

## Global HR Hot Topic

### Global Code of Conduct Drafting Checklist (part 1)

#### Challenge:

Drafting an internal (“ethics”) code of conduct with worldwide reach raises questions as to which topics to include, and which to exclude.

Drafting an internal global code of conduct that imposes ethics rules and compliance standards on employees across a multinational’s worldwide subsidiaries raises the question of which topics to cover—and which to omit. A Google search for “code of conduct” yields dozens of samples; the easy temptation is simply to copy some other multinational’s code. The problem with the model-form approach, however, is that each multinational’s unique business operations give rise to special needs. A code of conduct should cover only those topics which the issuing organization has an actual business case to regulate. The needs of government contractors differ from the needs of publicly-traded businesses, which differ from the needs of non-profits, which differ from the needs of organizations operating in the world’s trouble spots. In addition, many provisions in a well-drafted code of conduct inevitably reflect the issuer’s specific *business sector*—an oil company’s code looks quite different from a bank’s.

In short, someone else’s code of conduct might make an interesting example, but a best practice for drafting an internal ethics code is to use a topic-by-topic checklist to craft a bespoke code that meets the issuing organization’s particular business needs without including anything extraneous. Consider whether to include these topics:

#### Pointer:

Check that an internal code covers each topic for which there is a business case. Adapt each clause to account for realities of overseas workplaces. Exclude local human resources topics better addressed in individual employment agreements, or in local employee handbooks.

- **Introduction stating core values:** Internal codes of conduct usually open with a statement, often from the chief executive officer, explaining the organization’s core values and the reasons it is imposing a global code.
- **Statement of purpose and compliance philosophy:** Any multinational that imposes a global code of conduct will do so largely in an effort to comply with applicable laws. The vast majority of “applicable” laws are local laws imposed by the local host countries in which a multinational operates. On top of that, a multinational’s headquarters country may impose a handful of legal mandates that extend internationally. Indeed, overseas compliance with *the US* set of “extraterritorial” laws (FCPA, SOX, securities laws, international trade laws, discrimination laws, etc.) is what drives many US-based multinationals to implement codes of conduct. The code-drafting issue here is that multinationals too often neglect to explain to overseas employees that certain headquarters-country laws really do reach abroad. Without such an explanation, a US multinational’s overseas workers may doubt that they really have a legal obligation to follow *American* laws. But be careful to word any such compliance mandate carefully, to account for doctrines in some Eastern European and other countries that prohibit imposing foreign laws locally.



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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■ **Discrimination / equal employment opportunity:**

Some US multinationals may transplant robust American anti-discrimination provisions (often labeled “equal employment opportunity”) from US handbooks straight into a global code of conduct. Prohibiting illegal discrimination across worldwide operations is of course a vital and legally-mandated goal. But US-based multinationals need to deconstruct their US-drafted discrimination rules and rebuild them in a way that accounts for the global context. A key issue here is the code’s listing of protected groups: In the US, discrimination laws focus on protected groups, but some other countries, like Belgium, impose an obligation of total equality, and no group can be singled out for affirmative action. Further, certain groups protected in the US are not protected abroad, while many countries outside the US impose their own unique protected categories. A catch-all clause (“...or any other group protected by applicable law”) may be ineffective, given the doctrine of interpretation by which included factors predominate over omitted ones. One less-than-ideal strategy is not to list groups at all, but to invoke “applicable law.” A separate issue is accounting for the narrowness of the “extraterritorial effect” issue: US discrimination laws reach abroad, but only to protect a tiny sub-set of most US multinationals’ overseas workforces—foreign-employed US citizens. Too many global discrimination provisions seem to assume US discrimination laws apply to everyone abroad.

■ **Harassment:** Code of conduct harassment provisions lifted from US handbooks fall short in jurisdictions (such as some in Europe) that impose a broad concept of so-called “moral harassment,” “bullying,” “mobbing,” or “psycho-social harassment”—what used to be known stateside as *non-actionable* “equal-opportunity harassment” and what US states are only now considering regulating as “abusive work environment.” Many US-drafted international harassment provisions persist in defining “harassment” as unwelcome behavior based on a *victim’s*

*membership in a protected class*, but that definition is too narrow for those jurisdictions that legislatively prohibit abusive workplace behavior unlinked to protected-group status. A harassment prohibition in a given jurisdiction should be broad enough to include all locally-actionable harassment. A separate problem is that US-drafted harassment provisions tend to be too heavy on *co-worker dating restrictions*. In many countries these provisions, even if they merely require reporting a relationship, are offensive and virtually impossible to enforce.

■ **Diversity:** US-based multinationals sometimes include a diversity provision in their global codes of conduct, often lifted directly from the organization’s domestic US handbook or diversity communications. But any robust US-style diversity program will need radical reinvention outside the US. Avoid a diversity provision in any globally-applicable code of conduct unless the outside-US diversity program, goals, and metrics have been painstakingly tailored for the international environment.

■ **Conflicts of interest:** Many global codes contain provisions on employee conflicts of interest, such as prohibitions against contracting with relatives and against employing former government officials. Often these provisions also address moonlighting (employee holding side job or position on board of directors at competitor or supplier). Keep any globally-applicable conflicts provision flexible enough for regions where family relationships play a vital part in every-day business, such as the Arab world and Latin America.

■ **Bribery:** Local laws in probably every country prohibit bribing local government officials. In addition, extraterritorial laws in Organisation for Economic Cooperation and Development (OECD) countries prohibit multinationals from bribing or making improper payments to *foreign* government officials. The US law on this point, the Foreign Corrupt Practices Act, is a particularly-robust and aggressively-enforced statute that reaches accounting notations of certain

payments. Multinationals—particularly those that sell to or need licenses from foreign governments—need tough code of conduct anti-bribery provisions. Indeed, the bribery/improper payments code provision will in many cases be among the most vital.

■ **Business gifts to non-government contacts:** While US FCPA law prohibits overseas bribery of, and improper payments to, *government officials*, a growing trend is for employers (and even some countries’ laws) to prohibit “bribes” to *non-government* actors, such as payments to get business from customers, or such as gifts from suppliers. Global codes of conduct increasingly address this. Any such provision should be carefully thought-through: A payment to procure business from a private company is in certain respects different from a bribe or improper payment to a government official.

■ **Money laundering/financing terrorism:** Employers in the financial-services sector often impose code provisions that address money laundering and so-called “know your customer/client” rules. Codes also address compliance with US executive orders and regulations on terrorist financial matters, such as so-called “list-scrubbing” obligations meant to prohibit payments from specific suspected terrorists—an issue particularly acute for non-profits.

■ **Embargo/anti-boycott and foreign trade:** US trade laws with extraterritorial effect prohibit doing business in certain black-listed countries and prohibit complying with the Arab boycott of Israel. US-based multinationals often impose code provisions on compliance with these laws, although some countries (particularly in Eastern Europe) prohibit requiring locals from following foreign laws. As such, compliance with US trade restrictions raises special issues, in certain jurisdictions, which a code of conduct trade provision should address.

*This checklist will conclude with our August 2009 Global HR Hot Topic*

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