International Assignments: Overseeing Expatriate Programs, Cross-Border Employment Tax Issues and Secondment Agreements

Session Outline

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I. Hypothetical Fact Pattern

Your CEO calls to inform you that the Company’s Board of Directors has approved a major expansion of your Company’s operations in Europe. Initially, the CEO would like to place 10 senior vice presidents currently working in the U.S. on temporary (expatriate) assignments, four in France, three in Belgium and three in Germany. Some of the senior VPs have retained counsel to represent their interests in the negotiation of their expatriate agreements. Many of the senior VPs have children who are attending school (elementary, high school and college) in the United States. The senior VPs also have complicated compensation packages including stock options, pensions, profit sharing plans, discretionary bonus potential and relatively high base salaries (all in excess of $300,000 annually).

The CEO understands the general concept of expatriate agreements, but would like to know how long the assignments can last and whether the Company and the senior VPs can choose U.S. law to govern the expat agreements (he has heard that the labor and employment laws in the EU are generally more favorable to and protective of employees than U.S. law). The CEO has asked that you do whatever is necessary to move the senior VPs and their families as soon as possible to Europe, minimizing the disruption to them and their families, and without any loss of their employment benefits, taking into account their existing compensation packages and tax liabilities.

What are your next steps?

II. Legal Considerations

A. Defining Key Terms and Concepts:
   1. Expatriation, “posting,” “assignment” and “secondment”
   2. Host country
   3. Home country
   4. “Equalization” agreements
   5. “Totalization” agreements
   6. Tax Treaties
   7. Other?
B. Expatriate ("Posting") Agreement: What contractual provisions should be included, or at least considered? See Sample Expatriate Assignment Agreement.

1. U.S. choice of law and possible conflicts with home country “public policy.”
   a. Note that some countries, including France, have ratified the EC Convention on the Law applicable to Contractual Obligations (the "Rome Convention") dated June 19, 1980 and thus apply the rules set forth by the Rome Convention when the law applicable to the employment contract is uncertain.
   b. The basic rule set forth by the Rome Convention is that “a contract shall be governed by the law chosen by the parties” (Article 3).
   c. In accordance with the Rome Convention, the parties to an employment contract are free to choose the governing law, but some host countries’ law strictly limits this choice.
   d. Under Article 6 of the Rome Convention, a contractual choice of law in an employment agreement shall not have the result of depriving the employees of the protection afforded to them by the mandatory rules of the law that would apply in the absence of choice.
   e. As a result, the choice of law made by the parties often does not deprive the seconded employees of the protection afforded by mandatory rules of the host countries’ law.
   f. Practical tips for ensuring application of U.S. law:
      i. Clear and conspicuous contractual choice of U.S. law, applicable to the entire employment relationship and to the secondment (posting) arrangement.
      ii. Consider repatriating the seconded employee to the U.S. before termination of employment.
      iii. Temporary and limited nature of assignment, with expectation of repatriation after a defined period of time.

2. Termination of assignment for any reason, with or without notice, based on such things as a downturn in the business, mergers and acquisitions, etc. – note that this concept is not readily accepted in most EU member states, and in many Asian countries.

3. Repatriation at end of assignment – at a defined point in time, or subject to the Company’s sole and absolute discretion.

4. Expected duration of assignment, and reserve the Company’s right to terminate the temporary assignment early, in the Company’s sole and absolute discretion.

5. Conflicts of Interest – assignee agrees not to engage in any employment or business activity that will in any way conflict with his/her work for the Company and the interests of the Company.


a. France: Allows judicial review of reasonableness of restrictive covenants in employment contracts.

b. Belgium: Employers must pay a lump sum of at least 50% of the employee’s salary during the period of time covered by the restrictive covenant.

c. Germany: Same as Belgium.

8. Other legal arrangements, including new employment contract, suspension of existing (U.S.) employment contract.

9. “Self-employed” workers and “Managing Directors”:
   a. France: Employees
   b. Belgium: Self-employed
   c. Germany: Employee but not subject to protection of German (host country) law.

10. Unilateral contract modifications by the employer: Note that most EU member states consider an employer’s unilateral modification of important employment contract provisions to be an actionable breach of contract.

C. Collective Bargaining Agreements (“CBAs”): Note that many EU member states have different levels of CBAs and there is a risk of application of them despite contractual choice of U.S. law, based on where the work is performed and in what industries.

   1. For example, in France and Germany, the employer must inform, and in some cases consult, the local works council when hiring a foreign employee.

   2. In Germany, two types of collective agreements: works council agreements and trade union agreements.

   3. EU Posting of Workers Directive (96/7/EC).

D. Mandatory Host Country Language Requirements: In France and Belgium, employers must address their employees – including English-speaking expats – in French and Dutch, respectively, in accordance with local law. Instructions and correspondence in English may not be used as evidence in court. Also, employment contracts that are not drafted in French or Dutch, respectively, will be null and void.

E. Tax Treaties: Examination of any tax treaties (“equalization” and “totalization”) between the U.S. and the host countries. Why is this so important? Worst case scenarios and double taxation.

   1. France

   2. Belgium: Tax free reimbursement rule, repetitive and non-repetitive; foreign travel exemption (the salary pro rated to all the working days that the employee has been abroad are exempt under Belgium tax law).

   3. Germany

   4. Other special Treaties?
F. Tax “Equalization,” “Totalization” and Benefits Issues:

1. Do any foreign Tax Treaties apply?

2. State employment tax obligations regarding continued “domicile” in a state while on long term assignment abroad. Often, expatriate employees continue to maintain a home in the state in which they last lived or try to move to a non-income tax state before beginning an overseas assignment. Also, an employee’s family may remain in the U.S. for part of the assignment or the duration of it. A recurring issue is what is the obligation of the employer to collect and remit state level taxes including income and state social security taxes. Further, what is the employer’s obligation to pay unemployment taxes during assignment as to the state of domicile?

3. How should foreign tax credit provided under U.S. federal tax law affect state/federal income tax withholding by the employer?

4. Structuring “equalization agreements”: These agreements typically provide that an employer may arrange with an employee to assist with both in-country living expenses as well as neutralize the impact of being subject to multi-jurisdictional taxes.

5. Use of “totalization” agreements: These agreements typically allow for an employee expected to be on assignment for no more than five years to continue to participate in the Social Security system (providing ongoing employer and employee contributions to FICA) while on assignment abroad.

6. Global Benefit Plans: Will the assignee be able to continue participation in home country benefit plans?

7. Social Security: EU Regulation 1408/71. Bilateral treaties between the U.S. (home country) and the host country. Conditions for staying on U.S. Social Security:
   a. Social security country of origin (the country in which the employee normally works and contributes to Social Security before being posted abroad).
   b. Temporary posting/assignment (temporary as opposed to assignment for indefinite duration (five year maximum and renewals)).
   c. Interdiction of chained posting (the seconded [posted] employee is succeeded by another secondee and this succession continues).
   d. Organic link with original employer.
   e. France: 5 years, extension possible, place of work.
   f. Belgium: 5 years, extension possible, place of work.
   g. Germany: 5 years, place of work.

8. Other?
G. Employee Privacy Concerns: Placing an employee on an assignment inevitably involves the employer obtaining personal information beyond the normal scope.

1. For example, the EU Privacy Directive raises legal concerns with respect to the transfer of personally identifying information and data. Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

2. Contrary to U.S. law, EU law may prevent the monitoring of employees' computers, internet usage and emails, even if the affected employees expressly consent in writing. See Copland v. United Kingdom, European Court of Human Rights, April 3, 2007; recent case in which CNIL (French government privacy watchdog, “Commission Nationale de l'Informatique et Libertes”) fined Tyco International 30,000 pounds (approximately $60,000 U.S.) for non-cooperation and for providing erroneous information regarding personal employee data stored.

H. Personal safety/security of employee (and spouse/dependents): Take steps necessary to protect employee (and family) and to limit employer’s exposure in case of injury or accident.

I. Immigration Issues: What work visas are permitted under the host countries’ laws?
   1. France:
   2. Belgium:
   3. Germany:

J. Compliance with Home Country (U.S.) Laws:
   1. Assignee agrees to comply with all applicable home country laws and regulations, including U.S. laws that have extraterritorial reach:
      ▪ The Foreign Corrupt Practices Act
      ▪ Sarbanes-Oxley Act accounting fraud, reporting and “whistleblower” provisions (and possible conflicts with EU Directives, CNIL decisions)
      ▪ Anti-discrimination laws.

K. Compliance with Host Country Employment Laws:
   1. Need for an expatriate employment agreement/contract.
   2. Wage/hour laws – is the assignee in a job category where these laws will apply?
      a. France: 35 hour “maximum” work week (and recent erosion), and 10, 25 and 50% overtime rates.
      b. Belgium: 38 hour workweek, and 50% or 100% overtime rate.
      c. Germany: 48 hour workweek, no overtime pay requirement.
4. Termination procedures – severance pay and/or notice required?
5. Laws regarding leaves of absence and vacation; involvement of works councils in various aspects of the employment relationship; conflicts with public policy and/or labor and employment laws of host country.

L. Compliance with Company’s Global Code of Conduct

M. Termination and repatriation issues: Consider repatriating to the U.S. before termination of employment to minimize the risk of application of host countries' laws. If not practicable, evaluate the risks and potential exposure for “abusive” or wrongful termination under host countries' laws.

III. Practical Considerations

A. Pre-Assignment Preparation
   1. Candidate/Family Assessment
   2. Letter of Assignment
   3. Passports, Visas, Work and Residency Permits
   4. Physical Exams/Immunizations/Medical Expenses
   5. Personal, Legal and Financial Arrangements
   6. Pre-Assignment Human Resources Consultation
   7. Pre-Assignment Tax Consultation
   8. Cross-Cultural Training
   9. Language Training
   10. Pre-Assignment Preparation Expenses

B. Assignment Policies – see Sample Expatriate Assignment Policy
   1. Vacation and Home Leave
   2. Rest and Relaxation Leave
   3. Working Hours and Holidays
   4. Leave of Absence/Emergency Leave/Emergency Evacuation
   5. College Student Travel
   6. Currency Restrictions
   7. Family Status Change
C. Home Country Assistance
   1. Disposition of Home Country Housing
   2. Disposition of Home Country Automobile
   3. Transfer of Automobile within same Zone
   4. Temporary Living Expenses
   5. Relocation Transportation and Excess Baggage
   6. Shipment of Household Goods and Personal Effects
   7. Air Shipment/Storage of Household Goods/Pets

D. Host Country Assistance
   1. Mentoring Program
   2. Educational Assistance for Dependents
   3. Transportation while in Host Country
   4. Home Country Housing Norm
   5. Host Country Housing/Home Ownership
   6. Personal Effects/Liability Insurance
   7. Personal Security: Emergency evacuation; kidnap/emergency response; legal representation while abroad
   8. Relocation Allowance
   9. Goods and Services Allowance
   10. Quality of Life Allowance
   11. Spousal Assistance
   12. Major Appliances at Assignment Location

IV. Conclusion
   A. Preparation and planning are critical

   B. Do not assume that U.S. law will apply even with a contractual choice of law provision and a temporary assignment

   C. Need to involve experienced employment, tax/benefits, immigration and corporate compliance attorneys
Speaker / Panelist Biographies

Bruno Blanpain • Partner • Marx Van Ranst Vermeersch & Partners (MVVP) • Brussels, Belgium

Bruno Blanpain is a Partner with the firm, Marx Van Ranst Vermeersch & Partners (MVVP), in Brussels, Belgium. He has specialized in labor, employment and social security law for more than twenty years, with a focus on restructuring, equality and diversity issues. Mr. Blanpain is a graduate of the University of Leuven, Belgium (JD 1983) and the University of Kentucky in Lexington (MA IBA 1985). He speaks regularly both on national and international forums. Bruno has co-developed a CD Rom to assist personnel directors and HR managers in the process of organizing employee representation in Belgium. His other publications include: Plant Closings under Belgian law (Die Keure, Brugge, 1990) and the Belgian chapter of EU & International Employment Law, (Jordans, Bristol, 1997). Mr. Blanpain speaks four languages: Dutch, English, French and German.

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GJ Stillson MacDonnell is a Littler Mendelson Shareholder, based in the San Francisco office. She is Chair of the firm’s Employment Taxes Practice Group and is nationally recognized for her state and federal employment tax expertise. Ms. MacDonnell has successfully handled numerous employment tax audits and litigation against the IRS and California Employment Development Department. She is a former Chair of the Employment Taxes Committee of the Tax Section of the American Bar Association and is a fellow of the American Bar Foundation. Ms. MacDonnell speaks and publishes frequently on employment tax matters. She earned her J.D. from the University of Connecticut Law School. She is admitted to the California and Connecticut bars, Federal District Courts for Connecticut and Northern District of California, Second Circuit, Ninth Circuit, U.S. Tax Court, U.S. Court of Claims and United States Supreme Court.

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Tyler Paetkau is a Littler Mendelson Shareholder in the San Francisco office. He is an experienced employment practitioner who has focused part of his practice on representing multinational employers in cross-border transactions. Mr. Paetkau is a frequent author and speaker on labor and employment law topics, including: “Ending Employment Relationships Outside the U.S.,” An International Employment Law Conference, Labor and Employment Law Section of the Bar Association of San Francisco, with The San Francisco Chamber of Commerce, The World Affairs Counsel, and the California Minority Counsel Program, San Francisco. Mr. Paetkau earned his J.D. from the University of Michigan Law School, graduating cum laude in 1989, and his B.A. from the University of Michigan with high honors and high distinction. He is the current advisor of the Executive Committee of the State Bar of California’s Labor and Employment Law Section, and is admitted to practice in the state of California.