Bloomberg BNA

Daily Labor Report®

Reproduced with permission from Daily Labor Report, 145 DLR I-1, 07/29/2016. Copyright © 2016 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

COLLECTIVE BARGAINING

International Framework Agreements are collective bargaining agreements intended to set minimum labor standards across the entire operation of a multinational company, aid in establishing collective (union) representation and thereby reduce friction between labor and management. However, attorneys Douglas Darch and Christopher Burkett of Baker & McKenzie LLP say in this Bloomberg Law Insights article that IFAs can present compliance traps by triggering reporting obligations under, or even running afoul of, anti-bribery statutes. Multinational companies considering signing an IFA should carefully review its provisions, as they may need to adopt financial controls and negotiate exceptions to the typical IFA provisions in order to comply with anti-bribery laws in the U.S. and abroad, they say.

Anti-Bribery Compliance Traps in International Framework Agreements

BY DOUGLAS DARCH AND CHRISTOPHER BURKETT

Signing the typical International Framework Agreements (IFA) with global union federations or works' councils may carry an unintended consequence. IFAs are collective bargaining agreements intended to set minimum labor standards across the entire operation of a multinational company, aid in establishing collective (union) representation and thereby reduce friction between labor and management.

IFAs can present compliance traps, however, by triggering reporting obligations under, or even running afoul of, anti-bribery statutes. Multi-national companies considering signing an IFA should carefully review its provisions, as they may need to adopt financial controls and negotiate exceptions to the typical IFA provisions in order to comply with anti-bribery laws in the U.S. and abroad.

Background of IFAs

To combat perceived shopping by multinational companies for pro-business and cost-friendly jurisdictions, Global Union Federations (GUFs) adopted a strategy of negotiating global labor contracts with multinational enterprises, referred to as International Framework Agreements (IFAs), which applied to the enterprise's workers regardless of jurisdiction.

The first IFA was negotiated in 1988 with Danone, a company headquartered in France. Since then, over one hundred IFAs have been executed. IFAs have been negotiated by Global Union Federations, by European Works Councils (EWC), or Global Works Councils (GWC) or by partnerships involving both. The majority of IFAs have been executed in the past five years.

U.S. Anti-Bribery Statute

In the late 1940's and again in the 1950's, the U.S. Congress adopted a number of labor law reforms. These reforms focused on, among other issues, corruption in the collective bargaining process and labor racketeering due to ''pay offs'' of union officials.

The resulting U.S. anti-bribery statute applicable to labor unions and union officials is contained in Section 302 of the Landrum–Griffin Act, 29 U.S.C. § 186. The anti-bribery statute consists of two parts: a prohibition against payments, 29 U.S.C § 186; and, a reporting obligation imposed on the Chief Executive Officer and Chief Financial Officer to personally self-report violations, 29 U.S.C. § 433.

Specifically, Section 302 of the Landrum–Griffin Act makes it a criminal act: to give money or anything of value to a labor organization (union) which represents or which seeks to represent an employer's employees; for a union official to demand or request anything of

value from an employer when the union represents, or seeks to represent, the employer's employees; and, to provide anything of value to union officials. 29 U.S.C § 186.

The reporting section requires employers to file a report, under oath, with the U.S. Department of Labor reporting any payments made in violation of the statute. Not surprisingly, the sweep of Section 302 is very broad. The statute covers not only union or union officials when the union represents an employer's employees, it also applies to unions or union officials who merely seek to represent the employer's employees. Moreover, the sanctions are steep.

The crimes described in Section 302 are classified as felonies and are punishable by fines not to exceed $15,000.00 and imprisonment not to exceed five (5) years or both. The anti-bribery statute is enforced by two different federal agencies—the Department of Labor and the Department of Justice.

Extraterritoriality of the U.S. Anti-Bribery Statute

In 1959, the Department of Labor issued regulations advising Section 302 does not apply extraterritorially to conduct occurring outside the U.S. Retreating slightly in subsequent guidance, in 1966 the DOL refined its position by advising that when the transaction involved union officials based outside the U.S., the agency would engage in a case-by-case analysis focused on the impact of the transaction (the provision of the money or thing of value) on U.S. employees, and—as phrased by the DOL—''interests which are the objects of the [Landrum–Griffin] Act's protection'' to determine jurisdiction.

In so doing, the DOL relied on long-standing U.S. Supreme Court precedent permitting limited extraterritorial application of U.S. laws where the violation involves activities in the U.S. Importantly, the DOL gave one example for which it believed reporting would be required: reimbursing the expenses of a foreign member of an international [union] executive board who traveled to the U.S. to participate in the board's meetings conducted within the United States.

Reporting Requirements Under the U.S. Anti-Bribery Statute

The reporting provision of the U.S. anti-bribery statute requires the employer to self report on an annual basis all items of value it provided to an actual or potential union or union agent. Under U.S. criminal law, corporations do not enjoy protections against self-incrimination. As a result, it is a criminal offense not to submit a report when one is required.

The DOL has created a form on which the prohibited payments must be disclosed—DOL Form LM-10. The submission of Form LM-10 implicates corporate CEOs and the treasurer ''or other corresponding principal officers'' as the DOL requires such executive officers sign it, verifying its accuracy under oath and penalty of perjury. Keeping with the tenor of the times, the Department of Justice, the other federal agency charged with enforcing Section 302, has prepared and issued a template indictment for its regional offices to use when violations occur, which is available on its webpage.

Accounting Controls Under the U.S. Anti-Bribery Statute

The regulations adopted by the Department of Labor contain a *de minimis* exception to the reporting obligation. The exception, frequently referred to as the ''doughnut'' rule, is truly *de minimis*. An employer is permitted to provide up to $250 of value in the aggregate on an annual basis to a single union officer or agent. Obviously, a couple rounds of golf followed by a get-acquainted dinner could easily exceed this threshold and result in the obligation to report. The same $250 annual limit in the aggregate on money paid or gifts made also applies to a union. Consequently, an off-site labor-management meeting with a bargaining committee that includes food paid for by the employer could also trigger a reporting obligation. Notably, the DOL has taken the position an employer is obligated to adopt and maintain accounting controls so it can determine with certainty the amounts paid to union officials each fiscal year.

International Anti-Bribery Statutes

The U.K. Bribery Act (the ''UKBA''), considered by many to be the most stringent legislation of its kind, also poses a risk of liability for companies entering into IFAs. Unlike the narrow forcers, the UKBA makes it a criminal offense to pay bribes to any ''person,'' and to receive bribes.

The sweep of the UKBA captures even a broader range of relationships and activities. The ''functions'' or activities that the UKBA targets include not only union activity, but also bribes ''connected with business'' and ''any activity performed in the course of a person's employment.'' The UKBA creates strict liability for businesses that fail to prevent bribery where an associate person engages in bribery with the intention of obtaining or retaining business for the organization, or to obtain and retain an advantage in the conduct of business for the organization.

With the vote to exit the EU (Brexit), U.K. prosecutors may resort to the UKBA to level the playing field. In addition to the UKBA, Canada and Australia have similar provisions in their respective anti-bribery statutes. Multinational companies entering into IFAs must be mindful of these anti-bribery statutes and their broad scope.

Expense Provisions in IFAs and the Intersection With Anti-Bribery Laws

As typical of every collective agreement, the typical IFA contains minimum terms of employment for employees regardless of location. These minimum terms include wages, working conditions, safety, and anti-discrimination provisions among others. Most include provisions requiring the employer to recognize the rights of employees to form and join unions. Others address strengthening the role of the local trade unions and address the process of conducting collective bargaining obligations.

 COPYRIGHT © 2016 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 0418-2693

It became apparent, at least to labor, that a monitoring and a dispute resolution mechanism were needed or necessary. Monitoring required on-site investigations of far-flung facilities, and that came at no small expense. Dispute resolution required labor and management to meet periodically to discuss matters of mutual concern, including working conditions.

Frequently, these meetings required union representatives of U.S. or U.K. workforces to travel to other countries. To offset these costs, GUFs demanded that the employer pay for these travel and meeting expenses. Employers agreed to reimburse the GUFs for the expenses related to these activities, and an expense provision was included in the IFAs.

These expense-payment obligations however, collide face on with the criminal anti-bribery statutes in the U.S. and elsewhere. Such expense reimbursements likely trigger the reporting obligations under the U.S. anti-bribery statutes, and possibly create criminal liability under U.S., U.K., and other foreign anti-bribery statutes. The intersection between such common expense provisions in IFAs and these anti-bribery statutes creates a compliance trap. For example, something as innocuous as paying the expenses of a single U.S. labor official to travel to a meeting of the Global Works Council could trigger a reporting obligation.

Best Practices for Compliance

No matter where one is operating, anti-bribery statutes create a transnational risk, and proper due diligence and controls must be in place to ensure that union officials do not receive unlawful payments.

Even though the DOL has stated corporate compliance officers cannot sign the LM-10, corporate compliance officers would be well served to establish internal teams consisting of Human Resources, Financial, and Accounting personnel to review any IFA or other agreements with labor organizations to determine if the company has any financial obligations under it. Financial controls should be adopted which prohibit payments for activities of union officials, reimbursement of union officials for expenses, or other payments.

 COPYRIGHT © 2016 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 0418-2693