

International Employees

Acknowledgements

EJC is grateful to the following individuals for their assistance in updating the International Employees Chapter for the 6th Edition:

Carol Light, Esq.
Kelly Rojas, EJC Seibel Fellow (Law Clerk)

Table of Contents

Introduction	350
Definitions	350
Chart 1: Client is Employed by International Entity	351
Chart 2: Client is a Household/Domestic Employee	352
Employees of Embassies	353
Employees of International Organizations	353
Domestic Employees	354
Determining immunities, if any, of the employer	355
Embassies	355
International Organizations	356
Request a certification letter	356
Domestic Workers Employed in the Households of Embassy or Consulate Officials	357
Domestic Workers Employed in the Households of Officials of International Organizations	357
Domestic Employees: When Demand Letters Don't Work	358

Introduction

Generally speaking, most embassies, international organizations, and many of their officials are not subject to employment-related administrative processes and cannot be sued in U.S. courts. However, their immunity from the jurisdiction of local courts can be waived; therefore, in some cases, it is possible that these entities are fully subject to local laws and local courts. With respect to individuals, visa status is not determinative of privileges and immunities, of rank, or of amenability to local jurisdiction; it merely determines the basis for entry into the United States.

Note: If the employer has “privileges and immunities,” he or she is immune from U.S. jurisdiction for claims arising out of ordinary living expenses, including household employees.

Definitions

Civil Servant: An official who has the discretion to act on behalf of the employing entity. Determined by a fact-based analysis.

Embassy: The organization engaging in diplomatic representation of a foreign government to the Government of the United States. Includes consulates located in the Washington, D.C., area and usually special offices (trade offices, military liaisons, officially-sponsored tourist offices, etc.).

FSIA: (Foreign Sovereigns Immunities Act, 22 USC § 1601 et seq.) Law that incorporates the restrictive theory of sovereign immunity, essentially enabling U.S. citizens to sue foreign sovereigns for their commercial activities. Note specific service of process provisions at 28 USC § 1608.

Household/Domestic Employees: Individuals hired and paid by employees of embassies or international organizations (or their spouses) to work in the sponsoring individual’s home. These can include nannies, tutors, nursing attendants, cooks, cleaners and other household staff.

IO: (International Organization) Public international organization. An entity whose membership is made up exclusively of national governments (private entities and individuals cannot be members) and whose activities are governed by international instruments, such as treaties, which give them privileges and immunities in specific contexts.

Respected: In the case of Embassy officials with privileges and immunities, the Vienna Convention on Diplomatic Relations provides in Article 41(1): “Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State.” Generally individuals/entities who are immune from the jurisdiction of U.S. administrative and judicial authorities nonetheless have a duty and are expected to conform their conduct to the ordinary rules of the country in which they are stationed. A waiver of immunity can be granted by the appropriate authority of the sending state. However, the only real enforcement mechanism is for the host state to expel the individual

as a “persona non grata.” This is a drastic remedy and can trigger, no matter what the merits of the individual’s conduct might be, retaliatory expulsions of U.S. personnel.

The following charts may be helpful in determining an international client’s possible avenues of recourse for employment-related issues:

Chart 1: Client is Employed by International Entity

<u>The Client is employed by</u>	Client’s Citizenship	Client’s Job Function	U.S. Laws Apply	US Ad-min Juris.	US Judicial Juris.	Other Avenues of Redress
Embassy	Sending state	Not relevant	No	No	No	Embassy internal process or in sending state
	U.S. citizen	Civil servant (i.e., has discretion to act on behalf of sending state)	Respected	No	No	As above, however redress less likely in sending state
		Not civil servant	Contract law	No	Only under FSIA	As above
	Third country	Civil servant	Respected	No	No	Embassy internal process. Potentially, in sending state or home state
		Not civil servant	Contract law (but choice of law issue, i.e., where formed?)	No	Only under FSIA	Embassy internal process or where law of contract permits
International Organization	Not relevant	Not relevant	No, unless waived	No	FSIA if waived	Internal International Organization Process

Chart 2: Client is a Household/Domestic Employee

Note: For serious abuse or human trafficking, the worker can call the 24-hour National Human Trafficking Resource Center Hotline at **1-888-373-7888**. In case of an abusive situation, the domestic worker may qualify for a special visa to stay in the United States. Please see Immigration and Employment Chapter.

The Client is Employed By	Written Contract	U.S. Laws Apply	U.S. Admin and Court Jurisdiction	Other U.S. Redress *****
Embassy Official or Spouse	Yes (Contract required as part of visa process for worker to enter United States)	Respected; contract will usually incorporate U.S. laws	No	Contact embassy admin w/ documented written complaint
International Organization Official or Spouse	Yes	Contract will usually incorporate U.S. laws; some laws may apply if the employer is not a civil servant	If employer is civil servant, then no; if the employer is not civil servant, this depends upon the particular language of the immunity instruments	Check International Organization to see whether Employee Rules of Conduct encompass conduct at issue and/or process for redress. If not, contact the organization's personnel office to submit documented written complaint.
International Organization Official or Spouse	No *****	If employer is civil servant, then no; if employer is not civil servant, depends upon the particular language of immunity instruments.	If employer is civil servant, then no; if employer is not civil servant, depends upon the particular language of immunity instruments.	See above.

***** As a practical matter, exercising these options might endanger client's position and ability to stay in the United States.

***** Contract should have been required, which could cause problems for employer in obtaining future U.S. visas.

Employees of Embassies

If the client was hired in the sending state and sent to the United States with diplomatic status, the client's employing embassy is immune from U.S. jurisdiction and U.S. laws do not apply to embassy personnel decisions. *See generally*, Vienna Convention on Diplomatic Relations, Articles 22-40 ("Vienna Convention"). Depending on the law of the sending state, the worker may have a remedy there.

If the client was hired in the United States or a third country, it is necessary to examine his or her duties to see if he/she is a "civil servant." Generally, the worker will be a civil servant if s/he has the discretion to act on behalf of the sending state. If the worker is a civil servant, the employment transaction is immune from U.S. laws. *See, e.g.,* El-Hadad v. United Arab Emirates, 216 F.3d 29, 34 (D.C. Cir. 2000) ("Whether the employee shall be considered a civil servant of the foreign state – and thus noncommercial – requires consideration of several factors to make this determination, e.g., the foreign government's own laws defining civil servant and the employee's job title and duties in relation to that definition.")

If the client is a civil servant, although the employment relationship is immune from U.S. laws, there may be an internal embassy or Ministry of Foreign Affairs grievance process or internal dispute resolution mechanism available to the worker to resolve the dispute. If there is no known internal mechanism, the worker may draft a letter of complaint setting out the problem; what violations of the embassy's employment contract or procedures are alleged; and what remedy is sought. If the matter has already been discussed with the immediate supervisor, then the letter should be addressed to the next supervisory level or, if none, to the embassy's Secretary/Counselor/Minister for Administrative Affairs (which includes the embassy's personnel office).

If the client is not a civil servant, then his or her employment will be a commercial transaction and the sending state is not immune from the application of U.S. laws. However, enforcement of the law is difficult for several reasons. First, participation in the process of administrative agencies – EEOC or state/D.C. agencies – is completely voluntary, and embassies often will ignore or be irritated by attempts to involve them. *See, e.g., Ellenbogen v. Embassy*, Dist. Court, Dist. of Columbia CA No. 05-01553(JDB) 2005. Secondly, while embassies can be sued for commercial activities, service of process requires compliance with the elaborate provisions of the Foreign Sovereign Immunities Act. *See* 28 USC § 1608.

As a first step, a worker may write a letter of complaint; however, the letter should not include references to specific legal action or cite specific laws. Rather, broader language to the effect that the employee will "seek appropriate remedies under applicable law" should be used instead.

Employees of International Organizations

A public international organization ("IO") is one whose membership is made up exclusively of national governments (private entities and individuals cannot be members) and

whose activities are governed by international instruments, such as treaties, which give them privileges and immunities in specific contexts. Entities that operate internationally but have natural persons as members, such as the International Association of Chiefs of Police (IACP), are not IOs for this purpose. Some, such as the International Federation of Red Cross-Red Crescent Societies or various Olympic organizations, are not IOs but may have some privileges and immunities in particular countries or at particular times (e.g., during the Olympic Games).

Employees of international organizations that have privileges and immunities are without a U.S. remedy. U.S. courts will not generally intrude upon the internal workings of an international organization. Broadbent v. Organization of Am. States, 628 F. 2d 27 (DC Cir, 1980). However, IOs usually have “legal personality” and the ability to enter into ordinary contracts. Courts will probably not find employment contracts to have waivers of immunity without explicit language. *See, e.g., Mendaro v. World Bank*, 717 F. 2d 610 (D.C. Cir. 1983). Even U.S. citizen employees of IOs will not be able to take advantage of U.S. legal remedies. *See, e.g., Brzak v. United Nations*, 597 F. 3D 107 (2010) (cert denied) (alleging sexual harassment).

Again, the worker may draft a letter of complaint setting out the problem, what violations of the IOs employment contract or procedures are alleged, and what remedy is sought. If the matter has already been discussed with the immediate supervisor, then the letter should be addressed to the next supervisory level or, if none, to the part of the IO that most nearly resembles a personnel office. The letter should do no more than request assistance in resolving the problem, in order to avoid a premature election of remedies.

Domestic Employees

Workers employed as maids, nannies, housekeepers, personal drivers, personal nurses, caregivers or any other form of employment where the employer is not an embassy or an IO, but *the employee* of an embassy or IO, are distinct from officials who work directly for an embassy or IO. While U.S. laws do apply to these workers, some or all of their employment relationships may not be covered.

Note: For domestic employees who are in the United States on an A-3 or G-5 visa, their continued presence in the United States is dependent upon their continued employment by the original or another equally qualified visa sponsor. For domestic employees who reside in the employer's residence, raising issues about the employment relationship can put their housing in jeopardy, so workers in that situation should be advised to consider having alternative residential arrangements available.

Since at least 2008, domestic employees must have a contract in order to obtain a visa to enter the U.S. A-3 visas are provided for domestic employees of embassy households, while employees of IO households obtain G-5 visas. The contract:

- must be in English and also in a language understood by the employee to ensure the employee understands his or her duties and rights regarding salary and

- working conditions; and
- must guarantee the employee will be compensated at the state or federal minimum or prevailing wage, whichever is greater. For contracts signed before March, 2011, any money deducted for food or lodging is limited to that which is considered “reasonable.” For contracts signed as of March 2011, no deductions are allowed for lodging, medical care, medical insurance, or travel, and for contracts signed as of April 2012, deductions taken for meals are also no longer allowed. See State Department regulation: 9 FAM 41.21 N6.4(b)(3) at <http://www.state.gov/documents/organization/87174.pdf>, p. 9.

The willful failure by an employer to comply with this requirement could result in the employer's ineligibility to receive a visa under Section 212(a)(6)(B) of the Immigration and Nationality Act. See <http://travel.state.gov/> and 2009 Adjudicator's Field Manual Redacted version: www.uscis.gov.

Under some circumstances, special visas may be available to aid the protection of domestic workers who are escaping abusive situations. Other than the potential visa relief, the rights and remedies available to the domestic employee depend upon the status of the employer, which in turn is dependent on the kind of institution with which the employer is affiliated: i.e. embassy, consulate, or international organization.

Determining immunities, if any, of the employer

Embassies

Virtually all embassies of foreign countries to the United States are located in Washington, D.C. When an embassy official holds a diplomatic rank – e.g., under the Vienna Convention, either “a diplomatic agent” or a “member of the administrative and technical staff” – the official is immune from the jurisdiction of local laws and local courts with regard to his household employees. See Sabbithi v. Al Saleh 623 F. Supp. 2d 93 (D.C. Dist. Ct. 2009.)

If the employer is a high ranking official of an embassy, then his or her name will usually be found in the State Department's Diplomatic List. <http://www.state.gov/s/cpr/rls/dpl/> Those individuals usually have a diplomatic title, such as Deputy Chief of Mission, Minister, Counselor, Secretary, or Attaché, While these lists are updated at least four times annually, they may be outdated due to the end of a tour [after which the covered employer retains immunity only for a limited time] or the arrival of new personnel.

Note, however, that there are a number of embassy officials with civil and administrative immunity who are not on the Diplomatic List. These are “members of the administrative and technical staff”, for which there is no easily available reference list. See Request a certification letter, below.

Individuals who work in consular offices in Washington, DC are covered in the same fashion as other Washington DC employees in embassies. However, individuals at consular offices away from Washington generally do not have immunity from civil and administrative jurisdiction regarding domestic employees. See, e.g. Park v. Shin, 313 F. 3d 1138 9th Circuit 2002. Exceptions, usually providing more immunities, derive from specific bilateral agreements with certain States. See list at <http://www.state.gov/s/cpr/rls/fco/c61467.htm>

International Organizations

Washington, DC is the home of many international organizations but determining whether an individual employed there has privileges and immunities is difficult. The State Department does not publish any listing of individuals with privileges and immunities derived from their employment by an IO. See request a certification letter, below.

An IO might have a bilateral treaty or agreement with the United States that gives specific and sometimes limited privileges and immunities to the IO and some of its employees (e.g., Headquarters Agreement with Organization of American States). The status of an official employed by an IO depends on what laws, treaties and executive orders govern the particular international organization and what privileges and immunities attach to the official's particular job in that organization.

Most IOs will be covered by designation under the International Organization Immunities Act, which generally states that covered IOs have the same status as foreign governments and incorporates most of the privileges and immunities accorded to diplomatic missions and diplomatic agents under U.S. law, the Vienna Convention, and customary international law. See 22 U.S.C. § 288 et seq.

Request a certification letter

If there is any doubt about the immunities applicable to a certain individual, the surest method of determining the status of the domestic worker's employer is to ask the institution in which the employer works, i.e. the embassy or IO. In order to comply with State Department requirements, the request should be addressed to the Chief of Mission of an Embassy or the head of the particular international organization (e.g. the Director, Executive Director, Secretary General, or President) and set out a time frame in which a reply is expected. The time frame should be realistic as in large organizations, the process of getting the letter to the people who will actually answer it may be of some duration.

The request should clearly name the individual to be held liable along with what is known about his or her position and should ask for a statement that the individual has no immunity from criminal, civil and administrative processes for matters relating to domestic workers. The request can go on to state that if the individual has immunity, it be waived or, if not waived that institution asserting immunity request that the State Department provide a certification letter verifying the immunity as per existing State Department processes communicated to heads of missions.. It will be helpful to include a copy of the previous correspondence so the employing institution can see what the controversy concerns.

Domestic Workers Employed in the Households of Embassy or Consulate Officials

If the conditions under which the worker is living or working rise to the level of serious abuse or human trafficking, the worker can call the National Human Trafficking Resource Center Hotline at **1-888-373-7888**. This line is available 24 hours a day and serves as the central contact for locally available resources. Additionally, if the worker is in the United States on an A-3 visa, consideration may be given to contacting the Department of State's Diplomatic Security Service. See Chapter 18.

If the worker's situation does not rise to that level of seriousness and there is an employment contract, the contract should be reviewed. As a first step, a demand letter should be prepared describing the ways in which the employer is not meeting the contractual obligations and the remedy desired. The letter may be directed to the employing embassy official unless the worker feels that such communication will not lead to a resolution. In that case, the letter should be directed to the embassy official's supervisor, with a copy to the embassy official, and it should include a time limit for the response.

If there is no employment contract, then the demand letter should note that the employer has an obligation to offer a fair wage and reasonable working conditions, state the deficiencies, and include a time limit for the response.

If there is no response to a demand letter to the employer or if the response is not adequate, then follow-up to the Chief of Mission requesting that his or her employee honor the obligations of having a domestic employee. This communication should be as complete and self-explanatory (including copies of relevant documents) as is possible in the circumstances. If that does not adequately resolve the matter, see *When Demand Letters Don't Work*, below.

Domestic Workers Employed in the Households of Officials of International Organizations

If the conditions under which the worker is living or working rise to the level of serious abuse or human trafficking, call the National Human Trafficking Resource Center Hotline at **1-888-373-7888**. This line is available 24 hours a day and serves as the central contact for locally available resources. Additionally, if the worker is in the United States on an G-5 visa, consideration may be given to contacting the Department of State's Diplomatic Security Service. See Chapter 18.

If the worker's situation does not rise to that level of seriousness and there is an employment contract, the contract should be reviewed. As a first step, a demand letter should be prepared describing the ways in which the employer is not meeting the contractual obligations and the remedy desired. The letter may be directed to the employing IO official unless the worker feels that such communication will not lead to a resolution. In that case, the letter may be

directed to the IO employee's supervisor, if known, or to the Administrative or personnel office of the IO.

If there is no employment contract, then the demand letter should note that the employer has an obligation to offer a fair wage and reasonable working conditions, state the deficiencies, and include a time limit for the response.

It may be possible to attempt to pursue the claim or grievance through the IO's internal processes. Many IOs, including the large ones in Washington, have employee manuals and internal processes by which the IO employee may be disciplined. This can provide leverage for the domestic worker seeking redress if the employer's conduct (not having a written contract, failing to abide by that contract) violates an internal IO rule.

If there is no response to a demand letter to the employer or if the response is not adequate, then a follow-up to the head of the institution should be prepared and sent. It should be as complete and self-explanatory (including copies of relevant documents) as is possible in the circumstances. If that does not adequately resolve the matter, see *When Demand Letters Don't Work*, below.

Domestic Employees: When Demand Letters Don't Work

Until the privileges and immunities of the employer have been determined, the options are limited. Filing an administrative claim or civil litigation against someone who is immune from judicial and administrative process will not be effective and potentially wastes time and resources. However, preparing a civil complaint might demonstrate the seriousness of purpose and serve as a useful vehicle for one last contact with the head of the employer's sponsoring institution, which might include a reference to potentially having to involve appropriate State Department authorities, which in turn might jeopardize the institution's ability to assure that all its employees remain eligible for the appropriate State Department visa process for personal and domestic employees.

Litigation

If the demand letters do not produce a response or an adequate response, then consideration might be given to instituting litigation against the domestic worker's employer. If the employer has privileges and immunities, as a practical matter service of process is unlikely to be effective because of inviolability of the person and residence of such individuals. It may in some cases be possible to obtain service of process by consent (by the institutional employer or even the domestic worker's employer) but absent such an arrangement, there will be no jurisdiction. If the employer does not have privileges and immunities, normal service of process rules apply.

Involving the State Department

In cases where the domestic employee's employer and the employer's institution have not been

responsive, recourse can be had to the Department of State. See 2 FAM 234.2 Civil Cases, <http://www.state.gov/documents/organization/84395.pdf>, at p. 11. Such notification should be in writing, with the cover letter setting out the information required by 2 FAM 234.2b:

satisfactory evidence that:

- (1) A debt or civil liability is owed;
- (2) The matter was brought to the attention of the mission member concerned and to the head of the mission, without resolution; and
- (3) Immunity would preclude judicial or administrative action.

In the case of embassy and consulate employees, and employees of international organizations other than those affiliated with the United Nations, this communication should be directed to the Assistant Chief of Protocol for Diplomatic Affairs, US Department of State, 2201 C Street NW, Washington, DC 20520. In the case of United Nations and affiliated agencies, the above communication should be made to the Minister-Counselor for Host Country Affairs Section of the U.S. Mission to the United Nations, 799 United Nations Plaza, New York, NY 10017.

Note: This communication should be as clear, specific, precise and self-explanatory as possible with any documentary evidence attached. While previous demand letters should be included, do not neglect to write a careful summary with references to the evidence and documents attached. Practitioners may wish to consider including an affidavit from the client setting out, under penalties of perjury, the basis of the claim. Make this communication easy to understand – it will be the primary basis on which Department of State action will rest. Don't forget to include the appropriate contact information if further information is desired.

If there has been no response, follow-up by telephone and be prepared to deliver, email or fax another copy of the package. If that is necessary, you may wish to also provide copies to the Office of the Assistant Legal Advisor for Diplomatic Law and Litigation. US Department of State, 2201 C Street NW, Washington, DC 20520.