

## **MANDATORY RETIREMENT IN THE PRIVATE SECTOR: THE REACH (OR INAPPLICABILITY) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT DOMESTICALLY AND ABROAD**

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Since 1967 the Age Discrimination in Employment Act (“ADEA”) has shielded U.S. employees who are at least 40 years old from discrimination based on age.<sup>1</sup> Common sense dictates that these same protections against age discrimination should apply to U.S. employees who are employed abroad. However, U.S. expatriates are stripped of these protections due to various reasons including, but not limited to, differences in statutory interpretation, foreign law defenses, and discrepancies over defining who is the employer.

It is undisputed that the ADEA excludes foreign operations of an employer that is foreign (i.e. not controlled by a U.S. person).<sup>2</sup> However, courts disagree as to whether the ADEA applies to foreign persons employing U.S. citizens in the United States.<sup>3</sup> This comment will focus on the implications that the different interpretations of section 623(h)(2) of the ADEA have on compulsory retirement policies of foreign corporations based in the U.S. as well as U.S. corporations based abroad. First, I will examine the background of the ADEA and assess the reasons for the conflicting application of the amended statute both domestically and abroad. Second, I will discuss the exceptions of the ADEA that allow companies to legally practice compulsory retirement abroad. Third, I will discuss how courts have handled the application of 623(h)(2) in the context of foreign corporations operating within the United States. I will conclude with an overview of the steps multinational corporations are taking with

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1. Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1767, 1792 (1984) (codified as amended at 29 U.S.C. § 623(h) (2006)).

2. 29 U.S.C. § 623(h)(2) (2006) (stating “[t]he prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.”).

3. Helm v. S. African Airways, No. 84 Civ. 5404, 1987 WL 13195, at \*1 (S.D.N.Y. June 25, 1987).

respect to their retirement policies and offer some potential solutions for changing the mandatory retirement regime.

### I. ROOTS OF THE ADEA'S AMBIGUITY

The ADEA makes it “unlawful for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”<sup>4</sup> However, since the applicability of the ADEA in a foreign context was not clearly defined, U.S. employees working abroad were not completely protected. While Congress has the authority to regulate the conduct of U.S. employers outside the territorial jurisdiction of the United States, courts will nevertheless presume that Congress has not exercised this power, i.e., “that statutes apply only to acts performed within United States territory, unless Congress manifests an intent to reach acts performed outside the United States territory.”<sup>5</sup>

Before 1984, the ADEA was coterminous with the Fair Labor Standards Act, which is primarily domestic. Thus, before 1984, the ADEA did not apply to U.S. employees who worked abroad.<sup>6</sup> In 1984, however, the ADEA was amended to extend coverage to Americans working for U.S. employers in foreign locales. Three key provisions were added: 1) the definition of employee, 2) the issue of control, and 3) a foreign law defense.<sup>7</sup> According to the statute, an employee is defined as “any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.”<sup>8</sup> Regarding the issue of control, only American employers are subject to the ADEA; the ADEA’s provisions do not apply to foreign companies that incorporate in a location outside of the U.S.<sup>9</sup>

In an effort to extend the protections of the ADEA to Americans working abroad for U.S. companies, Congress enacted the Older Americans Act Amendments of 1984 (“OAAA”).<sup>10</sup> However, Congress did not want to affect foreign companies who employed Americans abroad. The purpose of section 623(h)(2) was to protect the principle of

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4. 29 U.S.C. § 623(a)(1) (2006).

5. *Torrico v. International Business Machines Corp.*, 213 F. Supp. 2d 390, 410 (S.D.N.Y. 2002) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987)).

6. 29 U.S.C. § 213(f) (2006).

7. 29 U.S.C. § 630(f) (2006).

8. *Id.*

9. *Id.*

10. Wayne N. Outten & Jack A. Raisner, *Multinational Employment: U.S. Employees of Foreign Employers and Employees of U.S. Employers Abroad*, PLI Order No. H0-001C (1998).

sovereignty. “[N]o nation has the right to impose its labor standards on another country.”<sup>11</sup> The ADEA also protects an employee, who is a U.S. citizen, working abroad for a United States corporation.<sup>12</sup> Thus, Congress added the following clause in the statute, which is the source of much confusion today: “[t]he prohibitions of [the ADEA] shall not apply where the employer is a foreign person not controlled by an American employer.”<sup>13</sup>

The specific language of section 623(h)(2) of the ADEA has resulted in two different interpretations. Two courts have taken a literal approach to interpreting the statute, holding that foreign employers are immune from ADEA liability in the United States.<sup>14</sup> In contrast, other courts interpreting the ADEA, in light of its legislative history and other policy considerations (including the Equal Employment Opportunity Commission’s Guidance, discussed below), have held that the ADEA is enforceable against foreign employers operating within the United States.<sup>15</sup>

The Civil Rights Act of 1991 further extended the reach of other employment discrimination laws such as Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>16</sup> and the Americans with Disabilities Act of 1990 (“ADA”).<sup>17</sup> Specific provisions that give extraterritorial effect to the major U.S. employment discrimination statutes now exist.<sup>18</sup> It is estimated that the 1991 amendments will affect 2,000 U.S. companies operating 21,000

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11. *Morelli v. Cedel*, 141 F.3d 39, 43 (2d Cir. 1998) (citing S. Rep. No. 98-467, at 27 (1984), reprinted in 1984 U.S.C.C.A.N. 2974, 3000).

12. *Id.* at 42-43.

13. 29 U.S.C. § 623(h)(2) (2006).

14. See *Mochelle v. J. Walter Inc.*, 823 F. Supp. 1302, 1309 (M.D. La. 1993) (concluding that the foreign parent of a U.S. employer is “specifically excluded from ADEA liability under 29 U.S.C. § 623(h)(2)”), *aff’d*, 15 F.3d 1079 (5th Cir. 1994); *Robinson v. Overseas Military Sales Corp.*, 827 F. Supp. 915, 920 (E.D.N.Y. 1993) (holding that 29 U.S.C. § 623(h)(2) clearly excludes foreign employers from liability under the ADEA), *aff’d* on other grounds, 21 F.3d 502 (2d Cir. 1994).

15. See Lisa A. Butler-Brust, *Protecting Older Americans Working for Foreign Employers from Age Discrimination in Employment*, 65 *FORDHAM L. REV.* 2535, 2536 (1996-1997) (citing *Robins v. Max Mara, U.S.A., Inc.*, 914 F. Supp. 1006, 1008-09 (S.D.N.Y. 1996) (holding the ADEA applicable to a foreign employer in the United States); *EEOC v. Kloster Cruise Ltd.*, 888 F. Supp. 147, 151-52 (S.D. Fla. 1995) (same); and *Helm v. S. African Airways*, No. 84 Civ. 5404, 1987 WL 13195, at \*7 (S.D.N.Y. June 25, 1987)).

16. Pub. L. No. 88-352 §§ 701-718, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-200e-17 (2006)).

17. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2006); 47 U.S.C. § 225 (2006)).

18. Americans with Disabilities Act of 1990, Pub. L. No. 88-352 § 102(c)(2) (codified as amended at 42 U.S.C. § 12111(4) (2006)); Civil Rights Act of 1964, Pub. L. No. 101-336 § 702(c), 104 Stat. 327 (codified as amended at 42 U.S.C. § 2000e-1(c) (2006)); Older Americans Act Amendments of 1984, Pub. L. No. 98-459 § 4(h), 98 Stat. 1767 (codified as amended at 29 U.S.C. § 623(h) (2006)).

overseas units in 121 countries.<sup>19</sup>

## II. APPLICATION OF THE ADEA ABROAD

When Congress issued the OAAA in 1984, it intended to protect U.S. employees working abroad from age discrimination.<sup>20</sup> There is no question that Congress has the authority to regulate the conduct of a U.S. employer outside the territorial jurisdiction of the United States.<sup>21</sup> Nevertheless, courts will presume that Congress has not exercised this power—i.e. that statutes apply only to acts performed within United States territory—“unless Congress manifests an intent to reach acts performed outside United States territory.”<sup>22</sup> It is generally presumed that legislation does not apply extraterritorially primarily “to protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>23</sup> However, if failing to extend the scope of the statute to a foreign entity will result in “adverse effects within the United States” or where “the conduct regulated by the government occurs within the United States,” then the presumption against extraterritoriality does not ordinarily apply.<sup>24</sup>

With a presumption against applying the ADEA outside of the United States, it is easy to see how a foreign employer, although employing U.S. citizens, can escape the reaches of the U.S. employment discrimination laws. There are several arguments that foreign employers can make in response to an accusation of non-compliance with the ADEA. These defenses are discussed in detail below.

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19. See Michael Starr, *Who's the Boss? The Globalization of U.S. Employment Law*, 51 BUS. LAW 635, 636 (1996) (citing 137 Cong. Rec. H3934 (daily ed. June 5, 1991)).

20. 29 U.S.C. § 213(f) (2006).

21. *Torrico v. International Business Machines Corp.*, 213 F. Supp. 2d 390 (S.D.N.Y. 2002); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987) (noting that a state has jurisdiction to legislate with respect to “the activities, interests, status, or relations of its nationals outside as well as within its territory”); *Reyes-Gaona v. North Carolina Growers Ass’n, Inc.*, 250 F.3d 861, 866 (4th Cir. 2001) (“[T]he limited nature of the 1984 amendments indicates that foreign nationals in foreign countries are not covered by the ADEA, regardless of whether they are seeking employment in the U.S. or elsewhere.”).

22. *Torrico*, 213 F. Supp. 2d at 397 (citing *United States v. Bin Laden*, 92 F. Supp. 2d 189, 193 (S.D.N.Y. 2000)); see also *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (“Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested.”).

23. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); see also *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554, 557 (7th Cir. 1985) (“The fear of outright collisions between domestic and foreign law—collisions both hard on the people caught in the cross-fire and a potential source of friction between the United States and foreign countries—lies behind the presumption against the extraterritorial application of federal statutes.”).

24. *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

### A. Textual Argument

First, there is an argument based on differences in textual interpretation of the statute itself. Section 634(h)(2) states: “The prohibition of [the ADEA] shall not apply where the employer is a foreign person not controlled by an American employer.”<sup>25</sup> “Person” is subsequently defined as “one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized group of persons.”<sup>26</sup> Although the ADEA’s legislative history indicates that section 623(h)(2) should only exempt foreign employers located outside the United States, other courts have interpreted the statute to mean that the ADEA exempts all foreign employers, even those operating within the United States, from complying with the ADEA.<sup>27</sup>

In *Robinson v. Overseas Military Sales Corp.*,<sup>28</sup> for example, the District Court for the Eastern District of New York ruled that the ADEA did not apply to a foreign corporation who had an office in New York.<sup>29</sup> The court’s ruling implied that all foreign corporations, even those with headquarters in the United States, are not covered by the ADEA.<sup>30</sup>

Similarly, in *Mochelle v. J. Walter Inc.*,<sup>31</sup> the District Court for the District of Louisiana held the ADEA inapplicable to foreign employers operating (though not headquartered) in the United States. The Court reasoned that the American employer would not be subject to the ADEA because its parent company was Canadian.<sup>32</sup> Thus, the employer would be exempt from complying simply because it was the agent of a Canadian parent company.<sup>33</sup> Ambiguity clearly exists in interpretation of the statutory text.

### B. U.S. vs. Foreign Employer?

Second, some foreign employers will claim that the ADEA does not

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25. 29 U.S.C. § 623(h)(2) (2006).

26. *Id.*

27. See S. Rep. No. 98-467, at 36 (1984), reprinted in 1984 U.S.C.C.A.N. 2974, 3009; H.R. Conf. Rep. No. 98-1037, at 49 (1984), reprinted in 1984 U.S.C.C.A.N. 2974, 3037.

28. See *Robinson v. Overseas Military Sales Corp.*, 827 F. Supp. 915, 920 (E.D.N.Y. 1993), *aff’d*, 21 F.3d 502 (2d Cir. 1994).

29. Cynthia Jean Robertson, *Has the Age Discrimination in Employment Act Remained Effective in the United States As Well As Abroad in An Increasingly Globalized Economy?*, 6 ELDER L.J. 323 (1998).

30. *Id.*

31. 823 F. Supp. 1302 (M.D. La. 1993), *aff’d*, 15 F.3d 1079 (5th Cir. 1994).

32. *Id.*

33. *Id.*

apply because U.S. employment laws should not encroach upon the employment laws of a foreign country. In other words, if a U.S. citizen is employed by a foreign entity, that employer may still be subject to U.S. employment discrimination laws if it is “controlled by an American employer.”<sup>34</sup> In such cases, the actions of the foreign entity will be attributed to the controlling U.S. employer, and U.S. employment laws like the ADEA will apply.<sup>35</sup>

After the new statutory provisions came into effect, the Equal Opportunity Employment Commission (“EEOC”), which is mainly responsible for enforcing the U.S. employment discrimination laws,<sup>36</sup> published an Enforcement Guidance in 1993. The EEOC used the Guidance as a means through which it described its interpretations of the new statutory provisions of the employment discrimination laws—including its analysis on deciding whether to bring an action in federal court.<sup>37</sup> While the Guidance is not binding per se, it will be followed if based on persuasive analysis.<sup>38</sup>

Since the U.S. employment laws will only apply to the benefit of U.S. employees working abroad, the critical question to ask is “Who’s the Boss?”<sup>39</sup> While the discrimination laws do not include a bright-line rule for determining a corporation’s nationality for the purposes of determining whether the U.S. employment discrimination laws apply, the EEOC has developed a rule for those corporations that are incorporated in the U.S. Such corporations are deemed to be a U.S. employer “because an entity that chooses to enjoy the legal and other benefits of being incorporated here must also take on concomitant obligations.”<sup>40</sup> However, even if a foreign corporation is not incorporated in the U.S., the EEOC takes a hard-line approach by rejecting a simple test of incorporation for such entities. Instead, if the foreign corporation is incorporated abroad, but has numerous contacts with the U.S., the EEOC mandates that the agency will “need to

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34. 42 U.S.C. § 12112(c) (2006); 42 U.S.C. § 2000e-1(c) (2006); 29 U.S.C. § 623(h)(2) (2006).

35. 29 U.S.C. § 623(h)(2); 42 U.S.C. § 12112(b)(5) (2006); 42 U.S.C. § 2000e-1(c)(1).

36. See Starr, *supra* note 19 (explaining that the EEOC enforces employment discrimination laws as a result of statutory changes).

37. *Id.*

38. See *id.* (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (distinguishing “EEOC’s policy guidelines” from “rules or regulations”). *But see id.* at 260 (Scalia, J., concurring in part) (declaring the law “unsettled” regarding judicial deference to EEOC interpretations of statutory language).

39. Starr, *supra* note 19.

40. EEOC, ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND THE AMERICANS WITH DISABILITIES ACT TO CONDUCT OVERSEAS AND TO FOREIGN EMPLOYERS DISCRIMINATING IN THE UNITED STATES, EEOC NOTICE 915.002 (1993), *reprinted in* EEOC Compliance Manual, 2009 WL 3607916 (C.C.H.), ¶ 2169, at ¶¶ 2313-25 (Oct. 20, 1993) [hereinafter EEOC ENFORCEMENT GUIDANCE].

review the totality of that company's contacts with the United States to make a nationality determination."<sup>41</sup>

In cases where a corporation's nationality is not easily determined through an incorporation test or test of minimum contacts with the U.S., several other factors can help determine whether the corporation is U.S.-controlled. Examples of such factors include the following: 1) the company's principal place of business (i.e., the place where primary factories, offices, and other facilities are located); 2) the nationality of dominant shareholders or those holding voting control; and 3) the nationality and location of management (i.e., the nationality of the officers and directors of the company).<sup>42</sup> While no one factor is determinative, the EEOC seems to believe that the more factors that demonstrate a corporation's connection with the U.S., the more likely it is for the corporation to be deemed a U.S. employer for the purposes of applying the U.S. employment discrimination laws.<sup>43</sup>

Deciding the nationality of a corporate employer does not end the inquiry. The U.S. employment discrimination laws apply to U.S. corporations operating abroad as well as foreign subsidiaries of U.S. companies. The following factors are used to determine whether a corporation is a U.S. subsidiary: 1) the interrelation of operations, 2) common management, 3) centralized control of labor relations, and 4) common ownership of financial control.<sup>44</sup> The EEOC's Enforcement Guidance refers to these factors as the "integrated enterprise" concept, which is well recognized in other contexts under U.S. labor and employment law.<sup>45</sup>

Although application of the ADEA to U.S. employees working abroad seems to be conceptually simple, already it is clear that U.S. citizens might not receive the protections of the U.S. employment laws if the corporation for whom they are working is not deemed to be a U.S. corporation nor a subsidiary of a U.S. corporation. In *Denty v. SmithKline Beecham Corp.*, for example, the court held that the ADEA did not apply to decisions of a British parent corporation because the corporation was not sufficiently "controlled" by its American subsidiary.<sup>46</sup> As we shall see in

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41. *Id.* But see Starr, *supra* note 19 (citing *Sumitomo Shoji Am. Inc. v. Avagliano*, 457 U.S. 176, 185 n.11 (1982)) (stating that the place-of-incorporation rule is consistent with treaty practice and has the advantage of making nationality determinations a simple matter).

42. See generally EEOC ENFORCEMENT GUIDANCE, *supra* note 40.

43. *Id.* at ¶¶ 2313-26.

44. 42 U.S.C. § 2000(e)-1(c)(2) (2006).

45. EEOC ENFORCEMENT GUIDANCE, *supra* note 40; see also *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235 (2d Cir. 1995) (using factors to hold parent company liable for subsidiary's unfair labor practices under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994)).

46. 109 F.3d 147 (3d Cir. 1997).

the sections that follow, additional defenses are available to a foreign employer that would allow it to escape the application of the U.S. employment laws like the ADEA.

### C. *Foreign Law Defense*

Foreign employers who practice age discrimination and thereby violate the U.S. ADEA are allowed to do so if acting otherwise would clearly violate the laws of the foreign country in which the workplace is located.<sup>47</sup> The scope of the foreign law defense is not yet settled.<sup>48</sup> In fact, there is an inconsistency in the way the EEOC interprets the foreign-law defense and the way courts have interpreted it.

The EEOC adopts a strict interpretation of the foreign-law defense, applying it only where compliance with U.S. discrimination laws will “inevitably” lead to a violation of foreign law.<sup>49</sup> According to the EEOC, employers who wish to raise this defense “cannot rely upon mere conjecture about the policies of the foreign country” and must present “a current, authoritative, and factual basis” for their belief that complying with the U.S. discrimination laws will violate the laws of their host country.<sup>50</sup> The EEOC Guidance also notes that the foreign employer may even have to show that they attempted to receive an exemption from authorities in the host country so that U.S. laws can be applied to the operations in question.<sup>51</sup> Michael Starr, author of “Who’s the Boss? The Globalization of U.S. Employment Law,” aptly notes that “U.S. employers operating abroad may find it difficult to satisfy these requirements in nations like Japan and certain Islamic states, where the distinction between law and social custom is not nearly as sharply defined as it is in the United

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47. See 29 U.S.C. § 623(f)(1) (2006) (“It is not a violation of U.S. law to take action that might otherwise constitute illegal discrimination against a U.S. citizen based on age, when such action is necessary to avoid violating a local law in the foreign country in which the workplace is located.”); see also *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447, 451 (D.C. Cir. 1995) (noting that mandatory retirement provisions are common throughout the Federal Republic of Germany and are valid if entered into before Congress extended the Act past U.S. borders).

48. Starr, *supra* note 19.

49. *Id.* (citing EEOC ENFORCEMENT GUIDANCE, *supra* note 40, at ¶¶ 2313-27). Cf. EEOC, POLICY GUIDANCE: ANALYSIS OF § 4(F)(1) “FOREIGN LAWS” DEFENSE OF THE AGE DISCRIMINATION OF EMPLOYMENT ACT OF 1967, EEOC NOTICE NO. N-915.046 (1989), reprinted in EEOC Compliance Manual, 2009 WL 3608228 (C.C.H.), ¶ 6524 (Dec. 5, 1989).

50. EEOC, HOST COUNTRY BARS HIRING OF WOMAN IN FOREIGN JOB, DECISION NO. 85-10 (1985), reprinted in Employment Practices Guide, 2009 WL 4380776 (C.C.H.), ¶ 6851, at ¶¶ 7054-55 (July 16, 1985).

51. EEOC ENFORCEMENT GUIDANCE, *supra* note 40, at ¶¶ 2313-29.

States.”<sup>52</sup>

While the EEOC views a clear demarcation between social custom and regulatory laws of a foreign nation, the distinction seems to be murky in the eyes of the U.S. courts. For example, in *Mahoney v. RFE/RL, Inc.*, a U.S. corporation fired two U.S. citizens who were working for it in Munich, Germany because the German labor agreement included a mandatory retirement provision for those at age 65.<sup>53</sup> The provision violated the ADEA, which prohibits mandatory retirement, but was perfectly lawful in Germany.<sup>54</sup> The U.S. Court of Appeals for the District of Columbia that ruled on the case held that the U.S. corporation did not violate the ADEA because retaining the two older workers would have “caused” the employer to violate the German law that prohibits breach of contract.<sup>55</sup>

Interestingly, the EEOC interpreted the facts of the *Mahoney* case in exactly the opposite way. According to the EEOC, a foreign law for the purposes of this defense must be codified. The EEOC reasoned that since no German statute explicitly required mandatory retirement, the U.S. employer’s compliance with the ADEA would not cause it to violate German law.<sup>56</sup> However, since many foreign cultures observe strict employment requirements that are part of their customs or religion, but that are not codified as law, the EEOC’s position could leave employers in a difficult situation when American expatriate employees’ rights collide with the cultural practices of a foreign country.<sup>57</sup>

#### D. Treaty Exception

Although foreign companies that have U.S. subsidiaries are subject to anti-discrimination laws such as the ADEA,<sup>58</sup> some foreign companies

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52. See Starr, *supra* note 19; see also Michael McKenna, *Age Discrimination & U.S. Law: What Japanese Firms Need To Know*, JAPAN SOCIETY, Apr. 18, 2007, available at [http://www.japansociety.org/age\\_discrimination\\_what\\_japanese\\_firms\\_need\\_to\\_know](http://www.japansociety.org/age_discrimination_what_japanese_firms_need_to_know) (“Public attitudes of respect for the aged are very strong, [which is] not surprising in one sense, since Japan is the heir of a Confucian tradition that emphasizes respect for the elders; but at the same time, private attitudes are much more ambiguous.” (internal quotations omitted)).

53. *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995).

54. *Id.*

55. *Id.*

56. *Id.*

57. Theodora R. Lee, *Global Employment Claims: Emerging International Labor and Employment Issues*, PLI Order No. 6740 (2005).

58. “American subsidiaries of foreign corporations are not covered by FCN Treaties.” *Id.* (citing *Sumitomo*, 457 U.S. at 176); *Spiess v. C. Itoh & Co.*, 725 F.2d 970, 975 (5th Cir. 1984); and *Kirmse v. Hotel Nikko*, 51 Cal. App. 4th 311 (1996)). However, when the foreign parent makes the decision, the FCN treaty applies as the subsidiary can assert its

are able to exempt themselves from U.S. laws by claiming protection under certain treaty laws. Bilateral agreements between the United States and other countries, most significantly the Treaties of Friendship, Commerce and Navigation (“FCN Treaties”), establish “the ground rules by which private commerce between American citizens and citizens of other countries is regulated.”<sup>59</sup> Generally, the FCN Treaties are designed to establish a stable environment for international investment and trade.<sup>60</sup>

The United States has signed FCN treaties with at least sixteen countries, including Japan, Korea, Greece, and Spain.<sup>61</sup> Typically, a FCN treaty contains an “employer-choice” provision, which allows companies to hire certain professional employees “of their choice” when operating within a foreign country. For example, Japanese and Dutch firms are allowed to choose employees of their own national background.<sup>62</sup> Similarly, Koreans are also allowed to choose from their own background.<sup>63</sup> The Supreme Court examined the implication of treaties and U.S. discrimination laws in *Sumitomo Shoji America, Inc. v. Avagliano*.<sup>64</sup> The Court decided the issue of whether an American-incorporated, wholly owned subsidiary of a foreign corporation could, itself, assert the rights of an FCN treaty. The Court held that an American-incorporated subsidiary “constituted under the applicable laws and regulations” of the United States cannot invoke its own treaty rights.<sup>65</sup> The Supreme Court reasoned that such rights are only available to Japanese companies operating in the United States and to U.S. companies operating in Japan.<sup>66</sup> The Court stated that “[t]he purpose of the [FCN] Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct

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parent’s treaty rights “to prevent the treaty from being set at naught.” *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1058 (5th Cir. 1998); *Papaila v. Uniden American Corp.*, 51 F.3d 54, 55 (5th Cir. 1995); *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991); *Santerre v. AGIP Petroleum Co.*, 45 F. Supp. 2d 558, 576 (S.D. Tex. 1999). *But see Kirmse*, 51 Cal. App. 4th at 319 (applying the California FEHA and holding that circumstances allowing for subsidiary to assert parent’s treaty rights more narrow than holding in *Fortino*).

59. Robertson, *supra* note 29 (citing *Spiess v. C. Itoh & Co.*, 643 F.2d 353, 355-56 (5th Cir. 1981) (citing Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958))).

60. *See Sumitomo*, 457 U.S. at 187 n.17 (explaining that the most striking advance of the postwar treaties is the widespread use of the corporate form of business organization in present day economic affairs).

61. *Id.*

62. *Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1181 (E.D.N.Y. 1979).

63. *See Lee*, *supra* note 57 (citing *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988)).

64. 457 U.S. at 187 n.17 (female secretaries argued that *Sumitomo*, a New York subsidiary wholly owned by its Japanese parent, was discriminating against them by hiring only Japanese males for its executive positions in violation of Title VII).

65. *Id.* at 182-183.

66. *Id.*

business on an equal basis . . . .”<sup>67</sup>

The federal judiciary remains divided on the reach of the FCN treaty defense. The Second Circuit has held that the employer must show citizenship is a bona fide occupational qualification (“BFOQ”) to claim a treaty defense on citizenship.<sup>68</sup> The Fifth Circuit interprets the defense more narrowly, holding that: “American subsidiaries of Japanese corporations have the limited right to discriminate in favor of Japanese nationals in filling [positions covered by the U.S.-Japan FCN treaty].”<sup>69</sup> Alternatively, the Sixth and Third Circuits hold that the treaty defense only applies to discrimination based on citizenship.<sup>70</sup> The ambiguity and inconsistency in applying the FCN treaty defense allows foreign companies to continue to justify the use of mandatory policies in more situations than should be allowed.

### III. EMPLOYMENT OF U.S. CITIZENS BY FOREIGN EMPLOYERS IN THE U.S.

U.S. employment discrimination laws, like the ADEA, clearly apply to foreign companies that employ U.S. citizens abroad. However, courts disagree whether the ADEA’s exclusion of the foreign operations of an employer that is a foreign person not controlled by a U.S. employer applies to foreign persons employing U.S. citizens in the U.S. According to one court, the place of employment, not the employer’s nationality, determines whether the ADEA applies.<sup>71</sup> Thus, discriminating against U.S. citizens in the U.S. is unlawful regardless of the employer’s nationality.<sup>72</sup>

The EEOC has also adopted this interpretation of the ADEA. In *EEOC v. Kloster Cruise Ltd.*, for example, the EEOC sued a Norwegian cruise company, Kloster Cruise Ltd., that held a subsidiary office in Bermuda based on suspicions that Kloster’s firing of several district managers, in an effort to reduce its workforce, was due to age discrimination.<sup>73</sup> In interpreting ADEA section 623(h)(2) the Court used

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67. *Id.* at 187-88.

68. *Avagliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), *rev’d sub nom.*, *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982).

69. *Spiess v. C. Itoh & Co.*, 643 F.2d 353, 355 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

70. *See Wickes v. Olympic Airways*, 745 F.2d 363, 367 (6th Cir. 1984) (holding that parties to the Treaty may “discriminate in favor of their own nationals or citizens for certain high level positions, but [can]not . . . discriminate against others in the labor force of the host country on any other basis”); *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1140-41 (3d Cir. 1988) (holding same); *Santerre v. AGIP Petroleum Co.*, 45 F. Supp. 2d 558 (S.D. Tex. 1999) (holding same).

71. *Helm v. S. African Airways*, No. 84 Civ. 5404, 1987 WL 13195 (S.D.N.Y. June 25, 1987).

72. *Id.*

73. 888 F. Supp. 147, 148-149 (S.D. Fla. 1995).

the standard two-part statutory analysis test to determine whether that section applies to foreign companies that employ U.S. citizens in U.S. territories.<sup>74</sup> In general, if a statute's text is clear, then "the Court must give full effect to the unambiguously expressed intent of Congress, regardless of any contrary interpretation by the EEOC."<sup>75</sup> However, where, as in this case, the statute is "silent or ambiguous" regarding an issue, then "the Court must defer to the EEOC's interpretation if it is reasonable."<sup>76</sup> "Agency interpretation is reasonable and controlling unless it is arbitrary, capricious, or manifestly contrary to [a] statute."<sup>77</sup> The court observed that the statute explicitly exempts foreign companies from complying with the ADEA and does so without specifically limiting its application to overseas operations. Nevertheless, the court also noted that in interpreting a statute, courts "do not look at . . . one provision in isolation, but rather look to the statutory scheme for clarification and contextual reference."<sup>78</sup> After examining closely related sections of the statute, the Court concluded that section 623(h)(2)'s exemption was intended to be limited to overseas operations.<sup>79</sup> The court granted the EEOC's motion for summary judgment, holding that the ADEA's exemption for foreign employers does not apply to foreign employers operating in the U.S.

Similarly, the District Court for the Southern District of New York ruled in *Sabol v. Cable & Wireless PLC* that although employees who are employed by foreign companies are not protected by the ADEA, domestic operations of foreign employers must still comply with the statute.<sup>80</sup> Other courts have explicitly adopted the EEOC's interpretation of section 623(h)(2). Yet another court has held that the ADEA does not apply to the employment of U.S. citizens in the United States by non-U.S. employers because the statute does not distinguish coverage on the basis of where the work is performed.<sup>81</sup>

In *Haugh v. Schroder Investment Management North America Inc.*, the plaintiff brought an ADEA claim against her former employer, an American subsidiary and the foreign parent company in the District Court

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74. *Id.* at 150 (citing *Dawson v. Scott*, 50 F.3d 884, 886 (11th Cir. 1995)).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* (citing *United States v. McLemore*, 28 F.3d 1160, 1162 (11th Cir.1994) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute."); *Smith v. United States*, 508 U.S. 223, 232 (1993)).

79. *Kloster Cruise Ltd.*, 888 F. Supp. at 150.

80. 361 F. Supp. 2d 205 (S.D.N.Y. 2005).

81. *Mochelle v. J. Walter Inc.*, 823 F. Supp. 1302, 1309 (M.D. La. 1993) (holding that even if American corporation was agent of Canadian corporation, latter would be exempt from liability under the ADEA based on express provision stating that ADEA "shall not apply where employer is foreign person not controlled by an American employer"), *aff'd*, 15 F.3d 1079 (5th Cir. 1994).

for the Southern District of New York. The plaintiff argued that the ADEA should apply to the foreign parent company by virtue of the “single employer” doctrine.<sup>82</sup> The court rejected plaintiff’s argument holding that “[t]he single employer doctrine cannot . . . overcome the bar presented by unambiguous language of Section 623(h)(2).”<sup>83</sup> The Court reasoned that although the single employer doctrine may make the foreign parent company the “employer” of the plaintiff for purposes of applying the ADEA, the “unambiguous statutory language” provides that “the ADEA shall not apply where the ‘employer is a foreign person not controlled by an American employer.’”<sup>84</sup>

The court went on to acknowledge but distinguish the holding in *Morelli v. Cedel*<sup>85</sup> that the ADEA should be applied to U.S. employees working for American subsidiaries of foreign companies. The Court reasoned:

While the holding in *Morelli* would permit a different conclusion, in particular its conclusion that the ADEA protects an employee working in the United States for a branch of a foreign corporation . . . the *Morelli* court did not have to confront the issue presented here: whether the single employer doctrine can trump unambiguous statutory language.”<sup>86</sup>

In conclusion, courts clearly differ in their interpretations of section 623(h)(2). It should also be noted that even if a court where an ADEA lawsuit has been filed rules that the ADEA does not apply to the employer because it is a foreign person doing business in the United States, the EEOC may nevertheless pressure the subsidiary into settling ADEA claims as a condition of doing business in the United States.<sup>87</sup>

#### IV. CURRENT APPLICATION OF U.S. EMPLOYMENT LAWS ABROAD

Mandatory retirement is a clear violation of the ADEA that should not be tolerated by companies who reap the benefits of employing U.S. citizens abroad. However, the protection of U.S. employment law must be

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82. No. 02 Civ. 7955, 2003 WL 21146667, at \*2 (S.D.N.Y. May 14, 2003) (citing 29 U.S.C. § 623(h)(2) and rejecting plaintiff’s argument based on the “single employer doctrine” that the ADEA should apply to the foreign parent company of her former employer). The single employer doctrine was developed by the National Labor Relations Board in the context of labor disputes and applied in *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995), to Title VII cases. It has since been used by district courts in ADEA cases. *Haugh*, 2003 WL 21146667, at \*2.

83. *Haugh*, 2003 WL 21146667, at \*2.

84. *Id.* (citing 29 U.S.C. § 623(h)(2)).

85. 141 F.3d 39 (2d Cir. 1998).

86. *Haugh*, 2003 WL 21146667, at \*2.

87. 6 Emp. Coord. Employment Practices § 41:282 (last updated Apr. 2010).

balanced in a way that protects a foreign nation's sovereignty, since U.S. laws should not override the employment laws of other countries. Given the increasingly global economy, however, it is necessary that the United States take decisive action to eliminate the uncertainty that surrounds such an important civil right.

Countries have been dealing with this issue in different ways. Japan, for example, has not shown any indication of establishing its own laws that protect its citizens against age discrimination. Instead, Japanese firms are being offered guidance on how to comply with the employment laws of the United States. A recent panel of distinguished specialists in law and culture discussed what Japanese firms with operations in the United States should do in order to comply with U.S. employment discrimination laws.<sup>88</sup> The panelists agreed that, in an ADEA case brought in the U.S., a plaintiff's presentation of the mandatory retirement policy of his employer's Japanese parent company would have a prejudicial effect in court even though such policies are entirely legal in Japan.<sup>89</sup> One panelist further offered that the foreign employer's best defense in such a scenario would be to claim that the firing decision took place not in Japan, but locally in the U.S.<sup>90</sup>

Unlike Japan, Canada has taken a pro-active approach to regulating age-based employment discrimination. Canada recognizes that the inconsistent application of the ADEA can be minimized if explicit laws prohibiting mandatory retirement are passed. In December 2006, Canada added an amendment to its Human Rights Code that prohibits mandatory retirement except in specific situations where forced retirement could be justified due to the nature of the job.<sup>91</sup> While this amendment is a step towards greater protection of employment rights, outlawing compulsory retirement has created a plethora of new issues regarding benefits. Employers who practiced forced retirement had policies in place that assumed benefits would stop at age 65. Now employers must decide whether to continue to provide benefits for those employees over 65 who decide to continue working.<sup>92</sup>

Australia has taken yet a different approach. Instead of explicitly outlawing mandatory retirement, it simply removed a provision from its Commonwealth Public Service Act of 1999 that permitted mandatory retirement.<sup>93</sup> A federal prohibition of age discrimination soon followed

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88. See Katherine Hyde, *Age Discrimination & U.S. Law: What Japanese Firms Need to Know*, *supra* note 52.

89. *Id.*

90. *Id.*

91. Gloria Gonzalez, *Canada Retirement Rule Raises Benefit Questions: Employers Consider Extending Coverage to Workers Over 65*, BUSINESS INSURANCE, Dec. 18, 2006.

92. *Id.*

93. Rachael Patterson, *The Eradication of Compulsory Retirement and Age*

with the implementation of the Commonwealth Age Discrimination Act 2004.<sup>94</sup> Yet, without a law that unambiguously protects older workers from compulsory retirement, such workers will undoubtedly continue to face hidden discrimination in the workplace. Research shows that older workers are the least preferred for employment and the most likely to be targeted for retrenchment.<sup>95</sup>

Multinational corporations that are affiliated with the United States, either through incorporation or via the existence of American subsidiaries must be alert to the reaches of section 623(h)(2) of the ADEA. In fact, law firms are counseling their clients to be wary of anti-discriminatory practices abroad. White & Case LLP, for example, published an article advising such multinational corporations how to reduce liability issues with respect to mandatory retirement policies.<sup>96</sup> The article describes a lawsuit in which Chinese employees who were forced to retire alleged that while their dismissals may not have violated Chinese labor statutes, the firings breached their employer's global discrimination policy.<sup>97</sup> The article also warns that evidence of age discrimination abroad, even if performed by a foreign employer and thus exempt from the ADEA, could possibly be admitted in a domestic age discrimination trial as evidence of systemic age bias (such as in a class action).<sup>98</sup>

## V. POTENTIAL SOLUTIONS

Even if the ADEA is found to have been violated in a particular case, the remedy for plaintiffs seems bleak at best: scholars state that the chance of recovery for all ADEA plaintiffs hovers around only 10%.<sup>99</sup> This statistic is not surprising considering that all claims involving violation of the federal employment laws must first be brought before the EEOC, which has no overseas offices and no formal procedures in place for

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*Discrimination in the Australian Workplace: A Cause for Celebration and Concern*, ELDER LAW REVIEW, Vol. 3, 2004, available at <http://ssrn.com/abstract=649868>.

94. *Id.*

95. *Id.* (citing DRAKE MANAGEMENT CONSULTING, AGE DISCRIMINATION IS ALIVE AND WELL, SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON EMPLOYMENT, EDUCATION, AND WORKPLACE RELATIONS INQUIRY INTO ISSUES SPECIFIC TO WORKERS OVER 45 YEARS (1999)).

96. Donald C. Dowling, Jr., *Global HR Hot Topic: Four Steps to Global Age Discrimination Policy Compliance* (White & Case Newsletters, New York, N.Y.), Aug. 2007, [http://www.whitecase.com/hrhottopic\\_0807/](http://www.whitecase.com/hrhottopic_0807/).

97. *Id.*

98. *Id.*

99. See Robertson, *supra* note 29 (citing Thomas S. Ulen, *The Law and Economics of the Elderly*, 4 ELDER L.J. 99, 126 (1996) (reviewing RICHARD A. POSNER, *AGING AND OLD AGE* (1995))).

processing claims arising in foreign countries.<sup>100</sup> Further, the subpoena power of the EEOC extends only to “the United States or any territory or possession thereof.”<sup>101</sup> As it stands now, then, there is not much to deter corporations from blatantly violating the ADEA.

In addition to being morally unsettling, it is also possible that mandatory retirement might run contrary to corporations’ objectives. “[T]here is substantial evidence that many workers can continue to work effectively beyond age 65 and may, in fact, be better employees because of experience and job commitment.”<sup>102</sup> Furthermore, “with regard to absenteeism, punctuality, on the job accidents, and overall job performance” workers over the age of 65 performed “about equal to and sometimes noticeably better than younger employees.”<sup>103</sup> The legal ramifications for mandatory retirement clearly need to be strengthened.

There are a number of ways to reduce the pervasive and unjust use of mandatory retirement policies abroad. First, Congress can amend section 623(h)(2) to clarify its definition of “employer.” The legislative history of the ADEA clearly indicates that it was designed to protect American citizens, regardless of whether their employer is the U.S. or a foreign entity. By explicitly stating in that statute that the ADEA does not exempt foreign employers operating within the United States, it would rid the uncertainty with which some courts continue to grapple.

A second proposal is for courts to follow the view held by the Sixth and Third Circuits that the FCN treaty defense is only for discrimination based on citizenship. Narrowing the application of the treaty defense would keep foreign employers, which are operating either abroad or domestically through U.S. subsidiaries, from inappropriately justifying unethical retirement policies.

A further proposal in addressing the issue of mandatory retirement is to approach it from the angle of establishing a global standard of workplace conduct. In 1995, President Clinton and the U.S. Department of Commerce developed the Model Business Principles (“MBP”), a voluntary business ethics code that sets forth standards relating to corporate conduct abroad.<sup>104</sup> The MBP consists of a number of principles, which American enterprises are encouraged to follow. Companies are urged to write formal principles of ethical behavior and communicate them to members of their

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100. Gerald L. Maatman Jr., *A Legal Guide For Multinational Corporations on Dealing With the Extraterritorial Application of U.S. Employment Discrimination Laws*, 3 DIG. INT’L L. 2 (1995).

101. *Id.* at 4.

102. Robertson, *supra* note 29 (citing S. Rep. No. 95-493, at 3 (1977)).

103. WILLIAM S. SWAN, HOW TO PICK THE RIGHT PEOPLE PROGRAM 3 (1989) (quoting David A. Andelman, *Job Survey Finds Aged Work Well*, N.Y. TIMES, Sep. 22, 1972, at 45).

104. Lee, *supra*, note 57.

organization.<sup>105</sup> The hope is that multinational enterprises will harness their economic power by serving as role models, with their peers in the international business community following suit.<sup>106</sup> Unfortunately, although the MBP represents an important initiative, it lacks legal consequence. Since the code is completely voluntary, there is a risk of “bluewash”—where large corporations will wrap themselves in the United Nations’ blue flag without doing anything new.<sup>107</sup>

Building upon the initiative introduced by the MBP, the United Nations created the UN Global Compact in 2000. With over 5,000 signatories in more than 130 countries, the Global Compact has become the world’s largest and most widely known corporate responsibility initiative.<sup>108</sup> Like the MBP, the UN Global Compact is also a voluntary code of ethics—one that is “committed to aligning the operations and strategies of multinational corporations with “ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.”<sup>109</sup> An important difference between the MBP and Global Compact is that the latter has recently incorporated measures of integrity to safeguard the good efforts of the UN, whereas MBP lacks any such measures of accountability.<sup>110</sup> Although, the UN lacks the authority to issue remedies in cases of corporate abuse, and specifically states that the Global Compact is not an assessment tool used to monitor corporate actions, it has established guidelines to assist in maintaining the quality of participants to the Global Compact. For example, a company’s failure to communicate its progress in implementing the ten principles of the Global Compact to their stakeholders, will result in placement on a list of “non-communicating” companies for one year, and will subsequently lead to delisting if such non-communication continues. Misuse of the UN name and allegations of corporate abuse are other actions that could lead to

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105. Andreas Georg Scherer & Marc Smid, *The Downward Spiral and the U.S. Model Business Principles—Why MNEs Should Take Responsibility for the Improvement of World-Wide Social and Environmental Conditions*, 40 *MGMT. INT’L REV.* 351, 351-71 (2000).

106. *Id.*

107. Gijsbert van Liemt, *Towards a different kind of globalization, or how the anti-globalists view the world* (Policy Integration Dep’t, World Comm’n on the Social Dimension on Globalization, Int’l Labour Office, Working Paper No. 38, 2004), available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms\\_079127.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_079127.pdf).

108. *Human Rights Dilemmas for Multi-National Corporations: Definitions and Language* (UN Global Compact, Working Paper No. 2, 2009), available at [http://human-rights.unglobalcompact.org/doc/UNGC\\_Dilemmas\\_Working\\_Paper\\_2\\_v10.pdf](http://human-rights.unglobalcompact.org/doc/UNGC_Dilemmas_Working_Paper_2_v10.pdf).

109. United Nations Global Compact, *What is Global Compact?*, <http://www.unglobalcompact.org> (last visited Apr. 12, 2010).

110. United Nations Global Compact, *Frequently Asked Questions*, [http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/Integrity\\_Measures\\_FAQs.html](http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/Integrity_Measures_FAQs.html) (last visited Apr. 12, 2010).

revoking participant status.<sup>111</sup> The Global Compact's integrity measures to seem to be having some effect thus far. On February 1, 2010, 859 companies were delisted from the United Nations' list of companies abiding by the Global Compact for failure to communicate on their progress.<sup>112</sup>

Critics might argue that since the labor protections listed in the MBP and UN Global Compact are designed to mirror the protections offered by Title VII, the pivotal statute upon which most employment discrimination cases in the U.S. are based, they do not have to explicitly include protections against age discrimination.<sup>113</sup> Indeed the language of Title VII states: "It shall be an unlawful employment practice for an employer 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."<sup>114</sup> Title VII does not consider age discrimination to be an unlawful employment practice. However, what must be considered in tandem with this fact is that the ADEA coexists with Title VII to provide U.S. citizens with protection against age discrimination suffered in the workplace. In contrast, there is no addendum to the MBP or UN Global Compact that serves to address the issue of age discrimination. Rather, the MBP and UN Global Compact both stand on its own. As a guide to the general principles that are expected of corporations in today's modern economy, both voluntary ethics codes are useful tools in discouraging companies from implementing mandatory retirement policies.

In addition to amending the specific language of the MBP and UN Global Compact, another proposal would be to subject violators of the principles to legal consequences. For example, if private citizens were allowed to bring suit for suspected violations, then corporations would likely feel accountable for their actions. In fact, some members of Congress have proposed such an idea.<sup>115</sup> In August, 2001, Congresswoman Cynthia McKinney of Georgia reintroduced a bill, H.R. 2782, which would implement a comprehensive Corporate Code of Conduct governing the employment of U.S. expatriates. Specifically, it would require any U.S. corporation employing more than 20 persons in a foreign country (either

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111. *Id.*

112. Press Release, United Nations Global Compact, 859 Companies Delisted for Failure to Communicate (Feb. 1, 2010), <http://www.unglobalcompact.org/news/8-859-companies-delisted-for-failure-to-communicate-on-progress>.

113. After all, three years before the passing of the ADEA, Congress had voted down an amendment to Title VII to include age discrimination as an unlawful employment practice. Laws Enforced by the EEOC, The U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited Apr. 12, 2010).

114. *Id.*

115. Lee, *supra* note 57.

directly or indirectly through subsidiaries, subcontractors, etc.) to implement a comprehensive Corporate Code of Conduct governing aspects of the employment of those persons abroad.<sup>116</sup> If the McKinney bill were passed, one could bring a private right of action to petition the appropriate federal official to investigate alleged violations of the code and the federal government could terminate government contracts with non-complying corporations.

Although the McKinney bill did not come to a vote in 2002, it received support from 25 members of Congress, thus indicating that there were at least some within the U.S. government who supported the idea of establishing a more stringent U.S. code of business conduct to be applied abroad.<sup>117</sup> Our representatives need to reintroduce Bill H.R. 2782 so that the current 111<sup>th</sup> Congress can vote to place measures of corporate accountability in the hands of private citizens.

## VI. GUIDANCE FROM THE LEGAL INDUSTRY

If the U.S. takes a strong stance against mandatory retirement, it is my prediction that other major players in the world economy will feel the pressure to follow suit. It is also imperative that the U.S. act quickly since the issue of mandatory retirement is one that countries are in the midst of hotly debating. As recently as March 2009, a European Court found that “the age ceiling is not discriminatory as long as the government can prove that it exists for good social and economic reasons.”<sup>118</sup> It is likely that legal forums in other countries are addressing the issue of compulsory retirement especially as the baby boom generation rapidly increases in age.

In deciding how to handle the issue, the legal industry can provide some guidelines. The American Bar Association (“ABA”), for example, finds itself in a similar position to affect change with respect to mandatory retirement policies in the U.S. legal industry. In August 2007, the ABA House of Delegates endorsed a New York State Bar Association (“NYSBA”) recommendation that called on law firms to end mandatory age-based retirement.<sup>119</sup> The recommendation stemmed from a 2006 study run on mandatory retirement policies in the legal industry, which “concluded that no legitimate reasons existed for such inflexible policies and that they hurt law firms, as well as the profession.”<sup>120</sup> Furthermore, the

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116. *Id.*

117. H.R. 2782, 107th Cong. (2001).

118. *Mandatory Retirement Age Should Be Put Out to Grass*, THE OBSERVER, Mar. 8, 2009, at 32, available at <http://www.guardian.co.uk/commentisfree/2009/mar/08/older-people-equality-retirement-age>.

119. Geri L. Dreiling, *Retiring Mandatory Retirement*, ABA JOURNAL, Jan. 1, 2008, [http://abajournal.com/magazine/retiring\\_mandatory\\_retirement](http://abajournal.com/magazine/retiring_mandatory_retirement).

120. *Id.*

study found that “mandatory retirement is found in 57 percent of firms with at least 100 lawyers.”<sup>121</sup> The president of the NYSBA, Mark H. Alcott, commented on the issue by stating that while mandatory retirement has been waning in the corporate world, “it remains deeply entrenched in the legal profession.”<sup>122</sup> As NYSBA president, he has made ending mandatory retirement a top priority.

Since the ABA endorsed the NYSBA’s recommendation, there appears to be movement towards changing the industry’s view of mandatory retirement. In October 2007, the Chicago office of Sidley Austin settled an age discrimination suit over the demotion of 32 partners and complied with EEOC demands to abolish its mandatory retirement policy.<sup>123</sup> One month later, Kirkpatrick & Lockhart Preston Gates Ellis dropped a mandatory retirement policy that had forced lawyers to retire at age 70.<sup>124</sup> Furthermore, in April 2007, Pillsbury Winthrop Shaw Pittman announced that it had scrapped its mandatory retirement age of 65.<sup>125</sup>

Opponents clamored that “the ABA should not dictate how firms should handle what amounts to a private contract matter with partners.”<sup>126</sup> In response, past ABA president, Michael S. Greco, answered: “This is a matter of principle, and principle trumps contracts.”<sup>127</sup> Similarly, the U.S. must recognize that quashing mandatory retirement policies is also a matter of principle. Just as the American Bar Association has taken a stance against mandatory retirement in today’s legal industry, so too should the U.S. set an example by discouraging mandatory retirement policies in the private sector.

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121. *Id.*

122. *Id.*

123. *EEOC v. Sidley Austin Brown & Wood LLP*, 406 F. Supp. 2d 991 (N.D. Ill. 2005).

124. Dreiling, *supra* note 119.

125. *Id.*

126. *Id.*

127. *Id.*