

Global HR Hot Topic

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Severance Releases and International Employees



Challenge:

A multinational leaves itself exposed to unfair double-dipping if it pays severance pay to a terminated international employee in exchange for an incomplete release that lets the fired employee turn around and sue in a country where the release is not enforceable.

Expatriates tend to set off on their overseas postings with every expectation that after the assignment ends they will “repatriate” back to their home country. But circumstances change. Too often a multinational ends up needing to fire an expatriate or some other international employee such as a cross-border secondee or a mobile worker whose principal place of employment, at the time of termination, is unclear.

Any employer that pays a terminating employee a generous severance package that includes extra consideration beyond the legal minimum has the right to the benefit of its bargain: a “release” barring a termination claim, wherever filed, seeking reinstatement or more termination pay. This is why so many employment agreements, expatriation letters, corporate severance pay policies, and individual termination packages link a severance payment to the proverbial “full release of claims in a form acceptable to the employer.”

But what release “form” should an employer find “acceptable” in the *international-employee* context? Almost every country has employment-release standards—ideal boilerplate release text and release execution formalities for an employee effectively to waive employment-severance claims. Complications arise whenever two (or more) jurisdictions’ employee-protection laws might possibly reach a single employee, because a release tailored to the standards of just one of the jurisdictions leaves the employer exposed to a lawsuit filed in the courts of the *other*. That is, any employer that tailors a border-crossing employee’s severance release to just one jurisdiction leaves itself exposed to a dismissal lawsuit filed in a different jurisdiction with a nexus to the employment.

Too many multinationals assume that just one of two possibly-applicable sets of employment laws should control a dual-jurisdiction employment relationship. Multinationals offering severance packages that include extra consideration beyond the legal minimum can feel tempted to structure a dual-jurisdiction severance release to meet just one would-be “lead country’s” release standards. A multinational might pepper into a release a catch-all clause purporting to release “all claims” in a second jurisdiction, or “all claims worldwide,”

Pointer:

Before paying an international employee to release severance claims, proactively structure a release that complies with waiver principles, and execution procedures, of each possibly-applicable jurisdiction.

Each monthly issue of Global HR Hot Topic focuses on a specific challenge to globalizing HR, and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case’s International Labor and Employment Law Practice helps multinationals globalize business operations, monitor employment law compliance across borders and resolve international labor and employment issues.

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but this peppered-in catch-all clause is rarely enough. Three examples illustrate the problem:

Example 1—Terminations in France follow rigid procedures. Binding French severance releases must be in French and meet specific formalities. If a US-to-France expatriate with a US choice-of-law clause in his expat assignment letter gets terminated from a French place of employment, the US choice-of-law clause may lull a multinational employer into structuring a US-compliant, English-language release. Even if that release peppers in a catch-all clause purporting to release “all claims in France and worldwide,” the document likely falls short of French release standards and will offer little defense to a French labor-court claim.

Example 2—A terminated US-citizen expatriate working for an American employer in Australia can invoke the extraterritorial reach of US age discrimination laws. A severance release drafted to conform to Australian release standards—even one that peppers in a catch-all clause purporting to waive “all claims in the US and worldwide”—falls short of the complex release strictures under the US Older Worker Benefit Protection Act [OWBPA], such as the OWBPA 7 or 21 or 45-day waiting periods. This Australia-compliant release—even with its peppered-in “all US claims” clause—will offer little defense to a US age discrimination claim.

Example 3—Any binding release of severance claims under Mexican law needs to be ratified by the Mexican labor board. If a fired mobile employee working on both sides of the US/Mexico border signs a US-compliant English-language release—even one that peppers in a clause purporting to release “all claims in Mexico and worldwide”—the document, unauthenticated by any Mexican agency, will offer little defense to a Mexican labor-court severance pay claim.

These three hypotheticals are exceptional, because they involve border-crossing employees. Most employees are local workers who are hired, reside, and work for an employer in a single country, subject to that one jurisdiction's law and courts. Severance releases for these single-country employees merely need follow the strictures of the place of employment. Dual-jurisdiction releases become important only where a terminated employee could bring viable employment-law claims in the courts, or invoking the laws, of more than one jurisdiction. Three scenarios most commonly raise this issue:

Extraterritorial laws: The fired employee is a citizen of (or in some cases was originally hired in) some different home country that presumes to extend its statutory/codified employment protection laws extraterritorially. Only a handful of countries extend employment laws abroad, chiefly the US and Venezuela (as to certain scenarios only), and in limited cases France.

Extraterritorial contract provisions: The fired international employee has an employment contract subject to home-country law—even if it is an underlying pre-expatriation contract that was suspended or “hibernated” during the overseas assignment and “springs back to life” only upon termination. Or else a fired employee can invoke a choice-of-law clause in the employment/expatriation documents that expressly selects some legal regime

other than that of the current place of employment. Multinationals may trip up if they put too much faith in the power of a home-country choice-of-law clause to divest the application of host-country employee-protection laws: Yes, a choice-of-home-country-law clause will pull in home country employment laws, but it will not usually divest the simultaneous application of host-country employee-protection laws that apply by public policy. See our *Global HR Hot Topics* of June and July 2008.

Unclear place of employment: Sometimes the fired mobile employee's place of employment (in the terminology of the Europe's Rome Convention, the “habitual place of employment”) is unclear. Imagine, for example, a regional sales director living in Switzerland with an office in Austria and customers predominantly in Germany. In these cases a fact question arises as to which country is the place of employment.

In these three types of cross-jurisdictional terminations, the best way to craft the proverbial “binding release of claims in a form acceptable to an employer” that pays severance money beyond applicable legal minimums will often be to combine the boilerplate release language, and all the necessary release-execution procedures, of each affected country's law into one single release (or put into separate, simultaneously-executed releases: Separate releases may be necessary where a local government agency ratifies the release and foreign provisions would complicate the process).

This can make for a cumbersome release document. Consider, for example, a binding release for a fired US citizen over age 40 who “habitually” works in the London office of an American multinational. Even if the employment agreement has a US choice-of-law clause (and even notwithstanding Europe's recently-amended Rome Convention), both US discrimination laws and UK unfair/wrongful dismissal protections will protect the employee *simultaneously*. So the employee must execute a release of US discrimination claims plus a release of any UK unfair dismissal action and (separately) any English law wrongful dismissal (i.e., breach of contract) claim. The hybrid release document needs to graft enforceable US OWBPA release language onto the text of a UK “compromise agreement” (employment release), including all the waiver “bells and whistles” of both systems, accommodating both the 7 or 21 or 45-day waiting periods of the US OWBPA and the co-signature of the employee's own solicitor lawyer necessary for a binding UK compromise agreement.

In some countries—Brazil, for example—a binding release of employment separation claims is impossible unless a fired employee files and dismisses a termination lawsuit in labor court. In those jurisdictions, no language inserted into any release document will give an employer a dispositive defense to a locally-filed severance lawsuit—the best an employer can get is effectively an employee-signed *receipt* for severance money tendered. Even so, the international severance-documentation analysis remains the same: An employer should document the separation, and tender severance pay, in the way that meets best practices of *each* jurisdiction whose employee-protection laws might protect the terminated international employee.