How to Craft a Global "Code of Conduct"— Internal Code of Business Ethics or Supply Chain Labor Code

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Most major multinationals, particularly those based in the United States, have issued some sort of code of conduct imposing baseline rules across their worldwide operations. But global conduct codes vary substantially as to their purpose, content and focus. In fact, "code of conduct" is not a term of art; it is just a broad label applied to a range of policies within multinational and nongovernmental organizations. The International Labour Organisation website used to say that "global codes of conduct do not have any authorized definition... [T]here is a great variance in the way these statements are drafted."

Many multinational policies labeled "code of conduct" have little to do with employment relationships. There are antitrust compliance codes of conduct, environmental-protection codes of conduct and advisory codes of conduct on topics like intellectual property and computer programming. But these non-employment codes—while each vital in its own right—are only loosely connected to a multinational's cross-border efforts at legal and ethical human resources compliance.

Even confining our discussion of global conduct codes to the international employment context, we must distinguish two very different kinds of codes. We begin our discussion of employment-context global codes of conduct by differentiating *external supply chain* conduct codes that protect the staff of a multinational's suppliers from so-called "sweatshop" conditions, versus *internal codes of business ethics* that impose compliance rules on a multinational's own personnel worldwide. In a sense, these two types of employment conduct code are polar opposites: External supplier codes seek to *protect* outside workers not employed by the code-issuer while internal ethics codes seek to *restrain* a code-issuer's own internal staff. An ambitious multinational might perhaps try to cobble these two different documents together into a single text, but effectively stitching a supply chain code onto an internal ethics code is a bad fit because both the purposes and intended audiences of these codes differ.

A multinational employer that wants either to issue a new global code of conduct or to update an old code should take three steps: First, clarify which of the two types of conduct code is at issue. Second, determine what the code should say. Third, implement the code across global operations. Accordingly, part 1 of our discussion addresses one type of conduct code, the supply chain labor ("sweatshop") code. Part 2 offers a checklist of topics to consider when drafting the other type of code, the internal code of business ethics. Part 3 lists the issues to address when launching and implementing an internal code of business ethics (but we leave a full analysis of launch logistics for another discussion).

Part 1: External Supply Chain Labor Code of Conduct

Because external supply chain labor codes of conduct differ radically from internal codes of business ethics, any multinational employer contemplating an employment-context "global code of conduct" must begin by deciding which type of code it needs—or whether it needs both.

Global supply chain or "sweatshop" codes of conduct first got traction in the 1990s when American human rights activists championed supplier codes to fight perceived overseas labor abuses and promote worker rights across the developing world. U.S. labor union activists fighting for job security for American

workers—protecting "American jobs"—jumped on the bandwagon and promoted supplier codes, too, to make American workers more competitive by raising the cost of using foreign labor. (*See* W. Martucci, *et al*., "International Workers, Companies and Consumers," *Law360*, Aug. 19, 2013) In 2013, the Rana Plaza factory collapse killed over 1,100 workers in Bangladesh, reinvigorating the supplier code of conduct movement (even though a building collapse would seem more an issue of construction code standards than labor standards). California passed a law effective since 2012, the Supply Chain Transparency Act, requiring companies to confirm they are not complicit in human trafficking or slavery. And effective in 2016 the UK implemented its Modern Slavery Act, which also requires reporting on supply chain labor conditions. These and other laws regulate issues that push certain businesses (particularly U.S. government contractors) to police their supply chains. But other than the FARs law that reaches U.S. government contractors, few if any laws actively mandate supply chain labor codes. *(See accompanying chart.)*

LAWS REGULATING THE POLICING OF AN ORGANIZATION'S SUPPLY CHAIN

LAW	WHO IS COVERED?	*REQUIRE* SUPPLY CHAIN CONDUCT CODE?	WHAT SUPPLY CHAIN POLICING DOES THE LAW MANDATE?
U.S. TARIFF ACT OF 1930 19 USC § 1307	Anyone attempting to "impor[t]" "goods, wares, articles, and merchandise" into the U.S.	No	• Importing into U.S. any "goods, wares, articles, and merchandise" made by "convict," "forced" or "indentured" labor is illegal • However, this prohibition does not reach and category of goods "which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States" • No reporting mandate—the law simply prohibits these imports
U.S. FEDERAL ACQUISITION REGULATIONS ("FARS") 48 CFR § 9.102 48 CFR § 9.104 48 CFR § 52.222	• U.S. government contractor under 48 CFR § 16.101 (*cf.* subparts §§ 16.1-.4) • The FARs *compliance program requirement* reaches contractors with U.S. govm't contracts of $500,000+	Yes (*cf.* "compli-ance certifi-cation" require-ment)	• <u>Prohibited activities in internal employment (not necessarily supply chain)</u>: A covered organization, itself, may not commit certain *designated "prohibited activities"* (labor abuses)—but this primary prohibition reaches the covered business's *own internal operations*, not necessarily its supply chain ✓ "Prohibited activities" are: no human trafficking; no procuring commercial sex acts; no forced labor; no confiscating worker IDs; no fraudulent recruiting; no using scofflaw recruiters; no charging recruitment fees; no refusing to provide guest worker return transportation home; no substandard worker housing; no refusing to provide written work contracts • <u>Mandated steps for internal operations (not necessarily supply chain)</u>: A covered org. must take these steps as to its *own internal operations* (not necessarily down the supply chain): ✓ Notify employees and agents of U.S. Government policy against human trafficking, and the organization's penalties for violation ✓ Tell Contracting Officer + agency Inspector General credible info. about human trafficking/other illegal labor abuses; cooperate with U.S. government investigations ✓ Provide reasonable access to facilities and staff (both inside and outside the U.S.) to allow responsible federal agencies to ascertain compliance with laws re human trafficking, procurement of commercial sex acts, forced labor ✓ Protect employees victims of/witnesses to prohibited activities; let them cooperate with government authorities • <u>Compliance program</u>: Implement a compliance program as to internal operations *and outside-U.S. suppliers/services providers* (this program can also be a mitigating factor in sentencing); this compliance program must: ✓ Include an awareness program to tell the org's. own employees about U.S. government policy against human trafficking, etc. ✓ Offer a process to facilitate the org.'s own employees reporting illegal activities without retaliation

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			✓ Include a recruitment plan + wage plan + housing plan (addressing the org.'s own employees) ✓ Include procedures to prevent *agents and contractors* from engaging in human trafficking • Imposition on contractors: A covered org. must *contractually impose these requirements* (above) *in contracts down the supply chain* • Compliance certification (48 CFR §§52.222-50(h)(5)): Annually, a covered org. must certify it has implemented a "compliance plan" to "monitor" *contractors'/agents'* "prohibited activities," + to certify compliance steps *contractors/agents* have taken
CALIFORNIA TRANSPARENCY IN SUPPLY CHAIN ACT 2015	• Orgs. doing business in CA • Annual global revenue $100,000,000+ • Identified as "manufacturer" or "retail seller" on CA tax return	No	• Disclose what—if any—steps taken as to: ✓ Verification of supply chain labor compliance ✓ Audits of supply chain ✓ Certifications of compliance by suppliers ✓ Any "internal accountability" standards as to supply chain labor compliance ✓ Training on supply chain compliance • The law does not require taking any affirmative steps as long as a covered organization discloses *"We did not take any steps."*
UK MODERN SLAVERY ACT 2015	• Commercial orgs. *conducting business in* UK • Supplies goods or services • Total revenue exceeds amount set in regs. of UK Sec'y of State	No	• Disclose what—if any—steps taken during the fiscal year to ensure slavery and human trafficking are not occurring in the supply chain or in the business • The law does not require taking any affirmative steps as long as a covered organization discloses *"We did not take any steps."*
EU DIRECTIVE 2014/95/EU AMENDING DIR. 2013/34/EU, RE DISCLOSURE OF NON-FINANCIAL AND DIVERSITY INFORMATION BY CERTAIN LARGE UNDERTAKINGS AND GROUPS	• Large public-interest entities (publicly-traded companies, banks, insurance cos. + others designated by Member States) • Employing 500+ employees • Subs. are *exempt* if included in parent reporting • Member State transposition by 6 Dec. '16	No	• Disclose information about development/performance/impact of company *(not necessarily supply chain)* activities regarding: ✓ Environmental matters ✓ Social and employment ✓ Respect for human rights ✓ Anticorruption and bribery ✓ Diversity in their board of directors • The above disclosure requirements seem to address internal operations—not necessarily supply chains—however: ✓ directive's non-binding "Whereas" ¶¶6,8 (only) mention "supply and subcontracting chains" ✓ directive art. 1(3) §1(d) addresses a "statement containing information…where relevant and proportionate [about] business relationships, products or services which are likely to cause adverse impacts" • The law does not require taking any affirmative steps as long as a covered organization discloses: *"We took no such steps and we have no such information or policies"*—but must provide a clear/reasoned explanation for this response

Supply chain labor codes may be as much a *public relations* as a compliance phenomenon. According to one commentator, "[i]t is unclear…whether [supply chain conduct codes] are anything more than publicity gold, with no legal efficacy." (Haley Revak, "Corporate Codes of Conduct: Binding Contract or Ideal Publicity," 63 HASTINGS L. J. 1645,

1646 (2012)) The underlying legal-standing issue here is that labor and employment laws bind actual and de facto employers, but not their customers. While a supplier organization that breaks a labor or employment law is directly responsible for its own labor/employment violation, its customers simply are not (unless perhaps the seller and customer were somehow so intimately intertwined that they constitute co-/dual-/joint-employers).

A supply chain labor code that is more than a mere publicity piece might be argued to impose responsibilities that, absent a code, the issuing organization would not have to worry about. That is, issuing a new supply-labor code might expose an organization to attacks on grounds not previously a threat:

1) *Duty to enforce:* A supply chain labor code might be argued to impose a duty on the issuer to protect supplier staff by enforcing the code; the code-issuer might be argued to be responsible for any breach of that duty. (*See* Doe v. Wal-Mart, 572 F.3d 677 (9th Cir. 2009))

2) *Co-/dual-/joint-employer:* A supply chain labor code by definition sets terms and conditions of employment for suppliers—thereby opening the code-issuer up to a charge of being a co-/dual-/joint-employer of supplier staff.

3) *Permanent establishment:* Setting detailed terms and conditions of employment for supplier staff working in foreign countries exposes a code-issuer to the argument it does business and has a taxable "permanent establishment" in those countries.

4) *False advertising:* Announcing publicly that a supply chain labor code exists raises the specter of false advertising allegations alleging the code-issuer promotes the code more than enforces it. (*See* Doe v. Wal-Mart, *supra*; Haley Revak, *supra*)

Notwithstanding that supply chain labor codes introduce these risks, organizations increasingly issue these codes, particularly organizations that source low-cost manufactured product from the developing world—high-tech hardware marketers, apparel and shoe companies, mass-market retailers, mid-market fashion marketers, sports equipment providers, toy makers and furniture retailers. Some oil and mining companies and some global manufacturing conglomerates also issue these codes. Supply chain labor codes pop up in unexpected sectors like building contractors in the Middle East, coffee shop "fair trade" sourcing protocols, publishing company supplier codes and university "Statements of Labor Values." And U.S. government contractors subject to FARs/Federal Acquisition Regulations are supposed to issue suppliers codes (see chart).

Still, supply chain labor codes are far from ubiquitous. Many major organizations have never issued one. Supplier codes remain relatively rare in industries from restaurants and hospitality to convenience stores to finance, from professional services including law firms, health care and industrial supply to most or all business-to-business sectors. Cutting-edge technology companies (other than those that sell tech hardware) tend not to issue these codes. In fact, while supply chain labor codes are common in some apparel retailing, they do not seem to be much of an issue among high-end luxury goods brands that source product from rich countries. And these codes are only now emerging in services sectors—even though most of the social, compliance, public relations and business-case arguments for supplier conduct codes apply to providers of *services*. Perhaps the next frontier will be imposing supplier codes on outsourced call centers and other low-wage, back-office services operations from India to the Philippines and beyond.

Before drafting, updating or adopting a supply chain labor code, factor in four issues: external focus, implicit poor-country focus, code content and implementation/monitoring.

- ✓ **External focus**: By definition, a supply chain labor code sets labor terms and conditions for external workers who work for unaffiliated suppliers. Supply chain codes are inherently external, neither addressed to nor meant to protect the code-issuer's own staff on its own payroll. While some supplier conduct codes may purport to

reach both supplier employees and the code-issuer's own staff, policing code compliance as to the code-issuer's internal staff rarely is much of an issue because a multinational that goes to the trouble of issuing a supply chain labor code sees itself as a conscientious employer not operating any "sweatshops" of its own. Not even the activists and labor unions who complain about foreign labor abuses tend to accuse multinational code-issuers *themselves* of shoddy labor practices in their own in-house operations—although there are important exceptions including discount retailers with large populations of low-wage staff.

- ✓ **Implicit poor-country focus**: Supply chain codes of conduct almost always purport to reach a multinational customer's suppliers worldwide, across rich and poor countries alike. But as a practical matter these codes mainly address suppliers in the *developing world*. Rich-country suppliers may have to "check the box" and affirm compliance, too, but activists decrying foreign labor abuses will not see worker exploitation as a pressing social issue in, say, Australia, Denmark or Japan. And so rich-country suppliers often ignore supply chain labor codes and only perfunctorily affirm compliance. Businesses and even lawyers in, for example, Germany and Russia seem to assume supplier conduct codes do not reach into their countries because their labor laws must surely be tougher than the codes. Indeed, code-issuers seem less than rigorous in appending their supply-chain codes to supply contracts with rich-country suppliers, even though the code's terms purpose to reach into all countries. No one ever seems to complain, even though many or most supply chain conduct codes actually contain clauses that go well beyond minimum statutory labor standards even in developed countries. For example, some of today's supply chain labor codes mandate anonymous whistleblower hotlines and formal diversity plans—but neither of these are required or even particularly common among employers in developed countries outside the U.S.

  Sometimes a supply chain labor code meant to protect developing-world workforces gets so protective that it acts as a disincentive to sourcing from developing-world suppliers. Factor in supplier workers' vital interest in *staying employed*. Trade unions and other worker advocates in developing countries may actually oppose overzealous rich-country attempts to protect workers so comprehensively that the protections threaten the livelihoods of the very workers ostensibly the beneficiaries. (*See* Thomas Friedman, "Don't Punish Africa," New York Times, Mar. 7, 2000)

- ✓ **Code content**: A supply chain code of conduct requires sellers to meet whatever minimum labor protections the code document happens to impose. Specific minimum labor standards covered differ widely from code to code. Some supply chain labor codes do little more than require suppliers comply with "applicable" labor and health/safety laws. Others supplier codes focus on a single issue or two—child labor, slave labor or human trafficking, for example, or (in the Middle East) banning recruitment fees and confiscating immigrant workers' passports. Meanwhile, other supply chain labor codes cover a range of potential workplace abuses like mandatory rest periods, bathroom breaks, anti-discrimination, health/safety, work hours caps, minimum pay rates, overtime pay, meeting payroll and the hot-button issue of *unionization*—the "right to organize." And so most supply chain labor codes end up addressing topics that local labor protection laws already address, anyway. To this extent, supply chain labor codes implicitly seem to presume that protections under local labor law protections in suppliers' countries are too weak or underenforced.

  Many industries in which supply chain labor codes are common have issued sample industry codes—forms and models setting out recommended code content and entire codes for organizations to incorporate wholesale. Some codes incorporate by reference model industry code templates and International Labour Organisation (ILO)

conventions. The Bangladesh Rana Plaza disaster spawned both a European and a separate American model supplier code for sourcing apparel from Bangladesh, even though there were already plenty of model apparel supply chain labor codes floating around before the Rana Plaza collapsed. Did these two model industry codes make any difference? Three years after Rana Plaza, "human rights groups say that…promises are still unfulfilled, and that safety, labor and other issues persist in Bangladesh and other countries where global retailers benefit from an inexpensive work force." (Rachel Abrams, "Falling Short of Commitments to Overseas Factory Workers," New York Times, May 31, 2016)

Be careful adopting an interest or industry group's model supplier labor code. A model code may well include provisions less than ideal for any given organization. In particular, beware the common practice of incorporating ILO conventions or other international human rights declarations into a global supply chain code. ILO standards are a bad fit for a supplier conduct code because the ILO itself addresses its conventions to nation-states, not corporations—the ILO designs its conventions as government legal templates, not private supply chain guidelines. Just as no U.S. domestic employee handbook would incorporate the U.S. Constitution bill of rights, to incorporate ILO or other rights-granting legal declarations into a business's supply chain conduct code fundamentally misconstrues what those standards are meant to do. Indeed, it make no more business sense to incorporate ILO conventions into a supply chain labor code than it would make sense to incorporate ILO conventions into a U.S. employee handbook, and few or no employers do that.

- *Tripartite Declaration.* The ILO has issued a "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" that offers broad suggestions to employers for their internal employment operations, but the ILO "MNE Declaration" does not recommend supply chain labor codes, and in fact it is silent on supply chain labor.

  Perhaps the biggest problem with incorporating ILO standards into a supply chain labor code is signing onto the core ILO right to *freedom of association*. Adopting this particular right invites the argument that the code-issuer has estopped itself and its suppliers from opposing union drives and resisting strikes and union initiatives worldwide. "Freedom of association" has widely divergent meanings around the world and academic literature within the labor movement interprets the concept expansively. Beware incorporating this particular right without embracing its sweeping ramifications. Consider the scenario of a U.S. union pointing to a "right to organize" or free association provision during a strike or organization drive. A supply chain labor code might merely require suppliers follow "applicable" labor unionization laws and "applicable" laws on free association of workers. For that matter, a conservative but viable approach to drafting a supply chain labor code is to anchor the entire code in a straightforward mandate that suppliers follow all "applicable" employment law without second-guessing local legislatures by adding in many additional rights.

- ✓ **Implementation and monitoring**: Multinationals usually impose their supply chain labor codes as appendices to the supply contracts, sourcing agreements and purchase orders that they enter with their "business partners" (sellers) around the world. However, many multinationals seem to impose their codes selectively, letting some suppliers off the hook, particularly those outside the developing world.

  The challenge to implementing a supply chain labor code is the awkward problem of how a customer can impose employment terms and conditions on both the supplier companies selling it things and on the companies selling materials to those suppliers. The missing legal link here is

privity of employment contract: Customers that buy product or services in arm's-length sales transactions from unaffiliated overseas sellers have no contact with or authority over the sellers' workforces (much less the over the workforces of companies supplying those suppliers). Absent enforceable provisions in a supply contract, a customer has absolutely no right to set or monitor terms and conditions of employment at foreign businesses that sell it goods, or at that seller's supplier organizations. In fact (as mentioned), organizations usually strive to *avoid* setting terms and conditions of employment for people they do not employ, so as not to expose themselves up to a claim that they are a co-/dual-/joint-employer of unaffiliated parties' staff. (*See* Univ. of Pennsylvania Wharton podcast "How the McDonald's Franchise Labor Case Could Upend an Industry," *available at* http://knowledge.wharton.upenn.edu/article/cappelli-mcdonalds/)

After an organization that has issued a supply chain labor code somehow gets all its overseas sellers (and their materials suppliers) to sign onto the code, monitoring the code—policing what goes on behind the workplace gates of foreign sellers and their materials suppliers—is even harder work. The *Wall Street Journal* has acknowledged the "difficulties Western companies sometimes face in assessing working conditions at the foreign plants that manufacture their products." (M. Bustillo, "Sex Abuse Alleged at Apparel Maker," June 20, 2011) And "an extensive investigation by *The New York Times*" found that many "Western companies'" supply chain labor code "inspection systems intended to protect [suppliers'] workers and ensure manufacturing quality [are] riddled with flaws." (S. Clifford, "Fast and Flawed Inspections of Factories Abroad," NYT, Sept. 1, 2013) Indeed, the logistical challenges to code monitoring have become so complex that, to quantify code monitoring metrics, a Harvard Business School Working Paper called "Monitoring Global Supply Chains" employs the formula

$Y_{icdj} = F(\beta_1 X_{id} + \beta_2 Ø_{id} + \beta_3 \lambda_{cd} + \beta_4 \dot{\alpha}_i + \beta_{5\dot{\upsilon}} + \beta_{6\dot{\eta}} + \varepsilon_{icdj}$. (J.Short, M. Toffel, A Hugill, HBS WP 14-032, 6/4/15, at pg. 19)

A code issuer unwilling to cross its fingers and just hope all its suppliers (and their materials suppliers) comply with its code will somehow have to go out and monitor compliance. That is a task fraught with logistical questions:

- Does the code issuer commit to compliance monitoring—or does it merely reserve a passive right to monitor? *(Advocates of supply chain labor codes insist on tough monitoring regimes, but, as mentioned, undertaking a duty to monitor might implicate significant legal exposure.)*
- Do employees who work for suppliers ever find out what rights the code purports to bestow on them? *(Supply chain labor code advocates criticize codes neither Addresses internal employees, rather than external employers: translated for nor communicated to suppliers' workers.)*
- How does a code-issuer access foreign sellers' premises to monitor work conditions? Should monitoring be pre-announced, or surprise? *(Advocates of supply chain labor codes insist that code-issuers retain a right and even a duty to inspect and monitor compliance, and insist that code-issuers follow through, regularly doing unnanounced on-site audits. For this there is actually a niche industry of outsourced supply chain labor code auditors.)*
- What does a code-issuer do if it uncovers minor violations at a supplier's overseas factories that otherwise exceed industry standards, or if it finds violations that do not justify cutting the seller off? *(Code advocates see most all violations as potentially serious and want code-issuers to remediate even less-urgent code violations.)*
- How far down the supply chain must a code-issuer impose and monitor its

code? *(Code advocates urge that codes extend all the way down the supply chain, beyond the link with privity of contract to the code-issuer, down to raw materials suppliers and apparently even to suppliers of services.)*

Part 2: Drafting an Internal Code of Business Conduct or Ethics

Moving beyond external supply chain labor codes, a completely separate kind of international human resources code of conduct is the internal *code of business ethics*. The rest of our discussion here addresses how to draft and implement a business ethics code.

Distinguishing an internal business ethics code from a supply chain labor code

An internal business ethics code is in essence a human resources policy that a conglomerate's headquarters imposes on its own internal staff across its worldwide network of subsidies and affiliates. In a sense, an internal business ethics code is completely different from a supply chain labor code. Confusingly, both of these often get referred to as "codes of conduct"—and sometimes these codes even get conflated into a single document. But these two types of conduct code differ in five key respects:

1. *Purpose (preventing corporate violations not protecting individuals):* An organization issues a code of business ethics chiefly to prevent the organization's own internal staff from implicating the organization in violations of the law and of other norms and rules that apply to the organization itself. In sharp contrast, an organization issues a supply chain labor code to get its suppliers to treat their own individual employees humanely.
2. *Mechanics (imposing rules not granting rights):* Business ethics codes impose detailed rules—lists of "thou shalt nots"—to rein in employee misbehavior by prohibiting illegal, unethical and inappropriate conduct. In sharp contrast, an external supply chain labor code is an aspirational document meant to grant affirmative rights to (outside) workers—rights to safe, humane and legally-compliant workplaces.
3. *Audience (addressing individual employees versus external entities):* An internal business ethics code is a human resources policy that addresses and applies to the organization's own individual staff employed on its own payroll. In sharp contrast, an external supply chain labor code is a business-to-business contract that binds unaffiliated employer entities.
4. *Topics (focusing on white-collar topics not blue-collar topics):* While a few topics may overlap between the two types of conduct codes (discrimination and harassment, for example, and sometimes workplace safety), for the most part business conduct codes address white-collar conduct like insider trading, conflicts of interests, data protection, bribery and searching emails/internet access. In sharp contrast, supply chain labor codes mostly address blue-collar labor protections like child labor, forced labor, human trafficking, rest periods, overtime and toilet breaks, plus—in the Middle East—recruitment fees and holding worker passports and—in Bangladesh—the structural integrity of workplace premises.
5. *Enforcement (imposing employee discipline, not contractual disqualification):* An individual employee who breaches a business conduct code gets disciplined, maybe dismissed. In sharp contrast, a supplier entity that breaches a supply chain labor code finds its business-to-business contractor status under review, possibly disqualified.

Strategic considerations in drafting a global code of business ethics

The challenge when drafting and implementing a business ethics code is deciding how to craft and impose a one-size-fits-all rulebook on staff across all relevant jurisdictions. A global business ethics code sets out rules that may seem perfectly logical back at headquarters, but that overseas might come across as culturally inappropriate. Some rules in an ethics code might even be illegal under

foreign local law. When launching or updating an internal code of business conduct or ethics across a multinational's worldwide operations, the first question is inevitably the matter of code content: *What should our code of business ethics say? Which topics should we include? Which can we omit?* A Google search for "code of conduct" or "code of ethics" yields dozens of excellent sample internal codes, and the easy temptation is just to copy somebody else's code, or at least to use someone else's as a first draft. Resist this temptation. When contemplating what to include in an internal ethics code, think hard about which topics the organization can afford to *omit.* Confine your global code of business ethics to topics the code-issuer actually needs to control across borders. The problem with copying some other organization's code is that each multinational's particular business operations spawn unique business needs. Needs of government contractors differ from needs of professional services organizations, which differ from needs of manufacturers. Needs of publicly-traded companies differ from those of a privately held business which differ from those of nonprofits. Needs of organizations operating in the world's business centers differ from needs of organizations serving the world's trouble spots. And needs differ by business sector—an oil company's needs differ from a bank's. Business needs also vary by headquarters country. A Japanese trading company has different needs from a U.S.-headquartered conglomerate. A privately held shipping company's business ethics code should include a human trafficking provision and a robust workplace safety section, but does not need an insider trading clause. The opposite is true of a publicly traded professional services firm.

Distinguish an internal ethics code from a *global employee handbook*. Employee handbooks generally address quotidian aspects of human resources that differ from country to country, topics best relegated to local employee communications like employee benefits, dress code, smoking policy, office hours, performance evaluations, expense reimbursement, holidays, vacation, paid and unpaid leave, payroll and overtime. Meanwhile, a well-drafted code of business ethics addresses baseline ethical standards that reach across borders, steering clear of provisions on day-to-day human resources topics more appropriate for local HR policies, for individual or collective employment agreements, or for local employee handbooks.

Topics to consider including in a global code of business ethics

Take an organic, not imitative, approach to drafting a global code of business ethics. Use a topic-by-topic checklist to craft a bespoke internal ethics code that meet the organization's actual needs without including anything superfluous. Consider the business case for each of the following topics commonly found in ethics codes, and tailor a globally applicable provision on each topic the organization needs to address for the international context:

- ✓ **Introduction stating core values**: Internal codes of business conduct or ethics usually open with a statement, customarily from the president or chief executive officer, explaining the organization's core values and reasons for imposing the code. Send the message from the top that code compliance is a vital business priority across the organization's global operations.
- ✓ **Statement of compliance philosophy**: Any multinational that issues a single code of business ethics across multiple jurisdictions intends to impose headquarters policies internationally while complying with "applicable" laws. But which laws in the global context are *applicable*? While both headquarters-country laws and local overseas-country laws might be applicable, too often code drafters focus so intently on headquarters country laws that they forget about or downplay local foreign laws. This gets priorities backwards, because the overwhelming majority of laws that apply to a global code of conduct are actually the *local laws of the host countries* where the multinational operates. For example, American lawyers would say that a German- or Japanese-headquartered multinational had its priorities backwards if it imposed policies on its Chicago and Los Angeles offices that address compliance with German or

Japanese law without focusing on U.S., Illinois and California law.

Yes, a handful of "extraterritorial" laws might apply in certain contexts, but keep extraterritorial laws in perspective. Perhpas ten or twenty U.S. and U.K. extraterritorial business law doctrines might plausibly be argued to reach into overseas workplaces (the U.S. FCPA, UK Bribery Act, some parts of SOX, Dodd-Frank, securities and antitrust laws, international trade sanctions laws, "trading with the enemy" and terrorism financing laws, some employment discrimination laws as applied to certain overseas staff). Meanwhile, hundreds of thousands of local foreign overseas labor/employment laws, local trade laws, local financial and accounting rules, local bribery laws, local criminal laws, local data privacy laws, local procedural and evidentiary laws, local antitrust laws, local intellectual property laws and other foreign laws govern overseas workplaces on the issues in a standard code of business conduct.

U.S.-drafted codes of ethics often say something to the effect of "because we are a U.S. company, our operations around the world must comply with U.S. law." This statement is demonstrably wrong—the United States Supreme Court has vigorously and repeatedly affirmed that American companies actually do *not* have to comply with any U.S. federal statute outside U.S. territory other than those few that expressly say they apply abroad. (*E.g.* Morrison v. National Australia Bank, 561 U.S. 247 (2010); EEOC v. Aramco, 499 U.S. 244 (1991))

And yet obviously an American company's global code of business ethics must address the few but vital topics regulated by extraterritorially reaching laws. This problem triggers two drafting issues. First is effective employee communication. Expect non-lawyers reading the code not to believe in extraterritorial laws, or not to understand how they work. Explain extraterritoriality without expecting too simple a message to do the trick A statement to the effect of "we're an American company so all our employees worldwide must follow American law" may be hard to believe. For example, American autoworkers at a German car maker's plant in South Carolina would not expect their actions in South Carolina to implicate German law, even if the German employer claimed they did. And the autoworkers would be mostly right. If a German-headquartered car maker wanted South Carolina assembly workers to believe they somehow fall under the long arm of German law, the employer would have to issue proactive employee communications convincingly making that case.

A second challenge to wording an extraterritorial-law compliance mandate in a global code of business ethics is staying on the right side of *anti-foreign-law statutes*. Doctrines in some jurisdictions (in Eastern Europe for example) in effect prohibit imposing foreign laws locally. This concept should be familiar to Americans, because some U.S. state laws purport to do the same thing. A German company, for example, cannot constitutionally tell workers in Alabama that they must follow German laws. (ALABAMA CONST. amendment 884) Word a code of conduct extraterritorial-law clause to comply with anti-foreign law statutes. A best practice is to impose substantive rules without invoking foreign (U.S.) law as their source. That is, better to say "do not bribe" than to say "comply with the U.S. FCPA."

- ✓ **Discrimination/equal employment opportunity**: Prohibiting illegal discrimination across worldwide operations is a vital and legally mandated goal, and so most global codes of business ethics contain discrimination clauses. Resist the temptation simply to transplant a robust anti-discrimination or "equal employment opportunity" provision from a U.S. employee handbook straight into a global ethics code. Rebuild that discrimination provision to account for the global context.

The primary issue here is listing *protected groups*. Discrimination laws in the U.S. and many other countries are grounded in protected status, but countries like Belgium and Chile actually impose a vague, all-but-chaotic obligation of *total equality*, prohibiting employers from singling out any group that a judge may later agree to protect. In these jurisdictions employment discrimination law prohibits discriminating against, for example, football fans, bloggers, graduates of low-status universities, smokers, the bald, short people, non-swimmers, Flat Earth Society members, and anyone with a tattoo or piercing. In these jurisdictions, to list protected groups in a conduct code discrimination prohibition is arbitrary and unduly restrictive, because local law protects all groups.

Indeed, listing protected groups is even a challenge in jurisdictions that *do* list protected statuses, but where the local protected statuses differ from the business ethics code's protected group listing. An ethics code discrimination clause listing only groups protected in the United States looks arbitrary in all jurisdictions that protect a different universe of statuses. For example, veteran status, genetic makeup and worker compensation claimant status tend not to be protected widely outside the U.S. Meanwhile, many foreign countries protect traits not protected stateside—for example, traveler (homeless) status in Ireland, and in other countries family status, language skill, political opinion and caste. (*E.g.,* O. Bowcott, "Woman Awarded £184,000 in UK's First Caste Discrimination Case," The Guardian (UK), Sept. 22, 2015)

Further, mentoring "age" as a protected class in a code of ethics that applies internationally raises a real problem in countries where the multinational *code-issuer itself* imposes mandatory retirement. Mandatory retirement remains common from India to Germany and beyond and persists in the U.K., Ireland and Israel even among many U.S.-based multinationals. (E.g. Moshe Gavish v Knesset, HCJ 9134/12 (Apr. 21 2016) (mandatory retirement legal in Israel).

The knee-jerk response is to add a catch-all clause following an ethics code discrimination provision's listing of protected groups ("…or any other group protected by applicable law"). But beware this catch-all clause. This catch-all clause will not necessarily be fully effective under the canon of construction by which included factors control over omitted ones (*inclusio unis est exclusio alterius*). Indeed, a catch-all clause demotes unnamed protected groups to a lower tier. Think of how dangerous it would be for a U.S. employee handbook discrimination clause to proclaim "We have a zero tolerance policy for any discrimination or harassment on the grounds of gender, race, national origin, ethnicity, sexual preference, veteran status, workers' compensation filing, genetic makeup, or any other characteristic protected by applicable law." An *age or disability* discrimination plaintiff would argue that this particular wording, catch-all clause notwithstanding, betrays the employer's obvious indifference to fighting age and disability discrimination.

One viable strategy is not to list any specific protected groups at all. Rather, have the code simply prohibit discrimination illegal under "applicable law." But even this approach is less than ideal because it forces the code-reader to do legal research into what is "applicable law."

Another challenge to drafting a discrimination provision in a global conduct code is how to account for the *extraterritorial reach of U.S. discrimination laws.* U.S. discrimination laws reach abroad only to the limited extent that they protect a tiny sub-set of most U.S. organizations' overseas workforce: overseas-working *U.S. citizens*. Think carefully before drafting a global discrimination provision that extends American-style discrimination protections to *everyone* abroad, just to reach this select few.

- ✓ **Harassment:** When U.S. multinationals define harassment, they tend to limit the

definition to the narrow U.S.-style concept linking unwelcome behavior to the victim's *membership in a protected class.* That narrow definition works stateside because American workplace harassment law falls under discrimination law. But so narrow a definition falls far short in jurisdictions that legislatively protect employee dignity and prohibit abusive workplace behavior unlinked to protected-group status. Brazil, Chile, Venezuela and many European countries prohibit "moral harassment," "bullying," "mobbing," "psycho-social harassment," "employee dignity" or "personality rights"—concepts once known stateside as non-actionable "equal-opportunity harassment." (U.S. states have tried but mostly failed to regulate this concept under the label as "abusive work environment.") A global business ethics code that persists in invoking the narrow, parochial American-style definition of harassment fails to prohibit a huge swath of illegal harassing behaviors merely because they happen to be legal stateside. Of course, to be effective, a harassment prohibition must be broad enough to prohibit *all* illegal workplace harassment. Accordingly, some progressive U.S.-based multinationals have begun to define "harassment" as the same as bullying, unlinked to protected group status. But so broad a definition significantly expands the universe of harassing behaviors in jurisdictions like the U.S. that do not ban bullying per se.

A separate challenge is that harassment provisions in many U.S.-drafted ethics codes tend to impose overly aggressive *co-worker dating restrictions*. In many countries, particularly in continental Europe, dating provisions—even ones that merely require reporting a sexual relationship to management—are offensive and all but unenforceable. Expect overseas staff to flout these rules, reasoning that their sexual relationships are none of their employer's business, and reasoning that reporting mandates are effectively unenforceable under data privacy law. (Oddly, the European employees who object to rules requiring them to report sexual relationships in the workplace seem much less likely to object to conflict-of-interests rules that reach parent/child and sibling relationships.)

- ✓ **Diversity**: U.S. multinationals sometimes pepper vague diversity pronouncements into their global codes of ethics, often watering down a more robust U.S. diversity provision lifted from the code-issuer's domestic U.S. diversity program communications. By the time a U.S. diversity provision gets loosened up enough for a global ethics code, it often amounts to little more than a cursory statement saying *"we value diversity"*—without defining the term and without imposing metrics for improving workplace diversity over time.

  A robust U.S.-style diversity program needs radical reinvention outside the United States because overseas demographics and so-called "diversity dimensions" differ greatly. A vague diversity pronouncement with neither definitions nor metrics might be worse than none at all. When considering whether to go ahead and stick a diversity provision in a global code of ethics, reconsider diversity program goals and metrics for the international environment. Omit any global diversity provision so vague that it is sloppy, functionally meaningless or not rigorous enough. This said, though, a harmless trend is to throw into an ethics code a short provision saying the organization values diversity and expects staff to respect others' opinions, perspectives, beliefs and practices.

- ✓ **Conflicts of interests**: Many global codes of ethics include provisions on employee conflicts of interests, prohibiting, for example, contracting with relatives on behalf of the organization, hiring relatives and former government officials, and holding ownership stakes in competitors. Conflict of interests provisions also may address moonlighting—employees holding side jobs or positions on boards of directors at competitors, suppliers or customers. A clear conflict of interests provision in a code of business conduct is vital because the

conflicts these provisions address tend to be perfectly legal under applicable law, and often the organization's own overseas local work rules are silent on conflicts. A code of conduct prohibition against conflicts may stand as the organization's only defense, its only applicable rule on such an important topic. And yet a cross-border conflict-of-interest clause needs to be flexible enough for those parts of Asia, Africa, the Middle East and Latin America where family relationships play a vital part in everyday business. Be sure a conflicts provision actually works internationally,

- ✓ **Bribery and improper payments**: Multinationals—particularly those that sell to or need licenses from foreign governments—must communicate, train on and enforce tough bribery and improper payments prohibitions, both because local laws around the world prohibit bribing government officials locally and because extraterritorial laws in the United States, the UK and Organisation for Economic Cooperation and Development (OECD) countries prohibit multinationals from making improper payments to foreign government officials.

  Of course, the U.S. extraterritorial bribery law, the Foreign Corrupt Practices Act, is an aggressively enforced statute that prohibits both bribes and deceptive accounting notations of improper payments. The U.K. Bribery Act is in some respects tougher than the U.S. FCPA, purporting to reach bribery outside the U.K. committed by non-U.K. entities with U.K. offices. These laws make the bribery provision in an international ethics code vital, unless the organization has a separate, free-standing bribery/improper payments policy. (*See* M. Swanton, "Combating Corruption: GCs Aim to Establish Global Ethics Codes," Inside Counsel, Jan. 2011) U.S.-based organizations cannot afford to relegate bribery compliance to local offices that may not understand the U.S. FCPA or the U.K. Bribery Act. This is why the anti-bribery (improper payments) clause often lies at the heart of an American multinational's global code of business conduct. In crafting a code of conduct bribery provision, touch all the FCPA bases. In addition:

  - ➢ *Tailor the bribery provision to address the organization's own likely contacts with government officials who might receive improper payments.* The bribery provision of an organization that frequently sells to government customers should look different from the bribery provision of an organization that frequently applies for government permits.
  - ➢ *Acknowledge and address local (overseas host country) bribery laws.* The U.S. FCPA and the U.K. Bribery Act prohibit bribing officials in, say, Egypt, Peru and Vietnam. But any code of conduct bribery prohibition that applies domestically in Egypt, Peru or Vietnam had better acknowledge the urgent, even primary need to comply with local domestic Egyptian, Peruvian and Vietnamese bribery laws. Too many code of conduct bribery provisions completely ignore local bribery law.
  - ➢ *Account for the U.K. Bribery Act as appropriate, without letting the "tail wag the dog."* U.K. enforcement of the Bribery Act against U.S.-headquartered multinationals as to operations outside the U.K. may be rare, or may not even have begun. Meanwhile, U.S. FCPA enforcement is robust. Keep this priority straight.
  - ➢ *Align with any free-standing bribery policy*. Many organizations have issued detailed free-standing global bribery/improper payments policies, but then stick a watered-down bribery clause into their global code of ethics. What if an employee sees and follows only the abridged code of ethics version? Align a code of ethics bribery and improper payments clause with any more detailed free-standing policy.

- ✓ **Business gifts to nongovernment contacts**: U.S. FCPA law prohibits improper

payments only to overseas government and political officials. U.S. law does not prohibit bribing foreign non-government entities (although improper payments to non-government recipients overseas can violate other laws like the internal accounting controls, books and false records provisions of the U.S. Securities Exchange Act of 1934). Still, a trend (consistent with U.K. bribery law) is for proactive conduct codes to prohibit improper payments even to *nongovernment* recipients like business customers. These provisions often address gifts received from business suppliers. Yet a payment to procure business from a private company differs in important respects from an improper payment to a government official or political party. Do not conflate these.

Think through the practical ramifications of any non-government business gift provision in a global code of ethics. Account for cultural issues: "[I]n Asia, gift giving is customary on the occasions of marriage and death. This presents a tricky situation [where] company policy may [prohibit] gifts from customers, vendors or suppliers [while] refusal of such an offering may be interpreted as a hostile or insulting gesture." (S. Hirschfeld, "Global Employee Handbooks Must Balance Compliance with Culture," SHRM online, 11/18/13)

- ✓ **Money laundering/financing terrorism**: Employers in the financial services sector need to impose "know your customer/client" mandates against money laundering. Codes of ethics also commonly address compliance with U.S. executive orders and regulations meant to restrict terrorism financing—so-called "list-scrubbing" obligations that prohibit payments to and from named suspected terrorists, an issue particularly acute for nonprofits.
- ✓ **Trade sanctions and embargo/anti-boycott**: Extraterritorial U.S. trade laws embargo or boycott (prohibit doing business in) certain black-listed countries and U.S. law prohibits complying with the Arab boycott of Israel. U.S. multinationals often impose code of conduct provisions instructing their overseas affiliates to comply with these U.S. trade laws. But remember that some jurisdictions—particularly in Eastern Europe—impose anti-foreign law statutes. Because a provision that strictly requires following U.S. trade laws can be argued to violate an anti-foreign-law statute, the text of any trade provision in a global ethics code needs to be nuanced. A best practice is to prohibit specific behaviors, as opposed to flatly imposing American statutory law.

  Remember, too, that overseas jurisdictions impose *their own* trade sanctions. Never draft a cross-border trade compliance clause cognizant only of U.S. trade law that could be read as a command to violate local host country trade law.
- ✓ **Antitrust/competition, non-collusion and trade practices**: Global codes of conduct often instruct staff not to commit basic antitrust violations like collusion and price fixing. Codes often tell employees where to find further guidance on these matters. Antitrust laws differ from country to country, and only some aspects of antitrust law reach extraterritorially, so code provisions on antitrust/competition tend to be broad.
- ✓ **Insider trading**: Publicly traded multinationals need global rules or code provisions that ban insider trading in the company's own stock. And professional services firms whose employees get access to inside information about publicly traded clients should impose tough *client* insider trading restrictions.
- ✓ **Audit/accounting fraud, SOX and Dodd-Frank**: Conduct codes often impose global SOX and Dodd-Frank accounting and compliance standards. Sarbanes-Oxley-regulated multinationals are subject to audit/accounting rules that can reach company operations worldwide, although not all of SOX applies extraterritorially. As a best practice, even certain non-SOX-regulated multinationals insert audit/accounting provisions into their global

conduct codes. Again, though remember that impose anti-foreign-law statutes. Better for code text needs to address prohibited acts, rather than invoke foreign (U.S.) statutes.

- ✓ **Data privacy/processing**: Data protection laws in the European Union, Argentina, Canada, Hong Kong, Israel, Japan, Korea, Mexico, Peru, Philippines, South Africa, Uruguay and beyond impose tough data laws on multinationals that run global human resources information systems. (But many other countries including Brazil, China, the U.S. and most of Africa do not impose omnibus data protection laws.) Multinational compliance with data protection laws when "processing" HR data is vital, but data protection compliance is not necessarily central to an internal code of ethics. Still, ethics codes sometimes impose broad data guidelines on staff who "process" personal data.

- ✓ **Monitoring communications and reserving right to search**: A best practice for a U.S. domestic employee handbook is to defeat employees' "expectations of privacy" in employer-provided communications systems by expressly reserving the employer's right to monitor employee emails, handheld devices, telephone calls and the like. Some U.S. employers also reserve a right to search offices, desks, lockers—even lunch boxes. These monitoring issues come up in the BYOD (bring-your-own-device) context.

  American employers that draft global ethics codes want to maximize their flexibility by extending an American-style right-to-monitor/search provision globally. The challenge is that in many jurisdictions these provisions are not, themselves, very effective. The straightforward American approach by which an employee communication reserving the employer's right to search can defeat employee expectations of privacy—and therefore defeat employee privacy claims—falls short in many countries.

  There is no "magic bullet" here, no single clause with which a global code of conduct can confer on a multinational legal power to search employees and their computers worldwide. An employee-monitoring provision in a global conduct code needs to account for the context of legal restrictions on workplace searches in all the jurisdictions at issue. The right-to-search clause in a conduct code is just a starting point, not an end point, in analyzing whether and when the employer can electronically monitor or search staff. Regardless of what employer monitoring rights a code of conduct *purports* to reserve, in many jurisdictions the employer will need legal advice before invoking purportedly reserved monitoring or search rights. And so regardless of what an ethics code monitoring provisions purports to say, before actually pulling the trigger and monitoring or searching overseas, understand applicable law.

- ✓ **Environmental protection**: Some global ethics codes require employees to comply with local environmental laws, and some codes expressly require compliance with the more protective of local environmental law, U.S. law or global environmental standards. Environmental clauses are vital in industries like manufacturing, oil and mining, but are often irrelevant in service industries.

- ✓ **Intellectual property**: Some global codes of conduct contain intellectual property provisions that instruct employees to respect others' copyrights, such as in photocopying, copying software, or emailing copyrighted materials.

- ✓ **Restrictive covenants and trade secrets**: Some global conduct codes purport to impose on worldwide workforces restrictive-covenant-like prohibitions—confidentiality, post-termination non-compete, non-solicitation of employees and customers and ownership of employee-created intellectual property. But for the most part, a code of conduct is the wrong medium to impose these restrictions. Remember that conduct codes do not bind *ex-employees*. Build restrictive-covenant-like rules into individual employment contracts or have employees execute standalone restrictive

covenants. Enforceability standards for restrictive covenants differ widely by country; many jurisdictions require extra consideration be paid after separation, which makes a one-size-fits-all global approach to restrictive covenants not feasible. Often the most workable strategy is to omit entirely from a code of ethics these restrictive covenant topics (at least beyond a confidentiality clause), or else to insert just a short statement in the code declaring the employer's commitment to enforce any employee-signed covenants.

- ✓ **Workplace safety and pandemic response**: Most every country imposes detailed workplace safety laws broadly analogous to U.S. OSHA. A global code of ethics cannot replicate every jurisdiction's local safety rules, but many conduct codes contain broad provisions telling staff to comply with applicable safety rules and imposing accident reporting procedures. Some multinationals impose detailed global safety frameworks and crisis response protocols that address, for example, pandemic or disaster response and "cardinal safety rules." But usually these appear separate from the conduct code, in a standalone global safety or pandemic policy.

  Another safety issue is on-premises possession of guns and weapons. This topic may be less of an issue outside the United States, and perhaps is more appropriately relegated to domestic U.S. employee handbooks.

  A related issue is "duty of care"—protecting business travelers and expatriates. This is a vital issue, but one usually best addressed outside a global conduct code.

- ✓ **Drugs and alcohol**: While the recent trend of U.S. states legalizing marijuana may change things, for years U.S. domestic employers have been inclined toward a "zero-tolerance" approach to drugs and alcohol in the workplace, refusing to hire applicants who test positive even where positive test results offer no evidence of work-time impairment. U.S. domestic employers occasionally fire good performers whose drug test results demonstrate only off-hours drug use. And U.S. employers regularly fire staff caught drinking on the job, even while still sober.

  Outside the United States and Canada, though, on-job alcohol use is less of an evil, and workplace drug testing is often virtually impossible. Zero-tolerance workplace alcohol policies outside the United States are impractical and come across as puritanical—in countries like Germany and Mexico, company cafeterias and vending machines serve beer and wine, and alcohol can seem ubiquitous at business lunches and company parties. As to drugs, remember that some substances illegal in much of the United States are legal elsewhere and so are all but impossible for employers to prohibit using off-hours. A zero-tolerance cannabis policy, for example, makes little sense in the Netherlands where menus in the ubiquitous "coffeehouses" offer varieties of hash and marijuana across a range of price points. In these jurisdictions, discipline for off-hours drug use abroad would not likely amount to good cause.

  Rethink (and loosen up) any U.S. domestic zero-tolerance drug/alcohol policy for the global context. Do a reality check by running a draft of a proposed global drugs and alcohol conduct code provision past overseas local human resources staff candid enough to explain how this plays out in their countries.

- ✓ **Labor rights**: Some internal ethics codes of business conduct actually contain clauses on labor rights, ILO standards and the flashpoint issue of "freedom of association," although—as addressed in our discussion of supplier codes—these provisions are more common in supply chain labor codes. In a business ethics code, just as in a supplier code, beware of adopting a free-association clause or any provision that incorporates ILO standards.

- ✓ **Child labor, human trafficking and slavery**: Codes of ethics in industries where child labor, human trafficking and slavery (forced and prison labor) are a risk

(industries like shipping, fishing and mining) might contain clauses on these topics. But otherwise, child labor, human trafficking and slavery are topics more appropriate for supply chain labor codes. A child labor, human trafficking and slavery provision might look inappropriate in the internal code of ethics of, for example, a financial services or professional services firm or a media sector business.

- ✓ **Media contact and social media**: Multinationals are constantly subjects of stories in the business press, and employees might get contacted by professional reporters. And so ethics codes traditionally addressed contacts with the media. But that scenario is remote compared to the much bigger issue today of social media—employees tweeting and posting comments about the employer organization. For these reasons, global codes of business ethics often contain provisions instructing employees on press relations, fielding media inquiries and on social media. Fortunately, the U.S. domestic labor law doctrine of "protected concerted activity" and social media policies tends not to be an issue abroad, not even in Canada. (*See* "NLRB and Social Media" page at www.nirb.gov) Therefore, social media provisions in global codes need not account for the uniquely U.S.-domestic concerted activity issue except to the extent the code applies domestically in the United States. The employment law issue outside the United States tends to be that employers wield little power to control staff on their off-hours outside the workplace when operating devices that are their own personal property.

- ✓ **Compliance, cooperation and investigations**: Some internal codes of conduct impose provisions that require employees follow both the code and all company rules set out elsewhere (such as in the employer's local human resources polices, handbooks, intranet, reimbursement procedures, clocking-in rules, safety protocols and the like). Separately, some codes purport to impose mandatory reporting rules that ostensibly require staff who find out about co-worker wrongdoing to denounce their fellows. Be careful with these clauses—they are not strictly enforceable in many jurisdictions. Indeed, including a mandatory reporting clause sometimes can be grounds for a foreign court to invalidate a unilaterally implemented code of conduct. (*See* Wal-Mart, Wuppertal Labor Court, 5th Div., 5 BV 20/05 (June 15, 2005) (Germany))

  Some ethics codes purpose to require employees to cooperate in internal investigations. These cooperation clauses may seem unobjectionable to Americans, but in many countries they can be unenforceable as improperly implemented mandatory reporting clauses. (Forcing a reluctant employee witness to cooperate in an investigation amounts to a mandatory reporting obligation.) Local laws overseas may not support discipline imposed for non-cooperation in an investigation, even where the code expressly purports to require cooperation. Draft any global investigation-cooperation clause so that it accurately states employees' actual responsibilities.

- ✓ **Sanctions clauses**: Many U.S.-drafted internal codes of conduct contain clauses exposing employees who violate the code to discipline up to discharge. But for an employer simply to declare that certain acts will be subject to punishment or discharge does not necessarily make it so. Local laws on good-cause discipline may prohibit employer sanctions even for blatant violations of rules clearly set out in an ethics code. For example, a mandatory reporting clause in a code of conduct may purport to force employee witnesses to denounce co-workers who break rules, but local law in many jurisdictions will not support discipline for failing to blow the whistle, even if that failure violates an express reporting mandate. Also, in jurisdictions from the UK to France and beyond, locally mandated disciplinary procedures will trump an inconsistent discipline clause in a global conduct code.

In drafting any global conduct code sanctions clause, factor in the rules regulating employer discipline outside U.S. employment-at-will. Do not stick an American-style discipline clause into a global code.

- ✓ **Complaint system/whistleblowing hotlines**: Sarbanes-Oxley requires imposing "anonymous" whistleblower hotline "procedures;" and Dodd-Frank implicitly encourages company whistleblower hotlines to the extent that the Dodd-Frank bounty program might lure whistleblowers over to the U.S. SEC. These days even many non-SOX-regulated multinationals impose global reporting procedures, outsourcing hotlines to outside providers. But workplace whistleblower hotlines are heavily regulated in the European Union and increasingly elsewhere. (*Cf* Donald C. Dowling, Jr., "How to Launch and Operate a Legally-Compliant International Workplace Report Channel," 45 THE INT'L LAWYER 903 (2011)) Any global code of conduct provision that addresses reporting procedures and describes a whistleblowing hotline needs careful strategy. Treat the launch of an international whistleblower hotline as separate from the launch of a global code of conduct.
- ✓ **Acknowledgment:** Many global codes of business conduct end with an acknowledgement page for employees to sign, agreeing to follow the code. But signed employee acknowledgements outside the United States raise a number of logistical problems. Acknowledgments overseas can actually backfire, offering ammunition to non-signers who violate the code. Carefully consider any acknowledgement provision.
- ✓ **U.S. federal sentencing guideline**s: Violations of some U.S. laws with extraterritorial reach can lead to U.S. criminal liability and convictions. Multinationals subject to U.S. personal jurisdiction should therefore draft their global codes of ethics cognizant of provisions in U.S. federal sentencing guidelines that offer credit for certain human resources policies structured to curtail illegal conduct. However, a code of business ethics should not mention U.S. federal sentencing guidelines explicitly. The drafting issue is imposing human resources rules and punishments robust enough to earn sentencing credit in case of a U.S. federal convictions or plea.

Part 3: How to Implement a Global Code of Business Conduct or Ethics

After crafting the text of a global code of ethics or business conduct, the next step is to pave the path for launching that code—a way to impose the internal ethics code so that it sticks, requiring overseas staff actually to comply, or be subject to discipline. Because the point of an international code of business ethics is to impose a set of human resources policies that subject employee violators to discipline, multinationals need to implement these codes in a way that complies with local-law restrictions against unilaterally imposed new work rules.

Launching any global code of business ethics (or any new version) requires a two-stage approach. Stage one is simply drafting code text, as we have now discussed. This might actually be said to be the easier stage, because this stage can get done mostly at headquarters by one person or a small team. Stage two, the more complex stage, is launching the code effectively across all relevant overseas jurisdictions in a way that requires overseas staff to follow the provisions in the code. This second stage is complex because it involves not only headquarters, but also foreign local human resources, overseas employee populations, foreign labor representatives and sometimes overseas labor agencies and labor courts.

In launching an internal code of business conduct or ethics internationally, account for nine steps and issues:

1. Number of versions
2. Non-conforming documents
3. Dual employer
4. Collective consultation

5. Translation
6. Communication, distribution and acknowledgement
7. Government filings
8. Vested rights
9. Backstopping

These nine issues amount to a project unto themselves, a separate but equally-complex project addressing these nine listed steps.