How to Roll Out a Global HR Initiative

Prepared by:
Donald C. Dowling Jr.
Littler Mendelson P.C.

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How to Roll Out a Global HR Initiative

"Launch Logistics" Process for Issuing an International Code of Conduct or Ethics, HR Policy or Compensation/Benefits Plan

By Donald C. Dowling Jr. | International Employment Partner | New York City

In this era of internationally aligned business operations, multinational employers always seem to be to launching, updating, refining or tweaking some global human resources initiative or other. Indeed, global HR initiatives seem to have become a fundamental feature of how multinationals do business across borders—particularly if we define "global HR initiative" broadly to include the full spectrum of all a multinational's (1) global HR/employment rules (2) global staff rules on business topics beyond HR, and (3) global compensation/ benefits offerings. In that respect, "global HR initiative" might include:

1. A multinational's *global HR/employment rules*—all its cross-border
   - codes of conduct or ethics
   - employee handbooks
   - single-topic HR policies (like policies on discrimination/harassment, conflicts of interests, employee data protection, employee use of social media)
   - HR programs and guidelines (like HRIS platforms, whistleblower hotlines, expatriate/secondment programs, "bring your own device" programs)
   - health/safety protocols (cardinal safety rules, pandemic/crisis plans, duty-of-care for expatriates and international travelers, travel tracking and evacuation services)

2. A multinational's *global staff rules on business topics beyond HR*—all its cross-border directives or policies on operational matters like
   - insider trading
   - internal audit/accounting measures
   - bribery/improper payment
   - conflicts-of-interests
   - antitrust/competition
   - intellectual property
   - environmental compliance

3. A multinational's *global compensation/ benefits offerings*—all its cross-border (regional or global)
   - executive compensation plans
   - sales compensation (commissions and incentives) plans
   - one-off employee benefit plans (like tuition reimbursement, adoption reimbursement, retention bonus and severance pay plans)
   - insurance benefits (life, disability, D&O, medical)
   - Employee Assistance Programs
   - equity plans (broad-based or executive stock grants, options, RSUs, phantom stock)
   - expense reimbursement protocols
   - expatriate benefits programs

By "global HR initiative" we therefore mean workplace policies and employee benefits plans that a multinational headquarters launches internationally to advance its business needs across borders. (But we are not including exceptional, large-scale, transformational workplace disruptions like international restructurings, global reductions-in-force/redundancies, cross-border workforce integrations, multi-jurisdictional spin-offs, or multinational bankruptcies.)

When a multinational sets out to launch, update, refine or tweak a global HR initiative, the organization always seems to focus primarily on content: *What rules should our global HR code or policy impose? What benefits should our global benefits offering provide?* If, for example, the particular global HR initiative happens to be a code of conduct, the multinational will inevitably ask: *What topics should we include in our global code?* If the initiative is a policy on bribery/improper payments, expect the organization to ask: *How should we define "improper payment"—and should we address "facilitating payments"?* If the initiative is a

retention bonus plan, the multinational's lead questions will likely be: *How much should our retention bonus award? And can we have a clawback?*

These are all important content questions about the global HR initiative. Answering them is vital. But content questions are not the only vital questions when launching, updating, refining or tweaking a global HR initiative. In any global HR initiative, content questions should just be stage # 1 of a two-stage process. Equally vital—but too often overlooked or downplayed—are the stage # 2 questions of process, what we might call *launch logistics*: How to launch the global HR initiative so it sticks, binding overseas staff without exposing the multinational to too much liability. We address in our discussion here the nine logistical steps a multinational should consider taking to launch any cross-border HR initiative:

- Step 1: Document that overseas staff received information about—or solicit staff *acknowledgements* to—the global HR initiative
- Step 2: Decide on the number of versions
- Step 3: Repeal and align older and local non-conforming policies and plans
- Step 4: Enlist overseas affiliates to adopt, ratify and impose the headquarters initiative directly on their own staff
- Step 5: Translate employee communications about the global initiative as required
- Step 6: Comply with collective consultation obligations
- Step 7: Make any mandatory government filings and take any other legally-mandated technical steps
- Step 8: Account for employee vested rights
- Step 9: Correct oversights in previous initiatives

But before explicating each of these nine steps, we might pause to consider *why*. Why should a multinational spend time and resources attending to technical issues around something as seemingly simple as promulgating or updating an in-house staff rule or granting employees some new employee benefit? After all, launching a *domestic U.S.* HR initiative is usually straightforward (except that launch logistics get complex if the initiative is a mandatory subject of union bargaining or if it falls under ERISA employee benefits regulation). American employers under employment-at-will often just communicate their latest rule, handbook, program or benefit to stateside staff, declaring it applies from today forward, maybe collecting employee acknowledgements and reserving a right to change or discontinue the initiative at any time—sticking in the disclaimer that "this is not a contract."

Outside the U.S., though, the process around launching or even just updating an internal rule, code, program or benefit gets substantially more complex. And so a U.S. multinational headquarters intent on rolling out or tweaking some sort of internal HR initiative across foreign operations proactively needs to consider our nine logistical steps, to account for the realities of the "indefinite employment" regimes outside American employment-at-will. Failing to address these issues might mean the initiative does not "stick" (is unenforceable abroad), might make a purportedly-temporary initiative permanent—and might spark legal liability.

Step 1: Document that overseas staff received information about—or solicit staff *acknowledgements* to—the global HR initiative

Never "soft open" a new global HR initiative, slipping it onto the company intranet site and expecting affiliate employees worldwide to find it, read it, understand it, and agree to comply. Develop a proactive strategy for communicating and distributing the new cross-border HR initiative in a way that binds each affected employee worldwide.

- If the global HR initiative is a cross-border policy, rule or code, play out the hypothetical scenario of an overseas employee later disciplined for violating it who claims ignorance: *What? I never knew about that rule you buried on the headquarters intranet site… you never told me I had to follow it—certainly, I never agreed to it!*

- If the global HR initiative is an international compensation, benefit or equity plan, play out the hypothetical scenario of an overseas employee later held ineligible for a pay-out:

What? I never knew about that loophole buried in that obscure plan document tucked away on the headquarters intranet site… you never told me I was subject to that restrictive provision—certainly, I never agreed to it!

Inevitably in all jurisdictions worldwide, an employer trying to enforce a policy, rule, code or benefit-plan term may bear the burden to prove it had, in advance, duly communicated the relevant provision to the employee now challenging it. Be able to prove that each covered employee, including future new-hires, received notice of, and (ideally) agreed to comply with, the global HR initiative.

This leads into the ever-present issue of whether to collect wet-ink signed or electronically mouse-clicked *employee acknowledgments* to a global employer initiative. U.S.-headquartered multinationals often expect staff worldwide expressly to consent to a global HR initiative, particularly where the initiative is a cross-border code of conduct/ethics or an international compensation/ benefit/plan. Many American multinationals interpret the U.S. Foreign Corrupt Practices Act, Sarbanes-Oxley, Dodd-Frank and U.S. federal sentencing guidelines as requiring that employers be able to demonstrate they communicated various policies to employees and required them to comply. Consistent with that, law and best practices in certain foreign jurisdictions beyond the United States (Austria, Czech Republic and Finland are prime examples) all but require employee-signed acknowledgements when an employer changes or adds new workplace rules. Additionally, many countries around the world look to whether a workplace code, policy, rule or benefit is "contractual." Those legal systems (which include common law countries like Australia, Canada, England, Ireland as well as civil law jurisdictions like Belgium, Germany, Norway) elevate certain workplace initiatives to the level of executed employment contracts. A "contractual" HR policy needs to integrate into employees' written employment contracts, ideally as a signed amendment to the existing employment agreement.

These issues add up to an excellent reason for a multinational to collect, from staff worldwide, executed acknowledgements to a new global HR initiative. Employee acknowledgements to an initiative may not be mandated by law, but they can protect the multinational around the world. And so, perhaps, headquarters should insist that each employee worldwide expressly confirm having received and read the documents that constitute the initiative. Maybe the organization should even word the acknowledgement text to have employees affirmatively *agree to comply*.

Unfortunately it is not nearly so easy. Unfortunately the process for collecting staff signed or mouse-clicked acknowledgements outside the United States is surprisingly nuanced. But because domestically within the U.S. collecting *American* staff acknowledgements is fairly straightforward (facilitated as it is by management-friendly employment-at-will principles), headquarters risks overlooking the steep challenges to collecting duly executed acknowledgements *abroad*.

Before imposing any employee-acknowledgment requirement internationally, craft a compliance strategy that accounts for the four serious logistical challenges outside the United States: (a) presumptive coercion (b) ineffective employment contract amendment (c) non-signers and (d) proof problems:

a. **Presumptive coercion:** Courts in much of Northern Continental Europe and in some countries beyond deem employee-signed agreements, including staff acknowledgments, void as presumptively coerced. The issue is the inherent inequality of bargaining power between an employer and staff—almost like a contract with a minor or someone adjudicated mentally incompetent. These countries presume workers have no free choice when their boss orders them to sign a boilerplate form; law presumes the subtext to an employee acknowledgement request is *"sign—or you're fired!,"* even if management did not state the request quite so bluntly. In these

jurisdictions, staff acknowledgements may be worthless, deemed void as presumptively coerced.

b. **Ineffective employment contract amendment:** We mentioned that certain common law and civil law jurisdictions treat some employer initiatives as "contractual" and see an employee acknowledgement as amending the employment agreement. In these situations a *properly executed* acknowledgement may indeed make the HR initiative enforceable as "contractual"—but an overly-casual acknowledgement, including one electronically executed, may prove unenforceable if it falls short of local employment-contract-execution strictures. So check out and comply with local contract-execution strictures. Where an employee acknowledgement is deemed "contractual," draft and execute it as a full-blown contractual amendment. Some countries may even require a government filing.

   A related issue is the U.S. employer that tries to have it both ways, collecting up staff acknowledgements but sticking into them (or into the underlying HR initiative documents themselves) an employment-at-will disclaimer or a "this-is-not-a-contract" disclaimer. These disclaimers are endemic to the United States, creatures of U.S. employment-at-will, and are almost always inappropriate in other countries, even Canada. Outside the U.S. an employer should openly embrace the contractual nature of its HR initiatives. The best approach may be affirmatively declaring the initiative and the employee acknowledgement are overtly "contractual."

   The problem here is that outside the U.S., employment-at-will disclaimers and "this-is-not-a-contract" disclaimers can serve as an escape clause, freeing staff from having to comply with the initiative *precisely because* it is "not a contract." An excellent example is the 2014 Canadian case *Oliver v. Sure Grip Controls*, in which a Canadian provincial supreme court held an American employer's employment-at-will clause in its Canadian handbook rendered a severance pay cap unenforceable. (Sup. Ct. British Columbia, 2014 BCSC 321 (2/28/14)) The court opinion (¶ 48) says: "I cannot conclude the plaintiff's [severance] damages should be limited to those based in the Handbook. The Handbook…made it clear that the Handbook 'is not a contract of employment….'"

c. **Non-signers:** When a multinational insists on collecting up staff acknowledgments to a global HR initiative, headquarters far removed from "the field" may assume that, ultimately, all employees worldwide will sign on. But a 100% return rate on staff acknowledgements is all but impossible across big global employee populations. Where overseas staff prove skeptical or hostile to the underlying global HR initiative (particularly if employee representative bodies resist it), some stray employees may openly refuse to sign acknowledgements. Others may passive-aggressively neglect to return their acknowledgements, even after repeated reminders from the HR team. Indeed, hapless local HR may be all but powerless to force employees—especially powerful executives and labor representatives—to sign or click "I accept."

   Local HR has little leverage here: Outside employment-at-will, an employer does not have good cause to discipline a worker just for refusing or neglecting to acknowledge something. In one case, for example, a Beijing court reinstated a chief guard who had been fired for refusing to acknowledge a handbook-update. (*Hou* case, Beijing Intermediate People's Ct. no. 4, 11/26/09)

   Non-signers of an employee acknowledgement raise a serious "Achilles' heel" problem. A non-signer who later violates the policy or rule, or who later seeks to escape a restrictive benefit-plan term, might argue he is exempt precisely *because* he never signed. Invoking co-workers' executed acknowledgements in his own favor, the recalcitrant non-signer may argue

the policy, rule or plan reaches only those of his colleagues who signed on and agreed to it. At that point the multinational realizes—too late—it would have been better off not collecting signed acknowledgements at all. (This non-signer would not have this particular argument without the employee acknowledgement process in the first place.)

d. **Proof problems**: In-house human resources teams may have unimpressive records retaining and tracking employee acknowledgements over time. Three common proof problems are sloppy recordkeeping, sloppy follow-through and sloppy computer verification:

   - *Sloppy recordkeeping*: Years after staff across far-flung offices were thought to have signed or mouse-clicked some dimly-remembered staff acknowledgement, it can prove maddeningly difficult for HR to dig out that one specific executed form of this one particular employee who now needs to be held accountable for complying with a provision he now claims he never saw: *Surely Pranav must have submitted an acknowledgement at some point…but where is it now?*

   - *Sloppy follow-through*: New-hires who "onboard" after a cross-border code or HR policy launch may never get asked to sign acknowledgements. Even where the acknowledgement-collection process worked in the first round, the organization may fail to follow through collecting acknowledgements going forward.

   - *Sloppy computer verification*: Mouse-click acknowledgements are notoriously hard to verify after the fact, when a dispute later ends up in court. Meeting the employer's burden to prove a given employee actually clicked "I accept" one day long ago can be all but impossible years later, under inflexible and antiquated evidence rules in foreign courts with changing electronic-signature proof requirements. Often the best the I.T. team can do is to say: *Eva must have acknowledged it—or else she couldn't have logged onto our system!* That might be true, but it is not likely admissible evidence of an electronic signature.

Never insist on collecting employee acknowledgements to a global HR initiative without a proactive strategy accounting for each of these four logistical challenges. One strategy, for example, is to time the employee acknowledgement process to coincide with some significant discretionary bonus payment, stock award or pay raise—confer the bonus, award or raise only in exchange for an executed acknowledgement. Another strategy: Send the relevant documents to employees by certified mail, scrupulously retaining postal receipts.

Where collecting staff acknowledgements worldwide is not feasible, consider alternatives. One alternative is seeking collective buy-in from employee representatives, rather than individual employee acknowledgements, in jurisdictions where employees are represented. Another alternative: The local HR team distributes relevant documents personally to each employee (maybe handing them out during a training session); HR representatives then create (and sign) forms or log sheets memorializing the date and circumstances under which each named employee received the package.

Step 2: Decide on the number of versions

A multinational rolling out a new cross-border HR initiative should first decide whether it can get away with issuing one single global document worldwide, whether to bifurcate dual versions, or whether to spin off distinct local versions (or riders) for each affected country. These three possible approaches—one policy, two policies, or local country policies/riders—differ significantly. None of the three approaches works best every time. Selecting the most appropriate of the three approaches depends in large part on the topic of the cross-border HR initiative. Topics like ethics, insider

trading and bribery lend themselves to a single global version. Topics like discrimination, harassment, diversity, background checking/testing and whistleblower hotline communications can be more appropriate for bifurcated dual versions, especially where the sponsor multinational employs a clear majority of its worldwide workforce at headquarters with only small pockets of staff abroad. Inherently local topics like holidays, vacation, overtime and data protection may be most appropriate for aligned but separate local country-by-country policies—or a single high-level global policy plus local riders.

As to the pros and cons of these three approaches:

- **Single global version:** To promulgate just one single cross-border HR initiative document offers a streamlined and uniform global approach. One single global version always seems simplest and most conducive to cross-border alignment, and so the single-version approach is usually the default. Multinationals may say they need one global document to impose a uniform global rule, to streamline employee communications and to promote global unity.

  But a single global policy/code or benefits/compensation plan document is not always ideal. Rules, provisions and benefits appropriate for headquarters employees sometimes need tweaking or reworking abroad. For example:

  - A single global *data protection policy* risks extending restrictive rules like the onerous data protection laws of Europe to employee populations that do not otherwise enjoy or even expect these protections

  - A single global *anti-harassment policy* that ties the harassment prohibition to protected group status is too narrow for jurisdictions that prohibit so-called "moral harassment," "bullying," "mobbing" or "psycho-social harassment." But a global harassment policy that accommodates the broad "moral harassment" concept may be broader than the employer wants in jurisdictions like the U.S.

  - A single global *vacation or overtime pay policy* might not work internationally without local modifications, because of inherently-inconsistent vacation and overtime pay laws from country to country.

  - A single global *severance pay plan, equity plan or other employee benefits plan* may be unworkable internationally unless modified locally to account for local employment, benefits, securities and tax laws. Clawback provisions in plan documents are particularly susceptible to varying local interpretations.

- **Bifurcated dual versions:** Multinationals sometimes launch a domestic HR policy at headquarters plus a separate but aligned "rest-of-the-world" version for overseas staff. The two-version approach tends to be most common at multinationals with a strong headquarters "center of gravity"—those that employ many at headquarters but only pockets of staff scattered across foreign countries. Headquarters at these organizations may want to avoid letting "the tail wag the dog" by compromising a global HR initiative to accommodate overseas complications but "watering down" the program for the majority of the organization's staff based at headquarters. This is particularly true where headquarters is in the U.S. and subject to employment-at-will and America's unique, heavily-litigated discrimination laws. The bifurcated two-version approach can be most appropriate for topics like diversity and reduction-in-force selection where U.S. principles differ intrinsically from best practices abroad. For example, a U.S. government contractor likely has no business case for promulgating a global affirmative action policy that exports all the requirements on U.S. government contractors—but it might issue

a U.S. affirmative action policy plus a broader rest-of-the-world *diversity* policy. Another context where the bifurcated two-version approach works well is the global whistleblower hotline: Restrictive hotline rules under European Union data protection law compel a multinational to make compromises for European hotline communications that headquarters often prefers to avoid making in communications outside Europe. (This said, scrupulously-compliant organizations may make separate tailored hotline communications across European member states.)

- **Local versions or riders:** Employment laws differ from country to country. The most compliant way to impose any workforce initiative across more than one country is to tweak the wording locally, tailoring for each jurisdiction a version or rider that accounts for local nuances. A recent Australian case illustrates the issue. The court struck down a U.S. multinational's otherwise-robust global sex harassment policy because it glossed over a few Australia-specific nuances and "made no reference to the legislative foundation in Australia for the prohibition on sexual harassment." (*Richardson v. Oracle Corp*., Aust. Pty. Ltd, 2013 FCA 102, at ¶¶ 161-64) The court in that case seems to want multinationals to tweak global policies to account for nuances of local country law.

  Accounting for local differences is always a best practice to the extent that ignoring local law and custom is a bad practice. The trade-off, of course, is that coming up with aligned local versions or riders can get unwieldy, expensive and slow, and weakens the unifying character of a single global initiative document. Also, in practice sometimes some of the local versions get crafted less thoroughly than others, leaving gaps.

Step 3: Repeal and align older and local non-conforming policies and plans

Never launch a new or revised global HR initiative by imposing it "on high" from headquarters, "damn the torpedoes," heedless of whatever the organization may have done in the past. Instead, start by collecting up, and then repealing or aligning, all existing global and local HR documents (policies, rules, plans) that speak to the topic of the new initiative. Even look into unwritten practices. For example, in issuing a new global severance pay plan, first repeal any earlier global severance pay plan, then align the new global plan with local severance pay plans, and finally remember to account for past unwritten severance pay practices at overseas facilities. This all sounds obvious, but multinationals often overlook this "repeal and align" step, or do it incompletely or half-heartedly.

This step breaks into three sub-issues: Repeal obsolete headquarters initiatives, align other HR policies and harmonize formal work rules:

- **Repeal obsolete headquarters initiatives:** A multinational that issues, for example, a revised or updated international code of ethics, global bribery policy or regional sales compensation plan must repeal all earlier versions floating around. Do not just slap the latest and greatest updated version onto the company intranet; first, dig out and repeal each extant obsolete version. Otherwise some hapless foreign employee may later stumble across an old version and assume it controls. Worse, some clever employee threatened with discipline for breaching a new policy (or held to less-generous terms under a new compensation plan) may exploit the organization's sloppiness, insisting a looser—but still extant on the intranet—old version controls.

- **Align other HR policies:** A more complex scenario is reconciling the new headquarters code, rule or plan with inconsistent local offerings. In every affected jurisdiction, repeal or reconcile dissonant local HR

policies, aligning them with the new headquarters code/policy/plan. This can be a big job, but failing to do it gives locals leverage to flout headquarters edicts.

Global headquarters initiatives often contain provisions that clash with existing local HR communications on similar subjects. Even absent a head-on conflict, if the subject of a headquarters policy overlaps with any local HR policies, expect the language to be inconsistent and susceptible to interpretation disputes. For example, a global code of conduct may address data protection, discrimination/harassment, conflicts of interest/nepotism, expense reimbursement, business gifts and on-job alcohol/drugs in ways inconsistent with local affiliate protocols addressing these topics. As another example, a global severance pay plan may not align with severance pay clauses in overseas individual or collective employment agreements.

Failing to harmonize a global initiative with local offerings can cause real problems. Imagine for example a local salesman who makes a big sale by entertaining a government customer in a way that complies with a loose local policy against overt bribery but that violates a nuanced headquarters policy on improper payments. Headquarters will argue the strict global policy trumps the local subsidiary's lax local rule—but the salesman, local management and local labor judges may be sympathetic to the counter-argument that the local rule controls over the more distant headquarters edict—especially if the local policy is in the local language but the headquarters rule is in English (even if the global policy has the boilerplate clause saying in case of conflict the "stricter" standard applies).

Also align the new global initiative with past overlapping *headquarters* initiatives. For example, a new global bribery/payments policy better not contradict the bribery/payments clause in the existing global code of conduct.

- **Harmonize formal work rules:** Amend local work rules to accommodate or incorporate by reference global headquarters mandates. Jurisdictions including Belgium, Chile, Colombia, France, Greece, Japan, Korea, Poland and Slovakia force local employers to issue formal work rules (or so-called "internal regulations") listing every infraction subject to discipline. Some jurisdictions impose their written-work-rules mandate only at workforces exceeding a minimum size—ten employees in Japan, for example. The policy behind these mandates is workplace due process, analogous to the American criminal procedure ban on ex post facto laws: Employers should not be allowed to discipline workers for would-be infractions never previously prohibited.

  Local work rules present a real hurdle when headquarters launches a cross-border rule, code or policy. Imagine for example a multinational with a tough global insider trading policy whose Seoul affiliate had issued Korean work rules containing (say) 23 listed infractions—but without a specific rule on buying and selling stock. If the husband of some employee sold company stock during a black-out period, can the employer fire the wife for his infraction? Expect the employee to argue the dismissal illegal as not grounded in a violation of one of the 23 posted rules—the employer is invoking a rule on insider trading it never properly posted. A Korean labor court may reinstate with back pay. Headquarters forgot to require its subsidiary to amend its posted work rules to incorporate the global policy.

Step 4: Enlist overseas affiliates to adopt, ratify and impose the headquarters initiative directly on local staff

Multinationals typically employ staff worldwide through a network of local subsidiary affiliates—separately incorporated overseas employer subsidiaries and affiliates. Often the text of a multinational's global HR initiative purports to address "our employees worldwide" even where the headquarters corporation does not directly employ "our" overseas staff and is

merely the stockholder or parent company of separately-incorporated foreign employer entities. For example, headquarters might be a Delaware corporation called "Acme Widget Company, Inc." and Acme factory workers in Mexico might be employees of a separate entity incorporated under Mexican law, perhaps "*Acme Widget Compañía de México, S.A. de C.V.*"

This reality of international business structure has profound effects on how a multinational should impose a global HR initiative. The big but often-overlooked legal challenge is that a mother corporation launching a global HR initiative rarely has "privity of employment contract" with (that is, rarely directly employs) affected overseas staff. The global HR initiative will impose rules on, or deliver pay or benefits to, people with whom the sponsor has no direct legal relationship.

Too often multinational headquarters considers this issue a technicality (if headquarters thinks of it at all). Headquarters may just push ahead, issuing its global HR initiative directly, bluntly addressing it to "our employees worldwide" even though the headquarters entity, itself, does not employ anyone overseas other than perhaps a handful of seconded expatriates.

- **The problem—Why a headquarters entity should avoid imposing a global HR initiative directly on affiliate staff:** The mistake of a headquarters entity purporting to impose a global HR initiative directly on overseas affiliates' staff can trigger four potentially-significant grounds for liability exposure: (a) headquarters permanent establishment (b) headquarters as co-/dual-/joint-employer (c) void or impotent rule and (d) payroll law compliance:

    a. **Headquarters permanent establishment:** For corporate and tax reasons, a multinational headquarters entity often stakes out the position that it does not transact business overseas. The headquarters entity defends the position that the conglomerate transacts business in overseas markets only through its network of locally-incorporated foreign subsidiaries and affiliates. Only the local entities file local corporate registrations, file local tax returns, and are subject to local court jurisdiction.

    But what if a multinational's headquarters entity sets terms and conditions of employment for staff in foreign jurisdictions by directly issuing detailed HR codes, policies and plans for overseas workplaces? Perhaps directly setting detailed terms and conditions for overseas workforces meets the definition of doing or "transacting" business in the jurisdiction and so triggers (or is a factor that with other factors triggers) a so-called "permanent establishment" subject to corporate registration, corporate tax filing mandates, and personal jurisdiction. Multinationals usually take steps to *avoid* such a potentially-catastrophic result.

    b. **Headquarters as co-/dual-/joint-employer:** If a multinational headquarters entity sets terms and conditions of employment overseas by directly imposing HR initiatives (codes, policies, plans) on overseas staff, then an employee in a dispute might sue both the local employer entity as well as the headquarters parent entity—co-defendants—arguing headquarters is a co-/dual-/joint-employer precisely because it set terms and conditions of employment via its global HR initiatives (codes/policies/plans). This is not just a theory; this claim gets asserted in labor courts regularly, particularly in Latin America and even in the United States. (*Cf. Brown v. Daiken America*, 756 F.3d 219 (2d Cir. 2014) (U.S. employee states Title VII claim against both U.S. subsidiary employer and its Japanese parent corporation, held to be a "single integrated enterprise with its American subsidiary to be properly named as a co-defendant"))

U.S. parent companies usually *avoid* taking steps that could be argued to set terms ands conditions of employment for staff not on the parent's own payroll—think of "double breasted" construction contractors and fast food franchisors. Be as careful when issuing global HR initiatives.

c. **Void or impotent rule:** Few jurisdictions will enforce a would-be workplace rule or policy that the employer never bothered to promulgate. A work rule issued by a foreign overseas parent—for example, an anti-bribery rule in a headquarters-issued global code of conduct—may be unenforceable if the actual employer (the local entity) never ratified, adopted or implemented it.

   A clear example is Russia, which requires that the "management body" (board of directors) of a Russian-incorporated entity formally approve and implement any workplace policy imposed on company staff. A work rule issued by a foreign overseas parent—think of the anti-bribery provision in the headquarters global code of conduct—may be unenforceable if never implemented by the Russian directors. The same analysis applies worldwide where the local subsidiary's corporate by-laws or "statutes" require a director resolution to implement a new company policy.

   For that matter, corporate-law analysis aside, any employee anywhere in the world disciplined for violating a headquarters-issued mandate can raise the technical argument under employment law that a rule is unenforceable if the local employer never issued or ratified it. The would-be "rule" is just a precatory statement of a third party with no power to set employment policy in this workplace. Employment law does not force workers to comply with wishes of third parties, even those that might happen to own stock in the employer.

d. **Payroll law compliance:** Where a multinational issues a global *compensation or benefits* plan, even if headquarters itself will fund the benefit, the organization is likely subject to local payroll laws requiring reporting/withholding/contributions to local tax and social security agencies. Without a local taxpayer identification number and with no local business presence, the headquarters entity is probably in no position to tender compensation or benefits under the plan directly to overseas staff. Headquarters may have to enlist local subsidiaries to tender payments funded by headquarters. Subsidiaries may have to ratify the plan.

- **The solution—Enlist affiliates to adopt, ratify and impose the headquarters initiative directly on their own staff:** Fortunately there is a conceptually simple solution, almost a "magic bullet" for resolving all four of these potentially-serious problems: Headquarters imposes the global HR initiative on its overseas employer affiliate entities, but not on any overseas employees as individuals. Headquarters enlists each overseas employer affiliate in the new initiative, requiring it adopt, ratify and impose the initiative more or less verbatim on local staff.

  As a practical matter this means that when launching some new global HR initiative, headquarters should engage each affiliate worldwide that employs affected staff, pushing down the task of adopting and ratifying the initiative locally, imposing it on each affiliate's own respective workforce. Instruct overseas management to take whatever steps necessary under local law and custom to implement the initiative locally. Management of each affiliate must do whatever it usually does when launching an analogous but home-grown HR initiative

(whether that initiative be an advisory guideline, HR program, binding work rule or employee benefit) so it sticks and protects the employer's interests.

Specifically which particular steps local management needs to take to adopt, ratify and impose a new global HR initiative depends on three factors: (1) what type of HR initiative it is—advisory guideline, HR program, binding work rule or employee benefit (2) the requirements of local law and local past practices for launching this particular type of HR initiative, and (3) which implementation tasks headquarters retains responsibility for at the global level, versus which ones get pushed down to local affiliates.

Depending on these three factors, local overseas affiliates might have to take some or all of the following steps to adopt, ratify and impose the headquarters HR initiative on local staff:

- *All-hands transmission memo*: At minimum, for an overseas affiliate to adopt, ratify and impose a headquarters HR initiative on local staff requires the local country director—the local affiliate's top officer—to issue an all-hands employee communication (memo, email, intranet posting) attaching the initiative document and saying something to the effect of: *Please read the attached, from our corporate headquarters. Going forward, this applies to you as our own local policy. We require you comply with the provisions in this attached document on the job every day.*

  If headquarters wants to collect staff acknowledgements (above, "Step 1"), instruct the local HR team to get acknowledgements to this country director transmission memo.

  If the global HR initiative purports to reach not only staff but also non-employee "business partners" (consultants and independent contractors), then local management's transmission memo will also have to address non-employee services providers. Be careful not to impose the initiative on non-employees in a way that undermines the legitimacy of their classification status.

- *Standing policy going forward:* Going forward (after issuing the transmission memo), local management should include some reference to this headquarters initiative within its standing package of local HR rules, polices and offerings. New hires might need to receive a copy.

- *Board of directors ratification:* As mentioned, corporate law in some jurisdictions (Russia, for example) and bylaws of some overseas subsidiaries require that the board of directors of a local employer affiliate pass a resolution adopting certain HR initiatives. Do this if required.

- *Local version or local rider:* The content of the particular global HR initiative might raise technical issues that push local overseas management to insist on making tweaks, spinning off a separate but aligned local version or local rider. (See above, "Step 2.") As one example, a global whistleblower hotline communication will likely need local modifications in Continental Europe.

- *Local work rules/policies amendment:* As mentioned, if the global HR initiative amounts to (or contains) new staff rules, and if the local overseas affiliate has issued a formal "work rules" document, local overseas management might have to amend existing work rules to accommodate or reference the global initiative. Or a local affiliate might have to amend or repeal otherwise-inconsistent local HR polices. (See above, "Step 3.")

- *Translation:* Where headquarters issues its global HR initiative document in English only, in some jurisdictions a local-language translation might be advisable or mandatory. (See below, "Step 5.")

- *Employee consultation:* Local labor law may require consulting with employee representatives before imposing certain new initiatives. Whether consultation is necessary also depends on the nature of internal collective bargaining relationships. (See below, "Step 6.")

- *Government filing and other legally-mandated steps*: In some countries law requires filing or registering documents regarding certain HR initiatives with government labor or data protection agencies. Some global initiatives in some countries might require formal employee notices, employee consents or other legally-mandated steps. (See below, "Step 7.")

- *Global compensation/benefit plan:* As mentioned, where the global HR initiative is a compensation or benefits plan, even where headquarters funds the program local overseas payroll laws might apply. Overseas subsidiaries might have to tender payments in the first instance, even if reimbursed by headquarters.

When enlisting local management to take these implementation steps to adopt, ratify and impose a global HR initiative on local workforces, headquarters should set a firm implementation deadline. After the deadline, follow up and require local managers to prove they complied. Once they have, headquarters becomes free to post the initiative documentation on its global intranet portal or otherwise communicate globally, directly from headquarters, treating the global initiative as a headquarters program. If in the future a challenge arises overseas alleging one of the four implementation shortcomings we discussed (headquarters permanent establishment; headquarters as co-/dual-/joint-employer; void or impotent rule; payroll law compliance), the local overseas affiliate can argue that it—not headquarters—directly imposed this initiative on its own local staff. Yes, for convenience, clarity, efficiency and global alignment headquarters adopted a sort of "shared services" model, posting or communicating information about the initiative company-wide on globally-accessible platforms. And yes, headquarters administered this particular program. But (the local overseas affiliate will argue) this initiative reaches each respective local overseas employee because the local employer affiliate adopted, ratified and imposed the program directly.

Step 5: Translate employee communications about the global initiative as required

A multinational that believes workforces across its overseas facilities speak fluent English may prefer the speed, simplicity and cost-savings of global HR communications in a single English-language version. Some multinationals have designated English their "official company language"—even some headquartered outside the English-speaking world.

Unfortunately, even where a single English-language package of global HR documents and communications might otherwise be practical, the texts might be subject to *language or translation mandates*. Having declared English "our official company language" does not confer a license to violate the world's language/translation laws. Depending on the nature of a global HR initiative and on the countries involved, headquarters might need a global translation strategy. Ascertain which of the affected non-English-speaking jurisdictions prohibit HR communications or work rules in a foreign language, and craft a strategy to comply.

These language/translation mandates are nuanced—more complex than a simple yes-or-no answer to the binary question *Does local law compel us to translate?* Countries around the

world impose language/translation legal rules in four discrete tiers:

(1) *flat prohibitions* that impose a penalty if the employer communicates with staff or issues work rules in a foreign language

(2) *enforceability prohibitions* that nullify an employer initiative if certain HR documents or employee communications appear in a foreign language

(3) *de facto translation requirements* that do not address language/translation at all but that require employers to present certain documents to government agencies or worker representatives—and that deem foreign-language versions not to comply

(4) *fraud, duress and hostile reception in local proceedings*; that is, legal regimes that do not invalidate foreign-language employer communications per se but that strictly construe foreign-language HR documents, reluctant to enforce them against local staff

A multinational promulgating a global HR initiative will be primarily interested in the first- and second-tier jurisdictions—those that flatly prohibit or nullify English-only text. Depending on the content of the initiative, Belgium, Chile, France, Iraq, Kuwait, Mongolia, Portugal, Quebec, Turkey, Venezuela, much of Central America and other places can fall into these first two tiers. But factor in penalties for violating language/translation laws, which range widely, from stratospheric to zero:

- One multinational once got fined €500,000 plus €20,000 per day for distributing English-language HR documents to French staff in violation of France's *Loi Toubon* language law. (Decision of Versailles Ct. App., Mar. 2, 2006 *interpreting* French Labor Code arts. R.1323-1, L.1321-6, R.5334-1, L.5331-4)

- At the other extreme, Kuwait's Arabic-language HR communications mandate does not impose any monetary penalty at all. (Kuwait Law of Labor in the Private Sector No. 6 2010, art. 29)

Step 6: Comply with collective consultation obligations

Management cannot necessarily implement a new HR initiative unilaterally as a *fait acompli*. Getting a global HR initiative to "stick"—making its terms enforceable against an employee who may later violate them—often requires complying with collective labor obligations, consulting or bargaining over the proposed initiative in affected countries with local worker representatives (trade union "cells," works councils, health and safety committees, employee advocates, employee delegations, worker ombudsmen and the like).

Labor laws worldwide impose consultation requirements analogous to the idea of a "mandatory subject of bargaining" under U.S. labor law—employers around the world cannot necessarily change terms or conditions of employment by unilaterally launching new policies, rules or even benefits until sitting down with worker representatives and "informing and consulting" (in Germany, sometimes, "co-determining") or bargaining over the proposed initiative. The consultation/bargaining obligation can be particularly daunting where management's proposal might materially *decrease* terms and conditions of employment for at least some staff.

Usually this consultation/bargaining obligation arises only where management already has an ongoing bargaining relationship with a standing body of worker representatives (which are common in many jurisdictions)—but China, Japan and under a few extreme scenarios European countries actually impose duties to consult or bargain with ad hoc worker representatives over management proposals even where the employer is union-free and has no standing labor relationships.

Expect a consultation/bargaining obligation to reach most any global HR initiative that headquarters wants to launch. Labor law worldwide teems with unfair labor practice cases

arising out of unilaterally-implemented headquarters initiatives. Just as U.S. labor law requires unionized employers to bargain over changes to HR policies as mundane as dress codes (*see Salem Hospital Corp.*, 360 NLRB No. 95 (2014)), the consultation/bargaining obligation abroad can reach routine changes in work rules (*see Hou* case, Beijing Intermediate People's Ct. no. 4, 11/26/09 (unilateral update of employee handbook void where implemented without consulting employee representatives)) In one famous case a German labor court invalidated an American headquarters-issued code of ethics in Germany because the German subsidiary had not consulted over the code with its German works council. (Labor Court of Appeals *LAG*, Dusseldorf, opinion of Nov. 14, 2005, *affirming* Labor Court of Wuppertal)

When launching a global HR initiative, talk to overseas management-side labor liaisons—management's local in-house teams that bargain with worker representatives on behalf of the employer. Give them an early "heads-up" about the incoming initiative. Strategize over local labor consultation/ bargaining dynamics and timing. Take the steps necessary to comply with local employee consultation obligations.

Step 7: Make any mandatory government filings and take any other legally-mandated technical steps

One part of launching a global HR initiative is complying with local government filing mandates. Certain jurisdictions require employers file documents disclosing various internal HR programs; for example, publicly traded American companies often file their codes of conduct, insider trading policies, whistleblower hotline policies and stock option plans with the U.S. SEC, and U.S. federal government contractors routinely make government disclosures regarding their affirmative action plans to the U.S. OFCCP. ERISA-regulated employee benefit plans might get filed with the IRS. Similarly, employers overseas may have to file papers disclosing certain HR programs to local government agencies. But the very American multinationals that scrupulously make all their SEC, OFCCP and ERISA filings might resist or overlook obligations to submit internal HR documents to *foreign* governments.

Filing or registering certain HR codes, policies or plans with foreign governments may indeed be necessary to make these initiatives effective locally. For example, French employers must file codes of conduct with France's Labor Inspectorate or a French labor court. Chilean employers must file any HR policy inconsistent with company work rules (*Reglamentos Internos de Orden, Higiene y Seguridad*) with the Chilean Labor Board or Ministry of Health. And certain data protection authorities in Europe require employers disclose internal HR systems that "process" employee data (payroll systems, human resources information systems, whistleblower hotlines, travel-tracking software and the like). Also, global equity and stock option plans might trigger filing requirements with local tax and securities regulators.

Be sure to make whatever overseas filings are necessary as to a global HR initiative. Also take whatever other legally-mandated technical steps the global initiative triggers. For example, depending on the nature of the initiative and the jurisdictions at issue, legally-mandated technical steps beyond government filings may include:

- making formal notifications to employees about HR data being processed
- collecting employee consents
- amending subsidiary-to-headquarters data export agreements
- renegotiating contracts with local HR services providers

Step 8: Account for employee vested rights

In discussing how to launch a new global HR initiative, for the most part we have addressed initiatives that make neutral or forward-looking changes with no significant deleterious impact on employees—policies, rules or codes enforceable in the future, as circumstances arise going forward, and new

plans that award extra benefits. But some global HR initiatives immediately and materially reduce the pay or employment terms of at least some staff, here and now. For example, a new regional sales compensation plan might reduce commissions effective immediately. Or a new global no-smoking policy may be intolerable to heavy smokers in countries that still tolerate workplace tobacco. A global co-worker-dating restriction might disrupt a branch office full of open workplace romances. A random-drug-testing policy might spark blowback in a data-privacy-sensitive jurisdiction like Continental Europe.

Outside employment-at-will, employees enjoy "vested rights" in their current terms/conditions of employment. Management cannot necessarily abrogate those rights unilaterally. Where a new global HR initiative materially cuts terms or conditions of employment abroad, the employer will have to take steps to account for the infringement on vested rights. These initiatives require a special, tailored strategy consistent with applicable law.

Step 9: Correct oversights in previous initiatives

In rolling out a new global HR initiative scrupulously accounting for the above eight steps, along the way headquarters might discover that *previous* company initiatives launched less rigorously. For example, imagine that a headquarters team rolling out a new version of the global bribery/improper payments policy duly accounts for our eight logistical steps—but along the way realizes that, years before, headquarters had rushed out the current global code of ethics without touching all these procedural bases. The new bribery policy may be fully enforceable, but that legacy ethics code could be vulnerable to real enforceability challenges. Perhaps some salesman at the Paris office could violate the ethics code but then argue it is not binding because the Paris subsidiary entity never adopted or ratified it. Or maybe the salesman could point out the code is in English, violating the *Loi Tubon* French language law. Or there might be an argument management never consulted over the ethics code with the Paris works council. And perhaps the salesman's electronic assent acknowledging the code is inadmissible under French evidence rules.

We discussed the eight logistical issues above in the context of launching a *new* global HR initiative before it "goes live." But many global HR initiatives already promulgated and purportedly in place today originally got rolled out without scrupulous attention to all the process steps. These codes, rules, policies and plans could suffer from shortcomings exposing them to viable enforceability challenges. Where a multinational failed properly to implement its current package of cross-border codes of conduct, work rules, HR policies and international benefits offerings, a best practice is to "backstop"—go back and correct oversights in implementation. The alternative is to proceed unprotected, with possibly-unenforceable rules and programs.

* * *

A multinational headquarters launching a global HR initiative—a cross-border employment rule, staff rule on a business topic beyond HR, or compensation/benefits offering—naturally focuses first on content: *What should the text of our new cross-border policy, code, rule or benefits plan say?* But drafting the content of the global HR initiative is merely the first stage in a two-stage process. After coming up with the documents that constitute the new initiative, headquarters needs to answer an entirely separate, often more complex question: *How are we going to launch this program in a way that effectively imposes it on our staff overseas?* That breaks down into a number of vital logistical steps. To overlook these process issues could threaten the entire initiative.