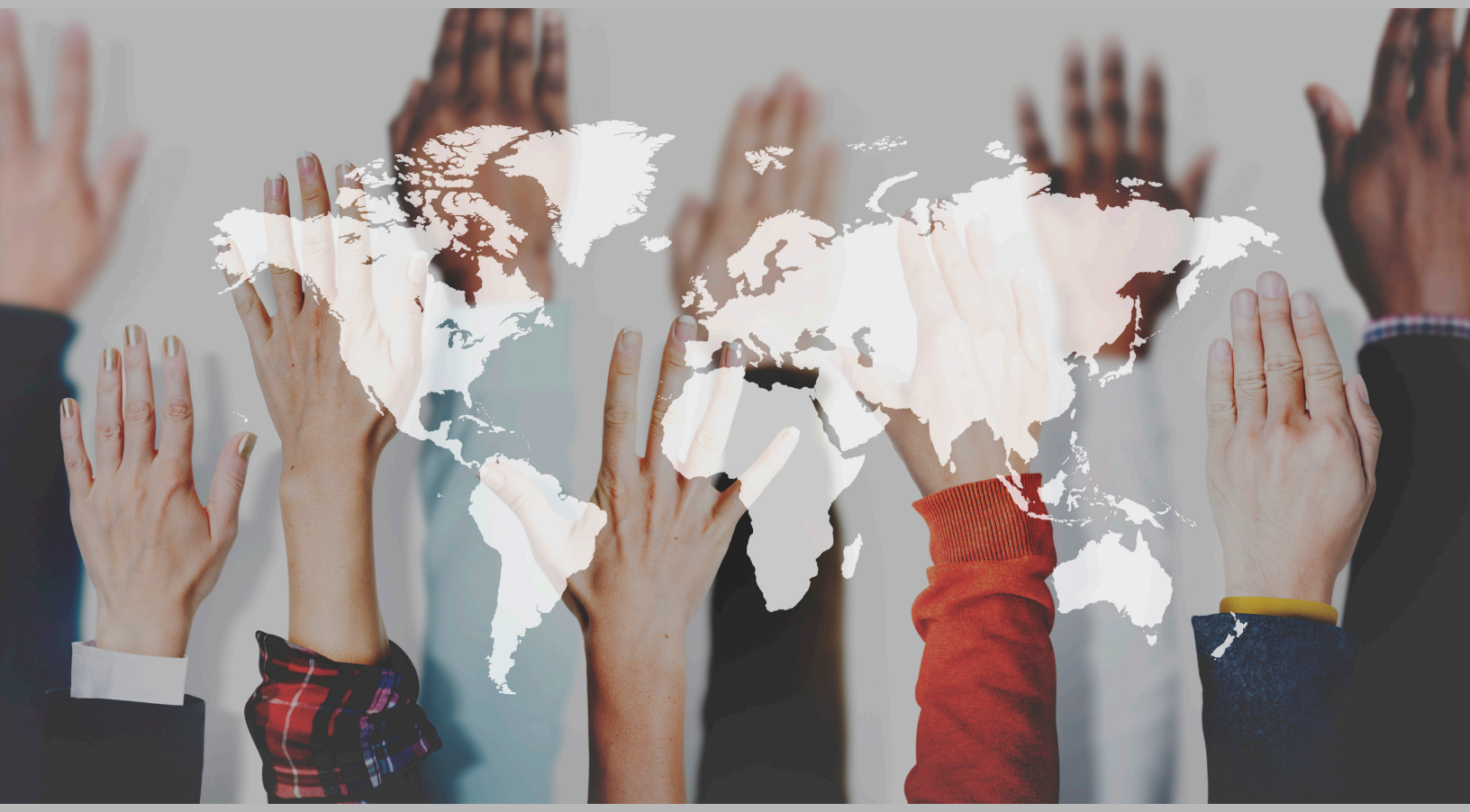

FOREIGN CONCEPT

Do Foreign, Non-U.S. Citizen Workers Count as "Employees" When Determining Whether Title VII Applies?

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For most employers, the question of how to count their workers in determining whether the Title VII of the Civil Rights Act applies to their firm is cut-and-dry. The majority either have 15 or more employees (and thus most anti-discrimination laws, like Title VII of the Civil Rights Act, apply), or they have fewer than 15 employees (and laws like Title VII don't apply).

This relatively simple question is made so by the reality that most employers either (1) don't employ foreign workers outside the United States, *or* (2) are large enough to clear the 15-employee threshold with domestic[1] workers even if they also employ foreign* workers outside of the United States. These employers simply view payroll and determine if each domestic worker listed therein was employed for twenty or more weeks in the preceding calendar year.

But for a smaller subset of employers, a critical question persists: what happens when the application of federal employment law to their company turns on whether a foreign worker, laboring outside the United States, is counted as an employee? Consider a company that employs hundreds of foreign workers in the country of that company's corporate residence yet employs only ten domestic workers in the United States. Does the existence of those foreign workers require the employer to comply with Title VII, despite the fact the

employer only employs ten domestic workers in the United States? The answer, it turns out, is muddled at best. Some district courts have said yes, and some no, leaving the question open and court-dependent. It is important for practitioners to be aware of this incongruity.

This article focuses primarily on Title VII, as it is the most generally applicable federal employment anti-discrimination law. Briefly, Title VII (42 U.S.C. § 2000e *et seq.*) bars employers from discriminating against or retaliating against a person who opposes discrimination against employees based on their status as a member of a protected class (race, gender, sexual orientation, religion, etc.). That law, however, only applies to "employers" with 15 or more employees.[2]

The statute defines "employer" as:

> "[A] person engaged in an industry affecting commerce who has **fifteen or more** employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person[.]"

42 U.S.C. § 2000e(b) (emphasis added). Title VII also, importantly, protects domestic workers employed in a foreign country. *Id.* § 2000e(f). So, to define the Title VII framework for this article, the following is generally true: Domestic employers, and foreign employers doing business in the United States, must comply with Title VII if they meet the employee-number requirement. Domestic employees of these companies are generally counted towards the employee-number requirement regardless of whether they work in or out of the United States. Moreover, foreign employees working inside the United States are counted towards the employee-number requirement. The question is: do foreign employees working outside the United States apply to the Title VII's 15-employee threshold?

As it turns out, this is a complicated question, and one will not be surprised to learn that the Supreme Court has never addressed it. Until 1998, the prevailing view was that foreign employees working outside the United States could not be counted for purposes of Title VII's application. That year, however, the Second Circuit decided *Morelli v. Cedel*.[3] In that case, the plaintiff, a domestic employee, worked in New York for a foreign bank. The bank terminated her employment, and she sued it for age discrimination under the Age Discrimination in Employment Act (ADEA). The bank argued it was a foreign employer with fewer than twenty domestic employees,[4] making the ADEA inapplicable. The district court agreed with the bank and dismissed the case, reasoning that because the ADEA did not expressly *protect* foreign employees, those same foreign employees did not *count* in determining whether the U.S. law applied. Thus, since the bank had fewer than 20 domestic employees, the ADEA did not apply.

On appellate review, however, the Second Circuit disagreed, noting that the ADEA expressly "counted" employees for the 20-employee threshold that it did not also protect (those being employees under the age of 40). The court then discussed policy rationales for the employee-number requirement, found that no rationale held firm for excluding foreign employees from the ADEA's count, concluded the bank's foreign workers *did* count towards the law's employee-threshold, and reversed the district court. *Morelli* thus became the launching point for the view that employee-number requirements in domestic federal laws can include foreign workers working outside the United States. A few years later, that view was expressly extended to Title VII's employee-number requirement by the Ninth Circuit in *Kang v. U. Lim America, Inc.*[5] In a 2-1 decision, the Ninth Circuit endorsed counting foreign employees for purposes of Title VII's application, emboldened by the provision of Title VII that expressly protects domestic workers in foreign countries.

The dissenting judge in *Kang* saw it differently. In his view, Title VII's express mention that it protected domestic employees overseas (a provision the ADEA did not contain) operated to exclude the protection of employees that Title VII did not mention: foreign employees overseas. Mostly for that reason, the dissenting judge would have ruled that foreign employees outside the United States did not count towards Title VII's employee threshold. Picking up on these threads, several district courts since *Kang* have also noted that Title VII and the ADEA have a key difference in how employees are defined versus how they are protected. As discussed above, under the ADEA, the statute expressly counts all employees in determining whether the statute applies but only protects a subset of that group. This was, in part, the reason the *Morelli* court believed that domestic and foreign employees could be counted in determining that the ADEA applied; there was no way to read the ADEA as statutorily excluding them. But Title VII defines as the same the employees it counts and the employees it protects, and it excludes from its protection foreign employees working outside the United States (something the ADEA does not do). Several district courts have thus rejected Morelli in the Title VII context and concluded that Title VII excludes foreign employees working overseas from the employee-number count.[6]

As discussed in the introduction, this incongruity between circuits and laws does not have far-reaching implications for many employers. It is, however, a crucial question for practitioners who often work with foreign employers—and especially those with limited but extant operations in the United States or those looking to expand or start operations in the United States. Defense practitioners, in particular and in this context, should familiarize themselves with the arguments made by the district courts as to why *Morelli* would not extend to Title VII. It is an unanswered question in many federal circuits, and there is legitimate reason to believe that cases like *Morelli* and *Kang* interpret Title VII incorrectly. Practitioners familiar with these arguments will be well-equipped to brief them when applicable.

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1* For ease of understanding, the term "domestic" as used in this article means "United States citizen," and "foreign" means "non-United States citizen."

2 Title VII is a federal law; many states have their own laws that bar employers with less than 15 employees from the same sort of conduct (discrimination and retaliation) that Title VII addresses.

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

4 The ADEA's employee-number requirement is twenty employees.

5 296 F.3d 810 (9th Cir. 2002)

6 *Mousa v. Lauda Air Luftfahrt, A.G.*, 258 F. Supp. 2d 1329 (S.D. Fla. 2003); *Davenport v. HansaWorld USA, Inc.*, 23 F. Supp. 679 (E.D. Miss. 2014).