R. Johnson, Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309 (2006).

38. Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 1980 O.J. (L 266) 1 [hereinafter Treaty of Rome].

39. Treaty of Rome, *supra* note 38, art. 6.

40. *Id.*

disputes shall be referred to a specific court of arbitration, such as the International Chamber of Commerce Court of Arbitration, the Inter-American Commercial Arbitration Commission, or the American Arbitration Association. Institutions may prefer to arbitrate employment disputes for a variety of reasons, including the perceived reduced expense of arbitration, the absence of a jury, and the ability through arbitration to keep matters out of the press or from becoming public record.

a. Enforceability of Choice of Forum Provisions Under U.S. Law

Under U.S. law, a choice of forum provision is generally enforceable as long as it does not place one of the parties at a substantial and unfair disadvantage or deny a party its day in court.⁴¹ U.S. courts have upheld forum selection clauses:

[U]nless the party objecting to its enforcement establishes: (i) it is a result of fraud or overreaching; (ii) enforcement would violate a strong public policy of the forum; or (iii) enforcement would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable.⁴²

The reasonableness of a choice of forum provision for an employment contract between an employee (in this case, a faculty member, administrator, or staff member) and the institution would depend upon the location and citizenship of the parties at the time the claim is brought. For example, a forum clause requiring claims by an American professor, who may teach abroad occasionally but primarily resides in the United States, to be litigated in the U.S. state where the institution is located, where the professor resides, or where a substantial part of the contract is to be performed might be reasonable.⁴³ On the other hand, a provision requiring an American professor to litigate against a U.S. institution in a foreign country may be challenged, especially if the professor resides in a country far from the forum or in a country with an underdeveloped legal system.⁴⁴ These facts could render a forum so inconvenient as to deny the plaintiff a day in court.⁴⁵ When litigants live in different countries, however, one or the other will be disadvantaged by the choice of forum. In these circumstances, a provision that made the foreign locale of the employee the

41. *Hadley v. Shaffer*, 2003 U.S. Dist. LEXIS 14106, at **11-12 (D. Del. Aug. 12, 2003).

42. *Id.* at *11.

43. *See Johnson*, *supra* note 37.

44. *Id.*

45. *Id.*

choice of forum in the contract might be considered reasonable.⁴⁶ In the context of business disputes, the United States Supreme Court has even upheld a neutral forum clause where neither party had a relationship to the forum.⁴⁷

Before an institution incorporates a choice of law or choice of forum provision in an employment contract, the institution must conduct a specific comparison between American employment law and the law of the foreign jurisdiction in which it is operating a study abroad program. It should also consider the enforceability of such clauses in the relevant countries. As the comparison between American and French law below demonstrates, there can be significant differences that an institution must be aware of before selecting a jurisdiction for the forum clause.

II. COMPARATIVE ANALYSIS OF EMPLOYER-INSTITUTIONS' OBLIGATIONS BY JURISDICTION

A. Jurisdictions Selected for Comparison

To examine the obligations of an institution that is acting as a multi-jurisdictional employer, this article compares the major employment laws that are implicated when hiring American and French employees for a French study-abroad program. This comparison demonstrates the complex legal obligations that an institution faces when acting as a multi-jurisdictional employer. Both France and China offer an interesting comparison because their respective employment laws are quite complex and are significantly different from U.S. employment laws with respect to vacation, wages, and the use of employment contracts.⁴⁸ In addition, both France and China are consistently ranked as one of the top destinations for study-abroad students.⁴⁹

1. United States Federal Employment Laws

Federal employment laws in the United States are passed by Congress. As set forth below, there are various federal employment laws governing equal opportunity and non-discrimination, payment of wages, disabled employees, labor relations, and other terms and conditions of employment. The Equal Opportunity Employment Commission (EEOC) is charged with

46. *Id.*

47. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972).

48. In France, labor law is governed by the French Labor Code (Code de Travail). In the People's Republic of China (PRC), the law is laid out in the Labor Code Law (LCL) and the Employment Promotion Law (EPL).

49. Institute of International Education, *Open Doors 2009 Fast Facts* (Nov. 16, 2009), http://opendoors.iienetwork.org/file_depot/0-10000000/0-10000/3390/folder/78747/Fast+Facts+2009.pdf. (France ranks 4th with 6.6% of all study abroad students traveling, while China ranks 5th with 5.0%).

promulgating regulations under Title VII of the Civil Rights Act of 1964,⁵⁰ the Equal Pay Act of 1963,⁵¹ the Age Discrimination in Employment Act of 1967,⁵² Title I and Title V of the Americans with Disabilities Act of 1990,⁵³ Sections 501 and 505 of the Rehabilitation Act of 1973,⁵⁴ and the Civil Rights Act of 1991.⁵⁵ The EEOC has five commissioners, each appointed for five-year, staggered terms. The President designates a Chair and a Vice Chair; the Chair is the chief executive officer of the Commission. The five-member Commission makes equal employment opportunity policy and decides whether to pursue litigation and whether and how to settle cases.⁵⁶

Minimum wages and overtime pay are governed by the Fair Labor Standards Act, which is enforced by the U.S. Department of Labor.⁵⁷ The National Labor Relations Act governs labor relations and collective bargaining agreements. This federal act is enforced by the National Labor Relations Board.⁵⁸

In addition to these federal employment laws, employment is also regulated via state employment codes, such as the California Labor Code. This article does not discuss the various state laws that govern an institution's employment relationship with its employees. Therefore, only the major federal employment laws will be contrasted with those of France and China.

2. France's National Employment Laws

French employment laws are passed by the French Parliament. Like the U.S., France has national employment laws that govern equal opportunity and non-discrimination, payment of wages, disabled employees, labor relations, and other terms and conditions of employment. They are completed by decrees, circulars, and other regulations adopted by the government to implement the laws. Most of these legal provisions are contained in the French Labor Code.⁵⁹

50. 42 U.S.C. §2000(a)-(h) (2006).

51. 29 U.S.C. §201 (2006).

52. 29 U.S.C. §§621-634 (2006).

53. 42 U.S.C. §§12101-12213 (2006).

54. 29 U.S.C. §§720-751, §§791-794e (2006).

55. 2 U.S.C. §601 (2006).

56. For general introductory material regarding the EEOC, see their website at http://www.eeoc.gov/abouteeo/overview_laws.html.

57. 29 U.S.C. §204(a) (2006).

58. 29 U.S.C. §153(a) (2006).

59. The French Labor Code is formally known as *Code du Travail* (labor). An official English translation of the *Code du Travail* is available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072050&dateTexte=20100416>.

In addition, to the French Labor Code, employment in France is often governed by National Collective Bargaining Agreements.⁶⁰ These are agreements entered into between trade unions, on behalf of employees, and employers. In these agreements, the parties may define conditions of employment, probationary and notice periods, severance indemnities, working conditions, and the social benefits granted to the employees.

3. The People's Republic of China's National Employment Laws

The People's Republic of China (PRC) generally governs the employment of foreign workers through the Regulations on the Management and Employment of Foreigners in China (REMF) enacted on May 1, 1996.⁶¹ The REMF states that "the labor administrations under the people's governments at the provincial, autonomous regional and municipal level, and those authorized at the prefectural level shall take charge of managing the employment of foreigners in China."⁶² Further, the REMF states that employment contracts involving foreigners be issued in accordance with the governing laws—including the recently passed Employment Contract Law and the Employment Promotion Law.⁶³

On January 1, 2008, the PRC enacted the Labor Contract Law (LCL).⁶⁴ Unlike controlling national employment laws in United States and France, the LCL itself does not specifically speak to issues concerning discrimination and equal opportunity for workers. Rather, the LCL's primary focus is on the "contract" between employers and workers.⁶⁵

The LCL governs the "establishment of employment relationships . . . and the conclusion, performance, amendment, termination and ending of employment contracts."⁶⁶ The scope of the LCL does not extend to workers defined as civil servants or working personnel managed by the

60. Salli A. Swartz, *Labor and Employment Law in France*, in INTERNATIONAL LABOR AND EMPLOYMENT LAW: A PRACTICAL GUIDE 65 (Phillip M. Berkowitz & Thomas Müller-Bonanni eds., 2006).

61. See Regulations on the Management and Employment of Foreigners (promulgated by the Ministry of Labor, et. al., Jan. 22, 1996, effective May 1, 1996) translated in http://www.novexc.com/mang_employment_foriegn.html [*hereinafter* REMF].

62. See *id.* at art. 4.

63. See *id.* at art. 18.

64. It should be noted that, due to the relatively recent passage of the Labor Contract Law (LCL) and Employment Promotion Law (EPL), that some employment law in the PRC is unsettled.

65. Andreas Lanfss, *China in 1A INTERNATIONAL LABOR & EMPLOYMENT LAWS* § 55-4 (William L. Keller & Timothy J. Darby, eds., 3d ed. 2009).

66. See Labor Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2007, effective Jan. 1, 2008), art. 2, translated in http://www.bjreview.com.cn/document/txt/2007-10/16/content_80896.htm. [*hereinafter* LCL].

PRC's Civil Servants Law. Significantly, the LCL requires negotiation between employer and employee (or his/her representative), stating that:

[e]mployers shall establish and improve labor rules and regulations, so as to ensure that workers enjoy their labor rights and perform their labor obligations. When an Employer formulates, revises or decides on rules and regulations or material matters concerning labor compensation, work hours, rest, leave, work safety and hygiene, insurance, benefits, employee training, work discipline or work quota management, etc. that have a direct bearing on the immediate interests of its workers, the same shall be discussed by the employee representative congress or all the employees.⁶⁷

Issues of discrimination and equal opportunity are covered by the Employment Promotion Law (EPL), also effective as of January 1, 2008. The EPL articulates the PRC's view concerning the promotion of employment opportunities and the promotion of "social harmony and stability."⁶⁸

B. Comparison of Employment Issues By Subject Matter

In order to highlight the respective obligations imposed on employers by U.S. and French employment laws, it is important to compare apples with apples. The next section of the article compares specific substantive areas of employment law between the U.S. and France, such as the doctrine of at-will employment and the payment of wages.

1. The Doctrine of At-Will Employment

a. United States

In the United States, most employment relationships are at-will, as defined by state law.⁶⁹ At-will employment means that an employer may

67. *See id.* Art. 4.

68. *See* Employment Promotion Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008), art. 1, *translated in* http://www.baliprocess.net/files/China/China_employment%20promotion%20law_2008-eng.pdf [*hereinafter* EPL].

69. *See* 27 AM. JUR. 2D *Employment Relationship* §10 (2010) ("In fact, employment contracts are presumed to be at-will"). Workers may also be engaged as independent contractors. In the United States, whether a worker is actually an independent contractor is a fact-intensive issue that must be examined on a case-by-case basis. The applicable test may vary by federal law (e.g. the IRS 20 factor test, I.R.S. Rev. Rul. 87-41, 1987-1 C.B. 296) or state law (see, e.g., the multi-factor test posited in *S.G. Borello & Sons, Inc. v Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989)). Moreover, this relationship may vary in accordance with the foreign locale where an institution is operating. Institutions must exercise extreme caution when classifying workers as independent contractors and are advised to consult with

terminate an employee's employment at any time, with or without notice or cause.⁷⁰ Other than tenured faculty members, employees under written contract, and faculty members who are covered by a collective bargaining agreement, U.S. citizens who are working for a U.S.-based institution abroad will generally be employed at-will.⁷¹ To the extent an institution wishes to establish the terms and conditions of employment for a U.S. citizen working abroad through the use of an employment contract, the institution must take care not to alter the at-will status of an American employee by the language of the contract, unless it specifically intends to do so. For example, in the case of an American citizen, the employee may be sent to work abroad for a semester. When drafting an employment contract for the semester, institutions must be careful to ensure that the contract does not guarantee employment for that semester. The contract may state the duration of potential employment (e.g. one semester), while reserving the right to discharge the employee at any time during the semester with or without cause.

b. France

In contrast to the United States, at-will employment is prohibited in France.⁷² Instead, certain procedures must be followed before termination. In indefinite-term contracts, the French Labor Code and governing national collective bargaining agreements generally provide for a short trial period at the outset of employment, wherein either the employee or the employer can terminate the relationship for any reason.⁷³ After this trial period, any termination of the employment relationship requires notice.⁷⁴ The alternative to indefinite term contracts is fixed-term employment (an arrangement which is in the minority in France, and only permitted in certain statutory exceptions).⁷⁵

There are two categories of dismissal under French Law, namely

foreign counsel in order to determine whether such a classification is even permissible in the jurisdiction.

70. *Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56 (Cal. 2006).

71. Matthew W. Finkin, *United States*, in 1B INTERNATIONAL LABOR AND EMPLOYMENT LAWS 33b-1 (William L. Keller & Timothy J. Darby eds., 3d ed. BNA 2009) ("The legal context for individual employment relationships in the United States is provided by the historical common law doctrine of 'at-will employment.' This doctrine, enacted into statute in some jurisdictions, provides that, absent a contrary agreement between the parties, an employment contract for an indefinite period is terminable at the will of either party — with or without notice, and with or without cause.").

72. Swartz, *supra* note 6, at 66.

73. *Id.*

74. *Id.* at 68

75. *Id.* at 69.

dismissal for a personal reason and dismissal for an economic reason.⁷⁶ In both cases, there must be a real and serious ground and in case of litigation, written evidence will need to be disclosed.⁷⁷ The burden of proof lies with the employer.⁷⁸

c. China

The PRC, unlike the U.S, does not recognize at-will employment. To the contrary, the LCL established certain measures that must occur prior to the termination of an employee.⁷⁹ The LCL requires all employment contracts, no matter their specific type, to contain certain information. The contracts *must* state the following:

- the name, domicile, and legal representative or main person in charge of the employer
- the name domicile and . . . other valid papers of the worker
- the term of the employment contract
- the job description and the place of work
- working hours, rest, and leave
- labor compensation
- social insurance
- labor protection and working conditions
- all other matters which laws and statutes require to be included in employment contracts.⁸⁰

In the event that the employment contract fails to contain one of the necessary elements, the labor administration authority is authorized to require the inclusion of the missing term. If the failure to include a required term causes harm to the employee, the employer may be liable for damages.⁸¹ Further, Article 12 of the LCL enumerates the three types of permitted employment contracts: fixed term, open-ended, and contracts that expire upon completion of a certain job.⁸² A “fixed-term” employment contract is one where the concluding date of employment is established and agreed upon by the employer and worker.⁸³ An “open-ended” employment contract is a contract where the employer and worker have agreed that the

76. Frederique Sauvage, *France*, in 1A INTERNATIONAL LABOR & EMPLOYMENT LAWS 4-16, 4-17 (William L. Keller & Timothy J. Darby, eds., 3d ed. BNA 2009).

77. *Id.*

78. *Id.*

79. See Labor Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2007, effective Jan. 1, 2008), art. 39, translated in http://www.bjreview.com.cn/document/txt/2007-10/16/content_80896.htm.

80. See LCL, *supra* note 66, at art. 17.

81. See LCL, *supra* note 66, at art. 81.

82. See LCL, *supra* note 66, at art. 12.

83. See LCL, *supra* note 66, at art. 13.

contract does not have a definite date of conclusion.⁸⁴ The contract may be concluded when the employer and worker negotiate a consensus as to the conclusion date.⁸⁵ The LCL also permits contracts which “expire upon the completion of a certain job.”⁸⁶ Finally, the REMF mandates that an employment contract not exceed a term of five years, although the contract can be renewed upon completion of relevant provisions of the REMF⁸⁷.

2. Discrimination & Harassment in Employment

a. United States

The United States has three federal statutes that prohibit discrimination in employment: Title VII,⁸⁸ the Americans with Disabilities Act,⁸⁹ and the Age Discrimination in Employment Act.⁹⁰ Each of these statutes explicitly provides for extraterritorial application to American citizens working abroad.⁹¹

84. See LCL, *supra* note 66, at art. 14.

85. *Id.*

86. See LCL, *supra* note 66, at art. 15.

87. See REMF, *supra* note 61, at art. 18–19.

88. 42 U.S.C.A. §§ 2000e–2000e-17. (Title VII of the Civil Rights Act of 1964). Section 2000e-2, (a) provides that:

[I]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.

89. The Americans with Disabilities Act (ADA) provides that no covered employer “shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) (2006).

90. The ADA provides:

It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. §§ 623(a)(1)-(3)

91. The definition of “employee” under Title VII of the Civil Rights Act of 1964 was specifically amended by the Civil Rights Act of 1991 to state that “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) (2006). The definition of “employee” under the ADA was specifically amended by the Civil Rights Act of 1991 to state that “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. § 12111, as amended on Nov. 21, 1991, P.L.

b. France

French law prohibits discrimination on the basis of national origin, union membership, religion, sex, ethnicity, race, handicapped status, morals, pregnancy, age, surname, physical appearance, sexual orientation, or family situation.⁹² Discrimination with regard to the payment of wages based on gender is also specifically prohibited by law.⁹³ In France, sexual harassment is both a criminal and civil offense;⁹⁴ a claim of sexual harassment may be asserted only when a person uses his or her position of authority to coerce a subordinate into having sexual relations.

c. China

The LCL does not contain any specific references to prohibitions against discrimination of any sort. The PRC's anti-discrimination law—the Employment Promotion Law—governs this area.⁹⁵ The EPL generally declares that all employment units, “in recruiting new employees . . . shall provide workers with equal employment opportunities and equitable conditions of employment, and shall avoid discriminatory employment practices.”⁹⁶ The EPL enumerates specific groups of people that are singularly protected, including women,⁹⁷ workers of all ethnic groups,⁹⁸ “handicapped persons,”⁹⁹ and rural workers.¹⁰⁰

d. Applying American Discrimination Law in a Foreign Country

Institutions of higher education that employ Americans working overseas face a difficult task. On the one hand, they must diligently apply U.S. equal employment opportunity laws. On the other hand, depending on the requirements of the foreign country, they must also navigate and apply the foreign employment laws. For instance, the application of U.S. equal

102-166, Title I, § 109(a), 105 Stat. 1077.)

92. C. TRAV. art. L. 122–45.

93. Law No. 83-635 of July 13, 1983, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 14, 1983, p. 2176.

94. Code Pénal, art. 222–23 states:

The act of harassing another by using orders, threats, constraint, or serious pressure in the goal of obtaining sexual favors, by someone abusing the authority conferred by its position, is punished by [a maximum of] one year of imprisonment” and a maximum fine of 100,000 francs.

95. See EPL, *supra* note 68, at art. 25.

96. See *id.* at art. 26.

97. See *id.* at art. 27 (The protection against discrimination does not extend to “certain types of work or positions designated by the state as unsafe for women.”).

98. See *id.* at art. 28.

99. See *id.* at art. 29.

100. See *id.* at art. 31.

opportunity law abroad must not cause the employer to “violate the law of the foreign country where the workplace is located” (the “foreign laws defense”).¹⁰¹ However, the EEOC has narrowly circumscribed the foreign laws defense by mandating that the “foreign laws” in question must be statutes that have been enacted by a foreign government and not merely local custom.¹⁰² The EEOC does not consider foreign practices and customs to be a valid basis for asserting the defense, even if those practices are legally binding.¹⁰³ As a result, institutions need to navigate these situations carefully, as the local custom and U.S. law may dictate two different approaches. To further complicate matters, there may be no applicable local statute. Additionally, to claim this defense employers must prove that compliance with both the foreign law and the U.S. non-discrimination law is impossible—that is, the employer must have tried using all possible means and failed to avoid a conflict between the foreign and U.S. laws.¹⁰⁴

American institutions that send U.S. employees abroad should also be aware of and guard against host country practices that might put the American employer at risk for liability under American equal employment opportunity laws. As discussed earlier, employers should insulate themselves from liability at the outset by establishing and enforcing clear

101. 29 U.S.C. § 623(a) (2006). See also U.S. Equal Employment Opportunity Commission, *Employee Rights When Working for Multinational Employers*, April 28, 2003, <http://www.eeoc.gov/facts/multi-employees.html>. See also Thomas Wang, Mahoney v. RFE/RFL – An Unexpected Direction for the Foreign Laws Defense, 30 VAND. J. TRANSNAT'L L. 379 (1997). See generally Gentry Locke Rakes & Moore LLP, *Application of U.S. Employment Laws to Workers Abroad*, Nov. 21 2006, <http://www.gentrylocke.com/showarticle.aspx?Show=242> (discussing FLSA, EPA, Title VII, ADA, ADEA, FMLA); David A. Lowe, *Sources of Legal Protection for American Workers Overseas*, 26 EMP. DISCRIMINATION REP. 14 (BNA Apr. 5, 2006).

102. Equal Employment Opportunity Commission, Policy Guidance: Analysis of the Sec. 4(f)(1) “Foreign Laws” Defense of the Age Discrimination in Employment Act of 1967, 2 EEOC COMPLIANCE MANUAL (CCH), p 2165 (Mar. 3, 1989), available at <http://www.eeoc.gov/policy/docs/foreignlaws-adea.html>.

103. *Id.* (“This element of the defense establishes that the “foreign laws” defense is available *only if* compliance with the ADEA would cause an employer to violate the laws of a foreign country at the situs of the workplace.”) (emphasis added).

104. The scope of the application of the “foreign law” defense is still somewhat unsettled. The EEOC’s restrictive interpretation of the foreign law defense was not followed by the D.C. Circuit in *Mahoney v. RFE/RL, Inc.*, which found that an American employer doing business in Germany did not violate the ADEA by following a mandatory retirement provision contained in a labor agreement that required employees to retire at age 65. *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995). The court determined that the collective bargaining agreement was a foreign “law” because it was legally binding. *Id.* at 450. However, in *Abrams v. Baylor College of Medicine*, the court held that excluding American Jews from rotation to Saudi Arabian destinations because of the perceived difficulty in obtaining visas for Jews due to the history of hostility between Jews and Arabs violated Title VII. *Abrams v. Baylor Coll. of Med.*, 581 F.Supp. 1570, 1579 (S.D. Tex. 1984).

and accessible complaint policies and procedures, and by taking the steps necessary to ensure that they are in compliance with applicable laws prohibiting discrimination and harassment.

3. Compensation & Benefits

Compensation, pay, or wage and hour issues are extremely rule-ridden and complex. Many jurisdictions have overlapping laws within them—such as the United States, where an institution of higher education must master two sets of laws: the individual state law and federal law. The complexity increases when an institution operates a study abroad program or a foreign campus, as the institution must also navigate the wage and hour laws of the foreign jurisdiction. A comparison of the relevant U.S. and French laws highlights this complexity.

a. Minimum Wages

i. United States

The federal Fair Labor Standards Act (FLSA) requires U.S. employers to pay employees a minimum wage of \$7.25 per hour.¹⁰⁵ Minimum wage requirements also are regulated by state¹⁰⁶ and local law.¹⁰⁷ The FLSA does not have extraterritorial application.¹⁰⁸ Thus, institutions of higher education do not have to comply with American federal, state, or city minimum wage laws when operating a foreign campus. However, the institution must take into account the wage laws of the jurisdiction in which it is operating a foreign campus. In addition, an institution must consider the effect that differential rates of pay for the same job will have on the

105. Fair Minimum Wage Act of 2007, 29 U.S.C. § 206 (2009).

106. For example, the 2008 minimum wage in California was \$8.00 per hour. Cal. Lab. Code § 1182.12 (Deering 2009). Since California's current law requires a higher minimum wage rate than does the federal law, all employers in California who are subject to both laws must pay the state minimum wage rate unless their employees are exempt under California law. California Department of Industrial Relations: Frequently Asked Questions, http://www.dir.ca.gov/dlse/FAQ_MinimumWage.htm (last visited Dec. 18, 2009).

107. Effective January 1, 2008, the City of San Francisco's minimum wage rate was \$9.36 per hour. One year later, it was raised to \$9.79 per hour. S.F., CAL., ADMIN. CODE. § 12R.4 (2009).

108. 29 U.S.C. § 213(f) (2006). The FLSA exempts from coverage "any employee whose services during the workweek are performed in a workplace within a foreign country." *Id.* Legislative history indicates that Congress intentionally excluded U.S. workers employed abroad from coverage under the FLSA. *Torrico v. IBM*, 213 F. Supp. 2d 390, 398 (S.D.N.Y. 2002) (noting that the statute's legislative history "indicates that Congress concluded that application of the FLSA to foreign countries is usually inconsistent with local conditions of employment, the level of the local economy, the productivity and skills of indigenous workers, and is contrary to the best interest of the United States and the foreign areas.").

morale of its employees. For example, an American employee who earns minimum wage while working at a U.S.-based campus would probably not accept a job at the institution's foreign campus if the foreign jurisdiction's lower minimum wage is offered.

ii. France

The Salaire Minimum Interprofessionnel de Croissance, or SMIC, regulates minimum wage rates in France, which vary depending on the age of the employee.¹⁰⁹ The minimum wage is set annually in July. As of December 17, 2009, the minimum wage in France was 8.86 Euros per hour.¹¹⁰ This translated to a minimum wage of \$11.83 per hour as of March 26, 2010.¹¹¹ An institution planning to operate in France must take into consideration the increased operating expenses that it will incur in order to comply with the local minimum wage requirements.

iii. China

In 2004, the PRC's Ministry of Labor and Social Security enacted a special regulation on minimum wage.¹¹² The regulation, which took effect March 1, 2004, divided wages into two types, one monthly and the other hourly, respectively applying to full-time and non-full-time workers.¹¹³ The monthly minimum wage should take into account factors such as a worker and his dependents' minimum living cost, the urban resident consumption price index, social security and housing accumulation fund fees, average salary, economic development level, and employment situation.

The hourly minimum wage should take into account the local monthly minimum wage, retirement pension and medical insurance fees, working conditions and intensity, work stability, and welfare of non-part-time workers, according to the regulation.¹¹⁴

Different standards between areas within a single province, municipality, or autonomous region are allowed.¹¹⁵ Provincial-level labor and social

109. Sauvage, *supra* note 76, at 4-72.

110. National Institute for the Study of Economic Statistics, Minimum Wage (SMIC) Data, http://www.insee.fr/fr/themes/tableau.asp?ref_id=NATnon04145®_id=0 (last visited Mar. 26, 2010).

111. American Express Travel Currency Converter, <http://corp.americanexpress.com/gcs/travel/us/corp/ctn/resources/currency.aspx> (last visited Mar. 26, 2010)

112. Provisions on Minimum Wages (promulgated by the Ministry of Labor and Social Security, Dec. 30, 2003, effective March 1, 2004) *translated in* <http://www.asianlii.org/cn/legis/cen/laws/pomw308/>. [*hereinafter* PMW].

113. PMW at art. 5.

114. PMW, *supra* note 112, at art. 6.

115. PMW, *supra* note 112, at art. 7.

security authorities are responsible for setting and adjusting the minimum wage standard, deciding its application, and related explanations. The authority should consult local trade unions, enterprise unions, or entrepreneur associations when setting the minimum wage standard and report it to the labor ministry, according to the regulation.¹¹⁶ However, employers are not permitted to pay the foreigners they employ wages lower than the local minimum wage standards.¹¹⁷

b. Overtime Wages

In addition to complying with the minimum wage laws, an institution must comply with the overtime laws of the jurisdiction in which it is operating a foreign campus. This is a very complex area of law and institutions are advised to consult with local counsel regarding the specifics of their jurisdiction. Part of the complexity arises from the various definitions of “overtime” used in each jurisdiction. As demonstrated below, there is a significant difference between the definitions of overtime under U.S., French, and Chinese law. This difference can translate into increased operating costs and can even impact the schedule and structure of an institution’s study-abroad courses.

i. United States

In the United States, the FLSA governs the payment of overtime wages.¹¹⁸ Under the FLSA, covered nonexempt workers must receive overtime pay at a rate of not less than one and one-half times their regular rates of pay after forty hours of work in a work week.¹¹⁹ State law also governs overtime compensation and may impose additional obligations on an employer. As set forth above, the FLSA is not subject to extraterritorial application.¹²⁰ Thus, regardless of the employee’s citizenship, an institution is not required to comply with U.S. federal or state overtime laws when compensating employees who are working in a foreign country.

ii. France

Overtime is not only governed by French laws and regulations; local customs and practices, as well as the culture of the local area, also dictate overtime pay. For example, under French law, many overlapping statutes regulate the duration of work by establishing limits on working hours. Several laws and regulations establish daily, weekly, and yearly maximums

116. PMW, *supra* note 112, at art. 4.

117. See REMF, *supra* note 61 at art. 22.

118. 29 U.S.C. § 207 (2006).

119. 29 U.S.C. § 207(a)(1) (2006).

120. See Darby, *supra* note 20, at 34–82.

for work.¹²¹

No employee can be required to work more than six days per week so that all employees receive at least one day of rest per week.¹²² This rest day is usually granted on Sundays. However, it may be granted on another day if the employer obtains specific authority from the French Labor Inspector, or if the employer is engaged in certain, identified activities.¹²³ If neither of these exceptions apply, an employer may be liable for criminal sanctions if its employees work on Sundays.¹²⁴ In most collective bargaining agreements, specific premiums are payable to the employees who work on Sunday.¹²⁵

French law provides that no employee may work more than ten hours per day, as set forth in the European Union (EU) Working Time Directive (Directive).¹²⁶ It also provides that the working day of the employee may not be made up of more than two parts, and that any employee must have at least 11 hours per 24-hour day to rest.¹²⁷ This means that the 10 hours of effective work must be distributed over a 13 hour period each day.¹²⁸

In accordance with EU texts, French law also provides that no employee may work more than 48 hours a week,¹²⁹ with an average working time of 44 hours a week over a period of 12 weeks, which can be increased up to 46 hours if an extended collective bargaining agreement applicable to the company so provides.¹³⁰

On January 1, 2000, France mandated that the legal work week be capped at 35 hours.¹³¹ This figure is not a maximum but is a threshold beyond which any time over 35 hours per week counts as compensable overtime.¹³² Employers who breach the working time provisions may be subject to criminal sanctions.¹³³ Thus, the employer and/or the supervisor of the institution's French campus could be personally subject to criminal

211. See, e.g. C. TRAV. art. L 3121-11 (regulating annual quota of overtime); C. TRAV. art. L 3121-10 (regulating weekly working hours); C. TRAV. art. L 3121-34 (regulating working hours per day).

122. Sauvage, *supra* note 76, at 4-74.

123. Swartz, *supra* note 60, at 68.

124. Sauvage, *supra* note 76, at 4-78.

125. *Id.* See C. TRAV., art. L 221-4. .

126. Council Directive 200/34, art. 17(b), 2000 O.J. (L 195) (EC) (amending Council Directive 93/104, 1993 O.J. (L 207) (EC)). See also Sauvage, *supra* note 76, at 4-78.

127. Council Directive 200/34, art. 17(b), 2000 O.J. (L 195) (EC) (amending Council Directive 93/104, 1993 O.J. (L 207) (EC)).

128. *Id.*

129. *Id.*

130. *Id.*

131. C. TRAV. art. L 212-1; Sauvage, *supra* note 76, at 4-74.

132. C. TRAV. art. L 212-5; Sauvage, *supra* note 76, at 4-76.

133. C. TRAV. art. L 212-10.

sanctions.

iii. China

Article 17 of the LCL, which enumerates the required elements of an employment contract, addresses the issue of overtime.¹³⁴ Article 17 clearly contemplates that “working hours” and “labor compensation” shall be set forth in the contract. Article 30 is more specific in focus stating that “overtime pay [shall be made] in accordance with relevant state regulations.”¹³⁵ Further, employers may not compel workers to work overtime.¹³⁶

If an employer fails to comply with the governing laws, the LCL allows for the individual worker to apply to their local People’s Court for a remedy.¹³⁷ The remedy consists of the issuance of an order to pay made by the governing Court. An employer can also be compelled, in the event they fail to properly compensate for overtime labor (or labor generally) or “arranges overtime without paying overtime” compensation, to pay the outstanding amount within a time specified by the labor administration authority.¹³⁸ If the employer fails to pay the amount within the specified time period, they are subject to a levy of damages that, at a minimum, consists of fifty percent of the amount payable and, at a maximum, one hundred percent of the amount payable.¹³⁹

Formerly, the Labor Law of the People’s Republic of China, which is superseded by the LCL, specified that

[a]n employer shall pay the workers’ wages at a rate higher than that for normal working hours according to the following standards in one of the following cases: (1) To pay no less than 150 percent of the usual wage for working overtime; (2) To pay 200 percent of the usual wage for work during rest days if the rest could not be delayed to another time; (3) To pay 300 percent of the usual wage for working in statutory holidays.¹⁴⁰

The recently enacted LCL does not contain specifics as to compensation since this is determined by the local rates.¹⁴¹

4. Privacy Related Issues and Obligations

Institutions must weigh carefully some of the privacy requirements

134. See LCL, *supra* note 66, at art. 17.

135. See LCL, *supra* note 66, at art. 30.

136. *Id.*

137. *Id.*

138. See LCL, *supra* note 66, at art. 86.

139. *Id.*

140. See LCL, *supra* note 66, at art. 44.

141. See LCL, *supra* note 66, at art. 55.

imposed by different countries.¹⁴² Privacy laws in certain jurisdictions, for instance, can significantly constrain the type of information to which an employer can have access or how one who has such information must treat it. For instance, significant differences exist between and among the U.S.,¹⁴³ Europe (with its European Union (EU) Data Protection Directive)¹⁴⁴, and Asia¹⁴⁵ with respect to approaches to privacy.¹⁴⁶ Europeans have strong data protection legislation that punishes abusers,¹⁴⁷

142. For perspective on privacy and technology with respect to higher education, see Kevin A. Cranman, *Privacy and Technology: Counseling Institutions of Higher Education*, 25 J. C. & U.L. 69 (1998).

143. Note that there are laws at the federal level that address, in part, privacy issues or have application to privacy issues. See, e.g., The Family Education Rights and Privacy Act of 1974 (FERPA; also often known as the Buckley Amendment), 20 U.S.C. § 1232g (2006) (specific focus on educational records); The Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510 (2006); The Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006); The Economic Espionage Act of 1996 (EEA) (providing for criminal penalties for misuse of trade secrets of others), 18 U.S.C. § 1831 (2006). Tort law considerations on public disclosure of private facts will also be relevant (see, e.g., RESTATEMENT (SECOND) OF TORTS § 652(D) (cmt. D)). Finally, institutions should consider export control and compliance laws (see, e.g., Export Administration Act of 1979, 50 U.S.C. § 2401 (2006), Commerce Department Export Controls, <http://www.bis.doc.gov/licensing/exportingbasics.htm> (last visited Mar. 26, 2010); Export Administration Regulations (EAR) Database, http://www.access.gpo.gov/bis/ear/ear_data.html (last visited Mar. 26, 2010); Department of the Treasury – Office of Foreign Assets Control (OFAC), <http://www.ustreas.gov/offices/enforcement/ofac/> (last visited Dec. 18, 2009).

144. Commission Directive 1995/51, 1994 O.J. (L 256) 49 (EC). Cf. Data Protection Act, 1998, c. 29 (Eng.).

145. Although China has some legislation that purports to address the protection of employee information (e.g., Art. 23 of Labor Contract Law of China, regarding the ability to include confidentiality provisions in labor agreements), China does not have what one might call a sophisticated infrastructure for the protection of information and data. See Bridget Treacy & Martin Abrams, *A Privacy Law for China*, COMPLINET, May 29, 2008, available at http://www.hunton.com/files/tbl_s47Details/FileUpload265/2269/privacy_law_for_China.pdf (last visited Dec. 19, 2009) (noting that privacy will be added to the 5-year legislative plan in China in 2009, but little expectation for action in the near term). Treacy and Abrams report they understood that China was no longer planning to implement a privacy approach based on European law, because such was “seen as not being compatible with the type of entrepreneurial economy the Chinese desire.”*Id.*

146. For more on data protection, see Association of Corporate Counsel: The In-House Counsel Bar Association, InfoPAK, Data Protection – A Practical Guide to Personal Data Transfer Laws in Asia/Pacific Region, Canada, Europe, and the U.S., <http://www.acc.com/legalresources/resource.cfm?show=19659> (last visited Oct. 7, 2009).

147. For information (in a variety of languages) on EU Directive 95/46/EC (protection of individuals with regard to the processing of personal data on the free movement of such data), Directive 2002/58/EC (privacy and electronic communications), and retention of data generated or processed with the provision of publicly available electronic communications services or of public communications networks), see Privacy Law Index, http://ec.europa.eu/justice_home/fsj/privacy/law/index_en.htm.

while U.S. law is not as protective. For example, the EU Directive requires that data controllers (a person or an entity that determines the purposes and means of processing personal data) must process and protect data according to specific rules.¹⁴⁸ Of particular interest is the sixth rule: “[d]ata that identifies individuals must not be kept longer than necessary.”¹⁴⁹ While that statement may make sense on its face, the complexities of information technology systems and automatic back-ups of databases may make such directives administratively or technologically difficult and expensive. Institutions will need to consider how to segregate, manage, use, protect, and then destroy information.

Seemingly simple steps like emailing payroll data to another office may violate privacy laws of certain territories. For example, the EU Data Protection Directive restricts data transfers to countries outside the EU which are not deemed to have an “adequate level of data protection.”¹⁵⁰ As well, data controllers “are required to inform you whenever they collect personal data about you, unless you have been previously informed.”¹⁵¹ The foregoing notice process may, on its face, make sense, but it will require complex administrative and technological systems and processes. Indeed, the requirement seems similar to the U.S. requirement that health care providers, like pharmacies, notify patients and customers of the entity’s privacy policy and have the patients confirm such receipt at return visits. More problematically, there is no central legal authority that dictates what conduct is required of employers with offices in different locations. Formulating an effective document retention policy will depend on determining the organization’s unique human resource needs as well as

148. See European Commission, Justice and Home Affairs, Data Protection in the European Union, http://ec.europa.eu/justice_home/fsj/privacy/docs/guide/guide-ukingdom_en.pdf [Hereinafter Data Protection Guide]. The rules, according to the Data Protection Guide (developed for general consumption, as opposed to the specific statutory language), are:

Data must be processed fairly and lawfully. [Data] must be collected only for explicit and legitimate purposes and used accordingly . . . Data must be relevant and not excessive in relation to the purpose for which [it is] processed . . . Data must be accurate [and updated] . . . Data controllers are required to provide reasonable measures for data subjects to rectify, erase, or block incorrect data about them . . . Data that identifies individuals must not be kept longer than necessary. In addition, each Member State must provide a supervising authority including having a public register so the public has access to names of all data controllers and what type of data they process. Data controllers must notify supervisory authorities when they process data, and Member States may have a simplification process for this notice.

Id. at 6.

149. Data Protection Guide, *supra* note 148, at 6.

150. Christopher Kuner, *Membership in the U.S. Safe Harbor Program by Data Processors*, 7 PRIVACY & SECURITY LAW 723 (2008). See also Data Protection Guide, *supra* note 148.

151. Data Protection Guide, *supra* note 148, at 9.

applicable law. In a discussion of “home working,” employers should focus on five main risks: (1) data security (protecting personal data an employee processes at home; as well as also protecting employer’s commercial information when employee works at home); (2) data in transit (IT security in general, but particularly in regard to portable storage devices); (3) data retention and destruction (both in terms of employee education on these obligations and compliance with these requirements); (4) data breach (educate remote workers on handling data breaches in remote working situations); and (5) privacy (for example, attempts to monitor staff at home may violate the Human Rights Convention which safeguards a person’s home, family life, correspondence, and privacy).¹⁵²

In order to comply with all of the applicable laws governing the privacy and retention of employee records, an employer must understand what information the organization collects, how this information is used, and to whom it is disclosed. Employers will also need to monitor evolving issues in document retention—such as employee privacy requirements and technology related issues relative to data privacy. In short, institutions of higher education operating programs overseas must review their policies and practices to ensure that they not only comply with all applicable laws in all relevant jurisdictions, but that they are practical and sensitive from an operational standpoint.

a. U.S.

Several U.S. statutes protect different aspects of the privacy of employees’ personal information. For example, employers are required under federal law to protect employees’ confidential medical or health information against unauthorized use and disclosure. The Health Insurance Portability and Accountability Act (HIPAA) and implementing regulations protect personal health information employers collect for health care plans.¹⁵³ Employers must safeguard such information and may not use it for employment-related purposes.¹⁵⁴ HIPAA does not preempt states from adopting laws that can be more stringent in protecting the privacy of individually identifiable health information.¹⁵⁵ Under the ADA, an employee’s medical history or health information must be maintained in separate medical files and must be treated as confidential medical information.¹⁵⁶

152. Bridget Treacy, *Data Protection and Home Working: Hidden Risks for Employers*, COMPLINET, Oct 23, 2008, available at http://www.hunton.com/files/tbl_s47Details%5CFileUpload265%5C2365%5CTreacy_DPandHomeWorking_Complinet.pdf.

153. 42 U.S.C. §1320d-6 (1996).

154. 45 C.F.R. § 164.502 (2009).

155. 42 U.S.C. § 1320d-7(a)(2) (2006).

156. 42 U.S.C. § 12112(d)(3)(B), (4)(C) (2006); 29 C.F.R. § 1630.14 (2009).

It is unlawful for an employer to publicly post or display an employee's social security number or to print it on employee identification cards, employee rosters, or mailing lists.¹⁵⁷ In addition, federal law prohibits interception and disclosure of oral communications in certain circumstances, and authorizes a civil action for violations.¹⁵⁸ Under the Electronic Communications Privacy Act (ECPA), the interception of wire or electronic communications and use or disclosure of information so obtained also is illegal.¹⁵⁹ The Stored Communications Act makes it unlawful to "intentionally access without authorization a facility through which an electronic communication service is provided . . . and thereby obtain . . . access to a wire or electronic communication while it is in electronic storage in such system."¹⁶⁰ The Computer Fraud and Abuse Act prohibits accessing certain computer systems without authorization and prohibits exceeding one's authorization in using such systems.¹⁶¹

Additionally, constitutional tort claims may also be asserted against private employers who allegedly act under color of state or federal law when invading certain privacy rights under the Fourth and Fourteenth Amendments of the United States Constitution.¹⁶²

b. France

French law imposes much more stringent requirements on employers in protecting their employees' personal information than U.S. law. For example, under the French Labor Code, all information an employer requests from a job candidate or employee must be aimed at evaluating either the individual's capacity to perform the job for which he or she has applied or her professional abilities in general.¹⁶³ To that end, employers must inform all employment candidates of the methods and techniques that will be used in the hiring process.¹⁶⁴ This information must be given to the candidates before these methods and techniques are actually used.¹⁶⁵ Once a candidate is hired, all information that employees are asked to provide must serve the purpose of assessing their professional abilities, and only data that has a direct and necessary link to making this assessment may be

157. 42 U.S.C. § 408(a)(8) (2006).

158. See 18 U.S.C. §§2511, 2520 (2006).

159. See 18 U.S.C. § 2511(1)(a) (2006).

160. 18 U.S.C. § 2701(a)(1) (2006).

161. Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006).

162. *Mathis v. Pacific Gas & Elec. Co.*, 75 F.3d 498, 501 (9th Cir. 1996).

163. C. TRAV., art. L 121-6.

164. *Id.* at art. L 121-7.

165. *Id.* Discrimination rules are applicable in the hiring process; it is a criminal offense to exclude individuals on the basis of sex, morals, family situations, ethnic group, national origin, race, religious beliefs, pregnancy, and/or trade union activities. *Id.* art. L. 122-25.

collected.¹⁶⁶ Employers must declare the collection of personal data to the Commission for Computer Technology and Personal Freedom, an independent state agency whose purpose, in part, is to inform individuals about their privacy rights and to investigate matters involving the collection and processing of personal data.¹⁶⁷ The Commission requires employers to declare all data that reveal the identity of an individual, including software that checks workers' productivity, computerized systems of clocking in, and systems that keep records of the recipients of phone calls or emails.¹⁶⁸

In addition to the requirement that employers must not collect any personal data without first informing the employee, the French Labor Code prohibits employers from keeping records or information on former employees.¹⁶⁹ After termination of employment, employers must destroy all information collected about former employees.¹⁷⁰

French law also forbids employers from examining their employees' private correspondence, including employees' emails.¹⁷¹ Employers may check that employees are not using their computers for private reasons, but have no right to read the contents of private messages.¹⁷² However, employers may intercept emails and wiretap telephones if they can demonstrate that their actions are justified for security reasons.¹⁷³ In any case, employers are required to give notice to employees of any technique used to monitor their activities at work.¹⁷⁴

Managing data collection, processing, and protection obligations is a significant responsibility. Presuming any given U.S. institution of higher education has a limited number of international operations, the institution may become familiar (and presumably master) the obligations of a specific jurisdiction. Whether one is considering an international operation or already has one, one should identify the locations where one operates or plans to operate; engage data compliance counsel with relevant expertise; and coordinate a team of people to assess the requirements and implement the plan. Such a team would likely include in-house counsel, information

166. *Id.* at art. L 121-6.

167. For more information regarding the Commission for Computer Technology and Personal Freedom, see Computer Technology and Personal Freedom at <http://www.cnil.fr/english/> (last visited February 24, 2008).

168. Christophe Vigneau, *Information Technology and Workers' Privacy: The French Law*, 23 COMP. LAB. L. & POL'Y J. 351, 368 (2002).

169. C. TRAV., art. L 121-6.

170. *Id.*

171. C. PÉN. art. 226-1. It is a crime to intercept in bad faith any messages that are sent, forwarded, or received through a telecommunications system so as to use the contents or to disclose them to others under the 1991 Act on the confidentiality of correspondence. *Id.*

172. C. TRAV., art. L 122-35.

173. C. PÉN., art. 226-15.

174. C. TRAV., art. L 121-8.

technology, human resources and financial personnel (as much data, no doubt, will relate to these functions), senior management at the international site, liaison personnel between the sites, and other subject matter experts as appropriate.

5. Time Off and Leaves of Absence

Institutions of higher education operating in more than one jurisdiction need to recognize that there can be great disparities in the laws regulating employee time-off and leave. There also can be overlapping laws within a single jurisdiction, making the task of managing a multi-jurisdictional workforce particularly daunting. Is the institution a covered employer under a particular leave statute? Is the employee an eligible employee for purposes of obtaining a leave? Is there any notice requirement that triggers the leave? Does the employee have a right to time off and, if so, for how long? To what salary and benefits is the employee entitled? Is there job protection and for what duration? At what point in time can an employee be terminated? These are all questions that an employer should consider any time an employee is absent for an extended or unexcused period or requests some kind of leave. The institution must also determine within each jurisdiction that it is operating: (1) what rules and laws apply to the institutions; (2) what rules and laws apply to the employee; and (3) what rules and laws apply to the employee's specific issue. Understanding that there are significant differences in the substantive requirements of leave laws, the sources for such leaves, and processes for invoking leave is a critical first step in being able to develop and implement appropriate leave policies.¹⁷⁵ Only by having an understanding of the subtleties in each country's laws in this substantive area can an employer expect to successfully adapt its policies to each country's legal requirements.

a. Vacation

i. U.S.

The provision of vacation time to employees is not mandated by either federal or state law in the United States. Thus, U.S. employees are not legally entitled to vacation time or vacation pay. If employers choose to provide employees with paid vacation benefits, they are permitted to pay employees cash for all vacation time that was not used during the year at

175. For example, in Europe, there is a lack of uniformity when determining how much leave an employee may take and under what conditions a leave can be taken. Some leaves are granted by statute, other by employer contract. *See, e.g. Sauvage, supra* note 76, at 4-80 to 4-84; Walter Ahrens & Mark S. Dichter, *Germany*, in 1A INTERNATIONAL LABOR AND EMPLOYMENT LAWS §4-80-84 (employee leave in France); 5-100 to 5-104 (William S. Keller & Timothy J. Darby eds., 3d ed. 2009).

the end of the year.¹⁷⁶

ii. France

In France, vacation time is mandated by the Labor Code.¹⁷⁷ Employees are entitled to five weeks of paid annual leave after one year of service.¹⁷⁸ Employees aged eighteen to twenty-one are entitled to thirty days of paid annual leave regardless of the amount of time they have worked for a company.¹⁷⁹ Additionally, employees must take at least twelve consecutive days of vacation between May 1 and October 31, and they may take as much as four weeks in a row.¹⁸⁰ An employer cannot offer cash payment in lieu of vacation, unless the employment contract has been terminated.¹⁸¹

iii. China

Neither the LCL nor EPL provide specific allowances for vacation leave. Rather, this issue is left to negotiation between the employer and the employee.¹⁸²

b. Sick/Medical Leave

i. U.S.

The ADA prohibits employers from discriminating against a “qualified individual with a disability” with regard to employment practices or terms, conditions, and privileges of employment.¹⁸³ A disability can be either physical or mental.¹⁸⁴ The ADA also requires employers to provide “reasonable accommodation” to enable an otherwise qualified individual with a disability to perform the essential functions of the job, unless to do so would cause an employer “undue hardship” or pose unacceptable safety and health risks.¹⁸⁵

Common examples of reasonable accommodations include leaves of absence, part-time or modified work schedules, and reassignment to a

176. *See, e.g.*, 27 AM. JUR. 2D *Employment Relationship* § 62 (2010); 30 C.J.S. *Employer–Employee* § 172 (2009).

177. C. TRAV. art. L 223.

178. Swartz, *supra* note 60 at 68.

179. C. TRAV. art. L 223.

180. *Id.*

181. *Id.*

182. *See* LCL, *supra* note 66, at art. 17 (“An employment contract shall specify the following . . . working hours, rest and leave.”).

183. 42 U.S.C. § 12115(a) (1990).

184. *Id.* at § 12102(1)(A).

185. *Id.* at § 12111(9)–(10).

vacant position.¹⁸⁶ “Undue hardship” means an “action requiring significant difficulty or expense” when considered in light of, among other factors: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facilities involved, number of persons employed, and the effect on expenses and resources or other impact upon the facilities’ operations; (3) the type of operations; (4) the availability of tax incentives; and (5) the amount of assistance available to the employer from outside agencies or organizations.¹⁸⁷

Eligible employees who are unable to perform any substantial work as the result of a severe mental or physical condition that has lasted or will last twelve or more months are entitled to receive Social Security benefits¹⁸⁸ if they have earned a minimum amount of Social Security credits.¹⁸⁹

The Family Medical Leave Act requires employers to provide eligible employees with twelve weeks of family or medical leave in a twelve-month period and to continue whatever health plan benefits it offers during the leave.¹⁹⁰ Employees may take this leave for their own serious health condition or for that of a spouse, child, or parent.¹⁹¹

ii. France

Pregnant employees in France are entitled to leave work six weeks before the expected delivery date and remain absent until ten weeks after the date of delivery.¹⁹² Both male and female employees are entitled to benefits related to the birth or adoption of a child on the same basis as employees on maternity leave.¹⁹³ Although French law does not require an employer to continue compensating an employee while he or she is on maternity leave, most collective bargaining agreements provide for paid leave. Regardless of whether paid leave is required by a collective bargaining agreement, employees receive payments from the social security fund in the amount of their net salary, subject to a tax.¹⁹⁴

Additionally, every employee who becomes a father is entitled to

186. *Id.* at § 12111(9)(b).

187. For information on undue hardships, see 42 U.S.C. § 12112(b)(5)(A) (2006); 42 U.S.C. § 12111(10) (2006); 29 C.F.R. § 1630.2(p) (1997); 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997). *See also* Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited Jan. 12, 2010).

188. 42 U.S.C. § 402 (2000).

189. 42 U.S.C. § 423(c) (2000).

190. 29 U.S.C. § 2601 (2000).

191. 29 U.S.C. § 2612(a)(1) (2000).

192. C. TRAV., art. L. 122-26.

193. *Id.*

194. *See* Abrams & Dichter, *supra* note 175, at 5-103 to 5-104.

paternity leave equal to eleven consecutive days to be taken within four months after the birth or adoption of a child.¹⁹⁵ If there are multiple births or health problems, the amount of leave pay may be increased.¹⁹⁶

iii. China

Neither the LCL nor EPL provide specific allowances for medical leave during the course of employment. Rather, it appears that this issue is left to negotiation between the employer and the employee.¹⁹⁷

6. Intellectual Property Rights: Who Owns What?

a. Patents & Copyrights: Ownership & Assignment of Rights

i. U.S.

As a policy matter in the United States, different higher educational institutions address intellectual property (IP) ownership and related issues differently. Many colleges and universities require employees to assign intellectual property created as part of their employment engagement to the college or university (or to a holding company created to own the IP created at that institution).¹⁹⁸ Institutions (or their IP holding companies) generally decide on a case-by-case basis whether to pursue commercialization of IP, or to license or assign it to the employee creator. There may be different applications with respect to copyright ownership and patent ownership. Sometimes, a copyright is licensed for no fee or assigned to the employee with respect to text books, because text books are usually not as lucrative, while an institution itself may be more likely to pursue monetization of a patent. IP issues are significant for institutions of higher education, particularly research institutions, because there is great opportunity for the creation and commercialization of meaningful innovations, both in the commercial and the research context. Institutions of higher education conduct research as part of their educational process,

195. Law No. 2001-1246 of Dec. 21, 2001, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], Dec. 26, 2001, at p. 20552.

196. *Id.*

197. See LCL, supra note 66, at art. 17.

198. See, e.g., Georgia Tech Research Corporation (GTRC), <http://www.gtrc.gatech.edu/>, which owns the IP created at the Georgia Institute of Technology, <http://www.gatech.edu/>; the University of Georgia Research Foundation (UGARF), <http://www.ovpr.uga.edu/ugarf/>, which owns the IP created at the University of Georgia, <http://www.uga.edu/>; Wisconsin Alumni Research Foundation for the University of Wisconsin (WARF), <http://www.warf.org>; the MIT Technology Licensing Office, <http://web.mit.edu/tlo/www/>, licenses the IP created at MIT; Stanford owns its IP and licenses it through the Stanford Office of Technology Licensing, <http://otl.stanford.edu> (last visited Jan. 12, 2010).

funded by both governmental agencies and industry. IP licensing is big business in U.S. higher education with organizations such as the Association of University Technology Managers (AUTM)¹⁹⁹ and the Licensing Executives Society (LES),²⁰⁰ among others, existing to bring technology licensing professionals together and provide for the development of IP, license-able technologies, and licensing arrangements. Universities can generate significant revenue with IP and technology transfer programs (e.g., MIT, Stanford, Wisconsin Alumni Research Foundation). U.S. employers must ask: are there proper assignments of intellectual property from employee to employer? (for instance, the contract may contain references to “Work Made for Hire” copyright aspects²⁰¹ in the U.S. and moral rights in the EU).²⁰²

ii. China

The intellectual property laws of China ostensibly foster “the development and innovation of science and technology for meeting the needs of the construction of socialist modernization.”²⁰³ With regard to ownership of intellectual property as between employer and employee, the scheme used in China is similar to that used in the U.S.²⁰⁴ For example, with regard to patents, an invention by an employee in execution of the tasks of his or her employer, or made by the employee using the material and technical means of his or her employer, is considered a “service invention-creation.” For this type of invention, the right to apply for a patent belongs to the employer. After the patent issues, the employer is considered the patentee (unlike in the United States, where the inventor is

199. For more information, see <http://www.autm.net/>.

200. For more information, see <http://www.usa-canada.les.org/>. In addition to the Licensing Executive Society (LES) USA/Canada, there are 31 other international licensing entities comprising LES International (LESI), <http://www.lesi.org/>.

201. For a general discussion of “Work Made For Hire” doctrine, see <http://www.copyright.gov/circs/circ09.pdf>. For general review of US Copyright Law, see <http://www.copyright.gov/title17/>. For general discussion on copyright issues with respect to higher education, see University of Texas System, Copyright Crash Course, <http://www.utsystem.edu/ogc/Intellectualproperty/cprtindx.htm> (last visited Nov. 3, 2007); see also Georgia Harper, Materials available through the Intellectual Property Virtual Scholar Program, University of Maryland University College, http://www.umuc.edu/distance/odell/cip/ip_scholar_harper.shtml (last visited Nov. 3, 2007).

202. For more on moral rights in the U.S., see The Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A (1990).

203. Patent Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, effective Apr. 1, 1985, amended Aug. 25, 2000) art. 1, *translated in* WORLD INTELLECTUAL PROPERTY ORGANIZATION COLLECTION OF LAWS FOR ELECTRONIC ACCESS (CLEA), available at http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=5001. [*hereinafter* PL].

204. *Id.*

considered the patentee).²⁰⁵ For a “non-service invention-creation,” the right to apply for a patent in China belongs to the inventor. After the application issues as a patent, the inventor is considered the patentee. Finally, with respect to an invention made by a person using the material and technical means of his or her employer, and where the employee and employer have entered into a contract that delineates ownership, the contract controls.²⁰⁶ It is important to keep in mind, however, that where any invention, belonging to any Chinese state-owned enterprises or institutions, is considered to be of great significance to the interest of the State or the public interest, the government may decide that the patented invention should be exploited by the government for a fee payable to the patentee.²⁰⁷ With regard to copyrights, the author of the copyrighted work in China is the citizen who has created the work. But, where a work is created for, and under the supervision and responsibility of a company or other organization, the company or organization is considered the author of the work.²⁰⁸ In light of what many Westerners (at least, many Americans) may consider to be a “host country favorable” or “government favorable” or, even, “foreigner unfavorable” IP structure in China, and with so much sponsored research taking place at, with, and through colleges and universities, it is worth reviewing the risks of enforcing IP rights claims in China.²⁰⁹

iii. France

In France, the right to a patent belongs to the inventor (or his or her assignee or legal successor).²¹⁰ However, inventions made by an employee (a) in the execution of an employment contract involving inventive work relating to his or her employment duties or (b) in the execution of studies or research activities which have been specifically entrusted to the employee are the property of the employer.²¹¹ In the foregoing situations, the employee may be entitled to additional fees in connection with his or her inventive work. The conditions under which the employee may be entitled to additional remuneration for his or her inventive contribution are determined by the collective bargaining agreements, the company

205. PL at art. 6.

206. *Id.*

207. PL at art. 14.

208. PL at art. 1.

209. Lulin Gao et. al., *Can Your Company Enforce Its Intellectual Property Rights in China*, 20 THE ACC DOCKET 52 (2006).

210. Law No. 96-1106 of December 18, 1996, Journal Officiel de la République Française [J.O.] [Official Gazette of France], December 19, 1996.

211. Law No. 94-102 of February 5, 1994, Journal Officiel de la République Française [J.O.] [Official Gazette of France], February 8, 1994.

agreements, and the individual employment contracts.²¹² All inventions made by an employee, other than those made in furtherance of his or her employment duties as defined above, are the property of the employee-inventor. But, if the invention is made by an employee (1) in the execution of his normal employment duties; (2) in the execution of activities of the enterprise of the employer; (3) by making use of know-how, techniques or methods which are specific to the enterprise of the employer; or (4) by making use of data procured by the enterprise of the employer, the employer shall have the right to acquire the whole or part of the property, or to use the rights resulting from the patent protecting the invention. In this case, the employee is entitled to fair compensation to be agreed upon with the employer.²¹³

The laws of France also provide for the protection of industrial designs or models: this can include the appearance of the whole or a part of a product resulting from the features of its lines, contours, colors, shape, texture, or materials, or of the product's ornamentation.²¹⁴ A "product" is considered any industrial or handicraft object, including parts intended to be assembled into a complex product, packaging or get-up, graphic symbols, and typographic characters, but excluding computer programs.²¹⁵ But, the registration of an industrial design or model does not prevent the owner from invoking copyright protection for the same design or model.²¹⁶ In France many designs and models (in particular those showing originality as required under copyright law) are protected by copyright, automatically and without registration, and it is possible by registering those designs or models under the design and model law to obtain double protection. With regard to ownership as between employer and employee, generally the same ownership scheme applies as that which applies to patents.²¹⁷

b. Confidentiality/Trade Secrets

For any employer, achieving a competitive advantage by protecting the creation and maintenance of its proprietary or confidential trade secret information is critical. This age of employee mobility makes it more important than ever for multi-jurisdictional employers to have written policies, in place addressing issues such as trade secrets, proprietary or confidential information concerns, and ownership (presumably by the

212. *Id.*

213. *Id.*

214. Law No. 2001-670 of July 25, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 28, 2001.

215. *Id.*

216. *Id.*

217. France, Industrial Designs and Models, *in* WOLTERS KLUWER LAW & BUSINESS 75 (discussing Intellectual Property Code 1992 as amended up to 2008).

employer) of intellectual property,²¹⁸ as well as agreements with employees memorializing their understanding of the organization's rights to the information, and the obligations to protect the integrity of such data, information, and creations. In the United States, though there is a Uniform Trade Secrets Act (UTSA),²¹⁹ and more than forty states and the District of Columbia have adopted the UTSA, trade secrets laws vary from state to state (indeed, among those who have and those who have not adopted the UTSA).²²⁰ For jurisdictions that have not adopted the UTSA, the Restatement of Torts and its six factors of trade secrets apply.²²¹ For example, in Georgia, a trade secret is information that derives economic value from being kept secret and the owner exerts efforts to keep the information secret.²²² It is imperative that employers evaluate the subject information to determine whether the rules and procedures they currently have in place at each location adequately protect the information from disclosure. For example, is access to the trade secret controlled through disclosure on a "need to know" basis only? Are sensitive documents labeled "confidential" (or with a similar legend) and kept in a secure location? Are all employees required to sign a non-disclosure or confidentiality agreement before they commence employment? Are employees educated about, and periodically reminded of, the organization's policies and procedures regarding confidential information? Are the employees' obligations regarding confidentiality discussed at exit interviews? Are follow-up letters regularly sent to former employees who have had access to important confidential information? These are just some of the questions that the multinational employer should ask to assess whether its trade secrets and other confidential information are being properly protected.

218. For examples of policies established by institutions of higher education regarding ownership of intellectual property, see Ohio University, Intellectual Property Ownership and Disposition and Employee Involvement in Research Commercialization, <http://www.ohio.edu/policy/17-001.html> (last visited April 19, 2010), University of Texas System, Intellectual Property Policy, <http://www.utsystem.edu/ogc/intellectualproperty/ippol.htm> (last visited April 19, 2010) Stanford University, Copyright Policy, Intellectual property, <http://fluid.stanford.edu/class/cee200/intellectual.htm> (last visited April 19, 2010), Massachusetts Institute of Technology, Patent and Copyright Ownership Policy Statement, <http://web.mit.edu/tlo/www/community/guide2.html#2.1> (last visited April 19, 2010), University of Florida, Intellectual Property Policy, <http://www.rgp.ufl.edu/otl/pdf/ipp.pdf> (last visited April 19, 2010).

219. See UNIF. TRADE SECRETS ACT § 1 (1985).

220. BRIAN M. MALSBERGER, TRADE SECRETS: A STATE-BY-STATE SURVEY (Samuel M. Brock, III & Arnold H. Pedowitz, eds. BNA Books, 2nd ed. 2003) (1997).

221. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

222. GA. CODE ANN. § 10-1-761 (2009). Accord CAL. CIVIL CODE § 3426 (West 1996); WASH REV. CODE ANN. § 19.108.010 (West 1998).

i. U.S.

The Uniform Trade Secrets Act (UTSA) offers an established definition of a 'trade secret' and has been adopted by over forty states.²²³ The UTSA defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique or process that (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."²²⁴ Misappropriation of an employer's trade secrets is an intentional tort under both common law and state statutes.

Additionally, breach of confidence is a recognized cause of action under state law. In California, for example, the courts recognize the cause of action based on the concept of an implied obligation or contract between the parties that confidential information will not be disclosed. Because the cause of action is based on an implied-in-law or quasi-contractual theory, it is a tort action.²²⁵ A breach of contract claim can also be brought when there is a written confidentiality agreement in place between employer and employee. Because of the growing and continuing importance of the knowledge economy and of IP more employers have turned to the U.S. Computer Fraud and Abuse Act, in addition to state laws on trade secrets and to employment agreements, to enforce their rights and protect their information.²²⁶

ii. France

France offers similar protection for trade secrets. French courts define trade secrets as secret manufacturing or industrial processes which are generally unknown by the competitors before their violation.²²⁷ In order to be protected, the trade secrets must have a certain degree of originality or have a practical value and must be kept secret from competitors.²²⁸

223. Oren Bar-Gill & Gideon Parchomovsky, *Law and the Boundaries of Technology-Intensive Firms*, 157 U. PA. L. REV. 1649, 1676 n. 85 (2009).

224. UNIF. TRADE SECRETS ACT § 1 (1985).

225. *Berkla v. Corel Corp.*, 302 F.3d 909, 917 (9th Cir. 2002).

226. 18 U.S.C. § 1030 (2002). *See also* Thomas Gray, *Using the U.S. Computer Fraud Statute in Trade Secret Cases*, 6 INTELL. PROP. L. & BUS. 30 (2008).

227. Roger J. Millgram, *Commission Proposed Capital Punishment—By Definition—For Trade Secrets, a Uniquely Valuable Right*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 919, 938 n. 83 (2006).

228. *Id.*

iii. China

China also offers protection for trade secrets.²²⁹ China provides that an employer and employee may include in their labor contract confidentiality provisions concerning trade secrets and intellectual property related confidential matters of the employer.²³⁰ Only an employer's senior management, senior technicians, and other personnel who are subject to confidentiality obligations may be subject to non-compete obligations.²³¹ If a worker has the obligation to keep trade secrets confidential, a non-compete provision may be agreed upon in a labor contract or confidentiality agreement, but such an agreement must stipulate that the employer will pay financial compensation to the worker on a monthly basis during the term of the non-compete period after the expiration or termination of the labor contract.²³²

7. Termination Issues

Despite hopes to the contrary, employment and related relationships sometimes end in complicated ways. Institutions should be aware of how termination issues are handled in the different jurisdictions where they operate. The reality of the current working world is that innumerable employees across the world are released from their jobs on a daily basis. Virtually every termination—regardless of whether it is a voluntary resignation, a for-cause discharge, reduction-in-force layoff, or some other form of termination—carries with it the possibility of subsequent litigation. Moreover, termination of employment is an area where both the substantive and procedural laws of each jurisdiction vary greatly. To be sure, treating the terminated employees fairly—and ensuring that they feel that they are being treated fairly—may be as important as compliance with laws, regulations, and policies. There can be great variations in the laws of different jurisdictions concerning issues such as: (1) grounds for termination; (2) procedures for termination; (3) notice requirements; (4) levels of compensation; (5) methods of enforcing employee rights; (6) payment and type of compensation due, if any; (7) severance requirements, if any; and (8) whether there is any judicial or administrative oversight of the termination process.

In most Member States of the EU, there are also special procedures for redundancies (i.e., economic layoffs). The procedures can be time-

229. Law for Countering Unfair Competition (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) art. 10 (P.R.C.); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 81, art. 39 (1994).

230. See LCL *supra* note 66, at art. 23.

231. LCL at art. 24.

232. LCL at art. 23.

consuming and most require compensation. We note that in some jurisdictions, wrongful termination may subject organizations and their representatives to criminal penalties (in extreme cases, imprisonment) as well as civil sanctions. For example, in India, violation of the 1936 Payment of Wages Act and the 1948 Minimum Wages Act may be punishable by fines, imprisonment and the confiscation of the employer's property.²³³

Likewise, whether and to what extent severance pay is owed to an employee is a critical issue for multinational employers; an issue often dictated by requirements stemming from a variety of different sources, such as the law, public policy, or an employment contract. In Europe, there are mandated severance pay requirements depending on the nature of the termination. In the U.K., for example, a redundant employee who has been continuously employed for two years will be entitled a statutory redundancy payment.²³⁴ The amount of the payment is based on the employee's length of continuous employment and gross average wages.²³⁵ In addition, many organizations have enhanced employee severance pay rights such that an employee is entitled to receive substantially more than the legally mandated payment.²³⁶

Thus, because of the varying and overlapping degrees of protection within each legal system, as well as the enhanced benefits that may be granted through policy and contract, employers must spend time reviewing this area carefully—to understand which laws or policies apply in the context of each termination and to avoid the potential legal pitfalls. In addition, the multinational employer should, as part of its audit, spend time with persons from the following job categories to learn about how the discharge practices actually operate: (1) members of senior management, especially those involved in reduction-in-force activities; (2) mid-level managers who frequently make termination decisions; (3) employees who have complained about aspects of the employer's discharge system; and (4) members of the human resource staff at each site who are involved in employee termination decisions and procedures. Similarly, the employer should also examine a variety of documents generated during the process of discharging employees such as applicable government contracts, employment termination documents, applicable liability insurance policies, notes from exit interviews, and material from past legal challenges. In short, the multinational employer must not only understand the substantive and procedural law in this area, but also must understand, on a practical

233. The Payment of Wages Act, No. 4 of 1936 § 20, India Code; The Minimum Wages Act, No. 11 of 1948 § 22A.

234. Paul Callaghan, *United Kingdom*, in INTERNATIONAL LABOR AND EMPLOYMENT LAWS §§8-93 (William L. Keller & Timothy J. Darby eds., 3d ed. 2009).

235. *Id.*

236. *Id.* at §8-95.

level, how its policies are implemented.

a. Severance and Unemployment Benefits

i. U.S.

In the United States employers are taxed at both federal and state levels for unemployment insurance benefits. Terminated employees receive approximately thirty-five to forty percent of their back wages in unemployment compensation.²³⁷ Most displaced employees can expect to receive benefits for six months, except in areas of high unemployment, where payments may continue for up to one year.²³⁸

ii. France

When an employee is laid off, the employer must provide notice of termination and severance payments.²³⁹ For employees with less than two years of service, the minimum notice period is one month; employees with two or more years of service receive two months.²⁴⁰ Executives are generally entitled to three months notice, regardless of length of service.²⁴¹ An employer may pay employees instead of providing such notice.

French employees also are entitled to mandatory severance payments. The minimum dismissal severance is one-tenth of the average monthly compensation per year of service for employees with two or more years of service, plus one-fifteenth compensation per year of service after ten years of service.²⁴² If the dismissal is for economic reasons, the severance payment is doubled.²⁴³ Employees are also entitled to payment for any accrued, unused vacation.²⁴⁴

French employees are eligible to receive more generous unemployment pay and for a longer period of time than American workers. In France the level of unemployment benefits is determined nationally. French employees are paid a percentage of their salary plus a set number of Euros per day.²⁴⁵ Workers in France can collect unemployment benefits from 122

237. Clyde W. Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1035 (1995).

238. *Id.*

239. C. TRAV. art. L. 122-8.

240. *Id.*

241. *Id.*

242. *Id.* art. L. 122-2.

243. *Id.* art. L. 122-9.

244. *Id.* art. L. 223-14.

245. Law No. 2000-601 of June 30, 2000, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 1, 2000.

to 1,825 days, depending on age and length of service.²⁴⁶

iii. China

The LCL provides specific requirements for the termination of employment. As described above, the LCL designates three types of employment contracts distinguished by the conclusion of the employment contract.²⁴⁷ Notwithstanding these delineations, there are barriers to the termination of the employment contract. For example, an employer and a worker may terminate their employment contract if they so agree after negotiating such an outcome.²⁴⁸ Further, the employee may terminate their employment contract upon thirty days' prior written notice to the employer.²⁴⁹

Significantly, in certain circumstances, an employee may terminate their employment if:

- (1) the Employer fails to provide the labor protection or working conditions specified in the employment contract;
- (2) the [E]mployer fails to pay labor compensation in full and on time;
- (3) the employer fails to pay the social insurance premiums for the worker in accordance with the law;
- (4) the rules and regulations of the employer violate laws or regulations, thereby harming the worker's rights and interests;
- (5) the employer used such means as deception or coercion, or took advantage of the other party's difficulties to cause him to conclude or amend the employment contract contrary to his true intent . . .²⁵⁰

Conversely, an employer may terminate an employment contract if the worker: (1) is proved during the probation period not to satisfy the conditions for employment; (2) materially breaches the employer's rules and regulations; (3) commits serious dereliction of duty or practices graft, causing substantial damage to the Employer's interests; (4) has additionally established an employment relationship with another Employer which materially affects the completion of his tasks with the first-mentioned employer, or he refuses to rectify the matter after the same is brought to his attention by the employer; (5) the employment contract is invalid due to the circumstance specified in the first paragraph of Article 26 hereof; or (6) has his criminal liability pursued in accordance with the law.²⁵¹

246. *Id.*

247. *See* LCL, *supra* note 66, at art. 13–15.

248. *See* LCL at art. 36.

249. *See* LCL at art. 37.

250. *See* LCL at art. 38.

251. *See* LCL at art. 39.

8. Non-Competition and Covenants Not to Compete

Likewise, it is critical for the multinational employer to understand which laws govern the practices that it wants to have restricted.

a. U.S.

In the U.S., for example, state law governs restrictions on employee non-competition. The enforceability of non-competition agreements varies greatly among the fifty states.²⁵² The multi-jurisdictional employer must refer to the law of the correct jurisdiction. For this reason, multinational employers have found that contracts involving covenants not to compete can often fill in gaps left by unfair competition and other business torts. For this reason, in addition to being mindful of the applicable laws in this area—both statutory and common law—multinational employers should also look at their agreements to determine what additional protections and rights have been granted. The restrictive covenant issue is a reminder of the importance of considering and memorializing governing law.

b. France

In France, as in the United States, covenants-not-to-compete are not prohibited *per se*, but they are unlawful if they create unlimited restraints on an employee's ability to work.²⁵³ There are no statutes under the French Labor Code governing the validity of non-compete clauses.²⁵⁴ Thus, the

252. See, e.g., *Edwards v. Arthur Andersen LLP*, 189 P.3d 285 (Cal. 2008) (holding that non-solicitation of customer or client clauses are unenforceable); *Lee v. Environmental Pest & Termite Control, Inc.*, 516 S.E.2d 76 (Ga. 1999) (illustrating that since post-employment non-compete covenants under Georgia law are difficult to enforce, one focuses on covenants not to disclose confidential information); Mari Myer, *Presentation at the State of Georgia Tech Law Section: NDAs and Covenants Not to Solicit*, H.B. 173, Gen. Assem., Reg. Sess. (Ga. 2009) (permitting Georgia courts to blue pencil (revise) restrictive covenant agreements, in order to narrow the scope of restrictions rather than invalidating the entire restriction). Because of Georgia Supreme Court case *Jackson v. Coker*, the matter must now be put to the voting public for an amendment permitting the Georgia General Assembly to implement the changes. 405 S.E.2d 253 (Ga. 1991). See also James J. Boutrous II, *Non-Competes: Choice of Law Matters*, Law360, March 26, 2009, http://www.law360.com/registrations/subscription_upgrade?article_id=90937 (offering that the "...need for up to date and comprehensive agreements with employees, which should include choice of law provisions in restrictive covenants . . . in most instances, courts will honor the parties' choice absent a compelling reason not to do so . . . [so that] businesses can be more secure in knowing beforehand what law will be applied." See also Claire Harrison, *Best Practices For Multistate Employers*, Law360, Mar. 1, 2009, <http://www.law.360> (with focus on Noncompetition Agreements (pages 1-2)).

253. John W. Ashbrook, *Comment, Employee Noncompetition Clauses in the United States and France*, 14 COMP. LAB. L. & POL'Y J. 47, 47-48 (1992).

254. *Id.* at 48-49.

validity of non-compete provisions is decided by case law.²⁵⁵ Some French courts hold that a noncompetition clause unlimited in time is invalid. An unlimited time restriction may be considered irrelevant, however, if the employee's ability to find another job is not unduly hampered. Similarly, a covenant that is unlimited in area is sometimes enforced if its duration is short.

It is important to check if the collective bargaining agreement provides for certain conditions and draft the clause accordingly. The employer may release the employee from his non-compete obligation and therefore not pay any compensation. Moreover, unless otherwise provided in the employment agreement, an employee in France is permitted to refuse a substantial modification to his or her employment agreement. If the employer does not obtain the proper consent, there is a possibility that the employee may be able to claim that the employment contract was modified to his or her detriment, and bring a constructive discharge claim.²⁵⁶

c. China

The LCL limits non-competition protections to senior management, senior technicians, and other personnel who have knowledge of trade secrets of the employer.²⁵⁷ The scope, territory, and term of the competition restrictions shall be agreed upon by the employer and the worker, and such agreement shall not violate laws and regulations. The term, counted from the termination or ending of the employment contract, for which a person as mentioned in the preceding paragraph is subject to restrictions in terms of his working for a competing employer that produces the same type of products or is engaged in the same type of business as his current employer; or, in terms of his establishing his own business to produce products or engage in business competing with his current employer's products or business, shall not exceed two years.²⁵⁸

III. CONCLUSION

As demonstrated in this article, American educational institutions that plan to open and operate, or already operate, a foreign campus face a myriad considerations in identifying, determining and applying relevant employment laws. Like many projects, proper planning and periodic reevaluation should help minimize risks and problems—and should improve the likelihood of success when the college or university serves as

255. *Id.* at 48.

256. *See, e.g.,* Carole E. Scott, *Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France*, 7 SAN DIEGO INT'L L.J. 341 (2006).

257. *See* LCL, *supra* note 66, at art. 25.

258. *Id.*

an employer in a study abroad, international, or foreign campus, or cooperative research setting. It is imperative that the institution implement a thoughtful, strategic approach when planning for and operating a foreign campus in order to minimize the institution's risk of exposure.