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Multinational Employer Monthly focuses on international HR management and compliance topics essential to the global operational needs of multinational companies.

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How to Craft a Severance Release for an Overseas Employee or Expatriate

Employees get hired with every expectation they will succeed on the job, and expatriates set off on overseas postings with every expectation their foreign assignments will flourish until they “repatriate” back to their home country. But circumstances can change, and multinational employers can find themselves dismissing overseas employees, expatriates or other border-crossing staff, such as international transferees or mobile workers. These dismissals inevitably raise the question: *How should we document the separation to get a binding release that will hold up in court?*

Any employer funding a severance payout for a departing employee (mandatory severance pay plus cash-out of final paycheck and accrued benefits like vacation and pro rata bonus) and that pays more than the bare minimum owed by law has the right to the benefit of its bargain—a release waiving severance pay claims, wherever filed, that blocks the worker from later demanding reinstatement, back pay, more severance pay, a higher calculation of accrued benefits or damages for discrimination, harassment, or abuse of the dismissal process. U.S.- headquartered multinationals already appreciate the value of binding employee severance releases and do not need to be sold on why a duly executed waiver of employment claims from a fired employee is so important. Indeed, American multinationals' own employment agreements, expatriation letters and corporate severance pay policies usually link future severance payouts to the proverbial “full release of all claims in a form acceptable to the employer.” Our question here, therefore, is what that “acceptable” release form needs to look like in the *international context*.

When an employee separation involves just one jurisdiction, the question of how to draft and execute the “full release of all claims in a form acceptable to the employer” is a fairly straightforward exercise in complying with the release strictures of that one country. When dismissing an employee in Ireland, for example, get an Irish employment release form and execute it consistent with Irish release-execution procedures. Do the same when dismissing someone in Argentina, Bahrain, China, or anywhere else. But what kind of “full release of all claims” is enforceable (and so can be “acceptable to the employer”) for a fired border-crossing employee like an expatriate, international transferee, or mobile worker? Our discussion here addresses two issues that together answer this question: how to draft and execute an employment-context release for someone working overseas, and how to craft a release for an expatriate or other border-crossing employee.

Part 1: How to Draft and Execute an Employment-Context Release for Someone Working Overseas

For an employee to waive severance claims, employment law in many countries imposes specific release strictures regulating both what a release must say and how parties must execute it. To draft and execute an enforceable employment-context release, find out the relevant jurisdiction's local employment release strictures—its rules as to whatever boilerplate text needs to be in the release document plus its release-execution procedures. These release strictures act as a sort of safe harbor in that a compliant release usually is binding and fully enforceable, while a noncompliant release is open to attack as unenforceable.

To understand the employment release strictures of any given jurisdiction, account for these six issues relating to the enforceability of an employment release in any country:

Public Policy

Many jurisdictions complicate *employment-context* releases beyond the basic requirements for releases of other civil claims because of the perceived need to protect workers. Laws often treat employment-context releases as different from general civil releases because the state strives to equalize bargaining power between a powerful boss and a vulnerable just-fired employee. The policy here is that if an employer could force a departing employee to execute an ironclad, binding release just to get a separation payment (particularly one already due anyway), then employers might underpay severance pay and invoke the release as a defense to a later claim for the rest of the payments owed under law. A hapless fired worker might sign whatever papers the employer put in front of him, waiving valuable rights under law. Understand the public policy of the jurisdiction at issue and craft a release that complies with it.

Local Quirks

Many legal systems impose specific strictures setting out what they will accept as an enforceable employment release. The technical constraints on employment-context releases vary significantly from

country to country. Therefore, an employment release document drafted for one jurisdiction is rarely appropriate for export. Boilerplate employment release text harvested from one jurisdiction and transplanted somewhere else almost never blossoms. Start drafting an employment release by getting a local form.

Fraud and Duress

We focus here on release text and execution. In addition, of course, in probably every jurisdiction a release that on paper looks perfectly compliant and duly executed is nevertheless subject to attack if the employer procured it with fraud or duress. Always take steps to buttress the employer position that the employee knowingly and freely consented. For example, be sure the release is in a language the employee can be proven to read fluently.

Terminating Contractors

A common scenario is the organization offering a severance payment to an overseas services provider who has been working ostensibly as an *independent contractor or consultant*, not classified as an employee. Any nominal contractor who could bring a viable employment severance claim in a local labor court alleging he had worked as a misclassified *de facto* employee should execute the same sort of release as an employee. This becomes complex, though, in jurisdictions where some local government labor office must authorize an employee release for it to become enforceable, because the employer will not want to highlight the possible misclassification.

Consideration

Sometimes an employer calculates a departing overseas employee's final paycheck, accrued vacation, pro rata accrued bonus, benefits, final commissions, notice-pay-in-lieu, and severance pay under applicable local law—and then insists the employee execute a release just to receive that final payout already owed under contractual or local statutory mandates. This raises the question: Is an employee release enforceable even if unsupported by independent consideration beyond satisfaction of debts the employer was already supposed to pay the employee anyway?

Sometimes yes, sometimes no. The “extra consideration” issue is most likely to be vital in common law countries. To sidestep the problem entirely, the employer can just pay something nominal, above the minimum amount owed by law, both to support release enforceability and to motivate the departing employee to sign the release. But that is not always necessary; in assessing release enforceability, civil law jurisdictions from Argentina, Mexico, and Venezuela to Thailand, South Korea, and beyond look more to the *formalities of release execution* than to common-law consideration analysis. Absent fraud or duress, these jurisdictions may enforce even a duly executed release unsupported by extra consideration.

Resignation and “Agreed Separations”

An employer making a big payout to a dismissed overseas employee understandably worries that it may not get the benefit of its bargain. What if it writes a big severance paycheck but then later gets sued? Where an employer has reason to worry about the enforceability of an overseas employee release, always consider the *resignation alternative*. Usually workers who quit have no legal right to severance pay or to notice-in-lieu payments. Outside of the handful of Arab countries that require employers pay “end-of-service gratuities” even to employers who quit, staff who resign usually get paid nothing (beyond cash-out of final paycheck and accrued benefits), because under most systems severance pay compensates for a *wrongful or unfair dismissal*. (Severance pay tends not to be owed when a dismissal is for good cause.) In many countries, after an employee and employer agree on a separation payment, an employee-signed resignation might be as effective as (in some jurisdictions even more effective than) a release. So consider the “paid-for signed *resignation*” strategy in addition to, or instead of, getting a severance release. But first consider constructive dismissal and local *evidence* law. In jurisdictions like Brazil, where an underlying e-mail or paper trail shows a nominal resignation was actually negotiated and not truly spontaneous, the signed resignation might not extinguish later severance claims if the nominally resigning employee later alleges constructive dismissal.

Additionally, there is the hybrid issue of the so-called “agreed separation.” Under law in most countries, an

employee who leaves the job while still alive either quits or gets fired—there is no middle ground. But in a few countries, like France and Turkey, the law recognizes a third way, sometimes called an “agreed separation” (called a *rupture conventionnelle* in France and an *ikale* in Turkey). In these countries, when structuring an employee separation, find out about the third option, which may be viable depending on local law, the circumstances of the dismissal and the employee’s goals. Sometimes, for example, the third option lets the exiting employee qualify for unemployment benefits not available in a resignation. Where a third option is available and is the best alternative, use it, complying with its release strictures.

With these six general principles in mind, an employer that needs to draft and execute an enforceable employment release in a foreign jurisdiction should find out whether the jurisdiction in question regulates employment-context releases. We might group the employment-release laws of the world into three broad categories: “release-regulated” jurisdictions, “release-unregulated” jurisdictions and “release-unenforceable” jurisdictions.

“Release-Regulated” Jurisdictions

Many countries impose rigid legal mandates dictating to employers what the text of an enforceable employment-context release needs to say or how an employer and employee need to execute an employment release for it to be binding—or both. For example:

- **United States:** One of the world’s most technical and specific sets of employment release requirements is the U.S. federal mandate under the Older Workers Benefits Protection Act (29 USC § 623) (OWBPA) regulating how an employee over age 40 can validly release an age discrimination claim under the Age Discrimination in Employment Act (29 USC § 621 et seq.). Among other strictures, the OWBPA in effect requires pages of boilerplate release language and imposes complex execution procedures that involve 21- or 45-day waiting periods and a seven-day revocation period.

- Bolivia, Mexico, Central America, Andean region:** To get an enforceable *finiquito* (employment release) in Bolivia, an employer first must fill out a form at the Bolivian Ministry of Labor itemizing the separation payments. Then the departing employee must sign an employer-provided receipt acknowledging the precise separation payments being tendered. Next, the Ministry of Labor must ratify and stamp both documents—without the Bolivian Ministry stamp, the release is not binding. (To keep the release private, parties sometimes consider getting a notary to authenticate the release, but notarization is not necessarily a binding substitute for the Ministry seal.) Mexico and much of Central America, as well as countries in the Andean region, impose similar procedures; without government labor agency sign-off, a *finiquito* release in these countries generally is unenforceable. In Ecuador, a release must offer a precise accounting that details the many elements of social payments and accrued benefits payouts, with specific figures and dates.
- England:** Various English statutes including the Trade Union Reform and Employment Rights Act 1996 in effect require that an enforceable employment-context release—which the English call a “compromise agreement”—contain certain boilerplate provisions, and that the document get executed with a written (usually co-signed) verification of the employee’s own legal advisor. That is, in England an employee’s solicitor or advisor actually needs to attest to having advised on the release’s terms and effects (which, of course, is a much more rigorous requirement than the U.S. OWBPA’s practice of merely offering an employee the *opportunity* to consult a lawyer). As part of severance packages, English employers often pay an extra amount corresponding to the employee’s legal fee for this release-signing service.
- Turkey:** After a July 2012 amendment to article 420 of the Turkish Code of Obligations, a binding employment-context release in Turkey must be in writing and must itemize the consideration

paid, which the employer must tender through an inter-bank wire transfer. The parties cannot even execute a binding employment release until the month *after* dismissal, which forces the employer to tender the full severance payout (including all contractual and legal entitlements) at termination, and to seek a release only *afterwards*, when the employer has less leverage and so must offer up extra consideration.

“Release-Unregulated” Jurisdictions

Not all jurisdictions impose detailed statutory requirements regulating the text and execution of a binding employment-context release; many jurisdictions impose no hard-and-fast strictures of release enforceability. These “release-unregulated” jurisdictions range from Argentina and Australia to most African and Arab countries to China, Singapore, and elsewhere in Asia. Indeed, we might also classify the United States as a “release-unregulated” jurisdiction for employees under age 40 beyond the reach of OWBPA. (*E.g.*, *EEOC v. Allstate Inc.*, 3rd Cir. 2015: “It is hornbook law that employers can require terminated employees to release claims in exchange for benefits to which they would not otherwise be entitled.”)

Usually these “release-unregulated” jurisdictions will enforce any clearly drafted release of employment claims written in the local language that references the claims being released (ideally mentioning specific local employment laws) if the release was not procured by fraud or duress. In release-unregulated jurisdictions, use a locally tailored release form and follow local execution protocols for civil contracts. Local lawyers in these jurisdictions often have on hand template employment release forms, but local law does not prescribe any specific release format, and so local forms may differ.

“Release-Unenforceable” Jurisdictions

Some jurisdictions—notably including Brazil, India, and Malaysia—do not recognize employee-executed releases as binding (unless the release is part of a dismissal with prejudice of a court-filed employment claim). The policy here is that severance pay mandates are what they are, and employers must comply with them—if a hapless worker signs a release

but later proves to a local judge that he deserved more separation pay than he got, the court will award the difference notwithstanding the release.

Even so, employers in these jurisdictions tendering separation pay often ask an employee to sign a release-like document itemizing the specific payments being made. In these jurisdictions, this document at best acts only as a *receipt* barring a later lawsuit that demands the employer repay itemized severance debts already satisfied. The document does not bar a claim alleging the employer *underpaid* separation pay, because under local law, employment releases are flatly unenforceable.

There are also hybrid jurisdictions—notably including France, Hong Kong, Iraq, New Zealand, the Philippines, Singapore, Spain, Switzerland, Sweden, and the UAE. In those countries, a document purporting to be an employee release will not usually extinguish a later-asserted claim alleging underpayment of *liquidated* employer debts for statutory severance pay, severance “indemnities,” notice pay, accrued vacation pay, proportionate bonus, or final paycheck. In these jurisdictions, employees cannot waive clear-cut rights under employment laws even after a dispute arises (before it goes to court). However, in these jurisdictions an employee release might indeed extinguish *unliquidated* civil claims like bonus disputes and claims for discrimination, “moral damages,” harassment, or abuse of termination process.

Part 2: How to Craft a Release Strategy for an Expatriate or Other Border-Crossing Employee

Releases for foreign local employees who got hired, lived, and worked in just one country are subject only to that jurisdiction’s law and courts, and merely need follow that jurisdiction’s legal strictures (unless there is a complicating choice of foreign law clause.) Because boilerplate text for staff releases and release execution procedures vary so much from country to country, the question becomes how to craft a release for a *border-crossing* employee, like an expatriate or a mobile worker (such as a sailor, airline pilot, or salesman with

an international territory) whose employment history might allow him to invoke two or more countries’ employment laws. Complications arise whenever two or more jurisdictions’ employee-protection laws converge on a single terminated worker. Our question is what an expatriate or mobile employee’s severance release should look like. Can that release effectively extinguish later-filed claims in the courts of, or invoking the laws of, *more than one* jurisdiction?

In the expatriate or border-crossing employee context, a severance release tailored to the standards of just one relevant country leaves the employer exposed to a lawsuit filed in the courts of whatever *other* jurisdiction may also have a nexus to the employment. For example, a release that was crafted to be fully enforceable in the home country jurisdiction may not be enforceable if the border-crossing employee asserts a viable dismissal claim in the *host* country (unless by sheer good luck the home country release also happens to meet all the host country’s strictures for a binding employee waiver.)

A mistake is to assume just one country’s employment (and hence employee-release) laws must somehow control a given border-crossing employee’s employment relationship. Multinationals may assume they can structure a border-crossing employee’s severance release so that it meets the standards of some assumed “lead country”—often the expatriate’s *home* country, particularly if the expat signed a home-country choice-of-law clause in an expatriate agreement or secondment letter. The multinational might include in its release some catch-all clause purporting to release “all claims” in a second jurisdiction (say, the host country) or purporting to release “all claims worldwide.” But a catch-all clause like this does not necessarily work, even if the employee had signed a choice-of-law clause opting for the “lead” country’s law to apply exclusively to the employment arrangement. Three hypothetical examples illustrate this problem:

Example 1

Dismissals of staff in France need to follow rigid procedures. To be binding, French severance releases must be in French and must meet specific formalities. Imagine, for example, a Cincinnati-to-Nancy expatriate with an Ohio choice-of-law clause in

his expat assignment letter who gets fired while working in France. The Ohio choice-of-law clause may lull the employer into structuring a U.S.-compliant English-language release (for example, an OWBPA-compliant release) that treats Ohio as the “lead” jurisdiction. But even if that release includes a catch-all clause purporting to release “all claims in France and worldwide,” it likely falls short of France’s rigid release standards—and so it may not offer much defense to a Nancy labor tribunal severance pay claim.

Example 2

Imagine a dismissed American citizen who worked for the last 10 years for an American multinational’s office in London. Even an American employee over age 40 who got hired locally in London or was “localized” and paid on the London payroll can always invoke the extraterritorial reach of U.S. age discrimination laws. A severance release drafted to conform to host country English release standards (a “compromise agreement”)—even a release that adds in a catch-all clause purporting to waive “all claims in the United States and worldwide”—falls short of the complex U.S. OWBPA release strictures like the OWBPA’s 21- or 45-day waiting periods. This English-compliant agreement, even with its “all claims in the United States” clause, offers little defense to an American age discrimination claim invoking the extraterritorial reach of the Age Discrimination in Employment Act.

Example 3

To be binding, a release of severance claims under Mexican law needs to be a *finiquito* ratified by a Mexican labor agency. Imagine an American working on both sides of the El Paso, Texas/Juarez, Mexico, border gets fired and signs a U.S.-compliant English-language release that includes a clause purporting to release “all claims in Mexico and worldwide.” If he later sues for severance pay in a Juarez labor court alleging Juarez was his place of employment, the release may not hold up, because it never got authenticated by the competent Mexican government labor agency.

How can an employer draft a binding release for an expatriate or other border-crossing employee? At minimum, a border-crossing employee’s release should name and release each affiliate employer entity that the fired worker might later claim to have worked

for at some point in his career. Otherwise, in analyzing a cross-border employment release scenario like these three examples, three complications can arise: extraterritorial laws, extraterritorial contract provisions, and unclear place of employment:

- **Extraterritorial laws:** Sometimes a fired employee is a citizen of, or was originally hired in, a home country that presumes to extend its employment protection laws extraterritorially. While only a handful of countries do this, those that do are vital to account for when analyzing employment release enforceability as to expatriates and other border-crossing staff. Brazil and Venezuela extend their employment laws extraterritorially, and in some limited but expanding scenarios, so does the United Kingdom. Also, a number of countries extend some, but not all, of their employment laws extraterritorially: We have seen that the United States extends its *discrimination* laws abroad to protect U.S. citizens who work for U.S.-“controlled” employers. Also, Germany extends its new minimum wage law abroad to protect German citizens or staff originally hired in Germany (although how that works is not yet clear).
- **Extraterritorial contract provisions:** Even where a border-crossing worker’s home country employment laws do not reach abroad by statute, a *choice-of-law* clause in the employee’s own employment contract, expatriate agreement, expatriate assignment letter, expatriate program documents, or equity/bonus/benefits plan documents (or buried in an original underlying “hibernating” host-country employment agreement) can have this same effect, pushing home country employment laws into the host country. That said, there are some exceptions (for example, a contractual clause calling for “English law” may not actually extend English employment law abroad where English employment law does not otherwise apply). In short, contrary to a common misunderstanding, a home-country choice-of-law clause does not usually divest the simultaneous application of *host-country* employee-protection laws.

- **Unclear place of employment:** Sometimes the place of employment of a fired mobile employee (in the terminology of Europe’s Rome I Regulation, the “habitual place of employment”) is unclear. Imagine, for example, a regional sales director who lives in France, has an office in Belgium, and serves customers predominantly in Luxembourg. Or think of a border-crossing employee (what the British call a “peripatetic” employee) with no fixed workplace, like a sailor, airline crew, or international tour guide. Or think of an expatriate who moved to a new assignment just last month. In these cases, a fact question can arise as to *which country is the place of employment* and, therefore, which country’s laws regulate release enforceability.

When dismissing staff in any of these three cross-jurisdictional employment scenarios, the best way to craft that proverbial “binding release of claims in a form acceptable to the employer” is often to combine each relevant country’s boilerplate release text and each relevant country’s mandated release-execution procedures into one single hybrid release. Or else break out separate, simultaneously executed releases—separate release documents are particularly likely to be necessary in jurisdictions like Bolivia and Mexico where a local government labor agency has to ratify the release and local provisions will inevitably complicate the process.

Combining two or more countries’ boilerplate release wording into a single release inevitably makes for a cumbersome, inelegant document, sometimes with passages in two different languages. Consider, as one example, a release for a 40-year-old American executive fired while working in the London office of an American multinational. Even if the underlying employment agreement has a U.S. choice of law clause, notwithstanding Europe’s Rome I Regulation, both U.S. discrimination laws and UK unfair/wrongful dismissal protections very likely protect this employee simultaneously. This executive should release U.S. discrimination claims and any UK unfair dismissal, wrongful dismissal or breach of contract claims. The employer needs a hybrid or double release document grafting enforceable U.S. OWBPA release language onto the text of a binding UK “compromise agreement.” It would need to include all the waiver provisions of

both systems and accommodate both the waiting and revocation periods of the U.S. OWBPA and the mandatory co-signature of the employee’s own solicitor required for a binding UK compromise agreement.

We have seen that in “release-unenforceable” jurisdictions like Brazil, a binding release of employment dismissal claims is impossible unless the fired employee first files and then dismisses a termination lawsuit in labor court, or unless the jurisdiction enforces an employee-signed resignation as a bar to severance pay claims. In these countries, as we have seen, no language inserted into any release document will give an employer a dispositive defense to a local severance lawsuit; the best an employer can get is an employee-signed *receipt* acknowledging and earmarking severance money tendered. In the border-crossing employee context, any severance document memorializing a separation and severance payment for an employee with a nexus to a “release-unenforceable” jurisdiction should document the separation under local best practices.

* * *

Even in the absence of fraud and duress, enforceable employment-context releases or waivers often must meet very specific local standards as to both release text and release execution procedures. These release strictures, where applicable, vary widely by jurisdiction.

Foreign local release rules inevitably come into play when dismissing staff abroad. Where a departing cross-border employee might be in a position to invoke employment rights under the laws of two (or more) jurisdictions, the employer can craft a hybrid release that meets the employment waiver rules of all possibly implicated jurisdictions.

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