

Rise of Internationals and Multijurisdictional Workforce Issues, and Why a Globally-integrated Practice Group Approach is Critical [PODCAST]

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Darren Gardner, a pioneer in the area of international employment law, joins IMS Insights Podcast to share his thoughts on helping companies manage an increasingly global workforce. Darren discusses King & Spalding's groundbreaking Global Human Capital and Compliance Practice, provides tips for navigating the complexities that can emerge with an international workforce, and identifies the new workplace innovations that he's seeing emerge in response to the COVID-19 pandemic.

Teresa Barber: Darren, welcome. It's wonderful to have you here. I appreciate you taking time for the conversation.

Darren Gardner: Pleasure to be here.

Teresa Barber: I want to ask you a little bit about COVID-19 and the pandemic. We know in many ways (that) it's forced the hand of innovation, as companies and firms look forward to new ways of connecting with customers and driving business. What have you been observing? How do you think companies are innovating to keep work going right now?

Darren Gardner: I think the model that's operated in the traditional and typical model has really had to change – and had to change quickly. (I think) most of the steps have revolved around, certainly, the adoption of technology – in particular, the use of the different platforms and collaboration tools. I also think the forced remote work has been something that has really forced everybody to modify what they do and how they do it – particularly in the short term.

Darren Gardner: Most of the innovation has been around how to get things done in an environment that people aren't typically used to, and where they're using technology and tools that are designed to facilitate interaction, but they're certainly not the same as face-to-face business.

Teresa Barber: Right. Looking at some of these changes, we might've thought a year ago, "This is just a workaround. This is temporary." Do you think that the pandemic has fundamentally altered the

way people and companies are working?

Darren Gardner: I do. I think (it's altered how people work) both in the short term, and I think there's really what we are calling, as part of our Global Human Capital and Compliance practice at King & Spalding, a global transformation of the modern workplace (happening in the long term). It is not the same, and it's not going to be the same. It's something that filters through, not just the day-to-day workforce interactions, but also all the collateral arrangements.

Darren Gardner: The real estate requirements, the geographies, all of the services that you typically need when you're in the office to be able (to function) – the security, the food, the catering, (it will affect) the types of things that typically you require that suddenly have gone away. Then, (it will also affect) things that you wouldn't necessarily expect – (for instance), what types of technology requirements do you now have? How does the technology that you operate in the environment of the office work when people are remote?

Darren Gardner: I think everybody's had to rethink (all this), really from soup to nuts. I don't think anybody's there yet, nor do I think that we're close to where we'll end up. I think it's really bespoke, based on business requirements, to a degree, and location, but that transformation has certainly started to occur, (and) I think it's going to continue.

Teresa Barber: Yeah. I know you're monitoring this on a daily basis, but what other related issues are you seeing on the horizon? I want you to talk to us a little bit about why you –and why King & Spalding – made the decision to launch the Global Human Capital and Compliance practice right now.

Darren Gardner: Delighted. I think, taking the second part first, (that) King & Spalding has been a very entrepreneurial firm and has been entirely focused on staying ahead of the curve. We didn't set the practice up as a consequence of COVID.

Darren Gardner: There's been a huge – I think – shift in how the workforce is both valued, and how valuable it is. It's generally the biggest cost, but it's also often the biggest opportunity. And I think the development of those ideas around the broader internationalization of business – and I'll talk more about some specific issues later – but the idea that there's now a centrality to workforce issues and dealing with them in a centralized, integrated way on a global basis is something that certainly I've done throughout my career.

Darren Gardner: But in our conversations, as we're looking at establishing the practice, King & Spalding really is a firm known for thinking about what's going to happen after what happens next. A lot of those issues are around people, and that was the basis for why we did it, (and) certainly, it's been proven out in the first year of operations. In terms of the issues and challenges – the first part of your question – that have arisen through COVID, it's been interesting.

Darren Gardner: They really fall, I think – again, much like the global transformation, (in) the modern workplace, we're just seeing some of these issues start to arise. I don't think we've seen anything like what will happen just yet, but there's a lot of challenges around the technology and the collaboration platforms – how people use them and what they do. There's a lot more familiarity, I think, and probably the interactions of coworkers (have) become a lot different than (they are) when you are in an office environment.

Darren Gardner: It's much easier to create a framework and a structure and apply rules that you

expect everybody to comply with when you have a common location. When people are using collaboration tools, and they're in groups and they're speaking to each other in shorthand in ways where you have people in different countries, it's really starting to lead to both cultural and compliance issues that are really tough to regulate.

Darren Gardner: Because of the speed that everybody had to react to the pandemic, and because of the nature of the change, it wasn't something that you could really address up front. At the same time, the way that arrangements have been put in place and that they've operated (under) during the course of the last year or so, I think there's a little bit of forgiveness, generally, because everybody had to get it in place. It was really about well-being and safety.

Darren Gardner: What happens as a consequence is (that) there's a series of both management issues, I think, and compliance issues, that as we get further into it, and as the arrangements and that transformation continues to take place, we're really starting to see – and we're going to see more of. They're the simple things that if you were to step back and look at the big picture, you would certainly identify – but the practicalities of doing it after it's happened make it that much more difficult, I think.

Darren Gardner: What we're seeing, (to give a few) examples of issues, (are things like): just how do you manage performance in particular roles in a remote environment, (when) part of it depends on personal interaction? How do you frame the use of the collaboration tools to be able to make sure that all of the things that you would normally get, with both your colleagues and customers, can be addressed appropriately? How do you address leave? How do you go on leave if you're working at home?

Darren Gardner: In countries outside the U.S., where there are significant statutory entitlements, those accruals and those costs where you have large workforces are really material – and can be contingent liabilities that are going to have to be addressed as companies move forward. At the same time, the flip side of leave, and collateral to it, (are) working hours. What's your ordinary day?

Darren Gardner: Your ordinary day used to be defined by when you're in the office. Now, you get emails, texts, and other prompts from different tools and social media interactions that typically weren't part of what you would do all day and all night. How do you comply with the laws, and how do you pay people appropriately in connection with those types of issues? I think there's a series of challenges that have started to rear their head. There are some really obvious ones.

Darren Gardner: Some of them are going to be issues that are going to have to be directly addressed. For companies that have global workforces, there (are) some complexities and issues that arise with that. Just the types of considerations that typically you wouldn't see, and that don't need to be part of your management or your business operational model, are going to be central to what happens as people continue in a remote environment.

Teresa Barber: Yeah. Very interesting to think about the rise of internationalization for firms right now. I'd like to talk to you a little bit about just the diversity of rules and regulations that companies are facing. You touched on that a little bit, but what does the world look like right now for firms that are operating in multiple jurisdictions (or) multiple countries? Is it all streamlined and simple?

Darren Gardner: Oh, I think it's far from it. I suspect that one of the (issues here) – harking back to why we did this – (is) having a fully integrated, centralized approach to be able to deal with global workforce issues in circumstances where there's a strategic component in how you do it and what

you can do (with it). Then, there's also that fundamental compliance element of what you have to do.

Darren Gardner: One of the things we've spent a lot of time on is looking at how we (can) help our large multinational clients (to) both ultimately make and save money in the best ways they can – (and to do so) efficiently, through their approach to the workforce, but at the same time comply with the laws that apply, which are very different around the world. I mean, the U.S. is so much different (than) any other country from an employment law perspective. It's a vast array of systems and processes, all of which you need to take account of.

Darren Gardner: The other element that I think a lot of folks – probably outside of those responsible for it – don't think about is (that) there's a huge premium based on corporate good citizenship, and corporate culture is exceptionally important. It's not just about what you do from a financial perspective, it's about how you deal with it and how you treat your people.

Darren Gardner: I think the movement towards responsible investing with the new – in the U.S., (at least) – public company (United States Securities and Exchange Commission [SEC]) human capital reporting guidelines and requirements(is) really starting to take shape. Those differences between regions, and the countries within regions, and in some cases, (the) states and provinces within countries, can be pretty stark.

Darren Gardner: I think the ability to have that centralized management system that enables you to have some certainty – to be able to protect your brand, to be able to promote your preferred corporate culture, and at all times, to stay out of the sight (of) the regulators – is exceptionally important. There's a number of areas, I think, that are particularly topical, and are going to be more so, that perhaps U.S. companies aren't –and haven't traditionally – been as focused on.

Darren Gardner: But, with expansion and with the internationalization, they're now everyday issues for multinational companies. Just issues generally, in (terms of) some of the differences in employment laws and how they're enforced. Developing countries often have the most complicated systems, because they're either archaic, or they base them and modify them from countries that have exceptionally narrow and specific requirements.

Darren Gardner: We've seen a lot of looks of surprise from some of our larger clients as they go into places that are not what they would (have anticipated) and (where) the issues they face aren't what they would have thought. (And) it's just around simple things – (like) the working hours that I mentioned previously, (or) the diversity and inclusion requirements that apply in different places. How some of the employment laws are operated and enforced is different around the world, and how it's done in the civil law jurisdiction is very different (from) a common law jurisdiction.

Darren Gardner: The development of privacy and how those laws have evolved, and the requirements that you have, not only for customers, but also for the HR data that you handle – which, when you operate a large human resource information system where data can be accessed about anybody anywhere (can be pretty substantial) – it carries with it some obligations and some fairly material requirements that you have to take account of.

Darren Gardner: The one I think that we are going to see perhaps the most attention (being) given to – particularly with the consequence(s) of the pandemic and that global transformation (of) the modern workplace and the move toward more permanent remote work – is workplace safety. Nobody quite thinks of their house or their bedroom or their kitchen as their workplace. (But) now, universally – or at least globally – (that) is the case.

Darren Gardner: What it means is – those laws – notwithstanding the fact that somebody might be sitting on a stool at their kitchen counter, the employer is still responsible for what happens in that workplace. Given the rush to remote work, and given, essentially, the lack of timing and planning that was possible, we're starting to see some real consideration given to (question like): what happens if you don't have smoke detectors or a fire extinguisher (in your home)? What happens if you don't have a first aid kit?

Darren Gardner: Because simple compliance requirements under the laws of many countries outside the U.S. carry with them fairly significant criminal penalties. (Thinking) as a director of a company in particular countries, if somebody gets hurt falling down the stairs at their house and they didn't have a railing to grab onto, and they did it while they were going to make themselves a cup of tea, (while) going from their bedroom to the kitchen – is the employer responsible for that?

Darren Gardner: The authorities – and what we are seeing in a lot of places – believe the employer is. I think we're going to see a real evolution in some of these compliance and risk management issues. I think that takes me back to the starting point of, "Why was it that, as King & Spalding, we set up the Global Human Capital and Compliance group? It was (because) we saw these things starting to develop. COVID has accelerated them, but the technology was certainly going to facilitate them, and they were going to come up over time.

Teresa Barber: Just fascinating, Darren, and so much just evolving on the horizon that we may have not ever really thought would be coming down the pipeline. Just hearing you talk, too, about the ability to view the complexity of how different governments handle different compliance issues, is really interesting. I want to drill down into that a little bit too, to think from the client's perspective when they're coming to you. I'd like to hear what you see the benefit is for clients on having that type of perspective.

Teresa Barber: Being able to have someone they can trust to say, "Look, we've seen it play out in this type of way. You're going to need to anticipate that." Can you talk to me a little bit about how you're helping, and seeing clients really manage this type of complexity well, and what that benefit is to have that type of clarity and context and perspective?

Darren Gardner: It certainly goes to the heart of what I do, and certainly what the team and I do for a living. The way that global businesses operate is not workplace by workplace. I think if anybody these days is going to try and run a 160-country business that has multiple locations within countries, and deal with it on a one-off non-strategic integrated basis, they're going to struggle because it's very difficult to be able to do that.

Darren Gardner: I think the real value that we've seen is being able to build strategies and develop systems that give you a globally-integrated, single-source, consolidated approach and system that enables you to operate your business within parameters that will satisfy the requirements around the world. Then, as I said, companies these days, they're not (really) worried about what they do in a specific place because that's not what defines them – what defines them is their brand. If you ask them who they are, it's really around what they do and how they're perceived.

Darren Gardner: Their good corporate citizenship, on the one hand, is really important because that drives the compliance. There's also the strategic and the accountability element(s), both from a social responsibility (perspective), but also from a financial performance perspective. Being able to have advisors that have that global experience – I personally have done 500-plus projects covering 160 countries for some of the world's biggest companies.

Darren Gardner: It gives you a view that really, you know what is possible (and) you know what is appropriate. It gives you the perspective to be able to address things in a way that is really underpinned by the strategic elements that are most important to clients. I can tell you, U.S. multinational companies are really focused on that compliance element – on that good corporate citizenship and appropriate meeting of all responsibilities. Their brands and their share price often depend on it.

Darren Gardner: As we move forward, I think we'll see more and more of that. The value that we present is certainly that global perspective, but with local knowledge and experience. At the same time, I think anybody who believes that one person, or a small team, can deal with every issue for all of their clients in every country around the world, (well) – they're either lying or misguided, and they don't really do it.

Darren Gardner: Having a full-service team, and having a structure that is globally-oriented, and having a world-class corporate practice, having a world-class litigation practice, having a trade practice that's second to none, having the ability to be able to interact with regulators, both domestically and around the world, and then tying that back to the type of human capital issues that companies are concerned about – (that) is really what we've done in building the Global Human Capital and Compliance practice.

Darren Gardner: It's not a tricky name for a local employment litigation practice. It's really a very broad-based practice that both covers the strategy and compliance, but also addresses the litigation and all of the collateral, corporate real estate tax – all the things that you don't really think that if you send one person to a particular location, that it would have an impact in the U.S.

Darren Gardner: Just as an example, last week I dealt with an issue where an employee from California, (their) mother got sick. He's from Argentina, (and) temporarily located back to Argentina. That was in May of last year. He's a sales guy so he's revenue-based, and he's been there for a year.

Darren Gardner: From a corporate regulatory, from a tax, from an immigration, and then ultimately a commercial perspective, you need a full team of folks with the ability to understand what the implications are to be able to address it – but also to be able to then come up with a plan for how you deal with those issues going forward. They're the kinds of things that, every day, we are now seeing as a consequence of COVID and the response to it.

Teresa Barber: Yeah. Very fascinating. Just the practice group itself, too, Darren, it sounds like you've really assembled a world-class suite of resources and talent. (And) not just from the compliance perspective or the litigation perspective, but really understanding corporate citizenship (and) some of the drivers behind the cultural issues, like diversity and inclusion and corporate social responsibility.

Teresa Barber: I'd love to hear a little bit more about how (that team came together), because it sounds like (it took) a very thoughtful approach to get this team identified (and) assembled, the resources that are brought to bear when you're forming this type of practice group for clients. Could you talk to us a little bit about the thoughtfulness that went into it, (and) what it's really designed to do?

Teresa Barber: I know you've hit on that a little bit, talking about just having a strategic approach (and) being integrated about how you're approaching things. I'd love to hear a little bit more.

Darren Gardner: Yeah. Look, there was a lot of time and effort that went into the planning – both into the capability and the resources. Obviously, the core team, we've worked together for a long time and that has – honestly, the team and the folks in it are the measure of success, I think. What we were able to do...King & Spalding had a whole series – and still has, and we are growing – practices that touch on the aspects that are collateral to the core of the human capital practice. Assembling that and really developing the systems and skills to be able to bring that to bear.

Darren Gardner: I mean, we're one of the few firms that actually has a specific board director advisory practice, where the reporting requirements as a consequence of the new human capital disclosures (are) only just starting to be relevant. But by having a truly global human capital practice, and having all of the elements that touch it, I think we've got some interesting thoughts on how that might evolve and how the systems and processes that public companies are going to need to be able to address what happens (will also evolve).

Darren Gardner: Look, frankly, things that folks don't necessarily think of – (like) trade unions – historically have been fairly quiet. Certainly recently, with the change of government in the U.S., I would anticipate that we're going to see some more activity in that space, and that goes to a whole lot of aspects of how business operates. You need to have the skills and resources, both to understand it and to be able to respond to it.

Darren Gardner: Again, unions have very large pension funds, and they get to decide what shares they buy, and how – it's a material investor, and it's a material investment vehicle. With the thoughts on ESG investing and with the importance of doing the right thing, it's not only coming directly from the workforce and the employees – it's really coming from organizations that are related to them that control significant funds that impact, ultimately, investments in public companies.

Darren Gardner: All of those elements aren't – if you see yourself as an employment litigator, you aren't really going to be able to address those downstream issues, which are the things that are going to drive decisions at the board level in large companies. What we've done is really think through those types of issues. We've consolidated that expertise. We've recruited where we knew that we would need increased breadth and depth.

Darren Gardner: Now, we've got a practice that really is the full life cycle of all human capital issues that ties perfectly into the regulatory environment, and into the corporate and commercial environment, either from a transactional, or a strategic, or a compliance point of view.

Teresa Barber: Darren, hearing you talk, it really sounds like this practice is a little more comprehensive than what we've seen so far out there. Is anyone else taking this type of strategic and comprehensive approach?

Darren Gardner: I think you'll find people will suggest that they are, but we obviously thought very hard about not only what we call the practice, but what we encapsulated in it. The human capital concept – to our knowledge, there are no other law firms that have a human capital practice. I think that's one of the (things that) I would say is a huge compliment to the firm and to that visionary approach with it, because it really is where things are going to end up.

Darren Gardner: If anyone needs any validation of that, the fact that we launched and announced the practice and started operating prior to the human capital disclosure in the U.S. (going into practice) is something that (just goes to show) – (I mean), no one knew that that was happening. We, I think, have been fairly proficient at predicting what was going to happen over the years, generally. I

think specifically, with what we're doing and the trends we're seeing with our large multinational clients, I think (other) firms will follow.

Darren Gardner: I do think if we look at this in a year or two, there'll be any number of firms that suggest they've got a human capital practice. I think the fact that we've been able to do it on a global basis, the things that we have included in it and the ability to roll in compliance, and then all of the collateral aspects to it that King & Spalding is famous for – it's been really pleasing for us.

Teresa Barber: Yeah. Very interesting to see this type of innovative approach from you, Darren, and from King & Spalding.

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