# **COMMENT: Extraterritorial Application of Title VII and the Americans with Disabilities Act: Have Statute, Will Travel**

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**Text**

**[\*191]** I. INTRODUCTION

American multinational employers breathed a sigh of relief when the United States Supreme Court in *EEOC v. Arabian American* ***Oil*** *Company* ***[\*192]*** *(Aramco)* [[1]](#footnote-2)1 affirmed the Fifth Circuit Court of Appeals by holding that their foreign subsidiaries employing United States workers [[2]](#footnote-3)2 did not have to comply with the United States employment discrimination laws of Title VII of the Civil Rights Act of 1964 (Title VII). [[3]](#footnote-4)3 This relief was short-lived, however, because Congress subsequently passed the Civil Rights Act of 1991 [[4]](#footnote-5)4 which amended Title VII and the Americans with Disabilities Act (ADA) [[5]](#footnote-6)5 to provide for extraterritorial application of Title VII and the ADA. In doing so, Congress effectually overruled the *Aramco* decision by mandating the worldwide application of federal employment laws. [[6]](#footnote-7)6

As a result of these extraterritorial amendments, Title VII and the ADA now apply abroad if the employee is a United States citizen and the employer is American or is controlled by an American employer. [[7]](#footnote-8)7 The amendments also provide a defense to the employer's otherwise unlawful discrimination if compliance with Title VII or the ADA would cause the employer to violate the laws of another country. [[8]](#footnote-9)8

Although congressional intent regarding key aspects of the extraterritorial amendments is vague, in October 1993, the Equal Employment Opportunity Commission (EEOC) issued a new policy statement for Title VII and theADA outlining how it will determine whether a foreign employer is American, how it will determine when an American employer controls a foreign corporation, what constitutes a foreign law, and under what circumstances the existence of a foreign law will cause a violation of Title VII or the ADA. [[9]](#footnote-10)9

**[\*193]** The Civil Rights Act of 1991 and the EEOC's aggressive interpretation of it have vastly expanded the scope of Title VII and the ADA's application outside the boundaries of the United States. [[10]](#footnote-11)10 In the future, it will be very difficult for an employer to show that, at a minimum, it is not controlled by a United States employer and therefore not subject to United States employment discrimination laws. In addition, the EEOC's narrow interpretation of the Foreign Laws Defense [[11]](#footnote-12)11 has effectively closed the only defense an employer could raise.

This Comment argues that, under most circumstances, United States employment laws should not apply outside the boundaries of the United States, especially under the EEOC's current approach. [[12]](#footnote-13)12 While at first blush this contention may seem draconian, it must be noted that in many cases Title VII does not apply to United States citizens *in the United States.* [[13]](#footnote-14)13 Extraterritorial application of United States employment law creates **[\*194]** a myriad of problems relating to issues of sovereignty, cultural differences, and conflict between United States and foreign laws. The application of United States employment laws abroad also hampers the ability of United States corporations to compete on a worldwide scale. In addition, a United States employee working abroad will often already be protected by the host country's employment discrimination laws. [[14]](#footnote-15)14

Part II of this Comment discusses the historical background of the extraterritorial application of Title VII, including the *Aramco* case and its abrogation by Congress. Part III discusses the EEOC policy statement and the factors examined to determine whether a corporation will be considered an American employer, what factors determine whether a foreign employer is controlled by an American employer, and the defenses available to an employer against the extraterritorial application of Title VII and the ADA. Part IV discusses the problems associated with the EEOC's approach, ramifications for United States employers operating overseas, and appropriate circumstances for application of Title VII and the ADA abroad. Finally, Part V suggests options for Congress and the courts.

II. HISTORICAL BACKGROUND OF EXTRATERRITORIAL APPLICATION OF TITLE VII

*A. The Aramco Decision*

In the 1991 *Aramco* decision, the United States Supreme Court held that Title VII [[15]](#footnote-16)15 did not apply outside the boundaries of the United States. [[16]](#footnote-17)16 **[\*195]** In this case, Mr. Boureslan, a naturalized United States citizen, was born in Lebanon [[17]](#footnote-18)17 and employed as an engineer by Aramco Services Company (ASC), a Delaware corporation with its principal place of business in Houston, Texas. [[18]](#footnote-19)18 ASC transferred Boureslan to Saudi Arabia to work for ASC's parent company, Arabian American ***Oil*** Company (Aramco), a Delaware corporation with its principal place of business in Saudi Arabia. [[19]](#footnote-20)19 Mr. Boureslan claimed that his supervisor harassed him "on account of his race, religion and national origin" while he was employed in Saudi Arabia. [[20]](#footnote-21)20 ASC terminated Boureslan in 1984, and he subsequently filed suit against ASC and Aramco under Title VII. [[21]](#footnote-22)21 Aramco responded by claiming that Title VII did not apply to Boureslan's employment in Saudi Arabia, and therefore, the court should dismiss all claims for lack of jurisdiction. [[22]](#footnote-23)22

Both the United States District Court for the Southern District of Texas [[23]](#footnote-24)23 and the Fifth Circuit [[24]](#footnote-25)24 held that the language of Title VII did not demonstrate that Congress expressed a clear intent to apply Title VII overseas. [[25]](#footnote-26)25 In rejecting Boureslan's policy arguments for extraterritorial application, [[26]](#footnote-27)26 the Fifth Circuit noted:

**[\*196]** We cannot ignore strong countervailing policy arguments against the application of Title VII abroad. The religious and social customs practiced in many countries are wholly at odds with those of this country. Requiring American employers to comply with Title VII in such a country could well leave American corporations the difficult choice of refusing to employ United States citizens in the country or discontinuing business. [[27]](#footnote-28)27

Boureslan subsequently appealed to the United States Supreme Court. [[28]](#footnote-29)28 In an attempt to prove that Congress indeed expressed an intent for Title VII to apply overseas, Boureslan pointed to the Alien Exemption provision of the Act. [[29]](#footnote-30)29 Relying on what was known as the "negative inference argument," [[30]](#footnote-31)30 Boureslan asserted that the provision, which exempts from Title VII's coverage an employer who employs aliens outside the United States, is evidence of Congress's intent to apply Title VII to American citizens working abroad for domestic companies. [[31]](#footnote-32)31 Boureslan argued that by negative implication, when Congress explicitly excluded *aliens* employed outside the United States from Title VII's protection, it must have intended to provide relief for *non-aliens*, or more properly, United States citizens. [[32]](#footnote-33)32 Otherwise, Boureslan argued:

If Congress believed that the statute did not apply extraterritorially, it would have had no reason to include an exemption for a certain category of individuals employed outside the United States. Because the statute's jurisdictional provisions cannot possibly be read to confer coverage only upon aliens employed outside the United States . . . Congress could not rationally have enacted an exemption for the employment of aliens abroad if it intended to foreclose all potential extraterritorial applications of the statute. [[33]](#footnote-34)33

**[\*197]** Chief Justice Rehnquist, speaking for a majority of the United States Supreme Court, rejected this "negative inference" argument. [[34]](#footnote-35)34 The Court held that there was insufficient evidence to conclude that Congress intended Title VII to apply extraterritorially. [[35]](#footnote-36)35 The Court noted that Title VII did not specifically exempt foreign employers hiring United States citizens abroad,did not set forth guidelines for overseas enforcement, and did not address conflicts with foreign laws and procedures. [[36]](#footnote-37)36 In affirming the lower courts' decisions, the Supreme Court broadly stated that "Congress knows how to place the high seas within the jurisdictional reach of a statute." [[37]](#footnote-38)37 Thus, the Court invited Congress to amend Title VII to apply overseas should it be so inclined. [[38]](#footnote-39)38

*B. Congress Provides Intent of Extraterritorial Application*

In 1991, Congress accepted the United States Supreme Court's offer. [[39]](#footnote-40)39 Congress included section 109 in the Civil Rights Act of 1991 entitled "Protection of Extraterritorial Employment." [[40]](#footnote-41)40 This section amends both Title VII and the ADA [[41]](#footnote-42)41 to provide the intent of extraterritorial application the Supreme Court maintained was missing. [[42]](#footnote-43)42 Among other things, section 109 amends Title VII and the ADA to provide the following: (1) " 'Employee' includes, with respect to employment in a foreign country . . . an **[\*198]** individual who is a citizen of the United States"; [[43]](#footnote-44)43 (2) Title VII and the ADA will cover discrimination against United States citizens abroad if engaged in by an American employer or by a foreign corporation controlled by an American employer; [[44]](#footnote-45)44 (3) Clarifies that neither Title VII nor the ADA will apply to "the foreign operations of an employer that is a foreign person not controlled by an American employer"; [[45]](#footnote-46)45 (4) Identifies factors to consider in determining whether an American employer controls a foreign corporation, including the interrelationship of operations, common management, centralized control of labor relations, and the common ownership or financial control of the two entities; [[46]](#footnote-47)46 and (5) Provides a defense for violations of Title VII and the ADA if compliance with those statutes "with respect to an employee in a workplace in a foreign country," would cause a covered entity to "violate the law of the foreign country" in which such workplace is located. [[47]](#footnote-48)47

Congress included the above provisions of the Act late in its deliberation process without a great deal of debate on the language or its meaning. [[48]](#footnote-49)48 As a result, the legislative history of the section is sparse, and Congress's intent as to the breadth of the provisions is vague.

*C. Legislative History of Extraterritorial Application Amendments*

Congress added the extraterritorial application provisions to the Civil Rights Act of 1991 late in the debate process in an effort to respond to the then recent *Aramco* decision. [[49]](#footnote-50)49 As a result, Congress included little in the way of legislative history to aid in interpreting the provisions or determining the scope of its intent. Congress engaged in little discussion of the amendments on the floor of the House and Senate, [[50]](#footnote-51)50 and it never significantly discussed the amendments in any report or hearing. [[51]](#footnote-52)51

Although Congress provided sparse guidance, the legislative history of the extraterritorial amendments that does exist makes it clear that Congress **[\*199]** intended to overrule the *Aramco* decision. [[52]](#footnote-53)52 It is also clear that Congress intended Title VII and the ADA to apply to United States citizens working abroad for American and American-controlled companies. [[53]](#footnote-54)53 In discussing how Congress intended to accomplish Title VII and ADA coverage for United States citizens working abroad for American or American controlled companies, Congress only indicated that it modeled the provisions on the 1984 amendments to the ADEA, in which Congress gave that Act extraterritorial effect. [[54]](#footnote-55)54 In failing to provide clear guidance of its intent, Congress effectively gave the EEOC a free hand to determine how far United States employment laws will reach overseas and what criteria should be applied.

III. THE EEOC POLICY STATEMENT

In its role of interpreting congressional legislation relating to employment law, in October 1993, the EEOC issued its policy statement regarding the extraterritorial application of Title VII and the ADA. [[55]](#footnote-56)55 Because of the limited legislative history of these provisions and Congress's lack of guidance, the EEOC was forced to define several key terms in the Act to make the provisions meaningful. The EEOC policy statement gives its interpretation of the meaning of "American" and "American-controlled" employer, "causing" a violation of a foreign law, and what constitutes a foreign "law." [[56]](#footnote-57)56

*A. What Constitutes an American Employer?*

Under section 109 of the Civil Rights Act of 1991, Title VII and the ADA prohibit discrimination overseas if the employer is deemed to be an "American" employer. [[57]](#footnote-58)57 Therefore, an initial question to be addressed in a particular case is whether the entity that allegedly discriminated is "American." [[58]](#footnote-59)58 Neither section 109 nor its legislative history set forth an explicit test for determining the nationality of employers. However, the October **[\*200]** 1993 EEOC policy guide fills this gap. [[59]](#footnote-60)59

The EEOC policy states that it will look initially to the employer's place of incorporation in ascertaining the employer's nationality. [[60]](#footnote-61)60 This is a common approach to determine the nationality of a corporate entity, and is the approach the *Restatement (Third) of the Foreign Relations Law of the United States* favors. [[61]](#footnote-62)61 However, the EEOC goes beyond the commonly accepted test of corporate nationality. The EEOC also asserts that when a company is incorporated outside the United States, it will still consider the corporation an American employer if the company has numerous *contacts* in the United States. [[62]](#footnote-63)62

The EEOC Policy Statement endorses several factors to determine whether an overseas-incorporated company can still be considered American by virtue of its United States contacts including: (1) the company's principal place of business; (2) the nationality of dominant shareholders; and (3) the nationality and location of management. [[63]](#footnote-64)63 None of these factors are individually determinative, but the EEOC considers each on a case by case basis. [[64]](#footnote-65)64 The EEOC never cites the source for this test, and Congress did not include these factors in the Civil Rights Act of 1991 or its legislative history.

*B. What Constitutes an American-Controlled Foreign Employer?*

In addition to covering American employers, Title VII and the ADA will also apply overseas if the foreign entity is controlled by an American employer. Section 109 of the Civil Rights Act of 1991 amends Title VII and the ADA to provide that if a United States employer controls a corporation which is incorporated overseas, courts will presume any practice prohibited by Title VII or the ADA engaged in by the foreign corporation is **[\*201]** engaged in by the United States employer. [[65]](#footnote-66)65 This provision has important consequences for multinational, United States-based corporations with overseas subsidiaries or affiliates. The effect of the statute is to impute liabilityfor the discrimination of the foreign subsidiary to the United States parent company. In addition, the statute will apply United States employment law to the overseas subsidiary in a foreign country if the EEOC finds the United States employer controls the subsidiary.

The Civil Rights Act of 1991 provides four criteria for determining whether the foreign company is controlled by the United States employer. [[66]](#footnote-67)66 These factors focus on the relationship between the companies and include: (1) the interrelation of operations; (2) the common management; (3) the centralized control of labor relations; and (4) the common ownership or financial control. [[67]](#footnote-68)67

The EEOC policy guide notes that the National Labor Relations Board (NLRB) first applied these criteria in a collective bargaining context to determine whether two companies are a "single employer." [[68]](#footnote-69)68 While a review of the NLRB cases could help to demonstrate the approach the EEOC will use, [[69]](#footnote-70)69 the EEOC relies primarily on pre-*Aramco* cases that applied the same four factors of control in a Title VII context, and, thus, are a more reliable indication of the EEOC's reasoning. [[70]](#footnote-71)70

*C. Pre-Aramco Cases Interpreting the Four Factors of Control*

The EEOC cites several cases demonstrating the approach it will take in determining whether a foreign corporation is controlled by a domestic employer. The EEOC first cites *Lavrov v. NCR Corp.* [[71]](#footnote-72)71 Relying on the **[\*202]** four factors now incorporated in section 109 and originally formulated by the NLRB cases, the *Lavrov* court, in the procedural context of ruling on a summary judgment motion, examined the activities of the United States parent and its foreign subsidiary to determine if the two were a single employer for purposes of invoking Title VII jurisdiction. [[72]](#footnote-73)72 The court first determined that the foreign entity, a wholly owned subsidiary, shared common ownership with its domestic employer. [[73]](#footnote-74)73 The court next examined the centralization of labor relations with the United States company. [[74]](#footnote-75)74 In *Lavrov*, the domestic company instituted corporate-wide personnel policies, [[75]](#footnote-76)75 thus, certain personnel decisions with regard to individual employees in the foreign subsidiary required approval by the United States company. [[76]](#footnote-77)76 Also, the foreign subsidiary was not authorized to change any remuneration plans, benefits, or operating conditions without the approval of the United States parent. [[77]](#footnote-78)77 Based on these factors, the court could not grant the United States company's motion for summary judgment on the "single employer" issue because whether the American company and its foreign subsidiary constituted a single employer or were separate companies presented a genuine issue of material fact. [[78]](#footnote-79)78 Because the case was in a summary judgment context, it cannot be determined whether these interrelationships were ultimately sufficient to establish control by the United States corporation. However, the case does provide insight into what specific facts courts will examine in applying the four factors of control.

Although not cited by the EEOC policy guide, *Armbruster v. Quinn* [[79]](#footnote-80)79 provides another example of how the courts have applied the four criteria of control to a Title VII context. In this case, the court examined the relationship between a domestic parent and its domestic subsidiary to determine whether the plaintiffs could properly invoke Title VII jurisdiction in a sexual harassment case. [[80]](#footnote-81)80 The plaintiffs were secretaries to the president of Syntax Corporation which had less than fifteen employees. [[81]](#footnote-82)81 Pure Industries (Pure), which had more than fifteen employees, owned one-hundred percent of Syntax's stock. [[82]](#footnote-83)82 Because Title VII only applies in cases where the employer employs more than fifteen people, the plaintiffs attempted to **[\*203]** demonstrate control of Syntax by Pure and, thereby, declare them a single enterprise. [[83]](#footnote-84)83

In *Armbruster*, as in *Lavrov*, the court readily established common ownership of the two entities because the parent, Pure, was the only owner of Syntax. [[84]](#footnote-85)84 In looking to other factors, the court noted that the two corporations were highly interrelated from an operations standpoint because Pure performed Syntax's payroll, accounting, and shipping functions. [[85]](#footnote-86)85 Additionally, Pure approved Syntax's purchases, retained Syntax's bank accounts, and approved various financial transactions. [[86]](#footnote-87)86 In determining the interrelation of labor relations, the court noted that the president of Pure hired Syntax's president, Pure's personnel office hired Syntax's manager, and the companies frequently transferred employees between themselves. [[87]](#footnote-88)87 All of these factors were sufficient to establish control of Syntax by Pure and present a prima facie case of single employer status to meet the statutory minimum of fifteen employees. [[88]](#footnote-89)88

In a contrasting holding, the EEOC policy statement cites *Mas Marques v. Digital Equipment Corp.* [[89]](#footnote-90)89 as an additional demonstration of how it will interpret control by the United States company. In *Mas Marques*, a United States citizen filed suit under Title VII against a West German company and its United States parent after the West German subsidiary rejected his employment application. [[90]](#footnote-91)90 In this case, however, the court did not find that the United States parent controlled the German company. In addressing the control issue, the court found that the German subsidiary's personnel policies, advertising, and marketing decisions were formulated without the involvement of the United States parent. [[91]](#footnote-92)91 The court specifically mentioned that there was a genuine parent-subsidiary relationship in which there were separate corporate structures, facilities, work forces, business records, bank accounts, tax returns, financial records, budgets, and corporate reports. [[92]](#footnote-93)92 The court found that the only operational connection between the two companies was that the German corporation purchased approximately one-half of its inventory from the United States corporation, and that the German company occasionally contracted for accounting and **[\*204]** bookkeeping services from the United States company. [[93]](#footnote-94)93 Based on this assessment, the court refused to justify holding the parent company liable for the actions of its subsidiary and affirmed the summary judgment dismissing the parent from the case. [[94]](#footnote-95)94

The EEOC policy statement further presents a hypothetical situation demonstrating how it will determine control by an American corporation. [[95]](#footnote-96)95 In the hypothetical, the EEOC indicates that the following factors are significant in determining that the foreign corporation, which was established by the United States parent to supervise international marketing of its products, was controlled by its United States parent: (1) the United States corporation owned 25% of the outstanding stock of the foreign corporation; (2) board membership of the two corporations overlapped; (3) the United States corporation set employee relations policies for the foreign corporation; (4) the United States corporation's representatives conducted regularly scheduled visits to inspect the foreign corporation's operations; and (5) the United States corporation would dictate changes in marketing and sales strategy for its products. [[96]](#footnote-97)96

The EEOC noted that it would find "control" by the United States corporation for purposes of Title VII and the ADA despite the fact that two companies have distinct corporate forms, have entirely separate staffs, and independently perform some operational and labor relations functions, such as payroll, hiring, and firing. [[97]](#footnote-98)97

The EEOC's interpretation of these factors has important ramifications for United States companies operating abroad through overseas subsidiaries because it is critical to determine whether Title VII and the ADA will apply to the subsidiary's actions. If these subsidiaries are wholly owned by the United States parent, as is often the case, this will result in an immediate "strike one" against the United States company. As noted in *Lavrov* and *Armbruster*, the wholly owned status partially satisfies the test for finding control by the United States parent, and according to the EEOC's hypothetical, mere 25% ownership, along with other factors, is sufficient to indicate control. [[98]](#footnote-99)98 In addition, many overseas subsidiaries do not retain the staff to perform administrative functions that they require, but instead contract for accounting, payroll, legal, and employee relations services through service agreements with the parent company. Sharing resources such as this provides for practical operational efficiencies for both the parent and the subsidiary. **[\*205]** Now, however, the practice will also tend to indicate control over the subsidiary for purposes of applying United States employment discrimination laws.

In the human resources area, international companies often transfer or loan employees from one operational subsidiary to another to provide specific technical expertise for a subsidiary which would otherwise have to hire outside consultants at a higher cost. While this practice is often the most financially efficient, it will tend to indicate control by the United States parent because of the interrelationship of operations.

These practices are unlikely to change as a result of the EEOC's interpretation because the operational efficiencies gained by them are too great. However, it is important for multinational firms to know that when dealing with United States citizen-employees abroad, American employment laws may apply to their overseas conduct.

*D. Defenses to Extraterritorial Application of Title VII and the ADA*

The Civil Rights Act of 1991 provides a narrow set of circumstances in which an American or American-controlled employer can assert a defense to claims of extraterritorial discrimination. [[99]](#footnote-100)99 Unfortunately for employers, the EEOC's interpretation of these defenses narrows them even further and makes it almost impossible for an American or American-controlled foreign corporation to satisfy all the elements of any defense.

The "Foreign Laws Defense" is the principal provision employers can use to defend against claims of discrimination abroad. [[100]](#footnote-101)100 Under this provision, it is not unlawful under either Title VII or the ADA for an employer to take otherwise prohibited action if compliance with either statute would cause an employer to violate the law of a foreign country in which the workplace is located. [[101]](#footnote-102)101 Although this provision appears to be relatively straightforward and could cover a variety of situations, the EEOC's interpretation of the provision makes clear that this defense can rarely be used in practice.

The defense has three essential elements: (1) the action is taken with respect to an employee in a workplace in a foreign country; [[102]](#footnote-103)102 (2) compliance **[\*206]** with Title VII or the ADA will *cause* the employer to violate a *law* of a foreign country; [[103]](#footnote-104)103 (3) in which the workplace is located. [[104]](#footnote-105)104 Of these three elements, the second will most likely prove to be the downfall of any employer trying to assert the Foreign Laws Defense.

*1. Violation of a Foreign "Law"*

In interpreting the second element of the defense, the EEOC policy statement indicates that it will take a very narrow view regarding whether Title VII or ADA compliance will "cause" a violation, and it applies an equally narrow view of what constitutes a foreign "law." [[105]](#footnote-106)105

The EEOC cites several cases it will use to determine what constitutes a foreign law beginning with *Mahoney v. RFE/RL, Inc.* [[106]](#footnote-107)106 In that case, an American employer terminated United States citizens working in Germany based on a union contract that expressly required mandatory retirement at age sixty-five. [[107]](#footnote-108)107 Mahoney sued RFE/RL [[108]](#footnote-109)108 for employment discrimination based upon alleged violations of the Age Discrimination in Employment Act. [[109]](#footnote-110)109 RFE/RL contended that the union contract, and the German labor practices it incorporated, were German "laws" that it would violate if it would have to comply with the provisions of the ADEA. [[110]](#footnote-111)110 In support of its argument, RFE/RL presented expert testimony stating that it was " 'the general policy of the unions' to insist upon a mandatory retirement age, and that such provisions are contained in the vast majority of collective bargaining agreements in Germany." [[111]](#footnote-112)111 Additionally, the expert also stated that such ubiquitous union contract terms were considered to have legal force in Germany. [[112]](#footnote-113)112 The court rejected this argument, stating that the union contract, although legally binding on RFE/RL, was not "law" for the purposes of the ADEA foreign laws defense. [[113]](#footnote-114)113 The court correctly noted that if the opposite were true, parties could avoid compliance with the ADEA simply by inserting contradictory language in the contract and citing it as a prohibitive **[\*207]** "law." [[114]](#footnote-115)114 The mandatory retirement age was in no way mandated by the German government and did not have general applicability beyond the parties to the contract, despite the expert's testimony that the mandatory retirement age was considered to have legal force in Germany. [[115]](#footnote-116)115 The fact that the mandatory retirement age was practically uniform throughout Germany and virtually every collective bargaining agreement in the country contained such a provision was insufficient to overcome the fact that the German legislature neither took the time nor felt the inclination to codify a principle so ingrained in the nation's labor policy and belief system.

The court rejected RFE/RL's second contention with reasoning similar to its rejection of the first. In an attempt to comply with the ADEA, RFE/RL signed individual employment agreements that allowed certain employees to continue working past the age of sixty-five. [[116]](#footnote-117)116 However, the company's "work council," which is bound by German law to giveeffect to a union contract, rejected the individual contracts because they abrogated the mandatory retirement provision in the union contract. [[117]](#footnote-118)117 RFE/RL unsuccessfully appealed to the German labor courts, and cited these unsuccessful appeals as prohibitive German "law" sufficient to give it a defense under the ADEA. [[118]](#footnote-119)118

In rejecting this argument, the district court stated that the German labor court's decisions merely enforced the contract upon the parties to it and did not hold that anything in German law compelled the decisions reached. [[119]](#footnote-120)119 According to the district court's reasoning, even though the German courts would not allow RFE/RL to extend retirement age past age sixty-five, this is not a foreign "law" which would permit an exception to the ADEA. [[120]](#footnote-121)120

The court's reasoning in *Mahoney* is sound from a strictly legal standpoint. The court correctly noted that there was no statute mandating the retirement age, and courts have consistently held that perceived customs and preferences of a host country do not justify discrimination against United States citizens. [[121]](#footnote-122)121 However, the decision ignores the practical realities **[\*208]** of how multinational corporations must operate and is a dubious precedent upon which the EEOC should rely.

For example, in countries with civil law systems derived from the French Civil Code or the German Civil Code (the BGB), employment laws and their interpretations are relatively easy to ascertain. In some countries, however, governments have not elected to codify social norms or mores which are deeply ingrained in the nation or are reflected in predominant religious beliefs. [[122]](#footnote-123)122 Although the civil codes of these countries do not recite these cultural values, they are, nevertheless, a part of a deeply seated belief system which guides a broad range of conduct. The mechanisms for conducting employment agreements are often a part of this belief system, but these cultural factorsdo not always rise to the level of a law.

Under the EEOC's interpretation, a United States employer operating in one of these countries could not cite cultural factors effecting employment agreements as a conflicting foreign law sufficient for the Foreign Laws Defense. This will be the case under the EEOC's interpretation despite the fact that in practice, as demonstrated by the *Mahoney* case, the employer will have no practical and sometimes no legal choice other than to abide by them. Japanese culture and the practices of Islamic countries provide a good example of an American employer's difficulty in attempting to comply with both Title VII and the cultural factors which govern employment, yet do not rise to the level of law.

a. Japan

Japan has adopted a civil code based on the civil codes of Germany and France, along with a constitution based upon that of the United States. [[123]](#footnote-124)123 However, Japan also still relies on traditional notions of the *giri*, a series of rules which was developed to specify the conduct to be observed on all occasions when one individual came into contact with others. [[124]](#footnote-125)124 The *giri* regulates behavior in relationships such as those between father and son, husband and wife, landowner and farmer, lender and borrower, employer and employee, and is still observed to a large degree today. [[125]](#footnote-126)125 It is a **[\*209]** loss of face and a source of shame for a Japanese person not to respect one of the *giri* in which he was involved. [[126]](#footnote-127)126 In contemporary Japanese society, the *giri* operates concurrently with the formal legal structure. [[127]](#footnote-128)127

The idea of law still has not penetrated the daily life of Japan. [[128]](#footnote-129)128 Further, book law in Japan does not accurately reflect the social mechanisms which adjust tensions and resolve disputes and may not reflect the state of the living law itself. [[129]](#footnote-130)129 Law is still considered a meansby which the state can forcibly impose the more or less arbitrary will of its political leaders. [[130]](#footnote-131)130 Moreover, law as an idea is still associated with punishments and prison. [[131]](#footnote-132)131 In popular conception, good Japanese people stay out of reach of the law. [[132]](#footnote-133)132

In the case of American companies operating in Japan, the American company cannot look solely to the civil code to discover its obligations while operating in the country. [[133]](#footnote-134)133 Japan has a complex set of rules of behavior with which the company must abide in order to function successfully. [[134]](#footnote-135)134 An examination of the civil code may not reveal all of the rules by which the country operates and the means by which employment agreements are performed. [[135]](#footnote-136)135 Under the EEOC's approach, an American company **[\*210]** could not cite the rules of conduct regulated by the *giri* as a law which its compliance with Title VII or the ADA could violate. United States courts would consider a citation to the *giri* to be a "custom or preference" of the host country which would be insufficient to justify violation of Title VII, [[136]](#footnote-137)136 despite the fact that practical operating conditions would be to the contrary.

b. Islamic Countries

American companies operating in Islamic countries face a situation similar to those operating in Japan. In nations such as Egypt, Syria, Morocco, Tunisia, and Saudi Arabia, the idea of traditional Muslim or Islamic law, based on the teachings of the *Koran*, is still prevalent despite the fact that these countries have adopted western-style legal systems derived from **[\*211]** the French, Swiss, and German codes. [[137]](#footnote-138)137 Muslim law is not an independent branch of knowledge or learning, but is a facet of the Islamic religion itself. [[138]](#footnote-139)138 In many cases, it is difficult to separate Islamic law from Islamic theology. [[139]](#footnote-140)139

Muslim law includes the *Sharia*, [[140]](#footnote-141)140 a system of behavior to be followed by believers, and is centered on the idea of man's obligations or duties to God and other men. [[141]](#footnote-142)141 The sanction for a violation of these obligations is the state of sin into which the believer neglecting them will fall, and for this reason, Muslim law often shows very little interest in the civil sanctions attached to violations of its prescribed rules. [[142]](#footnote-143)142

The idea of Muslim law is deeply ingrained in the cultures of these countries. In fact, the civil codes of many Islamic countries instruct judges to fill any gaps in the codes according to the principles of Muslim law. [[143]](#footnote-144)143

Under the EEOC's approach, it will be difficult for an American corporation to demonstrate the existence of a "law" which mandates that Title VII or the ADA shall not apply in these countries when confronted with a **[\*212]** restriction based on traditional Islamic law. For example, Islamic law severely restricts the rights of women in the workplace generally, [[144]](#footnote-145)144 and where they would come into contact with men specifically. [[145]](#footnote-146)145 An American company operating in a country which does not specifically include the prohibition of women in the workplace in its civil code, but instead relies on traditional Muslim law for this prohibition, could not rely on the prohibitions of traditional Muslim law as a defense to its discrimination against a woman who was a United States citizen. [[146]](#footnote-147)146 In such a case, the American company would be left with the difficult choice of subjecting itself to the enforcement procedures of Title VII, refusing to hire United States citizens in the country, or declining to conduct business in the country altogether.

This examination of Japanese and Islamic cultures indicates that in many cases the EEOC's interpretation of what constitutes a foreign law fails to recognize that cultural factors also can play a very influential role in how an American company operating overseas must conduct its employment practices. The EEOC's strict test, derived from the *Mahoney* case, simply ignores the practical realities of companies operating outside Europe and North America. The interpretation seeks to impose American standards of business and social life on the law of countries with histories and cultures wholly different from our own. The EEOC ignores the fact that countries having a deeply seated social policy, such as a mandatory retirement age, typically express these rules in contractual provisions that fall short of formal legal enactments simply because the country may chose to regulate retirement age in this fashion. [[147]](#footnote-148)147 As the Fifth Circuit correctly stated in *Aramco*, "the religious and social customs practiced in many countries are **[\*213]** wholly at odds with those of this country." [[148]](#footnote-149)148 The United States cannot expect other nations to follow its ideas of what areas of business and society require a statutory basis. Other countries have different means of regulating the interrelationships between people in the workplace.

The EEOC's interpretation of what constitutes a foreign law under Title VII and the ADA is also a substantial departure from the EEOC's prior interpretation of the Foreign Laws Defense in the ADEA. [[149]](#footnote-150)149 Under the ADEA policy guidance, the EEOC recognized the difficulty in determining what constitutes a "law" by stating " 'there is no word in the language which, in its popular and technical application, takes a wider or more diversified signification' " than the word "law." [[150]](#footnote-151)150 Under the 1989 ADEA policy, the EEOC recognized only that: (1) corporate policies, regulations, and rules would be insufficient to constitute a "law"; (2) a company's corporate charter registered with a government agency would not be a law; and (3) a bill which had passed only one of two parliamentary branches of a foreign government would not be considered a law. [[151]](#footnote-152)151

The ADEA policy statement also left open the possibility that rules for conducting employment agreements, although not codified by the foreign government, could nonetheless be a foreign law for purposes of the defense. Both *Fernandez*, [[152]](#footnote-153)152 and *Abrams*, [[153]](#footnote-154)153 were decided prior to issuance of the ADEA policy decision. [[154]](#footnote-155)154 The EEOC could have relied on these precedents to eliminate cultural factors and practical business factors not rising to the level of law from being cited as a foreign law for purposes of the ADEA Foreign Laws Defense, however, it elected not to do so. The EEOC's interpretation in the Title VII andADA context, has now closed this avenue.

The EEOC's reliance on the *Mahoney* decision clearly departs from **[\*214]** the earlier EEOC policy which recognized a more elastic definition of the term "law." It is now arguable that there are two different standards for interpreting the exact same language -- one under the ADEA and one under Title VII and the ADA. It is also arguable that Congress intended the EEOC to use the more elastic meaning of "law" in terms of Title VII and the ADA. This is especially relevant because this is the only definition of the word "law" the EEOC had ever used in this context.

*2. Determining the "Cause" of a Violation*

The Foreign Laws Defense to the extraterritorial application of Title VII and the ADA also requires that an employer's compliance with Title VII or the ADA would *cause* the employer to violate a foreign law. [[155]](#footnote-156)155 The EEOC has interpreted this provision to mean that in order to cause a violation, the employer must prove that it would be impossible for the employer to comply with both sets of requirements. [[156]](#footnote-157)156 ***Kern*** *v. Dynalectron Corp.* [[157]](#footnote-158)157 provides an extreme example of an employer's inability to comply with the laws of both countries.

Dynalectron hired ***Kern*** to fly helicopters in Saudi Arabia. [[158]](#footnote-159)158 The contract contemplated that ***Kern*** would fly over crowds of Muslims making their annual pilgrimage along Mohammed's path to the holy city of Mecca in order to protect against any violent outbreaks and to fight any potential fires. [[159]](#footnote-160)159 Saudi Arabian law, which is based on the Islamic religion, does not permit non-Muslims to enter into or fly over Mecca under penalty of death by beheading. [[160]](#footnote-161)160 Dynalectron, therefore, required all of its pilots to be Muslim either by birth or by conversion in order to provide for their safety on the job. [[161]](#footnote-162)161

***Kern***, a Baptist, completed Islamic conversion classes offered by Dynalectron but ultimately decided not to convert to Islam. [[162]](#footnote-163)162 He returned to the United States where he then filed suit under Title VII claiming he was discriminated against because of his religion. [[163]](#footnote-164)163 Although Dynalectron did not fire him from his job, ***Kern*** proved that he was constructively discharged by showing that because he did not convert, he could not fly over **[\*215]** Mecca, and that Dynalectron would have fired him had he not quit. [[164]](#footnote-165)164

The court held that the Saudi law permitting only Muslims to enter Mecca constituted a bona fide occupational qualification (BFOQ) for the job and therefore was a defense to Dynalectron's otherwise unlawful conduct. [[165]](#footnote-166)165 More particularly, the ***Kern*** court found that Dynalectron met its burden of proof because the safety of an employee is reasonably necessary to the normal operation of Dynalectron's business. Dynalectron could, therefore, justify its religious discrimination because it did not want to have its employees beheaded. [[166]](#footnote-167)166 There was a genuine inability of Dynalectron to comply with both the religious discrimination prohibitions in Title VII and the Saudi law mandating Muslim pilots. Therefore, requiring pilots to convert to Islam was a BFOQ justifying Dynalectron's discrimination. [[167]](#footnote-168)167

Although the case was decided before the extraterritorial amendments to Title VII, it provides a good example of the circumstances in which the existence of a foreign law will "cause" the employer to violate Title VII. The EEOC notes the defense will only be applicable where compliance with Title VII or the ADA will inevitably lead to a violation of foreign law. [[168]](#footnote-169)168 For example, the court noted that the BFOQ exception, and presumably the Foreign Laws Defense, would not apply in cases involving mere customer preferences for a specific gender or religion. [[169]](#footnote-170)169

There has been little in the way of judicial interpretation of what set of circumstances would "cause" an employer to violate the laws of a foreign country in an employment discrimination context other than the extreme facts of the ***Kern*** case. However, the United States Supreme Court has recently addressed the "cause" issue in a case involving the extraterritorial application of the Sherman Antitrust Act. [[170]](#footnote-171)170 In *Hartford Fire Insurance Co. v. California*, [[171]](#footnote-172)171 the Court held that there was no conflict between foreign **[\*216]** and domestic law when the person subject to regulation by both states could comply with both sets of laws. [[172]](#footnote-173)172 In applying such a narrow rule, it is difficult to comprehend where such a circumstance could occur with any regularity with the exception of the extreme facts in the ***Kern*** case.

Although the *Hartford* decision was in the context of the Sherman Antitrust Act, [[173]](#footnote-174)173 courts will undoubtedly use the reasoning of the Supreme Court in other cases where Congress has specifically provided for extraterritorial application as it has now done with Title VII and the ADA. As a result of the *Hartford* decision, the Court has effectively eliminated one of the few defenses Congress provided against the extraterritorial application of Title VII and the ADA.

IV. RAMIFICATIONS FOR EMPLOYERS AND APPROPRIATE CIRCUMSTANCES FOR EXTRATERRITORIAL APPLICATION OF UNITED STATES EMPLOYMENT DISCRIMINATION LAWS

*A. Ramifications for Employers*

Regardless of the degree to which the EEOC has truly reflected congressional policy, the EEOC's interpretation does present practical problems for the United States employer operating overseas. For example, in determining whether the allegedly discriminating entity is American, the EEOC rejects the traditional test of corporate nationality and expands the test by determining whether the foreign-incorporated entity has numerous contacts with the United States. [[174]](#footnote-175)174 In rejecting place of incorporation as the exclusive means of determining the nationality of the company, the EEOC overlooks the reasoning of the *Restatement* [[175]](#footnote-176)175 and the general assumption that under United States legislation the place of incorporation determines **[\*217]** corporate nationality. [[176]](#footnote-177)176 The place of incorporation test also finds support in the public international law arena as noted by the International Court of Justice (ICJ) in the landmark case of *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*. [[177]](#footnote-178)177 In *Barcelona Traction*, the ICJ declared a two-part test for determining the nationality of a corporation: the place of incorporation and the location of the registered office of the corporation. [[178]](#footnote-179)178

In rejecting the traditional tests of a corporation's nationality, the EEOC has complicated the ability of a multinational company, incorporated outside the United States, to determine in advance whether the EEOC and the courts would consider it an American employer and thereby subject to United States employment laws in a foreign locale. [[179]](#footnote-180)179

In addition to creating ambiguities over whether the law applies to certain entities, the EEOC's reasoning in determining when United States employment law applies overseas has some basic flaws. These flaws will hamper the ability of United States companies to compete on a worldwide scale. First of all, Congress has adopted the NLRB's approach to interpreting the four factors which determine if a foreign corporation is controlled by a United States employer, and the EEOC has elected to aggressively interpret the approach. [[180]](#footnote-181)180 This interpretation, while it may be suitable for the NLRB's purposes, is entirely too strict to apply to Title VII and the ADA. A finding of "control" for the purposes of the NLRB merely subjects the two entities to collective bargaining. However, a similar finding under the EEOC's interpretation will impute liability to the United States corporation for the actions of its subsidiary.

Because of the potential for vicarious liability, the EEOC's interpretation should be more relaxed than that of the NLRB. A finding of control in a Title VII context is essentially an attempt to pierce the corporate veil of the foreign-incorporated subsidiary. As such, Congress and the EEOC should use the traditional tests for piercing the corporate veil which typically require a showing of substantial control. [[181]](#footnote-182)181 Instead, Congress and the EEOC have elected to apply the more relaxed standards derived from the NLRB. [[182]](#footnote-183)182 The traditional test for imputing liability to a parent company should be used regardless of whether the case is in a Title VII context or the **[\*218]** traditional situation where a plaintiff attempts to pierce the corporate veil to find "deep pockets."

The EEOC's interpretation of what constitutes a foreign "law" also fails to recognize the importance of non-legal provisions relating to employment in other countries. In other countries, collective bargaining agreements are a primary source of protection of workers' rights and employers' obligations. [[183]](#footnote-184)183 However, the EEOC's interpretation of the extraterritorial effects of Title VII ignores the impact of collective bargaining agreements in foreign countries by refusing to allow provisions of such agreements to justify discrimination against United States citizens. While this approach may be proper when confined to the United States, the analysis fails when the employer and the union are subject to regulation by different countries.

In a wholly domestic context, an employer cannot rely on a collective bargaining agreement as a defense to its violation of Title VII. [[184]](#footnote-185)184 When limited to the United States, both the employer and the union are subject to Title VII's anti-discrimination provisions. In this situation, the employer cannot cite a provision in a collective bargaining agreement as a defense to its unlawful discrimination which is illegal for the union to demand. In a foreign context, however, the local union will not be subject to Title VII's restrictions and may be free to insist on an employer's discrimination based on such proxies as race, gender, national origin, and religion. [[185]](#footnote-186)185 If the American or American-controlled employer is required to refuse to discriminate based on its mandated compliance with Title VII abroad, the American employer may be placed in the precarious position of facing a strike by local employees, subjecting itself to the enforcement provisions of Title VII, or refusing to hire United States citizens in the country.

The EEOC's narrow interpretation of control will also have the effect **[\*219]** of treating all employees of the foreign subsidiary, not merely United States citizens, according to United States law. Many of the requirements of Title VII and the ADA, such as modifying facilities for wheelchair access, general hiring, firing, and promotion policies, and sexual harassment prohibitions, by their very nature must be applied to the entire overseas operation and cannot be enforced only to a select group of employees. The employer may be put at a competitive disadvantage vis-a-vis its overseas competitors who are not subject to United States law. [[186]](#footnote-187)186

Even if a foreign subsidiary of a United States company can implement plans to distinguish its treatment of United States and non-United States citizens, it will have the effect of creating considerable disharmony in the workplace. Nationals of the host country, who are treated according to their local laws, may feel discriminated against due to the preferential treatment the subsidiary confers to United States citizens. [[187]](#footnote-188)187

For example, Title VII mandates that both parents must equally be granted leave from work in order to care for a newborn child. [[188]](#footnote-189)188 While fathers who are United States citizens would be able to take time off from their overseas jobs, fathers who are nationals of the host country may not receive this benefit absent a corporate policy to the contrary. At a minimum, this disparity will tend to create a hostile and competitive environment among the employees, as well as a host of new morale problems with which the company must deal.

In addition, most foreign workplaces employing United States workers include a large percentage of workers from the host country. In this situation, the persons who act on behalf of the corporation, such as its managers, supervisors, and employees, may be foreign nationals. Thus, application of **[\*220]** Title VII and the ADA to United States or foreign corporations abroad will lead to the inevitable result of regulating foreign nationals in their home country. These foreign nationals, while being subject to Title VII and the ADA's prohibitions in conducting themselves towards United States citizens, would not enjoy the benefits of Title VII and the ADA. [[189]](#footnote-190)189 This practice will potentially create conflict in the workplace, [[190]](#footnote-191)190 and may promote international discord as well. A foreign government may properly resent the fact that the United States is regulating the conduct of its citizens in its own country.

Finally, the EEOC's interpretation is another example of the United States arrogant trampling on the values of other cultures. Ultimately, the United States corporation is a guest in a foreign land. As a guest, the corporation should be mindful of its practices and the wishes of his host should it desire to be treated favorably in terms of tax preferences and resource exploitation licenses. [[191]](#footnote-192)191 Congress and the EEOC have attempted to spread the American idea of employment rights derived from American history and experience into cultures entirely different from our own. As Judge Posner stated, "the wages a worker is paid and the hours he works are unambiguously associated with a place in which the work is done." [[192]](#footnote-193)192 The United States has no business imposing its labor laws on other countries who do not choose to accept them.

*B. Appropriate Circumstances for Extraterritorial Application*

Although extraterritorial application of Title VII and the ADA may create serious problems for the American employer in labor negotiations, internal morale, competition with foreign rivals, and issues of sovereignty, in certain cases application of United States employment law to United States workers overseas may indeed be appropriate. This is especially true if a United States employer, rather than a foreign employer, is in fact engaging **[\*221]** in the discrimination. In addition, countries may agree to waive any concerns of sovereignty in favor of protecting both countries' employees.

For example, the United States and the foreign government may agree to reciprocally apply each other's employment laws either through treaty or other international agreement. In this situation, the foreign government would consent to application of United States law both within its borders and to its citizens. [[193]](#footnote-194)193 This solution may prevent some of the problems of sovereignty that application of United States law in a foreign country may otherwise present.

Application of Title VII and the ADA to a United States worker employed overseas is appropriate when the discriminatory decision is made in the United States as opposed to the foreign country. [[194]](#footnote-195)194 In this situation, the discrimination takes place in the United States, not the foreign country, and issues of sovereignty are of lesser consequence. Likewise, Title VII and the ADA should apply to an overseas employee when the employee is sent overseas for the sole purpose of terminating him for a reason prohibited by United States employment laws but not prohibited by the foreign country. In this situation, it is clear that the employer conceived and planned the discriminatory conduct in the United States, and United States laws should apply. [[195]](#footnote-196)195

Finally, extraterritorial application of United States employment discrimination laws is appropriate when the foreign subsidiary is the mere alter-ego of the United States parent. If the corporation makes no effort to recognize the separate corporate structures of the parent and subsidiary under a traditional veil-piercing test, it is more apparent that the employee is discriminated against by a United States entity. In this case, the United **[\*222]** States employee should be entitled to Title VII and ADA protection because it is the United States employer, not the foreign employer, who is in fact discriminating.

V. POTENTIAL SOLUTIONS TO MITIGATE THE HARM TO EMPLOYERS

*A. Legislative Clarification*

Should it chose to do so, Congress has the authority to clarify its meaning of the extraterritorial amendments in successive legislation. Congress provided little indication in the legislative history of the Civil Rights Act of 1991 as to how far it intended for Title VII and the ADA to apply overseas. [[196]](#footnote-197)196 In addition, Congress did not consider the viewpoint of American and American-controlled employers who would be most effected by the legislation because Congress added the amendments after the congressional reports and hearings were completed. As a result, Congress should amend Title VII and the ADA to provide a clearer expression of its intent and, at a minimum, discuss the impacts of the legislation on those parties who are directly affected by it.

Specifically, Congress should provide a clearer indication of what constitutes an American employer. The EEOC, in interpreting what it considers to be congressional intent, states that it will consider more than just the place of incorporation to determine corporate nationality. [[197]](#footnote-198)197 Because this definition is more broad than previous interpretations of the term and conflicts with widely-accepted domestic and international law meanings, [[198]](#footnote-199)198 Congress should clarify its intent by articulating exactly which entities are covered by the Act.

In addressing what constitutes an American employer, Congress should also clarify and perhaps revise its test of when an American employer controls a foreign employer. As noted, Congress adopted the test of control from the NLRB who used the test in a collective bargaining context. From the NLRB's perspective, it used the test to consider whether the two entities are a single employer for collective bargaining purposes. [[199]](#footnote-200)199 A finding of control in a Title VII or ADA context, however, imputes liability to the American firm for the actions of its subsidiary. In adopting this test, Congress never considered this distinction in any of the legislative history. If Congress intends to apply such a broad meaning to the term control, it should so indicate.

Finally, Congress must clarify the meaning of the term "law" for purposes **[\*223]** of the Foreign Laws Defense. As the EEOC has on numerous occasions admitted, it is unclear what the term actually means. [[200]](#footnote-201)200 In defining the term, Congress must take into consideration that all countries do not manage employment agreements in a fashion similar to that of the United States, and many countries do not codify the mechanisms that govern employment law. [[201]](#footnote-202)201

*B. Judicial Interpretation*

Although the EEOC has provided its interpretation of Congress's intent of the extraterritorial application of United States employment discrimination laws, courts are not bound to strictly follow it. [[202]](#footnote-203)202 Congress has given little indication of its intent as to the exact definitions of "control," "law," and "American employer," therefore, courts are free to define these terms in a manner more reasonable to defendant corporations to make up for the fact that these interests were not represented during Congress's deliberation on the matter.

Specifically, courts can interpret the four factors of when an American **[\*224]** employer controls a foreign entity in a more traditional manner incorporating traditional corporate veil-piercing tests rather than adopting the EEOC's more stringent standards which were not developed for the purpose of imputing liability to another entity.Courts clearly must apply the factors set forth in the statute, such as the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control. However, courts are free to require a higher satisfaction of these standards than the EEOC currently urges to reflect the fact that the court is imputing liability across international boundaries.

Courts are free to recognize that not all countries regulate employment agreements through a mechanism which rises to the level of codification. The EEOC admits that it is not wholly sure what constitutes a foreign law, and there is little precedent to guide the courts in what constitutes a foreign law in an employment context. Defendant-employers should urge a broad meaning of the word "law" to reflect the practical realities of the manner in which they must operate overseas. This should include an argument that other countries do not always regulate certain aspects of employment through "law," but, nevertheless, the corporation is bound by the non-legal employment standards as a practical business matter.

Finally, courts applying the extraterritorial provisions of Title VII and the ADA will have to consider whether the defendant corporation is an "American" employer. In those cases where the employer is a corporation, courts should reject the EEOC's argument that factors other than the place of incorporation should determine the nationality of the corporation. While courts must examine other factors when the employer is a partnership or other business entity, the law is clear that the place of incorporation should be the standard for determining corporate nationality, as evidenced by the *Restatement*. [[203]](#footnote-204)203

VI. CONCLUSION

In passing the Civil Rights Act of 1991, Congress clearly intended Title VII and the ADA to apply to United States citizens working abroad for American companies. The EEOC's interpretation of the Act accomplishes this goal and carries out Congress's intent to protect United States employees working abroad. However, in adopting its current policy on the extraterritorial application of Title VII and the ADA, the EEOC goes beyond its precedent used in interpreting similar employment laws and creates a policy which may have gone beyond congressional intent.

The EEOC is charged with enforcing the nation's employment laws. [[204]](#footnote-205)204 **[\*225]** Employment laws, their enforcement, and their interpretation do not generally consider other issues such as international business and trade, the sovereignty of foreign nations, ingrained cultural biases of foreign nations, and conflicts of laws. Congress must address these issues. The EEOC's primary concern in implementing its policy on the extraterritorial amendments was to aggressively protect the employment rights of Americans working overseas, and in this respect, it succeeded. However, by giving the EEOC a free rein to implement its policies, Congress failed to restrain the EEOC so that business and foreign relations issues, also critical to United States interest, can be protected.

The only clear intent that Congress provided in passing the extraterritorial application sections of Title VII and the ADA was an indication that it wished to overturn the *Aramco* decision through language similar to the 1984 amendments to the Age Discrimination in Employment Act. [[205]](#footnote-206)205 However, Congress included little legislative history upon which the EEOC could rely in formulating its policy on the extraterritorial application of Title VII and the ADA. In doing so, Congress left it up to the EEOC to define critical aspects of the Act such as the definition of an "American" and "American-controlled" employer, the definition of a foreign "law," and what constitutes "causing" a violation of the foreign law. While the EEOC could have easily relied on its prior precedent in defining these terms, it elected to interpret these definitions much more aggressively than it had ever done before. In doing so, it has created numerous problems for American companies and their ability to compete on a worldwide scale which Congress may not have considered or intended. [[206]](#footnote-207)206

Regardless of the wisdom of the EEOC's interpretation, Title VII and the ADA will continue to apply to American companies' operations overseas. United States employers must take pro-active steps to ensure that its overseas subsidiaries are not controlled by its United States parents or, alternatively, that the subsidiaries fully comply with United States employment laws. However, because these pro-active steps can actually have the effect of subjecting the subsidiary to United States employment law, the more that a company monitors and involves itself in the labor management affairs of its foreign affiliates, the more likely a court will interpret this involvement as evidence of control by the United States company.

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1. 1 499 U.S. 244 (1991) [hereinafter *Aramco*], *affirming* Boureslan v. Arabian American ***Oil*** Company, 857 F.2d 1014 (5th Cir. 1988) [↑](#footnote-ref-2)
2. 2 The extraterritorial amendments to Title VII and the Americans with Disabilities Act (ADA) affect an estimated 2,000 U.S. companies which operate 21,000 overseas units in 121 countries. 137 CONG. REC. H3922, H3934 (June 5, 1991). [↑](#footnote-ref-3)
3. 342 U.S.C. § 2000e to 2000e-17 (1988 & Supp. V 1993) [hereinafter Title VII]. The statute states in pertinent part:

   § 2000e-2. Unlawful Employment Practices

   (a) Employer practices.

   It shall be an unlawful employment practice for an employer --

   (1) to fail or refuse to hire or 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 . . . . [↑](#footnote-ref-4)
4. 4 Pub. L. No. 102-166, 105 Stat. 1071 (1991). [↑](#footnote-ref-5)
5. 5 42 U.S.C. §§ 12101-12213 (Supp. V 1993) [hereinafter ADA]. [↑](#footnote-ref-6)
6. 6 Section 109 of the Civil Rights Act of 1991 was intended to "extend the protection of Title [VII] and the [ADA] to American citizens working overseas for American employers." 136 CONG. REC. S15,235 (daily ed. Oct. 25, 1991) (statement of Senator Kennedy). [↑](#footnote-ref-7)
7. 7 Title VII § 2000e-1(c)(1) (Supp. V 1993); ADA § 12112(c)(2)(A) (Supp. V 1993). [↑](#footnote-ref-8)
8. 8 Title VII § 2000e-1(b) (Supp. V 1993); ADA § 12112(c)(2)(C) (Supp. V 1993). [↑](#footnote-ref-9)
9. 9 Enforcement Guidance on Application of Title VII and ADA to American Firms Overseas and to Foreign Firms in the United States, Notice 915.002, EEOC Compl. Man. (CCH), P 2169, at 2313-25 to 2313-27 (Oct. 20, 1993) [hereinafter Application of Title VII and ADA]. The EEOC notice also addresses the application of Title VII and the ADA to foreign firms operating in the United States. However, this topic is beyond the scope of this Comment.

   Congress vested the power to administer and enforce Title VII primarily with the EEOC. Jacqueline E. Bailey, Note, Title VII Protections Do Not Extend to Americans Working Overseas. EEOC v. Arabian American ***Oil*** Co., 111 S. Ct. 1227 (1991), 5 TRANSNAT'L LAW. 417, 420 (1992). The grievance process starts with the employee filing a complaint with the EEOC. *Id.* at 421. The EEOC then conducts an investigation to assess whether there is reasonable cause to believe the employer engaged in employment discrimination. *Id.* Upon finding a reasonable cause to believe the employer violated Title VII, the EEOC attempts to rectify the employee's grievance with the employer. *Id.* If the attempt to rectify the situation is unsuccessful, the Commission may choose to litigate the matter on the employee's behalf. *Id.* If the Commission does not choose to litigate, the employee may file suit on his own behalf in federal court. *Id.* [↑](#footnote-ref-10)
10. 10 Edward A. Brill & Daniel R. Halem, *Foreign, U.S. Labor Laws Could Clash*, NAT'L L.J., Feb. 28, 1994, at S20 [hereinafter Brill & Halem]. [↑](#footnote-ref-11)
11. 11 *See infra* notes 100-22 and accompanying text. [↑](#footnote-ref-12)
12. 12 Other countries have elected not to apply their employment discrimination laws outside their own borders. For example, under Great Britain's Employment Protection (Consolidation) Act of 1978, most of the provisions for employment protection do not generally apply to the employee who ordinarily works outside Great Britain. *See* Ryuichi Yamakawa, *Territoriality and Extraterritoriality: Coverage of Fair Employment Laws After* EEOC v. Aramco, 17 N.C.J. OF INT'L L. & COMM. REG., 71, 107 n.272 (1992) [hereinafter Yamakawa]. [↑](#footnote-ref-13)
13. 13 Title VII has never applied to all American citizens employed by American companies in the United States. According to the EEOC's own statistics, Title VII does not apply to over 85% of all domestic business establishments or to about 15% of the workforce employed in this country. This amounts to approximately 10 million American workers. T. Eisenberg & S. Schwab, *The Facts Clearly Show that Reversal of Anti-Bias Precedent Would Create Hardship*, MANHATTAN LAW., Feb. 28-Mar. 6, 1989, at 16 n.3. The statute itself indicates that not all U.S. workers fall under the protection of Title VII. *See, e.g.*, Title VII § 2000e(b) (1988) (stating that employers with fewer than 15 employees are not subject to Title VII); Title VII § 2000e-1 (1988 & Supp. V 1993) (stating that employees of a religious society or religious educational institution alleging religious discrimination are not protected by Title VII); Title VII § 2000e-2(i) (1988) (stating that employees of businesses on or near an Indian reservation, alleging preferential treatment of Indians, are not protected by Title VII). In addition, case law has established further exceptions to Title VII. *See, e.g.*, Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 329-30 (1987) (holding religious organizations exempted from aspects of Title VII); Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986) (holding that independent contractors are not protected by Title VII); Smith v. Berks Community Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987) (stating that volunteer workers are not employees under Title VII); Smith v. Dutra Trucking Co., 410 F. Supp. 513, 518 (N.D. Cal. 1976) (holding that independent contractors are not protected by Title VII), *aff'd mem.*, 580 F.2d 1054 (9th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979). [↑](#footnote-ref-14)
14. 14 Bailey, *supra* note 9, at 438; *see also* Labor Law Comm. of the Section on Business Law of the Int'l Bar Ass'n, International Handbook on Contracts of Employment (Dr. Claude Serge Aronstein ed. 1976) (providing an overview of the hiring and firing practices in 29 countries, as well as available legal remedies for the employee). For specific examples of foreign employment discrimination laws, see generally Bailey, *supra* (citing Code du Travail arts. L. 122-35, 122-45, 123-1 (French laws prohibiting employment discrimination on the basis of sex, marital status, national origin, religion, or handicap)); Sex Discrimination Act, 23 Eliz. 2 ch. 65 (1975) (English law prohibiting sex discrimination); Race Relation Act, 24 Eliz. 2, ch. 74 (1976) (English law prohibiting race or national origin discrimination); Unfair Dismissals Act § 6 (1977) (Irish laws prohibiting employment discrimination on basis of religious or political beliefs, race, pregnancy, sex, and marital status). [↑](#footnote-ref-15)
15. 15 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993). Title VII prohibits various discriminatory employment practices based on an individual's race, color, religion, sex, or national origin. *See id.* §§ 2000e-2 to 2000e-3. An employer is subject to Title VII if it has 15 or more employees for a specified period and is engaged in an industry affecting commerce. An industry affecting commerce is "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor Management Relations Act." Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402 (1988). "Commerce" is defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." Title VII § 2000e(g) (1988). [↑](#footnote-ref-16)
16. 16 Aramco, 499 U.S. 244 (1991). [↑](#footnote-ref-17)
17. 17 Boureslan v. Arabian Am. ***Oil*** Co., 653 F. Supp. 629 (S.D. Tex. 1987), *aff'd*, 857 F.2d 1014 (5th Cir. 1989), *aff'd en banc*, 892 F.2d 1271 (1990), *aff'd*, 499 U.S. 244 (1991). [↑](#footnote-ref-18)
18. 18 Arabian Am., 653 F. Supp. at 629. [↑](#footnote-ref-19)
19. 19 *Id.* [↑](#footnote-ref-20)
20. 20 *Id.* [↑](#footnote-ref-21)
21. 21 *Id.* Boureslan also asserted claims under state law, which were dismissed for lack of pendant jurisdiction. Id. at 631. [↑](#footnote-ref-22)
22. 22 Id. at 630. [↑](#footnote-ref-23)
23. 23 *Id.* [↑](#footnote-ref-24)
24. 24 Boureslan v. Arabian Am. ***Oil*** Co., 857 F.2d 1014, 1019 (5th Cir. 1988). [↑](#footnote-ref-25)
25. 25 Contrast the lack of language giving Title VII extraterritorial application with the 1984 amendment to the Age Discrimination in Employment Act (ADEA). Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 623 (f) & (h) (1988 & Supp. V 1993) [hereinafter ADEA] (giving extraterritorial effect to the ADEA); *see also* Comprehensive Anti-Apartheid Act, 22 U.S.C. §§ 5001-5116 (1988 & Supp. V 1993) (giving extraterritorial effect to statute); Export Administration Act, 50 U.S.C. §§ 2401-2420 (1988 & Supp. IV 1992) (giving the same). [↑](#footnote-ref-26)
26. 26 Boureslan argued numerous policy considerations centering around the inequity and unfairness of denying Americans abroad the protections they are entitled in the United States. The court did not specifically articulate Boureslan's policy arguments. Boureslan, 857 F.2d at 1021. In rejecting these considerations, the court indicated that "it is not for this court to decide the policy issue for the legislative branch." Id. at 1020. [↑](#footnote-ref-27)
27. 27 Id. at 1020. On rehearing *en banc*, the Fifth Circuit affirmed the dismissal of the case for lack of subject matter jurisdiction. Boureslan v. Arabian Am. ***Oil*** Co., 892 F.2d 1271 (5th Cir. 1990) (*en banc*). The court stated that unless Congress expressly intends for a statute to apply abroad, the presumption against extraterritoriality will prevail. *Id.* [↑](#footnote-ref-28)
28. 28 Boureslan v. Arabian Am. ***Oil*** Co., 499 U.S. 244 (1991). [↑](#footnote-ref-29)
29. 29 42 U.S.C. § 2000e-1 (1988 & Supp. V 1993). [↑](#footnote-ref-30)
30. 30 *See* Bryant v. International Sch. Serv., Inc., 502 F. Supp. 472, 482 (D. N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982). The argument is similar to the familiar rule of statutory construction "*expressio unis est exclusio alterius.*" Developer's Mort. Co. v. Transohio Sav. Bank, 706 F. Supp. 570, 579 n.25 (S.D. Ohio 1989). This rule has been defined as an "implication that denies outside the area of expressed coverage what is expressly asserted within it." REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 41 (1975). The negative inference argument was the basis of several pre-*Aramco* federal district court cases upholding the extraterritorial reach of United States employment laws. *See* Seville v. Martin Marietta Corp., 638 F. Supp. 590, 592 (D. Md. 1986); Bryant, 502 F. Supp. at 483; Love v. Pullman, 13 Fair Empl. Prac. Cas. (BNA) 423 (1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978). [↑](#footnote-ref-31)
31. 31 Brief for Petitioner at 12-13, Boureslan v. Arabian American ***Oil*** Co., 499 U.S. 244 (1991) (No. 89-1838). [↑](#footnote-ref-32)
32. 32 *Id.* [↑](#footnote-ref-33)
33. 33 *Id.* [↑](#footnote-ref-34)
34. 34 Aramco, 499 U.S. at 256. [↑](#footnote-ref-35)
35. 35 *Id.* [↑](#footnote-ref-36)
36. 36 *Id.* [↑](#footnote-ref-37)
37. 37 Id. at 258; *see also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440 (1989) (indicating that Congress knows how to place the high seas within U.S. jurisdiction). Examples of Congress placing the high seas under U.S. jurisdiction are evidenced in several statutes. *See, e.g.*, 14 U.S.C. § 89(a) (1988) (empowering Coast Guard vessels to search and seize vessels "upon the high seas and waters over which the United States has jurisdiction" for "prevention, detection and suppression of violations of the laws of the United States."); 18 U.S.C. § 7 (1988 & Supp. IV 1992) ("Special maritime and territorial jurisdiction of the United States" in the Federal Criminal Code extends to United States vessels on "the high seas, [or] any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State"); 19 U.S.C. § 1701 (1988) (permitting the President to declare portions of the high seas as customs enforcement areas). [↑](#footnote-ref-38)
38. 38 Aramco, 499 U.S. at 259. The Court stated "Congress, should it wish to do so, may . . . amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot." *Id.* [↑](#footnote-ref-39)
39. 39 Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071 (1991). [↑](#footnote-ref-40)
40. 40 *Id.* [↑](#footnote-ref-41)
41. 41 42 U.S.C. §§ 12101-12213 (Supp. V 1993). [↑](#footnote-ref-42)
42. 42 Section 109 preserves the exemption in § 702 of Title VII for employers with respect to the employment of aliens outside any State. As a result, foreign nationals and resident aliens working abroad are not protected under Title VII whether they work for American, American-controlled, or foreign employers. Title VII generally covers aliens working inside the United States. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973). [↑](#footnote-ref-43)
43. 43 Title VII § 2000e(f) (1988 & Supp. V 1993); ADA § 12111(4) (Supp. V 1993). [↑](#footnote-ref-44)
44. 44 Title VII § 2000e-1(c)(1) (Supp. V 1993); ADA § 12112(c)(2)(A) (Supp. V 1993). [↑](#footnote-ref-45)
45. 45 Title VII § 2000e-1(c)(2) (Supp. V 1993); ADA § 12112(c)(2)(B) (Supp. V 1993). [↑](#footnote-ref-46)
46. 46 Title VII § 2000e-1(c)(3) (Supp. V 1993); ADA § 12112(c)(2)(C) (Supp. V 1993). [↑](#footnote-ref-47)
47. 47 Title VII § 2000e-1(b) (Supp. V 1993); ADA § 12112(c)(2)(C) (Supp. V 1993). [↑](#footnote-ref-48)
48. 48 *See infra* note 49 and accompanying text. [↑](#footnote-ref-49)
49. 49 The extraterritorial amendments to Title VII and the ADA first appear in a House version of the Civil Rights Act of 1991 introduced on June 7, 1991. *See* H.R. RES. 1, 102nd Cong., 1st Sess. (1991). The Court issued the *Aramco* decision on March 26, 1991. Aramco, 499 U.S. 244 (1991). By this time, most of the committee reports and hearings on the bill had been completed. [↑](#footnote-ref-50)
50. 50 *See infra* note 51 and accompanying text. [↑](#footnote-ref-51)
51. 51 137 CONG. REC. H3922, H3935 (1991) (stating that extraterritorial amendments are new and hearings on the matter were never conducted although they would have been useful). [↑](#footnote-ref-52)
52. 52 Section 109 was intended to "extend the protections of Title VII and the [ADA] to American citizens working overseas for American employers." 136 CONG. REC. S15,235 (daily ed. Oct. 25, 1991) (statement of Senator Kennedy). It also ensured that employers would not be "required to take actions otherwise prohibited by law. . . ." 137 CONG. REC. S15,477 (1991) (statement of Senator Dole); *see also supra* note 6 and accompanying text (stating that § 109 is intended to protect American citizens working overseas for American employers). [↑](#footnote-ref-53)
53. 53 137 CONG. REC. S15,477 (1991). [↑](#footnote-ref-54)
54. 54 137 CONG. REC. S15,472-477 (1991). [↑](#footnote-ref-55)
55. 55 Application of Title VII and ADA, supra note 9, at 2313-25. [↑](#footnote-ref-56)
56. 56 Application of Title VII and ADA, supra note 9, at 2313-25 to 2313-29. [↑](#footnote-ref-57)
57. 57 Title VII § 2000e-1(c)(1) (Supp. V 1993); ADA § 12112(c)(2)(A) (Supp. V 1993). [↑](#footnote-ref-58)
58. 58 In addition, the plaintiff in a Title VII case must be discriminated against by an "Employer." To be an "Employer" under Title VII, an entity must be engaged in an industry affecting interstate commerce and must employ 15 or more employees in each of twenty weeks in the current or preceding calendar year. Title VII § 2000e(a) (1988). The definition of "Employer" under the ADA is similar, except that the entity must have 25 or more employees. ADA § 12111(5) (Supp. V 1993). [↑](#footnote-ref-59)
59. 59 *See* Application of Title VII and ADA, supra note 9, at 2313-25. [↑](#footnote-ref-60)
60. 60 Application of Title VII and ADA, supra note 9, at 2313-25. [↑](#footnote-ref-61)
61. 61 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1987) (stating that for purposes of international law, a corporation's nationality is that of the state under which the corporation is organized); *id.* Reporters' Note 5 (stating that the general assumption under United States legislation is that the place of incorporation determines corporate nationality). [↑](#footnote-ref-62)
62. 62 Application of Title VII and ADA, supra note 9, at 2313-25. The EEOC correctly notes that a test other than the place of incorporation must be used in those situations where the employer is not a corporation, such as a law firm or an accounting partnership. Application of Title VII and ADA, supra note 9, at 2313-25. [↑](#footnote-ref-63)
63. 63 Application of Title VII and ADA, supra note 9, at 2313-25. [↑](#footnote-ref-64)
64. 64 Application of Title VII and ADA, supra note 9, at 2313-25. To date, there have been no cases interpreting these factors in a Title VII or ADA context. [↑](#footnote-ref-65)
65. 65 Title VII § 2000e-1(c) (Supp. V 1993), as amended by § 109 of the Civil Rights Act of 1991. [↑](#footnote-ref-66)
66. 66 Title VII § 2000e-1(c)(3) (Supp. V 1993), as amended by § 109 of the Civil Rights Act of 1991. These criteria are the same as those found in the 1984 amendment to the ADEA. [↑](#footnote-ref-67)
67. 67 *Id.* [↑](#footnote-ref-68)
68. 68 Application of Title VII and ADA, supra note 9, at 2313-25; *see also* Mas Marques v. Digital Equip. Corp., 637 F.2d 24, 27 (1st Cir. 1980) (stating that application of these criteria has been called the "single employer" doctrine). [↑](#footnote-ref-69)
69. 69 There are several frequently-cited NLRB cases interpreting the four factors of control. *See, e.g.*, Don Burgess Const. Co., 227 NLRB 765 (1977) (examining interrelation of operations, financial affairs, and labor relations of two companies); Western Union Corp., 224 NLRB 274 (1976) (stating that court examining factors of control and determining common control of labor relations is most critical factor); Gerace Const., Inc., 193 NLRB 645 (1971) (considering various facets of the four factors of control). [↑](#footnote-ref-70)
70. 70 The October 1993 EEOC Compliance Manual notes that its policy guide on the "single employer" doctrine, EEOC Notice No. N-915 (May 6, 1987) incorporated into Volume II of the EEOC Compliance Manual as Appendix G to § 605, may also be consulted for determining whether a foreign entity is controlled by an American employer. Application of Title VII and ADA, supra note 9, at 2313-26. [↑](#footnote-ref-71)
71. 71 600 F. Supp. 923 (S.D. Ohio 1984). [↑](#footnote-ref-72)
72. 72 Id. at 926. [↑](#footnote-ref-73)
73. 73 Id. at 928. [↑](#footnote-ref-74)
74. 74 *Id.* [↑](#footnote-ref-75)
75. 75 *Id.* [↑](#footnote-ref-76)
76. 76 *Id.* [↑](#footnote-ref-77)
77. 77 *Id.* [↑](#footnote-ref-78)
78. 78 *Id.* [↑](#footnote-ref-79)
79. 79 711 F.2d 1332 (6th Cir. 1983). [↑](#footnote-ref-80)
80. 80 *Id.* [↑](#footnote-ref-81)
81. 81 Id. at 1334. [↑](#footnote-ref-82)
82. 82 *Id.* [↑](#footnote-ref-83)
83. 83 Id. at 1335; Title VII § 2000e(b) (1988). [↑](#footnote-ref-84)
84. 84 Armbruster, 711 F.2d at 1338. [↑](#footnote-ref-85)
85. 85 *Id.* [↑](#footnote-ref-86)
86. 86 *Id.* [↑](#footnote-ref-87)
87. 87 *Id.* [↑](#footnote-ref-88)
88. 88 Id. at 1339. [↑](#footnote-ref-89)
89. 89 637 F.2d 24 (1st Cir. 1980). [↑](#footnote-ref-90)
90. 90 Id. at 26. [↑](#footnote-ref-91)
91. 91 *Id.* [↑](#footnote-ref-92)
92. 92 *Id.* [↑](#footnote-ref-93)
93. 93 Id. at 28. [↑](#footnote-ref-94)
94. 94 Id. at 30. [↑](#footnote-ref-95)
95. 95 Application of Title VII and ADA, supra note 9, at 2313-26 to 2313-27. [↑](#footnote-ref-96)
96. 96 Application of Title VII and ADA, supra note 9, at 2313-27. [↑](#footnote-ref-97)
97. 97 Application of Title VII and ADA, supra note 9, at 2313-27. [↑](#footnote-ref-98)
98. 98 Application of Title VII and ADA, supra note 9, at 2313-27. [↑](#footnote-ref-99)
99. 99 *See* Title VII § 2000e-1(b) (Supp. V 1993); ADA § 12112(c)(1) (Supp. V 1993). [↑](#footnote-ref-100)
100. 100 Title VII § 2000e-1(b) (Supp. V 1993); ADA § 12112(c)(1) (Supp. V 1993). [↑](#footnote-ref-101)
101. 101 Title VII § 2000e-1(b) (Supp. V 1993); ADA § 12112(c)(1) (Supp. V 1993). [↑](#footnote-ref-102)
102. 102 Title VII § 2000e-1(b) (Supp. V 1993); ADA § 12112(c)(1) (Supp. V 1993). The action must be in a foreign country, therefore, this defense will not apply to actions taken by the employer in any of the 50 states, the District of Colombia, Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, or the Outer Continental Shelf. *See* Title VII § 2000e(i) (1988) (defining "State"); *see also* 29 C.F.R. § 1630.2(d) (1992) (defining "State" for purposes of ADA jurisdiction). [↑](#footnote-ref-103)
103. 103 Title VII § 2000e-1(b) (Supp. V 1993); ADA § 12112(c)(1) (Supp. V 1993). [↑](#footnote-ref-104)
104. 104 Title VII § 2000e-1(b) (Supp. V 1993); ADA § 12112(c)(1) (Supp. V 1993). [↑](#footnote-ref-105)
105. 105 *See* Application of Title VII and ADA, supra note 9, at 2313-29. [↑](#footnote-ref-106)
106. 106 818 F.Supp. 1 (D.D.C. 1992). [↑](#footnote-ref-107)
107. 107 Id. at 3. [↑](#footnote-ref-108)
108. 108 RFE/RL is best known under the name of its broadcast services, Radio Free Europe and Radio Liberty. Id. at 2. [↑](#footnote-ref-109)
109. 109 *Id.*; ADEA, 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993). [↑](#footnote-ref-110)
110. 110 Mahoney, 818 F. Supp. at 1. The ADEA contains essentially the same language regarding the foreign laws defense as does Title VII and the ADA. *See* ADEA, 29 U.S.C. § 623(f) (1988). The EEOC indicates that the reasoning of *Mahoney* is equally applicable to Title VII and ADA cases. Application of Title VII and ADA, supra note 9, at 2313-28. [↑](#footnote-ref-111)
111. 111 Mahoney, 818 F. Supp. at 3. [↑](#footnote-ref-112)
112. 112 *Id.* [↑](#footnote-ref-113)
113. 113 *Id.* [↑](#footnote-ref-114)
114. 114 *Id.* [↑](#footnote-ref-115)
115. 115 Id. at 4. [↑](#footnote-ref-116)
116. 116 *Id.* [↑](#footnote-ref-117)
117. 117 *Id.* [↑](#footnote-ref-118)
118. 118 *Id.* [↑](#footnote-ref-119)
119. 119 *Id.* [↑](#footnote-ref-120)
120. 120 *Id.* [↑](#footnote-ref-121)
121. 121 *See* Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273 (9th Cir. 1981) (holding that stereotypes held by South American clients which included refusal to deal with female executives were insufficient to provide Bona Fide Occupational Qualification (BFOQ) status as a defense, 42 U.S.C. § 2000e-2(e), for sex discrimination in denying a woman the job); Abrams v. Baylor College of Medicine, 581 F. Supp. 1570 (S.D. Tex. 1984) (finding violation of Title VII where employer rejected Jewish applicants for a rotation program in Saudi Arabia based merely on informal conversations with Saudi officials and "various gleaned impressions to the effect that the Saudis did not want Jews in their country"). The EEOC cites these cases as other examples of situations which would not be considered "law" for purposes of the Foreign Laws Defense. Application of Title VII and ADA, *supra* note 9, at 2313-28 n.12. [↑](#footnote-ref-122)
122. 122 *See infra* notes 123-45 and accompanying text. [↑](#footnote-ref-123)
123. 123 RENE DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 497 (1978) [hereinafter DAVID]; Todd F. Volyn, *Agreement Consummation in International Technology Transfers*, 33 IDEA J.L. & TECH. 241, 267 (1993). [↑](#footnote-ref-124)
124. 124 DAVID, *supra* note 123, at 495. [↑](#footnote-ref-125)
125. 125 DAVID, *supra* note 123, at 498; *see also* R.E. Watts, *Briefing the American Negotiator in Japan*, 16 INT'L LAW. 597, 599-600 (1982) (stating that the fundamental purpose of the *giri* was to maintain the Confucian principle of societal harmony). [↑](#footnote-ref-126)
126. 126 DAVID, *supra* note 123, at 498. Historically, the *giri* replaced law, and according to some, morality. Until recently the system of the *giri* made the intervention of law in the western sense useless and even offensive. Even today, Japanese feel that resorting to the court system, even though permitted by the civil code, is the moral equivalent of extortion. *Id.* The courts in Japan are far from inactive, but serve primarily in a role of conciliation rather than adjudication. *Id.* [↑](#footnote-ref-127)
127. 127 Y. NODA, INTRODUCTION TO JAPANESE LAW 182 (1976) [hereinafter NODA]. The rules of the *giri* directed the lives of Japanese long before the modern legal system began to predominate, and the rules still operate today. *Id.* [↑](#footnote-ref-128)
128. 128 DAVID, *supra* note 123, at 498. [↑](#footnote-ref-129)
129. 129 CHIN KIM, SELECTED WRITINGS ON ASIAN LAW 41 (1982) [hereinafter KIM]. [↑](#footnote-ref-130)
130. 130 DAVID, *supra* note 123, at 498. [↑](#footnote-ref-131)
131. 131 DAVID, *supra* note 123, at 498. Much of traditional Japanese law descended from the early Chinese codes which were almost exclusively penal. This may explain how Japan's law came, early on, to be associated with constraint. KIM, *supra* note 129, at 54. [↑](#footnote-ref-132)
132. 132 DAVID, *supra* note 123, at 498. [↑](#footnote-ref-133)
133. 133 As an example, the Japanese Civil Code has a provision which allows the application of custom when the parties had such an intention. MINPO (Civil Code of Japan) art. 92. In addition, because Japan's civil codes were modeled after foreign codes, "there was inevitably a gap between the law and social reality. Custom, together with court judgments, played an important role in filling this gap and adapting the codes to changing social conditions." HIROSHI ODA, JAPANESE LAW 60 (1992) [hereinafter ODA]. Sometimes, customs which were contrary to the mandatory provisions of law have been upheld by the courts. *Id.* [↑](#footnote-ref-134)
134. 134 *See supra* notes 123-32 and accompanying text. [↑](#footnote-ref-135)
135. 135 For example, it is a common understanding in western countries that workers in Japan are entitled to "lifetime employment" with their company. The term refers to the practice whereby an employee joins a company after graduating from school, receives in-company training, and remains an employee of the same company until retirement at age 55. BRADLEY M. RICHARDSON & TAIZO UEDA, BUSINESS AND SOCIETY IN JAPAN: FUNDAMENTALS FOR BUSINESSMEN 31-32 (1981) [hereinafter RICHARDSON & UEDA]. Roughly one-third of Japan's labor force is employed under the system. *Id.* However, the Japanese Civil Code provides that the maximum term for an employment contract is five years. MINPO (Civil Code of Japan) art. 26. According to the Labor Standards Law, the term may not exceed one year. ODA, *supra* note 133, at 329 (citing Labor Standards Law of Japan art. 14). To get around the statutory prohibitions, employment contracts are systematically renewed upon expiration. ODA, *supra* note 133, at 329. Companies rarely dismiss employees even in an economic recession, and although an employee is legally free to quit and move to another company, he rarely does so. ODA, *supra* note 133, at 329. An employment relationship, like a family blood relationship, continues for a worker's lifetime and virtually eliminates mobility in the Japanese labor market. KIM, *supra* note 129, at 49. The "permanent employment" system is thus a well-entrenched facet of Japanese culture despite the fact that it is not mandated in the Japanese codes.

     Apparently, the Japanese government recognizes and supports the permanent employment system. In the period from 1973 to 1978, the Japanese manufacturing sector shed some one million employees or almost 10% of all manufacturing employees. RICHARDSON & UEDA, *supra*, at 31-32. To keep the discharges from becoming a major social problem, the government took the new step of providing subsidies to employers to encourage them to hold on to excess labor capacity. RICHARDSON & UEDA, *supra*, at 31-32. In effect, the government was subsidizing the permanent employment system during this critical period of adjustment. RICHARDSON & UEDA, *supra*, at 31-32.

     The permanent employment system is perceived to have been derived from Japan's traditional cultural values that emphasized paternalistic relations between superiors and their subordinates, as well as the concern by employers after World War I over having a stable work force. RICHARDSON & UEDA, *supra*, at 31-32. Permanent employment should best be seen as a social custom and a societal norm. RICHARDSON & UEDA, *supra*, at 32.

     Collective bargaining agreements and work rules also play an important role in the relationship between employer and employee in Japan. In Japanese labor law, collective bargaining agreements and work rules supersede any individual employment contracts. ODA, *supra* note 133, at 322. However, under the U.S. court's analysis in *Mahoney* and the EEOC's reliance upon it, a collective bargaining agreement or work rule which conflicts with Title VII may not be used by an American employer to justify discrimination mandated by the collective bargaining agreement but prohibited by Title VII. Mahoney v. RFE/RL, Inc., 818 F. Supp. 1 (D.D.C. 1992). [↑](#footnote-ref-136)
136. 136 *See* Abrams v. Baylor College of Med., 581 F. Supp. 1570 (S.D. Tex. 1984) (holding that customs and preferences are an insufficient basis on which to discriminate against United States citizens). [↑](#footnote-ref-137)
137. 137 DAVID, *supra* note 123, at 457, 481-83. [↑](#footnote-ref-138)
138. 138 David Suratgar, *The Development of the Legal Systems of the Middle East; Islamic Law and the Importance of Civil Law to the Process of Modernization, in* AN INTRODUCTION TO BUSINESS LAW IN THE MIDDLE EAST 1-3 (Brian Russell ed., 1976) [hereinafter Suratgar]. [↑](#footnote-ref-139)
139. 139 *Id.* [↑](#footnote-ref-140)
140. 140 Literally, the word "*Sharia*" means "the road to the watering place." Farooq A. Hassan, *The Sources of Islamic Law, in* 76 AM. SOC'Y INT'L L. PROC. 65, 66 (1982). [↑](#footnote-ref-141)
141. 141 *Id.* As a legal system, the *Sharia* has four basic sources: (i) *The Koran* -- the Word of God; (ii) *The Sunna* -- the practice of the Prophet; (iii) *Ijma'a* -- the consensus, or, the idea that God would not permit his people universally to be in error; and (iv) *Qiyas* -- reasoning by analogy from the preceding sources of law. Suratgar, *supra* note 138, at 3-4; *see also* DAVID, *supra* note 123, at 457-62 (providing background on these four sources of the *Sharia*). For example, the non-legal texts of the Koran have been construed by analogy to afford legal rules. Text stating, "they say trade is like usury, but Allah hath permitted trade lawful and forbidden usury," *Koran* 2: 275, has been interpreted by Islamic scholars as a pervading influence on the whole law of contracts, namely that the lawfulness of a commercial transaction has to be gauged in terms of reasonableness. Suratgar, *supra* note 138, at 4; *Koran* 2: 276-77. [↑](#footnote-ref-142)
142. 142 Suratgar, *supra* note 138, at 3. [↑](#footnote-ref-143)
143. 143 For example, the Constitution of Kuwait states: "The religion of the State is Islam, and Islamic Sharia shall be a main source of legislation." KUWAIT CONST. art. II, *translated in* 10 ALBERT BLAUSTEIN & GILBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: KUWAIT 12 (1991). The Egyptian Civil Code states that "in the absence of a provision of law that is applicable, the Judge will decide . . . in accordance with the principles of Muslim law." CIVIL CODE OF EGYPT art. I (1949), *translated in* 4 ALLEN P.K. KEESE, COMMERCIAL LAWS OF THE MIDDLE EAST: THE ARAB REPUBLIC OF EGYPT: THE CIVIL CODE 1 (1981). Also, the Egyptian Constitution states that "Islamic jurisprudence is the principal source of legislation." CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT art. II, *translated in* 6 ALBERT BLAUSTEIN & GILBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: EGYPT 11 (1991). In addition, the civil codes of Syria (enacted in 1949) and Iraq (enacted in 1951) require courts to fill gaps in the civil codes through application of Muslim law, and the constitution of Iran and the laws of Indonesia provide a procedure intended to assure conformity of institutions to the principles of Muslim law. DAVID, *supra* note 123, at 431. [↑](#footnote-ref-144)
144. 144 Influential Islamic leaders such as the Ayatollah Khomeini regarded the role of women as that of wife and mother in keeping with the *Sharia*, and women interested in pursuing the professions should be limited to those of midwifery, gynecology, sewing, teaching in girls' schools, and nursing. *See* Linda Cipriani, *Gender and Persecution: Protecting Women under International and Refugee Law*, 7 GEO. IMMIGR. L.J. 511 (1993) [hereinafter Cipriani]. [↑](#footnote-ref-145)
145. 145 P.A. Lienhardt, *Some Social Aspects of the Trucial States, in* THE ARABIAN PENINSULA: SOCIETY AND POLITICS 219, 221-22 (Derek Hopwood ed., 1972). For example, the Saudi Labor and Workmen's Law states "in no case may men and women commingle in the place of work or in the accessory facilities or other appurtenances thereto." SAUDI ARABIA LABOR AND WORKMEN'S LAW art. 160 (1969). Other cultures also have similar restrictions against women, such as in India under the Hindu religion, Africa under tribal laws, and Latin America under the tradition of *machismo*. Cipriani, *supra* note 144, at 513. [↑](#footnote-ref-146)
146. 146 *But see* EEOC Decision No. 85-10, Empl. Prac. Dec. (CCH), P 6851, at 7053-54 (July 16, 1985). In this case, the country's statute specifically prohibited employment of women where contact with the opposite sex would occur. *Id.* The statute and the identity of the host country were not disclosed in the opinion in order to protect confidentiality as required by Title VII. Title VII §§ 2000e-5, 2000e-8 (1988). [↑](#footnote-ref-147)
147. 147 *See* B.W. NAPIER ET AL., COMPARATIVE DISMISSAL LAW 67 (1982) (the diversity of legal regimes requires examination of both legislative rules and rules with an origin in collective agreements). [↑](#footnote-ref-148)
148. 148 Boureslan v. Arabian Am. ***Oil*** Co., 857 F.2d 1014, 1020 (5th Cir. 1988). [↑](#footnote-ref-149)
149. 149 *See* Analysis of the Section 4(f)(1) "Foreign Laws" Defense of the Age Discrimination in Employment Act of 1967, Notice 915.046, EEOC Compl. Man. (CCH), P 6524, at 5121 (Dec. 5, 1989) [hereinafter "Foreign Laws" Defense]. [↑](#footnote-ref-150)
150. 150 *Id.* (quoting Miller v. Dunn, 72 Cal. 462, 465 (1887)). In addition, the ADEA policy guide instructs that the EEOC will ultimately consult the State Department to determine whether a foreign law exists. *Id.* at 5125. The Title VII and ADA policy guide indicates that investigators should contact the EEOC "Attorney of the Day" for determination of the existence of a foreign law. Application of Title VII and ADA, supra note 9, at 2313-28. [↑](#footnote-ref-151)
151. 151 *See* "Foreign Laws" Defense, *supra* note 149, at 5121-22. [↑](#footnote-ref-152)
152. 152 Fernande z v. Wynn ***Oil*** Co., 653 F.2d 1273 (9th Cir. 1981). [↑](#footnote-ref-153)
153. 153 Abrams v. Baylor College of Med., 581 F. Supp. 1570 (S.D. Tex. 1984). [↑](#footnote-ref-154)
154. 154 Although these cases were in the context of Title VII, not the ADEA, the EEOC took the position at that time that Title VII applied overseas. *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Comm. on Labor and Human Resources United States Senate*, 98th Cong., 1st Sess. 3 (1983) (statement of EEOC Chairman Clarence Thomas). The EEOC could have used these Title VII cases as an analogy to the ADEA, especially considering its willingness to interchange precedent between Title VII and ADA contexts elsewhere in its policy. [↑](#footnote-ref-155)
155. 155 Title VII § 2000e-1(b) (Supp. V 1993); ADA § 12112(c)(1) (Supp. V 1993). [↑](#footnote-ref-156)
156. 156 Application of Title VII and ADA, supra note 9, at 2313-25. [↑](#footnote-ref-157)
157. 157 577 F. Supp. 1196 (N.D. Tex. 1983). [↑](#footnote-ref-158)
158. 158 Id. at 1197. [↑](#footnote-ref-159)
159. 159 Id. at 1197-98. [↑](#footnote-ref-160)
160. 160 Id. at 1198. [↑](#footnote-ref-161)
161. 161 *Id.* [↑](#footnote-ref-162)
162. 162 *Id.* [↑](#footnote-ref-163)
163. 163 *Id.* ***Kern*** attended conversion classes in Japan, selected an Islamic name, and then decided not to convert. Dynalectron later offered him a job as a member of the air crew, which did not require conversion, but he declined the job. *Id.* [↑](#footnote-ref-164)
164. 164 *Id.; see also* Anderson v. General Dynamics Convair, 589 F.2d 397 (9th Cir. 1978) (permitting constructive discharge as Title VII violation); Brown v. General Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979) (permitting the same). [↑](#footnote-ref-165)
165. 165***Kern***, 577 F. Supp. at 1201. The BFOQ defense states:

     Notwithstanding any other provision of this title . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

     Title VII § 2000e-2(a) (1988). [↑](#footnote-ref-166)
166. 166 ***Kern***, 577 F. Supp. at 1201. [↑](#footnote-ref-167)
167. 167 *Id.* [↑](#footnote-ref-168)
168. 168 Application of Title VII and ADA, supra note 9, at 2313-27. [↑](#footnote-ref-169)
169. 169 ***Kern***, 577 F. Supp. at 1201; *see also* Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273 (9th Cir. 1981) (holding that customer preferences are an insufficient basis to discriminate against U.S. citizens). [↑](#footnote-ref-170)
170. 170 15 U.S.C. §§ 1-36 (1988 & Supp. V 1993). [↑](#footnote-ref-171)
171. 171 113 S. Ct. 2891 (1993). [↑](#footnote-ref-172)
172. 172 In *Hartford*, the Court examined whether United States courts can rely on international comity to decline to exercise jurisdiction over acts of foreign citizens in their home countries when their own foreign government has stated that such extraterritorial application of a United States statute will conflict significantly with its own laws. Id. at 2909-10. The Court held that United States antitrust laws apply to foreign conduct that was meant to produce, and did in fact produce, some substantial effect in the United States. *Id.* In determining whether there was a true conflict between foreign and domestic law, the Court stated that no such conflict exists where a person who is subject to regulation by two states can comply with both sets of laws. Id. at 2910. In order to prove that a United States law would require the corporation to violate the laws of a foreign country, the corporation would have to prove that the foreign law would require them to act in a fashion prohibited by the laws of the United States or that compliance with both sets of laws is otherwise impossible. *Id.* [↑](#footnote-ref-173)
173. 173 15 U.S.C. §§ 1-36 (1988 & Supp. V 1993). [↑](#footnote-ref-174)
174. 174 *See supra* note 62 and accompanying text. The EEOC cites no authority for its position on this matter. [↑](#footnote-ref-175)
175. 175 *See supra* note 61 and accompanying text. The EEOC itself indicates that the place of incorporation is the general test for corporate nationality. Application of Title VII and ADA, supra note 9, at 2313-25. [↑](#footnote-ref-176)
176. 176 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213, Reporters' Note 5 (1987). [↑](#footnote-ref-177)
177. 177 1970 I.C.J. 3 (Feb. 5). [↑](#footnote-ref-178)
178. 178 *Id.* at 42. [↑](#footnote-ref-179)
179. 179 Brill & Halem, *supra* note 10, at S22. [↑](#footnote-ref-180)
180. 180 *See supra* note 69 and accompanying text. [↑](#footnote-ref-181)
181. 181 To pierce the corporate veil, the plaintiff must generally show a high degree of control by the parent or an attempt to perpetrate a fraud. ERNEST L. FOLK ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 329.3 n.11 (3d ed. 1993). [↑](#footnote-ref-182)
182. 182 *See supra* note 69 and accompanying text. [↑](#footnote-ref-183)
183. 183 *See supra* notes 135, 147 and accompanying text. [↑](#footnote-ref-184)
184. 184 Trans World Airlines, Inc. v. Hardinson, 432 U.S. 63, 79 (1977) (stating that neither a collective bargaining agreement nor a seniority system may be employed to violate Title VII); EEOC v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 452 (7th Cir. 1981) (stating that a collective bargaining agreement does not, of itself, provide a defense for Title VII violations). [↑](#footnote-ref-185)
185. 185 For example, a union may refuse to consent to promotion of women in supervisory positions or may insist on a mandatory retirement age. A similar issue arises when the American or American-controlled employer is negotiating a contract with the foreign government, as in a ***oil*** and gas concession agreement. In these cases, the concession agreement may contain a provision insisting on discriminatory treatment of employees, such as preferences of employment on the basis of national origin or religion. Alternatively, the government may insist on approving the company's selection of employees which may cause the American company to deny employment based on a discriminatory purpose. While still a contractual relationship and under the holding of *Mahoney* the contract could not be cited as a foreign "law" for purposes of the Foreign Laws Defense, this scenario gives the employer little room to comply with certain aspects of Title VII. This scenario comes much closer to rising to the level of "law" than does the collective bargaining agreement in *Mahoney* due to the foreign government's involvement, but it is still doubtful that the EEOC's interpretation would consider this a foreign law for purposes of the defense. [↑](#footnote-ref-186)
186. 186 The American or American-controlled employer may indeed be at a competitive disadvantage with non-American companies by virtue of the extraterritorial application of Title VII. Title VII prohibits discrimination against U.S. citizens based on mere customer preferences. Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273, 1276 (9th Cir. 1981). In *Fernandez*, the plaintiff successfully argued that an employer cannot discriminate against women under Title VII based on the hostility of its customers in Latin America against female executives. *Id.* Under this analysis, an American or American-controlled company may lose overseas business to foreign companies because of foreign customers' bias against females or other categories of employees protected by Title VII. Foreign corporations often are not under similar restrictions when operating abroad. *But see* Janice R. Bellace, *The International Dimension of Title VII*, 24 CORNELL INT'L L.J. 1, 23 (1991) (stating that the BFOQ defense should be less strict in an international context than that for a domestic context to incorporate customer's preference); Kenneth Kirschner, *The Extraterritorial Application of Title VII of the Civil Rights Act*, 34 LAB. L.J. 394, 404 (1983) (stating the same). [↑](#footnote-ref-187)
187. 187 For example, in *Mahoney*, RFE/RL would have to attempt to negotiate a contract provision giving preferential treatment to U.S. citizens or seek to depart entirely from the strongly entrenched mandatory retirement policy for all of its employees in Germany. There is obvious potential for conflict under these circumstances. Brill & Halem, *supra* note 10, at S20. [↑](#footnote-ref-188)
188. 188 Policy Guidance on Parental Leave, Notice 915.058, EEOC Compl. Man. (CCH), P 4818, at 4031 (Aug. 27, 1990). [↑](#footnote-ref-189)
189. 189 Brief of the Society for Human Resources Management as Amicus Curiae in Support of Respondents, EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244 (1991) (No. 89-1838). [↑](#footnote-ref-190)
190. 190 Foreign employees may experience adverse terms and conditions of employment by American companies because of the EEOC's remedial guidelines which call for discharge or discipline of the offending employee and preferential treatment for victims of discrimination. Lairold M. Street, *U.S. Corporations on Foreign Soil: Title VII of the Civil Rights Act*, 5 NBA NAT'L B.A. MAG. 8 (May 1991). [↑](#footnote-ref-191)
191. 191 *United Nations Code of Conduct on Transnational Corporations*, U.N. Commission on Transnational Corporations Art. 12 (1988) (stating that transnational corporations must respect social and cultural traditions of the countries in which they operate); *see also* Michael A. Warner, Jr., Comment, *Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law*, 11 NW. J. INT'L L. & BUS. 371 n.106 (1990). [↑](#footnote-ref-192)
192. 192 Pfeiffer v. WM. Wrigley Jr. Co., 755 F.2d 554, 556 (7th Cir. 1985). If U.S. laws regulating these matters were to be applied with regard to employment abroad, they could present conflict with local labor policies and even distort local economies. Yamakawa, *supra* note 12, at 109. [↑](#footnote-ref-193)
193. 193 Extraterritorial application of U.S. employment laws does have an effect upon foreign nationals. *See supra* note 189 and accompanying text. [↑](#footnote-ref-194)
194. 194 *See, e.g.*, EEOC v. Bermuda Star Line, 744 F. Supp. 1109, 1113 (M.D. Fla. 1990) (requiring employer to comply with Title VII for its decisions made in the U.S. concerning employment positions abroad). However, some courts have held that the place of the alleged discriminatory decision is irrelevant when the statute does not have extraterritorial effect. *See* Cleary v. United States Lines, Inc., 728 F.2d 607, 610 n.6 (3d Cir. 1984) (rejecting assertion that ADEA applies to overseas U.S. citizen-employees when discriminatory decision is made in the U.S. prior to extraterritorial amendments to ADEA); Zahourek v. Arthur Young & Co., 567 F. Supp. 1453, 1457 (D. Colo. 1983), *aff'd*, 750 F.2d 827 (10th Cir. 1984) (stating that the discriminatory effect of dismissal was in a foreign country and not subject to ADEA prior to extraterritorial amendments to ADEA). [↑](#footnote-ref-195)
195. 195 Congress felt this concern early in the history of extraterritorial application of U.S. employment laws and it was one of the major reasons Congress passed the extraterritorial amendments to the ADEA. "Foreign Laws" Defense, *supra* note 149, at 5120; *see also Age Discrimination and Overseas Americans, 1983: Hearings Before the Senate Subcomm. on Aging of the Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 1 (1983) (statement of Senator Grassley) ("By implication, . . . Congress intended Title VII to protect American employees working for American employers outside the United States."). [↑](#footnote-ref-196)
196. 196 *See supra* notes 49-51 and accompanying text. [↑](#footnote-ref-197)
197. 197 *See supra* note 62 and accompanying text. [↑](#footnote-ref-198)
198. 198 *See supra* note 61 and accompanying text. [↑](#footnote-ref-199)
199. 199 *See supra* note 69 and accompanying text. [↑](#footnote-ref-200)
200. 200 *See supra* note 150 and accompanying text. [↑](#footnote-ref-201)
201. 201 *See supra* notes 123-45 and accompanying text. [↑](#footnote-ref-202)
202. 202 The EEOC's enforcement guidance on the extraterritorial effect of Title VII and the ADA can best be characterized as an agency's non-legislative rule, such as a "general statement of policy or interpretative rule." *See generally* CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE §§ 3.25, 3.52 (1985) (stating that interpretive rules are distinguishable from legislative rules because legislative rules are made pursuant to the grant of authority to make rules and are binding on courts as an extension of legislative power. However, interpretive rules, as well as statements of policy, are not allocated by the Legislature, but are a means of communication between the agency and the public and do not have binding power unless the courts expressly give them power.). The EEOC did not use a notice and comment procedure, and the EEOC includes its enforcement guidance in the EEOC Compliance Manual. Application of Title VII and ADA, *supra* note 9, at 2313-28. These factors indicate an intent to make an interpretive rule rather than a legislative rule. KOCH, *supra*, § 3.52; *see also* Board of Educ. v. Harris, 622 F.2d 599, 613 (2d Cir.), *cert. denied*, 499 U.S. 1124 (1978) (holding that agency regulations implementing the statute are not legislative rules but are interpretive). *But see* Bureau of Alcohol, Tobacco, and Firearms v. FLRA, 672 F.2d 732, 735 (9th Cir. 1982), *rev'd*, 464 U.S. 89 (1983) (holding that the FLRA's interpretation and guidance on the issue was entitled to deference even though it did not have the force of law, provided it was reasoned and supportable).

     Although courts cannot ignore such rules and sound non-legislative rules should be given "deference" or "great deference," these standards leave the court free to substitute its judgment for that of the agency's. KOCH, *supra*, § 3.52. In fact, Congress anticipated much litigation regarding the extraterritorial amendments because of the lack of interpretative guidance Congress provided. *See* 137 CONG. REC. H3922, H3934 (1991) (stating that portions of the extraterritorial amendments will be the subject of much litigation). For example, in *Aramco*, the EEOC argued that the United States Supreme Court should defer to its interpretation of whether Title VII applies overseas because the EEOC is the agency charged with administrative enforcement of the Act. Brief for the Equal Employment Opportunity Commission at 20, EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244 (1991) (No. 89-1838). The Court rejected this and other arguments advanced by the EEOC and held that Congress's lack of intent to apply Title VII overseas is the relevant factor. *See supra* notes 28-38 and accompanying text. [↑](#footnote-ref-203)
203. 203 *See supra* note 61 and accompanying text. [↑](#footnote-ref-204)
204. 204 *See supra* note 9 and accompanying text. [↑](#footnote-ref-205)
205. 205 *See supra* note 54 and accompanying text. [↑](#footnote-ref-206)
206. 206 Congress never debated employers' concerns on the issue of extraterritorial application of the statutes. *See supra* notes 49-54 and accompanying text. [↑](#footnote-ref-207)